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William N. Eskridge, Jr.*

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INTRODUCTION

The homosexual in 1961 was smothered by law. He or she risked arrest and possible police brutalization for dancing with someone of the same sex, cross-dressing, propositioning another adult homosexual, possessing a homophile publication, writing about homosexuality without disapproval, displaying pictures of two people of the same sex in intimate positions, operating a lesbian or gay bar, or actually having sex with another adult homosexual. Arrest meant more than a fine and an overnight stay in jail. Misdemeanor arrests for sex-related vagrancy or disorderly conduct offenses meant that the homosexual might have his or her name published in the local newspaper, would probably lose his or her job, and in several states would have to register as a sex offender (assuming conviction). In some states, the convicted homosexual lost his or her driver’s license. If the homosexual was not a citizen, he or she would likely be deported. If the homosexual were a professional—a teacher, lawyer, doctor, mortician, beautician—he or she would likely lose the certification needed to practice that profession. Having oral or anal intercourse with someone of the same sex was the worst thing a homosexual could do in America circa 1961. Consensual homosexual intercourse was a serious crime in all the states, and a felony in all but one; several states imposed life sentences. A felony conviction (and in some states merely being charged) subjected the homosexual to special psychiatric evaluation as a potential “sexual psychopath.” If found to be such a creature, the homosexual was incarcerated indefinitely in a mental institution which, for many inmates, was a horror chamber of electro-shock and mental torture, and for some, a life sentence. If the charged homosexual was a member of the armed forces, he or she might be court martialed and would likely be dishonorably discharged, thereby losing all veterans’ benefits, however distinguished his or her service record.

Fear of social and familial ostracism kept most homosexuals in the closet. The law sealed that closet shut for most gays and lesbians, while at the same time, outing others in state-sponsored witchhunts. It is those who were outing who transformed both the law and the homosexual existence, and that transformation began in earnest during 1961.


2. I choose 1961 as a pivotal date because it marked a generational transition away from the traditionalism of the Eisenhower Administration, the due process jurisprudence of Felix Frankfurter, and the apologists of the Mattachine Society and Daughters of Bilitis. In 1961, John Kennedy opened a New Frontier in American politics, the Warren Court began shifting decisively toward the
The year 1961 was homosignificant on both coasts. In November, Dr. Franklin Kameny and a handful of others founded the Mattachine Society of Washington, D.C. ("MSW") as a more aggressive minority rights group. Whereas the West Coast homophile groups from the 1950s sought to persuade straight society to tolerate homosexuals who would occupy a mutually protective closet, MSW insisted upon equal rights for the "homosexual minority." The stated goals of the group were: to "secure for homosexuals the basic rights and liberties established by the word and spirit of the Constitution of the United States"; ";[t]o equalize the status and position of the homosexual with those of the heterosexual by achieving equality under law, equality of opportunity, equality in the society of his fellow men, and by eliminating adverse prejudice, both private and official"; and ";[t]o secure for the homosexual the right, as a human being, to develop and achieve his full potential and dignity, and the right, as a citizen, to make his maximum contribution to the society in which he lives." This statement of purpose represented an intellectual turning point in the history of the closet: homosexuals insisted upon equality as uncloseted citizens, not liberty engendered by a protective closet.

The main practical agenda of MSW was to confront harassment of homosexuals by the federal and district governments. At the August 1961 organizational meeting for MSW, Kameny was alerted that one of the sixteen men present was Lieutenant Louis Fochet of the District of Columbia Morals Squad. Kameny announced, "I understand that there is a member of the Metropolitan Police Department here. Could he please identify himself and tell us why he's here?" Thus outed by an out-of-the-closet homosexual, Fochet skulked out. Kameny and MSW followed the same unashamed approach in dealings with all branches of govern-
ment, including the White House and the Selective Service, both of which were on MSW's mailing list. This more aggressive spirit was also taking charge of New York's Mattachine Society ("New York Mattachine"), whose leadership changed hands from the old to the new guard in 1965, when Dick Leitsch was elected president of the group.7

If 1961 was significant in the East for the formation of MSW, it was significant in the West for the candidacy of José Sarria, the beloved waiter at the Black Cat bar, for city supervisor of San Francisco. In the midst of a citywide police crackdown on gay cruising and bars, Sarria persuaded hundreds of "very bold queens" to sign his petition and ran as an openly gay man, thereby offering thousands of men and women some public affirmation of their worth. His candidacy also galvanized the newly formed League for Civil Education to publish a newsletter, the LCE News, which was circulated in gay bars, and by 1962 reached a circulation of 7,000 copies (1,000 more people than voted for Sarria). Sarria was the spark that lit a small organizational brushfire, as the owners and employees of the city's gay bars organized the Tavern Guild in 1962; William Plath, William Beardemphl, and associates organized the Society for Individual Rights ("SIR") in September 1964.8

SIR affirmed "the worth of the homosexual and . . . the principle that the individual has the right to his own sexual orientation so long as the practice of the belief does not interfere with the rights of others."9 Like MSW in Washington, D.C., SIR in San Francisco insisted upon equal rights and not just an apartheid of the closet. Also like MSW and New York Mattachine in the mid-1960s, SIR was active in informing its members of their legal rights and in pressing for legal reform through lobbying and lawsuits seeking an end to state-imposed penalties. Unlike MSW and previous homophile organizations, however, SIR reached out to the larger gay community, including people who frequented gay bars. It organized social events, bridge clubs, bowling leagues, and opened a gay community center in 1966; SIR cooperated rather than competed with the Tavern Guild and the Council on Religion and the Homosexual, which had also been founded in 1964. As a result, SIR saw its member-

6. See D'EMILIO, supra note 3, at 154.
7. See id. at 165-68, 206.
8. See id. at 187-90.

"There should be an end to dismissals from our jobs; an end to police harassment, and the interference of the state with the sanctity of the individual within his home. To assure that these reprisals cease, we believe in the necessity of a political mantel guaranteeing to the homosexual the rights so easily granted to others."

Id.
ship grow from 250 in 1964 to almost 1,000 by 1967, making it the largest homophile organization in the country.\(^\text{10}\)

Homophile, or gay rights, organizations were blossoming like wildflowers in Tuscany by the end of the 1960s, and their growth was marked by the formation of an Eastern Conference of Homophile Organizations in 1963, a North American Conference of Homophile Organizations ("NACHO") in 1966, and a Western Regional Planning Conference of Homophile Organizations in 1967. The new wave of homophile leaders dominated the regional conferences of these groups. Kameny told the NACHO convention of February 1966 that ""all the problems of the homosexual,"" like those of racial minorities, were ""questions of prejudice and discrimination.""

At the August convention, Dick Leitsch, the new president of New York Mattachine, urged homophile organizations to be rights-insistent. ""We must demand the right to cruise, the right to work, the right to public accommodations, and the other rights the homosexual lacks."" Two years later, the NACHO conference endorsed ""Gay Is Good"" as the slogan of the homophile movement.\(^\text{13}\)

By the late 1960s, the heat was on. It boiled over the night of June 27-28, 1969, when the New York City police raided a Greenwich Village gay bar, the Stonewall Inn.\(^\text{14}\) Rather than going along with the raid, the gay people fought back. They surrounded the paddywagon and pelted the police with beer cans, bottles, and coins; the officers were forced back into the bar, which caught fire. When reinforcements arrived, the burgeoning crowd refused to disperse. Mild rioting recurred the next night, and some the next as well.\(^\text{15}\) Among those visiting the Stonewall after the initial riot was poet Allen Ginsberg, who remarked: ""You know, the guys there were so beautiful... [t]hey’ve lost that wounded look that fags all had ten years ago.""\(^\text{16}\)

Literally overnight, the Stonewall riots transformed the homophile reform movement of several dozen brave homosexuals, into a gay liberation movement populated by thousands of lesbians, gay men, and

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10. See D’EMILIO, supra note 3, at 190-91, 193.
11. Id. at 198.
12. Id.
15. See DUBERMAN, supra note 14, at 205-08.
biphilians who came out of the closet and formed hundreds of organizations—first the Gay Liberation Front (“GLF”) and the Radicalesbians; then the Gay Activists Alliance (“GAA”) in various cities and universities; then the National Gay Task Force, the Lambda Legal Defense and Education Fund, Inc., and other national groups dedicated to pressing for gay-friendly changes in the law.17 “Gay Is Good” reverberated with new, radical meaning in manifestos and books calling for sexual liberty and gender equality, and for the end of institutions thwarting those goals: sodomy and public indecency laws, vice squads and decoy cops, marriage and the two-parent family, obscenity laws, and antigay exclusions from state and federal employment, immigration and citizenship, and the armed forces. The 1970s roiled with legal disputes as gay people insisted that the law change to reflect gay liberation.

Openly gay people did transform the law, not in a burst of energy after Stonewall, but over a half generation (1961 to 1981) of which Stonewall was a midpoint and a focal point. Antihomosexual rules and laws were not abolished during this period, and in fact they actually increased in number. But their enforcement was blunted, and they were joined by rules and statutes that offered affirmative state protection for gay people.

Gay liberation was not a simple phenomenon but involved three interrelated struggles, all of which challenged the philosophy of the closet. The term “coming out” originally meant one’s first sexual experience with someone of his or her own sex,18 and rejection of the closet began with intimate sexual expression. Conservatives in the 1950s and 1960s considered homosexual conduct criminal, and even most liberals thought homosexual intimacy weird and unhealthy even if tolerable for pragmatic reasons. An increasing number of gay people rejected these assumptions and asserted that they could live sexually fulfilled and integrated lives, so long as they were left alone by nosy state agents. Gay liberation’s initial struggle, therefore, was to ensure opportunities for homosexual intimacy, which could be accomplished by protecting private gay spaces (Part I). These private spaces included the home, the automobile, and, for many gay men, the enclosed toilet stall and sex club booth as well.

After World War II, lesbians and gay men flocked to distinctive subcultures in the big cities (New York, Los Angeles, San Francisco,

17. See id. at 233.
In the 1950s, some gay people used the term “coming out” in its most old-fashioned sense, as an introduction of the gay person to those gay subcultures. Middle-class society was appalled by the subcultures and sought to suppress them. Agents of suppression included the local police and the FBI, liquor control boards and their spies, state and federal censors (including postal inspectors and customs agents), and university administrators. Where gay people sought connection and affirmation with others of their preference, mainstream society just saw a conspiracy of sickos and criminals. A second struggle, therefore, was for gay people to create their own nomos (normative community), which required asserting control over the territory of gay subculture: gay bars and restaurants, social and educational organizations, literature and erotica, movies and radio programs (Part II).

A third struggle, for full gay citizenship, was not really feasible until progress was made in the earlier two struggles. Only after a normal degree of privacy and association was assured for gay people could many of them even aspire to equal treatment as immigrants and citizenship applicants, public and private employees, soldiers, couples, and even parents. It was not until the 1960s that many gay people started to deploy the term “coming out” to denote expression of homosexuality to outsiders. Only after the Stonewall riots in 1969 did large numbers publicly self-identify as gay: they claimed space in public culture (Part III). That claim triggered the most resistance. Even after Stonewall, the government remained committed to a tolerant closet, where gay people would be safe from persecution so long as they were publicly silent about themselves. (“Don’t ask, don’t tell.”) By the 1970s, however, silence was impossible, and the demands of screaming queers were grating as well as unacceptable to mainstream America. Indeed, arguments for homosexual equality helped reenergize traditionalist politics in America. Traditionalists were most successful when they could credibly claim that equality for gay people threatened third parties—children and homophobic coworkers—with harm or was institutionally disruptive.

Law was critical to all three struggles for gay liberation, and lawyers—especially those associated with the American Civil Liberties Union (“ACLU”)—played key roles in those struggles. Legal rights that had been articulated in connection with women’s struggles for gender equality and, especially, African Americans’ struggles against apartheid, were at every point focal for gay rights advocates: the right to privacy (due process and the Fourth Amendment) was the rallying call for protecting private gay spaces; rights of association, speech, and press (the First Amendment) protected the territory of gay subculture; and equality...
rights (due process, then equal protection) pressed the agenda of full gay citizenship. Law was in one sense more important for ending the apartheid of the closet than it had been for ending racial apartheid, because the gay ghetto was harder to organize than the black one. Gays had the personal luxury, and the political disability, of being able to pass for straight, and most did. Lawyers and near lawyers, therefore, became not only the intermediaries of gay liberation to legal authorities, but representatives of all gay people to a society that still wished they would be unseen but not heard. In the 1960s most lawyers representing gay people were nongays associated with the ACLU, including Morris and Juliet Lowenthal in California, Norman Dorsen in New York, and Monroe Freedman in Washington, D.C. (Openly gay Frank Kameny was not a lawyer but did yeoman legal work in the same period.) In the 1970s, gay people would come to represent themselves increasingly.

At the end of the period covered in this account, 1981, the lesbian, bisexual, and gay man were still surrounded by law but no longer smothered by it. Gay people living in urban centers were unlikely to be arrested for dancing with or kissing someone of the same sex, cross-dressing in public, possessing a homophile publication, writing about homosexuality, displaying pictures of two adults of the same sex in intimate positions, operating a lesbian or gay bar, or having sex in private with another consenting adult. In most states, they could still be arrested for public solicitation if the object were an undercover cop, selling or possessing “hard core” pornography, having sex with a minor, loitering or having oral sex in a public rest room, or being disorderly or vagrant or lewd in public, whatever those terms meant. Except for offenses going to lack of consent, such as forcible sodomy and sex with a minor, the penalties were light and no longer included registration or incarceration in mental institutions. The police were much less likely to victimize gay people in 1981, but private violence was on the upswing, with sporadic police response. State and federal employers were not likely to fire a person for being gay in 1981, although private employers remained prone to do so. Many cities and a few states assured the lesbian, gay man, and bisexual protection against losing a job and being excluded from housing or public accommodations on the basis of sexual orientation. No state, however, assured same-sex couples the right to marry, and few treated lesbian parents with respect when they sought custody or visitation of their children from different-sex marriages.

As this summary suggests, changes in the law made a big difference in gay lives and some difference in American history. Decriminalization of most homosexual conduct shifted the balance of power between gay people and the state. Where homosexuals had been at the mercy of
pitiless police in the 1950s, gay people were often entitled to police protection by the 1980s. Protections against police and workplace harassment meant that more people felt comfortable being openly gay, and the more openly gay people there were the more space there was for a normalizing gay presence in movies, on the radio, at universities and even high schools, in politics and government, and so forth. The partial collapse of state censorship and the increasing demand for homosexual outlets directly contributed to an explosion and diversification of gay community centers, bars, baths, bookstores, erotica, literature, newspapers, and discourse. The love that dare not speak its name in the 1950s became a love that would not shut up in the 1980s, saturating American culture with homophile ideas such as the positive values of sex, consent as the dividing line between good and bad sex, equality of the sexes and deconstruction of gender, and benign sexual variation.

The most interesting features in my account are law's ambiguities, which need to be emphasized at the beginning. One important theme is the limits of legal change. Legal tolerance did not require, or even much contribute to, social tolerance in the medium term. Gay people remained alien to most Americans, and even the dramatic legal changes described above applied only in the major urban centers: New York; Boston; Philadelphia; Washington, D.C.; Atlanta; Miami; Dallas; Houston; Chicago; St. Louis; Denver; Seattle; San Francisco; Los Angeles; and San Diego. In the suburbs and rural areas, even of states having large urban populations (Georgia, Texas, Florida), homosexuals remained in the closet, almost as firmly as in the 1950s. Even in the big cities, the opening of the closet door was only partial, and perhaps even temporary. Gay rights made headway where the state was already wasting its time and resources rooting out perversion, and where deregulation was invisible to heterosexual society. But wherever gay presence threatened straight society, there was a backlash, a countermovement to limit or retract gay rights.

Thus the most important gay initiatives, equality in family recognition and in the private workplace, were substantially rebuffed during this period. Antihomosexual forces were not only able to prevent or roll back gay initiatives, but in a few areas ended up strengthening

19. Note that most of these cities in the 1970s and thereafter became increasingly gay, drug-ridden, and pauperized. The flight of the white middle class from the big cities presented opportunities for gay gentrification but also may have trapped gay subcultures in decomposing urban spaces.
antigay rules by modernizing their defenses. Same-sex marriage was a more distant goal in 1981 than it had been in 1961, and military service by lesbians and gay men was harder as well. The military cases are particularly noteworthy, for the defense of a gay exclusion shifted from the ridiculously circular (the possibility of blackmail) or daffily unscientific (gay people are mentally ill and unstable) rationales to stronger pragmatic rationales: closets are cramped in the armed forces and gay presence there unsettles heterosexuals and undermines morale and unit cohesion. In most areas, however, even a modernized rationale did not hold the line. State exclusions of gay men, bisexuals, and lesbians from teaching had previously been grounded in stereotypes of the homosexual as predatory on young children. States sought to perpetuate the exclusion by reference to more modern rationales such as the danger that openly gay teachers would signal state “approval” of homosexuality, contrary to the desires of most parents. Although this was a smarter rationale, states continued to lose ground in this area, and an increasing number of gay people popped up in the classroom. The same was true of police forces, where unit cohesion and officer disgust—the same arguments that would protect the military exclusion—failed to head off policies opening up police forces to gay officers.

For me, the most salient limitation of the law was its gendered agenda. Gaylegal goals little reflected the interests or perspectives of lesbians, not to mention gays of color or in poverty. The big changes in the law allowed middle class gay men more opportunities for cruising and casual sex, consumption of pornography and other products of the sex industry, and job advancement without the bother of a sham marriage or other techniques of passing for straight. These issues were of marginal importance for lesbians, however. Their lives were much more affected by private violence, child custody determinations, sexual harassment, gender discrimination, and workplace segregation by sex, all of which were foci of the feminist movement and substantially ignored by the gay liberation movement until the late 1970s. Some items flagged by the emergent gayocracy—especially marriage and pornography—were issues to which many lesbians were deeply ambivalent or opposed. Although the gaylegal agenda itself was changing in 1981, it was male-centered and sometimes misogynistic during most of this period.

20. Compare Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996), which makes this "displaced rhetoric" argument for wife beating.

Simply put, the gay male agenda was sexual liberty, while the lesbian agenda was gender equality. The sexual liberty agenda can be criticized not only from a feminist or lesbian feminist perspective. It can be, and was, criticized as more generally unhealthy. Gay subculture was the avant-garde in expanding the definition of sex, valorizing sex as spiritual and even intellectual expression, divorcing sex from procreation, commodifying sex, and creating numerous opportunities for people to have sex. Was their shift a good one, from unhealthy sex negativity toward a more positive view of sex? Or was it bad, from a balance between sexuality and commitment to a nation of sex addicts abusing their bodies? With the benefit of hindsight, it may have been both.

I. PROTECTING PRIVATE GAY SPACES: DUE PROCESS AND FOURTH AMENDMENT RIGHTS

The Due Process Clause of the Fourteenth Amendment is often taken to be the traditionalist anchor of the Constitution. As the Supreme Court stated in 1937, the Due Process Clause does not assure all procedural or substantive rights that seem fair to us today, but only those that violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The Warren Court of the 1960s, however, read the Due Process Clause in light of the general policy it embodied, that individual liberty should not be at the mercy of arbitrary state intrusion. Thus, the Court nationalized the criminal procedure protections in the Bill of Rights to apply to state police harassment of people of color and ethnic minorities. The Court created a substantive right of privacy to protect women’s reproductive freedom through contraception and abortion. The Court gave teeth to the doctrine that vague criminal laws were unenforceable, applying this to strike down vagrancy and other relics of the past that were used to control the lives and movement of poor people.

These Warren Court decisions, and the even more expansive decisions by the California Supreme Court, unsettled police practices and the criminal law. They shifted citizen-police bargaining power from

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22. See, for example, Andrew Holleran, Dancer from the Dance (1979), and Larry Kramer, Faggots (1979), two novels that unblinkingly and critically depicted the gay male subculture of sex, sex, and more sex.

unfettered police discretion, toward some regard for groups traditionally disenfranchised in American history, such as people of color (criminal procedure cases), women (privacy cases), and the poor (vagueness cases). Although these due process doctrines developed in response to the initiatives of other groups, homophile litigants appropriated these precedents to advance their agenda of protecting private gay spaces against police intrusion and harassment.

When successful, gay deployment of due process arguments rendered the principles of the cases even more destabilizing than they already appeared to traditionalist critics of the Warren Court. For example, the right to be free from unreasonable searches and seizures, extended to the states by the Court, was successfully invoked as a defense to police searches of closed toilet stalls by gay litigants, first in California, and later in other states, including southern states such as Florida and Texas. The right to privacy, snugly situated as an element of heterosexual marital intimacy, became an iconographic precedent for gay litigants challenging sodomy laws, other criminal penalties, restrictions on citizenship, civil services exclusions, and bar closings. There was nothing inherent in those precedents that required lower courts and legislatures to rescind antihomosexual measures, and the Warren and (especially) Burger Courts cut no breaks for gay litigants and typically went out of their way to oppose them. Their opinions bristled with antihomosexual rhetoric. The Justices would have been shocked that their decisions were being used to empower gay people. But, nonetheless, they did empower gay people by providing them with points of resistance to police authority.

Those points of resistance proved most important in combination with gay political campaigns for relief from police terror. During the period 1961-1981, gay rights discourse and lobbying persuaded most major cities to let up on police harassment of gay people. Enforcement of criminal laws in the big city states shifted from instances of consensual intercourse and solicitation to instances of homosexual prostitution, sex with minors, and pornography.24

The role of courts can easily be overestimated. Courts were more important protections at the retail level of arrest and detention than at the

24. By “urbanized states” I mean those of the East and West Coasts and the Midwest: New York, Pennsylvania, New Jersey, Washington, D.C., Massachusetts, perhaps Florida, California, Illinois, Ohio, and Michigan. I do not include any states in the South, except Florida, or the rural states of the West and Midwest. The old patterns of police enforcement (consensual intercourse and solicitation) persisted in the South and West during this period.
wholesale level of criminal law policy. Judges dismissed disorderly conduct, sodomy, and lewdness charges right and left for individual defendants but—with the notable exception of the California Supreme Court—were reluctant to nullify criminal laws used against gender benders and gay people. The right to privacy had virtually no bite for constitutional challenges to sodomy and lewdness statutes but proved a potent rallying point for gay political pushes to repeal sodomy laws, to realign prosecutorial policy away from consensual conduct between adults, and to defund police vice squads.

A. Due Process Incorporation of the Bill of Rights
(Criminal Procedure)

1. The Warren Court’s Nationalization of the Rights of Criminal Defendants

In the 1950s, the constitutional rights afforded criminal defendants varied among the states, because the criminal procedural assurances of the Bill of Rights had generally not been applied by the Supreme Court to the states. Also, those few rights theoretically available to defendants in state constitutions (which usually paralleled the Bill of Rights) were honored mainly in the breach, especially when defendants were African American, Latino, or homosexual. Homosexual defendants claimed, apparently with frequent justification, that they were enticed into law violation by decoy cops, spied on in private places, and tricked or subjected to the third degree for the purpose of extracting confessions.25

By 1970, the Supreme Court had nationalized the rights of criminal defendants, by “incorporating” most of the Bill of Rights into the Due Process Clause, which rendered them directly applicable to the states.26 Among the rights of criminal defendants that were so nationalized were the following:

- the right to be free from unreasonable searches and seizures (Fourth Amendment),27


26. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968). The Court held that the Sixth Amendment’s right to a jury trial for criminal defendants was of such importance that it “qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.” Id. at 156.

• the right not to incriminate oneself (Fifth Amendment), 28
• the right not to be tried twice for the same offense (Fifth Amendment); 29
• the right to a speedy and public trial (Sixth Amendment); 30
• the right to counsel, provided by the state if the defendant cannot afford one (Sixth Amendment); 31
• the right to confront one's accusers (Sixth Amendment); 32
• the right to a jury trial in criminal cases (Sixth Amendment); 33
• the right to be free of cruel and unusual punishment (Eighth Amendment); 34 and
• the right against excessive bail (Eighth Amendment). 35

Not only did the Warren Court nationalize these protections, but it also gave existing protections greater legal bite. For example, in Mapp v. Ohio, the Court expanded the application of the federal exclusionary rule to the states. Thereafter, violation of Fourth Amendment search and seizure standards meant that the evidence seized would be excluded, even if it established the defendant's guilt. 36 Moreover, the Court interpreted the Due Process Clause to prohibit police “entrapment” of defendants not otherwise disposed to commit crimes. 37

Homophile organizations were alert to every legal nuance and served to convey the latest legal developments to the aborning gay communities. As early as 1954, One, the earliest continuing homophile publication, published a one-page explication entitled Your Rights in Case of Arrest. 38 In 1964, MSW distributed to the gay community, as well as to the FBI, a similar instruction sheet on what to do “[i]f you are arrested.” 39 In 1965, SIR printed 20,000 copies of the Pocket Lawyer,

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39. See MATTACHINE SOC'Y OF WASH., D.C., IF YOU ARE ARRESTED (1964) (on file with the FBI, FOIA File HQ 100-403320, (Mattachine Society), § 6, Serial No. 117).
which were distributed by gay bars and homophile organizations. These instructions advised homosexuals that, if arrested or even questioned, they need not, and should not, cooperate with the police or say anything about homosexuality, the events leading to the arrest, or their employment and personal backgrounds. Furthermore, homosexual defendants were instructed to insist upon their right to contact a lawyer immediately and to follow his advice. The best defense homosexual defendants had against police harassment was knowledge of their rights.

