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SANCTIONING SODOMY: THE SUPREME COURT LIBERATES GAY SEX AND LIMITS STATE POWER TO VINDICATE THE MORAL SENTIMENTS OF THE PEOPLE

Gary D. Allison*

If the Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to incest, you have the right to adultery. You have the right to anything. . . . All of those things are antithetical to a healthy, stable, traditional family.

Sen. Rick Santorum¹

In its slow way, our society is beginning to shed many of its superstitions about the sexual act. The idea that there is no such thing as "normality" is at last penetrating the tribal consciousness, although the religiously inclined still regard nonprocreative sex as "unnatural," while the statistically inclined regard as "normal" only what the majority does. Confident that most sexual acts are heterosexual, the consensus maintains that heterosexuality . . . must be "right." However, following that line of reasoning to its logical conclusion, one would have to recognize that the most frequently performed sexual act is neither hetero- nor homosexual but onanistic, and surely, even in a total democracy, masturbation would not be declared the perfect norm from which all else is deviation. In any case, sex of any sort is neither right nor wrong. It is.

Gore Vidal²

I. INTRODUCTION

Human sexuality encompasses a variety of orientations, genders, and practices. Individuals may be heterosexual, homosexual, bi-sexual, or asexual in orientation.³ As judged by physical characteristics (e.g. chromosomes, internal configuration, external genitalia), an individual's gender may be characterized as

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1. Sheryl Gay Stolberg, *Persistent Conflict for Gays and G.O.P.*, 152 N.Y. Times A20, A20 (Apr. 23, 2003) (quoting U.S. Senator Rick Santorum's April 21, 2003, reflection on the possibility that the United States Supreme Court would strike down Texas' same-sex sodomy prohibition).

2. Gore Vidal, *The City and the Pillar Revised* 249 (E.P. Dutton & Co. 1965).

3. In this article, orientation refers to the sex of persons to whom an individual can be sexually attracted. See e.g. Pepper Schwartz & Virginia Rutter, *The Gender of Sexuality* 32 (Pine Forge Press 1998).

male, female, or intersex.⁴ Giving rise to theories of multiple genders is the increasingly obvious fact that some people are transgendered, meaning their behaviors reflect a wide variety of gender traits on the male-female continuum and differ from what is normally expected from persons of the genders indicated by their physical characteristics.⁵

4. Ms. Fausto-Sterling noted:

In the idealized, Platonic, biological world, human beings are divided into two kinds: A perfectly dimorphic species. Males have an X and a Y chromosome, testes, a penis and all of the appropriate internal plumbing for delivering urine and semen to the outside world. They also have well-known secondary sexual characteristics. . . . Women have two X chromosomes, ovaries, all of the internal plumbing to transport urine and ova to the outside world, a system to support pregnancy and fetal development, as well as a variety of recognizable secondary sexual characteristics.

That idealized story papers over many obvious caveats: some women have facial hair, some men have none; some women speak with deep voices, some men veritably squeak. Less well known is the fact that, on close inspection, absolute dimorphism disintegrates even at the level of basic biology. Chromosomes, hormones, the internal sex structures, the gonads and the external genitalia all vary more than most people realize. Those born outside of the Platonic dimorphic mold are called intersexuals.

Anne Fausto-Sterling, *The Five Sexes, Revisited* <http://www.findarticles.com/cf_0/m2379/4_40/63787449/print.jhtml> (accessed Sept. 29, 2003) [hereinafter Fausto-Sterling, *The Five Sexes*]. For a chart of six common types of intersexuality, see Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* 52 tbl. 3.1 (Basic Books 2000) [hereinafter Fausto-Sterling, *Sexing the Body*]. Ms. Fausto-Sterling estimates that intersexed babies account for 1.7 percent of all births. *Id.* at 51, 53 tbl. 3.2.

5. See e.g. Gordene Olga MacKenzie, *Transgender Nation* 1-2 (Bowling Green St. U. Pop. Press 1994). Transgendered people are also referred to as transsexuals. See Schwartz & Rutter, *supra* n. 3, at 32-33.

In recent years, some experts have begun distinguishing transsexuals from transgendered persons. For example, MacKenzie assigns the term transsexual to persons “who presently are or are planning to live in the role of the opposite gender full-time and desire hormonal and surgical “treatment”” and the term transgenderists to persons “who cross gender borders, usually full-time, and traditionally do not desire surgical alteration.” MacKenzie, *supra* n. 5, at 2; see Fausto-Sterling, *Sexing the Body*, *supra* n. 4, at 107. For purposes of this article, the MacKenzie designations will be used.

Fausto-Sterling has noted:

Transsexuals . . . once described themselves in terms of dimorphic absolutes—males trapped in female bodies, or vice-versa. As such, they sought psychological relief through surgery. Although many still do, some so-called transgendered people today are content to inhabit a more ambiguous zone. A male-to-female transsexual, for instance, may come out as a lesbian.

Fausto-Sterling, *The Five Sexes*, *supra* n. 4. In a 1993 article, Fausto-Sterling playfully suggested that five sexes be recognized based on various gonadal-genitalia configurations: male, female, “herms” (true hermaphrodites), “merms” (male-pseudohermaphrodites), and “ferms” (female-pseudohermaphrodites). Fausto-Sterling, *The Five Sexes*, *supra* n. 4. The psychologist, Suzanne J. Kessler objected to Fausto-Sterling’s five sexes proposal, noting that it

still gives genitals (albeit in more than two forms) primary signifying status and ignores the fact that in the everyday world gender attributions are made without access to genital inspection. There is no sex, only gender, and what has primacy in everyday life is the gender that is performed, regardless of the flesh’s configuration under the clothes.

Suzanne J. Kessler, *Lessons from the Intersexed* 90 (Rutgers U. Press 1998) (footnote omitted). Consistent with Kessler’s performance theory is the proposal of “transgender theorist Martine Rothblatt . . . [of] a chromatic system of gender that would differentiate among hundreds of different personality types. The permutations of her suggested seven levels each of aggression, nurturance, and eroticism could lead to 343 (7 x 7 x 7) shades of gender.” Fausto-Sterling, *Sexing the Body*, *supra* n. 4, at 108.

Even more obvious is the fact that many people, including persons involved in heterosexual coupling, engage in sexual practices other than vaginal intercourse such as oral sex, anal intercourse, masturbation (with another or alone), the use of various sex toys, etc. A 1994 study of U.S. sexual practices revealed that approximately eighty percent of Caucasian men, seventy-five percent of Caucasian women, seventy-two percent of Hispanic men, sixty-one percent of Hispanic women, fifty percent of African-American men, and thirty-five percent of African-American women perform oral sex, while approximately eighty percent of Caucasian men, seventy-eight percent of Caucasian women, seventy-two percent of Hispanic men, sixty-six percent of African-American men, sixty-four percent of Hispanic women, and forty-seven percent of African-American women receive oral sex.⁶ Similarly, a 2001 study comparing the sexual behavior of French and American mixed gender couples found that about thirty-five percent of U.S. men and twenty-six percent of U.S. women reported engaging in oral sex during their last sexual event, and “2.2% of U.S. men and 1.1% of U.S. women [reported engaging in] anal sex”⁷ during their last sexual encounter. Also, the authors of a 1998 book on gender reported that eight percent of women and twenty-seven percent of men masturbate once a week, and that “a fairly extensive video and sex-toy business now exists, which is popular among middle- and upper-class women.”⁸

Sodomy is defined as: “1: copulation with a member of the same sex or with an animal[;] 2: noncoital and [especially] anal or oral copulation with a member of the opposite sex.”⁹ Laws that criminalize sodomy seem to be aimed at suppressing the rich diversity of human sexuality described above by using criminal justice systems to confine sexual activity to heterosexual vaginal intercourse. These laws make criminals out of:

- gay men and lesbian women who choose to have sex with people to whom they can be sexually attracted,
- bisexuals who choose to have sex with same-sex partners,
- transsexuals and transgenderists who choose to have sex with persons of the same gender as indicated by the chromosomal-gonadal-genital gender configurations of both parties, and
- the substantial percentage of heterosexual persons which engages in non-coital sex practices.

Laws designed to restrain or prohibit behaviors that emanate from powerful human needs and desires are likely to be repealed because they are ineffective,

6. Schwartz & Rutter, *supra* n. 3, at 41 fig. 2.3.

7. John H. Gagnon, *A Comparative Study of the Couple in the Social Organization of Sexuality in France and the United States* <http://www.findarticles.com/cf_0/m2372/1_38/75820035/print.jhtml> (accessed Oct. 19, 2003).

8. Schwartz & Rutter, *supra* n. 3, at 44-45.

9. *Webster's Ninth New Collegiate Dictionary* 1120 (Merriam-Webster 1988).

unfair, and corrupting of those who are charged with enforcing them. Our nation's experience with prohibition of alcoholic beverages illustrates this thesis.

A temperance movement began in the early nineteenth century and over time grew increasingly powerful.¹⁰ As a result, on January 16, 1919, the Eighteenth Amendment, which prohibited the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof,"¹¹ was added to the U.S. Constitution.¹² Unfortunately, the Eighteenth Amendment "was massively and openly violated, and alcohol was readily available in most of the United States."¹³ The Prohibition goal of improving public health was thwarted by the emergence of new underground sources of alcoholic beverages that often contained "dangerous adulterants" and much higher alcohol content than beverages normally produced before Prohibition.¹⁴ Prohibition was unfairly enforced in ways that fanned the flames of class resentment.¹⁵ Worst of all, Prohibition overwhelmed the nation's law enforcement agencies by spawning organized crime, increased incarceration rates, and public corruption so rampant that "[e]veryone from major politicians to the cop on the beat took bribes from bootleggers, moonshiners, crime bosses, and owners of speakeasies."¹⁶

The ill effects of Prohibition generated a movement to repeal the Eighteenth Amendment.¹⁷ On November 16, 1932, the Twenty-First Amendment was sent to the states. It was ratified on December 5, 1933, thereby repealing Prohibition immediately.¹⁸

10. Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy* <<http://www.drugtext.org/library/articles/craig101.htm>> (accessed Oct. 19, 2003). The Temperance Movement inculcated a belief in the electorate that "alcohol was the major cause of nearly all social problems: unemployment, poverty, business failure, slums, insanity, crime and violence (especially against women and children)." *Id.*

11. U.S. Const. amend XVIII § 1 (repealed 1933 by U.S. Const. amend. XXI).

12. Levine & Reinerman, *supra* n. 10.

13. *Id.*

14. Mark Thornton, *Cato Policy Analysis No. 157, Alcohol Prohibition Was a Failure* <<http://www.cato.org/cgi-bin/scripts/printtech.cgi/pubs/pas/pa-157.html>> (accessed Oct. 19, 2003). The increase in deaths from poisoned alcoholic beverages was so dramatic and appalling that "Will Rogers remarked that 'governments used to murder by the bullet only. Now it's by the quart.'" *Id.*

15. Thus, President Hoover's National Commission on Law Observance and Enforcement reported:

Naturally... Laboring men resent the insistence of employers who drink that their employees be kept from temptation. Thus the law may be made to appear aimed at and enforced against the insignificant while the wealthy enjoy immunity. This feeling is reinforced when it is seen that the wealthy are generally able to procure pure liquors, while those with less means may run the risk of poisoning. Moreover, searches of homes... have necessarily seemed to bear more upon people of moderate means than upon those of wealth or influence.

Levine & Reinerman, *supra* n. 10 (quoting Wickersham Commission report) (internal quotations omitted).

16. Thornton, *supra* n. 14.

17. Levine & Reinerman, *supra* n. 10.

18. *Id.*; see U.S. const. amend. XXI.

The story of the rise, decline, and enforcement of sodomy laws in the United States fits the pattern of ultimately unenforceable and corrupting laws illustrated by Prohibition. This assertion is defended in Part II of this article with a comprehensive overview of the rise and fall of U.S. sodomy laws and how this cautionary tale is intricately tied to an increasingly stronger sexual liberation movement in the United States.

On June 26, 2003, the fate of sodomy laws in the United States took a dramatic turn when, in the case of *Lawrence v. Texas*,¹⁹ the United States Supreme Court declared sodomy laws unconstitutional as applied to homosexual sodomy occurring in private places between consenting adults.²⁰ In doing so, the Court overturned its five-to-four decision in the 1986 case of *Bowers v. Hardwick*.²¹ The Court held in *Bowers* that it was constitutional to enforce sodomy prohibitions against consenting adults who engage in homosexual sodomy in private places because the U.S. Constitution does not recognize “a fundamental right [of individuals] to engage in homosexual sodomy.”²² Moreover, the Court found that punishing persons who engage in private acts of consensual homosexual sodomy is rationally related to serving the legitimate government interest of upholding “majority sentiments about the morality of homosexuality.”²³

When the Court decides to overturn precedent, it usually feels obligated to explain why it did not invoke the doctrine of stare decisis and uphold the precedent.²⁴ The Court’s willingness in *Lawrence* to re-examine *Bowers* provoked Justice Scalia to issue a cranky dissent in which he accused the majority of manipulating, in an unprincipled fashion, the doctrine of stare decisis to justify its reconsideration of *Bowers*.²⁵ More specifically, Justice Scalia accused the majority of ignoring or misusing the standards of stare decisis articulated by the Court in the 1992 abortion rights case,²⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁷ Part III of this article contains an evaluation of the Court’s stare decisis

19. 123 S. Ct. 2472 (2003) (Kennedy, Stevens, Souter, Ginsburg & Breyer, JJ.).

20. *Id.* at 2476, 2478, 2480-84. Justice O’Connor declined to join the majority opinion. Instead, she found that the Texas sodomy statute violated the Equal Protection Clause because its prohibition applied only to sodomy between same-sex adults. *Id.* at 2484-88 (O’Connor, J., concurring in the judgment).

21. 478 U.S. 186 (1986) (White, J., Burger, C.J., Powell, Rehnquist & O’Connor, JJ.).

22. *Id.* at 191.

23. *Id.* at 196.

24. Stare decisis is a “[d]octrine that, when [a] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.” *Black’s Law Dictionary* 1261 (5th ed., West 1979). In a recent decision, the U.S. Supreme Court described its obligations when considering whether to overturn prior precedent as follows: “While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.” *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000) (quoting *St. Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997); *U.S. v. Intl. Bus. Machs., Corp.*, 517 U.S. 843, 856 (1996)) (internal quotations omitted).

25. See *Lawrence*, 123 S. Ct. at 2488-91 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

26. *Id.*

27. 505 U.S. 833 (1992).

analysis in light of Justice Scalia's critique and the Court's traditional approach to the doctrine in constitutional cases.

Parts II & III of this article document the increase in empathy for non-heterosexual persons that has developed within the United States since the Supreme Court decided *Bowers*. Given this developing empathy, it was not a great surprise that the *Lawrence* Court invalidated the Texas sodomy statute.²⁸

The *Lawrence* Court's rationale for striking down the Texas statute was, however, somewhat of a surprise. The Texas statute outlawed only homosexual sodomy,²⁹ whereas most states with sodomy laws still in effect at the time of *Lawrence* outlawed both heterosexual and homosexual sodomy.³⁰ Arguably, then, the Texas statute was vulnerable to an equal protection challenge that it is unconstitutional to criminalize acts of sodomy committed in private by consenting adults only when persons of the same sex are involved.³¹ However, only Justice O'Connor took the approach that the Texas homosexual sodomy statute should be struck down solely because it violates the Equal Protection Clause.³² Part IV of this article provides an analysis of why the Court did not opt for the minimalist equal protection approach, as well as an evaluation of the rational basis review conducted by Justice O'Connor and promoted by the petitioners.

The *Lawrence* majority bypassed the equal protection issues in favor of reaching a substantive due process holding that appears to have invalidated all laws that outlaw private acts of sodomy committed by consenting adults.³³ Moreover, the majority appears to have premised this new constitutional right of consenting adults to engage in private acts of sodomy on rational basis analysis rather than on fundamental rights or right-of-privacy precedents.³⁴ Given that the

28. See Jay Michaelson, *On Listening to the Kulturkampf, Or, How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 Duke L.J. 1559, 1561-62 (2000).

29. The Texas statute provides in relevant part that: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003). Texas defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1)(A)-(B).

30. When *Lawrence* was decided, only thirteen states still enforced sodomy prohibitions, and only four of these states enforced sodomy prohibitions against homosexual sodomy exclusively. *Lawrence*, 123 S. Ct. at 2481.

31. Indeed, in her concurring opinion in *Lawrence*, Justice O'Connor argued that the Texas statute should have been declared unconstitutional because it violated the Equal Protection Clause by prohibiting only homosexual sodomy. *Id.* at 2484-88 (O'Connor, J., concurring in the judgment).

32. *See id.*

33. *See id.* at 2476, 2482-84.

34. The majority opinion is a disorderly, rambling discussion that criticizes *Bowers*' fundamental rights and right-of-privacy analyses, *see id.* at 2476-81, declares that *Bowers* was undermined by two subsequent cases, *Lawrence*, 123 S. Ct. at 2481-82, provides an attenuated stare decisis analysis, *id.* at 2483, and concludes by proclaiming that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 2484.

There are three reasons why one can legitimately conclude that the *Lawrence* majority's holding is based on rational basis analysis. First, the majority opinion never declares that the right of consenting adults to engage in private acts of sodomy is a fundamental right or is protected by the Court's prior right-of-privacy precedents. *See id.* at 2488, 2492 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting). Second, the majority opinion never subjects the Texas statute to any form of heightened scrutiny. *Id.* at 2492. Third, the conclusion that the Texas statute furthered no legitimate state interest employs classical rational basis analysis, which requires statutes to be "rationally related

central legal conclusion of *Bowers* was that no one has a fundamental constitutional right to engage in sodomy,³⁵ and that acts of sodomy do not fall within the protection of the Court's right-of-privacy precedents,³⁶ it seems surprising that the *Lawrence* Court chose to overturn *Bowers* on rational basis grounds when rational basis analysis constituted a mere afterthought in *Bowers*.³⁷ Part V of this article provides a critique of the Court's substantive due process approach from which emerges a suggestion that the majority used rational basis analysis to decide *Lawrence* in an attempt to avoid fanning the flames of the cultural wars surrounding the issues of gay marriage and gays in the military.

II. THE RISE AND FALL OF SODOMY LAWS

As noted previously, sodomy laws are designed to prohibit sexual practices that are induced by strong sexual needs and desires. As a consequence, the sodomy laws of the United States were:

- not effective in eliminating the targeted sexual practices or removing from public visibility those who engage in them,
- applied in a discriminatory manner that has criminally labeled entire classes of people,
- corrupting of those charged with enforcing them,
- rarely used against consenting adults engaged in private sodomy acts, and
- virtually eliminated as a constitutional legal device for suppressing sexual activity between persons of the same sex.

A reasonably comprehensive account of the rise and fall of U.S. sodomy laws, and the concomitant rise of an increasingly effective sexual liberation movement, is necessary to understand that the *Lawrence* decision is a remarkably tepid gay rights victory. Accordingly, this section provides an expansive overview of these legal and social phenomena to provide emphatic support for the assertions outlined above about the nature and ultimate fate of U.S. sodomy laws.³⁸ From the data on sexual practices provided in the introduction, it is

to a legitimate interest of government." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.4, 415 (6th ed., West 2000).

35. 478 U.S. at 191-96.

36. The *Bowers* Court rejected Hardwick's right-of-privacy claims primarily because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent." *Id.* at 191.

37. The *Bowers* Court rejected Hardwick's rational basis assertions in a single paragraph that essentially just said "no" without elaboration other than to note that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.* at 196.

38. Anyone attempting to provide an account of gay life in America is heavily indebted to Professor William N. Eskridge, Jr. His incomparable study of U.S. sodomy arrest records, sodomy cases, and government policies toward gay men, lesbians, and transgendered people constitutes the information foundation upon which all future accounts of gay life in America must be constructed. Using this research, Professor Eskridge recited his own account of gay life in America in two seminal articles:

patently obvious that U.S. sodomy laws have failed to eliminate the sexual practices they target. The simple fact is that today a substantial percentage of sexually active Americans engage in oral and anal sex.³⁹

Much to the dismay of Americans who fervently dislike or fear homosexuality, U.S. sodomy laws have failed miserably as tools for removing from the public eye persons unwilling to conform to heterosexual norms. The failure of sodomy laws is documented below by an account of how gender-benders—women passing as men, men cross-dressing as women, and other feminized men—and persons with homosexual orientations overcame a criminal justice system that was increasingly hostile from the time of U.S. independence through the early 1960s. This was accomplished by the organization of a gay rights movement that not only achieved a rollback of U.S. sodomy laws, but also gained for gay men and lesbians increased cultural visibility, political power, and socio-economic acceptance.

A. (1776-1880): *Crimes Against God to Crimes Against Nature—A Divine Neglect*

By the early nineteenth century, execution was eliminated in all states as a penalty for committing sodomy.⁴⁰ Indeed, for most of the nineteenth century, U.S.

William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1800-1946*, 82 Iowa L. Rev. 1007 (1997) [hereinafter Eskridge, *Closet Construction*]; William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703 (1997) [hereinafter Eskridge, *Closet Apartheid*]. The author of this article has adopted Professor Eskridge's delineation of major eras in American gay life in covering the years 1776 through 1961.

