DEFINING QUEER: LESBIAN AND GAY VISIBILITY IN THE COURTROOM

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I. INTRODUCTION

On May 20, 1996, the United States Supreme Court decided Romer v. Evans, a landmark decision supporting gay and lesbian rights. The opinion struck down an amendment to the Colorado State Constitution, which prohibited state protection of lesbians and gay men. Although hailed as "undoubtedly the gay rights movement's most important legal victory," Romer lacked real political and social analysis. Its legalistic approach said little about the context of the decision and even less about the initiative's victims, the gay men and lesbians of Colorado. In fact, some authors have suggested that Romer is "missing pages," which create a "gap" in its reasoning unless filled in by the political and social context of gay and lesbian experience.

This paper is a contribution to the growing discussion on bridging the gap between gay life as understood by the judiciary and gay life as experienced by gay men, lesbians and bisexuals. To map the distance between where we are and where we could be, I begin with a mythical Romer v. Evans opinion to demonstrate what Romer could have said:

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1. I would like to thank the many people who helped make this article possible. In particular, thank you to my friends and former colleagues at the National Gay and Lesbian Task Force who gave me the political grounding and analysis to bridge the gap from activism to the law. I also owe thanks to N.Y.U. Professor Kris Franklin, Rea Carey, and the staff of the Yale Journal of Law and Feminism for their visionary and editorial assistance. Finally, thank you to Rebecca for your patience and support in this process especially for encouraging me to find and unleash my own voice.


3. The enactment challenged in the case was an amendment to the Colorado State Constitution, adopted by a statewide referendum in 1992. The purpose of the amendment was to repeal locally adopted ordinances, which protected gays and lesbians from discrimination in housing, employment, education, public accommodations, and other areas. See id. at 623-24.

In a 6-3 decision, the Supreme Court majority struck down Amendment 2, concluding that it violated the Equal Protection Clause because the amendment imposed a "broad and undifferentiated disability on a single named group" and, further, that the amendment lacked a rational relationship to a legitimate state interest. See id. at 632.


6. Andrew Koppelman, Romer v. Evans and Invidious Intent, 6 WM. & MARY BILL RTS. J. 89, 96 (1997) ("The logic that led to the inference of animus was incomplete; there was a gap in the reasoning.").

7. See id. at 132 ("It is only when the cultural background is kept in view that it becomes clear why Amendment 2's singling out of gays for broad disadvantage is constitutionally fatal.").
One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment to ending oppression against all people. For, as we now keep clearly in mind, the privilege earned from the oppression of one people is always conditioned on the loss of freedom for all people.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a statewide referendum. "The parties and the state courts refer to it as 'Amendment 2.'" In its explicit terms, the provision would prohibit legislative, executive or judicial action at any level of state or local government designed to protect gays, lesbians, and bisexuals from discrimination.

"We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them...."

Amendment 2 imposes "a broad and undifferentiated disability on a single named group, an exceptional, and as we shall explain, invalid form of legislation." "[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward [gays and lesbians]; it lacks a rational relationship to legitimate state interests."

Amendment 2 targets gay and lesbian people, also known as homosexuals, who are a large minority of persons "who love and sexually desire those of the same sex." According to conservative estimates, one in every ten Americans is gay or lesbian. There can be no doubt that our Nation has had a long and unfortunate history of discrimination against gays and lesbians. Many have been the focus of hatred, loss of freedom, physical and verbal violence, and death.

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8. Romer, 517 U.S. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 539 (1896) (Harlan, J., dissenting)).
11. See id. at 624.
12. Id. at 631.
13. Id. at 632.
14. Id.
15. PHARR, supra note 9, at 1 (defining "homosexual").
16. Activists have long cited the Kinsey Reports on Human Sexual Behavior for the claim that about ten percent of the population is gay or lesbian. See Urvashi Vaid, Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation 28 (1995). In fact, the number of gays and lesbians has been a long-standing source of controversy. The numbers range higher or lower depending upon the questions asked. See id. at 28.
18. In a study of anti-gay violence, 86% of lesbians and gay men surveyed reported being the object of
Homophobia, the irrational fear and hatred of homosexuals, is a constant force in the lives of gay and lesbian Americans. Through resisting what some have called “compulsory heterosexuality,” gay and lesbian persons risk loss of employment, rejection by family and friends, loss of children, and loss of the privileges of affirmation, physical safety, mental well-being, community, and credibility.

A contentious and pernicious statewide campaign preceded adoption of Amendment 2. Myths and stereotypes asserted by many Amendment supporters typify the indignities perpetuated against gay and lesbian persons. With the principal purpose of making real homosexuals invisible, Amendment supporters distorted gay experience, hurled unflattering stereotypes, and blamed gays and lesbians for their own persecution through allegations of sin, mental illness, and recruitment.

verbal attack. See Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431, 1463-64 n.125 (1992) (citing NATIONAL GAY TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION 24 (JUNE 1984)). The U.S. Department of Justice reports that gays are likely the “most frequent victims” of hate violence today. See id. at 1464 (quoting PETER FINN & TAYLOR MCNEIL, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY REVIEW 2 (1987)). The recent murder of Matthew Shephard in Wyoming once again brought anti-gay violence to the forefront of American consciousness. See, e.g., Bettina Boxall, Long Arm of Hatred: Deadly Assault on Wyoming College Student Stunned People Across the Country, Reminding Southland Gays and Lesbians of Their Vulnerability to Attacks, LOS ANGELES TIMES, Nov. 6, 1998, at B2. (“For gay men and women, especially young ones . . . Shephard’s much publicized death was a brutal reminder of their vulnerability.”).

19. See PHARR, supra note 9, at 1 (defining homophobia). Homophobia also has a fraternal twin in heterosexism, a “belief in the superiority of heterosexuals or heterosexuality.” James T. Sears, Thinking Critically Intervening Effectively, in OVERCOMING HETEROSEXISM 13, 16 (James T. Sears & Walter L. Williams eds., 1997).


21. See PHARR, supra note 9, at 1-26 (detailing the many costs of homophobia).

22. See LISA KEEN & SUZANNE GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 2 (1998) (“Each side called the other ‘radical,’ and each accused the other of being ‘liars.’ One side described the stakes in this struggle as akin to letting Satan take over the world. The other side said the foundation of American democracy was in jeopardy.”).

23. See PHARR, supra note 9, at 58-59 (arguing that imposed invisibility and the accompanying distortion and stereotyping of minority experience is essential to majority domination. “The dehumanizing process is necessary to feed the oppressor’s sense of being justified and to alleviate the feeling of guilt.”).

24. Each supposed cause of homosexuality can be readily debunked. See, e.g., John Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century 7 (1980) (arguing that when some portions of religious text are used to stigmatize an already marginalized minority while other portions that would burden the majority (such as proscriptions against contraception) are routinely ignored, “one must suspect something other than religious belief as the motivating cause of the oppression”); William N. Eskridge, Notes on Boullier and Evolving Psychiatric Opinion About Homosexuality as a Mental Disorder, in Sexuality, Gender, and the Law 183, 186 (William N. Eskridge & Nan D. Hunter eds., 1997) (acknowledging the 1972 retraction of the American Psychological Association position that homosexuality is a mental illness); Rhonda Smith, Policy Against ‘Reparative Therapy’ Could Draw Fire, The Washington Blade, January 8, 1999 (visited May 5, 1999) (http://www.washblade.com/health/990108b.htm) (announcing the APA’s denunciation of “ex-gay” “conversion”); Gregory M. Herek, Bad Science in the Service of Stigma: A Critique of Cameron Group’s Survey Studies, in Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals 223 (Gregory M. Herek ed., 1998) [hereinafter Stigma and Sexual Orientation] (scientifically discrediting all allegations of the Cameron Group, an anti-gay organization, which alleged, among other untruths, that gays are “18 times more likely to engage in sexual practices with minors” and “perpetrate
Such far-reaching inaccuracies were in wide circulation in the months preceding the election. Records of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.

Like other oppressed groups, gays and lesbians have suffered for falling outside of the defined norm of American society. In the United States, this norm is enumerated as male, white, heterosexual, Christian, able-bodied, youthful, and wealthy. Those conforming most closely to the norm enjoy the greatest institutional and economic power.

This Court has played a role in making homosexuals and other minorities a stranger to its laws. This Court has for decades denied to gays and lesbians every possible right of human dignity that the Constitution was designed to provide.

This Court and courts like it have exerted institutional and economic dominance through institutional and personal violence. We have enforced written laws like the sodomy laws, which strike fear into the hearts of all gays and lesbians. We have blessed the unwritten laws that force gays and lesbians into an economic blackmail requiring them to be either honest or

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25. For example, Paul Cameron’s pedophilia “statistics,” though thoroughly discredited, see id., continue to turn up in anti-gay propaganda including the Amendment 2 campaign. See T. MARCO, SPECIAL GAY RIGHTS LEGISLATION (1991) (citing Cameron statistics to attack gays and lesbians).

26. See Romer, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

27. See Pharr, supra note 9, at 53-55. In her seminal work, Homophobia: A Weapon of Sexism, activist and theorist Suzanne Pharr provides a lucid analysis, which places homophobia into the broader spectrum of oppressions. According to Pharr, it is virtually impossible to isolate homophobia from other oppressions such as sexism, racism, classism, ableism, anti-Semitism, and ageism. While each has its own unique qualities, all oppressions share common roots.

28. See id. at 53.

29. See id. at 53-55 (For example:

“[i]n our schools, the primary literature and history taught are about the exploits of white men, shown through the white man’s eyes. Black history, for instance, is still relegated to one month, whereas ‘American history’ is taught all year round. Another major institution, the media, remains controlled and dominated by white men and their images of themselves.”).

30. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (describing the Court’s prior privacy opinions protecting heterosexual sexual expression and choice but concluding that it was “evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy”).