2. Criminal Procedural Rights as Protections for Homosexual Defendants

Among the most important Supreme Court criminal procedure decisions were Escobedo and Miranda, which required the police to warn the accused that anything he said may be used against him and to inform the accused of his immediate right to counsel. These precedents were immediately applied to protect homosexual defendants. Oscar Maldonado and Joseph Holman were arrested for having oral sex with a young blond man in a public rest room in Los Angeles. The complaint against them was dismissed, then reinstated, and they were subsequently convicted, based upon the testimony of the police, Maldonado’s casual confession, and Holman’s silence in the face of that confession. (Maldonado had tried to explain to the police that the blond man had enticed him and "I couldn’t help [him]self so [he] went down on him." The defendants charged that they were victims of selective prosecution, as they were Latino and African American, respectively; the same magistrate who had reinstated the charges against them had dismissed charges against two white men for precisely the same conduct with the same blond man. The appeals court was unpersuaded by the race discrimination argument but reversed on the basis of Escobedo and the state’s failure to apprise the defendants of their right to be silent and to have counsel at the state’s expense. An attorney would not have allowed Maldonado to make such a casual statement to the police.

Individual rights were equally important when the police engaged in mass raids seeking to terrorize lesbian and gay communities. The Philadelphia police, in March 1968, arrested twelve customers at a lesbian bar and interrogated them with the usual third degree. The

43. Id. at 47.
44. See id. at 47, 48.
Daughters of Bilitis ("DOB") retained a lawyer who persuaded the district attorney to drop the charges because the interrogations obviously violated *Miranda*.

45 Alerted that lesbians were no longer easy arrests, the Philadelphia police directed their resources elsewhere. The most common defenses to police raids were violations of the Fourth Amendment warrant or reasonable cause requirements. After the Los Angeles vice squad raided the properties and confiscated the files of Jaguar Productions (producers of gay pornography) in January 1974, attorneys for the defendants complained that incriminating evidence gathered in the search exceeded the terms of the warrant that the police had obtained. The defendants not only won pretrial suppression motions that led to withdrawal of criminal charges but also sued the police department for $2 million under 42 U.S.C. § 1983, for violation of their Fourth Amendment rights.

46 These episodes demonstrate the dual effects of criminal procedural rights: they not only protect individual defendants *ex post* by reversing illegal convictions, but also protect all similarly situated defendants *ex ante* by raising the costs of police investigations or prosecutions generally, and by assuring future defendants of attorneys who put the state to its proof. Where the crime was victimless, as was the case for most charges against gay people, proof was typically shaky and often relied on illegal confessions, searches, and seizures. The search and seizure cases opened up another line of defense in these circumstances as well: the police were spying into private spaces where they had no right to look.

Early cases where homosexual defendants raised privacy-based Fourth Amendment arguments were litigated in California state courts. The leading case, *Bielicki v. Superior Court*,

47 involved an officer of the Long Beach Vice Squad who staked out the pay toilets of an amusement park and, through a pipe overlooking two closed toilet booths, espied Robert John Bielicki and another man engage in sodomy. Upon this evidence, Bielicki and his companion were arrested. The California Supreme Court, however, suppressed the officer's evidence on the ground that it was the fruit of an unreasonable search and seizure that violated the California and United States Constitutions. The court held that such spying invaded the "personal right of privacy of the person occupying the

45. See D'Emilio, supra note 3, at 200-01; Ladder, May-June 1968, at 22-23.
and represented an abusive police practice. By extending the protective closet to include water closets, the California Supreme Court was extending unprecedented legal rights to homosexual male cruisers. Lower courts in the state applied Bielicki conservatively, however, and the Ninth Circuit rejected its rule outright.

The U.S. Supreme Court confirmed Bielicki's understanding of the Fourth Amendment in 1967 with its decision in Katz v. United States. Overturning a conviction based on evidence obtained from an FBI listening device attached without a warrant to a public telephone booth, the Court held that private activity, even in an area accessible to the public, is constitutionally protected against warrantless searches. As Justice Harlan's concurring opinion explained, "an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy" that cannot be invaded without a warrant. After Katz ratified Bielicki's analytical framework, states as diverse as Maryland, Michigan, Minnesota, and Texas adopted the Bielicki holding that closed toilet stalls are a zone of privacy which the police cannot invade without a proper warrant.

The lower courts in California declined to extend Bielicki to exclude police observations of oral copulation when the toilet stalls had no doors and, therefore, were open to public view. Gay defendants resisted this

48. Id. at 292. "Authority of police officers to spy on occupants of toilet booths—whether in an amusement park or a private home—will not be sustained on the theory that if they watch enough people long enough some malum prohibitum acts will eventually be discovered." Id.

49. See Maldonado, 50 Cal. Rptr. at 46, 47 (allowing police to spy into a rest room area unscreened from public view, but overturning the conviction because of an illegally obtained confession); People v. Norton, 25 Cal. Rptr. 676, 678 (Dist. Ct. App. 1962) (finding that Bielicki was inapplicable when a toilet stall had no door).

50. See Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).


52. See id. at 351-52, 359.

53. Id. at 360-61 (Harlan, J., concurring) (citations omitted). The lucid concurring opinion has arguably been more influential than the muddier opinion for the Court.


55. See, e.g., People v. Crafts, 91 Cal. Rptr. 563 (Ct. App. 1970); People v. Norton, 25 Cal. Rptr. 676 (Dist. Ct. App. 1962). Compare Britt v. Superior Court, 374 P.2d 817 (Cal. 1962), which involved a toilet stall having walls and a door that did not extend down to the floor. Although acknowledging the fact that "the act committed . . . might possibly have been visible" to anyone entering the common use area of the rest room, the court noted that the officer "was not so stationed and the subject evidence [of oral copulation] was not so obtained," and held that this rendered the evidence inadmissible. Id. at 819. Crafts sidestepped the analysis of Britt, stating that the California
interpretation and, represented by ACLU attorneys, obtained a favorable decision from the California Supreme Court in *People v. Triggs*.

The court held that "[m]ost persons using public rest rooms have no reason to suspect that a hidden agent of the state will observe them. The expectation of privacy a person has when he enters a rest room is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door." Other states did not follow California in this regard, but *Triggs* contributed to the decline of toilet spying by the police in California.

By the 1980s, *Katz* protections were sometimes applied to various forms of electronic surveillance that were available for rest room spying by police. Some courts expanded upon *Bielicki* by excluding evidence obtained by police spying on men in parked cars and in booths at adult theaters. One of the leading adult bookstore cases was *Leibman v. State*. Defendants Leibman and Bloomer entered adjoining booths of an adult theater in Dallas. Officers Przywara and Thomas, both in the Dallas Vice Squad, witnessed oral sex by Leibman on Bloomer’s penis, inserted into a “glory hole” which connected their two booths. The officers were able to witness this violation only by assisting one another, through hand-holds, to peer over the walls of the booths. The Texas Court of Criminal Appeals found that the enclosed booths were spaces in which Leibman and Bloomer had reasonable expectations of privacy.

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Supreme Court had retreated from its prior position and acquiesced to subsequent court of appeals decisions. *See Crafts*, 91 Cal. Rptr. at 564.


57. *Id.* at 236. In holding that patrons have a reasonable expectation of privacy, Chief Justice Donald Wright’s opinion also relied on a 1970 law making it a misdemeanor to place a two-way observation mirror in public rest rooms. *See id.* at 238 (citing CAL. PENAL CODE § 653n (West 1988) (effective April 1, 1970)); *see also* People v. Metcalf, 98 Cal. Rptr. 925, 926-27 (App. 1971) (relying on section 653n as a basis for applying a *Bielicki* evidentiary exclusion to observations of open-stall oral copulation). When police arrested 40 men on charges of lewd bathroom behavior observed illegally, not only did defendants invoke *Bielecki-Triggs* rights, but gay activists publicly criticized abusive police practices and called for a criminal investigation of the department store which allowed the illegal observation. *See San Diego Tearoom Busts Leave Ugly Wounds*, ADVOCATE, Oct. 23, 1974, at 6.


under *Katz*. Even though the booths were “public spaces” under the state’s public lewdness law, the officers’ surveillance was the search of a private space under the Fourth Amendment. The court held that the search of Bloomer’s booth was constitutionally unreasonable, and evidence against him was suppressed, because it was “nothing more than a calculated invasion of privacy which has little relationship to protecting the average law-abiding citizen.” But once the officers saw Bloomer flush against his booth, the court held that there was a reasonable basis for believing a crime was being committed in Leibman’s adjoining booth. Hence, Leibman’s privacy was justifiably invaded, and his conviction upheld.

*Leibman* suggests this bizarre image: just as the Dallas police were looking over the booths to spy on and monitor Leibman and Bloomer’s moment of sexual contact, so the Texas courts were looking over the heads of Officers Przywara and Thomas to spy on and monitor the police department’s moment of official voyeurism. The Fourth Amendment privacy cases are about which spaces are free game for police monitoring. Even occasional judicial intervention, as in states like Texas, had some retarding effect on law enforcement against consensual homosexual activities, one would think. As the next section suggests, though, the matter is somewhat more complicated.

3. Criminal Procedural Rights and Gay Power

In the 1950s, the police ran roughshod over homosexuals and their groups, with little fear of political repercussions. This was not the case in the larger metropolitan areas after the 1960s. The major reason was that lesbians and gays organized and fought back politically, insisting that they be treated decently. But gay political presence often triggered a backlash among the police and local political leaders, who increased the persecution. When that happened, constitutional rights not only saved many defendants from long prison sentences, but rights discourse gave lesbian and gay people arguments around which they could rally and which might be persuasive to neutral observers. In cities as divergent as Chicago, Denver, Los Angeles, Miami, New York, San Francisco, and Washington, D.C., homophile groups and their lawyers (usually affiliated with the ACLU) took their rights-based arguments to police chiefs, prosecutors, mayors, and councils and slowly achieved a new balance of power between police and gay people. Consider the most prominent examples.

62. *Leibman*, 652 S.W.2d at 949.
During the 1950s and 1960s, San Francisco was both a gay mecca and a gay hell. The thriving gay and lesbian subculture provoked repeated official bashing in the form of police raids on gay clubs, massive entrapment squads, and constant pressure to close gay bars. The era of constant harassment was sharply punctuated with the following event: a vicious police raid on a benefit ball hosted by San Francisco’s Committee on Religion and the Homosexual (“CRH”) on New Year’s Day, 1965. Although the event had been cleared with San Francisco officials, the police showed up and demanded entry into the hall. Lawyers for CRH refused them admission, because the event was private under Bielicki, and police had no warrant or probable cause to believe a crime was being committed. The police took the lawyers into custody, entered the hall to great fuss, and arrested two men for lewd behavior. The organizers were able to orchestrate substantial publicity and public outrage, in part because the police had wantonly disregarded privacy rights recognized by the California Supreme Court and in part because some of the victims of police brutality were respectable straight people, including religious leaders. The ministers and other members of the coalition denounced the police behavior the next day at a press conference that commanded headlines from all the San Francisco newspapers. “‘That was when we got newspapers, TV, and radio on our side,’” stated Harold Call, a homophile leader who suffered under years of antigay alarmism by the city’s newspapers. The firestorm of protest cowed police harassment of gay people for several years and impelled it to assign a staff person as full-time liaison with the homosexual community. The community, in turn, formed a “Citizens Alert” answering service where people could report police misbehavior.

Public outrage was soon forgotten, though, and permanent reductions in police terror awaited solid displays of gay political power. Arrests of gay people for “perversion” (oral sex, usually consensual) soared again in 1970-71 under Mayor Joseph Alioto. Gays protested this resurgence, but their voices were not seriously attended to until after 1971, when their votes decisively contributed to the election of progay Sheriff Richard Hongisto. Almost immediately, arrests and police

63. Accounts of this event can be found in SUSAN STRYKER & JIM VAN BUSKIRK, GAY BY THE BAY: A HISTORY OF QUEER CULTURE IN THE SAN FRANCISCO BAY AREA 41-42 (1996), and EDWARD ALWOOD, STRAIGHT NEWS: GAYS, LESBIANS, AND THE NEWS MEDIA 40 (1996).
harassment fell off. Although police continued some decoy and spying operations, virtually all the arrests in 1972 were for public sex and, even more prominently, commercial sex. After the early 1970s, police harassment of gay people in San Francisco was sporadic, and when harassment occurred it was often swiftly and severely punished by the authorities. By 1981, San Francisco was actively recruiting gay people to serve as police officers and vigorously prosecuted gay-bashing incidents by straight youths.

The Stonewall riots illustrate the equally uneven progress made in New York City. Like San Francisco, New York’s large gay community was constantly harassed by the police, censors, and liquor licensing agents during the 1950s and 1960s. The police were unremittingly hostile to homosexuals during the administration of Mayor Robert Wagner (1954-1966), and it is believed that gay people strongly supported the insurgent candidacy of Republican John Lindsay (Mayor, 1966-1974). The Lindsay administration got off to a bad start when the new mayor announced a campaign to rid Times Square of undesirable elements, including people the homophobic New York Times referred to as “promenading perverts.” The Mattachine Society, as well as the ACLU, publicly protested the crackdown, asserting that the Lindsay police were illegally entrapping gay people through decoy cops and interrogating them without informing them of their rights. After conferring with the mayor, Police Commissioner Howard Leary announced that the police would thereafter avoid entrapment and respect the rights of homosexual defendants. Arrests fell off markedly. Although the police continued to raid gay bars, Commissioner Leary reduced the number of officers assigned to such duty and concentrated on bars and private clubs allegedly run by organized crime.

In 1969, at the end of Lindsay’s first term in office, police harassment of gay people and their bars again increased. In February, a raid of the Continental Baths netted twenty-two arrests, but the magistrate

67. See S.F. Mental Unit Says Most ’72 Arrests for Public Sex, ADVOCATE, May 9, 1973, at 23.
69. See id. at 164-68.
70. See Clayton Knowles, Cleanup Mapped for Times Square, N.Y. TIMES, Feb. 23, 1966, at 41. For an example of the homophobia during this period at the Times, see ALWOOD, supra note 63, at 66-69 (recording the dismissal of critic Stanley Kaufmann as a result of a mildly gay-tolerant opinion piece).
71. See Rosen, supra note 68, at 168-70.
dismissed all charges as unsupported by legally admissible evidence.\textsuperscript{72} Tension between the police and gays came to a head in the June 1969 Stonewall riots. Although Stonewall was a defining moment in gay liberation, it did not discourage police gay-bashing. To the contrary, harassment escalated. In 1970, the police raided the Snake Pit and arrested 167 gay people; one of the frightened arrestees jumped from the second floor of the police stationhouse and was impaled on a spike-iron fence. In response, GLF conducted a death vigil for him as he lay dying in a hospital.\textsuperscript{73} Representative Ed Koch wrote to Commissioner Leary, accusing him of illegal arrests (the charges against virtually all of the Snake Pit defendants were dismissed) and harassment of gay people.\textsuperscript{74} Whitman Knapp, Chair of the Commission on Police Corruption, charged that antihomosexual laws were a leading cause of police corruption in New York.\textsuperscript{75} GLF protesters turned up the heat on the administration. Commissioner Leary resigned in September 1970.\textsuperscript{76}

Incidents of police brutality toward gay people and harassment of their organizations, notably DOB and GAA (the successor to GLF), continued into the 1970s.\textsuperscript{77} However, the scales shifted. Police beatings of gay people now triggered detailed documentation, press coverage, and often protests, followed by meetings with the mayor’s office, police officials, and the human rights office, whose first chair, Eleanor Holmes Norton, was publicly progay.\textsuperscript{78} For the first time, gay groups gained regular access to police chiefs and other officials, who proved increasingly responsive to gay demands for respecting their rights. After well-publicized police intrusion into a community meeting and indifference to

\textsuperscript{72} See Martin S. Weinberg & Colin J. Williams, Male Homosexuals: Their Problems and Adaptations, 33-34 (1974).
\textsuperscript{73} See Rosen, supra note 68, at 173.
\textsuperscript{75} See David Burnham, Knapp Says Laws Spur Police Graft: Lindsay Appointee Explains Objectives of Inquiry, N.Y. Times, June 7, 1970, § 1, at 65. This was a theme in other cities, most notably Chicago, where 19 police officers were convicted in 1973 of extorting payoff money from 53 bars, including 15 gay bars. See Police Official, 18 Other Cops Convicted in Chicago, Advocate, Nov. 7, 1973, at 5; see also St. Louis Police Scandal, Advocate, Apr. 21, 1976, at 12 (investigating kickback scheme associated with sodomy arrests). The Pennsylvania Crime Commission in 1974 charged that victimless crimes such as “homosexuality” fueled police corruption. See ‘Cut Corruption, Revise Sex Laws’, Advocate, May 8, 1974, at 7.
\textsuperscript{77} See Ruth Simpson, From the Closets to the Courts: The Lesbian Transition 122-29 (1976) (recounting police harassment of DOB).
\textsuperscript{78} Several vicious assaults on gay people, either by the police or with their acquiescence, are described in Rosen, supra note 68, at 178-81. In 1973, gay community leaders were engaged in regular discussions with the police commissioner, the mayor’s office, and the human rights office.
antigay violence during the summer of 1973, 300 demonstrators picketed the Chelsea police station. GAA leader Bruce Voeller procured police assurances that harassment would end.\textsuperscript{79}

By the end of the Lindsay administration, police harassment had abated. When Ed Koch became Mayor in 1978, one of his first acts was a directive prohibiting sexual orientation discrimination by all municipal agencies, including the police department.\textsuperscript{80} Thereafter, Police Commissioner Robert McGuire established an Office of Equal Employment Opportunity to investigate discrimination complaints within the department, including sexual orientation claims.\textsuperscript{81} The police union resisted these initiatives, but the force became more gay responsive as it gained openly gay officers. According to one account, "[b]y the end of the decade, serious police harassment of gay people had become uncommon in New York City. When it did occur the reaction was swift and strong."\textsuperscript{82}

Washington, D.C., the nation’s capital, had an even larger closeted gay community, many of whose members were federal employees frightened of losing their jobs. The District Police Department’s Morals Squad sent spies and decoy cops into cruising areas to harass gay men and to occasionally raid gay bars and bath houses. On the whole, its activities were highly uneven,\textsuperscript{83} varying according to neighborhood and congressional political pressure, as well as occasional counterpressure by gay rights groups. This latter phenomenon became pronounced in the 1970s, when the post-Stonewall enthusiasm stimulated the formation of local chapters of GLF and GAA, in addition to the District’s move towards home rule.

In late 1972, Morals Squad undercover work was netting twenty to thirty arrests per week for sexual solicitation. In a public letter to city officials, GAA objected to what it considered illegal entrapment of gay

\textsuperscript{79} See Gotham Cops to Be Nicer(?) \textit{Advocate}, Sept. 12, 1973, at 3.

\textsuperscript{80} See Rosen, supra note 68, at 186; Maurice Carroll, \textit{Bias Against Homosexuals Banned by Koch in All Mayoral Agencies}, N.Y. Times, Jan. 24, 1978, at 1.

\textsuperscript{81} See Rosen, supra note 68, at 186 (citing Interim Order No. 40, N.Y. City Police Dep’t (Sept. 27, 1978)).

\textsuperscript{82} \textit{Id.} at 188.

\textsuperscript{83} Compare \textit{Gay Blade}, Aug. 1970 (cruising untouched by police in the summer of 1970, after a flurry of harassment earlier that year), and \textit{Gay Blade}, Dec. 1970 (heightened police action against cruisers by sending more undercover officers into cruising areas), with \textit{Gay Blade}, Dec. 1971 (undercover police activity declining in D.C., but on an upswing in northern Virginia). \textit{The Gay Blade} was a one-page monthly information sheet started in October 1969; over the years it was transformed into a gay community weekly newspaper. Back issues are on file at the Library of Congress, Microform Department, No. 87/794.
men by these officers. In March 1973, GAA activists staged a sit-in at police headquarters to protest harassment and entrapment. Arrests fell back to about five per month, but zoomed back up in 1974 after gay pressure subsided. GAA had the last word, however. Once home rule gave the District substantial control of its own budget in 1975, GAA persuaded the council to eliminate funding for the Morals Squad. While the police continued to harass cruising gay men and some gay establishments, activity was episodic after 1975.

Most of the cities having sizeable gay populations followed the same pattern of pressure-and-response, where an outrageous police raid or series of raids would trigger publicity and organized response from the gay community, followed by a dialogue and a deal with the police. Los Angeles offers a dramatic example. As late as 1972, Police Chief Edward Davis refused even to talk with gay leaders about police harassment. In an open letter, he opined that “open and ostentatious merchandizing of the concept of homosexuality is a clear and present danger to the youth of our community. It’s one thing to be a leper. It’s another thing to be spreading the disease.” Davis’s views were representative of those of his officers, who regularly and viciously raided gay clubs well into the 1970s. The turning point was the 1973 election of Burt Pines as district attorney, with key gay support. Pines in April 1974 announced a new policy of only prosecuting “serious crimes” and specifically not prosecuting lewdness cases where a lesbian or gay couple were only holding hands, kissing, or dancing (traditionally considered lewd by L.A. police). Although the police resisted Pines’s progay policy, lewd vagrancy arrests had fallen off 50% by late 1974. Police attitudes remained hostile, but gay political pressure assaulted those attitudes from various political angles after 1974: Pines in 1975 called for the hiring of openly gay police (which occurred later), shockingly antigay internal police memoranda were leaked to the press, the vice squad’s budget came under fire and was reduced in 1976, and a police liaison was finally named in 1981. Although Los Angeles’s police department

86. See Pat Kolar, Police Crackdown, GAY BLADE, May 1974, at 1.
87. See Johnson, supra note 3, at 61.
89. See Joel Tlumak, No Police Agreement: Pines Eases Gay Prosecutions, ADVOCATE, May 22, 1974, at 1. Pines’s statement said his office “will only prosecute gay bar conduct cases that involve grossly offending conduct, prostitution, minors, or violence. In short, activity that would be unacceptable in straight bars will not be condoned in gay bars.” Id. at 16.
continued to have a deserved reputation for abuse, by 1981 it was much less capable of harassing gay people.

Without providing a detailed account, it can be said that the dynamics of each city's gays/police accommodation differed in interesting ways. In Chicago, for example, police harassment of gay establishments did not become a serious problem until after police officers were convicted of taking bribes from gay and straight bars. An outrageous raid in 1979 led to a dialogue between police and gay organizations and a formal police order limiting harassment and requiring sensitivity training in 1980-81. Still, the pattern suggested above was roughly characteristic of cities as different as Dallas, Philadelphia, Denver, Seattle, Boston, Minneapolis, and Houston. Indeed, in these cities, as well as in New York, San Francisco, Washington, D.C., and Los Angeles, some progress had been made by 1981 in alerting the police to violence against gay people.

B. Substantive Due Process and Repeal or Nullification of Sodomy Laws (The Right to Privacy)

Both legal and medical experts, beginning in the 1950s, agreed that consensual, adult sexual activity constitutes a realm of privacy that the state should not invade. This was a theme of the American Law Institute's ("ALI") Model Penal Code, which decriminalized consensual adult sodomy. In 1961, a coalition of lawyers and medical experts, chaired by Professor Charles Bowman of the University of Illinois, persuaded the Illinois legislature to adopt the Model Penal Code, thereby eliminating criminal sanctions for adult consensual sodomy. Law revision commissions in Maryland, Minnesota, and New York made similar proposals which were considered and rejected by their state legislatures.