The author of this article recommends two annotated bibliographies to readers wishing to acquire a more comprehensive understanding of the rise and fall of U.S. sodomy laws and the rise of the sexual liberation movement in the United States. The first—Rachel Kranz & Tim Cusick, *Library in a Book: Gay Rights* ch. 8 (Facts On File 2000)—contains an extensive listing of books, articles organized under various subject headings, and web sites. The second—Lee Walzer, *Gay Rights on Trial: A Reference Handbook* 301-10 (ABC-CLIO 2002)—provides a selected listing of books. The most important books included in these bibliographies are: George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (Basic Bks. 1994); John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (U. Chi. Press 1983); Martin Duberman, *Stonewall* (Dutton 1993); William N. Eskridge, Jr., *Gay Law: Challenging the Apartheid of the Closet* (Harv. U. Press 1999) [hereinafter Eskridge, *Gay Law*]; Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love between Women from the Renaissance to the Present* (William Morrow & Co. 1981); Jonathan Katz, *Gay American History: Lesbian and Gay Men in the U.S.A.* (Thomas Y. Crowell 1976); Randy Shilts, *And the Band Played On: Politics, People, and the AIDS Epidemic* (St. Martin's Press 1987); Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* (Knopf 1995); Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* (Anchor/Doubleday 1995); Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (Free Press 1999). Other books recommended by the author include: *Gays and Lesbians in the Democratic Process: Public Policy, Public Opinion, and Political Representation* (Ellen D.B. Riggle & Barry L. Tadlock eds., Colum. U. Press 1999); David F. Greenberg, *The Construction of Homosexuality* (U. Chi. Press 1988); Richard A. Posner, *Sex and Reason* (Harv. U. Press 1992); Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life* (Routledge 2002); Chuck Stewart, *Gay and Lesbian Issues: A Reference Handbook* (ABC-CLIO 2003).

39. See Schwartz & Rutter, *supra* n. 3, at 41 fig. 2.3.

40. In the United States' colonial period, records reveal that at least twenty people were prosecuted for committing sodomy, and four were executed. This number is seemingly low even though every colony had case law or statutory law making sodomy a crime, and some colonies made sodomy a crime punishable by death. See Eskridge, *Closet Construction*, *supra* n. 38, at 1013. By 1820, "the original thirteen states [had] adopted [sodomy laws] but without the death penalty." *Id.*

sodomy laws primarily codified the era's preference that sexual behavior be confined to acts capable of producing children.⁴¹ Moreover, consenting adults were rarely prosecuted for committing sodomy, same sex or otherwise, until the 1880s, for increasingly from the time of Independence until 1880, sodomy prosecutions involved non-consensual sex acts, such as bestiality, forced sex, and sex between a man and a youth.⁴² Indeed, there may have been no prosecutions involving consenting same-sex partners prior to 1880, a year when there were only sixty-three persons incarcerated in the United States for sodomy convictions.⁴³

B. (1881-1921): Sinner to Degenerate—A Descent into Fear

Sodomy prosecutions and convictions increased at progressively higher rates after 1880.⁴⁴ In great part, this crackdown on persons who engaged in sodomy was the result of medical and psychoanalytic theories about the causes of homosexuality being manipulated to convince Americans that gay men and lesbians are degenerate and even pathologically dangerous people.⁴⁵

Writing in the 1860s, Karl Heinrich Ulrichs posited the theory that homosexuality was an innate congenital condition caused “when an accident in the differentiation of the fetus associated a preference for male partners (which Ulrichs defined as a female preference) with a male body, or vice versa.”⁴⁶ Degeneracy theory—the notion that the human body could deteriorate from exposure to unhealthy environments in ways that would cause the victim to manifest many undesirable or subnormal traits (e.g. a propensity to commit crimes, become mentally ill, or suffer medical problems) and that these “degenerate” traits could be passed on genetically to offspring⁴⁷—was first postulated by French physicians in the 1870s and then disseminated widely through Richard von Kraft-Ebbing's 1886 book, *Psychopathia Sexualis*.⁴⁸ According to degeneracy theory, homosexuality is one of many innate subnormal traits that a degenerate person might display.⁴⁹

In the 1880s, a Darwinian theory of homosexuality was presented by James Kiernan and Frank Lydston, American physicians who, along with Kraft-Ebbing, hypothesized that gay men and lesbians “were congenital throwbacks to the period before monosexuality was established in the animal kingdom.”⁵⁰ On the basis of this theory, Dr. Lydston contended that “[a]ll vice and crime . . . could be

41. Thus, by the middle of the nineteenth century, most states had enacted sodomy laws that outlawed “crime[s] against nature.” *Id.* at 1013-14. This shifted the focus of the statutes away from law based on Biblical injunctions against sodomy to “natural law’s insistence that sexual activity occur within marriage.” *Id.* at 1014.

42. *See id.* at 1013-15.

43. Eskridge, *Closet Construction*, *supra* n. 38, at 1014-15.

44. *See id.* at 1016-17.

45. *Id.* at 1022-32, 1057-59, 1062-69.

46. Greenberg, *supra* n. 38, at 408.

47. *Id.* at 411-12.

48. *Id.* at 412-14.

49. *See id.* at 415.

50. *Id.* at 415, 415 nn. 79-80.

traced to 'the degenerate classes,' those 'persons of low grade and development, physically and mentally, with a defective understanding of their true relations to the social system in which they live. . . . In them, vice, crime, and disease go hand in hand.'"⁵¹

Theories holding that homosexuality is an innate congenital trait spawned a movement to decriminalize homosexual activity.⁵² After all, "[i]f homosexual desire is congenital and therefore beyond control, one could argue for legal immunity in a criminal-law system that viewed crime voluntaristically."⁵³ Both Ulrichs and Kraft-Ebbing supported this movement.⁵⁴

These theories, especially degeneracy theory, produced very different results in the United States. Here, "[a]round 1900 it was widely believed that the very fabric of society and the body politic was threatened by degenerate classes in general, and prostitutes in particular."⁵⁵ Perhaps Anthony Comstock, founder of the New York Society for the Suppression of Vice, best summarized popular opinion about how society should deal with people regarded as sexual degenerates when he said:

These inverts are not fit to live with the rest of mankind. They ought to have branded in their foreheads the word 'Unclean,' and as the lepers of old, they ought to cry 'Unclean! Unclean!' as they go about, and instead of the . . . law making twenty years imprisonment the penalty for their crime, it ought to be *imprisonment for life*.⁵⁶

Comstock's widely shared sentiments, plus growing public discomfort with the increased visibility of prostitutes and gender-benders⁵⁷ led to states amending their crimes against nature law so that "two adults engaged in consensual oral sex could be charged with the crime against nature, and . . . women as well as men could be prosecuted for the crime."⁵⁸ As a consequence, sodomy prosecutions and convictions increased geometrically from 1880 through 1921.⁵⁹ In addition, a variety of other laws, mainly aimed at prostitution, including disorderly conduct, vagrancy, loitering, indecent exposure, public lewdness or indecency, and solicitation, were created and sometimes used "to regulate same-sex 'degeneracy.'"⁶⁰ Most of these new laws were state misdemeanors or municipal ordinances, so the penalties for violating them were minor compared to penalties associated with felony sodomy convictions.⁶¹ Not surprisingly, prosecution and

51. Eskridge, *Closet Construction*, *supra* n. 38, at 1024 (quoting G. Frank Lydston, *The Diseases of Society (The Vice and Crime Problem)* 37 (Lippincott 1905)).

52. Greenberg, *supra* n. 38, at 409-11, 414-15.

53. *Id.* at 409.

54. *Id.* at 409, 414-15.

55. Eskridge, *Closet Construction*, *supra* n. 38, at 1025.

56. *Id.* (emphasis added) (footnote omitted).

57. *Id.* at 1017-22.

58. *Id.* at 1026.

59. *See id.* at 1016-17, 1025-32.

60. *See* Eskridge, *Closet Construction*, *supra* n. 38, at 1032-53.

61. *See id.* at 1032.

conviction rates under these laws were many times greater than those for alleged sodomy violations.⁶²

C. (1921-1946): *Degenerate to Sexual Psychopath—A Psychiatric Imprisonment*

Perversions of Sigmund Freud's psychoanalytic theory of what causes homosexuality led to another transformation of U.S. sodomy laws and their application from 1921 to 1946.⁶³ As a result, the U.S. criminal justice system began to regard persons with homosexual orientations, especially gay men, as aggressive sexual psychopaths who greatly endangered children.⁶⁴

According to Freud, newborn children "deriv[e] sexual] pleasure from tactical sensations anywhere on [their] bod[ies]."⁶⁵ As they mature, children pass through various stages of sexual development involving combinations of sexual pleasure centers (entire body, mouth, anus, genitals) and love objects (self, mother, father, someone of the opposite sex).⁶⁶ Freud contended that homosexuality is not an innate biological trait, but rather arises post-birth as a result of a child having her passage through various stages of sexual development interrupted by some disturbance in family dynamics before she completes the final stage of acquiring a normal heterosexual orientation.⁶⁷

"Freud's theory made heterosexuality just as much the product of family interaction as homosexuality."⁶⁸ As a consequence, Freud believed homosexuality was not a disease and that gay men and lesbians could lead happy and productive lives.⁶⁹ He also believed that sexual orientation could not be altered. Given the uses to which his theory was put by the American criminal justice system, it is ironic that Freud opposed criminally prosecuting homosexual behavior.⁷⁰

Despite his empathy for gay men and lesbians, Freud's theory of homosexuality regarded heterosexual orientation as normal and homosexual orientation as a condition arising from a failure of the child to complete the full sexual maturation cycle.⁷¹ This gave credence to the popular belief derived from degeneracy theory that homosexual orientation is subnormal.⁷²

By asserting that sexual desires and traits are factors influencing "virtually every aspect of human life,"⁷³ Freud made it possible for other psychoanalysts to believe that "sexual orientations are not merely one attribute of many that

62. *Id.* at 1032-33.

63. *Id.* at 1054, 1057-59, 1062-69.

64. *See id.* at 1054, 1057-58, 1062-69.

65. *See Greenberg, supra* n. 38, at 424.

66. *Id.*

67. *See id.* at 424-25.

68. *Id.* at 425.

69. *Id.*

70. *See Greenberg, supra* n. 38, at 426. "In 1930, [Freud] signed a statement stating that to punish homosexuality was an 'extreme violation of human rights.'" *Id.*

71. *See id.* at 426-28.

72. *Id.* at 428.

73. *Id.*

characterize us, but the key to who we really are."⁷⁴ From Freud's theory that homosexual orientation derives from a subnormal family dynamic that could be regarded as pathological,⁷⁵ many psychoanalysts developed the belief that gay men and lesbians were deeply disturbed and "pathological in a profoundly fundamental sense."⁷⁶

Freud's rejection of the notion "that a male invert was basically womanish, and perhaps not dangerous . . . opened the way for his American followers to conceptualize the male homosexual as aggressive."⁷⁷ As early as the 1920s, this picture of the sexually aggressive gay man developed in the United States, just as Freud's theory about the causes of sexual orientation was provoking a heightened concern over childhood sexuality.⁷⁸ The concern manifested itself in the beliefs that a child's development of a normal heterosexual orientation could be disturbed if the child was molested, and that children were in great danger of being molested by gay men because gay men were, according to some American psychoanalysts, sexual psychopaths.⁷⁹

Beginning in the 1920s, and extending into the 1940s, fear that sexually aggressive gay men were dangers to children spawned steady increases in sodomy arrests and convictions.⁸⁰ Nevertheless, as indicated by a table of sodomy arrests in various large cities from 1875 to 1946, the number of sodomy arrests from 1921 to 1946 was not large.⁸¹

A great majority of all sodomy arrests in this era appear to have been for predatory sex acts—rapes of adults and acts of sodomy between an adult man and a child.⁸² Most cases of adult-child sodomy seem to have involved an adult man engaging in oral or anal sex with a male under the age of eighteen.⁸³ To provide

74. Greenberg, *supra* n. 38, at 428.

75. *Id.* at 424, 428-29.

76. *Id.* at 428-29.

77. See Eskridge, *Closet Construction*, *supra* n. 38, at 1063-64.

78. See *id.* at 1062-65.

79. *Id.* at 1062-64. Representative of this viewpoint was the following statement included in a 1924 study of prisoners in the Indiana prison system by Dr. Paul Bowers, a physician with the Indiana State Prison:

Not all expressions of homosexuality are to be regarded as evidence of insanity, yet it may be safely said that the majority of sexual perverts are psychopathic individuals.

Whether these anomalies of the sexual instinct are always congenital or not has not been settled, and it does seem that inverse and perverse sexual habits may be acquired early in life by the association with vicious and depraved individuals. The sexual perverts are at any rate an exceedingly dangerous and demoralizing class which should be permanently isolated to prevent their mingling with others.

Id. at 1063 (footnote omitted).

80. See *id.* at 1059-62.

81. See Eskridge, *Closet Construction*, *supra* n. 38, at 1111. In Baltimore, the sodomy arrests rose from twenty-nine in 1921 to sixty-two in 1942, with fluctuations in between as the arrests were generally on an upward trajectory. The numbers during the same time period were ninety-five to 163 in New York, and twenty-three to forty-two in St. Louis. *Id.*

82. See *id.* at 1059-60.

83. See *e.g. id.* at 1060.

additional protection to children, new carnal knowledge and child molestation laws that “explicitly applied to men’s molesting of boys as well as girls”⁸⁴ were created in many states.

After experiencing how prison did little to alter the predilections of persons who engaged in sexual abuse of children, many states began to enact sexual psychopath laws that authorized the state to keep persons found to be sexual psychopaths in confinement and under treatment indefinitely, or until they were “cured” of their sexual pathology.⁸⁵ States may have been influenced in part to enact these laws by the Freudian belief theory that sexual orientation is an acquired trait, for this theory led some American psychoanalysts to believe that persons with homosexual orientations could become heterosexual with proper treatment.⁸⁶

Although “[s]exual psychopath laws were justified by the threat posed by men with uncontrolled sexual appetites, to minor males as well as females, [their] actual application . . . focused disproportionately upon homosexuals engaging in sex with other adults.”⁸⁷ Accordingly, many of those convicted under these laws were persons whose crimes were making sexual overtures to, or engaging in consensual sodomy with, other adults of the same sex.⁸⁸ Being convicted as a sexual psychopath for committing such crimes was a quite serious matter. Unlike the relatively minor punishments meted out for these crimes in previous eras, persons condemned as sexual psychopaths faced such draconian punishments/cures as extremely long confinement or alternative treatments—castration, “profrontal [sic] lobotomies . . . massive injections of male hormones, electrical shock and other aversion therapy.”⁸⁹

Anti-gay and lesbian sentiments of this era were strong enough to cause the federal government and the states to adopt a variety of regulatory measures other than sodomy prosecutions and sexual psychopath laws in order “to expunge homosexuality from the nation’s public culture.”⁹⁰ These regulatory measures included censoring literature, plays, and movies involving gender bending or same-sex intimacy themes,⁹¹ depriving gay men and lesbians of places in which to meet by raiding establishments known to welcome them and depriving such establishments of state liquor licenses,⁹² and excluding gay men and lesbians from military service.⁹³

84. *Id.* at 1061.

85. See Eskridge, *Closet Construction*, *supra* n. 38, at 1066-67.

86. See *id.* at 1058; Greenberg, *supra* n. 38, at 429.

87. Eskridge, *Closet Construction*, *supra* n. 38, at 1067-68.

88. *Id.* at 1068 n. 225.

89. *Id.* at 1066.

90. *Id.* at 1069.

91. See *id.* at 1069-80.

92. Eskridge, *Closet Construction*, *supra* n. 38, at 1080-86.

93. *Id.* at 1086-93.

D. (1946-1961): *Psychopath to Traitor—An Opening of the Closet*

Immediately after World War II, the United States entered an era that was the most repressive toward gay men, lesbians, and gender-benders.⁹⁴ Professor William N. Eskridge, Jr., has noted that “[t]he anti-homosexual terror in the United States from 1947 to 1961 was a chilling echo of the anti-homosexual terror in Nazi Germany from 1933 to 1945.”⁹⁵ As documented by Professor Eskridge, the parallels are indeed striking, for in both countries:

- Gay men, lesbians, and other sexual non-conformists were declared enemies of the State.⁹⁶
- Homoerotic literature was censored or banned, and places socially frequented by gay men and lesbians were forcibly closed.⁹⁷
- Persons deemed to be sexual psychopaths were subjected to indefinite preventive detention.⁹⁸
- Registers of persons committing homosexual offenses were established.⁹⁹
- Special law enforcement units which were established for “detecting and flushing out homosexuals” often engaged in raids

94. See generally Donald P. Haider-Markel, *Creating Change—Holding the Line: Agenda Setting on Lesbian and Gay Issues at the National Level*, in *Gays and Lesbians in the Democratic Process: Public Policy, Public Opinion, and Political Representation* 242, 246-47 (Ellen D. B. Riggle & Barry L. Tadlock eds., Colum. U. Press 1999); Kranz & Cusick, *supra* n. 38, at 33-36, 56-57, 59; Seidman, *supra* n. 38, at 127, 163-64, 171-73; Stewart, *supra* n. 38, at 4-7, 11, 46, 62, 82-84; Walzer, *supra* n. 38, at 31-41; Eskridge, *Closet Apartheid*, *supra* n. 38, at 706-70.

95. Eskridge, *Closet Apartheid*, *supra* n. 38, at 766.

96. *Id.* at 766. This included President Eisenhower’s “executive order adding ‘sexual perversion’ as a ground for investigation under the federal loyalty-security program.” *Id.* at 742 (citing Exec. Or. 10450, 3 C.F.R. 936, 938 (1953)).

97. *Id.* at 766-67. In the 1940s, “the 1873 Comstock Act, which prohibited the mailing of ‘obscene, lewd, or lascivious’ materials . . . began to be used against bodybuilding magazines.” Kranz & Cusick, *supra* n. 38, at 59. In 1954, the Los Angeles postmaster seized the magazine *One*, a publication that “was more text- than image-oriented” and contained “mainly nonsexual articles and stories about gay life.” *Id.* With respect to places frequented by gay men and lesbians, the following description of gay life during the 1940s-1960s makes it clear that it was dangerous for gay men and lesbians to have any social lives outside their homes:

Bars were about the only place gays and lesbians could meet, and often the bars were unmarked and required patrons to enter through a back door so that no one could see them entering from the street. With no provocation or legitimacy, police regularly entrapped men for lewd conduct, raided bars and baths, and suspended business licenses of gay establishments. For example, in some cities and states there were laws that required bar patrons to wear clothing conforming to their gender. Police would enter a lesbian bar and seek out the manliest looking patron. They would take her outside to the sidewalk and make her strip. They were making sure that she was wearing at least three items of clothing that were “feminine.” If she wore boxer shorts, she could be arrested.

Stewart, *supra* n. 38, at 6.

98. The Nazis were more lenient with regard to preventive detention, imposing it only upon “habitual sex criminals convicted of molesting children,” while in the United States, the District of Columbia and some states imposed preventive detention not only on convicted habitual sex criminals, but also on “people not even charged with a crime.” Eskridge, *Closet Apartheid*, *supra* n. 38, at 767.

99. *Id.* In the United States, these registers were established in several states, commencing with California in 1951, and Congress came close to enacting a national registry in 1951 and 1952. *Id.*

leading to the arrest of groups of persons alleged to be homosexuals.¹⁰⁰

- Information about gay men and lesbians was systematically collected by a national government law enforcement agency and shared “with other enforcement agencies[,] . . . the Civil Service and even private employers.”¹⁰¹
- Gay men and lesbians were forcibly excluded from the armed services.¹⁰²
- “[A] fraction of . . . homosexual offenders [were sentenced] to [segregated detention facilities] where they were subjected to medical experiments and treatments. . . .”¹⁰³

Many of these practices and law enforcement activities had emerged in the United States before 1946, but they were carried out with much greater intensity in the sixteen years following World War II.¹⁰⁴ The intensity of this anti-gay and lesbian crusade emanated from two phenomena: (1) the desire to roll back the “increased prominence of gay subcultures”¹⁰⁵ that developed during World War II as a result of men and women being “thrust into homosocial environments with intense emotional bonding”¹⁰⁶ by “renormalizing around the breadwinner-husband/housekeeper-wife-based family”;¹⁰⁷ and (2) the advent of Cold War hysteria, fanned by the flames of McCarthyism, which caused the federal government and the U.S. public to regard gay men and lesbians as national security risks, susceptible to being blackmailed into cooperating with enemies of the nation in order to keep their homosexuality a secret.¹⁰⁸

In previous eras, persons opposed to gay men and lesbians were reasonably satisfied to have the law prosecute only those persons who engaged in public or non-consensual homosexual activities.¹⁰⁹ With the advent of the Cold War, and

100. *Id.*

101. *Id.* at 768. In the United States, the compilation and sharing of information about gay men and lesbians for purposes of removing them from public life was intensely pursued through inter-governmental cooperation. To this end,

[T]he FBI made up lists of gay bars [and] local vice squad officers provided the federal government with lists of gay men picked up on morals charges like soliciting and sodomy. The U.S. Postal Service compiled lists of recipients of male physique magazines, and even put tracers on the mail of gay men it identified so as to track down other homosexuals.