32. See Pharr, supra note 9, at 56. Pharr uses a broad definition of violence to encompass both physical acts of violence as well as written and unwritten laws which can themselves be brutal forms of harassment. Thus court enforcement of sodomy laws, see, e.g., Bowers v. Hardwick, or (tacit) approval of anti-gay employment discrimination, see, e.g., Shahar v. Bowers, 114 F.3d 1097, cert. denied, 139 L. Ed. 2d 638 (1998) (denying certiorar to litigant fired for engaging in commitment ceremony with lesbian partner), can themselves be seen as acts of violence. Court actions stripping parents of their children because of sexual orientation are perhaps the most visceral and shocking forms of judicial terrorism. See, e.g., S.E.G. v. R.A.G., 735 S.W. 2d. 164 (Mo. Ct. App. 1987) (taking custody of four minor children from lesbian mother because of judge’s belief that lesbians were uncommon and unwelcome in his small community).

33. See, e.g., Bowers v. Hardwick.
employed, but never both. We have turned the other cheek when those amongst us with the greatest hatred have lashed out in physical violence.

At its root, our hostility towards gays and lesbians derives from a sexist belief in male dominance and from social taboos surrounding sexuality itself. Gay and lesbian existence disrupts a social order built on the principle that women exist merely for the pleasure and service of men. Further, because of their different sexuality, gays and lesbians face obstacles created by a prudish American need to constrain sexual expression. This Court has validated, without fully comprehending, these underlying roots. This is a heritage of which we are not proud. Further, we believe it is obnoxious to the constitutional provisions we are bound to uphold.

It is not within our new constitutional tradition to enact laws of this sort. Inherent differences between heterosexuals and homosexuals, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either orientation or for artificial constraints on an individual's opportunity.

We must conclude that Amendment 2 classifies gays and lesbians not to further a proper legislative end but to make them unequal to everyone else. This Colorado can not do.

Amendment 2 also deprives gays and lesbians of liberty without due process of law. The freedom to form romantic and intimate sexual relationships has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men and women.

34. See, e.g., Shahar v. Bowers.
35. Homosexuality is a direct threat to the rigid gender roles that ensure male dominance. See Alan Taylor, Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals, 9 J. HOMOSEXUALITY 37, 50 (1983). See also John F.W. Meagher, Homosexuality: Its Psychobiological and Pathological Significance, 33 UROLOGIC AND CUTANEOUS REV. 510, 513 (1929) (“The driving force in many agitators and militant women who are always after their rights is often an unsatisfied sex impulse, with a homosexual aim. Married women with a completely satisfied libido rarely take an active interest in militant movements.”); Midge Decter, The Boys on the Beach, COMMENTARY 35, 35 (Sept. 1980) (from THE NEW CHASTITY AND OTHER ARGUMENTS AGAINST WOMEN'S LIBERATION (1972)) (“A lesbian is not a woman.”); Joseph Pleck, Men’s Power with Women, Other Men, and Society: A Men’s Movement Analysis, in THE AMERICAN MAN 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980) (viewing gay men as betrayers who threaten to topple the myth of male supremacy because they have become “like women”).
36. Gay and lesbian sex lives, whether real or mythic, may be the biggest obstacle to full acceptance for gay men and lesbians. See VAI, supra note 16, at 192-95. (“We are hated because of how, with whom, and how much . . . we do it . . . For the idea of ‘social order’ itself to exist, desire must be controlled.”).
37. Cf. Romer, 517 U.S. at 633 (“It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”).
38. Cf. United States v. Virginia, 518 U.S. 515, 533 (1996) (“Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”) (internal quotations omitted).
40. Cf. Loving v. Virginia, 388 U.S. 1, 12 (1967) (“[Anti-miscegenation] statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”).
41. Cf. id. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).
fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships.\textsuperscript{42}

By striking down Amendment 2 today, we hope to send a clear message that the eyes of the law are neutral where the rights of persons are at stake.\textsuperscript{43}

Before the law, homosexual identity is as viable, legitimate, and normal as heterosexual identity. Amendment 2 violates the Equal Protection and Due Process Clauses.

The real \textit{Romer} decision, though lackluster by comparison, is nevertheless important. The decision marks the first time a Supreme Court majority acknowledged, rather than perpetuated, society’s animus toward gays and lesbians.\textsuperscript{44} For this, the opinion is indeed a “momentous symbolic victory.”\textsuperscript{45} But a “symbolic victory” is a hollow victory. \textit{Romer} treats gays at an awkward arms-length, utterly failing to explain who gays, lesbians, and bisexuals are.\textsuperscript{46} The Court could not describe gay and lesbian life short of explaining that we engage in economic “transactions,” which would be jeopardized by Amendment 2.\textsuperscript{47} Nor does the opinion articulate an understanding of the character, magnitude, or history of the homophobia at the root of Amendment 2.\textsuperscript{48} The Court suggested that gays and lesbians are “politically unpopular,” but offered no proof,\textsuperscript{49} then concluded that animus

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\item \textsuperscript{42} See Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (J. Blackmun, dissenting) (citing Karst, \textit{The Freedom of Intimate Association}, 89 \textsc{Yale} L.J. 624, 637 (1980)).
\item \textsuperscript{43} Cf. \textit{Romer}, 517 U.S. at 623.
\item \textsuperscript{44} The opinion drew the “inevitable inference that the disadvantage imposed” by Colorado’s Amendment 2 was “born of animosity” toward gays and lesbians. \textit{Romer}, 517 U.S. at 634. The Court rejected the State’s “special rights” argument, instead finding that anti-discrimination ordinances protecting gays and lesbians were merely “protections taken for granted by most people either because they already have them or do not need them.” \textit{Id.} at 631.
\item Ten years earlier, when the Supreme Court decided \textit{Bowers v. Hardwick}, upholding the Georgia sodomy law, the results were disastrous. 478 U.S. 186, 192 (1986) (finding no “fundamental right” to engage in “homosexual sodomy,” upholding the anti-sodomy law on the basis of a moral code with “ancient roots,” and failing to recognize gay and lesbian identity as separable from sexual conduct).
\item \textsuperscript{45} David A. Kaplan & Daniel Klaidman, \textit{A Battle, Not the War}, \textsc{Newsweek}, June 3, 1996, at 24.
\item \textsuperscript{46} See Janet E. Halley, \textit{Romer v. Hardwick}, 68 U. \textsc{Colo. L. Rev.} 429, 388 (1997) (suggesting that the Court’s silences are significant and worthy of attention).
\item \textsuperscript{47} The court offered only a sterile definition borrowed from the Boulder and Denver City Codes. \textit{See Romer}, 517 U.S. at 624 (defining “sexual orientation” as “the choice of sexual partners, i.e., bisexual, homosexual or heterosexual” and as “the status of an individual as to his or her heterosexuality, homosexuality or bisexuality”).
\item \textsuperscript{48} \textit{Id.} at 629.
\item \textsuperscript{49} The Court rejects, without discussion, an argument by Colorado that Amendment 2 is designed to protect the liberty interests of employers and landlords who have “personal or religious objections to homosexuality.” \textit{Romer}, 517 U.S. at 635 (“The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.”). The Court simply concludes that Amendment 2’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.” \textit{Id.} at 632.
\item \textsuperscript{50} \textit{Id.} at 635 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (quoting \textit{Department of Agriculture v. Moreno}, 413 U.S. 528, 534 (1973) (protecting the rights of commune residents, among others, to receive government subsidies)).
\end{itemize}
must be at play. Absent a historical, political, social, or personal context for gay experience, the opinion is indeed “puzzling and opaque.”

The cursory treatment of gay men and lesbians in Romer v. Evans is unacceptable. We can do better. In fact, we already have. It is not too much to expect a court opinion to articulate some understanding of gay and lesbian experience. It is not too much to expect courts to recognize and reject the homophobia experienced by gay men and lesbians. Further, it seems clear that gay litigants will win more cases when courts understand gay experience.

In this essay I explore the misunderstanding, the homophobia, and the possibility for education surrounding all gay rights litigation. To aid in this analysis, I draw upon the work of theorists and litigators from diverse perspectives and borrow lessons from other activists who have faced societal hatred. I suggest that our losses may flow, in part, from a tendency to forget or overlook homophobia even as we oppose it. I conclude that educating courts on the context of homophobia and gay and lesbian experience may be integral to achieving legal victories for gay rights. I close with a recent supportive gay rights decision that demonstrates the potential for judicial understanding and the legal argumentation necessary to bridge the gap.

II. RECOGNIZING HOMOPHOBIA IN LEGAL ADVOCACY

It should be self-evident that gay rights cases are about homophobia. After all, there would rarely be a conflict if not for some original act of homophobia. Nevertheless, court opinions too often ignore the underlying homophobia in a gay rights conflict. Furthermore, depictions of real gay and lesbian lives are equally rare. In Part II, I demonstrate how a tendency to forget homophobia or make purely legalistic arguments undermines our legal position and creates a dangerous opportunity for misinformation.

A. Don’t Forget They Hate Us

The well-adjusted homosexual comes to view her or his romantic feelings and sexual practices as perfectly natural – just a mirror image of straight love and sex. ... It is easy to forget, then, that most straights lump homosexuality into the “creepy weirdo” class – alongside necrophilia, bestiality, pedophilia, feces fetishism, and snuff sex.

51. Although the Court received evidence on the history of gay and lesbian discrimination, it could not articulate the background reasoning for its pro-gay position. See KEEN & GOLDBERG, supra note 22, at 75 (describing the historical testimony offered to “undermine the credibility of the state’s various other explanations for Amendment 2” by demonstrating that “the real purpose of the initiative was to allow discrimination against lesbians, gay men, and bisexuals”)


As an advocate for gay and lesbian liberation, I find that I frequently make the intellectual mistake of forgetting that homophobia exists. I am not alone in this. The pattern among gays and lesbians to forget homophobia and imagine that we are accepted in society is a coping mechanism many of us use. I suspect this “forgetting” is especially common among those of us living in urban centers. By “forgetting” homophobia, we avoid the exhaustion and despair we would encounter were we to truly feel every stare, see every sneer, and hear every snicker lobbed at us by the straight world. As activist Urvashi Vaid writes, “the notion that homosexuality has been mainstreamed is an illusion we yearn to believe because we are so tired of being vilified, loathed, and marginalized.”