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93. The Illinois legislature was aware that it was repealing the sodomy law when it adopted the Model Penal Code. See Letter from Dr. Charles Bowman, Professor of Law, University of Illinois College of Law, to the Florida Legislative Investigation Comm. (June 15, 1964) (on file with the Florida State Archives, Johns Comm. Collection, Series 1486, Box 2, Folder 4).
legislatures in the 1960s. Florida and other states debated such a move, with medical experts and law professors supporting it, while law enforcement officers and religious groups opposed it. Illinois remained the only state to decriminalize consensual adult sodomy until 1969, when Connecticut became the second state to do so. (Appendix A to this Article sets forth court challenges to and legislative revisions of sodomy laws.) Before 1969, however, Connecticut was the situs of another battle over sexually repressive laws.

Connecticut prohibited the use of birth control devices since 1879 and, with Massachusetts, remained the last states to have such statutes in 1961. That same year, in Poe v. Ullman, the Supreme Court used a procedural dodge to avoid a constitutional challenge to the law, despite a powerful dissent by Justice John Harlan. Harlan believed that the Due Process Clause's "principle of liberty" afforded constitutional protection for the most intimate details of the marital relation, including contraception. Four years later, the Supreme Court finally struck down the Connecticut law in Griswold v. Connecticut. Justice William Douglas's majority opinion found a right to privacy in the shadows ("penumbras") of the First, Third, Fourth, Fifth, and Ninth Amendments. While the right to privacy announced in Griswold clearly extended to consensual sexual intimacy, Griswold did not read like a charter for homosexual emancipation. Because the plaintiffs were married, Justice Douglas emphasized the marital features of the new right of privacy. Quoting Justice Harlan's Poe dissent, concurring Justices Goldberg, Warren, and Brennan explicitly distanced the right to marital privacy from adultery and homosexuality, two foci of apparently legitimate state regulation.

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95. See Minutes, Advisory Comm. to the Florida Legislative Investigation Comm. (June 29-30, 1964) (on file with the Florida State Archives, Johns Comm. Collection, Series 1486, Box 1, Folder 15), reprinted in Eskridge, supra note 1, app. 6.
96. 367 U.S. 497, 508 (1961) (denying declaratory relief based on Connecticut's decision not to enforce the statute, creating a lack of justiciability).
97. See id. at 548-53 (Harlan, J., dissenting).
99. See Griswold, 381 U.S. at 484.
100. See id. at 485-86.
101. The concurring Justices stated: "Adultery, homosexuality and the like are sexual intimacies which the State for-
dissent, Justice Harlan concurred only in the Court’s judgment. With four concurring Justices explicitly denouncing “homosexuality,” two Justices dissenting from the judgment, and the opinion of the Court stressing contraception use within the marital context, *Griswold* did not read like a promising precedent for protecting homosexuals.

Yet *Griswold* was important, in part because it announced a constitutional privacy right. Opening the way for legal challenges to old sexuality laws, *Griswold* came at a point in time when sexual privacy was a metonym for tolerance of consensual same-sex intimacy. *Griswold* also marked the occasion for a new ally to join the homophile cause: the national ACLU. Local union chapters in Washington, D.C., Los Angeles, San Francisco, New York, and Philadelphia had been supportive of homophile initiatives, and the chapters had contributed lawyers and publicity to challenges of particular state acts since the 1950s. Those chapters pressed the national organization to reverse its 1957 position, acquiescing in antihomosexual criminal and employment laws, and the ACLU commenced serious reconsideration in 1964. At the same time, the central office was telling prohomosexual members that legal action depended in large part on how the Supreme Court decided the contraception challenge, which the ACLU was supporting. After *Griswold*, in 1967, the ACLU revoked its previous position and adopted the ALI’s position that private consensual behavior between two people of the same sex ought not to be illegal; the ACLU maintained that sodomy laws criminalizing such conduct were unconstitutional infringements of the right to privacy. *Griswold* did not impel the ACLU to change its policy (that was effected by the local chapters), but it did fix the rationale for the new policy and strongly encouraged the ACLU to devote resources to constitutional challenges to state sodomy laws.

Due to *Griswold* and the ACLU’s new prohomosexual position, homophile leaders and individual defendants had a new weapon against police harassment: they could not only argue about abusive police tactics and the interpretation of the particular sodomy law, but they could argue that the law was unconstitutional. However, the first test case was not

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\textit{bids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.}\"\textit{Id. at 499 (Warren, C.J., Brennan & Goldberg, JJ., concurring) (quoting Poe, 367 U.S. at 553 (Harlan, J., dissenting)).}
\end{flushright}
one engineered by the ACLU or a homophile organization. Rather, Buchanan v. Batchelor\footnote{308 F. Supp. 729 (N.D. Tex. 1970); see also GARROW, supra note 98, at 398-99.} was a complaint for declaratory judgment filed by Henry McCluskey, a twenty-six-year-old Dallas attorney, one month before the Stonewall riots. Although McCluskey was avowedly heterosexual, his client, Alvin Buchanan, was gay and wanted to overturn a five-year sentence for having oral sex with a consenting adult male.\footnote{See Buchanan, 308 F. Supp. at 730.} McCluskey’s complaint charged that the Texas sodomy law was overbroad under Griswold\footnote{See id. at 732.}, for it criminalized marital as well as nonmarital oral sex.\footnote{See id. at 736.} Federal Judge Sarah Hughes, writing for the three-judge court, agreed with McCluskey and struck down the law for that reason,\footnote{308 F. Supp. at 736.} but in 1971 the Supreme Court vacated that judgment without explanation.\footnote{See id. at 736.}

Subsequent moves by the Supreme Court expanded the breadth of the Griswold precedent. In Eisenstadt v. Baird\footnote{405 U.S. 438, 443 (1972).} the Court struck down a Massachusetts law which criminalized the distribution of contraceptives to unmarried people. Justice William Brennan’s opinion for the Court held that Griswold was not limited to the marital relationship.\footnote{See id. at 453-55.} “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”\footnote{Id. at 453.} For that proposition, Justice Brennan cited Stanley v. Georgia,\footnote{394 U.S. 557 (1969).} where a unanimous Court ruled that the invasion of a man’s home and his subsequent arrest for possessing illegal pornography was unconstitutional. The Court’s decision to overturn abortion statutes in Roe v. Wade\footnote{410 U.S. 113 (1973).} confirmed that the right of privacy was not limited to married couples and suggested that this right entailed a freedom for women not just to control their bodies, but
to enjoy previously unheard of sexual liberty. Roe also returned the right to privacy to the Due Process Clause and formally abandoned Griswold's experiment in penumbral reasoning.\footnote{116. See David Crump, How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy, 19 HARV. J.L. & PUB. POL’Y 795, 815 (1996).}

Encouraged by these precedents which read Griswold expansively, the ACLU brought a class action lawsuit in 1973, Doe v. Commonwealth's Attorney,\footnote{117. 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976).} challenging Virginia's sodomy law. The majority of the three-judge court rejected the ACLU's arguments, however, choosing to read Griswold in light of Harlan's Poe dissent.\footnote{118. See id. at 1201-02.} Judge Robert Merhige, Jr. warmly dissented, rereading Griswold in light of Eisenstadt. He interpreted those precedents as taking the ALI's position that consensual adult sexual intimacy conducted in private ought not to be criminalized.\footnote{119. See id. at 1203-04 (Merhige, J., dissenting).} The Supreme Court affirmed the judgment of the three-judge panel without opinion,\footnote{120. See Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976).} suggesting that the panel majority was correct. Although the ambiguous precedential value of summary affirmances left room for argument, in light of Griswold's actual reasoning and the narrow majority in Eisenstadt (four to three, with two conservative Justices not voting), it is not surprising that the moderately conservative Burger Court would not have extended the right of privacy to protect homosexuals.

Griswold had greater resonance at the state level, where defendants asserted their right to privacy under state, as well as federal, constitutional law. Consistent with Doe, the large majority of judges—and every state judge to address the issue in the traditionalist southern states—rejected such challenges (Appendix A). Exemplary was the case of Eugene Enslin, the manager of two bars, an adult bookstore, and a massage parlor in Jacksonville, North Carolina.\footnote{121. See 'Abominable Crime' Law Heading for Major Test, ADVOCATE, Nov. 20, 1974, at 17, for background, as well as the court's opinion in State v. Enslin, 214 S.E.2d 318 (N.C. Ct. App. 1975), cert. denied, 425 U.S. 903 (1976).} According to Enslin, the local police in 1974 had little interest in enforcing state laws against homosexual conduct but were engaged in a campaign to close down his massage parlor. As part of that campaign, they enlisted the services of a seventeen-year-old marine, who offered the massage parlor $30 for acts of heterosexual prostitution. When Enslin refused, the marine countered with the possibility of homosexual sodomy, which Enslin readily agreed
to do for free; the two retired to Enslin’s private chambers. Although the police staking out the massage parlor could not view the encounter, the marine later testified that he and Enslin engaged in consensual oral sex. For that episode, Enslin was prosecuted under North Carolina’s “crime against nature” statute, convicted, and sentenced to one year in jail. (The marine was not prosecuted but did transfer to another unit outside North Carolina.) The ACLU’s new Privacy Project, founded in 1973 under the leadership of Marilyn Haft, made Enslin’s case a test case, for it presented a clean set of facts: oral sex by consenting adults in complete privacy and without monetary compensation. Nonetheless, the ACLU lost the case in North Carolina courts, and only Justices Brennan and Marshall of the Supreme Court were willing to review the case.

By the time North Carolina’s Court of Appeals rejected Enslin’s privacy and other constitutional arguments in 1976, similar arguments had prevailed in seventeen other states (including California, Illinois, Indiana, Iowa, and Ohio), albeit in their legislatures and not in their courts.122 Most of the states repealed their consensual sodomy laws as part of a general recodification of their criminal codes along the lines suggested by the Model Penal Code and its privacy philosophy. It appears that many state legislators did not focus on the revisions’ allowance of consensual sodomy. Indeed, two states reinstated their sodomy laws after it came to legislators’ attention that the Model Penal Code was (relatively) liberal on issues of sexual privacy. In both states, antihomosexual feelings drove the reinstatements. Idaho reinstated its entire criminal code within months of the new code’s taking effect, in response to an argument by the Church of Jesus Christ of the Latter Day Saints that the state would become a haven for “sex deviates.”123 Arkansas was both more measured and more explicitly antihomosexual


123. Idaho’s criminal code reform in 1971 was specifically motivated by a legislative study council’s recommendation to decriminalize many sex crimes and by the experience of the reform’s sponsor, Republican Senator William Roden. Roden had been an assistant prosecutor during the “Boys of Boise” homosexual witchhunt of 1955-56 and believed the craze had been “a very unfortunate situation.” Idaho Repeals New Consenting Adults Code, ADVOCATE, May 10, 1972, at 3. When The Advocate published these views in 1971, Democrat Senator Wayne Loveless charged that the revision would make Idaho a magnet for “sex deviates” and other undesirables. Loveless spearheaded an effort in March 1972 to repeal the entire code and reinstate the old law. Roden was philosophical. “I still feel the same way,” he told The Advocate after the repeal. “The code was repealed solely as the result of an emotional hysteria generated by some very right-wing church and political groups.” Id.
in its reaction. In 1976, when its criminal code revision took effect, Arkansas legislators proposed to reinstate only sodomy prohibitions (not the entire code), and only as a misdemeanor and only as applied to same-sex sodomy.

The Arkansas compromise, enacted in 1977, was not a novelty. The idea had originated in Kansas, which in 1969 decriminalized heterosexual sodomy and reduced homosexual sodomy to a misdemeanor. The same approach was followed in Kentucky (1974), Missouri (1977), Nevada (1977), Tennessee (1989), and Texas (1973); Montana’s revised code (1973) maintained sodomy as a felony but, like these other states, limited the felony to same-sex sodomy.124 The evidence from these states plus Arkansas and Idaho suggests that in the Baptist South and the Mormon West moralist opposition to homosexuality was a substantial barrier to decriminalization of homosexual conduct, even when equally sinful heterosexual conduct was decriminalized. This experience also shows how gay rights issues in the early 1970s were already galvanizing counteractivism among religious traditionalists. These traditionalists correctly surmised that the privacy philosophy of the Model Penal Code and gay rights advocates was on the whole antithetical to morals-based criminal regulations.

The debate between the lawyers and the moralists was best reflected in California. Gay rights attorneys and the California Committee for Sexual Law Reform conducted a constitutional guerilla war against the state “perversion” and “sodomy” laws in the early 1970s, regularly winning dismissals of criminal prosecutions from trial judges and simultaneously pressing for state adoption of Representative Willie Brown’s (later Assembly Speaker and then Mayor of San Francisco) sex law reform bill in Sacramento.125 Originally introduced in 1969, Brown’s bill was the first state legislative initiative that focused on reforming sodomy law in particular. As such it drew the ire of traditionalists, who argued, in their words, that “‘homosexuality is a sin,’ gay people ‘molest children,’ [and] ‘the growth of homosexuality will destroy California as it did ancient Greece and Rome.’”126 With the support of Governor Jerry Brown, the Brown bill was enacted in May 1975, but only over the

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125. Some of the unreported trial court opinions are discussed in Ruling Hits California’s Oral Sex Law, ADVOCATE, Oct. 11, 1972, at 1; and San Diego Judge Strikes Felony Oral Copulation Law, ADVOCATE, Apr. 11, 1973, at 19.

opposition of a massive letter-writing and lobbying campaign by the Concerned Christians of Sacramento and the National Association of Evangelical Churches.

The dramatic climax of the struggle was an intense debate in the state senate. Supporters led by Senator George Moscone (later the martyred Mayor of San Francisco) emphasized that the bill would only protect private consensual sex between adults. Opponents led by Senator H.L. Richardson (later a California Supreme Court Justice) denied that the bill’s allowance of “homosexuality” could be confined to the private sphere: homosexuals spread venereal disease and therefore were a public health menace; courts would extend the bill’s protections to “‘the beaches, the bushes and restrooms’” (as California’s high court had already done); and impressionable children would receive the message that “‘homosexuality is okay.”’ The bill passed the senate after a dramatic tie-breaking vote by Lieutenant Governor Mervyn Dymally. Governor Brown’s signing the bill into law only deepened the public debate. In May 1975, the Coalition of Christian Ministers was formed by evangelical religious leaders to procure enough signatures to force a state referendum to repeal the law. Notably, mainstream Protestant, Catholic, and Jewish churches had no part of the Coalition, and its petition drive failed.

The California sodomy repeal was a watershed in several respects. First, it marked the end of the period where sodomy repeal could free ride on general criminal code revision along Model Penal Code lines. In 1976 (the year California’s reform took effect), five states repealed their consensual sodomy laws as part of a general criminal code revision; four states did so in 1977; two did so in 1978; none have done so since 1978. After 1977, sodomy repeal efforts had to stand on their own, and for that reason the successes were usually tied to judicial more than legislative campaigns. For example, the New Jersey Supreme Court’s expansive view of the right to privacy pushed that state’s legislature toward sodomy repeal in 1978. New Jersey was the last state to repeal its sodomy law legislatively until Wisconsin did so in 1983, and

127. Id.
128. See Battle Lines Form in Sex Bill Referendum Fight, ADVOCATE, June 18, 1975, at 4.
129. The states were Indiana, Iowa, New Hampshire, South Dakota, and West Virginia.
130. The states were Nebraska, North Dakota, Vermont, and Wyoming. The Nebraska revision was enacted over the veto of Governor James Exon, who objected to the revision on general moralist grounds, but without specific reference to homosexuality.
131. The states were Alaska and New Jersey.
it took another ten years for the next repeal, when Nevada did so in 1993.  

Additionally, the California debate exposed new fault lines in American politics. The debate saw two previously unorganized groups coalesce into a deathlock of moral combat: a prosex gay lobby versus an evangelical Christian one. Each contended for the votes of the middle, and when the evangelicals lost they, significantly, sought resort in the popular referendum process, a move that foreshadowed Anita Bryant's "Save the Children" campaign in 1977 and John Briggs's "keep homosexuals out of the classroom" campaign in 1978. Finally, and most significantly, the California debate sharply revealed new lines of intellectual debate over the meaning of privacy. Progay legislators like Brown argued for privacy as a right to be let alone by the government in matters of personhood. Antigay legislators like Richardson went beyond the moralist, Sodom-and-Gomorrah arguments that had prevailed in Idaho in 1972. Instead, they argued that privacy was a canard, because homosexual intercourse has dire public consequences: venereal disease, encouragement of weak or immature people to adopt the homosexual "lifestyle," and symbolic state approval of homosexuality. These were more powerful arguments than the simple moralisms traditionally uttered and were capable of persuading relatively neutral observers.

The new round of constitutional privacy challenges to consensual sodomy laws yielded significant victories in New York and Pennsylvania, both states with strong gay liberation movements and declining police interest in enforcing antihomosexual laws. The New York Court of Appeals' decision in People v. Onofre was particularly significant, as it represented a full-court press against New York's consensual sodomy misdemeanor by the Bar of the City of New York, the ACLU, and the Bar of the City of New York, the ACLU, and the

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132. After a decade of intense constitutional litigation and several years of political lobbying, the District of Columbia repealed its sodomy law as part of a reform of sexual offense law in 1981. The Reverend Jerry Falwell, head of the Moral Majority, launched a campaign to override the District's law in Congress. "'This is a perverted act about perverted acts,'" he said at a news conference, where he warned that the District could become "'the gay capital of the world'" or "'another Sodom and Gomorrah.'" Larry Bush, House Kills D.C. Sex Law as Gay Prospects Dim, ADVOCATE, Nov. 12, 1981, at 8. The antihomosexual theme was submerged during debate in the House of Representatives, whose members focused on issues of rape and sexual assault. On October 1, 1981, the House cast a legislative veto of the District's action, by a vote of 281-119. This was the first time since home rule was granted in 1975 that Congress had vetoed a District law. The next year, the Supreme Court held that one-house legislative vetoes are unconstitutional. See Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). The District in 1994 repealed its sodomy law without congressional reaction. See Appendix A.

Lambda Legal Defense & Education Fund, all of which filed amicus briefs. The court of appeals adopted the amici's central argument, that the right to privacy is not limited to marriage and procreation-based activities and is "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint."\(^{134}\)

_Onofre_ reflected a particular reading of the privacy right. The majority judges not only expanded that right beyond the marriage and procreation contexts of _Griswold, Eisenstadt_, and _Roe_, but also beyond the intimate setting of the bedroom. Two of the couples prosecuted in the case (one different-sex, one same-sex couple) had consensual sodomy in parked automobiles. Consistent with the Fourth Amendment cases protecting cars, as well as toilet stalls, from unreasonable searches and seizures, the New York Court of Appeals found that this setting was sufficiently private to merit protection.

Going beyond the Fourth Amendment cases, the New York Court of Appeals in _People v. Uplinger_\(^{135}\) summarily applied _Onofre_ to invalidate a state law prohibiting loitering in a public place for the purpose of soliciting another person for "deviate sexual intercourse." Other state courts used _Onofre_-style reasoning to invalidate their public solicitation laws or sodomy laws as applied to oral sex in quasi-public settings.\(^{136}\) This was a radical view of "privacy," reading the concept as one which created a space of sexual freedom generally. The U.S. Supreme Court would reject such a broad understanding in _Bowers v. Hardwick_,\(^{137}\) but the _Onofre_ understanding has continued to have appeal.\(^{138}\)

Indeed, the _Onofre_ understanding of privacy can be said to have triumphed even before _Hardwick_ was handed down. By 1983, twenty-five states, representing almost 60% of the American population, had decriminalized consensual sodomy;\(^{139}\) twelve states representing about

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134. _Onofre_, 415 N.E.2d at 939.
137. 478 U.S. 186 (1986).
138. _See_ Wasson, 842 S.W.2d at 487 (decided six years after _Bowers_).
139. The states were Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa (judicial invalidation followed by legislative repeal), Maine, Nebraska, New Hampshire, New Jersey (judicial invalidation followed by legislative repeal), New Mexico, New York (judicial invalidation), North Dakota, Ohio, Oregon, Pennsylvania (judicial invalidation), South
15% of the population had reduced consensual sodomy to a misdemeanor or to a misdemeanor-level sentence;¹⁴⁰ thirteen states and the District of Columbia, representing about a quarter of the population, prohibited consensual sodomy as a felony.¹⁴¹ Even in states that continued to criminalize sodomy, the law was almost never applied in situations where two adults were engaged in secluded sexual intercourse. Sodomy laws were in these states overwhelmingly deployed in nonconsensual cases of rape and sex with a minor, cases usually involving heterosexual intercourse. As applied in consensual situations, sodomy laws were used as the legal basis to monitor gay cruising areas (like public rest rooms) and to investigate or raid quasi-public forums—adult bookstores (the situation in Leibman), sex clubs, gay baths, and massage parlors (the situation in Enslin). The only reported case I have seen in the last twenty-five years where a sodomy law was applied to criminalize sex between consenting adults in a private home was Hardwick itself—where the state withdrew the prosecution but civil liberties groups pressed for a reported decision nonetheless.

C. Vagueness and Statutory Obsolescence

The precipitous decline in the application of state sodomy laws to consensual same-sex intimacy represented an advance, in part because it removed the possibility of draconian sentences for consensual sex which characterized the old regime. In the early 1970s, gay men were serving life sentences in Oregon for engaging in consensual oral sex, and were serving indefinite sentences in state mental institutions in other states, where they were subjected to electroshock therapy and chemical experimentation that replicated death experiences.¹⁴² But the decline of sodomy laws was not as big an advance as the gayocracy made it out to be, for by the 1970s relatively few gay men and almost no lesbians were actually prosecuted under such laws. Cruising gay men and butch lesbians were, instead, arrested under laws criminalizing public vagrancy, Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Appendix A.

140. The states were Alabama, Arizona, Arkansas (criminalizing only same-sex sodomy, but at the misdemeanor level), Florida (sodomy law invalidated but misdemeanor for "unnatural and lascivious conduct" left in place), Kansas (same-sex only), Kentucky (same-sex only), Minnesota (misdemeanor-level penalty of one year maximum), Missouri (same-sex only), Nevada (same-sex only), Tennessee (same-sex only), Texas (same-sex only), and Utah.

141. The states were Georgia, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, and Virginia.

indecency, lewd or disorderly conduct, or dressing in attire not appropriate for one’s sex.143 Because these laws involved public or quasi-public conduct, they were not as susceptible to privacy-based attacks.

A third line of due process jurisprudence proved more useful for gay legal challenges to miscellaneous sexual indecency laws. In a long line of cases, the Supreme Court held that statutes which provide insufficient notice for citizens and police to ascertain precisely what conduct is criminally proscribed violate the Due Process Clause on grounds of vagueness.144 In addition to the obvious constitutional policy of fair notice, the doctrine also implemented two subtler constitutional policies. One is the policy against arbitrary enforcement of broad criminal laws against disfavored status groups.145 A vice of vague criminal laws is the large discretion they vest in law enforcement officials, and the concomitant danger that the discretion will not be applied neutrally.146 Hence, the void-for-vagueness doctrine helped rein in excessive police and prosecutorial discretion, precisely the sort of claim made by defendants of color such as those in Maldonado.147

The final and most subtle policy underlying the vagueness doctrine lies in a need to weed out obsolescent crimes. Statutory commands, clear once upon a time, might grow muddier as time passes and the meaning conveyed to the original audience is lost upon new audiences. At some point, judges have an obligation to sweep such statutes off the books and insist that the legislature update its commands into something more

143. These laws are examined in Eskridge, supra note 1. For example, thousands of gay men were arrested every year in Los Angeles County for violating § 647(a) of the California Penal Code, prohibiting “lewd vagrancy.” See Jon J. Gallo et al., Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 UCLA L. REV. 643 (1966); Barry Copilow & Tom Coleman, Report and Investigation of Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department, ADVOCATE, Feb. 14, 1973, at 2.

144. See United States v. Harriss, 347 U.S. 612, 617 (1954) (holding that due process requires that criminal laws must “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute”); Winters v. New York, 333 U.S. 507, 515 (1948) (holding that due process requires that there “must be ascertainable standards of guilt” in criminal laws); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (stating that a statute “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable”); see also Anthony Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960).

145. See, e.g., Robinson v. California, 370 U.S. 660 (1962) (holding that the Eighth Amendment prohibits application of criminal sanctions to the mere status of being a drug addict).

146. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (holding that an ordinance which bestows arbitrary power on municipal authorities is unconstitutional).

147. See supra text accompanying notes 34-36.
intelligible to the average citizen.\textsuperscript{148} Many of the once-clear commands that grew muddier over time were statutory crimes targeting people considered deviant or even dangerous in the nineteenth century, but who were no longer considered a social menace.