Walzer, *supra* n. 38, at 34.

102. Eskridge, *Closet Apartheid*, *supra* n. 38, at 768.

103. *Id.* In Germany, the detention facilities were concentration camps, and the “medical experiments and treatments, primarily [involved] castration.” *Id.* (footnote omitted). In the United States, the detention facilities were “hospitals or special prison wards,” and the medical experiments and treatments primarily involved “electrical shock and injections of hormones and drugs.” *Id.* (footnote omitted).

104. *See generally id.* at 710-70.

105. *See Eskridge, Closet Apartheid*, *supra* n. 38, at 711.

106. *Id.*

107. *Id.*

108. *See Haider-Markel, supra* n. 94, at 246-47; Walzer, *supra* n. 38, at 31-36.

109. *See Eskridge, Closet Construction*, *supra* n. 38, at 1104.

the attempts of government to link homosexuality to national security threats, “[t]he anti-homosexuals mobilized the forces of state power in the 1950s to ‘throw open’ the ‘closet door’ . . . and to destroy homosexuality before it destroyed the country.”¹¹⁰ To that end, a new type of anti-gay statute emerged that made even private consensual homosexual activity illegal.¹¹¹ “As a result, it became a crime throughout most of the United States not only to engage in consensual sodomy in a private place, but also to suggest or propose such an idea.”¹¹² To enforce this proscription against private consensual sodomy, vice squads in many cities were beefed up, and their operatives not only patrolled public places, such as parks and restrooms, with a vengeance, they also enticed gay men into propositioning them and even went so far as to spy on gay men in hotel rooms, where they had gone to enjoy private sexual relations, and to invade gay men’s homes in pursuit of sexual invitations.¹¹³ Needless to say, the promised protection of the closet was battered down.

Faced with a determined governmental effort to crack open the closet, gay men and lesbians faced “the worst of both worlds: neither privacy nor integrity. The never-ending masquerade of the closet made it impossible for [gay men and lesbians] to have integrity, and yielded a self-fulfilling prophecy whereby [they] were persecuted, in part, because they were untrustworthy and susceptible to blackmail.”¹¹⁴ This was a terrible dilemma. By remaining in the closet so heterosexual Americans could not see who they were, gay men and lesbians played into the hands of those who portrayed them as dangerous perverts; but those who left the closet faced ruinous persecution.¹¹⁵

The way out of the closet was aided by the publication of Dr. Alfred Kinsey’s studies of human sexuality, *Sexual Behavior in the Human Male*¹¹⁶ and *Sexual Behavior in the Human Female*.¹¹⁷ Kinsey’s statistics suggested that the amount of homosexual activity among Americans was much higher than people

110. See Eskridge, *Closet Apartheid*, *supra* n. 38, at 709.

111. In 1953, Congress “rewrote the District[of Columbia]’s indecent exposure law” so that private homosexual acts could be criminally prosecuted. *Id.* at 717. “By 1961, twenty-one states had removed public place requirements from their lewdness or indecency statutes.” *Id.*

112. *Id.*

113. *Id.* at 717-21.

114. Eskridge, *Closet Apartheid*, *supra* n. 38, at 707.

115. Donald Webster Cory, writing in his seminal book *The Homosexual in America*, noted that the potential persecution was

so great that pretense is almost universal; on the other hand, only a leadership that would acknowledge [it] would be able to break down the barriers. . . . Until the world is able to accept us on an equal basis as human beings entitled to the full rights of life, we are unlikely to have any great numbers willing to become martyrs. . . . But until we are willing to speak out openly and frankly in defense of our activities, and to identify ourselves with the millions pursuing these activities, we are unlikely to find the attitudes of the world undergoing any significant change.

D’Emilio, *supra* n. 38, at 57 (quoting Donald Webster Cory, *The Homosexual in America* 14 (Greenburg 1951)) (internal quotations omitted).

116. Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (W.B. Saunders Co. 1948).

117. Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* (W.B. Saunders Co. 1953).

believed,¹¹⁸ and that some men and women who had engaged in homosexual behavior did not have permanent homosexual orientations.¹¹⁹ Although now disputed,¹²⁰ at the time Kinsey's findings confirmed gay people's "sense of belonging to a group"¹²¹ and "implicitly encouraged those still struggling in isolation . . . to accept their homosexual inclinations and search for sexual comrades."¹²²

In 1951, under the pseudonym of Donald Webster Cory, Edward Sagarin published *The Homosexual in America*, a "subjective account from the perspective of twenty-five years of experience as a homosexual."¹²³ Besides providing a description of gay life in America, Sagarin hoped to "win acceptance for a new view of the homosexual."¹²⁴ To that end, he asserted that:

We who are homosexual . . . are a minority, not only numerically, but also as a result of a caste-like status in society. . . . Our minority status is similar, in a variety of respects, to that of national, religious and other ethnic groups: in the denial of civil liberties; in the legal, extra-legal and quasi-legal discrimination; in the assignment of an inferior social position; in the exclusion from the mainstream of life and culture.¹²⁵

Perhaps not coincidentally, 1951 also marked the beginning of a permanent gay rights movement through the founding of the Mattachine Society, one of the pioneer homophile organizations.¹²⁶ Originally the Mattachine Society organized to convince gay men and lesbians that they constituted a unique minority subculture that was oppressed by the dominate heterosexual culture and that they should unite in militant, collective action to fight for equality.¹²⁷ Acting in this vein, the Mattachines won an important early gay rights victory when its campaign against police entrapment tactics lead to a jury deadlock in a case where a gay

118. Among men, fifty percent reported erotic feelings for another man, thirty-seven percent reported at least one post-adolescent homosexual experience that led to orgasm, four percent claimed a homosexual orientation throughout adulthood, and about twelve percent said they had been through at least one three-year period where their sexual orientation was predominantly homosexual. D'Emilio, *supra* n. 38, at 35. Among his women subjects, twenty-eight percent reported erotic feelings for another woman, thirteen percent reported having at least one homosexual experience leading to orgasm, a little over one percent stated they had a permanent homosexual orientation, and about five percent said they had been through at least one multi-year period where their orientation was primarily homosexual. *Id.*

119. *See id.*

120. His data overstated the percent of the U.S. population that were gay men because "[h]is sampling methods . . . may have overly represented prisoners and gay men. . . ." Walzer, *supra* n. 38, at 41.

121. D'Emilio, *supra* n. 38, at 37.

122. *Id.*

123. *Id.* at 33; *see id.* at 255.

124. *Id.* at 33.

125. D'Emilio, *supra* n. 38, at 33. (quoting Donald Webster Cory, *The Homosexual in America* 3, 13-14 (Greenburg 1951)).

126. *Id.* at 58. D'Emilio asserted that although the Mattachine Society may not have been the "first homosexual emancipation group in the United States[,] . . . [its] founding . . . mark[ed] the start of an unbroken history of homosexual and lesbian organizing" *Id.* at 58 n. 2. The Mattachine Society was "named after a French society of unmarried men who performed at carnivals." *Id.* at 42.

127. For a detailed account of the "Radical Beginnings of the Mattachine Society," *see id.* at 57-75.

man resisted sexual misconduct charges against him by raising an entrapment defense.¹²⁸

As the Society grew, it attracted a membership that rejected the vision of a distinct oppressed gay minority culture and the mission of taking collective action to resist the oppression through legal changes. Instead, a new leadership developed that:

- viewed gay men and lesbians as no different than other U.S. citizens, except in the way they expressed themselves sexually,¹²⁹
- rejected the concept of a separate homosexual culture,¹³⁰ and
- urged gay men and lesbians “to adjust to a ‘pattern of behavior that is acceptable to society in general and compatible with . . . recognized institutions of . . . home, church, and state,’”¹³¹ and aid “‘established and recognized scientists, clinics, research organizations and institutions [that were] studying sex variation problems.’”¹³²

In 1955, an organized lesbian group, the Daughters of Bilitis, was founded in San Francisco by lesbians who were originally trying to establish a safe venue in which to meet and socialize with other lesbians.¹³³ Two of its founders encouraged the organization to “broaden its goals to include the educational work of changing the public’s attitude toward lesbianism.”¹³⁴ In fact, they derived a model for this proposal from their discovery of the Mattachine Society in San Francisco.¹³⁵ Although lesbians had different needs and perspectives than gay men,¹³⁶ the two groups managed to “[work] closely and cooperatively throughout the 1950s.”¹³⁷ Together they pursued a cautious agenda, one suited for the oppressive times in which they were founded, focused primarily on a strategy of “public education . . . [that] sought to persuade the public that homosexuals are no different from heterosexuals.”¹³⁸

128. Walzer, *supra* n. 38, at 45.

129. See D’Emilio, *supra* n. 38, at 79, 81.

130. See *id.*

131. *Id.* at 81 (quoting Ken Burns).

132. *Id.* at 81 (quoting Ken Burns). For a detailed discussion of the Mattachine’s “Retreat to Respectability,” see *id.* at 75-91.

133. D’Emilio, *supra* n. 38, at 102. The Daughters of Bilitis’ name was derived from “‘Songs of Bilitis,’ an erotic poem by Pierre Louys.” *Id.* Of local interest is the fact that one of the founders, Phyllis Lyon, was born in Tulsa, Oklahoma. *Id.*

134. *Id.* at 103.

135. *Id.*

136. For example, lesbians tended not to “cruise parks, beaches, and restrooms the way . . . some [gay men] did,” so they did not fall victim to police entrapment. Walzer, *supra* n. 38, at 46-47. “[G]ay men debated whether they could form long-term relationships, [but] lesbians . . . had no problem settling down in devoted relationships.” *Id.* at 47. To lead a lesbian life, women had to achieve financial independence apart from a husband, but as women they faced employment discrimination and typically received wages lower than men received for the same work. *Id.* Many lesbians had children who had to be cared for, and some were still “locked in heterosexual marriages.” D’Emilio, *supra* n. 38, at 104.

137. See D’Emilio, *supra* n. 38, at 103.

138. Seidman, *supra* n. 38, at 175-76.

Scientific support for the Mattachine thesis—that gay men are no different from heterosexual men—was provided by a study commenced in 1953 by Dr. Evelyn Hooker pursuant to a grant from the National Institute of Mental Health.¹³⁹ Dr. Hooker's study was innovative in two ways: (1) it was the first rigorous study using "nonpatient, noninstitutionalized" gay men,¹⁴⁰ and (2) it was the first study to compare the mental health of gay men and heterosexual men.¹⁴¹ The study involved giving psychological tests to thirty gay men and thirty heterosexual men, then asking three highly respected expert interpreters to determine which men were gay and which were not.¹⁴² Much to their surprise, the experts could not distinguish the gay subjects from the heterosexual subjects on the basis of their test results.¹⁴³ They could not do so because the tests "suggested that the psychological profile of gay men not in therapy was indistinguishable from that of a comparable group of heterosexual males, that a deviant sexual orientation did not necessarily imply pathology, and that homosexuals adjusted to their situation in a multiplicity of ways."¹⁴⁴

As science demonstrated the lack of basic differences between gay people and heterosexual people, various criminal code reform studies conducted in the early to mid-1950s called for the decriminalization of same-sex sodomy between consenting adults in private places.¹⁴⁵ In 1955, the prestigious American Law Institute (ALI) "narrowly voted . . . to decriminalize consensual sodomy in a tentative draft of its proposed Model Penal Code."¹⁴⁶ The ALI rationale for decriminalizing consensual sodomy was that "[n]o harm to the secular interests of the community is involved in atypical [sic] sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities."¹⁴⁷ This rationale was consistent with ALI's broader philosophy concerning the role of the state's coercive power:

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. . . . Such matters are best left to religious, educational and other social influences. . . . [I]t must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.¹⁴⁸

139. See Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-1990, An Oral History* 21-22 (Harper Collins 1992).

140. D'Emilio, *supra* n. 38, at 141; Stewart, *supra* n. 38, at 147.

141. Stewart, *supra* n. 38, at 147.

142. Marcus, *supra* n. 139, at 22-24.

143. *Id.* at 23-24; Stewart, *supra* n. 38, at 12.

144. D'Emilio, *supra* n. 38, at 141.

145. These studies included those produced by criminal code reform commissions in New Jersey, Illinois, California, and New York. Eskridge, *Closet Apartheid*, *supra* n. 38, at 773.

146. *Id.* at 774 (footnote omitted).

147. *Id.* (quoting Model Penal Code § 207.5, 277-78 (Tent. Dft. No. 4, 1955)) (internal quotations omitted).

148. *Id.* at 774 n. 429 (quoting Model Penal Code § 207.1, 207 (Tent. Dft. No. 4, 1955)) (internal quotations omitted).

As the 1950s drew to a close, the United States Supreme Court handed down two important First Amendment cases involving erotic materials: *Roth v. United States*¹⁴⁹ and *One, Inc. v. Olesen*.¹⁵⁰ In *Roth*, the Court adopted a definition of obscenity that made it more difficult for government to censor materials dealing with sexual matters or appealing to readers' sexuality.¹⁵¹ In *One*, the Court, in a one sentence per curiam opinion that cited *Roth* as the controlling authority,¹⁵² reversed lower court holdings that *One* magazine, "published for the purpose of dealing primarily with homosexuality from the scientific, historical and critical point of view,"¹⁵³ was obscene.¹⁵⁴

One's reversal was important because, given the intensity of public animosity toward homosexuality in the 1950s, it was not certain that materials with homosexual themes or content would be treated the same as other materials with sexual content.¹⁵⁵ *Roth* and *One* provided the basis for the belief that the United States Supreme Court "was open to the view that discussion of homosexuality and same-sex intimacy was not itself an appeal to 'prurient' interests."¹⁵⁶ Ultimately, these cases initiated a First Amendment jurisprudence that allowed "gay characters and themes [to become] part of American public culture."¹⁵⁷

149. 354 U.S. 476 (1957).

150. 355 U.S. 371 (1958) (per curiam).

151. The Court held that obscene material is that "which deals with sex in a manner appealing to prurient interest." *Roth*, 354 U.S. at 487. More specifically, the Court held that material is obscene if "the average person, applying contemporary community standards", *id.* at 489, would find "its predominant appeal is to prurient interest [which is] a shameful or morbid interest in nudity, sex, or excretion, and . . . it goes substantially beyond customary limits of candor in description or representation of such matters", *id.* at 487 n. 20 (quoting Model Penal Code § 207(2) (Tent. Dft. No. 6, 1957)) (internal quotations omitted), "when it is considered as a whole." *Id.* (quoting Model Penal Code § 207(2) (Tent. Dft. No. 6, 1957)) (internal quotations omitted).

The Court made clear that *Roth's* obscenity test made it more difficult to censor sex-charged materials by proclaiming that "[t]he portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.* at 487. This protection is important, said the Court, because "[s]ex[] [is] a great and mysterious motive force in human life [that] has indisputably been a subject of absorbing interest to mankind through the ages[, and] it is one of the vital problems of human interest and public concern." *Roth*, 354 U.S. at 487.

152. *One*, 355 U.S. at 371.

153. *One, Inc. v. Olesen*, 241 F.2d 772, 777 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 371.

154. *Id.* The circuit court declared *One* to be obscene because of the homosexual content of an article, a poem, and an advertisement. *Id.* In the article, *Sappho Remembered*, a young college girl is enticed by her lesbian roommate to "[give] up her chance for a normal married life [with her childhood sweetheart in order] to live with the lesbian." *Id.* The circuit court declared the article to be "nothing more than cheap pornography calculated to promote lesbianism." *Id.*

The poem, *Lord Samuel and Lord Montagu*, recounted the homosexual adventures of "Lord Montagu and other British Peers." *One*, 241 F.2d at 777. It was found to be obscene because the circuit court said it "pertain[ed] to sexual matters of such a vulgar and indecent nature that it tend[ed] to arouse a feeling of disgust and revulsion." *Id.*

The ad was for another magazine, *The Circle*. It was deemed obscene because the content of the magazine being advertised was found by the circuit court to be obscene primarily because it contained pictures the court found to be "obscene and filthy by prevailing standards [and] stories . . . similar to . . . 'Sappho Remembered', except that they relat[ed] to the activities of the homosexuals rather than lesbians." *Id.* at 778.

155. See Eskridge, *Closet Apartheid*, *supra* n. 38, at 807-08.

156. *Id.* at 806.

157. *Id.* at 808.

E. (1961-1973): Closet to Liberation—A Normalizing Rebellion

Despite the legacy of ineffectiveness and unfairness established by U.S. sodomy laws, as late as 1960 all fifty states prohibited sodomy.¹⁵⁸ This changed in 1961, when Illinois became the first state to decriminalize private consensual sodomy.¹⁵⁹ In 1962, the ALI formally adopted its draft proposal on Deviate Sexual Intercourse, which criminalized acts covered by state sodomy laws only when they were non-consensual.¹⁶⁰ ALI commentary supplied three broad justifications for decriminalizing consensual private same-sex sodomy between adults:

1. an ethical concern about criminally proscribing behavior the ALI believed did not harm the secular interests of the community and about which there was no consensus in the community as to its morality;¹⁶¹
2. a practical concern that the costs of enforcing sodomy laws against adults engaging in private consensual sodomy are too high in terms of economic resources available for criminal law enforcement, the perceptions of unfairness such enforcement generates, and the opportunities such enforcement provide for “private blackmail and official extortion”¹⁶² while the benefits to the public are too low in terms of actually deterring such conduct; and
3. a philosophical concern that criminalizing behavior “only because it is inconsistent with the majoritarian notion of acceptable behavior”¹⁶³ unduly sacrifices “the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality.”¹⁶⁴

By 1973, six other states had followed Illinois’ lead and the philosophy of the Model Penal Code by repealing laws that prohibited private consensual sodomy between adults.¹⁶⁵

158. *Bowers*, 478 U.S. at 193.

159. *Id.* at 194 n. 7.

160. See Model Penal Code § 213.2 (ALI 1962).

161. Model Penal Code § 213.2 cmt. 2 (ALI 1980). This concern reflected the ALI’s findings that societal objections to homosexual conduct were more based on aesthetic repulsion or moral beliefs than on any proof that it causes any real harm, and that theories about the nature of homosexuality either demonstrate that those who engage in same-sex sodomy are not blameworthy (because homosexuality is not a choice but an innate or acquired immutable trait), or involve moral sentiments (homosexuality is a sin) that are not universally shared. *Id.*

162. *Id.* at § 213.2 cmt. 2. This concern was premised on the belief that economic resources available to the criminal justice system should be devoted to “crimes that directly threaten security of person and property,” the difficulty in successfully prosecuting crimes for which there are no complaining victims, the capriciousness of the extremely few successful prosecutions of same-sex private sodomy between consenting adults, and the potential for this type of enforcement threat to subject the targets to blackmail and extortion. *Id.*

163. *Id.*

164. Model Penal Code § 213.2 cmt. 2 (quoting *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* 52 (Am. ed. 1963)).

165. These states included Colorado (1972), Connecticut (1971), Delaware (1973), Hawaii (1973), North Dakota (1973), and Oregon (1972). Lambda Legal, *State by State* <<http://www.lambdalegal.org/cgi-bin/iowa/states>> (accessed Oct. 20, 2003). The Lambda Legal website lets you find the status of

Beginning in 1965, the United States Supreme Court decided three important reproductive freedom cases that provided individuals with considerably more liberty to engage in non-procreative sexual intimacies: *Griswold v. Connecticut*,¹⁶⁶ *Eisenstadt v. Baird*,¹⁶⁷ and *Roe v. Wade*.¹⁶⁸ Although these cases did not concern the right of persons to engage in same-sex sexual intimacies, they did develop the notion of an unenumerated right of privacy that arguably eliminated the states' authority to confine private sexual behavior to sex for procreation within marriage.¹⁶⁹

In *Griswold*, the Court held that the United States Constitution provides U.S. citizens with a fundamental right of privacy that protects the sexual intimacies of married couples from nearly all forms of government interference,¹⁷⁰ including their decision to use contraceptives.¹⁷¹ Marriage, said the Court, is "a relationship lying within [this] zone of privacy"¹⁷² against which state laws forbidding marital couple to use contraceptives "[have] a maximum destructive impact."¹⁷³ To the Court, "[allowing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship."¹⁷⁴

The *Griswold* majority located the unenumerated right of marital privacy in "penumbras emanating" from express language in the First, Third, Fourth, Fifth and Ninth Amendments,¹⁷⁵ but Justices Harlan and White located it within fundamental liberty interests protected by the substantive reach of the Due Process Clause of the Fourteenth Amendment.¹⁷⁶ Justice Harlan believed that the Due Process Clause protects all rights that reflect values "implicit in the concept of ordered liberty,"¹⁷⁷ and in *Griswold*, he found that the marital use of contraceptives was such a right.¹⁷⁸ In a passage often paraphrased in later cases involving issues as to whether an asserted right is fundamental, Justice White found that the right of marital couples to use contraceptives was a fundamental liberty interest because there is a "realm of family life which the state cannot

each state's sodomy laws by going to the state-by-state web page, using the map of the United States to click on to each state, and then click onto the sodomy law link for each state.