When I forget homophobia it is for one reason only: who wants to remember? Who wants to remember that the most common emotional reaction to homosexuals is disgust, discomfort, and confusion? Why remember that 46 percent of the American public disapproves of homosexuality? Why do we need to be reminded that gays and lesbians are the second most unpopular group in the United States? To paraphrase Minnie Bruce Pratt, hey, “that’s our lives you’re talking about!”

54. I use the first person to personalize and make visible the personal as well as the intellectual importance of our equality to me as a lesbian lawyer. In so doing, I intend to accentuate the theme of this work, that visibility and honesty about our lives is pivotal to gay and lesbian liberation and equality.

55. See, e.g., Bozall, supra note 18, at B2 (quoting a UCLA graduate student, “West Hollywood is a little bubble—that’s where I live . . . . It’s really easy to live in a little gay world and forget people have other experiences.”).

56. Research confirms that those expressing anti-gay attitudes are more likely to come from rural areas or small towns. Thus, gays and lesbians living in rural communities may be more aware of the anti-gay sentiments of their neighbors. See Sears, supra note 19, at 21.

57. VAID, supra note 16, at 5.


There are weaknesses in all social science data. The bulk of research on homophobia is drawn from studies of university students who tend to be upper and middle class. Further, results tend to have an urban slant with little focus on racial or ethnic variation. See Sears, supra note 19, at 17. National polling data also has its limitations. For example, social scientists have observed a tendency for those polled to give different answers depending upon the wording or placement of a question. See ALAN S. YANG, FROM RIGHTS TO WRONGS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 5 (National Gay and Lesbian Task Force Policy Institute, 1998). In addition, most Americans are not well informed on the facts or the issues and even tend to hold inconsistent positions on civil rights issues. See id. For the above reasons, I will use polling and social science data where instructive but continue to think critically about much of it. As the old adage goes: “statistics don’t lie, statisticians do.”

59. See Frank Newport, Some Changes Over Time in American Attitudes Toward Homosexuality, but Negativity Remains (visited March 6, 2000) <http://www.gallup.com/poll/releases/pr990301b.asp> (When responding to the question, “Do you feel that homosexuality should be considered an acceptable alternative lifestyle or not?”, 50% answered “acceptable,” 46% answered “not acceptable,” and 40% had “no opinion.”).

60. “Illegal” immigrants are the most unpopular group according to the National Election Study’s “Feeling Thermometer.” YANG, supra note 58, at 20 n.18.

61. See Minnie Bruce Pratt, My Life You are Talking About, in LESBIANS, GAY MEN, AND THE LAW, supra note 20, at 487, 489.
Ironically, this tendency to know and yet "forget" homophobia may be especially common among gay and lesbian activists. As activists and litigators, a belief in our ability to create change is the motivating root of our work. Thus, we may intellectualize or "forget" the obstacle of homophobia in order to find energy to continue our work. But such forgetting comes at a great price.

Many litigation strategists argue that this is no time to be forgetting homophobia. Some authors suggest that highlighting homophobia and drawing attention to gay and lesbian experience is an absolute necessity for success in the courtroom. For example, Marc Fajer argues that a critical step in any gay rights case is identifying the underlying homophobia that triggered the conflict. In an employment discrimination case, for instance, an advocate might highlight the faulty homophobic assumptions of the firing manager, which motivated the discrimination being challenged. Such an approach provides a means of educating courts on the context of homophobia and gay and lesbian experiences. Thus, it seems that a well-equipped advocate must come to court ready to address and deflate the homophobic assumptions surrounding every gay rights case. This will require a keen awareness of the constant presence of homophobia in gay and lesbian life.

B. See No Evil – The Invisibility of Gay and Lesbian Experience

One of the anti-gay lobby's most powerful weapons is what we might call "the gay abstraction" – the unknown homosexual other. Just as political and legal abstractions like "civil rights" and "special rights" can be exploited and made into terms of opprobrium, so can the abstract class of invisible homosexuals be molded in the image of hate.

-- Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents

One consequence of forgetting homophobia is that we may overestimate the level of knowledge and understanding in the mainstream world. In fact, the existence, achievements, and everyday life of gay men and lesbians is largely invisible or little understood outside gay circles. As the authors of After the

62. See, e.g., Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511, 514 (1992); Todd Brower, "A Stranger to Its Laws:" Homosexuality, Schemas, and the Lesson and Limits of Reasoning by Analogy, 38 SANTA CLARA L. REV. 65, 152 (1997); see also Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents, 29 HARV. C.R.-C.L. L. REV. 283, 316-17 (1994) ("The debate over gay civil rights laws should be understood as part of this larger project of securing meaningful gay and lesbian equality. Increased visibility should be at the center of that project.").
63. See Fajer, supra note 62, at 514.
64. Schacter, supra note 62, at 313.
65. See PHARR, supra note 9, at 58-59.
Ball quipped, "straights know very little about homosexuality and would prefer to know even less." This desire for ignorance is evident in the near blackout of gay and lesbian news events and the ongoing struggle over gay and lesbian visibility. Straight America, it seems, would rather know nothing about gays and lesbians than accommodate their worldview to make room for an authentic homosexual existence.

Activist and social theorist Suzanne Pharr suggests that the invisibility of gay men and lesbians is part of a larger pattern keeping members of non-dominant groups from public awareness. When minorities are neither seen nor heard, writes Pharr, "there is a reinforcement of the idea that the Norm is the majority and others either do not exist or do not count." As a matter of principle then, increasing the visibility of gay and lesbian experiences counteracts efforts to make us invisible. We can, in effect, take space in the world by remaining visible even in the midst of efforts to erase gays and lesbians. In the courtroom context, remaining visible means making legal arguments that educate courts and address the unique experience of gay life in a homophobic society.

If invisibility alone were the problem, as litigators we could simply undergo the task of explaining gay life to an ignorant but unbiased court. This, of course, is not the case. Straight America has taken the liberty of filling in the holes in reality left by the invisibility of gays and lesbians. This background set of presumed familiarity has been called "pre-understanding." Pre-understanding includes whatever stereotypes, mischaracterizations, or other distortions the listener believes he or she knows about gay and lesbian experience. Litigators must face and overcome this pre-understanding when

66. KIRK & MADSEN, supra note 53, at 5.
67. One telling example of news blackout was the underreporting of attendees at the 1987 March on Washington by The New York Times. The event was one of the largest civil rights events in history but merited no coverage whatsoever in the nation's national news magazines, Time and Newsweek. See KIRK & MADSEN, supra note 53, at 6-7. Notwithstanding the recent extensive news coverage of the murder of Matthew Shephard in Wyoming, see supra note 18, day to day coverage of gay and lesbian news events is remarkably low. See KIRK & MADSEN, supra note 53, at 6.
68. PHARR, supra note 9, at 58. For Pharr, the "norm" is defined as "male, white, heterosexual, Christian, able-bodied, youthful, and wealthy." Those conforming most with this norm enjoy the greatest societal power. Id. at 53.
70. To hear much of straight America tell it, there are almost no gays or lesbians living in the United States today. Those few who do exist lack values, are sex-obsessed and are easily detectable. Furthermore, gays have only themselves to blame for their problem, which is either a sin, a mental illness, or the result of succumbing to recruitment. See supra notes 9-36 for sources addressing stereotyping of gays and lesbians. Countless authors have addressed the phenomenon of homophobia. See, e.g., PHARR, supra note 9; KIRK & MADSEN, supra note 53; Koppelman, supra note 17; Koppelman, supra note 6.
Research continues to demonstrate that as more gays, lesbians, and bisexuals come out of the closet, support for gay rights increases. Thus, a litigation approach that counteracts gay and lesbian invisibility has a strategic purpose as well. Making visibly pro-gay and educational arguments in the courtroom is, in effect, "coming out" in the courtroom setting. As pioneering psychologist Gregory Herek has confirmed, people with limited contact with lesbians and gays are the most hostile towards them. These findings suggest that as judges and juries see and learn more about gays and lesbians, tolerance will also improve within the courtroom. Thus, if gay rights advocates educate judges and juries on gay experience, we may win more cases.

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71. See YANG, supra note 58, at 18 (citing Gallup, Public Survey Research Associates, and National Election Study over time and concluding that "[p]ublic opinion data provide strong evidence that simply knowing a lesbian or gay acquaintance, friend, co-worker or family member is associated with increased tolerance toward lesbians and gays, in general, and support for equal rights, in particular.").

C. The Limits of Legal Argument and Analogy

The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, seek the shelter of separation of powers.

-- Robert Cover, *Justice Accused*, on judicial responses to slavery.\(^{73}\)

In addition to overlooking homophobia and its accompanying gay invisibility, litigators may be plagued by the frustrating but enduring myth that emotion, policy, and human bias play no role in the Rule of Law.\(^{74}\) As a result, litigators often make arguments focused not on gay and lesbian experience but on preexisting and impersonal legal frameworks.\(^{75}\) This "legalistic formula"\(^{76}\) misses an opportunity to educate and generate empathy from judges and juries. Absent sufficient educational hand-holding from litigators, courts often misapply the law when gay people are involved.