All of these policies were important to the Court in \textit{Papachristou v. City of Jacksonville},\textsuperscript{149} which invalidated a Jacksonville, Florida vagrancy ordinance. In language widely used by state and municipal vagrancy laws, the ordinance made it a crime to be “vagabonds, or dissolute persons who go about begging, . . . lewd, wanton and lascivious persons, . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons,” and so forth.\textsuperscript{150} The lead defendants (Margaret Papachristou, Betty Calloway, Eugene Melton, and Leonard Johnson) were two white women and two black men who were doing nothing more sinister than riding around together in an automobile. One’s suspicion is that they were arrested for being an interracial group of women and men, a suspicion reinforced by other cases involving people of color and down-and-out folks who were not doing anything apparently unlawful.\textsuperscript{151} Justice Douglas’s opinion for the Court held that the vagrancy law was not intelligible to “[t]he poor among us, the minorities, the average householder,” criminalized ordinary lawful conduct considered an amenity of normal life, and seemed to be enforced mainly against “nonconformists” and “suspicious persons.”

The Court’s main concern in \textit{Papachristou} was the abuse of antiquated vagrancy laws against the poor and people of color. Gay litigants seized upon the precepts of the void-for-vagueness decisions and argued their applicability to obsolete sodomy laws and turn-of-the-century sexual solicitation laws. The anti-obsolescence pitch was

\textsuperscript{148} Alexander Bickel suggested that statutes might violate due process by reason of their desuetude, by which he meant disuse as well as obsolescence. \textit{See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS} 148-56 (2d ed. 1986). Rather closely to the proposition in text, but more provocatively, Guido Calabresi has argued that courts have authority to “overrule” obsolescent statutes. \textit{See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES} 17-24 (1982).

\textsuperscript{149} 405 U.S. 156 (1972).

\textsuperscript{150} \textit{Id.} at 156 n.1.

\textsuperscript{151} \textit{See, e.g.,} NAACP \textit{v. Thompson}, 357 F.2d 831 (5th Cir. 1966) (holding that injunctive relief was a proper remedy to bar interference with peaceful protests by civil rights activists).

\textsuperscript{152} \textit{Papachristou}, 405 U.S. at 162-63, 169, 170. Notwithstanding the usefulness of such dragnet laws to the police, the unanimous Court held the ordinance contrary to even-handed due process. “The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great musculature that holds society together.” \textit{Id.} at 171.
surprisingly successful in deregulating same-sex intimacy even beyond the traditional ALI-type privacy position.\(^\text{153}\)

1. Sodomy Laws

Many state sodomy laws were prime candidates for \textit{Papachristou} challenges, for they were adopted in the nineteenth century, criminalized only the “crime against nature” (a term perhaps understood in 1800 but much less clear by the 1960s and 1970s), and were enforced in arbitrary and resource-wasting ways.\(^\text{154}\) Nonetheless, vagueness challenges to sodomy laws had repeatedly been rejected in the 1950s and early 1960s. That string was broken in the same year as the Stonewall riots, by the Alaska Supreme Court in \textit{Harris v. State}.\(^\text{155}\)

The court held that “crime against nature” had little meaning to the typical citizen and that the “decisions in other states [were] in hopeless contradiction about the scope of the term.”\(^\text{156}\) According to the court, the very term reflected the statute’s obsolescence, for “natural law” is a sectarian rather than secular basis for regulating sexuality.\(^\text{157}\) In addition, the court invoked John Stuart Mill’s \textit{On Liberty}, Freud and modern sexology, the ALI’s Model Penal Code, as well as the Wolfenden Report, as justification for clearing the statutory decks.\(^\text{158}\) “[T]he widening gap between our formal statutory law and the actual attitudes and behavior of vast segments of our society can only sow the seeds of increasing disrespect for our legal institutions.”\(^\text{159}\)

Although an eloquent opinion, \textit{Harris} had only limited judicial impact. It applied solely to the “crime against nature” phrase, and not the reference to “sodomy” in the Alaska law.\(^\text{160}\) Only two state supreme

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\(^{153}\) See, \textit{e.g.}, Balthazar v. Superior Court, 428 F. Supp. 425, 434 (D. Mass. 1977) (holding that a statute prohibiting unnatural and lascivious acts was unconstitutionally vague as applied), \textit{aff'd}, 573 F.2d 678 (1st Cir. 1978); \textit{State v. Sharpe}, 205 N.E.2d 113, 115 (Ohio 1965) (holding that a statute forbidden solicitation to commit unnatural sexual acts was void as unconstitutionally vague).


\(^{156}\) \textit{Id.} at 641.

\(^{157}\) \textit{See id.} at 645.

\(^{158}\) \textit{See id.} at 644-46.

\(^{159}\) \textit{Id.} at 645.

\(^{160}\) The opinion had only limited impact for the appellant in \textit{Harris} as well—his conviction was affirmed. The case was remanded for an amended judgement to reflect a “conviction for the crime of sodomy and not a crime against nature.” \textit{Id.} at 649. Alaska repealed its sodomy law in Act.
courts followed Alaska's example. The Florida Supreme Court invalidated that state's "crime against nature" law on grounds of vagueness, observing that "the law, to be vibrant, must be a living thing, responsive to the society which it serves." Oddly, the Florida court declined to apply this reasoning to the state's less severe criminal penalty against "unnatural and lascivious conduct," a statutory command that seems just as vague as that in the "crime against nature" law. The Massachusetts Supreme Judicial Court reinterpreted, rather than invalidated, an "unnatural and lascivious acts" law to edit out consensual adult intimacy but (oddly in light of the Alaska and Florida decisions) left the "crime against nature" law untouched.

Some federal judges were attracted to the Harris reasoning. The Fifth Circuit applied Papachristou to invalidate a conviction under Florida's "crime against nature" law, but the Supreme Court reversed, because the Justices believed the term provided sufficiently clear notice given the extensive judicial construction and prosecutorial enforcement of the law over the years. In Rose v. Locke, the Court held that Tennessee's "crime against nature" law was not vague as applied to cunnilingus, because that term was "no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes." Coming only a few years after Papachristou, where the same reasoning had been rejected, Rose bears a whiff of judicial squeamishness about sexual perversion. The Burger Court regarded sodomy as the love that need not speak its name very clearly.

Although neither privacy nor vagueness arguments persuaded the Supreme Court that "crime against nature" or sodomy laws were ever unconstitutional, these arguments had a more receptive audience among
legislators, prosecutors, and police chiefs. Even conservatives agreed with the idea that criminal statutes ought to tell the citizens more precisely what they were not supposed to do, and the ALI's medical term "deviate sexual intercourse" (with a legalistic definition telling exactly which body parts were not supposed to come into contact with which other body parts) replaced "crime against nature" and "sodomy" prohibitions in most but by no means all state codes.  

2. Lewdness and Sexual Solicitation Laws

As noted above, most arrests of gay people occurred under broadly phrased vagrancy, lewdness, disorderly conduct, and solicitation laws. Most states and municipalities in 1961 had such laws, and that did not change in jurisdictions adopting the Model Penal Code. Although the Code decriminalized consensual adult sodomy in a private place, it criminalized public homosexual (but not heterosexual) solicitation for such activity. Hence, Illinois, Ohio, and many other states that adopted the Model Penal Code continued to criminalize homosexual solicitation; many municipal ordinances made sexual solicitation illegal generally. Defendants and their ACLU allies challenged these laws, with frustrating results. Ohio courts, for example, struck down municipal ordinances prohibiting sexual solicitation but upheld (though narrowly construed) the state homosexual solicitation prohibition against vagueness attack. The District of Columbia Court of Appeals invalidated one clause of its lewd or indecent act law (used to prosecute homosexual solicitors, mainly) on vagueness grounds in 1974, but upheld

167. Among the big states bucking the ALI trend, however, were Georgia (calling the crime "sodomy" but specifying rather precisely what conduct constituted the crime), Florida (which, even after Franklin, criminalized "unnatural and lascivious acts"), Maryland (criminalizing "perverted practices"), Massachusetts (criminalizing the "abominable crime against nature"), Michigan (criminalizing "gross indecency" between two men or two women), and North Carolina (criminalizing "crimes against nature").

168. For a definition of the crime of "loitering to solicit deviate sexual relations," see MODEL PENAL CODE § 251.3 & explanatory note (Official Draft and Explanatory Notes 1980) ("[T]his offense is not directed against private homosexual behavior but against the public nuisance created by the conduct proscribed."). See also MODEL PENAL CODE AND COMMENTARIES § 251.3 cmts. 1-3 (Official Draft and Revised Comments 1980) (noting that "at the time the Model Code was drafted, every American state punished deviate sexual relations, at least as between persons of the same gender"). For a definition and discussion of the concept of "deviate sexual relations," see id. § 213.2 cmts. 1-3. Deviate sexual relations, found within the general definition of deviate sexual intercourse, included both oral and anal intercourse. The Code excepted from criminal sanction such relations between consenting adults "where they conduct their relations in private and create no public nuisance." Id. at cmt. 2.


the remainder of the law one year later.\textsuperscript{171} Other high courts rejected such challenges altogether.\textsuperscript{172}

Even when legal challenges prevailed, the police often continued to enforce invalid laws. In 1971, Colorado adopted the Model Penal Code, thereby repealing its consensual sodomy law but retaining an offense for "loitering for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual intercourse." Denver Judge Irving Ettenberg declared the loitering law unconstitutionally vague, and the district attorney dismissed all pending cases in late 1972. Yet the police continued to arrest gay men for lewd solicitation, allegedly under authority of Denver ordinances prohibiting offers to commit lewd acts or loitering in a public place for the purpose of lewdness or prostitution. In April 1972, Judge Ettenberg declared the municipal loitering law unconstitutional for the same reasons the state law was invalid. Not only did the police continue to arrest gay men for lewd solicitation, but arrests "soared" from sixty to seventy per month in 1971 and 1972 to 125 in February 1973.\textsuperscript{173} Concerned citizens formed a gay coalition that year to protest this pattern of arrests. Negotiations with the police went nowhere, so the coalition sued the city to enjoin police harassment, both because it was pursuant to invalid ordinances and because it discriminated against gay men. After the trial judge denied the city's motion to dismiss and the state supreme court invalidated the state's lewd loitering law, the city came to terms with the gay coalition, promising that gay people would not be targeted for arrest, and arrests under the ordinances immediately fell to minuscule levels.\textsuperscript{174}

The same process of grass-roots politics and aggressive litigation, backed up by factual studies, characterized gay challenges to California's broad array of sexual regulations. In the famous Carol Lane case decided in 1962, the California Supreme Court held that municipal laws regulating sex and lewdness were preempted by the state's comprehensive regulation of these issues.\textsuperscript{175} This was a critical development,

\textsuperscript{171} Compare District of Columbia v. Walters, 319 A.2d 332, 335 (D.C. Cir. 1974) (striking down the phrase in a law criminalizing "any other lewd, obscene, or indecent act"), with District of Columbia v. Garcia, 335 A.2d 217 (D.C. Cir. 1975) (upholding the part of that law criminalizing the making of a "lewd, obscene and indecent sexual proposal").


\textsuperscript{173} See Dilemma in Denver: As Laws Fall, Arrests Soar, ADVOCATE, Mar. 28, 1973, at 15. For another example of police refusal to abide by judicial invalidations of antihomosexual solicitation laws, see Tampa Police Ignore Court, Go Ahead with Arrests, ADVOCATE, Mar. 14, 1973, at 18.

\textsuperscript{174} See Denver Free: Months of Legal and Political Maneuvering Pay Off as Police Chief Signs Accord to Halt Harassment, ADVOCATE, Nov. 6, 1974, at 3.

\textsuperscript{175} See In re Lane, 372 P.2d 897, 899 (Cal. 1962).
because it eliminated the detailed sex codes adopted in most California municipalities. As the California Supreme Court and legislature proceeded substantially to deregulate consensual same-sex intimacy, there were no fall-back local laws as there had been in Colorado. In 1966, a state appeals court struck down the state’s “public indecency” law as vague. In 1975, the legislature repealed the sodomy law, leaving the crime of “lewd vagrancy” as the main basis for arrests of cruising gay men. The ACLU, Gay Rights Advocates (a San Francisco firm), and other attorneys representing gay defendants attacked the lewd vagrancy law as unconstitutionally vague in the same manner that had proved successful against the public indecency law. The National Committee for Sexual Civil Liberties offered expert evidence and data in such cases. Nevertheless, California’s intermediate appellate courts rejected such arguments throughout the 1970s.

The California Supreme Court overruled this line of cases in Pryor v. Municipal Court. The defendant, Don Pryor, was arrested for soliciting an undercover Los Angeles cop to engage in oral intercourse. This was a time-tested scenario for lewd vagrancy arrests, but Pryor and his attorneys sought a declaration from the courts that the lewd vagrancy law was fatally vague. Justice Mathew Tobriner’s opinion for the court held that the terms “lewd” and “dissolute” were hopelessly vague and that their vagueness was not narrowed by the law’s legislative background. Efforts by lower courts to give more definite content to the

176. See In re Davis, 51 Cal. Rptr. 702, 716 (Dist. Ct. App. 1966) (invalidating CAL. PENAL CODE § 650), Judge Kaus’s opinion invalidated the law as applied to Jeanne Davis’s bare-breasted modeling at a private fashion show run by her and her husband. See id. at 704. Judge Kaus marked the irony that the court was invalidating a statute that was usually “used as an instrument of mercy rather than of harshness,” id. at 716 n.21, for homosexual defendants in particular. The judge’s experience, coupled with evidence compiled by an independent study, see Gallo et al., supra note 143, at 772-75, established that pleading guilty to this provision was the plea bargain of choice by sex offenders, as it was virtually the only sex offense that did not subject the offender to public registration. See In re Davis, 51 Cal. Rptr. at 716 n.21.

177. See Brief of Amicus Curiae, National Comm. for Sexual Civil Liberties, Pryor v. Municipal Court, 599 P.2d 636 (Cal. 1979) (L.A. 30901). The brief included two privately printed studies as attachments, TOY, UPDATE: ENFORCEMENT OF SECTION 647(a) OF THE CALIFORNIA PENAL CODE BY THE LOS ANGELES POLICE DEPARTMENT (1974); Copilow & Coleman, supra note 143, which the court recognized as suggesting that there had been a deliberate effort to target male homosexual offenders. See Pryor, 599 P.2d at 644 n.8.


179. 599 P.2d 636 (Cal. 1979).

180. See id. at 641. The 1961 revision of section 647(a) had converted “lewd vagrancy” from a status to a behavior crime. The legislative materials, however, indicated an intent to continue the old status crime policy in the new law, see id., a policy at war with the Due Process Clause as
lewd vagrancy provision had been unsuccessful, and defendants were basically left to the unpredictable sympathies of juries and prosecutors. Justice Tobriner noted that "male homosexuals" constituted the bulk of the prosecutions, an obvious violation of Papachristou's warning against laws whose application was arbitrarily limited to unpopular minorities. Having found the law unconstitutionally vague, the court declined, however, to strike it from the books. Instead, Justice Tobriner limited the law to the solicitation of sexual conduct that occurs in a public place, or to sexual touching if the actor knows or should know of the presence of persons who would probably be offended by that kind of conduct. This interpretation narrowed police discretion and, more importantly, empowered local gay rights coalitions in their negotiations with local police forces and prosecutors.

The legal equilibrium reached in California was almost the same as that in New York, but in New York it was the legislature and not the courts that clarified vague solicitation laws. Traditionally, homosexual solicitors were arrested under New York's broadly worded "disorderly conduct" and "vagrancy" laws, which were applied with full force by the New York State Court of Appeals to any kind of homosexual solicitation or suggestive conversations. The legislature repealed both laws in the mid-1960s and replaced them with more narrowly tailored statutes that criminalized specific acts of public disorder and public loitering with intent to solicit "deviate sexual intercourse." Applying Onofre's privacy rationale and following the leads of courts in Colorado, the District of Columbia, Ohio, Oregon, and Pennsylvania, the New York

construed in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). In 1960, Arthur Sherry advocated a change in the old California vagrancy laws which helped lead to their revision. He noted that "[t]he abandonment of the concept of status as a basis for the imposition of penal sanctions ... marks a break from the traditional vagrancy pattern and ... will be responsive to the needs of and in accordance with the legal and social standard of contemporary society." Arthur H. Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 CAL. L. REV. 557, 572 (1960).

181. See Pryor, 599 P.2d at 644.
182. See id. at 645.
183. See id. at 647. Ohio's Supreme Court similarly limited that state's homosexual solicitation law in State v. Phipps, 389 N.E.2d 1128, 1131 (Ohio 1979).
187. See id. § 240.35(3).
Court of Appeals invalidated the latter statute in *Uplinger*. This move left no criminal provision in New York that targeted same-sex intimacy.

3. Cross-Dressing Ordinances

The most successful invocation of the void-for-vagueness doctrine came in the lawsuits challenging laws which criminalized cross-dressing. The earliest law targeting cross-dressing was an 1864 St. Louis ordinance providing that no person "shall . . . appear in any public place in a state of nudity, or in a dress not belonging to his or her sex, or in an indecent or lewd dress." Dozens of municipalities adopted similar ordinances in the late nineteenth and early twentieth centuries. Antimasquerade statutes in New York and California were interpreted by the police and judges to make cross-dressing illegal statewide. In these jurisdictions, the laws were applied against "butch" lesbians and men impersonating females. By the 1960s they were also applied to transsexuals, people who not only cross-dressed but also wanted to change their anatomical sex.

Cross-dressers became bolder after Stonewall, and *Papachristou* gave drag queens, transsexuals, and their ACLU allies winning arguments against police harassment. The Ohio Supreme Court's decision in *City of Columbus v. Rogers* was a leading case reflecting this transformation. Columbus had a cross-dressing prohibition copied from those adopted in the nineteenth century. Rogers was convicted for female impersonation. Chief Justice O'Neill invoked the controlling federal precedents and found, as a factual matter, that dress is a particularly

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189. ST. LOUIS, MO., REV. ORDINANCES No. 5421 (Misdemeanors), art. II, § 2 (1864). The ordinance was codified in subsequent revised codes of St. Louis until it was eventually invalidated by *D.C. v. City of St. Louis*, 795 F.2d 652 (8th Cir. 1986).


malleable social convention, indeed one that was more sexually indeterminate than ever before.

At the present time, clothing is sold for both sexes which is so similar in appearance that "a person of ordinary intelligence" might not be able to identify it as male or female dress. In addition, it is not uncommon today for individuals to purposely, but innocently, wear apparel which is intended for wear by those of the opposite sex.\textsuperscript{194}

In light of these social developments, "the terms of the ordinance, 'dress not belonging to his or her sex,' when considered in the light of contemporary dress habits, make it 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"\textsuperscript{195} This reasoning strikes me as hard to dispute, especially given the strong relevance of Papachristou's concerns with adequate notice, police discretion, and selective enforcement against unpopular minorities.

Rogers-type reasoning was invoked by judges to strike down cross-dressing ordinances in Chicago, Cincinnati, Detroit, Fort Worth, Miami Beach, St. Louis, Toledo, and other cities.\textsuperscript{196} I have found only one reported case that rejected due process challenges to cross-dressing laws. Richard Mayes, a transsexual (later Rachell Mayes), was arrested a dozen times for cross-dressing in Houston, Texas. Represented by the ACLU, Mayes challenged the constitutionality of Houston's law. Mayes lost in Harris County court, and the U.S. Supreme Court declined to hear an appeal.\textsuperscript{197} In 1981, eight transsexuals successfully challenged the same law, on the ground that cross-dressing is needed therapy for them. After

\textsuperscript{194} Id. at 565.

\textsuperscript{195} Id. (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

\textsuperscript{196} See D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986); City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); City of Cincinnati v. Adams, 330 N.E.2d 463 (Ohio Mun. Ct. 1974); Cross-Dress Law Falls, ADVOCATE, Sept. 24, 1975, at 10 (state trial judge invalidates Detroit cross-dressing law based in part on expert testimony about the blurring of male and female fashions); Fort Worth Judge Raps Drag Arresies, ADVOCATE, Dec. 19, 1973, at 14 (judge throws out drag queen arrests at behest of Awareness, Unity, and Research Association, a Fort Worth gay group); Toledo's 'Pervert Drag' Law Voided, ADVOCATE, Nov. 7, 1973, at 16 (federal judge voids Toledo law prohibiting any "'homosexual, lesbian, or other perverted person'" from appearing in clothing of the opposite sex); Unconstitutional: Court Voids Miami Beach Drag Bans, ADVOCATE, July 11, 1972, at 4 (federal judge accepts ACLU invitation to void several Miami Beach cross-dressing laws used to harass female impersonators).

the federal district court decision accepted their arguments, Houston repealed the ordinance.\(^{198}\)

This deployment of the Due Process Clause underlines the error of viewing the clause as nothing more than a repository of static tradition. If due process invokes tradition at all, it is only the general principles confirmed by tradition (for example, the criminal law must give fair notice of its commands) and the application of those principles in light of ever-evolving social conventions (for example, dress of one's sex is unclear today in ways it would not have been unclear in 1864). Like the sodomy and sexual solicitation cases, the cross-dressing cases also illustrate the way in which state and federal constitutional law reflects changing social power. It was only after lesbians and gay men came out of the closet in great numbers that sodomy laws began to be repealed or nullified, and it was only after transvestites and transsexuals were emboldened that cross-dressing laws followed suit. The vagueness line of cases was a convenient vehicle for these groups to translate their social message and power into legal terms.

II. ASSURING SPACE FOR LESBIAN AND GAY SUBCULTURES: FIRST AMENDMENT RIGHTS

Gay and lesbian subcultures had existed in many cities before World War II but grew like brushfires after the war.\(^{199}\) Their growth was fueled by demographic factors, including increased urbanization and economic opportunities for women to work outside the home. When cities became known as centers for lesbian and gay subcultures, gay people gravitated to them from everywhere. Once a critical mass of people congregated in a city, social and educational institutions formed. Just as public cruising and cross-dressing by gay people grated mainstream society, so did homophile institutions, even the tamest. Municipal, state, and federal efforts to suppress institutions of gay subculture intensified after World War II. In my view, there was not much the state could do to destroy these institutions, absent an all-out war, but state repression surely retarded their development and drove many of them underground. Homophile resistance was tepid in the 1950s, bolder in the

\(^{198}\) See *Short Takes*, *Advocate*, Aug. 20, 1981, at 12.

1960s, and defiant in the 1970s. Constitutional law played an important role in the increased boldness of defenders of gay subcultural turf.

As the negotiations following the CRH raid0 and the cross-dressing cases suggest, due process requirements of fairness provided some protection for lesbian and gay subcultures, that is, the spaces in which lesbian and gay communities could be fostered: bars, restaurants, baths, churches, newspapers, confessional literature, erotica, clubs, and associations.201 However, the main lines of protection for lesbian and gay subcultures were afforded by the First Amendment, particularly their rights of free speech, press, and association. Gay rights litigation, in turn, afforded growth opportunities for an evolving First Amendment.

The Supreme Court of Chief Justice Earl Warren inherited an anemic First Amendment and gave it blood by invoking its jurisprudence of free speech and association to protect alleged Communists, leftwing subversives, and hated civil rights groups.202 None of the Warren Court’s leading First Amendment decisions of the 1950s involved openly homosexual litigants,203 but homophile groups and their lawyer allies seized upon the First Amendment principles and doctrines to insist that gay people should be tolerated at least as much as Communists. This insistence came in response to unprecedented efforts in the late 1950s and early 1960s by postal inspectors, alcoholic beverage control agents, and censors to suppress homophile association, publication, and speech.

200. See supra notes 54-55 and accompanying text.

201. See Don Romesburg, Twelve Tips for Meeting Other Young Queers, in OUT IN ALL DIRECTIONS: THE ALMANAC OF GAY AND LESBIAN AMERICA 294 (Lynn Witt et al. eds., 1995) [hereinafter OUT IN ALL DIRECTIONS] (discussing various locations and methods for meeting homosexuals).


203. Although One, Inc. v. Olesen, 355 U.S. 371 (1958), a summary disposition, did. On the authority of Roth v. United States, 354 U.S. 476 (1957), the Court reversed a Ninth Circuit decision upholding the Postal Service’s refusal to mail the October 1954 issue of One, a homophile magazine, on the ground that it was obscene. See One, Inc., 241 F.2d at 772. As evidence of obscenity, the Postal Service cited a short story about a young woman who falls in love with an older lesbian, a bland poem about titled homosexuals in England, and a simple advertisement for a French homophile magazine. See id. at 777.
As a federal appellate judge stated: “Even homosexuals and reprobates who prey upon their hapless condition are entitled to find refuge in [the Constitution’s] dictates. Freedom of association is one of them. Freedom of expression is another.”