166. 381 U.S. 479 (1965).

167. 405 U.S. 438 (1972).

168. 410 U.S. 113 (1973).

169. See Model Penal Code § 213.2 cmt. 2. The ALI observed that "it seems likely that the newly enunciated constitutional right of marital privacy extends to all forms of consensual sexual activity between husband and wife." *Id.*; see Seidman, *supra* n. 38, at 169.

170. See 381 U.S. at 481-86.

171. *Id.* at 485-86.

172. *Id.* at 485.

173. *Id.* at 485.

174. *Id.* at 485-86.

175. *Griswold*, 381 U.S. at 484.

176. *Id.* at 500 (Harlan, J., concurring); *id.* at 502-04 (White, J., concurring). The Due Process Clause of the Fourteenth Amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

177. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)) (internal quotations omitted).

178. *Id.*

enter' without substantial justification."¹⁷⁹ This realm, said Justice White, "includes the right 'to marry, establish a home, . . . bring up children,' . . . [and] 'direct the upbringing and education of children.'"¹⁸⁰

In yet another *Griswold* concurrence, Justice Goldberg sought to limit the types of sexual intimacies that could be covered by the right of privacy announced in *Griswold*. Thus, he asserted that *Griswold's* holding "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct,"¹⁸¹ and cited "extramarital sexuality"—adultery and homosexuality—as the type of promiscuity and misconduct states could continue to regulate after *Griswold*.¹⁸² Nevertheless, in the 1972 *Eisenstadt* case the Court extended the protections of *Griswold* to fornicators.¹⁸³

Eisenstadt concerned the constitutionality of a Massachusetts statute that prohibited single people from using contraceptives for purpose of preventing pregnancy.¹⁸⁴ The statute permitted all adults, married or single, to use contraceptives to prevent disease,¹⁸⁵ permitted any married person to use contraceptives irrespective of whether it was used for sex within marriage,¹⁸⁶ and applied certain health related controls on all contraceptives regardless of the health risks they posed.¹⁸⁷ As a consequence, the Court construed the statute to have only one purpose: prohibiting the use of contraceptives because their use is immoral.¹⁸⁸

Given *Griswold*, Massachusetts' prohibition on the use of contraceptives to prevent unwanted pregnancies fell exclusively on single people. The Court found that this discrimination violated the Equal Protection Clause of the Fourteenth

179. *Id.* at 502 (White, J., concurring) (quoting *Prince v. Mass.*, 381 U.S. 158, 166 (1944)).

180. *Id.* at 502 (quoting *Meyer v. Neb.*, 262 U.S. 390, 399 (1923); *Pierce v. Socy. of Sisters*, 268 U.S. 510, 534-35 (1925)).

181. *Id.* at 498-99 (Goldberg, J., Warren, C.J. & Brennan, J., concurring).

182. *Griswold*, at 499.

183. *Eisenstadt*, 405 U.S. at 454-55.

184. *Id.* at 441-42.

185. *Id.* at 442.

186. *See id.* at 449.

187. *See id.* at 450-52.

188. *See Eisenstadt*, 405 U.S. at 452-53. The Court settled on this purpose after rejecting suggestions that the statute's purposes also included discouraging fornication and protecting the health of its citizens. Noting that denying fornicators access to contraception would impose on them undue risks of unwanted pregnancies, the Court refused to believe that the legislature wanted pregnancy to be a deterrent to a crime—fornication—for which the maximum punishment was only ninety days in jail. *Id.* at 448-49. For similar reasons involving the relative harshness of penalties, the Court believed it was unreasonable to think that the statute's purpose in subjecting distributors of contraceptives to a maximum five-year prison sentence was to reduce the incidence of fornication. *Id.* at 449-50.

The Court rejected health protection as the purpose of the statute for a variety of reasons. First, the health consequences of using contraceptives were the same for married and single people, so the Court found it irrational to deny single people the right to get contraceptives from health care professionals. *Id.* at 450-51. Second, the statute covered all contraceptives, even those that imposed no significant health risks on prospective users. *Id.* at 451. Third, the statute permitted single people to use contraceptives to prevent disease, so the Court thought it was irrational for the state to believe that the health consequences of using contraceptives varied with the purposes for which they were used. *Eisenstadt*, 405 U.S. at 451 n. 8. Fourth, there were many other state and federal statutes that regulated the health consequences of contraceptive use, so the Court found that the ban on single people using contraceptives was not required. *Id.* at 452.

Amendment¹⁸⁹ because treating single people differently from married people with respect to contraceptives does not have a fair and substantial relation to the objective of the law.¹⁹⁰ This rational basis approach let the Court avoid deciding whether single people have a fundamental right of privacy to have sex. But part of the Court's rational basis analysis seemed to embrace that notion, for the Court opined:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters *so fundamentally affecting a person* as the decision whether to bear or beget a child.¹⁹¹

The pure rational basis part of the *Eisenstadt* holding is almost as powerful, for the Court expressly held that, even in the absence of *Griswold*, the rights to contraception are the same for all individuals, married or not, since "[i]n each case the evil . . . would be identical, and the underinclusion would be invidious."¹⁹² To drive this point home, the Court quoted Justice Jackson's concurrence in *Railway Express Agency v. New York*:¹⁹³

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹⁹⁴

In 1973, the Court in *Roe* announced that women have a fundamental right of privacy to terminate unwanted pregnancies under certain conditions,¹⁹⁵ but in

189. The Equal Protection Clause of the Fourteenth Amendment states that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

190. *Eisenstadt*, 405 U.S. at 453-54.

191. *Id.* at 453 (second emphasis added).

192. *Id.* at 454.

193. 336 U.S. 106 (1949).

194. *Eisenstadt*, 405 U.S. at 454 (quoting *Ry. Express*, 336 U.S. at 112-13 (Jackson, J., concurring)) (internal quotations omitted).

195. 410 U.S. at 153-54, 159, 162-66. The Court found that states do have legitimate interests in regulating how pregnancies are terminated that can become compelling under certain conditions (the health of women undergoing abortions and the potential life of the unborn fetus), and therefore women did not have an absolute right to end their pregnancies free from all state regulation. *Id.* at 159. Putting this holding into practice, the Court found that the state's interest in the health of women becomes compelling at the start of the second trimester of pregnancy, when the health dangers of abortion begin to equal or exceed those of continuing the pregnancy. *Id.* at 163. The Court found the

doing so it articulated a limited list of freedoms that are included within the fundamental right of privacy. Specifically, the Court stated that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in this guarantee of personal privacy.”¹⁹⁶ Further, the Court limited the personal freedoms that could be included in the right of privacy to those that have “some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”¹⁹⁷

In the 1960s, the Court continued its trend of enlarging First Amendment protection for erotic materials.¹⁹⁸ Commenting on the effect of the privacy decisions, John D’Emilio contended that they were consistent with the effect of *Griswold* because they “brought cultural products in the public sphere into conformity with private sexual behavior . . . [and] may also have . . . affirmed a nonprocreative eroticism among heterosexual men and women.”¹⁹⁹ Moreover, this sexual permissiveness led to a proliferation of literary and film materials, fiction and non-fiction, that provided gay men and lesbians with depictions of gay eroticism and gay life in general.²⁰⁰ The availability of these materials “strengthened a sense of belonging [among gay men and lesbians and] made the gay subculture of the nation’s larger cities more accessible.”²⁰¹

The 1960s were also the heyday of civil right movements. Inspired by the example of African-Americans rising up to demand equality, a new leadership developed within homophile organizations that sought to enlist gay men and lesbians into a civil rights approach for winning equality with heterosexuals.²⁰² This approach required gay men and lesbians to come out of the closet and engage in direct action to resist the various inequities and disabilities imposed on them by U.S. law and society.²⁰³ Chief among the inequities and disabilities faced by gay men and lesbians were government harassment,²⁰⁴ employment discrimination,²⁰⁵ religious condemnation,²⁰⁶ and the medical community’s sickness model of homosexuality.²⁰⁷

Direct action against government harassment produced a valuable lesson for the gay community: fighting back openly caused government to back down and

state’s interest in protecting the potential life of the fetus becomes compelling at the start of the third trimester of pregnancy, when the fetus reaches the developmental stage of being able to survive outside the mother’s womb. *Id.* at 163-64.

196. *Id.* at 152 (quoting *Palko*, 302 U.S. at 325) (citation omitted).

197. *Roe*, 410 U.S. at 152-53 (citations omitted).

198. See D’Emilio, *supra* n. 38, at 132-34.

199. *Id.* at 134 (footnote omitted).

200. *Id.* at 134-39.

201. *Id.* at 148.

202. *Id.* at 150.

203. See D’Emilio, *supra* n. 38, at 153, 158, 160, 169-70, 196-97, 227-31.

204. See *id.* at 145-46, 157, 182-89, 193-95, 202-03, 206-08, 213-14, 231-32.

205. See *id.* at 154-56, 208-09.

206. See *id.* at 192-93, 214-15.

207. See *id.* at 140-44, 156, 162-64, 169, 196-97, 215-17.

inspired increasing numbers of gay men and lesbians to join the fight.²⁰⁸ Successes “in limiting police abuses allowed social institutions such as bars to thrive and led to a more stable gay subculture, especially among men.”²⁰⁹

One particular fight between gay men and police ignited the modern gay liberation movement. At about midnight on June 27, 1969, New York police decided to raid a bar, the Stonewall Inn, that was patronized mainly by young, nonwhite drag queens.²¹⁰ Much to the surprise of the police, “the least accepted, most marginalized segment of the gay male community—the men who dressed as women—[engaged] in physical combat with New York City cops [thereby capturing] the imagination of both gay and straight observers.”²¹¹ A riot ensued that lasted several days. One surreal scene perhaps best captures the defiance demonstrated by the gay community at Stonewall, for in the midst of the chaos, “[a] group of gay cheerleaders was heard singing, ‘We are the Stonewall girls/We wear our hair in curls/We have no underwear/We show our pubic hairs.’”²¹² Stonewall was no laughing matter, however, for it immediately spawned a growth of gay rights organizations throughout the nation that were much more assertive than were the pioneer homophile organizations.²¹³ “Before Stonewall, about a

208. In the early sixties, a few brave gay activists in San Francisco began fighting back against a brutal police crackdown on them and their favorite gathering places. Their willingness to speak out led to a formation of a Tavern Guild dedicated to fighting unfair liquor laws and harassment of gay customers. D’Emilio, *supra* n. 38, at 186-89. This led to political organizing in the gay community because the resistance “kept alive among patrons a sense of grievance.” *Id.* at 189.

Later, in 1964, with the help of religious allies, the San Francisco gay community successfully fought back against arrests of the religious organization’s lawyers for denying police entrance to a dance put on by the religious organization for the gay community. Not only did this result in the acquittal of the lawyers, the support of the ministers legitimized the gay community’s assertions that gays were the victims of illegitimate police harassment. *Id.* at 193-95 “The event strengthened the commitment of [the religious organization’s] members to take up the cause of justice for gay women and men and their involvement guaranteed that at last the issue would receive a hearing.” *Id.* at 195. The following year, the religious organization released a study—entitled *A Brief of Injustices*—to expose a pattern of social, legal and economic oppression of a minority group.” *Id.* at 202 (quoting Council on Religion and the Homosexual, *A Brief of Injustices: An Indictment of Our Society in Its Treatment of the Homosexual* 10 (CRH 1965)) (internal quotations omitted). The Council on Religion and the Homosexual’s study fomented a political movement calling for a civilian police review board that generated political pressure on San Francisco politicians from many minority communities. D’Emilio, *supra* n. 38, at 202. The end result was a halt of police “harassment of gay bars.” *Id.* With this harassment at an end, “[t]he number of gay bars in the city, reduced to fewer than twenty in 1963, rose to fifty-seven by the beginning of 1968. . . .” *Id.* Similar results were produced in New York when the gay community, with the New York Civil Liberties Union as an ally, fought back against a crackdown against them ordered by the so-called liberal Republican mayor, John Lindsay, in 1966. *Id.* at 206-08.

209. *Id.* at 202.

210. D’Emilio, *supra* n. 38, at 231.

211. Kranz & Cusick, *supra* n. 38, at 36.

212. Stewart, *supra* n. 38, at 12-13.

213. The prototypes of these new muscular gay organizations were gay liberationists, gay reformers, and lesbian-feminists. See Walzer, *supra* n. 38, at 12-15. These groups differed from the pioneer homophile groups “in two critical ways”: (1) they were not apologetic or hesitant about their sexual orientation—“homosexuality was a valid form of erotic and emotional expression, and anything less than the full rights of citizenship [was] unjust . . .”; and (2) they believed, “political action, rather than self-help or education, was the path to equality.” D’Emilio, *supra* n. 38, at 244.

Gay liberationists not only wanted to reform society’s views about homosexuality, they also believed that “[t]he fight for gay justice was . . . inseparable from [the New Left] struggles to transform

dozen gay organizations existed. Within three months after the riot, more than fifty lesbian and gay organizations formed throughout the United States.”²¹⁴ By 1973, the number of these organizations had “mushroomed into more than 800.”²¹⁵

In 1965, resistance to government employment discrimination paid off in an important victory in *Scott v. Macy*,²¹⁶ an employment discrimination case against the U.S. Civil Service Commission. After scoring high enough on civil service exams to qualify for a federal government position, Bruce Scott was disqualified from employment consideration because he refused to comment on allegations that he was a homosexual on grounds that his sexual orientation was not relevant to job performance.²¹⁷ Scott’s position was affirmed by the United States Court of Appeals for the District of Columbia, which held that “[t]he Commission must at least specify the conduct it finds ‘immoral’ and state why that conduct related to ‘occupational competence or fitness’”²¹⁸ This opinion “strongly [suggested] that homosexual conduct may not be an absolute disqualification for Government jobs.”²¹⁹ A similar victory was won against the New York City Civil Service Commission in 1966, when a court prohibited the Commission from engaging in its previous practice of rejecting applicants “who ‘by appearance, actions or attitudes’ struck [Commission interviewers] as gay.”²²⁰ In the 1969 case of *Morrison v. State Board of Education*,²²¹ the California Supreme Court held that a teacher could not

gender roles, the institution of marriage and the family, and the political economy of capitalism and imperialism.” Seidman, *supra* n. 38, at 174 (footnote omitted). With respect to sexual mores:

[G]ay liberation believed in the “connectedness of sex,” meaning that casual sex offered gay men the opportunity to break out of the isolation that society had imposed on them, a means to form friendships and work out the negative messages that they had received about their sexual identity. Casual sex in bathhouses and the like was seen as a way of creating a real sense of brotherhood among gay men.

Walzer, *supra* n. 38, at 14.

The Gay Liberation Front (GLF) was the organization that epitomized gay liberation politics. See Stewart, *supra* n. 38, at 13-14. Gay reformers generally, “did not want to overthrow the entire political and social system.” *Id.* at 14. They also wanted to focus “more specifically . . . on achieving gay legal and civil rights.” Kranz & Cusick, *supra* n. 38, at 24. So they broke off from the GLF to form the Gay Activists Alliance (GAA). See Stewart, *supra* n. 38, at 14. GAA strategies were bold, for they included “petition drives, political zap actions [demonstrations involving publicly confronting politicians with questions or chastisement], and street theater . . . [that] included . . . members of the same-sex . . . [holding] hands or [kissing] in public.” *Id.*

Lesbian feminists formed a separatist movement. See D’Emilio, *supra* n. 38, at 236; Walzer, *supra* n. 38, at 14-15. Originally, they were attracted to the women’s rights movement because “[t]he ‘battle of the sexes’ which predominates in American Society prevails in the homosexual community as well and the Lesbian finds herself relegated to an even more inferior status.” D’Emilio, *supra* n. 38, at 228 (quoting Del Martin, *The Lesbian’s Majority Status*, Ladder 24-26 (June 1967)). However, they encountered hostility from heterosexual women within the women’s rights movement largely because heterosexual women often maintained ties to men despite belonging to a movement that saw men as their enemies. *Id.* at 236-37.

214. Stewart, *supra* n. 38, at 13.

215. D’Emilio, *supra* n. 38, at 238.

216. 349 F.2d 182 (D.C. Cir. 1965).

217. *Id.* at 183.

218. *Id.* at 184-85 (footnotes omitted).

219. See D’Emilio, *supra* n. 38, at 156 (quoting *Washington Post*) (internal quotations omitted).

220. *Id.* at 208.

221. 461 P.2d 375 (Cal. 1969).

be disqualified from teaching in California schools for engaging in private consensual same-sex sexual activity with another adult for a brief period of time absent showing that this activity somehow negatively affected his ability to perform well as a teacher.²²² Most importantly, in 1973, the United States Civil Service Commission “[informed] federal agencies that they could not deny employment to gay men or lesbians solely on the basis of sexual orientation.”²²³

The nation’s churches became more concerned about socio-economic conditions in the 1960s as a result of the civil rights movement, the “‘rediscovery’ of widespread poverty in the midst of abundance, and the idealistic rhetoric of the Kennedy presidency.”²²⁴ In San Francisco, this religious activism led to the formation of the Council on Religion and the Homosexual (CRH) in 1964.²²⁵ The ministers who help found the CRH “acknowledged the role that religion had played in the persecution of homosexuals and promised to initiate [a] dialogue in their denominations on the church’s stand toward same-gender sexuality.”²²⁶ From this modest beginning, a reassessment of religious views about homosexuality was initiated in many U.S. Christian denominations.²²⁷ Little progress was made as to reversing official church creeds during the 1960s, but some denominations did begin calling for the decriminalization of consensual same-sex intimacies, ending of employment discrimination against gay men and lesbians, and halting of police harassment.²²⁸ In part, this more accommodating religious approach to homosexuality was in response to direct challenges of gay rights activists, as reflected in the following message to clergy delivered in 1966 by a gay rights organization in Kansas City:

It is high time that the church accept its responsibility for the deplorable, misinformed attitude of society toward the homosexual in America today. The laws which apply to sexual matters between consenting adults in private are based upon

222. *Id.* at 391-94.

223. Stewart, *supra* n. 38, at 46.

224. See D’Emilio, *supra* n. 38, at 192.

225. *Id.* at 193.

226. *Id.*

227. See *id.* at 214-15. Traditionally in the United States, religious attitudes toward homosexuality have been dominated by Christian interpretations of the Bible. See Walzer, *supra* n. 38, at 21-23. Certain passages in particular have been used to demonstrate that homosexuality is condemned as a sin. For example, in Genesis 18-19, the Bible gives an account of God destroying Sodom and Gomorrah because the residents therein demanded that Lot hand over to them two angels of the Lord. Traditional interpretations of these passages hold that the angels were threatened with homosexual rape. Whosoever Ministries, Inc., *Whosoever: An Online Magazine for Gay, Lesbian, Bisexual and Transgendered Christians, Genesis 18-19* <<http://www.whosoever.org/bible/genesis.html>> (accessed Oct. 21, 2003). And, Leviticus 18:22 states, “Thou shall not lie with mankind, as with womankind: it is abomination.” *Leviticus 18:22* (King James). *Leviticus 20:13* states that “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death.” *Leviticus 20:13* (King James). These prohibitions are a part of a Holiness Code, most of which is not now considered binding on Christians. Yet, many denominations have continued to view homosexuality as a cardinal sin because of these passages, despite rejecting other parts of the Holiness Code. Whosoever Ministries, Inc., *Whosoever: An Online Magazine for Gay, Lesbian, Bisexual and Transgendered Christians, Leviticus 18:22 & 20:13* <<http://www.whosoever.org/bible/lev18.html>> (accessed Oct. 21, 2003).

228. See D’Emilio, *supra* n. 38, at 215.

religious attitudes. . . . It is time the Church taught compassion and understanding, rather than condemnation.²²⁹

Bolstered by social science studies challenging the medical view that homosexuality was an illness, and badgered by the pioneer gay activist Frank Kameny, gay leaders began challenging the illness theory of homosexuality.²³⁰ These challenges became increasingly assertive throughout the 1960s and into the 1970s.²³¹ More and more, the gay activist view found support in the medical community.²³² In 1973, this foment resulted in the American Psychiatric Association (APA) amending its *Diagnostic and Statistical Manual of Mental Disorders* to remove homosexuality from the list of mental illnesses.²³³ A prominent APA member expressed the belief that the APA action signified “that there was no reason why . . . a gay man or woman could not be just as healthy, just as effective, just as law abiding, and just as capable of functioning as any heterosexual.”²³⁴ No longer could people justify discriminating against gay men and lesbians on grounds that they were sick perverts.²³⁵

229. *Id.* at 200 (quoting Phoenix Society message) (internal quotations omitted).