Law is a self-referential and closed system.\(^{77}\) Thus, it is quite common for legal arguments to focus upon a dry formula of legal elements and precedent rather than upon the human drama of a particular case.\(^{78}\) This presents two interrelated problems for the gay rights litigator. To rely upon case precedent and reasoning by analogy, a judge or jury must identify when circumstances are sufficiently similar to merit like treatment.\(^{79}\) But if the decisionmaker's view of similarity or difference is skewed by his or her own pre-understanding of gays and lesbians, decisions will not follow as they should.\(^{80}\)

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74. See Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987) ("While there exists a tendency on the part of lawyers, judges, and -- might I add -- law professors, to deny a role to empathic responses in their approaches to legal problems, it is no hunch to claim that the better understanding we have of a situation at all levels, the better our decisionmaking is likely to be.").
75. See, e.g., Fajer, *supra* note 62, at 512-13 ("Since *Bowers*, advocates and scholars have scrambled to find legal theories to protect gay men and lesbians from discrimination. They have crafted arguments based on the First Amendment, the Equal Protection Clause, state privacy rights, equitable principles, and various statutes. In particular cases, some of these arguments have succeeded; in many cases, they have not. Yet the key to achieving gay rights may lie not in the substance of the legal arguments, but in the way they are presented."); Henderson, *supra* note 74, at 1588 ("[a] system of rules is formal insofar as it allows its . . . interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules . . . Everything will depend on where one draws the line between the factors of decision that are intrinsic to the system, and therefore worthy of consideration, and those that are not."), quoting ROBERTO UNGER, *LAW IN MODERN SOCIETY* 204 (1976)(emphasis omitted).
77. See id. at 1588.
78. See id. (a formalistic legal approach "can also preclude the discourse entirely by mechanical application of rule either by bureaucratic formalization and routinization -- the 'checklist' method of decision with legal consequences -- or by judicial formalization. (One is tempted to characterize this form of legal decisionmaking as the 'garbage in, garbage out' method.")") (footnotes omitted).
80. See Brower, *supra* note 62, at 69 (Anti-gay pre-understanding leaves its "traces in legal doctrine, as many judges are unable to apply relevant legal precedent when gay persons and issues are involved.").
Gay advocates have long struggled against the phenomena that plainly established principles of law often do not apply when gays and lesbians are involved. For example, the Supreme Court failed to see that gays and lesbians experience their sexuality in much the same way as heterosexuals experience theirs. Consequently, the Court failed to apply *Eisenstadt v. Baird*,\(^8\) protecting the right to heterosexual sexual privacy and autonomy, to *Bowers v. Hardwick*,\(^8\) denying the right to homosexual sexual privacy and permitting state regulation. Many courts continue to take children out of the custody of gay parents because the child will be burdened by living in a homophobic society.\(^8\) Such decisions contradict the Supreme Court’s ruling in *Palmore v. Sidoti* that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”\(^8\) Some courts seem unable to see that removing a child to accommodate homophobia is just as devastating and shortsighted as removing a child to accommodate racism, as was the case in *Palmore*.\(^8\) These are just two examples of the discordant treatment of gays and lesbians in a precedential system that fails to see similarity and difference.

The inability of the legal system to protect gay and lesbian rights is easily traced to homophobia. As Todd Brower argues, the false beliefs about gay men and lesbians common among many judges may prevent them from “appropriately interpreting legal doctrine and precedent, and has led to anomalous results.”\(^8\) In a legal system based upon reasoning by analogy to precedent, it becomes all the more important that judges and juries understand just who it is they are comparing to whom. It is this failure of the system that led Fajer to conclude that for gay rights litigation to succeed, litigators must “tell stories of the lives of lesbians and gay men with an eye . . . [toward] subverting the pre-understanding of non-gay society . . . .” The footnotes accompanying the mythical *Romer* decision of Part I can provide a starting point for litigators interested in undermining homophobic pre-understanding.

A second problem with a legalistic approach to gay rights litigation is that rule-based decisionmaking provides a refuge from real moral dilemmas.\(^8\) When advocates make purely intellectual arguments, we make room for courts to avoid the moral conflict presented by many gay rights cases.\(^8\)

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82. 478 U.S. 186 (1986).
83. See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (finding that “active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement . . . .”) (citation omitted).
85. See id.
87. See Henderson, *supra* note 74, at 1589 (describing use of “doctrinal formality” on a death penalty trial to “make the case for death in the most lawyerly, legalistic, dispassionate form.”)(quoting Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.)
88. See id. at 1590 (“In other words, legality gives judges a number of ways to block human pain and escape responsibility.”).
Henderson argues that rather than pure legal arguments, litigators should add appeals to empathy. "[I]t is no hunch," asserts Henderson, "that the better understanding we have of a situation at all levels, the better our decisionmaking is likely to be." By making the client as real as possible, a judge will have "an appreciation of the human meanings of a given legal situation." Unlike empathic arguments, which demand recognition of the human pain of the gay litigant, pure legal arguments can ignore this pain, hiding behind the cloak of the Rule of Law and legalistic formulas.

If not supplemented by stories of gay and lesbian life, purely legalistic arguments assume a common understanding of gay life between the judge and litigant. As evidenced by the frequent failure of legal reasoning where gays and lesbians are involved, this assumption seems unrealistic. Absent the full context of gay and lesbian experience, legal arguments miss an opportunity for the gay visibility necessary to defuse homophobia and allow courts to avoid our moral struggle.

D. A Critical Lesson: Hardwick – Allowing Our Enemies to Define Us

[When]ever the Christian Right is the only group talking about us, we are in trouble.

-- Christina McNight, Lesbian Avengers Civil Rights Organizing Project

In the absence of true stories of gay and lesbian lives, courts are left to fill in the void with their own background knowledge. Judges must rely upon their own pre-understanding of gays and lesbians, which can often be based in negative stereotypes and myths. Worse yet, when lesbians and gay men do not tell our own stories, we create an opportunity for our enemies to define us. The Supreme Court decision in Bowers v. Hardwick is a famous example.

Defending the constitutionality of the Georgia sodomy law, the State of

89. Id. at 1576.
90. Id.
91. See Fajer, supra note 62, at 513-14 (discussing the misconceptions of the Bowers v. Hardwick majority and the failure of litigants to address stereotypes).
93. Typical
95. "stereotypes of lesbians include the beliefs that lesbians tend to be independent, to not be easily influenced, to not give up easily, to have a need for security, to be significantly different from the 'normal, healthy adult,' to be positive toward females, to be masculine, to have short hair, to be negative toward males, to be too blatant, and to be a bad influence on children. . . . Gay men are stereotyped to be interested in sex, to be emotional, to have a need for security, to be neat, to enjoy art and music, to be significantly different from the 'normal, healthy adult,' to be positive toward males, to be feminine, to have high-pitched voices, to wear jewelry, to be creative, and to be complicated."

Georgia and amici spouted a broad array of stereotypes about gays and lesbians. The briefs fully exploited stereotypes of gays and lesbians as perverted, dangerous, child molesters who spread AIDS. The State asserted the "legislative fact" that:

[H]omosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, [and] transvestitism, to name only a few. Homosexual sodomy is often practiced outside the home such as in public parks, rest rooms, 'gay baths,' and 'gay bars,' and is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, and, indeed a possible relationship to crimes of violence.95

Next the State argued that "homosexual sodomy is the anathema of the basic units of our society—marriage and the family."96 Finally, the State warned that, if the Court overturned Georgia’s sodomy law, “the order of society, our way of life, could be changed in a harmful way."97 The amici briefs further developed these overtures to historical hatred, fear of AIDS, and other irrational prejudice toward gays and lesbians.98

The attorneys for Michael Hardwick failed to counteract this wave of hatred and misinformation. The story of Hardwick and of gays and lesbians as real human beings was barely told. Here was a man who had been interrupted during private consensual sex by a police officer who had entered his bedroom99 Anyone who could understand that gays and lesbians also experience much of their sexuality in the context of love, human relationship, and family should have been outraged by such a state intrusion.100 Demonstrating that gay identity is a separate phenomenon from sexual activity and dismantling the myth that sexuality permeates every aspect of gay and lesbian life should have been an integral part of Hardwick’s litigation strategy.101 By deconstructing this set of stereotypes, Hardwick’s attorneys

96. Id.
97. Id.
99. See Art Harris, The Unintended Battle of Michael Hardwick: After His Georgia Sodomy Case, A Right-to-Privacy Crusader, WASHINGTON POST, Aug. 21, 1986, at C1.
100. For more on recognizing and deconstructing the myths of homosexuality see PHARR, supra note 9; Fajer, supra note 62; Koppelman; supra note 17, and Law, supra note 17.
101. See PHARR, supra note 9; Fajer, supra note 62, at 537-51.
could have demonstrated the human suffering of all gays and lesbians caused by sodomy laws. But this was not to be.

Instead, it was only those who oppose gay and lesbian rights who were left to define us. Professor Lawrence Tribe’s brief for Michael Hardwick offered only legal arguments.\(^{102}\) Tribe argued simply that the “the only issue” in the case was “the relevant standard of review, not the validity” of the statute.\(^{103}\) Tribe acknowledged Georgia’s mischaracterization of gays and lesbians only perfunctorily, addressing the appeals to prejudice in just one page and one footnote.\(^{104}\) Instead of recasting the facts and narrative, Tribe dismissed the hateful “facts” as relevant only at trial.\(^{105}\) This proved to be false.

In essence, Tribe argued, the Court should focus only on the constitutional protection granted to private adult consensual sexuality in general. The Court should not concern itself with gays or with gay sex, even though these were the targets of the Georgia statute. This was pure legal argument, not narrative. The argument focused on legal standards, rules, and precedent but did not tell the story of Hardwick and other gay men and lesbians. Tribe’s legalistic approach failed to give the Court a way to understand the human dimension and consequences of the law. Furthermore, the argument did little to counteract the effective appeals to prejudice offered by Georgia (which reinforced views likely held by many of the Justices). As one critic summarized, Hardwick’s attorneys “failed to tell the story of the actual plaintiff and of actual gay people, thus leaving the stereotype unanswered.”\(^{106}\)

The Supreme Court majority cast the question as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”\(^{107}\) By a 5-4 decision, the Court concluded that it did not.\(^{108}\) As the devastating conclusion attested, clearly the choice of legal standard was not the “only issue” relevant in the decision. Rather, it was the homophobia of the statute and the homophobia of the Justices that proved most important in the

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\(^{103}\) Id. at 27.

\(^{104}\) See id. at 27-28. The brief explicitly addressed the misinformation from Georgia in a short footnote, stating:

“Even if the State’s imaginative recasting of the 30 million Americans who comprise our homosexual population as a furtive criminal underclass had the slightest basis in fact, rather than in irrational fear and prejudice, the State appears to have missed the point that nothing in Respondent’s argument claims any special protection for [public] sexual activity . . .”

Id. at 21 n. 38.

\(^{105}\) See id. at 27 (“[Only at trial] may the untried questions of fact to which Georgia alludes in its brief become relevant.”).

\(^{106}\) Henderson, supra note 74, at 1643. Lynne Henderson suggests that efforts to bring Hardwick’s life alive and demonstrate the real harm of homophobia and sodomy laws might have created the necessary empathy for Hardwick that would have changed the outcome. By focusing on a legal theory of “rights” and the right to be “left alone” the harm and context of homophobia was ignored.