First Amendment litigation was relatively successful. By 1981, gay literature, including erotica, was available nationwide. Most locales were forced to tolerate lesbian and gay newspapers, radio programs, bars, churches, student clubs, and other institutions of homophile association and community. First Amendment lawsuits were relatively successful, in part because the gay or gay-friendly parties were institutions that were able to devote substantial resources to litigation. Unlike the schleps the police hauled in from public rest rooms and bar raids, at least some of the gay bars and publishers of gay erotica were monied enough to compete with the state as repeat litigation players. As repeat players, these institutions developed longer term legal strategies, retained very good attorneys, and attracted useful allies.

The ACLU served as gays’ best ally, and largely contributed to their success in First Amendment cases. Although, and perhaps because, it had waffled on issues of political, as well as sexual subversion in the 1950s, the ACLU and its allied attorneys were keenly interested in helping gay litigants and groups litigate First Amendment cases in the 1960s and 1970s. Homosexuals were better than Communists as a means of establishing a strong First Amendment, because homosexuals were even more villainized. If even the intensely hated and feared homosexuals could find protection in the First Amendment, then its principles were truly universal and robust against popular sentiment. Thus it was that the homophile and gay liberation movements became part of the great First Amendment litigation.

204. United States v. Zuideveld, 316 F.2d 873, 883 (7th Cir. 1963) (Swygert, J., dissenting) (citation omitted).


207. In 1957, the national ACLU adopted a resolution approving laws that criminalized same-sex intimacy and excluded homosexuals from government employment. See David Cole, Are You Now or Have You Ever Been a Member of the ACLU?, 90 MICH. L. REV. 1404, 1414 (1992) (book review). On the other hand, the ACLU insisted that homosexuals enjoy the same due process and free speech rights as other Americans, and ACLU-affiliated attorneys regularly represented gay defendants in the 1950s.
Amendment tradition, whereby the most hated groups (usually) found themselves free to organize and say things the majority of Americans despised. The freedom of the most despised to say what they thought reassured mainstream Americans that their freedom was that much more solid. In turn, the First Amendment provided legal protection for the institutions of the gay subculture at the very point, in the late 1950s and early 1960s, when their expansion and public visibility provoked heightened local, state, and national censorship. In part because of the assumptions of immunity created by First Amendment jurisprudence, gay subculture grew from nests of local bars, a few publications, and assorted romance and physique magazines in 1961 to a rainbow of organizations, churches, publications, and social clubs in 1981.

A. The Right of Association

The Supreme Court first recognized people's freedom of association in *NAACP v. Alabama ex rel. Patterson.* Overturning Alabama's subpoena of the NAACP's membership lists, the Court held that the First Amendment protects people's right "to pursue their lawful private interests privately and to associate freely with others in so doing." The Court reiterated that right in *Gibson v. Florida Legislative Investigation Committee,* which protected the Miami branch of the NAACP from identifying its members to Florida's race-baiting, red-baiting, and gay-bashing Johns Committee. Although the right of association originated in civil rights membership-list cases, no court limited the right to such cases. This constitutional right of anonymity had direct and important relevance for homophile organizations, whose members were so frightened of publicity that they often used pseudonyms even within the organizations. This assurance that the state could not obtain membership lists provided some space for homophile organizations to attract members. Moreover, the *NAACP v. Alabama* right of association was not limited to cases protecting membership lists. Lesbians and gay men

209. Id. at 466; see also United States v. Rumely, 345 U.S. 41 (1953) (state cannot force publisher to disclose identities of book purchasers).
211. See Note, The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil, 70 YALE L.J. 1084 (1961). For example, Edward Sagarin ceased using his pseudonym, Donald Webster Cory, after losing control of the Mattachine Society in 1965 to its more militant members. Sagarin went on to write scathing criticism of the Society and sociological works that characterized homosexuals as deviants. See D'Emilio, supra note 3, at 168.
212. Griswold, for example, cited *NAACP v. Alabama* as upholding a peripheral First Amendment right whose shadow contributed to the penumbral right of privacy. See Griswold v.
associated for the same social, political, and educational reasons as other people, and attorneys for gay bars, organizations, and clubs invoked this right repeatedly, even before Stonewall.  

1. Gay Bars and Bathhouses

The traditional situses of homosexual socializing were the tavern or bar, the dance hall, and the bathhouse. The state's primary response to these institutions was either benign neglect or harassment through occasional police raids. Police raids, especially when newspapers printed the names of those detained, were probably effective enough in communities with small lesbian and gay populations. A more powerful regulatory weapon emerged after the repeal of Prohibition in 1933. Rather than prohibiting liquor, the state became the vendor or the licensor of liquor sales in bars, taverns, hotels, and other establishments. In most states, liquor licensing statutes or agency regulations required that licensees be of "good moral character" and that licensed establishments not permit "disorderly" behavior on the premises. Violation of these conditions meant that a liquor license—and hence the establishment's main source of income—could be suspended or revoked by the liquor commission or alcoholic beverage control board. Inevitably, these conditions were applied in antihomosexual ways in states with visible gay subcultures.

By 1961, Florida, Michigan, New Jersey, New York, Virginia, and other states actively monitored bars and revoked their licenses for tolerating lesbian and gay customers. However, it was California's activist regulation that generated the first important cases, partly because California gay bars were the most profitable and partly because the California Supreme Court (the court of the legendary Justice Roger Traynor) was the most bold. In overturning the license revocation of a gay bar, the California Supreme Court in 1951 held that "[m]embers of the public of lawful age have a right to patronize a public restaurant and bar so long as they . . . not committing illegal or immoral acts." The court did not clearly state that this was a constitutional right, but the


214. For historical introductions, see CHAUNCEY, supra note 199, at 207-26 (gay bathhouses), 331-51 (gay bars); KENNEDY & DAVIS, supra note 199 (lesbian bars); Allan Bérubé, The History of Gay Bathhouses, in POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM 187-221 (Dangerous Bedfellows eds., 1996).

legislature forced the issue when, in 1955, it passed a law requiring the revocation of the liquor license of any establishment that is "a resort for . . . sexual perverts."216

In the test case of Vallerga v. Department of Alcoholic Beverage Control,217 Mary Azar and Albert Vallerga, co-owners of the First and Last Chance Bar in Oakland, conceded that their bar was a "resort for homosexuals" and argued that the 1955 amendment was unconstitutional. Their position was supported by an amicus brief prepared by Morris and Juliet Lowenthal, ACLU attorneys who specialized in gay rights cases. In its 1959 decision, the California Supreme Court unanimously but cautiously invalidated the 1955 amendment. The court emphasized that the regulatory department did not rely on investigative reports of lewd conduct or its revocation authority under a pre-1955 statutory prohibition of a bar being used as a "disorderly house or place in which people abide or to which people resort . . . for purposes which are injurious to the public morals."218 "Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances, may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges."219 The court concluded with the suggestion that if the department had relied on police reports of "women dancing with other women, and women kissing other women," it would have sustained the revocation as consistent with the rights of the customers.220

Although it was the first decision to strike down a statute targeting "sexual perverts" as unconstitutional, Vallerga was not revolutionary. It was a compromise that established a closet on terms unfavorable to homosexuals: they had a theoretical right to congregate, but not if they touched or kissed one another, as that would be offensive to the hypothetical heterosexual. The only offended heterosexuals who were likely to frequent these bars, however, were undercover investigators, revealing that Vallerga acquiesced in the closet culture. Same-sex dancing and kissing in a gay bar threatened the morals of a society that would never see it except through the eyes of its undercover investigators, who could bust such an establishment at the drop of a stool pigeon. Nonetheless, Vallerga was no more restrictive than any other state rule.

218. CAL. BUS. & PROF. CODE § 25601 (West 1985). Violation of this prohibition subjected a bar to the loss of its liquor license. See id. § 24200(a).
219. Vallerga, 347 P.2d at 912 (citation omitted).
220. Id. at 913.
Before 1967, no judge in America was willing to say that the *NAACP v. Alabama* right of association allowed the homosexuals to dance together in a gay bar. When pressed into litigation, courts in New York, New Jersey, Florida, and Louisiana upheld similar measures by state liquor authorities. On the other hand, the proprietors, as well as customers of gay bars were stimulated by these actions to resist through organized political and legal activism.

The last years of the 1950s and the beginning of the 1960s witnessed the most intense crackdown on gay bars in American history. Consider how this scenario played out in Miami. Florida's Legislative Investigation Committee served as a clearinghouse for antihomosexual law enforcement in that state, particularly in the years from 1958 to 1963. The committee shared police surveillance and its own investigatory files with the Florida Beverage Control Board, which closed many lesbian bars especially, all with little legal challenge. Miami was the center for one of the largest gay communities and in 1954 had adopted an ordinance making it unlawful for an owner, operator, manager or employee of a business licensed to sell intoxicating beverages to knowingly sell to, serve to or allow consumption of alcoholic beverages by a homosexual person, lesbian or pervert, as the same are commonly accepted and understood, or to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business.

Invoking this and other municipal ordinances, the Dade County Sheriff, the Miami and Miami Beach Police Departments, and the Beverage Control Board combined to harass all of Miami's gay and lesbian bars out of existence in 1960. Not a single official protested this campaign. For the late 1950s and early 1960s, there is no reported decision in Florida, or in any other southern state, reversing a gay bar's loss of its license. On the other hand, gay bars in Miami came back like heads on the hydra: for every bar closed by the authorities, two new ones were opened. Because gay bars were highly lucrative, the risk of raids and

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closure were offset by the possibility of huge profits, profits which could also justify hiring attorneys. One bar owner challenged the 1954 ordinance in the mid-1960s, but a state appeals court ruled that the city policy was justified “to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been deemed illegal.” The appeals court did not even mention the right of association. Sporadic harassment and closures continued through the 1960s but were abated when a bar owners association, formed in 1971, won a ruling from Municipal Judge Donald Barmack that the “congregating homosexuals” ordinance was constitutionally invalid.

The Miami experience was replicated in most other cities with large lesbian and gay populations: around 1961, the police sought to terrorize gay bars and baths with periodic raids and name-taking, while state or local alcoholic beverage rules prohibited even “congregating” by gays and lesbians in bars and enforced such rules by license revocations or suspensions based upon the reports of undercover investigators; in the 1960s or 1970s bar owners formed law reform coalitions or organizations to resist those policies by challenging them as a matter of law and by bargaining with the police as a matter of community politics, and in the 1970s deregulation of consensual adult sodomy reduced pressure on authorities to police gay baths, which also came to be left alone; by 1981, gay bars and baths proliferated like mushrooms after a spring rain. The right of association recognized by the Supreme Court played a small but key role in empowering bar associations to discredit “congregating homosexuals” policies such as Miami’s. Consider how this struggle played out in San Francisco, New York, and New Jersey.

After Mayor George Christopher was politically smeared for allegedly making San Francisco a magnet for homosexuals in that city’s 1959 election, he and his police chief hounded gay bars and cooperated

225. See Miami Bar Ordinance Held Void, ADVOCATE, Jan. 5, 1972, at 2. Later that year, the police department suspended enforcement of the ordinance and promised the bar owners that police harassment would diminish. See Miami Bars Open Dialogue with Lawmen, ADVOCATE, Aug. 16, 1972, at 10.
226. These rules tended to be particularly explicit in the South. In addition to the 1954 Miami ordinance, see 1956 Va. Laws, ch. 521 (permitting license suspension of bars that become “a meeting place or rendezvous for . . . homosexuals”); and Kotteman v. Grevenberg, 96 So. 2d 601, 603 (La. 1957) (allowing license revocation for bar “in which perverts and sex deviates congregated”). But they were hardly limited to the South. See, e.g., Murphy’s Tavern, Inc. v. Davis, 175 A.2d 1, 2, 5 (N.J. Super. Ct. App. Div. 1961) (suspending bar license because owner allowed female impersonators and homosexuals “to frequent and congregate” there; suspension justified as a prophylactic to thwart “sexual misconduct . . . in its embryonic stages”).
with the state’s Alcoholic Beverage Control ("ABC") Board in getting liquor licenses revoked for most of the lesbian and gay hangouts. Following the roadmap laid out in Vallerga, license revocations were based upon reports by undercover police and ABC agents that they were solicited for "unnatural acts" and witnessed "fondling or kissing between male patrons" as well as "lewd conversation." Twelve of the thirty gay bars lost their licenses in 1960-61, and most of the remainder lost their licenses in 1962-63. Some of the bars challenged the revocations in court. Distinguishing Vallerga, the California appellate courts upheld revocations for the Black Cat, the 585 Club, and the Paper Doll, based upon decoy cop testimony about kissing, dancing, and advances by homosexual patrons. As in Miami, the San Francisco bars came back, only much more quickly. Not only were there more bars and many more patrons, but the bars became a major center of political activity (leaf-letting, get-out-the-vote drives, etc.). In 1962, bar owners formed a Tavern Guild that protected their interests. By 1965, gay bars in San Francisco had turned the corner with regard to licensing. In the 1970s, bars remained controversial, but the ABC and penal code problems shifted from cross-dressing and campy behavior to nude dancing and prostitution.

In October 1959, egged on by a press campaign, the New York State Liquor Authority ("SLA") Chair, Thomas Rohan, announced that the SLA would revoke the licenses of all bars "patronized by prostitutes and homosexuals." In the next year, virtually all of the thirty or more gay bars in the city were closed down, typically for "permitting homosexuals and degenerates to loiter," even when bar owners (implausibly) claimed unawareness of the customers' sexual orientation. None of the closings resulted in reported litigation to overturn the SLA action. On the other hand, new bars opened up to replace the closed ones, sometimes in the same location under ostensibly new management. There was then a regulatory lull before enforcement

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picked up again in the mid-1960s. For example, in March 1967, the SLA revoked the license for Tony Pastor's, a Greenwich Village bar, because it "permitted the licensed premises to become disorderly in that it permitted homosexuals, degenerates and undesirables to be on the license premises and conduct themselves in an offensive and indecent manner."233

By 1967, however, owners of these establishments were emboldened by an important legal victory that year. In Kerma Restaurant Corp. v. State Liquor Authority,234 a closely divided New York Court of Appeals overturned a license revocation which rested upon nothing more than dubious instances of cross-gender attire and allegations of lewd solicitation among the patrons. The court found that this was not sufficient evidence of "general disorder"—the statutory standard. On the other hand, in December of 1967, the court upheld a license revocation where there was evidence that there was extensive "feeling of private parts," with apparent acquiescence of the management.235 This thoroughly mixed message nonetheless empowered gay bars to require the SLA to expend more resources in order to close them; this legal respite came just as gay political power was crystallizing in the state. After the 1969 riots at the Stonewall, a bar operating without a liquor license, the SLA gradually shifted its efforts toward regulating (monitoring lewd conduct) rather than closing gay bars under its "disorderly place" powers.

The most dramatic litigation was in New Jersey, whose ABC Department energetically investigated gay bars and revoked their licenses under the Department's Rule 5, which, as amended in 1950, required licensees to police their premises against any "'lewdness' and 'immoral activity, ... [or] 'foul, filthy, indecent or obscene language or conduct,' or 'any disturbances, brawls, or unnecessary noises.'"236 Adopting arguments advanced in a Mattachine Society amicus brief, the New Jersey Supreme Court in One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control237 held that bars could not be disciplined simply because gay people congregated in them and engaged in campy or gender-crossing behavior and dress. Justice Jacobs's opinion applied and reinterpreted Vallerga in light of subsequent Warren Court

236. One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control, 235 A.2d 12, 14 (N.J. 1967) (quoting New Jersey's A.B.C. Rule 5). An example of this rule in practice was Re Louise G. Mack, A.B.C. Bulletin 1088, Item 2 (Nov. 2, 1955) which suspended a bar's license because the licensee allowed the establishment to operate as a congregating place for homosexuals.
237. 235 A.2d at 19.
decisions. He started with the proposition that homosexual status cannot be criminalized, and held that homosexuals have "the equal right to congregate within licensed establishments such as taverns, restaurants, and the like." Relying on Griswold and NAACP v. Alabama, Justice Jacobs required the ABC Department to show strong reason to invade "rights of the homosexuals to assemble" and the bar's corresponding right to serve them. After this remarkable introduction, the court dismissed the usual third-party effects—nonhomosexual patrons who wander in would be shocked by effeminate behavior, homophobes might attack patrons, the public would lose confidence in the liquor industry—as insufficiently established in the record. The court believed that less restrictive regulations could deal with the third-party effects without sacrificing patrons' rights.

Similar to Kerma and Vallerga, One Eleven Wines & Liquors invalidated an explicitly antihomosexual liquor policy which directly infringed gay people's rights of association. None of these decisions ended state harassment of gay bars, for all three cases left room for liquor commissions to investigate lewd conduct, however defined. The key variable became how much of its resources a liquor board was actually willing to invest in vendettas to close down particular bars. The answer in the 1970s for New York, San Francisco, Los Angeles, Chicago, and Washington, D.C. was virtually none, for political as well as fiscal reasons. As a result of legal deregulation and the post-Stonewall social revolution, bars and baths boomed in the 1970s. Chicago, which had about a dozen recognized gay bars in the mid-1960s, sported between sixty and seventy-five gay bars ten years later; San Francisco and Los Angeles—the chief battleground of the bar wars of the 1950s and early 1960s—had 130 and 300 gay bars, respectively; New York's bar culture doubled in that period; multiple bars opened in cities previously without places for lesbian and gay socializing. It was estimated in 1976 that there were 2,500 gay bars generating $100 million each year, as well as 150 gay bathhouses pulling down $20 million per year. These numbers would not have been possible without an emerging regulatory consensus that gay people are entitled to associate with, and have private sex with, one another at institutions of their own creation.

238. Id. (citing Stoumen v. Reilly, 234 P.2d 969, 971 (1951)).
239. Id.
240. See id. at 18-19.
Notwithstanding these changes, bars and baths continued to be risky businesses. In only a few states were there "congregating homosexuals" prohibitions. Most of the regulatory attention focused on issues of rowdy conduct by patrons, nude dancing, and drugs and prostitution. In California v. LaRue, the U.S. Supreme Court held that nude dancing and other lewd activities were amenable to broad state regulation. Indeed, the states were empowered to regulate bar activities more extensively than other associational activities, pursuant to extra authority granted to states to regulate the sale of liquor by the Twenty-First Amendment. Although the state offered few formal barriers to gay and lesbian socializing, Big Brother was watching the show and deciding how much fun gays would be permitted.

2. Gay Organizations and Churches

Even before NAACP v. Alabama, state actors realized that they could not prevent homosexual men and women from creating the Mattachine Society and lesbians from establishing DOB. The homophobic FBI, for instance, recognized gays' rights to organize for political and informational purposes. That recognition, of course, did not prevent the FBI and local police from spying on these organizations, leaking the names of known members to employers, and on occasion, raiding meetings on trumped-up pretexts. In August 1960, for example, Philadelphia police raided a Mattachine reading group held in a private house and detained over eighty persons, including several married couples (all but two of whom were released without arrest). Worse yet was the New York Police Department's harassment of the New York chapter of the DOB in 1970 and 1971. According to the chapter's president, Ruth

242. The best example is Virginia, whose ABC law prohibited liquor licensees from allowing their premises to "become a meeting place or rendezvous for users of narcotics, drunks, homosexuals, prostitutes, pimps, panderers, gamblers, or habitual law violators," VA. CODE § 4-37(a)(2)(c) (Michie 1950). In the early 1970s, Virginia's ABC Board sought to close down the Cue Club, Norfolk's most popular gay bar, because it was a "congregating place for homosexuals" and a situs for "lewd and disorderly conduct." Virginia Bar Under Siege Because It Caters to Gays, ADVOCATE, Nov. 22, 1972, at 14. This ongoing regulatory battle stimulated the formation of the Tidewater Gay Freedom Movement, the area's first gay rights organization. By the late 1970s, the ABC Board, under legal and political seige, retreated from its policy. See Fred Parris, Va. Gays Fight Archaic Liquor Laws, GAY BLADE, June 1978, at 1. The explicitly antihomosexual statute was not repealed until the 1990s, however.

243. 409 U.S. 109 (1972) (affirming the authority of California's ABC Board to prohibit explicitly sexual live entertainment or films in licensed establishments).

244. See Cade Ware, Hello and Goodbye to the FBI, GAY BLADE, Apr. 1977, at 12 (reporting that the police and the FBI were spying on D.C. gay leaders, illegally tapping their phones, and breaking into their offices).

245. See Dal McIntire, Tangents, ONE, Nov. 1960, at 17.
Simpson, police intrusions into DOB meetings and harassment of the group's leaders, including herself, contributed to the group's dissolution.\textsuperscript{246} No one went to jail, because Simpson and other DOB leaders had access to lawyers who guided them through the criminal justice system. Note that police organizational raids operated disproportionately against lesbians (bar raids operated mostly against gay men).

Notwithstanding police harassment, gay rights organizations flourished in the 1960s, in part because the Warren Court's precedents had created a libertarian regime under which the state could not directly suppress such organizations. After 1960, these organizations grew more politically militant—insisting that "Gay Is Good" and not just tolerable, publicly picketing and otherwise protesting antigay policies, and forming relationships with civil liberties lawyers across the country. New kinds of gay organizations formed, most notably the Metropolitan Community Church ("MCC"), a lesbian and gay congregation established in Los Angeles in 1968 by Reverend Troy Perry.\textsuperscript{247} Insulated from attack by the Free Exercise Clause of the First Amendment, as well as the implied right of association, MCC spawned almost 100 sibling congregations in other cities during the 1970s. Additionally, gay-friendly groups formed within major religions, including the United Methodist Gay Caucus, Dignity (Roman Catholics), Evangelicals Concerned, The Friends' Committee for Gay Concerns as well as the Committee of Friends on Bisexuality (both Quakers), Integrity (Episcopalians), Unitarian-Universalist Gay Caucus, Lutherans Concerned for Gay People, Presbyterian Gay Caucus, Congregation Beth Chayim Chadashim and Congregation Beth Simchat Torah (Jewish congregations founded in Los Angeles, New York, and Washington, D.C. in the 1970s).\textsuperscript{248} These groups provided counseling for gay individuals and couples, places for social and intellectual events, and programs for issues of coming out, alcoholism, venereal disease, and sexual harassment.

After Stonewall, hundreds of new organizations formed, most notably GLF (Gay Activists Alliance) and its successor GAA (the Gay Liberation Front). These organizations were more radical and militant than those of the 1960s, including even MSW (Mattachine Society of Washington). Like MSW, they could not be suppressed and were willing

\begin{itemize}
  \item \textsuperscript{246} See \textsc{Simpson}, supra note 77, at 122-30. DOB was beset by other problems more serious than a single police raid, which was most likely the straw that broke the camel's back.
  \item \textsuperscript{248} See \textit{Advocate Guide}, supra note 247, at 19.
\end{itemize}
to go to court to resist police harassment.\textsuperscript{249} Realizing this, antihomosexual state officials did not try to destroy or censor these organizations directly. (An exception was the North American Man-Boy Love Association, formed in 1977 and harassed by the police.) Rather, as they had previously done with gay bars, officials often used the licensing or benefit process as an indirect mechanism of censorship. The first target was MSW, and the brief struggle between it and the licensocracy set a pattern frequently replicated in the metropolitan states during the 1970s and the rural states during the 1980s.