230. *See id.* at 140-44, 163-64. In July 1964, Kameny asserted that “[t]he entire homophile movement . . . is going to stand or fall upon the question of whether homosexuality is a sickness, and upon our taking a firm stand on it.” *Id.* at 163 (quoting Kameny’s lecture to the New York Mattachine Society in July 1964) (internal quotations omitted). He also articulated his view that “until and unless valid positive evidence shows otherwise, homosexuality *per se* is neither a sickness, a defect, a disturbance, a neurosis, a psychosis, nor a malfunction of any sort.” D’Emilio, *supra* n. 38, at 164 (quoting Kameny’s lecture) (internal quotations omitted). The Washington Mattachine Society adopted Kameny’s position in early 1965. *Id.*

231. *See id.* at 216-17, 235; Marcus, *supra* n. 139, at 253.

232. In 1969, the National Institute of Mental Health Task Force on Homosexuality recommended that sodomy laws be repealed and the public educated about homosexuality. *See Stewart, supra* n. 38, at 16.

233. *See Marcus, supra* n. 139, at 253-54. Some have charged that this was a political decision taken in response to pressure placed on the profession by gay activists. For example, Greenberg asserted in *The Construction of Homosexuality* that this step “did not stimulate a rethinking of the theory of sexual preferences [and] . . . [that] 70 percent of the 2,500 psychiatrists who responded to a survey conducted by the journal *Medical Aspects of Human Sexuality* opposed it.” Greenberg, *supra* n. 38, at 430. But others assert that the decision, though not unanimous, was based on the premise that illness theories of homosexuality could not be supported by scientific evidence since psychiatric studies using gays who were not imprisoned or institutionalized showed they had a capacity for “normal” life equal to that of heterosexuals. *See Marcus, supra* n. 139, at 252-54. Moreover, as the prominent psychiatrist Judd Marmor pointed out, “many of the ‘pathological’ traits of homosexuals in treatment stemmed from ‘a total fabric that includes a specific kind of social mores . . . that deprecates and condemns homoerotic behavior and makes life much more difficult and hazardous for homosexuals.” D’Emilio, *supra* n. 38, at 142 (quoting Judd Marmor, *Introduction*, in *Sexual Inversion: The Multiple Roots of Homosexuality* 1, 20 (Judd Marmor ed., Basic Books 1965)). As to the charge that the decision was political, not medical, some gay activists affirm it but contend that the medical profession’s views of homosexuality were always political. *See Marcus, supra* n. 139, at 222-25.

234. Marcus, *supra* n. 139, at 254 (quoting Dr. Judd Marmor).

235. *See id.* As one pioneer lesbian activists put it:

The problem with the sickness label is that it’s supposedly scientific and is therefore not subject to dispute. You can argue with people who say you’re immoral because you can say that there are so many kinds of morality. There are no absolutes. Now that people don’t have the sickness label, they’re coming out with more basic reasons for being against us: “I don’t like you.” “I don’t like the way you live.” “I think you’re immoral.” “I think you’re rotten.” All of that is more honest than this “you’re sick” nonsense.

Id. at 225 (quoting Barbara Gittings) (internal quotations omitted).

At the beginning of this era, gay people were being intensely persecuted in the United States because they had been condemned by medical, legal, and religious institutions as sinners, mentally ill psychopaths, and criminals. In contrast, by the end of 1973, gay men and lesbians had been normalized by the medical profession, won important advocates within the legal profession for decriminalizing their way of having sex, and convinced religious institutions to reconsider whether they were sinners.

F. (1974-1986): Liberation to Backlash—A Developing Kulturkampf

Having won relief from police harassment, gay culture had the freedom to grow in major U.S. cities. This opportunity was most dramatically realized in the Castro section of San Francisco, which, due to a large influx of gay men in the early 1970s, became a “‘gay territory’ . . . designed by and for homosexuals.”²³⁶ Castro soon became the first neighborhood in U.S. history to be “populated mostly by men attracted sexually and emotionally to other men.”²³⁷

As a gay territory, Castro possessed the potential for electing an openly gay person to public office. Harvey Milk became that person, winning a seat on the San Francisco Board of Supervisors in 1977.²³⁸ His election came after several unsuccessful but surprisingly strong campaigns that he undertook despite opposition from veteran gay political activists who preferred to support heterosexual candidates sympathetic to gay rights.²³⁹ Although Harvey Milk was not the first openly gay person to win public office,²⁴⁰ he came to “[symbolize] the ascendancy of gay power—gays would take their place in politics by dint of hard work and political organizing, rather than relying on their liberal heterosexual friends to advance, ever so slowly, their interests.”²⁴¹ Harvey Milk became a gay political icon as a result of tragedy, for he and mayor George Moscone, a heterosexual sympathizer of gay rights, were assassinated in November 1978 by a former city councilor who had resigned in protest of the city’s pro-gay direction and was angered by resistance to his attempts to rescind his resignation.²⁴² As a political icon, Milk’s life and death have inspired many other gay men and lesbians to run for public office.²⁴³

Gay political power also increased in strength at the national level during this era. In 1977, the National Gay Task Force was received at the White House by presidential aid Midge Constanza to discuss gay issues.²⁴⁴ “This [was] the first

236. Walzer, *supra* n. 38, at 53.

237. *Id.*

238. *Id.* at 56.

239. *Id.* at 54-55.

240. In 1974, that honor was shared by Kathy Kozachenko, who was elected to the Ann Arbor, Michigan city council, and Elaine Noble, who was elected to the Massachusetts state legislature. Kranz & Cusick, *supra* n. 38, at 38.

241. Walzer, *supra* n. 38, at 57.

242. See Kranz & Cusick, *supra* n. 38, at 39.

243. Walzer, *supra* n. 38, at 57.

244. Stewart, *supra* n. 38, at 90.

such meeting between a gay organization and the Office of the President.”²⁴⁵ In 1979, some 200,000 people participated in the first gay and lesbian March on Washington.²⁴⁶ Seventy-seven gay men and lesbians were elected as delegates to the 1980 Democratic Party National Convention.²⁴⁷ Four years later, the Democratic Party added gay rights to its national platform.²⁴⁸

At all levels, gay political power was devoted to getting civil rights laws to include prohibitions against discrimination based on sexual orientation. By 1977, about forty cities had such prohibitions in place.²⁴⁹ In 1982, Wisconsin became the first state to enact statewide gay rights legislation.²⁵⁰

Gay rights advocates had mixed success at the federal level. Legislation was introduced in the mid-1970s to add to the nation’s civil rights laws a prohibition against discrimination on the basis of sexual orientation.²⁵¹ Although this effort failed, it reframed the issue of discrimination based on sexual orientation as an incremental advancement of civil rights, thereby broadening the gay rights coalition to include “ethnic minorities and other traditional Democrats.”²⁵² Records of congressional hearings during the 1970s reflect greater participation by gay rights advocates.²⁵³ This not only reflected a successful effort of gay activists “to expand the scope of conflict over homosexuality,”²⁵⁴ it also changed the venues where homosexuality was discussed—away from defense related committees where “cold warriors and Evangelicals . . . had complete control over framing the issue.”²⁵⁵

Gay rights advocates also gained important victories within federal agencies. The U.S. Civil Service Commission formally dropped its ban on federal employment of gays and lesbians in 1975.²⁵⁶ At about this same time, the U.S. Immigration and Naturalization Service considerably loosened its ban on homosexual immigrants by limiting it only to persons convicted of sex crimes.²⁵⁷ In 1976, the U.S. Internal Revenue Service “canceled a policy that had forced homosexual education and charity groups to publicly state that homosexuality is a ‘sickness, disturbance, or diseased pathology’ before being given tax-exempt . . . status.”²⁵⁸

In 1976, the gay rights movement suffered a setback when, under pressure from Congress, the U.S. Department of Housing and Urban Development (HUD)

245. *Id.*

246. *Id.* at 18.

247. Kranz & Cusick, *supra* n. 38, at 38.

248. *Id.*

249. Walzer, *supra* n. 38, at 55.

250. Stewart, *supra* n. 38, at 18.

251. Haider-Markel, *supra* n. 94, at 248.

252. *Id.* at 248-49.

253. *See id.* at 249-50.

254. *Id.* at 250.

255. *Id.*

256. Haider-Markel, *supra* n. 94, at 248.

257. *Id.* at 249.

258. *Id.*

“repealed a regulation that had allowed same-sex couples to apply for public housing.”²⁵⁹ Another setback occurred in 1981 after President Reagan took office, when the U.S. Department of Defense (DOD) issued a policy revision that “explicitly [stated] that homosexuality is ‘incompatible with military service’ . . . [and required] all recruits to be questioned about their sexual orientation.”²⁶⁰

The HUD and DOD policy reversals were not the only gay rights setbacks during this era. In 1977, a political backlash was initiated by former Miss Oklahoma and entertainer Anita Bryant, who launched an initiative referendum against Dade County, Florida’s gay rights law.²⁶¹ Ms. Bryant formed an organization named “Save Our Children,” and “sought to portray gay men and lesbians as child molesters, ‘recruiters’ of innocent young people into their sinful ranks.”²⁶² This campaign drew support from people over a wide spectrum of political and religious beliefs, including “the Reverend Jerry Falwell . . . the National Association of Evangelicals; the Roman Catholic archdiocese of Miami; the president of the Miami Beach B’nai B’rith . . . both of Florida’s [U.S.] senators and its liberal governor.”²⁶³ As a consequence, the referendum passed by more than a two-to-one margin of the vote.²⁶⁴ Shortly thereafter, “similar referendums [succeeded] in St. Paul, Minnesota; Wichita, Kansas; and Eugene, Oregon. . . .”²⁶⁵

In 1978, Californians were asked to vote on an initiative petition, Proposition 6, that would have prohibited gay men and lesbians from teaching in California public schools and banned “any teacher or school employee from saying anything positive about homosexuality on school grounds.”²⁶⁶ Harvey Milk vigorously debated the initiative all over California,²⁶⁷ and a broad coalition of “teachers, labor unions, Democrats, and many Republicans, including [former] Governor Ronald Reagan, came out against [it].”²⁶⁸ As a consequence, Proposition 6 “was defeated 59 percent to 41 percent”²⁶⁹ Gay rights activists and their supporters in “Seattle also defeated an anti-gay rights referendum by a two to one margin.”²⁷⁰

This Culture War over gay rights spawned powerful new political organizations on both sides. On the anti-gay side, Pat Robertson founded CBN University in 1977; in 1979 Jerry Falwell founded the Moral Majority and Beverly LaHaye founded Concerned Women for America.²⁷¹ Pro-gay forces countered in 1980 with the formation of the Human Rights Campaign to “[fight] antigay ballot initiatives and [support] candidates who promote antidiscrimination policies based

259. *Id.*

260. Stewart, *supra* n. 38, at 93 (quoting DOD policy).

261. See Kranz & Cusick, *supra* n. 38, at 38-39.

262. *Id.* at 39.

263. *Id.*

264. *Id.*

265. *Id.*

266. Kranz & Cusick, *supra* n. 38, at 39.

267. Walzer, *supra* n. 38, at 56.

268. Stewart, *supra* n. 38, at 17.

269. Kranz & Cusick, *supra* n. 38, at 39.

270. *Id.*

271. Stewart, *supra* n. 38, at 18.

on sexual orientation.”²⁷² The following year, “[a] group of mothers and fathers [organized] the Parents and Friends of Lesbians and Gays (PFLAG)”²⁷³ which has become a powerful gay rights support group.

By far, the most serious challenge faced by gay men during this era was the outbreak of Acquired Immune Deficiency Syndrome (AIDS) in 1981. It was first recognized in gay men, and it spread so rapidly among gay men that it was originally named the Gay-Related Immune Deficiency.²⁷⁴ The carnage was horrific. “In [the] Castro neighborhood a few years after the epidemic began roughly half of the gay men were infected with human immunodeficiency virus [(HIV)]. . . .”²⁷⁵ From 1981 to 1987, about 50,280 Americans contracted AIDS, with 47,993 (ninety-five percent) of them ultimately dying as a result.²⁷⁶

Besides the loss of life, the gay community suffered a loss of their sexual liberation. “[T]he late 1970s and early 1980s [was] ‘party time’ for gay men. . . .”²⁷⁷ As it became clear that having multiple sex partners increased a person’s risk of contracting or spreading AIDS, pressure developed within and without the gay community to close the bathhouses which had been the venues for the sexual rites that had become a defining characteristic of gay liberation.²⁷⁸

The bathhouse controversy not only created dissension within the gay community,²⁷⁹ it raised again the specter of gays being labeled as diseased sinners who deserved branding, confinement, and death.²⁸⁰ Fear that AIDS could be contracted through casual contact became an excuse for firing gay men and lesbians.²⁸¹ Until Rock Hudson’s 1985 announcement that he had AIDS and his subsequent death put a recognizable face on AIDS victims, and scientists began reporting that AIDS could be contracted through heterosexual sex, neither the media nor the government paid much attention to the disease.²⁸² Government’s

272. *Id.*

273. *Id.* at 93.

274. Walzer, *supra* n. 38, at 58.

275. *Id.*

276. U.S. Ctr. for Disease Control & Prevention, *Erratum: Vol. 50, No. 21*, <<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5047a10.htm>> (last updated Nov. 30, 2001) (Table 1. Number and percentage of persons with AIDS, by selected characteristics and period of report—United States, 1981-2000).

277. Kranz & Cusick, *supra* n. 38, at 20.

278. *Id.* at 40.

279. Members of the gay community fought among themselves as to whether to shut down the bathhouses. While some bathhouses were closed, some members of the gay community, aided by civil rights groups, went to court to fight closure orders. It was clear that some gay men continued to go to bathhouses throughout the epidemic—“though perhaps they behaved somewhat differently once they got there.” *Id.* at 41.

280. To that end, “William F. Buckley[] called for the tattooing of all HIV-positive gay men on their buttocks,” some legislators suggested that all HIV-infected people be quarantined, and “Pat Buchanan wrote, ‘Pity the poor homosexuals. They’ve declared war on nature and nature is exacting its judgment.’” Walzer, *supra* n. 38, at 59.

281. *Id.*

282. *Id.*; see Kranz & Cusick, *supra* n. 38, at 41; Stewart, *supra* n. 38, at 20. After Hudson’s announcement, “[t]he federal government, under the leadership of Surgeon General C. Everett Koop, warned that no one was immune from AIDS and that responsible sexual practices were necessary to stop its spread.” Walzer, *supra* n. 38, at 59.

neglect of AIDS caused a serious under-funding of AIDS research and treatment during the early years of the epidemic.²⁸³

Ironically, the AIDS epidemic served to strengthen the cause of gay rights. The Gay Men's Health Crisis (GMHC) was formed in 1982, and many "[o]ther AIDS groups were quickly formed . . . to provide social services and support for people with AIDS."²⁸⁴ Lesbians rallied to help their gay male friends, leading to a new rapprochement between gay men and lesbians after they had sought different paths to liberation during the late 1960s and 1970s.²⁸⁵ Most importantly, once the media became engaged in the AIDS crisis, attention on the crisis made people more aware of gay issues in general.²⁸⁶ This brought "new actors . . . into the debate, including broad civil liberties groups, medical professionals, and members of Congress who had previously been uninterested in gay-related issues."²⁸⁷ However, many of the existing actors, such as Republican Senator Jesse Helms, continued to define AIDS in terms of morality and legislated to prevent federal funds from being used in ways thought to promote homosexuality.²⁸⁸

The gay community's campaign against state sodomy laws was dramatically successful in state legislatures and state courts. From 1974 through 1983, sixteen state legislatures repealed their sodomy laws,²⁸⁹ and the sodomy laws of two more states were struck down by state courts.²⁹⁰ As a result, by 1984 sodomy laws had been repealed or overturned in twenty-six states. Over half the United States was now within the gay sex liberation zone.

Any hope that the gay sex liberation zone could be quickly expanded to cover the entire country through a favorable United States Supreme Court decision was crushed in 1986. After previously declining to overrule a 1975 federal district court decision that upheld Virginia's sodomy laws,²⁹¹ the Court rejected constitutional challenges to the right of states to outlaw private consensual sodomy between adults in *Bowers v. Hardwick*.²⁹²

Despite the AIDS epidemic, the backlash against gay rights, and the rebuff of the United States Supreme Court, gay men and lesbians achieved a great increase in visibility in the media and politics, much of which was positive. Gay

283. See Kranz & Cusick, *supra* n. 38, at 41.

284. *Id.*

285. *Id.* at 20-21. To signify their newfound solidarity, in 1986 gay men and lesbians joined together to convert the National Gay Task Force into the National Gay & Lesbian Task Force. *Id.* at 21.

286. Haider-Markel, *supra* n. 94, at 251.

287. *Id.*

288. *Id.*

289. States which repealed their sodomy laws during this time period included Alaska (1980), California (1976), Indiana (1977), Iowa (1978), Maine (1976), Massachusetts (date not available), Nebraska (1978), New Jersey (1979), New Mexico (1975), New Hampshire (1975), Ohio (1974), South Dakota (1977), Vermont (1977), Washington (1976), Wisconsin (1983), and Wyoming (1977). See Lambda Legal, *supra* n. 165.

290. See *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (striking down the New York sodomy laws); *Cmmw. v. Bonadio*, 415 A.2d 47 (Pa. 1980) (striking down the Pennsylvania sodomy laws).

291. *Doe v. Cmmw.'s Atty. for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

292. 478 U.S. at 189.

culture also got much more attention in pop culture media.²⁹³ But the pop culture perspective of gay men and lesbians as reflected in the “[m]ainstream films of the 1970s and 1980s [was] almost uniformly condemning.”²⁹⁴ Most presented gays as “*the impure other to the pure heterosexual*.”²⁹⁵ These films “acknowledge the reality of homosexuals but represent them either as harmless but freakish and pathetic,”²⁹⁶ “or as serious physical, moral, and social threats.”²⁹⁷ In Hollywood, it was as if the progress gay men and lesbians made toward public acceptance during the 1960s and early 1970s had never occurred.

G. (1987-2003): Liberation to Acceptance—An Uncertain Citizenship

As the nation entered the post-*Bowers* era, AIDS continued to be a major challenge. Concerned that there had not been enough progress in the funding of AIDS research, the gay community founded the AIDS Coalition to Unleash Power (ACTUP) in 1987.²⁹⁸ Although AIDS was devastating the gay community, it also brought more attention to gay rights than ever before.²⁹⁹ Through its own political action and partnerships with a broader sympathetic coalition, the gay community achieved significant success in securing AIDS related legislation in the early 1990s. This legislation included the enactments of the Ryan White CARE Act,³⁰⁰ which provided emergency funding for AIDS, and the Americans with Disabilities Act,³⁰¹ which contained provisions prohibiting the discrimination against people with AIDS and people infected with HIV.³⁰² Nevertheless, AIDS

293. Seidman, *supra* n. 38, at 127.

294. *Id.* at 128.

295. *Id.*

296. *Id.* at 132. For example, in *Car Wash* (1976) a gay man is portrayed as “a ‘queen’—swishy, limp-wristed, and exhibiting an exaggerated, affected feminine style.” *Id.* at 128.

297. Seidman, *supra* n. 38, at 132. Reflecting many Americans’ fears of “the new [public] homosexual, who demanded respect and challenged heterosexual privilege, . . . films of [this era] . . . often portrayed [the homosexual] as a sociopath—an aggressive, violent, evil figure.” *Id.* at 129. Thus, in *Sudden Impact* (1983), a murder victim turns out to be the villain, because she is a “stereotypical butch” lesbian who “has short hair[,] . . . wears blue jeans and a jean jacket with the sleeves cut off[,] . . . smokes, curses, and talks in an aggressively masculine style.” *Id.* She also just happened to have raped her murderess and the murderess’ sister, and was planning to kill the murderess at the time she was killed. *Id.*

Looking for Mr. Goodbar (1977) portrayed a gay relationship between a wealthy feminized older man who pays for sexual relations with a young handsome man. *See id.* at 130-32. “In contrast to the heterosexual ideal of a love-based companionate intimacy, [this] homosexual relationship is presented as an exploitive and corrupting exchange of youthful beauty for material comfort.” Seidman, *supra* n. 38, at 131. Later, the young man murders a beautiful young woman, who had invited him to be her sexual partner for the night, because he was unable to complete the sex act until he violently raped her by “[entering] her from behind, as if he were having sex with a man.” *Id.* “Filled with rage and self-hatred, he [murdered] to cleanse himself of his homosexual feelings.” *Id.* at 131-32.

298. Stewart, *supra* n. 38, at 20.

299. For example, the *New York Times* began substituting the term gay for homosexual in 1987. *Id.*

300. *Ryan White Comprehensive AIDS Resources Emergency Act of 1990*, Pub. L. No. 101-381, 104 Stat. 576 (1990).

301. *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, 104 Stat. 327 (1990).