\(^{107}\) Hardwick, 478 U.S. at 190 (“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”).

\(^{108}\) Ironically, the Georgia Supreme Court recently struck down the sodomy law as a violation of Georgia’s constitutional right of privacy. See Powell v. State, 270 Ga. 327 (1998).
end. Justice White drew upon his own pre-understanding of gay experience as supplemented by the caustic State and amici briefs.\textsuperscript{109} White believed there was "[n]o connection between family, marriage or procreation on the one hand and homosexual activity on the other."\textsuperscript{110} When no connection was "demonstrated" by Hardwick, White believed the majority was free to rule as it did, setting back the gay rights movement indefinitely.\textsuperscript{111}

As Hardwick illustrates, we make a grave mistake when we assert legal arguments that ignore homophobia and fail to illuminate gay and lesbian lives. Hardwick reinforces the lesson that a successful legal argument must necessarily overcome or circumvent the homophobia of the listener.\textsuperscript{112} In effect, making visibly gay arguments means openly acknowledging that the controversy concerns gays and lesbians. But to do so, gay rights advocates must trust that courts can learn to understand gay and lesbian experience. This requires a leap of faith quite like the coming out process itself. If we hope to begin a dialogue with the courts addressing the reality of our lives, we have no choice but to begin it. Gay rights litigators can borrow this visibility approach from grassroots organizers and from the litigation successes of the civil rights movement.

\textsuperscript{109.} Fajer, \textit{supra} note 62, at 513-14 ("Justice White's pre-understanding clearly included the common non-gay belief that gay people experience sexual activity differently from non-gays. Gay sexuality, according to this common understanding, is all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure—the civilizing influences that keep 'normal' sexuality under control.")

\textsuperscript{110.} Hardwick, 478 U.S. at 191.

\textsuperscript{111.} Id. According to Justice White, Hardwick's argument relied upon precedents protecting privacy rights in the context of heterosexual child rearing, marriage, and procreation. Unbelievably, White found no basis for a right to privacy for consensual gay sexuality in any of the following cases: Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (concluding that "the custody, care and nurture of the child reside first in the parents"); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (protecting the liberty of parents to control the education of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (defining the liberty protected by the Fourteenth Amendment to include, at a minimum, "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.") (citations omitted); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (ending forced sterilization and finding that "[m]arriage and procreation are fundamental to the very existence and survival of the race"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down an anti-miscegenation law and concluding that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (protecting access to contraception in marriage and finding that the Bill of Rights creates "zones of privacy"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (protecting access to contraception for single (heterosexual) people stating, "[i]f 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 persons as the decision whether to bear or beget a child"); Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the right of privacy extends to "encompass a woman's decision whether or not to terminate her pregnancy").

A failure to see the connection between the above cases and gay sexuality must be attributed to White's misconception of gay and lesbian identity and its relation to sexuality. See also Fajer, \textit{supra} note 62 (arguing that Hardwick's attorneys indeed failed to demonstrate the connection by focusing instead on purely legal arguments).

\textsuperscript{112.} See Henderson, \textit{supra} note 74, at 1638-49. See also Fajer, \textit{supra} note 62, at 513-15.
III. THE POWER OF VISIBILITY

As I argue throughout this Article, educating juries and judges will play a critical role in the success of gay rights litigation. Rather than concede our invisibility, litigators must embrace an advocacy style that counteracts prejudice through self-definition and appeals to empathy. This approach focuses on making visible the real lives and experiences of lesbians and gay men living in a homophobic society. Likewise, empathy and visibility have been integral to grassroots organizing successes and have served other movements in the courtroom in the past. I provide here two examples to underscore the value of educating through visibility. The first tracks the organizing success of the Lesbian Avengers whose openly gay organizing strategy proved integral to defeating a statewide anti-gay initiative in Idaho. The second draws on the litigation style of Thurgood Marshall. Marshall’s empathic and forthright approach demanded that courts examine the underlying racism that infused the institutions of his (and our) time. Both illustrations demonstrate the value of visibility to social change strategies.

A. Lessons from the Heartland

It is possible to win . . . and do the right thing at the same time.

-- Chanelle Matthews, Lesbian Avengers Civil Rights Organizing Project

In the fall of 1994, Idaho voters faced Proposition 1, an anti-gay initiative modeled after but far more expansive than Colorado’s Amendment 2. After a hard fought campaign, which included significant anti-gay hostility, the initiative was narrowly defeated by just 3,000 votes. A good share of the credit should go to the Lesbian Avengers, a grassroots direct action group focused on lesbian survival and visibility. The Avengers targeted three rural

113. Pursley, supra note 92, at 90.
114. See id.
115. See Pursley supra note 92, at 90
116. See id. (Upon invitation, the Lesbian Avengers Civil Rights Organizing Project (LACROP) sent eight full-time and eight part-time lesbian organizers to work in the state through the November 1994 election.).
counties in Northern Idaho, adopting a campaign strategy based on public education through gay visibility. The lessons of the campaign apply equally well to the work of gay and lesbian advocates in the courtroom.

The Avengers sponsored visibility actions in tiny communities in the northern counties, some as small as 725 residents. The campaign strategy was to defeat the initiative by putting a face on its previously invisible victims, gay and lesbian residents of Idaho. Events included a dance-in, door-to-door canvassing, street theater, picnics, and leafletting.

Many gay and lesbian volunteers went door-to-door to talk openly about their lives. One activist canvassed her tiny farming community, distributing a statement she had written about her life as the townspeople’s “lesbian neighbor.” In the small town of Moscow, population 18,000, thirty-five activists gathered at the Latah County Fair, a site of historic gay bashing. They passed out Hershey’s Kisses and a card that read “How about a kiss instead?” On the reverse side, the card read, “For the last twelve years, lesbians and gay men have been threatened, harassed and beaten at the Latah County Fair. STOP THE VIOLENCE. STOP THE HATE.” The Lesbian Avengers’ actions also sought to directly counteract anti-gay rhetoric promulgated by the Religious Right.

By contrast, the more mainstream Boise-based “No on 1” Coalition worked in a centralized campaign broadcasting a very different message. The Coalition sponsored “No on 1” television ads that never mentioned the words “gay,” “lesbian,” or “homosexual.” Rather than rebuking the right wing’s homophobic rhetoric, the Coalition campaign pushed two bland messages: “No Government Intervention in Private Lives” and “Proposition One: It’s Expensive.” Such restrained messages are reminiscent of Professor Lawrence Tribe’s legalistic arguments in Hardwick. Both failed to counteract homophobia or give the listener a way to understand the human dimensions and consequences of the issue.

117. See id. (Northern Idaho is “one of the most rural areas in the country, with hundreds of logging, mining and farming towns scattered on small highways and dirt roads . . . .” “[T]he region is currently infamous for housing the national headquarters of Aryan Nations.” Of the organizing effort, Pursley writes, “[i]t was a challenging job in an area that had almost no infrastructure for progressive organizing of any kind (the entire 250-mile region houses only one domestic violence center and no abortion services).”)
118. See Pursley, supra note 92.
119. See id. (Genesee, Idaho, population 725, was the site of one visibility action).
120. See id. (“In Lewiston, a working-class timber town of 28,000, five lesbians and gay men [held] a town forum to speak about living and growing up queer in Lewiston – the first time that lesbians and gay men in this town [had] ever gotten together to publicly come out.”).
121. See id.
122. Id.
123. For example, activists distributed literature that spoke openly about lesbian and gay lives. See id.
124. The “No on 1” Coalition, was formed by largely gay and lesbian groups in Boise with full-time staff members and technical and financial support from national groups including the Human Rights Campaign (Fund), Gay and Lesbian Americans, and the National Gay and Lesbian Task Force. See id.
125. See id. (The goal of gay and lesbian visibility for LACROP “became extremely important in Idaho, where No on 1 television ads never mentioned the words ‘lesbian,’ ‘gay’ or even ‘homosexuality.’”).
126. See id.
When the votes were tallied, it was clear that the Avengers' unapologetic approach had won hearts and minds. In the three rural counties targeted by the Avengers' visibility actions, voters not only said "no" to the proposition, but returned numbers far better than expected.\textsuperscript{127} By contrast, the bulk of the remaining counties targeted by the Coalition voted "yes," supporting the anti-gay proposition.\textsuperscript{128}

Lesbian Avenger Christina McNight addressed the lesson of the campaign:

People get really intimidated by polls and by self-proclaimed "professionals." Polls always show that most straight people don't like queers, which we know anyway, but what polls don't recognize is the fact that the Christian Right is talking about lesbian and gay people during the campaign. And whenever the Christian right is the only group talking about us, we are in trouble.\textsuperscript{129}

The Avengers' visibility approach ignored cautions from more moderate campaign professionals who attempted to diminish the "gayness" of the issue.\textsuperscript{130} Instead, in order to debunk the message of the Christian Right, it was essential for the Avengers "that lesbian and gay visibility be integral to every local action and campaign project."\textsuperscript{131}

The success of the Lesbian Avengers' visibility approach in Idaho underscores the lesson learned in litigating \textit{Bowers v. Hardwick}. The right wing is already talking about gays and lesbians. If we hope to win, gay rights advocates must prioritize gay and lesbian visibility as the Avengers did in Idaho. This means explaining our life experiences and addressing the harm of homophobia. Ignoring homophobia and pretending that gay rights issues are not about gay people did not work in \textit{Hardwick}, did not work in Idaho, and will not work in the courtroom. The Lesbian Avengers faced real violence and threats when they joined other activists to organize in northern Idaho.\textsuperscript{132} By

\textsuperscript{127} See id. (The statewide tally was 50.4\% "no" (pro-gay) versus 49.6\% "yes" (anti-gay). In Latah County, which "elected conservative Republicans to almost every town and county office" in 1995, the "no" vote was 61\%, the second highest in the state. Both Nez Pierce, a working-class logging and manufacturing county, and Bonner, a county with a strong right-wing and neo-nazi presence, turned in "unexpected" "no" votes of 54\%. Both county votes were much more favorable than Ada County (which includes Boise) and Kootenai County, "the north's largest county, and the only one to have its own No on 1 office.").