In 1962, MSW registered as an educational organization under District of Columbia law, so that it could solicit funds.\textsuperscript{250} Representative John Dowdy (D-Texas) introduced a bill to revoke MSW's license to solicit funds in 1962. His rationale was: “The Mattachine Society is admittedly a group of homosexuals. The acts of these people are banned under the laws of God, the laws of nature, and are in violation of the laws of man.”\textsuperscript{251} This bill was reintroduced in 1963. The August 1963 hearings before Representative Dowdy's District of Columbia subcommittee were a donnybrook. Kameny openly defied Dowdy, who made a series of disparaging remarks about “queers” and “fairies.”\textsuperscript{252} Assistant Corporation Counsel for the District Robert Kneipp and Professor Monroe Freedman, representing the National Capitol Area Civil Liberties Union, testified that the Dowdy bill was an unconstitutional burden on Mattachine's First Amendment rights to speech and association.\textsuperscript{253} Still, the Dowdy bill rolled through the House of Representatives on a 301-81 roll-call vote, although it was politely ignored by the Senate. Later in the
month, the District of Columbia Department of Licenses and Inspections proposed to revoke MSW's license because its officer list contained pseudonyms, a fact that Kameny had conceded at the Dowdy hearings. Those proceedings, too, ended inconclusively, but not without further publicity for MSW, which before 1963 had been resolutely ignored by the mainstream media. "By virtue of the energetic efforts of Representative Dowdy . . . we are now known throughout the informed Washington community—heterosexual as well as homosexual—and known in the best possible light," bragged Kameny.254

Would a judge in 1963 have agreed with the critics of the Dowdy bill? An answer is not entirely clear. Even in the early 1970s, judges were typically unwilling to intervene when administrators interfered with gay people's efforts to organize. While the First Amendment protected gay organizing from direct state censorship, it did not necessarily guarantee gays any affirmative state recognition. For example, the Ohio Supreme Court upheld the decision of the Secretary of State to disallow the Greater Cincinnati Gay Society's Articles of Incorporation as against public policy: "We agree with the Secretary of State that the promotion of homosexuality as a valid life style is contrary to the public policy of the state."255 On the other hand, the previously unsympathetic New York Court of Appeals ordered its Secretary of State to incorporate GAA and rejected any public policy objection to incorporating gay organizations.256 States like New York and California were more likely to accommodate the post-Stonewall rush to organize because the political equilibrium in those jurisdictions had already shifted toward recognizing gay power. States like Ohio were still shocked by the post-Stonewall visibility of gay people. This was even more true in southern, border, and western states, where gay groups generally did not even petition for state recognition or incorporation until the 1980s, at which point it was clear that the state had no legal basis to deny gay groups regular rights associated with incorporation.257

257. While Mississippi may not be typical even of the South, it reflects the different equilibrium there. The state balked at giving charters to the Mississippi Gay Alliance ("MGA") and the Friends of Lesbians/Gays Mississippi, which sought charters in 1984. Upon threat of litigation, the parent group of the organizations got its charter in July, but the state refused MGA a charter. The reason given was that MGA was likely to encourage people to violate the state's "crime against nature" law. The Attorney General finally acquiesced, again only after pressure of a lawsuit that probably would have been successful, in the summer of 1985. See LAMBDA UPDATE, Winter 1985, at 1.
In another example, the Lambda Legal Defense & Education Fund, Inc. petitioned the New York courts for approval as a legal assistance corporation in 1972. Lambda’s stated purposes were “to promote the availability of legal services to homosexuals by encouraging and attracting homosexuals into the legal profession; to disseminate to homosexuals general information concerning their legal rights and obligations; and to render technical assistance to any legal services corporation or agency in regard to legal issues affecting homosexuals.”

The Appellate Division of the New York Supreme Court denied the application on the grounds that the corporation was “neither benevolent nor charitable,” as required by law, and that there was no need for the organization. “A supplemental affidavit does indicate a lack of desire on the part of some attorneys who work pro bono publico to take the cases of homosexuals, but this appears to be no more than a matter of taste, and it is not established that lawyers are completely lacking.” A fractured New York Court of Appeals reversed the decision as “unsupportable” (without saying why or how) and remanded to the lower court to rethink, in light of criteria that were left unsaid. On remand, the appellate division grudgingly approved the application, but only after striking one clause from Lambda’s statement of goals: “to promote legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals and by providing potential assistance to such students after admission to law school.”

A similar waffling strategy was adopted by the Internal Revenue Service (“IRS”). Educational and charitable organizations are entitled to exemption from federal income tax, and their contributors are entitled to tax deductions. The IRS had granted tax-exempt status to organizations not having “gay” in their names, most prominently the University Fellowship of Metropolitan Community Churches described above, and had been willing to give “gay” groups exemptions if they stipulated that they did not “promote” homosexuality or if they accepted homosexuality as a “diseased pathology.” Accordingly, the IRS denied tax exempt status to the Gay Community Services Center of Los Angeles in January 1973. In an important turnabout and after a series of meetings with gay representatives, the IRS reversed itself in August of that year, giving

259. Id.
262. See I.R.C. § 170 (1994) (deduction for contributions to charitable organizations); id. § 501(c)(3) (exemption for charitable organizations).
exempt status for the first time to an organization with "gay" in its name.\textsuperscript{263} Lambda Legal Defense got surprisingly quick approval the next year, but the IRS then denied exempt status to the Pride Foundation, a pro-gay educational and legal organization.

The IRS found that the Pride Foundation's "efforts toward the elimination of unjustified and improper discrimination or treatment, or toward violations of the privacy of adult individuals, are insignificant when compared to the possible detriment to society," specifically, "advancing the unqualified and unrestricted promotion of the alleged normalcy of homosexuality" which the IRS feared would have the effect "in the general prevalence of what is still generally regarded as deviant sexual behavior."\textsuperscript{264} As legal authority for its position, the agency cited the Supreme Court's disapproval of "perverted" sexuality in its obscenity opinions and state sodomy laws against homosexual conduct. Once such a justification was out in the open, gay legal representatives were able to ply the IRS with arguments and information undermining its premises. Lawyers for the Fund for Human Dignity in New York worked with the IRS for two years and persuaded the agency to grant exempt status to gay educational groups, without any disclaimer, in a September 1977 ruling.\textsuperscript{265} As constitutional icing on the cake, the D.C. Circuit held in 1980 that the IRS's old rule violated due process antivagueness requirements as applied to a feminist journal that favorably discussed lesbianism.\textsuperscript{266}

Gay religious, educational, and legal organizations were not nearly so numerous as were gay bars and baths by the end of the 1970s.\textsuperscript{267} Also unlike the bars and baths, their growth was not slowed by police harassment or state suppression, certainly not by direct censorship, and probably not by hassles over licensing and certification. IRS's refusal to

\textsuperscript{263} See IRS Grants Tax Exemption to a 'Gay' Group; a First, ADVOCATE, Sept. 11, 1974, at 24.

\textsuperscript{264} IRS Denies Exemption to Pride, Calls Activities 'Detrimental', ADVOCATE, Nov. 6, 1974, at 27. The IRS characterized Pride's dinner-lecture series as a format that "encourages or facilitates homosexual practices to a substantial degree," and thereby "readily contribute[s] to increased personal relationships among homosexual individuals." Id.


\textsuperscript{266} See Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980).

\textsuperscript{267} One report found about 125 religious organizations—fewer than the number of gay bars in Los Angeles alone—with a combined membership of more than 20,000, and 110 secular, nonstudent organizations with a combined membership of 9,873—about the same as that of the Polish Army Veterans Association of America. See Sasha Gregory-Lewis, A Profile: Gay Organizations, Part III, ADVOCATE, Dec. 1, 1976, at 7.
grant tax exempt status stymied any organization wanting to raise money, but any organization willing to persevere was able to obtain the exemption, which was routinely available after 1977. The political and legal battles over state recognition were symbolic politics by and large: the state conceded that the First Amendment prevented it from directly suppressing gay organizations, but believed that the Amendment did not require the state to apportion its benefits and approved forms to gay groups on a par with other groups. In short, antihomosexual discourse shifted from "let's harass gay organizations and expose the names of members" (the Dowdy approach) to "no promo homo" (no promotion of homosexuality). The First Amendment contributed to this shift, as the former was clearly in violation, and the latter an open question.

3. Gay Student Clubs

Before Stonewall, very few homosexual college students were out of the closet. Only a few colleges had homophile student groups; the earliest known group was formed at Columbia University by Rita Mae Brown and others in 1966. After Stonewall, lesbian and gay college groups grew like weeds in a vacant lot. The main goal of such groups was to create a gay-friendly community within the university that would be a center for social as well as educational exchanges. There was little that college administrations could do to keep students from forming their own clubs and organizations, except to deny college or university recognition and funding for the groups. Like other gay organizations that were denied such equal rights, the student groups found homophile and ACLU attorneys eager to litigate their cases under the First Amendment's right of association.

The Supreme Court in 1972 held that students have a First Amendment associational right to form a Students for a Democratic Society chapter at a public college or university. Although the Court cautioned that a university has residual power "to assure that the traditional academic atmosphere is safeguarded" and to promulgate reasonable rules and regulations, the decision augured against a state educational institution's refusal to recognize gay student groups. Such nonrecognition would usually be content-based, a virtually impossible

268. Ironically, at the moment discourse was shifting, former Representative Dowdy was sent to jail for bribery. Dowdy blamed his troubles on "'homosexuals and urban renewal interests,'" who were intent on silencing him. Dowdy Says Gays Behind Conviction, ADVOCATE, May 10, 1972, at 4.


270. Id. at 194 n.24.
regulation to justify under stringent First Amendment standards. For instance, public universities in the South and Midwest often denied recognition to gay student groups for openly content-based reasons, and the groups won recognition in even the most conservative federal courts.  

The hardest such case, *Gay Students Organization v. Bonner,* was also the first federal appellate decision. The University of New Hampshire recognized its Gay Students Organization ("GSO") in 1973, but encountered outside political pressure when GSO sponsored a dance on campus. Bowing to the pressure, the university's board of trustees banned further social events by GSO, although it did allow the group to put on a play, which exposed the university to further publicity and pressure from the governor. Federal appeals Judge Frank Coffin held that the university could not censor GSO's activities. So long as the gay students advocated no illegality, and their literature was not obscene, the university was required to treat them the same as other student groups. *Bonner* was a remarkably gay-friendly opinion, because it

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271. See, e.g., *Gay & Lesbian Students Ass'n v. Gohn,* 850 F.2d 361 (8th Cir. 1988) (University of Arkansas at Fayetteville); *Gay Student Servs. v. Texas A&M Univ.,* 737 F.2d 1317 (5th Cir. 1984); *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students v. Matthews,* 544 F.2d 162 (4th Cir. 1976) (Virginia Commonwealth University); *Student Coalition for Gay Rights v. Austin Peay State Univ.,* 477 F. Supp. 1267 (M.D. Tenn. 1979); *Wood v. Davison,* 351 F. Supp. 543 (N.D. Ga. 1972) (University of Georgia).

272. 509 F.2d 652 (1st Cir. 1974).

273. After the play, gay literature was distributed, and that generated even more press. The *Bonner* court recounted Governor Meldrim Thomson's response, who wrote an open letter to the trustees after the play, warning that if they did not "take firm, fair and positive action to rid your campuses of socially abhorrent activities," he would "stand solidly against the expenditure of one more cent of taxpayers' money for your institutions." Dr. Thomas N. Bonner, President of the University, then issued a public statement condemning the distribution of the homosexual literature and announcing that a repetition of the behavior would cause him to seek suspension of the GSO as a student organization. *Id.* at 654. This was not an empty threat. A few years later, Florida conditioned university funding on their refusal to recognize any student organization advocating or encouraging sexual relations outside of marriage. The Florida Supreme Court struck down the condition in *Department of Education v. Lewis,* 416 So. 2d 455 (Fla. 1982). A recent decision striking down a similar effort by the Alabama legislature is *Gay Lesbian Bisexual Alliance v. Sessions,* 917 F. Supp. 1548 (M.D. Ala. 1996).

274. The court assumed that a university, so minded, would not be powerless to regulate public petting (heterosexual or otherwise), drinking in university buildings, or many other noncriminal activities which those responsible for running the institution rightly or wrongly think necessary "to assure that the traditional academic atmosphere is safeguarded." Thus, if a university chose to do so, it might well be able to regulate overt sexual behavior, short of criminal activity, which may offend the community's sense of propriety, so long as it acts in a fair and equitable manner.
not only assured that gay student groups would have breathing room for their homophile activities, but also because it rejected the "heckler's veto" argument in the educational setting.275

The principles Judge Coffin articulated in Bonner only applied to state colleges and universities. Judge Coffin's articulations might, however, apply more broadly. One case involved a high school prom, which was forced to allow a gay couple to attend in 1980.276 A more complex case involved a private university, Georgetown. Lesbian, gay, and bisexual students formed an informal group at that Roman Catholic university and its law center in 1977 and petitioned for recognition as a student club in academic year 1978-79. The organizations' statements of goals emphasized education and information about homosexuality, policy and legal issues, and the larger gay community. Georgetown refused to recognize the groups. "This situation involves a controversial and complex matter of faith and moral teachings of the Catholic Church," explained the law center's Dean David McCarthy, and "official subsidy of a gay law students organization would be interpreted by many as endorsement of the positions taken by the gay movement on a full range of issues."277 Although the First Amendment would have invalidated a public university's action for such reasons, Georgetown was private and therefore not governed by the First Amendment.

Nonetheless, the students sued in 1980, pursuant to the District's Human Rights Act. Originally adopted in 1973 and passed as a home rule statute in 1977, the Human Rights Act prohibited discrimination on the basis of sexual orientation by private employers, public accommodations, and educational institutions, such as Georgetown.278 Thus it was

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Bonner, 509 F.2d at 663 (quoting Healy v. James, 408 U.S. 169, 194 n.24 (1972)).

275. See id. at 661-62. "The heckler's veto perverts [the First Amendment] by denying protection on the theory that expression may so incense listeners that they will harm the speaker." Brent Hunter Allen, Note, The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation, 47 VAND. L. REV. 1073, 1094 (1994).

276. Aaron Fricke petitioned Rhode Island's Cumberland High School to bring a male date, Paul Guilbert, to the prom. Citing the danger of disruption and even threats to Fricke, the principal denied the request. Represented by the ACLU, Fricke sued and won. Judge Pettine granted an injunction, extending Bonner's disapproval of the heckler's veto to a high school setting. See Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980). For an account of the uneventful prom that followed, see AARON FRICKE, REFLECTIONS OF A ROCK LOBSTER (1983).


278. See D.C. CODE ANN. §§ 1-2501 to 1-2557 (1992 & Supp 1996). The students relied on § 1-2520(1), which prohibits educational institutions from denying or restricting "the use of, or access to, any of its facilities or services" because of sexual orientation and other discriminatory
Georgetown, and not the gay students, that relied on the First Amendment—specifically, the Free Exercise of Religion Clause as well as the Free Speech Clause. Ultimately, the District's Court of Appeals ruled that Georgetown had to provide equal access and services to the gay groups but did not have to "recognize" the groups formally. 279

The Georgetown case was exceptional, but it reflected the trend: every legal challenge to university exclusions of gay student groups was successful, and almost every major university had such a group, even in the South, where such groups sometimes had to sue the legislatures threatening to withhold funds from colleges that were prepared to recognize gay groups. 280 By 1976, there were more than 300 gay groups on college and university campuses, having between 8,000 and 10,000 members. 281 Although the student groups by the late 1970s showed little of the barnburning political activism of those in the late 1960s, they were among the most important gay organizations, because they provided emotional and social support for lesbian and gay youth at a critical period in their lives, put on valuable educational and social functions benefiting the larger university and local community of gay people and some straights, and often served as centers for local reform. Stanford, Princeton, University of Southern California, and Michigan adopted university nondiscrimination policies as a result of gay student petitions. East Lansing and Ann Arbor, Michigan; Yellow Springs, Ohio; Pullman, Washington; and Chapel Hill, North Carolina adopted gay rights ordinances in large part because of support from the universities located in those towns. 282

B. Freedom of the Press

Although no value is more deeply enshrined in the First Amendment than its protection of a free press, courts throughout this century have held that the protection does not extend to obscene publications. 283 But

reasons. For other such laws, see Appendix B.

279. See Gay Rights Coalition, 536 A.2d at 5 n.2 (opinion of Mack, J., setting forth the court's judgment and the alignment of judges).
281. See Randy Shilts, Gay Campus Movement: Trading Pickets for Proms, ADVOCATE, Sept. 8, 1976, at 6. By 1981, 26% of all colleges and universities had recognized such groups; the figure was 80% for public colleges and universities. See Recognition for Gay Students, ADVOCATE, Nov. 26, 1981, at 10.
what makes a publication "obscene"? During the 1950s, many censors, prosecutors, and judges believed that any favorable mention of homosexuality or description of sex between people of the same sex was obscene. Allen Ginsberg's poem *Howl*, celebrating nonconforming and specifically homoerotic love, was seized by Customs officials on grounds of obscenity in March 1957. When the books were released, the San Francisco police arrested a bookstore owner and his clerk for violation of the state's law criminalizing the sale of obscenity. The censorship of *Howl* reflected the double regulation of allegedly obscene publications: they could be seized by federal officials, and if they escaped the federal net state and local police often went after them. At the federal level, the Customs Office only had jurisdiction to seize obscene publications arriving from overseas. Domestic mailings fell under the jurisdiction of the Postal Service, which was also authorized to seize obscene mailings. Pursuant to these powers, and after two years of close monitoring, the Postal Service seized the October 1954 issue of *One*, the first homophile publication circulated in the U.S. mail, believing that a poem, an ad for a French magazine, and a short story entitled *Sappho Remembered*, which depicted love between two women, were obscene. The lower federal courts upheld the Postal Service's position, implying that any discussion of homosexual love that was not disapproving was obscene. Although the Postal Service seized no other issues of *One*, it reportedly kept lists of the people who subscribed to the magazine and gay pen-pal clubs, opened the mail of people on those lists, and shared their names with employers.

Some judges and commentators thought that the broad understanding of obscenity was unconstitutional. In 1957, Judge Clayton Horn overturned the San Francisco police seizure of *Howl* because he thought the First Amendment protected serious literature, however nonconforming and randy it might be. In the same year, the Supreme Court in *Roth v. United States* confirmed that obscene speech is not protected by the

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286. Movies were subject to a third level of censorship: the private Motion Picture Code of 1934 prohibited any depiction of homosexuality or mention of sexual perversion.
291. *See* the account of the *Howl* case, reprinted in GINSBERG, *supra* note 284, at 173.
First Amendment, but narrowed the definition of obscenity to include only "material which deals with sex in a manner appealing to prurient interest."\(^{291}\) *Roth* opened up a new area for First Amendment litigation and signaled a constitutional standard of moderate tolerance. Its application to homosexuality was immediately confirmed by the Court's summary reversal, on authority of *Roth*, of the lower court opinions upholding Postal Service censorship of *One*.\(^{292}\) The implication that favorable discussion of sexual orientation was constitutionally protected was revolutionary. The First Amendment directly and importantly facilitated the development of subcultural literature, erotica, and media. It also assured that lesbian and gay subcultures would be the subject of mainstream literature and media attention. On the other hand, the courts remained suspicious of sexual materials generally (treating these less favorably than hateful racist or sexist speech) and homosexual materials in particular (sometimes treating them less favorably than sexist materials).

1. Lesbian and Gay Literature and Print Media

*Roth* and *One, Inc. v. Olesen* did not answer all questions regarding sexual references in literature. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*,\(^ {293}\) the Court invalidated state censorship of *Fanny Hill*, a ribald eighteenth-century novel which included episodes of prostitution, same-sex female and male intercourse, female masturbation, and different-sex flagellation. Justice William Brennan's plurality opinion refined the *Roth* test to require that "(a) the dominant theme of the material taken as a whole appeal[] to a prurient interest in sex; (b) the material [be] patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material [be] utterly without redeeming social value."\(^ {294}\) Three other Justices concurred under approaches more protective of erotic publications.\(^ {295}\) Three Justices dissented. Supporting more stringent censorship, dissenting Justice Thomas Clark relied on an expert opinion that "obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, . . . may induce antisocial conduct by the average

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292. See *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam), rev'g 241 F.2d 772 (9th Cir. 1957).
294. Id. at 418 (Brennan, J., plurality opinion).
295. See id. at 421 (Black & Stewart, JJ., concurring in the reversal); id. at 424 (Douglas, J., concurring in the judgment).
He invoked J. Edgar Hoover, who "ha[d] repeatedly emphasized that pornography is associated with an overwhelmingly large number of sex crimes." He invoked J. Edgar Hoover, who "ha[d] repeatedly emphasized that pornography is associated with an overwhelmingly large number of sex crimes."

Any other result in Memoirs would have been a threat to serious literature about the variety of sexual experiences. If Fanny Hill could not be censored, it seemed probable that other tales of sexually unconventional lives likewise could not be, including the lesbian romances of Ann Bannon and other authors popular in the 1950s and 1960s. On the other hand, because Fanny Hill was considered a literary classic and because its description of same-sex intimacy was more colorful than anatomically specific, Memoirs did not necessarily forbid censorship of literature with less literary merit or more explicit sexuality. On the same day it decided Memoirs, the Court (also in opinions by Justice Brennan) decided two other cases which confirmed the censors' authority.

At issue in Mishkin v. New York were fifty different paperback pulps, some depicting what Justice Brennan termed "normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality," with others depicting "scenes in which women were making love to women." The key issue in the case involved the meaning of the Roth-Memoirs "prurient appeal" test. The appellants argued that most of the pulps, especially those depicting flagellation, fetishism, and lesbianism, had little apparent prurient interest to the average person, yet the Court insisted that they could be censored. Hence, Justice Brennan refined the prurient appeal test in the following way:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

The final case decided that day, Ginzburg v. United States, involved the censorship of arguably nonobscene material. Finding that it was created and distributed "entirely on the basis of its appeal to prurient interests," especially those of impressionable adolescents, the Court held that "in close cases evidence of pandering may be probative with respect

296. Id. at 452 (Clark, J., dissenting).
297. Id.
299. Id. at 505.
300. Id. at 508.
to the nature of the material in question and thus satisfy the Roth test.\textsuperscript{302}

Notwithstanding the analytical ambiguities of Roth as modified by the Memoirs, Mishkin, and Ginzburg trilogy (themselves later modified by the Court and interpreted in various ways by state courts), the obscenity cases created a legally safe space for most lesbian and gay literature. The Court's \textit{per curiam} opinion in \textit{One, Inc. v. Olesen} insulated informational publications from censorship, even when they depicted lesbians and gay men favorably. Memoirs protected publications that could plausibly claim literary or scientific merit. Mishkin could be distinguished as allowing censorship only when sex was explicitly described, without any intellectual agenda. Gone were the days when Customs officials, Postal Service personnel, and local police could simply decree what would be available to citizens. There was still a fair amount of censorship, to be sure. For instance, a lower court in New York found the description of lesbian sex in \textit{Flesh Worshippers} "sick" and, therefore, obscene under Mishkin.\textsuperscript{303} On the eve of Stonewall, however, the New York Court of Appeals reversed the censorship.

Not only were there substantive obstacles to press regulation, but more importantly the Supreme Court also took away censors' procedural advantages. Before the 1960s, censors could seize publications \textit{ex parte}; the publisher would have to sue for return of the materials, which gave the state all the advantages of inertia.\textsuperscript{304} These were precisely the kinds of prior restraints that the Warren Court disapproved in other contexts. In \textit{Marcus v. Search Warrant},\textsuperscript{305} the Court held that seizure of allegedly obscene materials (including a publication called \textit{Sexual Deviation}), based upon an \textit{ex parte} petition to a magistrate, was unconstitutional, because under Roth it would have a chilling effect on the promulgation of protected materials. This prohibition was expanded to include even informal prior restraints by state actors against allegedly obscene materials in \textit{Bantam Books, Inc. v. Sullivan}.\textsuperscript{306} Two years later, the Court extended Bantam's strong presumption against prior restraints to protect allegedly obscene movies in \textit{Freedman v. Maryland}.\textsuperscript{307}

\textsuperscript{302} Id. at 474.


\textsuperscript{304} See, e.g., Truth Seeker Co. v. Durning, 147 F.2d 54 (2d Cir. 1945) (ruling on filmmakers' suit to recover material).

\textsuperscript{305} 367 U.S. 717, 731-33 (1961).

\textsuperscript{306} 372 U.S. 58, 70-71 (1963).

The Supreme Court’s First Amendment jurisprudence contributed to the decline of the censor and the explosion of lesbian and gay publications. The three homophile publications founded in the 1950s—One, Mattachine Review, and The Ladder—had no problems with censors during the 1960s. Testing the limits of censorship, new and more militantly progay publications were founded in the mid-1960s, including Philadelphia’s Drum and San Francisco’s Vector in 1964, Washington, D.C.’s Homosexual Citizen in 1966, and Los Angeles’s The Advocate in 1967. Along with The Ladder, whose editor Barbara Gittings kept that publication in the avant-garde of the gay press, these new magazines explicitly aimed to build lesbian and gay subcultures that would exercise increased political power. Drum and The Advocate, in particular, also embraced gayradical prosex values consonant with the “do your own thing” philosophy of sixties subculture. Gay and lesbian sex was celebrated as a positive human good, not something to be merely tolerated. These magazines and Vector included explicitly erotic photographs and advertisements. Drum was the first gay journal to publish frontal male nudity, which earned publisher Clark Polak a federal indictment for obscenity. As part of a plea agreement in 1969, Polak agreed to terminate Drum.