302. Haider-Markel, *supra* n. 94, at 252.

continued reaping a heavy toll in the United States, as indicated in the following table:³⁰³

<u>Years Reported</u>	<u>AIDS Cases Reported</u>	<u>Death Rate</u>
1988-1992	202,000 approx.	89.5%
1993-1995	257,000 approx.	61.8%
1996-2000	264,000 approx.	22.6%

On June 1, 2001, the United States Center for Disease Control and Prevention reported that:

As of December 31, 2000, 774,467 persons had been reported with AIDS in the United States; 448,060 of these had died; 3542 persons had unknown vital status. The number of persons living with AIDS (322,865) is the highest ever reported. Of these, 79% were men, 61% were black or Hispanic, and 41% were infected through male-to-male sex.³⁰⁴

Perhaps as a result of the attention given to the gay community in light of AIDS, gay men and lesbians have achieved a much higher and more positive cultural profile since 1986. The United States Postal Service twice issued commemorative stamps with gay themes—one in 1989 commemorating the twentieth anniversary of Stonewall,³⁰⁵ and one in 1993 depicting a red ribbon stamp to encourage AIDS awareness.³⁰⁶

In 1997, Ellen DeGeneres' character on her prime time television show "[came] out as a lesbian,"³⁰⁷ which was a first for network television. Subsequently, the television networks substantially increased the number of gay characters depicted in their programs.³⁰⁸ Shows prominently featuring gay characters included "MTV's *The Real World*, . . . NBC's *Will & Grace*, [and] Showtime's *Queer as Folk*."³⁰⁹ This trend has persisted despite the unsuccessful attempt of the Christian Action Network in March 1999, to force broadcasters to

303. U.S. Ctr. for Disease Control & Prevention, *supra* n. 276.

304. U.S. Ctr. for Disease Control & Prevention, *HIV and AIDS—United States, 1981-2000* <<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5021a2.htm>> (last updated June 8, 2001) (emphasis added). The Center for Disease Control and Prevention reported:

AIDS in the United States remains primarily an epidemic affecting [men who have sex with men (MSM)] and racial/ethnic minorities. A new generation of MSM has replaced those who benefitted[sic] from early prevention strategies, and minority MSM have emerged as the population most affected by HIV. Socioeconomic factors (e.g., homophobia, high rates of poverty and unemployment, and lack of access to health care) are associated with high rates of HIV risk behaviors among minority MSM and are barriers to accessing HIV testing, diagnosis, and treatment. . . . Minority MSM may not identify themselves as homosexual or bisexual because of the stigma attached to these activities and may be difficult to reach with HIV prevention messages. In addition, the proportion of AIDS cases attributed to heterosexual contact and among women is substantially greater than earlier in the epidemic.

Id. (emphasis added).

305. Stewart, *supra* n. 38, at 100.

306. *Id.* at 108.

307. Kranz & Cusick, *supra* n. 38, at 104; Stewart, *supra* n. 38, at 114.

308. In 1999, the Gay and Lesbian Alliance Against Defamation (GLAAD) noted that there would be more than twenty-five gay or bisexual characters on network series during the Spring 1999 television season. Kranz & Cusick, *supra* n. 38, at 105.

309. Stewart, *supra* n. 38, at 26.

attach an HC (homosexual content) rating to every show with gay characters.³¹⁰ In 2003, VH1 aired an infotainment documentary entitled *Totally Gay*, “an explosive, sexy, fast-paced take on the new openness of sexuality in the twenty-first century [that explored how] lines are blurring and [documented] the dramatic changes that have turned the mainstream into the mixed-stream.”³¹¹

American movies portrayed gay men and lesbians in a much more favorable light during the 1990s and into the twenty-first century than they did in the 1980s. In 1994, Tom Hanks won an Academy Award for best actor for his role in *Philadelphia* (1993), in which he played a gay lawyer dying of AIDS who sued his law firm after it fired him upon learning he had AIDS.³¹² The film depicts the lawyer and his lover as dignified, loving, well-adjusted individuals triumphing in the face of death and homophobia.³¹³ Then, in 1995, Whoopi Goldberg played a strong lesbian character who nurtures two heterosexual women through the trials and tribulations of relations gone wrong in *Boys On the Side* (1995).³¹⁴ In 2000, Hilary Swank won an Academy Award for best actress for her portrayal of a transgendered murder victim in the film *Boys Don't Cry* (1999).³¹⁵

Despite this more positive image for gay people, it could be argued that the film industry was creating an image of the normal gay that “[deserves] respect and integration”³¹⁶ because he or she “does not challenge heterosexual dominance.”³¹⁷ According to this argument, the normal gay person portrayed in American films of the 1990s “is expected to be gender conventional, link sex to love and a marriage-like relationship, defend family values, personify economic individualism, and display national pride.”³¹⁸ As a consequence, “[l]esbians and gay men who are gender benders or choose alternative intimate lives will likely remain outsiders.”³¹⁹

Moreover, lesbians as a group may remain outsiders, for it appears that few films in this era featured a “normalized lesbian character.”³²⁰ This dearth of

310. Kranz & Cusick, *supra* n. 38, at 104-05.

311. VH1, *Shows, About the Show, Totally Gay*, <http://www.vh1.com/shows/dyn/totally_gay/series_about_special.jhtml> (accessed Nov. 4, 2003).

The show [explores] heavy hitters like Madonna, Christina Aguilera and Justin Timberlake; artists who make brave artistic statements and earned respect of straights and gays alike. It'll check out the marketing campaigns of companies that have led to the cultural foregrounding of the male sex object. Also at bands like T.a.t.u, that have successfully used controversial sexual imagery to sell their products. Finally it will look at the impact all this has had on ordinary people's lives.

Id.

312. See Stewart, *supra* n. 38, at 109.

313. See Seidman, *supra* n. 38, at 133-37.

314. See *id.* at 141-43.

315. Stewart, *supra* n. 38, at 121.

316. Seidman, *supra* n. 38, at 133.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 142. Seidman reported:

Boys on the Side is . . . one of the few commercially successful films of the 1990s that feature lesbians. Of the twenty-odd films produced in the 1990s that I looked at, only *Boys on the*

lesbian characters is perhaps the result of normalized lesbians being perceived as more of a threat to normal heterosexual life than are normalized gay men.³²¹ As one observer noted:

Lesbians claim masculine privilege—in the choice of socioeconomic independence, in the pursuit of women as sex and love partners, and at least for some lesbians in the integration of masculine styles of self-presentation as a way to flag their sexual identity and to claim social respect and power. [They also signal] to all women the possibility of roles outside of wife and mother.³²²

Nevertheless, in May 1993, *New York* magazine published a cover story “declaring the advent of ‘lesbian chic,’ which presented female same-sex relationships as glamorous, slightly exotic alternatives to heterosexual relationships.”³²³ Perhaps this view of lesbianism has become the pop culture view, for during the 1990s popular singers k. d. lang, the Indigo Girls, and Melissa Etheridge came out as lesbians without much impact on their careers.³²⁴

The literary world has also become much more accepting of gay men and lesbians. Many bookstores now have gay and lesbian sections.³²⁵ Mainstream presses are publishing many more works by gay men and lesbians.³²⁶ However, “[w]ith some notable exceptions—Dorothy Allison, Sarah Schulman, Sapphire, and Adrienne Rich—it has been far harder for lesbian writers and poets to be published than for gay men.”³²⁷

Homoerotic art touched off an intense cultural war in the early 1990s. In 1990, the curator of the Cincinnati Museum of Art was charged with obscenity after displaying the ‘ controversial homoerotic photographs of Robert Mapplethorpe.³²⁸ The curator was acquitted, but he subsequently left the

Side featured a normalized lesbian character—though less mainstream films such as *Chasing Amy* (1997) and *Set It Off* (1996) also present affirmative lesbian characters.

Seidman, *supra* n. 38, at 142.

321. *Id.* at 142-43.

322. *Id.*

323. Kranz & Cusick, *supra* n. 38, at 106. However, the lesbian community was conflicted by the idea of “lesbian chic.” Some found that “this image of them as sexy, urbane women was a welcome relief from the popular stereotype that portrays them as mannish, unattractive asexuals.” *Id.* But, “[m]any others . . . were disturbed by the implication that lesbianism was merely a set of lifestyle poses that could be put on and discarded at will.” *Id.*

324. *See id.* at 107.

325. Stewart, *supra* n. 38, at 26.

326. In November 1999, the gay newspaper, *New York Blade*, published a list of gay and lesbian authors whose works had been published by mainstream presses that included:

Penguin (Jaye Zimet’s *Strange Sisters: The Art of Lesbian Pulp Fiction, 1949-1969*), St. Martin’s (Paul Russell’s novel *The Coming Storm*), Simon and Schuster (Brad Gooch’s memoir and self-help book, *Finding the Boyfriend Within*), Consortium (Rik Isenee’s celebration of gay midlife, *Are You Ready?*; Michael Thomas Ford’s memoir, *That’s Mr. Faggot to You: Further Trials From My Queer Life*; Dan Woog’s *Friends and Family: True Stories of Gay America’s Straight Allies*); Dutton (Dan Savage’s *The Kid: What Happened After My Boyfriend and I Decided to Go Get Pregnant: An Adoption Story*); and J.P. Tarcher (Christian de la Huerta’s *Coming Out Spiritually*).

Kranz & Cusick, *supra* n. 38, at 105.

327. *Id.*

328. *Id.* at 102-03. Mapplethorpe’s works “featured sadomasochistic imagery, including a self-portrait of himself naked except for a leather cap and jacket with a bullwhip inserted in his anus. Also

museum, and the aftermath led Congress to reduce National Endowment of the Arts grants to artists and organizations perceived as supporting homoerotic works.³²⁹

Religious acceptance of gay men and lesbians increased greatly following *Bowers*. Many major religious denominations within the United States became intensely divided over such issues as whether openly gay men and lesbian women may serve as ordained clergy and whether it is proper for members of their clergy to perform same-sex marriages.³³⁰ Even the fiercely anti-gay Reverend Jerry Falwell appeared to have adopted a love the sinner, hate the sin approach to homosexuality when he issued a 1999 apology “for not always loving homosexuals”³³¹ but also made it clear he was still opposed to homosexual activity.

Gay men, lesbians, and gay issues also achieved a much higher political profile after *Bowers*. The second March on Washington drew over 200,000 participants in 1987 to petition government on behalf of gay issues.³³² Gay men and lesbians also became more visible as officeholders. In 1987, Congressman Barney Frank came out as gay.³³³ Eleven years later, Tammy Baldwin became the first openly lesbian woman elected to Congress.³³⁴ In 1993, President Clinton’s nominee for assistant secretary of housing, Roberta Achtenberg, was confirmed, making her the highest-ranked open lesbian in government.³³⁵ Moreover, both President Clinton and President George W. Bush successfully appointed openly gay men to be ambassadors.³³⁶

The 1992 presidential campaign was a high-water mark for gay and lesbian political power. In West Hollywood, candidate Bill Clinton electrified the mostly gay audience by proclaiming: “I have a vision for America, and you are part of it.”³³⁷ Clinton promised to end the ban on gays in the military.³³⁸ At the 1992 Democratic National Convention, “Bill Clinton [became] the first presidential nominee to mention gay people in his acceptance speech,”³³⁹ and his openly gay aid, Bob Hattoy, addressed the convention in prime time.³⁴⁰ The 1992 Republican National Convention was very different; the failed Republican candidate Pat

in the exhibit was a photograph of a man’s torso in a three-piece suit, with a large black penis sticking out of the unzipped pants.” *Id.* at 103.

329. *Id.*

330. See Kranz & Cusick, *supra* n. 38, at 113-19.

331. Caryle Murphy, *Mutual Apology for Hateful Speech: Christian Right Leader Falwell, Gay Rights Activist Talk Tolerance*, Wash. Post C3, C3 (Oct. 24, 1999) (available in LEXIS, News Library, WPOST) (internal quotations omitted).

332. Walzer, *supra* n. 38, at 60.

333. Stewart, *supra* n. 38, at 98.

334. Kranz & Cusick, *supra* n. 38, at 133.

335. Stewart, *supra* n. 38, at 107.

336. In 1997, President Clinton nominated James Hormel to be ambassador to Luxembourg. See *id.* at 116. In 2001, President Bush’s nominee, Michael Guest, was confirmed as ambassador to Romania. *Id.* at 125. At ambassador Guest’s swearing in ceremony, Secretary of State Colin Powell acknowledged the ambassador’s lover. *Id.*

337. Walzer, *supra* n. 38, at 61 (internal quotations omitted).

338. *Id.* at 62.

339. Stewart, *supra* n. 38, at 104.

340. Walzer, *supra* n. 38, at 61-62.

Buchanan, declared a “cultural war” with a focus on gays, and signs were waived saying “Family Rights Forever, Gay Rights Never.”³⁴¹ With help of the gay vote, Clinton defeated incumbent President George Bush, and openly gay congressmen were re-elected.³⁴²

The political success of the gay rights movement in electing candidates during the late 1980s and early 1990s brought new forces into the political arena. In 1989, Pat Robertson founded the Christian Coalition, an organization dedicated to electing religious conservatives to public office in part to counter the gay rights movement.³⁴³ On the other side, gay political action committees were credited with contributing more than \$760,000 to congressional campaigns in 1992,³⁴⁴ and gay Republicans created the Log Cabin Republicans in 1993.³⁴⁵

Political success ultimately must be measured in terms of whether political power can be converted into favorable legislation. It appears that the pro-gay and anti-gay forces have fought to a stalemate in the post-*Bowers* era. With respect to federal legislation, the pro-gay forces were more successful in the early 1990s. During this time, they not only won passage of the ADA’s non-discriminatory provisions, but they also won enactment of a Hate Crimes Statistics Act,³⁴⁶ which included provisions for collecting data about crimes committed on account of victims’ sexual orientation, and legislation ending immigration policies that exclude gay immigrants.³⁴⁷ However, the pro-gay forces have been unsuccessful in getting federal legislation that would prohibit discrimination on the basis of sexual orientation at the national level.³⁴⁸

The gay rights movement has been relatively more successful at the state and local level than at the federal level. Currently, thirteen states and the District of Columbia have laws protecting gay men and lesbians from employment discrimination,³⁴⁹ and eight other states protect gay men and lesbians from discrimination with respect to public employment.³⁵⁰ In the 1970s, only forty communities passed gay rights laws.³⁵¹ “[B]y 2000, the number had swelled to well over three hundred.”³⁵² The laws have been passed in every geographic area and

341. *Id.* at 62.

342. Haider-Markel, *supra* n. 94, at 252.

343. Stewart, *supra* n. 38, at 20.

344. Haider-Markel, *supra* n. 94, at 252.

345. Kranz & Cusick, *supra* n. 38, at 131.

346. Pub. L. No. 101-275, 104 Stat. 140 (1990).

347. *See* Haider-Markel, *supra* n. 94, at 252; Stewart, *supra* n. 38, at 101-02.

348. The Federal Gay and Lesbian Civil Rights Bill, introduced in 1975, “has . . . no hope of passage,” and the Employment Non-Discrimination Act (ENDA) has languished since it was introduced in 1994. Seidman, *supra* n. 38, at 178.

349. These states are California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New York, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin. *See* Lambda Legal, *States Which Prohibit Sexual Orientation Employment Discrimination* <<http://www.lambdalegal.org/cgi-bin/iowa/states/antidiscrimi-map>> (accessed Oct. 22, 2003).

350. These states are Colorado, Delaware, Illinois, Indiana, Montana, New Mexico, Pennsylvania, and Washington. *See id.*

351. Seidman, *supra* n. 38, at 177.

352. *Id.*

every type of community (metropolitan, suburban, small town).³⁵³ Still, “the jobs and homes of the overwhelming majority of gays and lesbians are not legally protected by any local, state, or federal laws,”³⁵⁴ and there have been, by one count, “472 cases of proposed anti-gay legislation.”³⁵⁵

Courts have also produced mixed results in the cultural war over gay rights. In the 1996 case *Nabozny v. Podlesny*,³⁵⁶ the United States Court of Appeals for the Seventh Circuit held that school officials violated a gay student’s equal protection rights. This student was being harassed by other students because he was gay, and the school officials refused to act on his complaints.³⁵⁷ The court found the school officials’ non-action constituted an impermissible discrimination on the basis of gender and sexual orientation.³⁵⁸

Also in 1996, the United States Supreme Court, in *Romer v. Evans*,³⁵⁹ struck down a Colorado constitutional provision that prohibited all levels of state government from granting “minority status, quota preferences, protected status or [a] claim of discrimination”³⁶⁰ on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”³⁶¹ The Court found that the provision discriminated against a discrete class based on sexual orientation in a manner that served no legitimate government purpose.³⁶² It did so, said the Court, because the provision “[identified] persons by a single trait and then [denied] them protection across the board.”³⁶³ In effect, this broad denial of protection denied gay men, lesbians, and bisexuals equal protection by making it more difficult for them than others to seek aid from government.³⁶⁴ Moreover, the Court found that the broad effects of the provision were “so far removed from [the] particular justifications”³⁶⁵ offered by Colorado—respecting “other citizens’ freedom of association”³⁶⁶ and “conserving resources to fight discrimination against other groups”³⁶⁷—that its only purpose and effect was to disadvantage a discrete class of persons out of animosity toward them.³⁶⁸

353. *Id.*

354. *Id.*

355. *Id.* at 178.

356. 92 F.3d 446 (7th Cir. 1996).

357. *Id.* at 456-58.

358. *Id.* at 453-58. On the sexual orientation charge, the Court held that there could be no rational basis for school officials treating gay students differently than others with respect to protecting them from schoolyard bullies. *Id.* at 458.

359. 517 U.S. 620 (1996).

360. *Id.* at 624 (quoting Colo. Const. art. II, § 30(b)).

361. *Id.* at 624 (quoting Colo. Const. art. II, § 30(b)). It was adopted by a margin of fifty-three percent to forty-six percent during a referendum election on November 3, 1992. Stewart, *supra* n. 38, at 23.

362. *Romer*, 517 U.S. at 632.

363. *Id.* at 633.

364. *See id.* at 633-34.

365. *Id.* at 635.

366. *Id.*

367. *Romer*, 517 U.S. at 635.

368. *Id.*

Gay rights were subordinated to First Amendment expressive rights, however, in two cases where groups resisted associating with persons of gay sexual orientation. In the 1995 case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,³⁶⁹ the Supreme Court held that it would violate the First Amendment rights of parade organizers to require them to include in their parade a group of gay, lesbian, and bisexual descendants of Irish immigrants.³⁷⁰ The court recognized that doing so could convey the message that the organizers approved of homosexuality.³⁷¹

Five years later, in *Boy Scouts of America v. Dale*,³⁷² the Court held that it would violate the Boy Scouts of America's (BSA) First Amendment freedom of expressive association rights for a state to use its public accommodations law to force the BSA to accept gay scouts and scoutmasters.³⁷³ In the aftermath of *Dale*, the Boy Scouts of America and its local chapters lost thousands of scouts, adult supporters, and millions of dollars in contributions as a result of its anti-gay policies.³⁷⁴ But the BSA would have also suffered devastating losses if it had reversed those policies, because the Mormon and Roman Catholic Churches, whose members dominate scouting at this time, would have withdrawn their support.³⁷⁵

Gay rights advocates have also made progress in getting recognition, protection, and benefits for the families they have formed with their lovers. The necessity of achieving these family goals became apparent during the early days of the AIDS crisis, when gay men were denied the rights to care for their dying long-time companions and to inherit through intestate succession from their companions after death.³⁷⁶ Sadly, the intestate succession problem remains, for some gay companions of victims of the terrorist attacks of September 11, 2001, may not receive survivor benefits that are being provided to surviving family members of 9/11 victims.³⁷⁷

369. 515 U.S. 557 (1995).

370. *See id.* at 573-78.

371. *See id.*

372. 530 U.S. 640 (2000).

373. *Id.* at 655-59.

374. Sara Rimer, *Boy Scouts Under Fire; Ban on Gays Is at Issue*, 152 N.Y. Times A19, A19 (July 3, 2003) (available in LEXIS, News Library, NYT).

375. *Id.*

376. Walzer, *supra* n. 38, at 61.

377. Long-time same-sex companions of gay police officers and firefighters who died in the 9/11 tragedies will receive certain federal benefits under a law enacted in 2002 that permits people who are not immediate family of the deceased heroes to receive these benefits if they were named as beneficiaries in the decedents' life insurance policies. *See* Elisabeth Bumiller, *The Most Unlikely Story Behind a Gay Rights Victory*, 151 N.Y. Times A25, A25 (June 27, 2002) (available in LEXIS, News Library, NYT). This bill became law despite opposition of many conservatives who opposed gay people being treated as family members. *Id.* Many same-sex surviving companions of civilian 9/11 victims may not be as lucky, for they evidently will receive benefits from a federal fund to compensate families of 9/11 victims only if states in which they live recognize gay family affiliations. *See* Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, 152 N.Y. Times A1, A1 (May 30, 2002) (available in LEXIS, News Library, NYT).