\textsuperscript{128} Ada County, which includes Boise the state's largest city and capital, defeated the measure by just 51\%. See id.

\textsuperscript{129} Id.

\textsuperscript{130} The more mainstream "No on 1" activists maintained a policy of "message control." For example, in order to volunteer for the group, an applicant was required to sign a form stating that she "would not talk to the press, write articles or send in letters to the editor ... without approval from the executive committee." Id. In Pursley's view, "[t]hese rules were intended to 'control the message,' and effectively precluded volunteers from promoting lesbian and gay visibility in the press." Id.

\textsuperscript{131} Id.

\textsuperscript{132} See id.

("Out and proud organizing in northern Idaho isn't easy. LACROP members and local activists faced
comparison, gay rights advocacy inside a courtroom, even before a hostile judge, seems downright tame. Gay rights advocates of all stripes would be well advised to take the leap of faith modeled by the Lesbian Avengers in Idaho.

B. Outsider Voices and Empathy in the Courtroom

[If you wish a judge to overturn a settled and established rule of law, you must convince both his mind and his emotions, which together in indissociable blend constitute his sense of injustice.]

Gay rights advocates can also take a lesson in education through visibility from the great litigator and Supreme Court Justice Thurgood Marshall. As an NAACP attorney in the 1950s, Marshall’s unconventional style brought the harm of racism and the life experiences of African-Americans front and center in the courtroom. Like the Avengers in Idaho, Marshall insisted on visibility. He refused to let the African-American community remain invisible. Instead, Marshall continually placed the suffering of the African-American community before the eyes and ears of the court. This visibility approach educated each Justice on the unique experience of living as a person of color in a racist society. Although legal decisionmaking tends to have little to do with understanding human experience, the impact of Marshall’s outsider voice stands in contrast, as a testament to the possibility of judicial empathy.

An example of this visibility approach was Marshall’s use of the “doll stories” in litigating the landmark school desegregation case, *Brown v. Board of Education*. The “stories” demonstrated the detrimental effects of bigotry, discrimination, and segregation on African-American children. In the 1950s experiments, young African-American girls were given the choice of two identical dolls, one black and one white. Asked which doll was the “good doll,” the girls overwhelming chose the white dolls over the black “bad"

See also supra note 115.


134. See Henderson, supra note 74, at 1574.

135. By analyzing the lessons learned from Marshall’s work and applying them to pro-gay advocacy, I do not suggest that racism and homophobia are identical or interchangeable. Numerous skilled social critics have identified the significant differences between the two prejudices and between the life experience of people of color who cannot, as gay men and lesbians may, hide their identity from a hateful world. Rather, I use the analysis to show the capacity of courts to hear outsider voices and the importance of educating courts and demystifying non-dominant identity and experience.

136. See *Brown v. Bd. of Educ.* (I), 347 U.S. 483, 495 (1954) (striking down the “separate but equal” doctrine in public education and finding that “[s]eparate educational facilities are inherently unequal”). This discussion of Thurgood Marshall’s use of the doll stories is informed by fruitful conversations with Professor Kris Franklin, New York University School of Law, 1999.

Psychologist Kenneth Clark concluded that “the Negro child accepts as early as six, seven, or eight the negative stereotypes about his own group.” NAACP experts concluded that black and white children had an equal capacity to learn but that:

segregation deterred the development of [black children's personalities] ... [I]t destroys their self-respect ... [I]t denies them full opportunity for democratic social development ... [I]t stamps [the child] with a badge of inferiority.

Counsel for Kansas responded by dismissing the emotions of the case. As a matter of law, he argued, because the school facilities were equal, the psychological response was irrelevant. This was a legalistic response, which the Court chose not to hear.

Marshall’s advocacy in Brown hammered away at the underlying racism of the “separate but equal” doctrine. During oral argument, Marshall rejected the position of the opposing counsel by redirecting the Court’s attention to the pain of African-American experience. “At this point,” Marshall argued:

it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the mainstream of American life in these states.

The only [conceivable reason for segregation] is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make clear that that is not what our Constitution stands for.

Justice Frankfurter also tried to step back from the emotions of the case by equating African-American children with, for example, “all blue-eyed children.” Marshall blocked him. The comparison was unacceptable, argued

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138. See Rowan, supra note 137, at 15.
139. Id.
140. Kamisar, supra note 137, at 38 (quoting the trial transcript).
141. The State argued that the psychological reaction to segregation “is something which is something apart from the objective components of the school system, and something that the state does not have within its power to confer upon pupils therein.” Id. at 33.
142. John Davis, attorney for the State, mocked the social science data and argued that the question of school segregation was a legislative one, which fell outside the institutional competence of the Court. See id. at 58-59, 61.
143. Id. at 61-62.
144. Id. at 239-40.
Marshall, "because the blue-eyed people in the United States never had the badge of slavery, which was perpetuated" by segregation.146 Marshall's approach both educated the Court and persuaded the Justices on the merits.

The human emotion woven through the Brown opinion demonstrates that Marshall's empathic social science data and argument struck a cord with the Court. In a moment of considerable empathy, the Court concluded:

To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.147

"In these days," wrote the Court, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."148 Consequently, the Court was moved to disband school segregation, finding:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.149

By educating the Court on the meaning of being African-American in a racist country, Marshall led the court to a remarkable decision. Brown exemplified the Court's capacity to "hear a different and affecting narrative."150 Likewise, the openly gay organizing approach of the Lesbian Avengers confirms the human capacity to understand gay and lesbian lives. The Lesbian Avengers and Thurgood Marshall (admittedly an unlikely pair) also underscore the principal that visibility will lead to victory. The Avengers, working outside of the courtroom, confronted homophobia head on. Their work, using visibility actions to educate mainstream society, never made the mistake of ignoring homophobia or overestimating the knowledge of their audience. By definition, the Avengers' work took a leap of faith, trusting that if lesbians and gay men told their stories, those stories would be heard. Translating this approach to courtroom advocacy, Marshall confronted racism

146. See Holt, supra note 145, at 1 (citing ROWAN).
148. Id. at 493.
149. Id. at 493 (citations omitted).
150. Henderson, supra note 74, at 1608. While the self-conscious Court ultimately retreated from its decision in Brown II, the original opinion remains a powerful symbol of the Court's capacity to understand outsider lives.
by educating the court on African-American experience. His storytelling skill, combined with his use of social science and his ability to refocus the court on the underlying racism of segregation, no matter where the argument strayed, was remarkable. These lessons are transferable to the work of gay and lesbian advocates battling homophobia inside the courtroom.

In the following section I evaluate a recent and profound gay rights victory. I also address the legal argument that made the victory possible. My aim is to encourage more litigators to take a leap of faith by integrating approaches like those of Marshall, the Avengers, and the attorneys in the following case.
IV. WINNING – "GETTING IT" IN THE COURTROOM

As any gay rights litigator knows, when we lose, we lose big. But what may not be as obvious is that when gay litigants win, we can win it all. As the following opinion, Weaver v. Nebo School District,\(^\text{151}\) makes clear, wholesale gay rights victories are possible. Weaver may not be as ideal as the mythical Romer decision of Part I of this Article, but it expresses the capacity of courts to address gay and lesbian experiences in our language. Our greatest victories, such as Weaver, come from courts that are willing to reject anti-gay discrimination, and, more importantly, to debunk the hatred on which such discrimination depends. Litigators can be instrumental, as were the Weaver attorneys, in educating the court on homophobia and its impact on gay and lesbian lives.

In 1998, a lone federal judge in central Utah raised the bar for what a positive case could be for gay rights. In Weaver v. Nebo School District, the defendant public school district removed a lesbian high school coach and imposed restrictions on her ability to discuss her sexual orientation.\(^\text{152}\) Not only did the judge acknowledge and reject all the homophobic assumptions underlying the case, he dispelled the myths with a razor-sharp analysis of social inequalities typical of a street activist. Furthermore, the judge recognized homophobia and corrected the faulty assumptions of the defendants. Weaver demonstrates the capacity of courts to understand gay narrative and renounce the homophobia we face.\(^\text{153}\) The success of Weaver must be attributed in part to the illustrations and arguments in the plaintiff's brief. Weaver's attorneys identified the underlying homophobia in the case. Then, through effective storytelling, the brief systematically debunked the myths, assumptions, and pre-understanding of the opposition while appealing to the empathy of the court.

A. Factual Background

Wendy Weaver was a high school teacher and girl's volleyball coach in


\(^{\text{152}}\) The recent Vermont Supreme Court case, Baker v. State of Vermont, in which the Vermont Supreme Court required the state legislature to grant same-sex couples the "common benefits and protections that flow from marriage," is also noteworthy. 744 A.2d 864, 867 (Vt. 1999). However, while the Baker court must have grappled with the moral dilemmas inherent in the case behind closed doors, the majority's written decision did little to acknowledge or articulate the underlying debate. The lengthy decision sidestepped the religious and moral debate, instead focusing on a legalistic approach to the problem. In fact, the court undervalued the homophobic impact of the state's denial of marriage benefits to same-sex couples. The court reasoned that, unlike the institutionalized racism addressed in the Supreme Court's line of desegregation cases, homophobia was merely the effect and not the intent of the state's marriage laws. See id. at 887.

Spanish Fork, Utah.\textsuperscript{154} Weaver maintained an excellent nineteen-year teaching and coaching record, including coaching the team to four state championships. At some point, Weaver's ex-husband, also a school district employee, began telling members of the school community that Wendy Weaver was a lesbian.\textsuperscript{155} Eventually, one of her players asked Weaver outright, "are you gay?"\textsuperscript{156} Weaver truthfully responded, "yes." Later the student's parents met with school administrators and complained that Weaver had told the student she was gay. The student explained that she would quit the team because she was uncomfortable playing for a gay coach.\textsuperscript{157}

After numerous discussions among school administrators, Weaver was eventually called into the school district office for a meeting. She was informed that she would no longer coach the girls' volleyball team. Furthermore, she received a letter informing her that she was not to discuss her sexual orientation with any students, staff or parents.\textsuperscript{158} In a second letter from the school district, the school candidly explained that Weaver must not speak openly with students, even off-campus, because she was perceived as an "authority figure and role model."\textsuperscript{159} As the District further explained, if

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154. All facts drawn from Weaver v. Nebo School Dist., 29 F. Supp. 2d 1279, 1280-82 unless otherwise noted.