Drum’s cautionary experience with censorship’s still lively sex negativity was overwhelmed by Stonewall, which unleashed the counterculture in full force. With postal and other censors at bay, dozens of lesbian-feminist and gay magazines were founded in the wake of Stonewall. Many of these new publications were radical, advocating positions such as lesbian separatism (The Furies), free love (Gay), and gay political militancy (Gay Power). Community-centered newspapers, such as The Gay Blade in Washington, D.C., and the Bay Area Reporter in San Francisco, were established in this period, identifying political points of contest. These magazines became a forum for debates within

309. See id. at 89-95.
310. The most amusing example was The Advocate's publication of a Twentieth Century Adonis, an almost nude publicity photo taken of actor Ronald Reagan in 1940 for the film, The Life of Knute Rockne. See Advocate, Jan. 1969, at 20.
311. See Streitmatter, supra note 308, at 112.
312. Among the journals started up in 1969-1972 were Come Out (1969, N.Y. City); Gay Blade (1969, D.C.); Gay Power (1969, N.Y. City); Gay Dealer (1970, Phila.); Gay Sunshine (1970, S.F.); Sisters (1970, S.F.); Focus (1971, Boston); Lavender Woman (1971, Chicago); Lesbian Tide (1971, L.A.); Amazon Quarterly (1972, Oakland); Faggotry (1972, N.Y. City); Furies (1972, D.C.); Lesbians Fight Back (1972, Phila.); and Très Femmes (1972, San Diego).
lesbian and gay communities, publicized social events, conducted dating services (the personals), and carried advertisements for openly gay and gay-friendly businesses. These newspapers helped displace the bars as the local center of gay subculture. By 1975, there were 300 identifiably gay or lesbian publications, with a combined circulation estimated at between 200,000 and 350,000 readers.313

Serious gay literature flourished like azaleas in April. Writers such as James Baldwin, Mary Renault, and Christopher Isherwood, who had written about homosexual themes in the 1950s, wrote rich, nuanced books exploring sexual variety during the 1960s.314 As established writers and highly independent thinkers, they would have written their classics regardless of the state of censorship in the United States during this period, but it is not clear that they would have been able to find mainstream publishers.315 John Rechy’s stark depiction of sexual restlessness and hustler anomie in City of Night, published in 1963, would probably not have been publishable in the 1950s. Audre Lorde’s poetry, lyrical in the 1950s, became more openly autobiographical and lesbian feminist in the 1960s and 1970s.316 Baby boomers avidly consumed gay and lesbian literature, and some were inspired by that literature and by feminist work to add their descriptions to the richness of human sexuality.317

Most of these writers, Adrienne Rich and Edmund White in particular, contributed to the deepening of gay intellectual culture, and also to the divides between lesbian and gay intellectuals. Lesbian intellectuals such as Kate Millett tended to focus more on gender expectations and the persistence of patriarchy;318 Rich’s essay on “compulsory heterosexuality” is the classic work of this genre.319 Lesbian intellectuals contributed important essays criticizing the institution of marriage, the

313. See Streitmatter, supra note 308, at 185.
314. See JAMES BALDWIN, ANOTHER COUNTRY (1962); CHRISTOPHER ISHERWOOD, A SINGLE MAN (1964); MARY RENAI NA, THE PERSIAN BOY (1972).
315. For example, Baldwin’s classic exfoliation of the closet, Giovanni’s Room, published in 1956, was not picked up by Knopf, which had previously published his acclaimed Go Tell It on the Mountain in 1953. Instead, the book was placed with an unknown, Dial Press, which also published Another Country. See David Leeming, James Baldwin: A Biography 116 (1994).
persistence of gender stereotypes, and violence against women.\textsuperscript{320} Gay male intellectuals focused more on individual sexual experience and evolution.\textsuperscript{321} Although second-level censorship of these works continued in public schools and libraries, first-level censorship disappeared. The collapse of censorship made it possible for a slew of feminist and gay publishing houses to emerge after Stonewall revealed and created the large demand for gay literature.\textsuperscript{322}

The literature produced by these writers was read by lesbian and gay adolescents trying to come to terms with their sexuality, college students in literature as well as gay or women's studies courses, and adults of all sexualities. By 1981, the First Amendment had decisively contributed to some prominence of gay intellectuals in the public culture.

2. Homoerotica

If censorship of gay literature, magazines, and newspapers was a lost cause by the 1960s, the same could not be said for gay pornography.\textsuperscript{323} The average American, and presumably therefore the average censor, was scandalized more by homoerotic images than by verbal descriptions of homosexual intimacy. So was the average Supreme Court Justice. Although the Court's precedents were generally hostile to homoerotica and local officials were often eager to confiscate it, censorship only marginally reduced its availability. Many more gay men consumed pornography than read gay newspapers or novels.

Nonetheless, the Court's first homoerotic image case was a victory for the publisher of mail-order gay erotica. In \textit{Manual Enterprises, Inc. v. Day},\textsuperscript{324} the Court held that the Postal Service could not constitutionally refuse mail services for male physique magazines. The magazines in dispute (\textit{MANual}, \textit{Trim}, and \textit{Grecian Guild Pictorial}) contained photos of seminude male models, sometimes in pairs, usually posed provocatively. The plurality opinion by Justice John Harlan (author of the antihomosexual privacy dissent in \textit{Poe}) assumed correctly that

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\textsuperscript{321} \textit{See Claude J. Summers, Gay Fictions: Wilde to Stonewall} 172-214 (1990) (discussing Baldwin's \textit{Giovanni's Room} and Isherwood's \textit{A Single Man}).


\textsuperscript{323} I am using the term \textit{pornography} to mean erotic pictures or pictures-and-words, but not words alone. Also note that I advert only to gay (male) pornography. There was little photographic pornography aimed at lesbians; most images of two women making love were in products marketed for heterosexuals, as woman-woman lovemaking is highly erotic to many straight men.

\textsuperscript{324} 370 U.S. 478, 492-94 (1962).
such magazines had a “prurient” appeal to male homosexuals, but held them nonobscene because they were not “patently offensive” to community standards.\(^{325}\) Although Mishkin made clear that Manual Enterprises did not protect erotica simply because it only appealed to “deviant” minorities,\(^ {326}\) the earlier decision cleared male physique magazines, which were the main form of gay erotica in the early 1960s and could be obtained by mail as well as at newsstands. Once a line was drawn protecting that form of erotica, publishers felt freer to press the envelope, and they did. The seminude figures allowed in Manual Enterprises gave way in the early 1960s to nude models, at first posing alone and then (mid-1960s) in pairs, and then (late 1960s) to depictions of men having sex with men, and women with women.

After the Memoirs, Mishkin, and Ginzburg trilogy of 1966, the Supreme Court decided cases by ad hoc memoranda, affirming or reversing lower court determinations of obscenity vel non.\(^ {327}\) Those decisions often focused on homoerotica. In Maryland, for example, most of the published state court obscenity opinions in the late 1960s involved homoerotic materials. The Maryland courts refused to censor movies and photographs of nude men or even boys under the authority of Manual Enterprises, but readily censored depictions of homosexual fellatio, masturbation, bondage and discipline, and nude pictures accompanied by “hard core” written commentary under the authority of Mishkin.\(^ {328}\) In its most agonized decision, a divided Maryland Court of Appeals held that The Boy Lovers was not obscene, because the nude males did not carry erect penises and the commentary was a serious discussion of homosexuality.\(^ {329}\) The Supreme Court vacated that judgment and remanded the case in light of a series of obscenity decisions (all authored by Chief Justice Warren Burger) handed down on June 21, 1973.

In two decisions, the Court sweepingly sustained Congress’s power to prevent the importation of obscene material, and to prevent such

\(^{325}\) See id. at 482. Only one Justice joined Harlan’s opinion, however. Four Justices concurred in the result, two Justices did not participate in the decision, and only Justice Clark dissented.


\(^{327}\) This practice was first initiated in Redrup v. New York, 386 U.S. 767 (1967). See also Heller v. New York, 413 U.S. 483 (1973); Interstate Circuit, Inc. v. City of Dallas, 391 U.S. 53 (1968), vacating 366 F.2d 590 (5th Cir. 1966); Potomac News Co. v. United States, 389 U.S. 47 (1967), rev’g United States v. 56 Cartons Containing 19,500 Copies of Magazine Entitled Hellenic Sun, 373 F.2d 635 (4th Cir.).


\(^{329}\) See Village Books, 282 A.2d at 134.
material from entering the stream of commerce. In three other decisions, the Court also upheld substantial state regulatory authority. In Paris Adult Theatre I v. Slaton, the Court sustained a civil injunction against a gay adult theater, solely because of the state interest in order and morality. In Kaplan v. California, the Court upheld a state obscenity conviction for selling a book that described "[a]lmost every conceivable variety of sexual contact, homosexual and heterosexual." This decision was the first post-Roth case where the Court upheld an obscenity conviction for a book on the basis of words alone, without illustrations (Mishkin involved explicit illustrations accompanying verbal descriptions). Finally, in Miller v. California, the Court modified the Roth-Memoirs test by applying the "community standards" prong to local, rather than national, values and by broadening the "utterly without redeeming social value" prong to eliminate "utterly."

The key opinion was Miller, whose analytic style echoed the antihomosexual consequences of its substantive redefinition. Miller and its companion cases were a direct political response to the growth of pornography after the Warren Court's procedural and substantive decisions. An inexorable consequence of the decision was to encourage local crackdowns on gay erotica, which was significantly more likely to violate Miller's "community standards" test than straight erotica. Ironically, Chief Justice Burger's opinion insisted on closeting the deviant features of the case even as his opinion sought to suppress that form of eroticism. Thus the Chief Justice described the censored materials vaguely as "pictures of men and women in groups of two or more engaging in a variety of sexual activities." The materials were more accurately described in the state's brief as "depictions of cumni-

333. Id. at 117.
335. Dissenting in Miller were four Warren Court stalwarts—Justices Douglas, Brennan, Stewart, and Marshall. The majority consisted of four appointees of President Richard Nixon—Chief Justice Burger (the author of all the opinions) and Justices Blackmun, Powell, and Rehnquist—and Justice White, a frequent dissenter from the Warren Court's relatively liberal decisions. The decisions came a few years after the Report of the President's Commission on Obscenity and Pornography (1970), which had demonstrated the growth of the pornography industry. See Hamling v. United States, 418 U.S. 87 (1974) (same five Justices upholding the convictions of gay pornographers for the homoerotic brochure advertising an "illustrated" version of the Report). The Commission's criticism of state obscenity laws as a means for regulating pornography was rejected out of hand by conservative groups in the 1970s.
336. Miller, 413 U.S. at 18.
lingus, sodomy, buggery and other similar sexual acts performed in groups of two or more. The opinion aspired to a double closet: suppression of discourse about sexual deviance as well as the erotica itself.

The Supreme Court was partly successful, for the decisions emboldened local censors to go after gay erotica. In the year after the decisions, police in Texas cracked down on gay adult bookstores, censors in Los Angeles seized several gay porn films, and a judge in New Mexico ordered an adult bookstore to cease "exhibiting or distributing to anyone any movies or periodicals which portray homosexuality, including lesbianism, masochism, sadism, or which portray violent crimes without punishment thereof." The new First Amendment test at least initially chilled bookstores and filmmakers even from carrying informational and nonerotic gay materials such as The Advocate.

Applying the new standards, the Supreme Court leaned heavily on antihomosexual animus. For example, the year after Miller, the Court sustained the convictions of publishers of a homoerotic brochure publicizing an "illustrated" version of the Report of the President's Commission on Obscenity and Pornography, on the same day that it unanimously overturned the conviction of a defendant who displayed Carnal Knowledge, a sexually explicit movie about promiscuous heterosexuals. In Ward v. Illinois, the same five-Justice majority upheld the application of Illinois's obscenity law to two books about sado-masochism. To refute the charge that the publisher had insufficient notice that such books were criminally obscene, Justice White's opinion for the Court relied on three Illinois state court opinions that defined obscenity in Illinois as anything "abnormal," lumping consensual sadomasochism with both rape and with same-sex intercourse or foreplay.

337. Brief for Appellee at 26, Miller (No. 70-73) (discussed in Ward v. Illinois, 431 U.S. 767, 781 n.5 (1977) (Stevens, J., dissenting)).
340. See Hamling v. United States, 418 U.S. 87 (1974); Jenkins v. Georgia, 418 U.S. 153 (1974). Jenkins can be distinguished from Hamling insofar as its nudity was not combined with ultimate sex acts. On the other hand, the conviction in Hamling was for a very short brochure, while the reversal in Jenkins involved an erotic and highly sexist motion picture.
342. See id. at 771-72 & nn.3-5 (describing People v. Sikora, 204 N.E.2d 768 (Ill. 1965) (censoring three stories with homosexual as well as sadomasochistic themes); City of Chicago v. Genaci, 264 N.E.2d 153 (Ill. 1970) (censoring materials with explicit accounts of "lesbianism, and sadism and masochism"); City of Blue Island v. DeVilbiss, 242 N.E.2d 761 (Ill. 1968) (censoring
Where the Chief Justice of the Supreme Court was squeamishly antihomosexual, Justice White was forthrightly so, and put booksellers as well as filmmakers on notice that "lesbianism" and "flagellation" and "homosexual necking" were potential danger signs of obscenity.

Read together, *Miller*, *Kaplan*, and *Mishkin* not only bristled with antihomosexual rhetoric or associations and encouraged local authorities to censor homoerotica, but provided rules that facilitated convictions. The decisions, for example, allowed states to present homoerotica to heterosexual juries and exploit their disgust: under *Miller* prosecutors could play on juror revulsion against or ignorance of homoerotic material to prove violation of community standards and insufficient redeeming social value, but under *Mishkin* defense counsel could not rely on the material's strangeness to defuse prurient appeal. Following *Kaplan*, Texas courts, which have produced more reported decisions on homoerotic than any other state combined in the last generation, interpreted *Mishkin-Miller* to allow judges to preserve juror ignorance by excluding expert testimony on issues of sexual deviation. "[I]t is not necessary for jurors to have an understanding of deviant group interests; the pornography speaks for itself."

*Miller*, *Paris Adult Theatre I*, and *Kaplan* enabled southern jurisdictions to go after homoerotica, but their impact was complicated by the practicalities of a national marketplace in pornography that had developed by 1981. Even if Texas prohibited the sale of explicitly graphic magazines, Texas citizens could still obtain them, either by traveling outside the state's borders or by simply ordering them through the mail. The partial deregulation of pornography helped create a nationwide market that could only be regulated effectively by the federal government, which for political reasons had lost interest in suppressing most such material. An exception was child pornography, which triggered nationwide interest in the late 1970s. After extensive hearings, Congress and virtually every state enacted special statutes regulating and severely

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penalizing the production, distribution, or sale of child pornography.\textsuperscript{348} Twenty states, but not the federal government, regulated child pornography regardless of its obscenity, a practice largely ratified by the Supreme Court in \textit{New York v. Ferber}.\textsuperscript{349} Because a significant fraction of child pornography is homoerotic and because the only organized adult-minor sexuality association was the North American Man-Boy Love Association, these developments represented a new frontier in the censorship of gay erotica.

We need to be cautious about any simple causal relationship between the First Amendment and the availability of homoerotica. On the one hand, the Warren Court's liberalization of obscenity law coincided with an expansion and even an explosion in such materials, and the Burger Court's retrenchment and antihomosexual reasoning coincided with more aggressive censorship. On the other hand, the Warren Court's antihomosexual signals in \textit{Mishkin} had no discernible effect, and gay porn continued its upward spiral after a brief period of chill in 1973-74. The legislative deregulation of sodomy in most urbanized states, the stingy funding of vice squads in most major cities, the Post Office's disinclination to enforce its censorship authority aggressively, and the increasing leisure time for urban gay and bisexual men were all probably more important to the growth of gay porn than the Supreme Court's decisions. Compare and contrast the lesbian and gay media during this period, which developed with much less input from the jurisprudence of the First Amendment.

3. The Lesbian and Gay Media

The electronic media (movies, radio, television) have been heavily regulated by the federal government, but it was self-censorship rather than any federal action that kept homosexuality deeply in the closet during the 1950s. The private Motion Picture Production Code's prohibition of any reference to "sex perversion" silenced cinematic homosexuality, and radio and television stations showed no interest in tackling the subject. During most of this period, the Supreme Court was prepared to allow significant federal regulation of the electronic media, including regulation of nonobscene but sexually indecent speech, but the regulatory authorities played a small role in the development of lesbian and gay media. By 1981, homosexuality was out of the closet, usually depicted stereotypically but increasingly depicted realistically by gay or


\textsuperscript{349} 458 U.S. 747 (1982).
gay-friendly artists. Although government regulation played a little role in this development, its contribution was more positive than negative.

a. Movies

The year 1961 was an ambiguous breakthrough year for media depiction of gay people. The Motion Picture Association of America ("MPAA") decided to rescind the Motion Picture Code's prohibition against any cinematic reference to homosexuality, in response to pressure from several important directors who wanted to make gay-themed films and from critics who pointed out that several movies in the 1950s had, in effect, already broken the taboo. The MPAA explained that "[i]n keeping with the culture, the mores and the values of our time, homosexuality and other sexual aberrations may now be treated with care, discretion and restraint." As a private censorship group, MPAA was not directly responding to First Amendment jurisprudence, but its action may have been facilitated by the Supreme Court's decisions in the 1950s that announced, for the first time, that movies were protected under the First Amendment.

Apparently, a condition of letting homosexuality out of the celluloid closet was depicting homosexuals as pathetic victims. Thus, the Motion Picture Code's seal of approval was immediately given to pending projects by William Wyler and Otto Preminger, both of whom featured suicides by homosexual characters. It was withheld from Basil Dearden's Victim, a British thriller which sympathetically depicted gay people. The appropriation of lesbian and gay characters followed this dreary pattern through the 1960s. Virtually all of the American movies

350. See, e.g., SUDDENLY, LAST SUMMER (Columbia 1959) (although handled quite subtly, the main character is homosexual); TEA AND SYMPATHY (Metro-Goldwyn-Mayer 1956) (exploring a school boy's problems with his sexual identity without explicitly mentioning homosexuality).

351. Announcement of the Motion Picture Association of America (Oct. 3, 1961), in VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES 121-22 (rev. ed. 1987). The MPAA supplemented its October amendment to assure that "sexual aberration could be suggested but not actually spelled out." Id. at 129.

352. See Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 690 (1959); U.S. 684, 690 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (overruling Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915)).


355. In VICTIM (Allied Film Makers/Parkway 1961), Melville Farr (portrayed by Dirk Bogarde) was an eminent, married barrister who developed feelings for a working class youth. Insistent that he not violate his marriage vows, Farr had a sexless relationship with the youth, until blackmailers threatened to expose the two. After the youth's suicide, Farr publicly exposed the blackmailers, and himself, in an effort to seek decriminalization of consensual homosexual intimacy.
depicted their lesbian and gay characters as sick, predatory, or violent, and often as all three. Homosexuals typically ended up dead by their own hands or at the hands of disgusted heterosexuals or, if they were lesbians, seduced and cured. The abolition of the Production Code in 1968 reflected Hollywood’s shift toward more treatment of sexuality, including homosexuality, but more was not necessarily better.

In the 1960s, only movies made abroad were able to depict homosexual attraction in a realistic manner. British directors Sidney J. Furie and Roy Boulting created remarkably deep explorations of the naturalness of homosexuality and the fragility of bourgeois manhood. Jean Delannoy’s *Particular Friendships* was a loving depiction of romance between two boys, scathingly contrasted to the self-loathing of a priest whose similar feelings were closeted by the repressive church. A box office success in the United States, John Schlesinger’s *Darling* featured an attractive Italian waiter, who was a love interest for both Julie Christie and her gay photographer buddy. In *Persona*, by Ingmar Bergman, the relationship between a mute actress and her chatty nurse was lovingly, sensitively, and ambiguously carried out. Robert Aldrich’s *The Killing of Sister George* was a tragic depiction of society’s erasure of the distinctive persona of a butch lesbian portrayed by Beryl Reid—she dared speak the name of her lesbian love and was, literally, silenced for it.

No American movie depicting homosexuals as predators or killers was censored by the state for violence, obscenity, or group libel, but

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356. Homosexual characters often killed either the objects of their desires, see *The Mafu Cage* (Clouds Production 1978) (Carol Kane); *Reflections in a Golden Eye* (Warner Brothers & Seven Artists 1967) (Marlon Brando), innocent third parties, see *Deathtrap* (Warner Brothers 1982) (Michael Caine and Christopher Reeve); *Looking for Mr. Goodbar* (Paramount Pictures 1977) (Tom Berenger); *No Way to Treat a Lady* (Paramount 1968) (Rod Steiger), or themselves, see *The Children’s Hour* (United Artists 1961) (Shirley MacLaine); *The Sergeant* (Warner Brothers and Seven Artists 1968) (Rod Steiger). See the excellent discussions in AUDREA WEISS, *VAMPIRES AND VIOLETS: LESBIANS IN FILM* (1994), and Russo, supra note 351.

357. See, e.g., *Goldfinger* (United Artists 1964) (the sexiest of the James Bond thrillers, in which Sean Connery seduces the amazon Pussy Galore); *Lilith* (Columbia 1964) (in which Warren Beatty seduces a mental patient he finds embracing another woman).


359. See *The Leather Boys* (Lion-Garick 1964).


362. See *Darling* (Embassy 1965).

363. See *Persona* (Svensk Filminindustri 1966) (Liv Ullmann and Bibi Andersson).

364. See *The Killing of Sister George* (Cinerama Releasing Corp. 1968).
some of the more realistic foreign films were censored. *The Killing of Sister George* was found to be in violation of Massachusetts's and Connecticut's obscenity and film licensing laws, and required editing of any lesbian sexuality.\textsuperscript{365} California courts allowed censorship of Jean Genet's film *Un Chant d'Amour* because of its depiction of homosexual masturbation, sodomy, oral copulation, sadism and masochism, and voyeurism, all within a dreary prison context.\textsuperscript{366} Because the film went "far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships," the court found it violated the limits set by *Manual Enterprises* and *One, Inc. v. Olesen* and was similar to the material censored in *Mishkin*.\textsuperscript{367} The Supreme Court affirmed.

After Stonewall, more gay-affirmative cinema began to develop. The drying up of censorship had little to do with this development. It was, rather, occasioned by Hollywood's acknowledgment of a significant gay and lesbian audience. The first "gay" American movie was a slavish adaptation of Mart Crowley's play, *The Boys in the Band*.\textsuperscript{368} Although the gay male characters were a menagerie of popular stereotypes (the sissy, the dumb hustler, the acid wit concealing guilt, the tolerant but shocked heterosexual), the movie also included a well-adjusted gay couple who displayed obvious physical affection and dramatically reaffirmed their love at the end. Also, the film gave even the stereotyped characters human depth and sympathy. Just as Radclyffe Hall's 1929 novel *Well of Loneliness* was both depressing and liberating for some lesbians, *Boys in the Band* was similarly moving for some gay men. Indeed, it could be viewed as a searing indictment of the closet culture, for the unhappiness the film documents is, in part, a product of the outlaw status of gay relationships.