Nevertheless, governments and private institutions have been increasingly treating the intimate same-sex relationships of gay men and lesbians as families. In the 1989 case of *Braschi v. Stahl Associates Co.*,³⁷⁸ the New York Court of Appeals held that two long-time gay male companions constituted a family for purposes of permitting the surviving non-tenant to resist eviction from a New York rent-controlled apartment.³⁷⁹ Similarly, in *State v. Hadinger*,³⁸⁰ a 1991 case, an Ohio appellate court held that lesbian and gay couples have spousal relationships for purposes of enforcing Ohio's domestic violence laws.³⁸¹ The following year, "Massachusetts [became] the first state to grant lesbian and gay state workers the same bereavement and family leave rights as heterosexual workers."³⁸²

Domestic partnership acts and benefits programs provide broad recognition for the variety of ways Americans now define and form families, for they ensure that persons who fulfill the role of spouses to unmarried workers receive the same benefits as the spouses of legally married workers. Currently, eight states have domestic partnership laws in place.³⁸³ "By the late 1990s, 421 cities and states, and over 3,500 businesses or institutions of higher education offered some form of domestic partner benefit."³⁸⁴

Gay men and lesbians also have begun to assert their right to be parents by raising together children from previous heterosexual marriages over whom they have custody, co-parenting children born as a result of them "donating sperm or serving as surrogate mother[s],"³⁸⁵ and adopting as couples through second parent adoptions. Currently, twenty-one states and the District of Columbia are receptive to second parent adoptions.³⁸⁶ However, Lambda Legal has ranked fourteen states as hostile to gay men and lesbians adopting children,³⁸⁷ and

378. 543 N.E.2d 49 (N.Y. 1989).

379. *Id.* at 53-54.

380. 573 N.E.2d 1191 (Ohio App. 10th Dist. 1991).

381. *Id.* at 1193.

382. Stewart, *supra* n. 38, at 105.

383. These states include California, Connecticut, Hawaii, Massachusetts, New York, Oregon, Vermont, and Washington. See Lambda Legal, *Government Employers Offering Domestic Partner Benefits* <<http://www.lambdalegal.org/cgi-bin/iowa/states/domesticpart-map>> (accessed Oct. 22, 2003).

384. See, Seidman, *supra* n. 38, at 177. For a partial listing of government and private employers which offer domestic partner benefits, see Lambda Legal, *Partial Summary of Domestic Partner Benefits Listings* <<http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=21>> (last updated Aug. 1, 2001).

385. Walzer, *supra* n. 38, at 63. Second parent adoptions involve "one member of the couple [adopting] or [having] a child naturally and then the other same-sex partner [petitioning] the court for recognition as a parent as well." *Id.*

386. These states are: Alaska, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, and Washington. Lambda Legal, *Overview of State Adoption Laws* <<http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=399>> (last updated Aug. 27, 2002). Now courts of some states must "[grapple] with how to accord visitation when a same-sex couple with children [breaks] up." Walzer, *supra* n. 38, at 63-64.

387. These states are: Alabama, Arkansas, Florida, Louisiana, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wyoming. Lambda Legal, *supra* n. 386.

indicates that the outlook for same-sex couples adopting is uncertain in the remaining fifteen states which have not received a hostile ranking despite not yet permitting second parent adoptions.³⁸⁸

Ultimate recognition of same-sex families will come only when same-sex couples are permitted to marry. In the 1974 case of *Singer v. Hara*,³⁸⁹ the Court of Appeals of Washington rejected claims that limiting marriage to heterosexual couples violated Washington's Equal Rights Amendment and the Equal Protection Clause of the Fourteenth Amendment.³⁹⁰ It did so on grounds that the heterosexual marriage limitation was not a classification based on sex,³⁹¹ homosexuality is not a suspect class,³⁹² and the heterosexual marriage limitation rationally furthered the state's legitimate "interest in affording a favorable environment for the growth of children."³⁹³

Nineteen years later, in the case of *Baehr v. Lewin*,³⁹⁴ the Hawaii Supreme Court held that barring same sex couples from marrying constituted classification on the basis of sex,³⁹⁵ and therefore the State of Hawaii could not deny same-sex couples the right to marry unless the State could show that the prohibition "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights."³⁹⁶ The court then remanded the case to the trial court for a determination as to whether Hawaii's heterosexual limitation on marriage could meet the strict scrutiny standard.³⁹⁷

Concerned that Hawaii would ultimately find that bans against same-sex marriage were unconstitutional,³⁹⁸ Congress enacted the Defense of Marriage Act (DOMA),³⁹⁹ and it was signed into law by President Clinton on September 21, 1996. DOMA relieves unwilling states from the obligation of recognizing same-sex marriages authorized by the state where the marriage occurred,⁴⁰⁰ and, for purposes of interpreting federal laws, regulations and agency interpretations defines marriage as "a legal union between one man and one woman as husband

388. These states include: Arizona, Colorado, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Dakota, and Wisconsin. *Id.*

389. 522 P.2d 1187 (Wash. App. Div. 1 1974).

390. *Id.* at 1195-96.

391. *Id.* at 1195.

392. *Id.* at 1196.

393. *Id.* at 1197.

394. 852 P.2d 44 (Haw. 1993).

395. *Id.* at 60.

396. *Id.* at 68.

397. *Id.*

398. This concern proved to be unfounded, even though on remand the trial court did hold that it was unconstitutional for Hawaii to prohibit same sex marriages, for voters ratified a proposed constitutional amendment to give the legislature the exclusive right to define marriage as involving only heterosexual couples, and in 1999 the Hawaii Supreme Court dismissed the claim of those seeking same-sex marriages as moot. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (available at 1999 Haw. LEXIS 391).

399. *Defense of Marriage Act of 1996*, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

400. 28 U.S.C. § 1738C (2000).

and wife”⁴⁰¹ and spouse as “a person of the opposite sex who is a husband or a wife.”⁴⁰²

DOMA was not the last word on same-sex marriages in the United States. On December 20, 1999, in the case of *Baker v. State*,⁴⁰³ the Vermont Supreme Court held that same-sex couples have a right under Vermont’s constitution “to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”⁴⁰⁴ It further held that the acceptable remedy need not be marriage, and, accordingly, it gave the Vermont Legislature reasonable time within which to craft a remedy.⁴⁰⁵ In response, the Vermont Legislature enacted a measure in 2000 to provide couples with all the legal benefits of marriage through a relationship called civil union.⁴⁰⁶

Providing persons who enter into intimate same-sex relationships the same rights, benefits, and responsibilities of heterosexual couples who enter into marriage goes a long way toward according gay men and lesbians first-class citizenship. Gay men and lesbians’ quest for first-class citizenship would be complete if they were accorded the rights and responsibilities of serving in the United States armed forces. But this aspect of citizenship is still denied gay men and lesbians who will not deny their sexual orientation and refrain from engaging in same-sex intimacies. On August 18, 1993, despite promising in his campaign to end the ban on gays serving in the military, President Clinton succumbed to intense congressional pressure and signed into law a new “policy concerning homosexuality in the armed forces.”⁴⁰⁷ Under this new policy, persons shall be denied the right to serve, or continue to serve, in the United States armed forces if they engage in same-sex intimacies,⁴⁰⁸ proclaim themselves to be homosexuals,⁴⁰⁹

401. 1 U.S.C. § 7 (2000).

402. *Id.*

403. 744 A.2d 864 (Vt. 1999).

404. *Id.* at 886.

405. *Id.*

406. 2000 Vt. Acts & Resolves 91. Major substantive provisions are codified at Vt. Stat. Ann. tit. 15, §§ 1201-07 (2002). As this article was in its final editing stage, the Supreme Judicial Court of Massachusetts held that Massachusetts’ laws prohibiting same-sex marriage contravened the state constitution because they are not rationally related to any legitimate government interest. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

407. See Walzer, *supra* n. 38, at 283-84. The act containing this policy is codified at 10 U.S.C. § 654 (2000).

408. 10 U.S.C. § 654(b)(1) provides that a person shall be separated from the military if officials find:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member’s usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

10 U.S.C. § 654(b)(1).

or marry someone of the same sex.⁴¹⁰ Dubbed the “Don’t Ask, Don’t Tell” policy, it has resulted in gay men and lesbians being dismissed from the military at higher rates than under previous policies.⁴¹¹

Meanwhile, the United States’ gay sex liberation zone significantly expanded after *Bowers*. Sodomy laws were judicially invalidated in eight states,⁴¹² legislatively repealed in three states and the District of Columbia,⁴¹³ and judicially invalidated in part of Missouri.⁴¹⁴ So, as *Lawrence* was being decided, only twelve states still had fully operational sodomy laws, and the sodomy crimes were felonies in only seven of these states.⁴¹⁵ Moreover, only three states among those that still had fully operational sodomy laws banned only same-sex sodomy.⁴¹⁶

H. Summary

It is quite clear that the status of gay men and lesbians with their fellow citizens has undergone a spectacular evolution. Having once been universally condemned by religious leaders as sinners, gay men and women are now taking their places as clergy in some important religious denominations. Having once been labeled by American psychiatrists and politicians as mentally ill degenerates, psychopaths, and traitors, now gay men and lesbians are officially regarded by the psychiatric profession and many within the political class as having the same capacity to achieve success and happiness as those who are heterosexual.

Clearly, sodomy prohibitions and related laws, which were designed to turn gay men and lesbians into criminals for the way they engage in sexual intimacies, have failed to end these biologically and emotionally imperative behaviors and to remove their perpetrators from the public scene. Instead, these misguided laws had mostly disappeared even before the Court began its deliberations in *Lawrence*. Like prohibition of alcohol, prohibitions of sodomy and related activities were ineffective and prone to producing unfairness, corruption, and evil. Moreover, with the exception of the aberrational Cold War era, these laws were

409. 10 U.S.C. § 654(b)(2) provides that a person shall be separated from the military if a finding is made:

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Id. § 654(b)(2).

410. *Id.* § 654(b)(3).

411. See Walzer, *supra* n. 38, at 62.

412. These states include: Arkansas (2002), Georgia (1998), Kentucky (1992), Maryland (1999), Michigan (1990), Minnesota (2001), Montana (1997), and Tennessee (1996). Lambda Legal, *supra* n. 165.

413. These states include: Arizona (2001), Nevada (1993), and Rhode Island (1998). *Id.*

414. *Id.*

415. The seven states where sodomy remained a felony were: Idaho, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, and Virginia. Four of the states where sodomy was only a misdemeanor include Alabama, Florida, Kansas, and Texas. *Id.*

416. These states were Kansas, Oklahoma, and Texas. *Id.*

rarely enforced against adults engaged in consensual private acts of sodomy. As a consequence, even before *Lawrence*, legislatures or courts in all but a handful of states had repealed these prohibitions, thereby removing the badge of criminality from gay men and lesbians.

With so many Americans no longer regarding them as sinners, psychopaths or criminals, gay men and lesbians have been elevated in substantial numbers into the roles of public officials, religious leaders, pop culture icons, valued friends, trusted employees, and responsible parents. They have also been making significant strides toward achieving the first-class citizenship that will come when they gain the rights to sanctify their loving relationships through marriage and to demonstrate their love of country through service in the nation's armed forces.

III. THE JUSTIFICATION FOR RECONSIDERING *BOWERS*

As demonstrated above, the status of gay men and lesbians has undergone a remarkable transformation. The details of this transformation could have supplied the Court with powerful ammunition it needed to justify reconsidering *Bowers*' holding that states could constitutionally criminalize private acts of same-sex consensual sodomy between adults. Instead, it chose to use a very unassertive stare decisis analysis to justify reconsidering *Bowers*. As a consequence, the Court may not have provided its decision to reconsider *Bowers* with a rationale powerful enough to blunt backlashes that could negate *Lawrence*'s potential for helping gay men and lesbians achieve greater acceptance.

In the 1992 abortion rights case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court engaged in perhaps its most storied stare decisis analysis.⁴¹⁷ It supplied the current analytical framework for determining if a prior precedent should be reconsidered by identifying and applying four key analytical factors:

- Has the “rule . . . proven to be intolerable simply in defying practical workability”?⁴¹⁸
- Has the “rule [engendered] a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”?⁴¹⁹
- Have “related principles of law . . . so far developed as to have left the old rule no more than a remnant of abandoned doctrine”?⁴²⁰
- Have “facts . . . so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”?⁴²¹

417. See Michaelson, *supra* n. 28, at 1606.

418. *Casey*, 505 U.S. at 854.

419. *Id.*

420. *Id.* at 855.

421. *Id.*

The Court also noted that it must take great care not to diminish the public's perception of its legitimacy by the way it overrules prior precedent. Its legitimacy can be protected, said the Court, only if its decision to overrule prior precedent is perceived to "rest on some special reason over and above the belief that a prior case was wrongly decided"⁴²² and is "grounded truly in principle [rather than a] [compromise] with social and political pressures . . ."⁴²³ Further, the Court warned that in intensely controversial cases, where "the Court's interpretation . . . calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,"⁴²⁴ the decision to replace the old precedent with a new one must be backed by a justification powerful enough to dispel concern that it was not just "a surrender to political pressure."⁴²⁵ Otherwise, the new rule may not have the "rare precedential force [needed] to counter the inevitable efforts to overturn it and to thwart its implementation."⁴²⁶

In applying this analysis, the starting point must be to identify the central holding of *Bowers* that was reconsidered in *Lawrence*. It was not *Bowers*' holding that there is no fundamental right to engage in private consensual same-sex sodomy, because, as Justice Scalia correctly notes in dissent, the *Lawrence* Court approached but never directly addressed this aspect of *Bowers*.⁴²⁷

First, the Court blended together the holdings of four pre-*Bowers* reproductive freedom decisions—*Griswold*, *Eisenstadt*, *Roe*, and *Carey v. Population Services International*⁴²⁸—into an overarching proposition that:

- individuals have "the right to make certain decisions regarding sexual conduct,"⁴²⁹
- "the protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance,"⁴³⁰ and
- both the sexual conduct right and the liberty protection extend to persons other than those in a marital relationship.⁴³¹

Second, after criticizing the *Bowers* Court for characterizing the issue before it as simply whether individuals have a fundamental right to engage in sodomy, and reframing the issue to be whether individuals have a right to pursue the opportunity to form enduring personal relationships by engaging in the most personal human conduct (sex) within the most private of places (the home), the *Lawrence* majority pronounced—without reference to supporting precedent—the

422. *Id.* at 864.

423. *Casey*, 505 U.S. at 865.

424. *Id.* at 867.

425. *Id.*

426. *Id.*

427. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

428. 431 U.S. 678 (1977).

429. *Lawrence*, 123 S. Ct. at 2477.

430. *Id.* (emphasis added).

431. *Id.*

conclusion that “[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.”⁴³² Third, the Court opined that “our laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁴³³ Fourth, the Court quoted approvingly the “sweet-mystery-of-life passage” used in *Casey* to reaffirm women’s fundamental abortion rights— “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”⁴³⁴—and then proclaimed that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁴³⁵ All of these pronouncements hinted that the liberty interest involved in *Lawrence* constitutes a fundamental right, and yet the Court never explicitly held that the right of adults to engage in private consensual same-sex sodomy is fundamental.

Instead, the Court cited approvingly Justice Stevens’ dissent in *Bowers*.⁴³⁶ In his dissent, Justice Stevens used rational basis equal protection analysis to justify his conclusion that Georgia’s sodomy law had been applied to gay men in an unconstitutionally discriminatory manner.⁴³⁷ The *Lawrence* Court borrowed two propositions from Justice Stevens’ dissent: (1) laws cannot constitutionally prohibit conduct solely because the state believes that conduct is immoral; and (2) the Due Process Clause of the Fourteenth Amendment protects every person’s private sexually intimate choices.⁴³⁸ After reciting a number of sexual harms that private consensual same-sex sodomy between adults does not produce,⁴³⁹ and all but proclaiming that the same-sex couple before it had a right of privacy to engage in private consensual sodomy,⁴⁴⁰ the Court applied Justice Stevens’ propositions to hold that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁴⁴¹ In short, the

432. *Id.* at 2478.

433. *Id.* at 2480. For the Court’s elaboration of the detailed fifty-year history, see *Lawrence*, 123 S. Ct. at 2480-81.

434. *Id.* at 2481 (quoting *Casey*, 505 U.S. at 851).

435. *Id.* at 2482 (emphasis added). For Justice Scalia’s sarcastic characterization of the *Casey* passage as the sweet-mystery-of-life passage, see *id.* at 2489 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

436. *Id.* at 2483-84 (majority).

437. See *Bowers*, 478 U.S. at 214-20 (Stevens, Brennan & Marshall, JJ., dissenting).

438. *Lawrence*, 123 S. Ct. at 2483-84.

439. Regarding same-sex sodomy, minors are not involved, no one is injured, no one is coerced, there is no public sex, prostitution is not involved, and government is not required to recognize formally any form of same-sex relationships. *Id.* at 2484.

440. The Court described the petitioners’ constitutional entitlements as follows:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”

Id. (quoting *Casey*, 505 U.S. at 847).

441. *Id.*

Lawrence Court only reconsidered *Bowers*' one paragraph holding that state laws proscribing private same-sex consensual sodomy between adults serve a legitimate state interest even if their only purpose and effect is to vindicate the majority's moral sentiments about homosexuality.⁴⁴²

Although the *Lawrence* Court didn't say so, the *Bowers* rational basis holding has certainly been workable in the sense of how that factor was applied in *Casey*. It is a simple rule—states may constitutionally criminalize private same-sex sodomy between consenting adults. It is surely within the competency of judges to hold trials for determining if defendants engaged in sex acts that constitute sodomy.

The *Lawrence* majority rather cavalierly proclaimed that "*Bowers* . . . has not induced detrimental reliance comparable to some instances where recognized individual rights are involved."⁴⁴³ In doing so, the Court seemed to imply that precedents establishing individual rights are more likely than precedents that disestablish them to induce detrimental reliance sufficient to compel the Court to leave the rights in place even though they may be in error.⁴⁴⁴ Given that states have rarely enforced their sodomy laws against adults who engage in sodomy that is private and consensual,⁴⁴⁵ it is hard to argue that government has invested much in reliance on *Bowers*.

Conversely, millions of gay men and lesbians have put immense faith in government continuing its all but non-existent enforcement of sodomy and related prohibitions against same-sex sexual behavior. They would not have been able to come out of the closet and establish a thriving gay culture if government had continued to repress them as it did during the Cold War era. A decision

442. See *id.* at 2488 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting). The *Bowers* paragraph in question, stated that:

[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree. . . .

Bowers, 478 U.S. at 196.

443. *Lawrence*, 123 S. Ct. at 2483.

444. That was the Court's approach in *Casey*, when it decided that it should not overturn *Roe*'s central holding that women have a conditional constitutional right to have abortions. With respect to the detrimental reliance issue, the *Casey* Court asserted that:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . . [W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

Casey, 505 U.S. at 856.

445. See *Lawrence*, 123 S. Ct. at 2479.

reaffirming *Bowers* could spark an intensification of anti-gay discrimination and a revival of prosecutorial fervor.

Indeed, in his *Romer* dissent, Justice Scalia all but said that it is okay to discriminate against gay men and lesbians because the way they have sex constitutes a crime and they have “a tendency or desire”⁴⁴⁶ to commit that crime. Moreover, the mere existence of unenforced sodomy laws has caused gay men and lesbians to suffer discrimination in various other areas of their lives because they have been viewed as members of a presumptive criminal class.⁴⁴⁷ For example, the presumptive criminality of gay men and lesbians has been used to discriminate against them in child custody cases⁴⁴⁸ and the search for public employment.⁴⁴⁹

Perhaps the ability to use unenforced sodomy laws to disadvantage lawfully gay men and lesbians in other areas is the chief way some states have relied on *Bowers*. If so, this was clearly not the type of detrimental reliance the *Lawrence* Court was willing to support. It noted that sodomy laws extend “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”⁴⁵⁰ Then the Court explicitly rejected the option of subjecting Texas’ sodomy statute to equal protection analysis out of fear that invalidating the law on that ground would just lead to the state enacting an “even-handed”⁴⁵¹ sodomy law that could be used to justify continued discrimination against gay men and lesbians.⁴⁵²

Justice Scalia did raise a detrimental reliance concern that deserves detailed attention. Specifically, he asserted that “[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”⁴⁵³ To prove this assertion, he cited cases that upheld state prohibitions against the sale of sex toys,⁴⁵⁴ “[cited] *Bowers* for the proposition that ‘[l]egislatures are permitted to legislate with regard to morality . . . rather than confined to preventing demonstrable harms,”⁴⁵⁵ upheld banning persons from the military people who had homosexual orientations,⁴⁵⁶ rejected a claim that individuals have a constitutional right to engage in sexual intercourse outside of marriage,⁴⁵⁷ rejected a claim that persons have the right to

446. See *Romer*, 517 U.S. at 642 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

447. The myriad of ways enforced sodomy laws have caused gay men and lesbians to suffer have been documented in two recent articles. For a discussion of these ways, see Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813 (2001); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 Harv. Civ. Rights-Civ. Libs. L. Rev. 103 (2000).

448. Hassel, *supra* n. 447, at 831-36.

449. *Id.* at 836-38.

450. *Lawrence*, 123 S. Ct. at 2482.

451. See Hassel, *supra* n. 447, at 823.

452. *Lawrence*, 123 S. Ct. at 2482.

453. *Id.* at 2490 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

454. *Id.* (citing *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001)).

455. *Id.* (quoting *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998)).

456. *Id.* (citing *Holmes v. Cal. Army Natl. Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997)).