155. See id. at 1282 (quoting a letter issued by the School District stating, ""The District has received reports that you have made remarks within the school setting about your ex-wife's sexual orientation.'').

156. See id. at 1281 (quoting a letter issued by the School District stating, "Ms. Weaver telephoned prospective volleyball team members to inform them of the camp schedules. One of the calls went to a senior team member. During the conversation, the team member asked Ms. Weaver, 'Are you gay?' Ms. Weaver truthfully responded 'Yes.'").

157. See id. at 1281 (quoting a letter issued by the School District stating, "The team member and her mother telephoned Principal Wadley to let him know that the team member would not be playing volleyball because she was uncomfortable playing on the team knowing that Ms. Weaver is gay.'").

158. See id. at 1281-82. The full letter reads:

The District has received reports that you have made public and expressed to students your homosexual orientation and lifestyle. If these reports are true, we are concerned about the potential disruption in the school community and advise you of the following:

- You are not to make any comments, announcements or statement to students, staff members, or parents of students regarding your homosexual orientation or lifestyle.
- If students, staff members, or parents of students ask about your sexual orientation or anything concerning the subject, you shall tell them that the subject is private and personal and inappropriate to discuss with them.

This memo is to place you on notice of the expectations the school district has for you concerning this matter. A violation of these requirements may jeopardize your job and be cause for termination.

Id.

159. Weaver 29 F. Supp. 2d at 1281-82 (days after Weaver filed suit, she received a second letter to "clarify" the first. It read in part:

The District's intent with the July 22 letter was that the foregoing restrictions [contained in the July 22 letter] on your communications apply only while you are acting within the course and scope of your duties as a teacher for the District. Our main areas of concern are situations such as classroom teaching, extracurricular school-sponsored activities and parent-teacher conferences where, we believe, discussion of one's sexual orientation would be inappropriate. We believed that this intent was apparent in the July 22 letter from the fact that it was written on District stationery and addressed the issue of "disruption in the school community."

As further clarification of the July 22 letter, we strongly encourage you to avoid discussions of the foregoing matters at any time with students because we believe that in virtually any interaction you have with a student, including off-campus contacts, you are always perceived by the student as a teacher, authority figure and role model.)
students, staff, or parents asked Weaver about her sexual orientation, she was
instructed to tell them that the "subject is private and personal and
inappropriate to discuss with them." Weaver's ex-husband received a
similar gag order. Weaver filed suit, challenging the restraints on her speech
and her dismissal as volleyball coach.

Weaver won her motion for summary judgment. Federal District Court
Judge Bruce Jenkins refused to capitulate to the homophobia of the school
administration and issued a model opinion supporting lesbian and gay rights.
Judge Jenkins recognized the harm of homophobia, rejected, and even
corrected, homophobic arguments and assumptions.

B. Addressing Homophobia

[Freedom] to differ is not limited to things that do not matter much. That
would be a mere shadow of freedom. The test of its substance is the right to
differ as to things that touch the heart of the existing order.

-- Bowers v. Hardwick (Blackmun, J.,
dissenting)\textsuperscript{161}

Clearly, a case like Weaver's raised serious First Amendment and Equal
Protection issues. However, had her attorneys from the National Lesbian and
Gay Rights Project of the American Civil Liberties Union simply addressed
the legal issues, Weaver's success could have been jeopardized. Unlike the
Bowers legal team twelve years earlier, the ACLU strategy acknowledged that
legal arguments were not the only issues needing to be addressed. This was a
controversial case. At its heart was an openly lesbian coach and teacher
working with the children of a small and conservative Mormon community.
Weaver's attorneys correctly predicted that the case would trigger
homophobic reactions and assumptions that needed to be both addressed and
defused.

The first task of Weaver's attorneys was to frame the litigation to highlight
the underlying homophobia of the school's actions while remaining conscious
of the potential homophobic assumptions of the judge. The brief begins by
addressing explicitly any homophobic assumptions the reader might hold
about the case:

At the outset, it is important to emphasize what this case does not involve.
It does not involve any allegation of improper conduct by Ms. Weaver toward
her students or her team. It does not involve any communications by Ms.
Weaver in the classroom. Ms. Weaver was and continues to be an excellent
and professional public high school teacher. She has adhered to and continues

\textsuperscript{160} Id. at 1281-82.

\textsuperscript{161} 478 U.S. 186, 211 (alteration in original) (quoting West Virginia Bd. of Educ. v. Barnette, 319
U.S. 624, 641-42 (1943)).
to adhere to school policy governing curriculum content and decorum in her teaching and coaching.\textsuperscript{162}

Having cleared the air of any potential misunderstanding, Weaver's attorneys continued, defining the case as one involving the "unconstitutional response of school district officials, motivated by real or perceived public animus against her sexual orientation, to the fact that Ms. Weaver is a lesbian and simply wishes to be honest about that fact."\textsuperscript{163} In short, Weaver sought the ability to "be truthful about her identity."\textsuperscript{164} From the start, the brief made clear that this case was about homophobia and not about the deserved punishment of a wrongdoing homosexual, as was the Court's view in \textit{Bowers}.

Like Thurgood Marshall's arguments in \textit{Brown}, Weaver's attorneys continually brought the court back to the underlying existence and harm of prejudice. Woven throughout the brief are reminders that the true issue of the case was the "moral disapproval and animus expressed by the community," viewpoints that could not be constitutionally advanced by the school district.\textsuperscript{165} The restrictions on Weaver's speech were oppressive, according to her lawyers, because she would be forced to "monitor her speech in every interaction, policing herself in case the visiting neighbor or friend of a friend who dropped by might have a child in the school district."\textsuperscript{166} The brief continually comes back to the oppressive environment created when "fear and hostility" are allowed to "excuse discrimination."\textsuperscript{167}

Judge Jenkins heard the message and saw the context of homophobia. Writing on the applicable equal protection standard, the Judge wrote:

Despite mounting evidence that gay males and lesbians suffer from employment discrimination and, as recent events in Wyoming remind us, other more life-threatening expressions of bias, courts, including the Supreme Court, have not yet recognized a person's sexual orientation as a status that deserves heightened protection.\textsuperscript{168}

Later, Judge Jenkins found that the negative reaction of some community members was not a rational basis for terminating Weaver's coaching position. "If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, [the decision to terminate Weaver's coaching position] is necessarily irrational," he concluded.\textsuperscript{169} Judge Jenkins' ability to "get it," recognizing the context of homophobia and false
stereotypes, forms the basis of his supportive opinion.

C. Educating Your Audience

[W]e must decide the case on legal grounds. However, much history, sociology, religious belief, personal experience or other considerations may inform our individual or collective deliberations.

-- Baker v. State (Johnson, J., concurring in part and dissenting in part)\textsuperscript{170}

After placing the case in the context of homophobia, Weaver’s attorneys had to educate the court on the lives of lesbians and gay men. As evidenced by the “No on I” Coalition’s organizing in Idaho, it is not enough to make arguments that assume an understanding of lesbian and gay experience or ignore gay experience altogether. Weaver’s attorneys could safely assume that her experience as a lesbian was more or less invisible to the judge. In order to reach the legal merits of the case, the judge would need to understand Weaver’s identity.

1. Flaunting

Weaver’s attorneys educated the court through storytelling and appeals to empathy, which both addressed the underlying homophobia of the school’s actions and debunked myths about gay men and lesbians. First, the brief addressed the pressure placed on Weaver to remain closeted. Weaver was told that if she were publicly gay, i.e., if she discussed her sexual orientation, she would lose her teaching position. This is not surprising. Discrimination against gays and lesbians is often a reaction to some speech or public act that draws attention to their gay identity.\textsuperscript{171} The school’s position reflects a common view that gay life should not be discussed (or seen) in public.\textsuperscript{172} According to this perspective, while heterosexuals routinely discuss their partners and walk hand-in-hand, gay people who do the same are “ flaunting” their sexuality.\textsuperscript{173} To identify this mistaken belief, Weaver’s lawyers first highlighted the

\textsuperscript{170} 744 A.2d 864, 912 (Vt. 1999).

\textsuperscript{171} The public act of being openly gay can lead to sanctions by families, employers, gay-bashers, churches, police officers, and government agencies. See Fajer, supra note 62, at 571-76. The U.S. Military’s “Don’t Ask, Don’t Tell” policy is a classic example of discrimination for the public act of coming out. See also Shahar v. Bowers, 114 F. 3d 1097 (11th Cir. 1997), in which an employment discrimination suit was filed when the Georgia Attorney General rescinded an employment offer after he learned of the employee’s plans to participate in a lesbian commitment ceremony.

\textsuperscript{172} For more on the suppression of gay speech as a method of ensuring gay invisibility, see infra Part II.B. For a fuller discussion of the suppression of gay speech and expression and the problems it creates see Fajer, supra note 62, at 570-607.

\textsuperscript{173} See Fajer, supra note 62, at 606 (“heterosexuals ‘come out’ constantly”).
hypocrisy:

It is solely [the] mention of her sexual orientation—specifically, the fact that she is a lesbian—that the district forbade. [The district] imposed no like restriction on heterosexual teachers; indeed, Ms. Weaver’s ex-husband Gary was cautioned not to mention his wife’s sexual orientation but given no similar warning about disclosing his own.\textsuperscript{174}

Next, the brief counteracted homophobic beliefs by telling conflicting stories about the supposed “flaunting” of gay life. Rather than being an “inappropriate” and taboo topic,\textsuperscript{175} the brief outlined the many times when one’s sexual orientation might come up, whether gay or straight. Weaver could not “attend[ ] a school social function with her partner,” tell “staff parents or students that she, her partner and their children live together as a family,” or relate “even the most mundane aspects of how she moves through her day-to-day life.”\textsuperscript{176} Such every day examples also suggested that heterosexuals live openly because they have no need to self-censor.

The Judge responded to these arguments, first noting that the silencing letter sent to Weaver’s ex-husband was riddled with heterosexist assumptions. Tracking the Weaver brief, the Judge wrote, “tellingly, his letter prohibited only the discussion of Ms. Weaver’s sexual orientation, not his own.”\textsuperscript{177} In fact, as the Judge observed, teachers were encouraged to “speak freely on issues concerning heterosexual lifestyles,” such as marriage, “abstinence before marriage and fidelity within marriage.”\textsuperscript{178} The Judge’s analysis acknowledged the obvious, but often overlooked, fact that all people have a sexual orientation and that heterosexuals are often encouraged to flaunt their heterosexuality.\textsuperscript{179}

\textsuperscript{174} Plaintiff’s Motion at 14, Weaver (No. 2:97 - CV- 819J).
\textsuperscript{175} See Weaver, 29 F. Supp. 2d at 1281-1282 (quoting a letter to Weaver from the Nebo School District).
\textsuperscript{176} Id. at 1282.
\textsuperscript{177} Id. at 1286
\textsuperscript{178} Id.
\textsuperscript{179} See id. ("Because the restrictions imposed on Ms. Weaver (and her ex-husband) only targeted speech concerning homosexual orientation and not heterosexual orientation, the restrictions are properly considered viewpoint restrictions. Such a one-sided approach to sexual orientation is classic viewpoint discrimination... ")
A neutral recognition of the panoply of sexual orientations allowed Judge Jenkins to conclude, "[s]imple as it may sound, as a matter of fairness and evenhandedness, homosexuals should not be sanctioned or restricted for speech that heterosexuals are not likewise sanctioned or restricted for."180 Furthermore, Jenkins acknowledged Weaver’s important "interest in acknowledging her sexual orientation and living her life openly as a lesbian."181 Thus, the court rejected the unspoken assumptions of heterosexual supremacy and gay invisibility. By identifying and undermining the “flaunting” myth, the brief directed attention away from Weaver and toward the homophobia underlying the case. The strategy worked. Judge Jenkins saw Weaver as real person and understood her experience as a sexual minority.

2. Separating Sex and Identity

Weaver’s attorneys faced another educational hurdle triggered by Weaver’s role as a girl’s sports coach. The context of Weaver’s firing as coach suggests that locker room paranoia played a role in the school’s decision.182 The idea, familiar in the gays in the military context,183 is that somehow Weaver would be unable to control herself sexually around female volleyball players.184 This fear is based on the conflation of sexual acts with identity,185 and the homophobic myth that gays and lesbians are nothing more than sexual beings.186

Weaver’s brief addressed this fear directly:

and is 'presumptively invalid.'"
(citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992)).
180. Id. at 1290.
181. Id. at 1285.
182. While never mentioned specifically, the District may have had "locker room paranoia" based on the misperception that heterosexuals are not "safe" if left alone with lesbians and gay men. See e.g., PHARR, supra note 9, at 32 ("many heterosexual women believe that lesbians will pursue them sexually against their will just as men will"); Rhonda R. Rivera, Lawyers, Clients, and AIDS: Some Notes from the Trenches, 49 OHIO ST. L.J. 883, 896 (1989) (describing the parents of a lesbian who suggested that her lover would molest their daughter if left alone with her).
183. General Powell stated before the Senate during the 1993 gays in the military debate:
[I]t is very difficult in a military setting, where you don't get a choice of association, where you don’t get a choice of where you live, to introduce a group of individuals who are proud, brave, loyal, good Americans, but who favor a homosexual life style, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers. I think that it is a very difficult problem to give the military. I think it would be prejudicial to good order and discipline to try to integrate that in the current military structure.
184. See generally Herek, supra note 24 (discussing gays and lesbians as child molesters).
185. See generally supra note 70, (discussing conflation of sex and identity); supra note 36 (discussing taboo of gay sexuality); see also Brief for Petitioner Michael H. Bowers at 36-38, supra note 95.
186. See e.g., SASHA G. LEWIS, SUNDAY’S WOMEN: A REPORT ON LESBIAN LIFE TODAY 10 (1979) (describing the view of lesbians as predominately sexual lustful beings overwhelmed by lust for other women); Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317, 1320-21 (5th Cir. 1984) (stating that university argued that proposed gay student support group was likely to "incite, promote, and result" in homosexual activity); Id. at 1323 (describing how an "expert" testified that "it would be a shock really, if there were not homosexual acts engaged in at or immediately after" a gay student group meeting.).
It was not because she had lost her flair for volleyball, or had too many losing seasons, that Ms. Weaver lost her position as coach. It was not because she had punished players, or led the team in prayer sessions, or joked with team members about her sex life. She had done none of these things. She was denied the position because the school thought the local community would not want a lesbian coaching the team.\textsuperscript{187}

Indeed, the brief quoted a deposition of the school’s principal in which he admitted that “the reason we had a sense [of community discomfort] was because the relationship between coach and players on a team is a much closer relationship than the relationship between a teacher and students in a class.”\textsuperscript{188} Weaver’s attorneys turned this myth against the school, arguing that such stereotyping was constitutionally impermissible.

Judge Jenkins refused to hear the school’s coded argument. The “perceived negative reaction [in the community],” the Judge concluded, “arose solely from Ms. Weaver’s sexual orientation, and not from her abilities as coach. [Thus], it does not furnish a rational job-related basis for the defendants’ decision.”\textsuperscript{189} The Weaver court recognized Weaver the Coach as a separable person from Weaver the Sexual Being.\textsuperscript{190}

Weaver’s attorneys drew attention to this distinction, consistently separating Weaver’s sexuality or “private life” from her identity and work as a coach and teacher.\textsuperscript{191} Educating the court on the unique gay experience of coming out, the brief described the “decision—always highly personal and oftentimes extremely difficult—[as] nothing less than a decision about defining one’s most intimate personal identity.”\textsuperscript{192} “Whatever decision a gay person makes about telling her family and friends, or not telling them, or waiting to tell them, will affect her relationships for years to come. With that decision,” wrote her attorneys, “she defines who she is within her closest personal community.”\textsuperscript{193} In so doing, the brief not only appealed to the Judge’s empathy, but educated the court on the reality of gay identity in a homophobic society.

The brief appealed to the importance of living openly to human well-
being. “Surely Ms. Weaver enjoys a legitimate expectation that in her personal
drop, she can decide how and with whom she might communicate her sexual
orientation, free from interference from the state.”194 Again, Judge Jenkins
heard the argument, concluding that Weaver had an interest “in
acknowledging her sexual orientation and living her life openly as a
lesbian.”195

Throughout the text, the judge’s opinion refers to Weaver in respectful
terms, and reflects an understanding of lesbian life outside the bedroom.196
Hypothesizing on the gag order’s limitless restrictions, Judge Jenkins worried
that Weaver would be barred from discussing her sexuality “when meeting a
parent of a student in the supermarket,” “speaking at dinner with a friend who
may be a staff member at the school,” or “even when speaking with her own
children, who are students in the School District.”197 Moreover, Weaver could
be in violation if she were “spotted by some student, parent, or staff member
while walking hand-in-hand with another in the seclusion of her own yard.”198

As gays and lesbians, we are well aware that we shop in supermarkets,
have dinner with friends, have children, and (some of us) have yards. But
these are still shocking and insightful revelations in a court decision. To read
many judicial opinions, we are too busy fornicating to find time for
supermarket chit chat. This telling illustration of gay life in Weaver is a
testament to the capacity of courts to recognize our lives. That discussion of
dinner parties could leave us so excited, demonstrates how starved we are for
victories with depth.

If the district court’s opinion had merely rejected the heterosexist
assumptions underlying the school district’s argument, Weaver would have
been hailed as a smashing success. But the opinion went even further,
recognizing the context of homophobia and the false assumptions underlying
the discrimination. Thus Weaver is a profound victory. In its genuine
understanding of gay and lesbian experience, Weaver demonstrates that
judicial understanding is possible. Significant credit must be given to the
forthright advocacy approach taken by Weaver’s attorneys. Their approach
exemplifies the litigation and activist results possible when education and
visibility take center stage. By recognizing homophobia and educating the
court on the realities of gay and lesbian life, Wendy Weaver was transformed
from a woman to be scorned and silenced to a sympathetic coach and teacher
whose dignity must be restored.

194. Id. at 21.
195. Weaver at 1285.
196. Judge Jenkins’ terminology included: “status as a lesbian,” id. at 1290, “one’s identity as
homosexual,” id. at 1284, and “gay males and lesbians,” id. at 1287.
197. 29 F. Supp. 2d at 1285-86.
198. Id. at 1286.
V. CONCLUSION – COMING OUT IN THE COURTROOM

The truth is that in order to change homosexual status, we must be forthright and open about what it means to be and live as homosexuals. Nothing will change as long as we pretend to be people we are not.

-- Urvashi Vaid, *Virtual Equality*199

The idea that we win when courts understand gay and lesbian lives and the context of homophobia should not come as a surprise. The concept mirrors the powerful transformation many lesbians and gay men experience when coming out. When gays are visible, we garner more support. It makes sense that, like anybody else, a judge is more likely to rule in our favor if she understands our experience.

As evidenced by decisions like *Romer* and *Weaver*, many courts are already addressing the harm of homophobia, albeit with varying degrees of candor. By bringing gay and lesbian experiences into the courtroom, we ask the court to address and remedy the unique homophobia we face. Thus, as a matter of principal, and strategy, gay rights advocates must expect judicial understanding from the court.

Such understanding requires an advocacy style that addresses homophobia and illuminates gay and lesbian lives. If courts are to affirm our rights, it will be imperative that judges and juries understand the similarities and differences between the gay and straight communities. By acknowledging the gayness of gay rights litigation while appealing to judicial empathy, advocates will make the evasive decisionmaking of *Bowers v. Hardwick*, and even *Romer v. Evans*, difficult to justify. Ultimately, such strategic use of our outsider voices will bridge the gap to judicial understanding. We may find, like the Lesbian Avengers in rural Idaho, that our visibility has the power to change hearts and minds. Perhaps some day we will discover that the mythic *Romer* opinion of Part I, is not as far off as we imagine.