457. *Lawrence*, 123 S. Ct. at 2490 (citing *Owens v. State*, 724 A.2d 43, 53 (Md. 1999)).

engage in adultery,⁴⁵⁸ and upheld prohibitions on nude dancing in front of consenting audiences.⁴⁵⁹ Justice Scalia also predicted that *Lawrence*'s rejection of morality as a legitimate stand-alone state interest in upholding laws against offensive behavior would lead to the invalidation of "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."⁴⁶⁰

Justice Scalia's case examples do not support his thesis that *Lawrence* will produce "massive disruption of the current social order."⁴⁶¹ *Lawrence* could possibly change the outcome in only two of these cases—the sex toy and nude dancing cases. Even with respect to these cases, there is room to doubt that *Lawrence* would make a difference.

The outcome of the sex toy case may indeed have depended exclusively on the holding by the United States Court of Appeals for the Eleventh Circuit that Alabama had a legitimate interest in banning the commercial sale of sex toys based on its moral preferences for discouraging "prurient interests in autonomous sex"⁴⁶² and its belief that "the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State."⁴⁶³ However, the court found that there were three other state interests that could be legitimate and rationally furthered by the sex toy ban: "banning the public display of obscene material, banning 'the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships,' and banning the commerce in obscene material."⁴⁶⁴ It is simply unclear whether the court relied in part on any of these other interests.⁴⁶⁵

The nudity case raised the issue of whether businesses could provide totally nude dancers as entertainment for an audience of consenting adults.⁴⁶⁶ In a plurality opinion dealing almost exclusively with whether the ban violated the dancers' First Amendment expressive rights, Chief Justice Rehnquist held that the ban on nude dancing did not violate the dancers' First Amendment rights because it "further[ed] a substantial governmental interest in protecting order and morality . . . [that] is unrelated to the suppression of free expression."⁴⁶⁷ Similarly, in his concurring opinion, Justice Scalia asserted that "[t]he purpose of the . . . statute . . . is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified."⁴⁶⁸ But, in a separate concurrence, Justice Souter cited state interests

458. *Id.* (citing *City of Sherman v. Henry*, 928 S.W.2d 464, 469-73 (Tex. 1996)).

459. *Id.* (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality)).

460. *Id.*

461. *Id.* at 2491.

462. *Williams*, 240 F.3d at 949 (quoting Appellant's Br. at 13, 16).

463. *Id.* (quoting Appellant's Br. at 13, 16).

464. *Id.* at 949 (quoting *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1286-87 (N.D. Ala. 1999)).

465. *See id.* at 950-52.

466. *Glen Theatre*, 501 U.S. at 562-63, 566 (plurality).

467. *Id.* at 569-70.

468. *Id.* at 575 (Scalia, J., concurring).

related to harms apart from moral offensiveness—prevention of “prostitution, sexual assault, and other criminal activity”⁴⁶⁹—that justified the nude dancing ban.

Each of the other cases clearly involved state interests other than the moral disapproval of the majority. In one case, the United States Court of Appeals for the Seventh Circuit upheld Congress’ discontinuance of Social Security disability payments to mentally ill people confined to mental institutions because they were acquitted by reason of insanity on grounds that it saved taxpayers from making payments to persons already being supported by the government.⁴⁷⁰ The United States Court of Appeals for the Ninth Circuit found that the ban on gays in the military furthered the legitimate interest of reducing sexual tensions among military personnel that could affect force cohesion.⁴⁷¹ In a statutory rape case, the Maryland Court of Appeals cited a number of demonstrable harms to children that statutory rape statutes are designed to prevent, including risks of sexually transmitted diseases, trauma, permanent damage to their sex organs, and serious psychological damage.⁴⁷² Finally, in the adultery case, the Texas Supreme Court only used *Bowers*’ fundamental rights holding to justify its conclusion that no one has a fundamental right to engage in adultery.⁴⁷³ The court also found that prohibitions against adultery help prevent injuries to “third persons, such as spouses and children.”⁴⁷⁴

Persons who have sex with multiple partners increase their risks of contracting and spreading sexually transmitted diseases.⁴⁷⁵ Clearly, preventing behaviors that tend to involve people having multiple sex partners, such as prostitution and fornication, is rationally related to furthering a legitimate state interest in promoting good public health. With the advent of the animal rights movement, it is not too far fetched to suggest that protecting animals from harm is a legitimate state interest rationally furthered by bans on bestiality. Bigamy is a form of adultery that imposes risks of harm to spouses and children. Adult incest can also produce demonstrable harms. Children born of incest are subject to increased risks of genetically caused birth defects and diseases.⁴⁷⁶ Perpetrators of incest may suffer intense psychological problems.⁴⁷⁷ So, most of the critters in

469. *Id.* at 583 (Souter, J., concurring).

470. *See Milner*, 148 F.3d at 813-17.

471. *Holmes*, 124 F.3d at 1133-34.

472. *Owens*, 724 A.2d at 52-53.

473. *City of Sherman*, 928 S.W.2d at 468-70.

474. *Id.* at 470.

475. *See* U.S. Ctr. for Disease Control & Prevention, *Trends in Sexual Risk Behaviors among High School Students—United States, 1991-1997*, 47 MMWR Weekly (Sept. 18, 1998) <http://www.cdc.gov/nchstp/dstd/MMWRs/Trends_Risk_Behaviors_HS_students.htm>.

476. *See* Mary Beth Murphy, *Brother and Sister Charged with Incest: Crime Rarely Prosecuted against Consenting Adult Family Members*, Milwaukee J. Sentinel 1, 1 (Feb. 13, 1997) (available in LEXIS, NEWS library, MILJNL) (detailing criminal charges filed against a brother and sister who were living as husband and wife and who had produced children together, at least one of whom seemed to have a genetically related health problem).

477. Heather Mallick, *Bedtime Story; Kathryn Harrison, at 20, Slept with Her Father And Lived to Tell the Tale*, Toronto Sun C10 (Apr. 6, 1997) (available in LEXIS, NEWS library, TORSUN) (presenting a book review about the incestuous relationship a young adult woman had with her father and how that relationship caused her to suffer intense psychological problems).

Justice Scalia's parade of sexual monsters can be reined in by state laws designed to prevent demonstrable harms.

Prior to *Lawrence*, the United States Supreme Court's reproductive freedom cases of *Griswold*, *Eisenstadt*, *Roe*, and *Casey* thoroughly undermined the constitutionality of state regulations designed to confine sexual activity to procreation within marriage.⁴⁷⁸ Adding private consensual sodomy between adults to the list of non-procreative sexual activities the state may no longer regulate does not change much, especially since many heterosexual persons engage in sodomy,⁴⁷⁹ and the states have rarely enforced their sodomy laws. It is therefore quite predictable that bans on masturbation will soon fall. But, such bans have been even more ineffective than the bans on sodomy, and there has not ever been a big investment in policing masturbation in this country.

As for obscenity, it would appear that the world is flooded with pornography, and demand for it is ever growing.

In the US alone, . . . [pornography's] turnover is estimated to be between [ten billion dollars] and [fourteen billion dollars]—bigger than professional football, basketball and baseball put together, more than Hollywood's domestic box office receipts and larger than all the revenues generated by rock and country music recordings.⁴⁸⁰

Should *Lawrence* undermine the Court's previous obscenity decisions, it is debatable whether society could be deluged with any more pornographic images than are currently available. Concern about the damage caused to children used to make it should prevent *Lawrence* from undermining governments' constitutional authority to prohibit the production and dissemination of child pornography.⁴⁸¹

That leaves same-sex marriage. Given court decisions in Hawaii, Vermont, and Massachusetts that extended to same-sex couples the rights and responsibilities, if not the label, of marriage,⁴⁸² it would be disingenuous to dismiss Justice Scalia's concern that *Lawrence* could be a stepping stone to a United States Supreme Court opinion extending marriage rights to same-sex couples throughout the United States. However, as will be demonstrated below, the *Lawrence* majority went out of its way not to provide potent constitutional ammunition for those desiring same-sex marriage. Furthermore, it is disingenuous of Justice Scalia to suggest that legitimizing same-sex marriages would create a huge societal disruption, for same-sex relationships have already received much of the benefits traditionally provided to marital couples from many businesses, states, and local governments.⁴⁸³

478. See *Lawrence*, 123 S. Ct. at 2476-78, 2480-84.

479. See *supra* nn. 6-8 and accompanying text.

480. Vlada Tkach, *Vice Investing - The Vice Squad - They May Be Bad For Us*, *Investors Chron.* 34, 34 (Nov. 16, 2001) (available in LEXIS, NEWS library, INVSTR).

481. See *N.Y. v. Ferber*, 458 U.S. 747, 756-60 (1982).

482. *Baehr*, 852 P.2d at 59-67; *Baker*, 744 A.2d at 886-87, 888-89; *Goodridge*, 798 N.E.2d 941.

483. See *supra* nn. 376-406 and accompanying text.

In sum, *Lawrence* either will not bring about the societal disturbances Justice Scalia fears, or it will produce effects that society has already anticipated and substantially accommodated. Any detrimental reliance society had placed on *Bowers* clearly would have been outweighed by the potential detrimental reliance losses gay men and lesbians would have suffered if a reaffirmation of *Bowers* triggered more intense anti-gay discrimination or revived the prosecutorial fervor of the Cold War era. *Bowers* did not meet the second *stare decisis* factor for favoring the prior precedents.

Little needs to be said about the *Lawrence* Court's conclusion that *Bowers*' central holding was contradicted by "precedents before and after its issuance,"⁴⁸⁴ for even Justice Scalia did not quarrel with this conclusion as it related to the erosion of *Bowers*' rational basis holding.⁴⁸⁵ In his *Bowers*' dissent, Justice Stevens asserted that "[t]he essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral."⁴⁸⁶ The *Lawrence* Court embraced this assertion,⁴⁸⁷ thereby expanding the rationale that conferred the right to control reproductive decisions so that now all individuals have the right to decide what types of private consensual sexual activities to engage in with other adults.⁴⁸⁸ By contending that *Bowers* was undermined by *Romer*,⁴⁸⁹ the Court expanded a rather technical equal protection holding that was highly dependent upon overbreadth analysis into a general proposition that laws designed only to vindicate the moral sentiments of the majority serve no legitimate government interest.⁴⁹⁰

It is not clear what purpose was served by the Court contending that *Casey* somehow undermined *Bowers*. The Court embraced *Casey*'s reaffirmation that a right of privacy still existed that extended "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁴⁹¹ And, as noted previously, the Court stated that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."⁴⁹² And yet, the Court did not take the next logical step and proclaim that gay men and lesbians enjoy the same fundamental rights of privacy as heterosexual persons. As a consequence, Justice Scalia was surely correct when he observed that "[t]he Court's claim that [*Casey*] 'casts some doubt' upon the holding in *Bowers* . . . does not withstand analysis."⁴⁹³

484. *Lawrence*, 123 S. Ct. at 2483.

485. *Id.* at 2489 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

486. *Bowers*, 478 U.S. at 218 (Stevens, Brennan & Marshall, JJ., dissenting).

487. *Lawrence*, 123 S. Ct. at 2484.

488. *Id.*

489. *Id.* at 2482.

490. *See id.* at 2482, 2484. With respect to the technical nature of *Romer*'s equal protection holding, see *supra* notes 359-68 and the discussions in the article's text. For a view that *Romer* does not by logic or effect undermine *Bowers*, see Michaelson, *supra* n. 28, at 1576-80.

491. *Lawrence*, 123 S. Ct. at 2481.

492. *Id.* at 2482.

493. *Id.* at 2489 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

It is also difficult to understand what purpose was served by the Court's historical analysis. Ostensibly, it undertook an attenuated historical analysis to demonstrate that the historical premises of *Bowers* were "not without doubt and, at the very least, . . . overstated."⁴⁹⁴ In *Bowers*, history was used only to refute assertions that adult gay men and lesbians possessed fundamental rights of privacy or other fundamental rights to engage in private consensual acts of sodomy with other adults.⁴⁹⁵ As previously demonstrated, the *Lawrence* Court neither reconsidered nor reversed *Bowers*' fundamental rights holdings. So, other than suggest that the *Bowers* Court did not have a very sophisticated historical approach to its fundamental rights analysis, the *Lawrence* Court's historical analysis contributes little to the outcome of the case. It certainly cannot be said to have established that *Bowers* was undermined by a change of facts or a change in the perception of what the facts were at the time it was decided.⁴⁹⁶

The Court's decision to reconsider *Bowers* is supported by the detrimental reliance and legal development aspects of its stare decisis analysis, but the workability factor was not discussed and its factual development discussion was not relevant to the outcome of the case. As a consequence, it is debatable whether the Court made such a convincing case for reconsidering *Bowers* that its decision to do so will be accepted broadly enough to prevent the occurrence of a damaging backlash. In fact, in the wake of the *Lawrence* decision, the Republican Party is considering putting an anti-gay marriage plank in their national platform.⁴⁹⁷ Earlier, a Wirthlin poll showed that

six out of 10 Americans believed that only marriage between a man and a woman should be recognized legally and that 57 percent supported a constitutional amendment to that effect. The poll also found that 56 percent of voters would be more likely to vote for a candidate who backed such an amendment.⁴⁹⁸

IV. THE EQUAL PROTECTION ISSUES

Texas' sodomy statute prohibited only same-sex sodomy. As a consequence, the *Lawrence* majority and Justice O'Connor felt it was vulnerable to Equal Protection challenge.⁴⁹⁹ The *Lawrence* majority, however, declined to tackle the equal protection issues raised by the Texas sodomy statute. The Court took this approach out of concern that the failure to examine the statute's substantive validity could leave homosexual persons subject to damaging collateral stigma generated by the statute's declaration that homosexual conduct is a crime, even if the statute was "not enforceable . . . for equal protection reasons."⁵⁰⁰ Unwilling to

494. *Id.* at 2480. For the Court's historical analysis, see *id.* at 2478-80.

495. See *Bowers*, 478 U.S. at 190-95.

496. For a look at Justice Scalia's critique as to the significance of the Court's historical analysis and conclusions, see *Lawrence*, 123 S. Ct. at 2492-95 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

497. *GOP May Nail Defense of Marriage Plank into '04 Platform*, Bull.'s Frontrunner (Sept. 23, 2003) (available in LEXIS, NEWS library, FRNTRN).

498. *Id.*

499. *Lawrence*, 123 S. Ct. at 2482; *id.* at 2484-88 (O'Connor, J., concurring).

500. *Id.* at 2482 (majority).

overturn *Bowers*,⁵⁰¹ but equally unwilling to uphold Texas' sodomy law,⁵⁰² Justice O'Connor completed a rational basis equal protection analysis, concluding that the Texas sodomy law unconstitutionally discriminated against gay men and lesbians as a class.⁵⁰³

Justice O'Connor's equal protection analysis was driven by the equal protection analysis in *Romer*. *Romer*'s influence was most dramatically evident in her conclusion that the Texas sodomy law discriminated against gay men and lesbians as a class rather than against a behavior because it proscribed a behavior that is "closely correlated with being homosexual."⁵⁰⁴ She was also influenced in coming to this conclusion by the fact that Texas law imputes criminality to the status of being homosexual for non-criminal law purposes.⁵⁰⁵ Noting that Texas rarely enforced its same-sex sodomy law, she observed that "the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."⁵⁰⁶ Taking all these factors into account, Justice O'Connor concluded that "[t]he Texas sodomy law 'raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'"⁵⁰⁷ Thus, she held that, under the Equal Protection Clause, moral disapproval was not a legitimate justification to criminalize only same-sex sodomy.⁵⁰⁸

V. A SUBSTANTIVE DUE PROCESS CRITIQUE

It would be difficult to over-criticize the disorganization and lack of clarity of Justice Kennedy's majority opinion. Until the last sentence of the penultimate paragraph, Justice Kennedy conceals the Court's true basis for overturning *Bowers* after taking the reader through numerous fundamental rights false starts and disjointed transitions from one disparate topic to another. Then, the reader discovers that the climax is quite muted—a rational basis holding rather than a resounding reconsideration of *Bowers*' fundamental rights holdings. Worse yet, the *Lawrence* majority never rebuts Justice Scalia's libel that its timid little holding will in fact massively disrupt the existing social order, thereby failing to provide a set of arguments with sufficient clarity and power to fend off the inference that it was the product of politics rather than principle.

501. *Id.* at 2484 (O'Connor, J., concurring).

502. *Id.*

503. *Id.* at 2484-88.

504. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

505. *Id.* at 2487 ("[C]alling a person a homosexual is slander *per se* because the word 'homosexual' 'impute[s] the commission of a crime.' (quoting *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 310 (5th Cir. 1997))). "[T]he statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law." *Id.* (quoting *St. v. Morales*, 826 S.W.2d 201, 202-03 (Tex. App. 3d Dist. 1992)) (internal quotations omitted).

506. *Id.* at 2486.

507. *Id.* (quoting *Romer*, 517 U.S. at 634).

508. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring). Justice Scalia emphatically rejected Justice O'Connor's equal protection analysis mainly on grounds that the Texas sodomy law outlawed certain sexual conduct and therefore applied equally to everyone regardless of sex and sexual orientation. *Id.* at 2495-96 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

As a result, the Court imposed on the supporters of gay rights the worst possible scenario for overturning *Bowers*. They are left with a precedent that is a poor tool for helping them achieve a citizenship equal to that of heterosexuals, an unanswered libel in Justice Scalia's dissent that is fueling a potentially disastrous backlash, and an opinion that is so poorly crafted that it cannot even supply a coherent and compelling story sufficient to defend *Lawrence's* rational basis holding.

Imagine what could, and should, have been produced if Justice Kennedy and his four majority brethren had fully used the history of gay experience in America. They could have produced an opinion that informed the American people that its historic view of gay men and lesbians had been distorted by false science blending with religious fundamentalism and political scapegoating. Backed by a well-told story of how legitimate studies of free gay men and lesbians refuted the medical profession's opinion that gay men and lesbians were mentally ill psychopaths, the Court's veiled reference to its bold overturning of ancient miscegenation laws in *Loving v. Virginia*⁵⁰⁹ would not only have made sense, it would have provided a powerful argument against letting deep-rooted prejudice justify denying gay people the fundamental rights of privacy enjoyed by heterosexuals.⁵¹⁰

The fundamental rights of privacy discovered in *Griswold* and sustained in *Casey* protect "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁵¹¹ As previously documented, in the post-*Bowers* era, gay men and lesbians have been quite active in forming family relationships and have been successful in getting businesses, states, and local governments to recognize them through domestic partnership benefits and laws. But, the *Lawrence* majority also failed to tell this compelling story. If it had, its attempt to reframe the *Bowers* issue from the right to engage in a particular set of sex acts to the potential for gay men and lesbians to form meaningful long-term relationships would have made more sense and led inexorably to the conclusion that *Bowers'* right of privacy holding should be reversed.⁵¹²

A decision extending to gay men and lesbians the fundamental right of privacy would have been worth fighting for much more than what *Lawrence* produced. A well-reasoned opinion backing that decision could have provided those who support gay rights with a powerful tool for winning the minds and hearts of open-minded Americans who may not have knowledge of the gay experience in America. Together, they would have been a compelling rallying point in the cause of obtaining first class citizenship for gay men and lesbians.

509. 388 U.S. 1 (1967).

510. Instead, this history was not even included in the Court's historical analysis. See *Lawrence*, 123 S. Ct. at 2478-81. The Court could not even bring itself to cite *Loving* in the critical passage that embraced Justice Stevens' dissent in *Bowers*. See *id.* at 2483.

511. *Casey*, 505 U.S. at 851.

512. For a powerful argument supporting this assertion, see Michaelson, *supra* n. 28. See *Lawrence*, 123 S. Ct. at 2478, 2481-82, 2484, for the Court's disparate attempts to make *Lawrence* more about giving gay men and lesbians the freedom to form lasting and meaningful relationships than about giving them the right to engage in a specific set of sex acts.

The Court failed to provide that rallying point. This failure seemed to be a calculated one, for the Court's majority and Justice O'Connor seemed quite concerned that a fundamental rights holding could spawn decisions outlawing prohibitions against same-sex marriage and bans on openly gay men and lesbians serving in the military. Thus, the majority, in counseling "against attempts by the State, or a court, to define the meaning of the [sexual] relationship or to set its boundaries,"⁵¹³ qualified its counsel with the qualification that exceptions could be made if "abuse of an institution the law protects"⁵¹⁴ is involved. Similarly, in dispelling the notion that laws prohibiting private same-sex sodomy between consenting adults are necessary to prevent demonstrable harms, the majority noted that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."⁵¹⁵

Justice O'Connor expressed this concern even more explicitly in her concurring opinion. After finding that Texas' sodomy law violated the Equal Protection Clause, Justice O'Connor went on to assure the public that this

does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.⁵¹⁶

Perhaps the majority and Justice O'Connor hoped that these assurances that *Lawrence* would not alter the rules with respect to marriage and gays in the military would prevent a political backlash. If so, that hope was quite naïve. There is now a significant chance that the 2004 elections will ratify a damaging backlash that could lead to a permanent thwarting of first-class citizenship for gay men and lesbians. If so, *Lawrence* will provide gay rights supporters with little, if any, shelter from this political storm.

513. *Lawrence*, 123 S. Ct. 2478.

514. *Id.*

515. *Id.* at 2484.

516. *Id.* at 2487-88 (O'Connor, J., concurring).