The remainder of the 1970s saw a fair number of movies—the most interesting of them made in Europe, but permitted in the United States—reflecting a gay sensibility, as well as openly gay characters.\textsuperscript{369}

\textsuperscript{365} See Russo, *supra* note 351, at 173.
\textsuperscript{367} Id. at 181, 182.
\textsuperscript{368} See *The Boys in the Band* (Cinema Center/Leo 1970).
\textsuperscript{369} As examples, consider John Schlesinger's *Sunday, Bloody Sunday* (United Artists 1971), an amazing film and this Author's favorite; Mervyn Nelson's *Some of My Best Friends Are...* (American International Pictures 1971); Luchino Visconti's *Death in Venice* (Alfa Cinematografica & Productions et Editions Cinematographiques Francaises 1971); Bob Fosse's *Cabaret* (Allied Artists 1972), a highly ambivalent adaptation of Christopher Isherwood's *The Berlin Stories* (1954); Christopher Larkin's *A Very Natural Thing* (Montage Creations Inc. 1974); Sidney Lumet's sensationalist *Dog Day Afternoon* (Warner Brothers 1975); George
CHALLENGING THE APARTHEID OF THE CLOSET

Apart from brilliant exceptions such as Bob Fosse's *Cabaret*, American movies continued to treat gay characters as sissies or predators. Even as the evil homosexual was depicted in more complicated roles, homosexuals were coming under increasing public scrutiny. Gay organizations insisted on more gay-friendly treatment. In 1973, GAA and the National Gay Task Force ("NGTF") developed a guide for the film industry's treatment of homosexuality and gay people. Gay groups agitated for gay-friendly depictions and protested stereotypical ones. Three homophobic clunkers released in 1980 provoked angry protests from gay organizations such as NGTF and from individuals frustrated with Hollywooden stereotypes. Although these movies showed how far moviemakers had to go, they were sensitive to the bad box office the protests threatened. Films in the 1980s grew increasingly gay-friendly.

b. Radio

The movies' depiction of sexual orientation had little to do with the law, for the cinema is largely self-regulating and movies remained antihomosexual even after the law ceased to be. Television and radio, in contrast, are pervasively regulated by the Federal Communications Commission ("FCC"). Thus, the legal discourse about the acceptability of sexual references and characters was centralized within one federal agency, not the state courts and private associations regulating the movie...
industry. Under the circumstances of the 1960s, centralized regulation did not seriously impede the development of radio programs targeting the lesbian and gay subculture and was, therefore, probably a better regime than decentralized state and local regulation.374

In 1930, KVEP radio in Portland, Oregon was reprimanded by the Federal Radio Commission for allowing a politician to accuse a newspaper of shielding "sodomites"; the mere mention of homosexuality on the air was taboo before World War II.375 That changed after the war, albeit slowly. The pioneer was the Pacifica Foundation, created in 1946 as an alternative source of information from that provided by corporate radio. At the instigation of gay activist Randy Wicker, Pacifica's New York affiliate (WBAI) broadcast Live and Let Live on July 16, 1962. The program was a discussion of homosexuality by Wicker and seven other openly gay men—the first time on radio that gay people were able to present themselves without any moderator or other filter.376

Several weeks later, the program was rebroadcast on KPFA, Pacifica's Berkeley affiliate, which had previously broadcast readings of Howl by Allen Ginsberg in 1957; two informative one-hour panel discussions on The Homosexual in Society in 1958;377 and readings of his homophile poetry by Lawrence Ferlinghetti in 1959. Live and Let Live provoked angry protests and a petition to revoke Pacifica's license for KPFA and other stations because the program, along with those previously aired, were "obscene" or "indecent." The FCC in 1962 had ruled that Roth's narrowing definition of obscenity did not govern FCC regulation because "broadcast material is available at the flick of a switch to young and old alike" and is delivered in a medium infused with a general public interest.378 Hence, the FCC could punish a licensee for "patently offensive" programming. Pacifica defended Live and Let Live

374. There were a few local efforts at censorship—most prominently Cincinnati's indictment of radio journalist John Zeh (host of a regular show called "Gaydreams") and station WAIF-FM for a humorous program on lubricants and sex toys, which the prosecutor claimed was "material harmful to juveniles." 'Obscene' Radio Show Brings Felony Charges, ADVOCATE, Apr. 2, 1981, at 10. The Greater Cincinnati Gay Coalition established a legal defense fund, and Zeh's ACLU lawyer got the charges dismissed. See Charges Against Gay Radio Show Dismissed, ADVOCATE, Oct. 15, 1981, at 10.

375. See OUT IN ALL DIRECTIONS, supra note 201, at 125.

376. See ALWOOD, supra note 63, at 46-47.

377. The program was described in Del Martin, 2-Hour Broadcast on Homophile Problem, LADDER, Jan. 1959, at 7. A transcript is reprinted in MATTACHINE REV., Aug. 1960, at 9-25.

under this standard, arguing that "so long as the program is handled in
good taste, there is no reason why subjects like homosexuality should not
be discussed on the air."\textsuperscript{379}

The FCC agreed that Pacifica exercised reasonable discretion and
renewed Pacifica's licenses. The Constitution itself countenances no
censorship here, the agency concluded—otherwise "only the wholly
inoffensive, the bland, could gain access to the radio microphone or TV
camera."\textsuperscript{380} The agency also emphasized, however, that \textit{Live and Let
Live} was a tiny portion of KPFK's overall programming and was
scheduled for late evening (after 10 p.m.), "when the number of children
in the listening audience is at a minimum."\textsuperscript{381} Commissioner Robert E.
Lee, concurring separately, emphasized that he considered \textit{Live and Let
Live} to be irresponsible broadcast journalism, "nothing but sensa-
tionalism." He complained that "a panel of eight homosexuals discussing
their experiences and past history does not approach the treatment of a
delicate subject one could expect from a responsible broadcaster. A
microphone in a bordello, during slack hours, could give us similar
information on a related subject."\textsuperscript{382}

Pacifica took this FCC ruling as a green light to further gay
programming. KPFA and Pacifica's other affiliated networks in Los
Angeles (KPFK), Houston (KPFT), New York City (WBAI), and
Washington, D.C. (WPFW) ran gay-informative programs throughout the
1960s and eventually adopted regularly scheduled programs in the
1970s.\textsuperscript{383} Pacifica's primary regulatory problems in the 1970s grew out
of its broadcast of George Carlin's "Seven Dirty Words" monologue, not
its gay programming.\textsuperscript{384}

The feminist and lesbian-feminist movements of the 1960s
stimulated the creation of women's programming as well. Reflecting its
aversion to "vulgar" language, the FCC initiated license revocation
proceedings in the early 1970s against a Seattle station for playing the
song \textit{Every Woman Can Be a Lesbian} over and over on its show \textit{Make
No Mistake About It—It's the Faggot and the Dyke}. Although the station
ultimately retained its license, \textit{Make No Mistake} was dropped.\textsuperscript{385}

\textsuperscript{379} \textit{In re} Pacifica Found. (KPFK), 36 F.C.C. 147, 149 (1964).
\textsuperscript{380} Id.
\textsuperscript{381} Id.
\textsuperscript{382} Id. at 152-53 (Lee, Comm'r, concurring).
\textsuperscript{383} These included KPFA's \textit{Fruitpunch} in 1973, KPFK's \textit{IMRU} in 1975, and KPFT's \textit{Wilde
'N Stein} in 1975. \textit{See OUT IN ALL DIRECTIONS, supra} note 201, at 124-25.
\textsuperscript{384} \textit{See} FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC order banning "seven
dirty words" against First Amendment attack).
\textsuperscript{385} \textit{See OUT IN ALL DIRECTIONS, supra} note 201, at 128.
long as feminist programs steered away from what the FCC considered vulgar language, lesbian themes were tolerated. Frieda Werden and Katherine Davenport produced what seems to have been the first syndicated multi-part series on homosexuality, *What's Normal*, in 1975 and sold it to the Longhorn Radio Network in Texas. Washington, D.C.'s Media Collective produced *Sophie's Parlor* beginning in 1972, and after 1977 this show was broadcast over the Pacifica affiliate, WPFW. Another Pacifica affiliate, Los Angeles's KPFK, ran *Lesbian Sisters*. The show's producer, Helen Rosenbluth, recalled how empowering lesbian programming was—many listeners called the station to say how the program helped them deal with their sexuality: ""They didn't feel crazy anymore, like they were the only ones. The power of radio is amazing.""

Perhaps even more important were organized gay efforts to persuade private as well as public regulators to support more accurate depiction of homosexuality and gay people. NGTF and two gay media organizations petitioned the National Association of Broadcasters to revise its television as well as radio codes to discourage antihomosexual slurs and defamations. The Association declined to amend its radio and television codes but maintained that existing code provisions protected against homophobic slurs and defamations and that gay people were welcome to file complaints with the respective boards. Gays also pressed the FCC to require its radio licensees to be more sensitive to the needs of gay groups. After the agency adopted a "community ascertainment" checklist of groups that licensees were supposed to consult (racial minorities and women, for example), NGTF and 143 local organizations in forty-nine states petitioned the FCC to include gay groups.

c. Television

Television programmers in the 1960s were less willing to deal with issues of homosexuality than their counterparts in radio. Hence, issues of access rather than censorship were most prominent, for television, like

386. See id.
387. Id. at 129.
388. The codes provided: ""Special sensitivity is necessary in the use of material relating to sex, sexual orientation, race, color, creed, religious functionaries or rites, or national or ethnic derivation."" NGTF proposed to add ""sexual orientation"" after ""sex."" ""Code Is Adequate": *TV, Radio Boards Reject Bias Ban*, ADVOCATE, Aug. 14, 1974, at 20. NGTF also proposed affirmative steps to hire openly lesbian and gay reporters, to let gay people speak for themselves rather than through ignorant filters, to cover gay events, and to add gay programs. See id.
389. See id.
radio, offered gay people opportunities to present their perspectives directly to America. The first television program dealing with gay issues to reach a nationwide audience was The Rejected on September 9, 1961, a public television program produced by KQED in San Francisco and carried by forty other stations. Freelance producers John Rearvis and Irving Saraf set up the program to debunk gay stereotypes by presenting expert testimony (anthropologist Margaret Mead and psychiatrist Karl Bowman) and compelling interviews with openly gay men themselves (members of the Mattachine Society).

In striking contrast to this informative show was the first major network documentary, The Homosexuals, broadcast on CBS in 1967. What started as a sympathetic examination gradually evolved into a mishmash of disconnected interviews with openly gay men (women were never interviewed on these shows), homophobic psychiatrists Irving Bieber and Charles Socarides, and a closeted gay man whose face was obscured by a potted plant and who opined that he was emotionally sick. Commentator Mike Wallace proclaimed the “average homosexual” to be “promiscuous” and essentially incapable of committed relationships. The program, combining determined ignorance with confused stereotypes, was a giant step back from the friendly viewpoint of The Rejected.

The networks were timid about presenting issues of sexual orientation because they were big businesses which depended on sensitive corporate advertisers, not because they feared the FCC. What is more remarkable is the success with which the networks’ news divisions kept homosexuals in the closet—ignoring homophile picketing of various U.S. government agencies from 1965 to 1968, the Stonewall riots of 1969, and the Lesbian Nation movement during the early 1970s. Apart from an episode of ABC’s N.Y.P.D. in 1967 and a Phil Donahue program on lesbians in 1968, television programs in the 1960s eschewed gay and lesbian characters or situations.

Stonewall’s in-your-face activism shook the networks’ complacency, as gay people demanded both visibility and fair treatment. In 1972 and 1973, Mark Segal, a “Gay Raider,” protested network distortion of the gay experience by “zapping” (disrupting) the 11:00 news of a Philadelphia ABC affiliate, NBC’s Tonight Show and Today Show, and The CBS

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391. The Rejected and reactions to it are described in TV Critics Praise 'Rejected', LADDER, Oct. 1961, at 17; Calling Shots: KQED(9) to Show The Rejected, MATTACHINE REV., Sept. 1961, at 2, 12-13, 15; and ALWOOD, supra note 63, at 41-42.

392. See id. at 41-42.

393. See id. at 73.
Evening News with Walter Cronkite. Cronkite was unfazed by Segal's entrance and even spoke with the young man during his trial for trespassing on CBS property. Segal persuaded Cronkite that CBS had distorted coverage of gay issues, and on May 6, 1974, Cronkite devoted a considerable segment of the evening news to a report on gay rights ordinances adopted in various cities.

More important in the long run was Loretta Lotman's establishment in 1973 of an organization that would ultimately be called Gay Media Action, which monitored television programs and protested antigay stereotyping. Lotman's first success was to mobilize a national grassroots campaign for affiliates to cancel a homophobic episode of ABC's Marcus Welby, M.D. Although the show aired as scheduled, on October 8, 1974, most of the sponsors withdrew their ads, and seventeen ABC affiliates decided not to carry the episode. Gay Media Action and the NGTF continued to apply similar pressure on the networks, and in 1975 Lotman addressed the National Association of Television Program Executives, urging them to treat gay characters more realistically. Slowly during the 1970s, the balance shifted, from occasional shows which bashed (Marcus Welby in 1974) or sympathized with (That Certain Summer in 1972) gay characters, to those which had recurring gay characters on several shows (Alice, Barney Miller, and The Nancy Walker Show), to NBC's announcement in 1981 that Tony Randall would star in Love, Sydney, a comedy based on a play about a gay man who becomes a surrogate father to a child whose abortion he prevents.

Most important, gay rights advocates finally began to make progress in challenging distorted treatment of gay issues. The Media Access Project in Washington, D.C., for example, persuaded the FCC to apply its fairness doctrine to sustain a complaint by the Dallas Gay Political Caucus to require WFAA-TV to provide equal time for gays to respond to antihomosexual invective in a show featuring evangelical James Robinson. The most important test case did not involve the FCC, however. It dealt with a show aired by CBS in 1980, Gay Power, Gay Politics. Although ostensibly about a neutral subject, the attempts to increase gay political power, the show was alarmist and graphically suggested that gay power meant S&M and sexual kink as a way of life.

394. See id. at 143-47.
395. See id. at 145-47.
396. See id. at 147-54.
397. See id. at 195. In response to protest from Clean Up TV and the Coalition for Better Television, both traditionalist advocacy groups, NBC completely closeted Sidney's sexuality. See id.
399. See ALWOOD, supra note 63, at 184-91.
Gay reporter Randy Alfred documented forty-four examples of serious distortion or misrepresentation as the basis for a complaint filed with the National News Council. CBS denied all but one example, where the producers deliberately spliced different segments of a recorded event to suggest wild applause for an apology delivered by San Francisco Mayor Diane Feinstein for antigay remarks. This made the gays in the audience appear to gloat over the apology, when the applause was actually in response to Feinstein’s condemnation of antigay violence. The Council voted nine to two that most of Alfred’s allegations were true. On October 21, 1980, CBS reported the rebuke it had received and acknowledged that it had violated its own standards with the applause splicing.

C. Freedom of Speech (The Right to Come Out)

As the media cases reflect, the easiest First Amendment right for lesbians and gays to assert during the period 1961 to 1981 was the right to express themselves through public speech. That was the lesson of One, Inc. v. Olesen, in which the Supreme Court refused to allow the Postal Service to censor a homophile journal for including gay-sympathetic articles, and of Pacifica Foundation, in which the FCC refused to censor KFPA for airing a discussion of homosexuality by homosexuals themselves. The insight implicit in those rulings was that, for gays and lesbians, identity speech (“I am gay”) was both personal and political.

Conversely, the most difficult First Amendment issue for the same period was the right of a public servant to speak about gay rights and issues of sexual orientation or to come out of the closet professionally. These were hard cases because American law’s libertarian baselines make it much harder for the state to deprive citizens of free speech than to condition state benefits, such as employment, on citizen restraint. In the gay speech cases, this distinction linked up with the idea of the closet; even if the state could not hunt down and imprison homosexuals, it could discourage them from becoming open about their sexuality by denying them employment if they were too far “out.”

The First Amendment applies to any state actor, including the state as employer, and the Warren Court recognized that public employees enjoy substantial protection for their public speech.400 In Pickering v. Board of Education,401 the Court held that a high school teacher could

400. See, for example, Shelton v. Tucker, 364 U.S. 479, 480-81, 490 (1960), which invalidated a state statute that required teachers, as a condition of employment, to file an affidavit listing every organization to which he or she belonged or contributed to within the preceding five years.

not be dismissed simply because he made erroneous statements while criticizing the school board’s handling of a local bond issue. Because there was no showing that the statements undermined the teacher’s effectiveness or the operation of the schools generally, Justice Thurgood Marshall’s opinion found no legitimate state interest that could justify penalizing the teacher for speaking on issues of public concern. *Robinson v. California*, which held that the state could not criminalize the status of being a drug addict, read together with *Pickering*, created an analytical basis for the personal right of individuals not to be penalized by the state for coming out of the closet as gay people. *Robinson* protected the expression of their status, and *Pickering* suggested that such speech was protected if it were of public concern. Most judges did not read the cases in this manner, however. The member of the armed forces, the public school teacher, and even the university librarian who stated his or her homosexuality received scant First Amendment protection. (Recall the obscenity cases.)

In one case, James M. McConnell accepted a librarian position with the University of Minnesota in May 1970. The Board of Regents voted to withdraw that offer, in light of media publicity accompanying his application to marry another man, Jack Baker. Already suing the clerk of the Hennepin County Court for refusing him a marriage license, McConnell then sued the Regents for refusing him the job and lost both lawsuits. In the employment litigation, the federal court characterized McConnell as seeking “the right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer.” Analytically, the court transformed McConnell’s identity speech claim into activist conduct, unprotected by *Pickering*. The court also transformed McConnell’s libertarian claim (the state cannot penalize me) into an antilibertarian claim (the state must implement my unconventional ideas), a claim with which the First Amendment had no concern. These rhetorical transpositions were typical in First Amendment cases involving public employment.

Even odder was the case of Joseph Acanfora, III. When he was a student at Pennsylvania State University, Acanfora joined the Homophiles

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404. McConnell, 451 F.2d at 196.
of Penn State, an organization founded to develop public understanding about homosexuality. Upon graduation, the Pennsylvania Secretary of Education held up his certification as a teacher because of that membership. Meanwhile, Acanfora was hired as a junior high school teacher in Montgomery County, Maryland. When Pennsylvania "outed" Acanfora at a public press conference, to announce that the state would certify him as a teacher, Montgomery County transferred him away from contact with students. Acanfora sued, and lost. 405 The trial judge found no evidence that Acanfora's sexual orientation affected his teaching effectiveness, but faulted him instead for granting press and television interviews after his transfer. 406 This "sensationalism" went beyond the "bounds of propriety which...must govern the behavior of any teacher" and rendered his transfer nonarbitrary. 407 Having been outings by state officials in Pennsylvania, Acanfora lost because he engaged in too much expression. This holding was in tension with Pickering, and on appeal the Fourth Circuit so held. 408 But the appeals court affirmed the lower court on the ground that Acanfora had withheld material information—his homosexuality—from his original teaching application and, hence, could be disciplined for engaging in too little speech. 409 This holding was in tension with Shelton v. Tucker, 410 which protected teachers against being required to disclose their organizational activities.

Acanfora's case illustrates the limited reach of the First Amendment. It clearly protected his rights to join homophile political organizations, but did not prevent the state from penalizing him from such activities, either by denying him a teacher's certificate or a job teaching minors. The case also reveals the instability of the closet. For homosexuals and moderate lawyers in the 1950s (such as ALI and ACLU members), the closet was mutually protective: so long as they were not seen or heard, homosexuals were to have private spaces free from police harassment. The mutually protective closet was always unstable, however, because eventually a state or private actor was going to pry open the door and push some denizens of the closet out. Moreover, other denizens came to recognize the closet as a masquerade that not only compromised their personal integrity, but also created the political conditions which made witchhunts and selective prosecution possible. By the 1960s a band of

406. See id. at 845-46, 856-57.
407. Id. at 857.
408. See Acanfora v. Board of Educ., 491 F.2d 498, 500 (4th Cir. 1974).
409. See id. at 499.
openly gay people rejected the closet, and during the 1970s masses of
lesbians and gays came out of the closet. The media and the state were
pushing or pulling people out of the closet as well. Joseph Acanfora was
halfway out of that closet in 1972; Pennsylvania, Montgomery County,
the media, and the Fourth Circuit completed that job by pulling him the
rest of the way out within the next two years.

The state had several choices in such situations. In the 1960s, it
fostered an expanded closet. Gay people were increasingly allowed to
freely engage in consensual sex in their homes, socialize within their bars
and clubs, and create their own subculture; they were not encouraged to
participate in the mainstream public culture, however. This represented
political progress for gays, from a *Dred Scott* regime where the
homosexual was presumptively an outlaw, to a *Plessy* regime of
“separate but equal” rights. But this was a friendlier apartheid than that
of *Plessy* for one reason: gay people could choose the form of their
segregation—physical segregation for openly gay people versus
emotional segregation for those who chose the closet. As the 1970s wore
on, the state increasingly acquiesced to a post-closet regime, where
openly gay people could participate in the public culture. The First
Amendment played little role in this transition, but the transition affected
First Amendment doctrine, pressing *Pickering* toward greater protection
for gay public employers or employees advocating gay-friendly
ideas.411

The judicial opinion that best reflected this transition was *Gay Law
Students Ass’n v. Pacific Telephone & Telegraph Co.*412 Several
individuals, the Society for Individual Rights, and the Gay Law Students
Association sued Pacific Telephone & Telegraph for alleged harassment
and discrimination on the basis of sexual orientation. The California
Supreme Court found their lawsuit actionable on either constitutional or
statutory grounds. As to the latter, the court applied the state labor code,
which prohibited workplace discrimination on the basis of “‘political
activities or affiliations.’”413 The court found that “‘the struggle of the

411. As an example, Richard Aumiller, an admitted homosexual, granted three interviews
expressing his views on homosexuality to a local newspaper. The United States District Court in
Delaware upheld his First Amendment claims and reinstated him to his former teaching position at
the University of Delaware, primarily by using a strict reading of *Pickering*. See *Aumiller v.
University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977); *see also National Gay Task Force v.
Board of Educ.*, 729 F.2d 1270, 1274 (10th Cir. 1984), *aff’d by an equally divided Court*, 470 U.S.
903 (1985) (striking down Oklahoma law prohibiting school teachers from advocating or
couraging “homosexual activity,” as inconsistent with “core” First Amendment principles).
412. 595 P.2d 592 (Cal. 1979).
413. *Id.* at 610 (quoting § 1101(b) of California’s Labor Code).
homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity.\textsuperscript{414} The court continued:

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.\textsuperscript{415}

This reasoning was remarkable, for it explicitly linked identity speech with political activism, which was the whole point of gay liberation's invocation for gay people to come out of the closet. \textit{Pacific Telephone & Telegraph} also illustrates how the libertarian model of gay rights was giving way to an egalitarian model. Once openly gay people became too numerous and too respectable to lock up, the state not only came to tolerate their liberty but was pressed to treat them with equal dignity as heterosexuals.

III. ALLOWING OPENLY GAY PEOPLE SPACE IN PUBLIC CULTURE: DUE PROCESS AND EQUAL PROTECTION RIGHTS

\textit{Acanfora} and \textit{Pacific Telephone & Telegraph} illustrated the philosophical incompleteness of arguments based on privacy, procedural due process, and freedom of association. Until openly lesbian, gay, transgendered, and bisexual persons were understood to be equal citizens who could not be discriminated against because of their sexual orientation, their private and subcultural spaces would remain vulnerable.

This theme was sounded early on by Dr. Franklin Kameny, the founder of MSW. In June 1962, Kameny wrote to Attorney General Robert Kennedy for the purpose of introducing himself and the society:

We feel that, for the 15,000,000 American homosexuals, we are in much the same position as the NAACP is in for the Negro, except for the minor difference that the Negro is fighting official prejudice and discrimination at the state and local level, whereas we are fighting official prejudice and discriminatory policy and practice, as ill-founded, as unreasonable, as unrealistic, and as harmful to society and to the nation, at the Federal level. Both are fighting personal prejudice at all levels. For these reasons, and because we are trying to improve the

\textsuperscript{414} \textit{Id.}  
\textsuperscript{415} \textit{Id.}
position of a large group of citizens presently relegated to second-class citizenship in many respects, we should have, if anything, the assistance of the Federal government, and not its opposition.\footnote{Letter from Dr. Franklin E. Kameny, President, the Mattachine Society of Washington, D.C., to Robert F. Kennedy, Attorney General of the United States 1 (June 28, 1962) (on file with the FBI, FOIA File HQ 100-403320 (Mattachine Society) § 6, Serial No. 88). Earlier expressions of this egalitarian view are in Donald Webster Cory, The Homosexual in America: A Subjective Approach (1951).}

In August 1962, MSW made similar points in a press release which it circulated to the media, members of Congress, and other government officials. The release argued that “it is time that a strong initiative be taken to obtain for the homosexual minority—a minority in no way different, as such, from other of our national minority groups—the same rights, provided in the Constitution and the Declaration of Independence, as are guaranteed to all citizens.”\footnote{News Release from the Mattachine Society of Washington, D.C. 1 (Aug. 28, 1962) (on file with the FBI, FOIA File HQ 100-403320 (Mattachine Society) § 6, Serial No. 90X).}

Kameny was not alone in these views. The First National Planning Conference of Homophile Organizations, held in Kansas City on February 19-20, 1966, adopted the following resolution:

Homosexual American citizens should have precise equality with all other citizens before the law and are entitled to social and economic equality of opportunity.
Each homosexual should be judged as an individual on his qualifications for Federal and all other employment.

. . .

Homosexual American citizens have the same duty and the same right to serve with the armed forces as do all other citizens; homosexuality should not be a bar to military service. . . .

For too long, homosexuals have been deprived of these rights on the basis of cultural prejudice, myth, folklore, and superstition. . . .

. . . It is time that the American public re-examine its attitudes and its laws concerning the homosexual.\footnote{U.S. Homophile Movement Gains National Strength, Ladder, Apr. 1966, at 4. Fifteen gay organizations signed onto this statement, including six Mattachine groups, three chapters of DOB, SIR, CRH, and One, Inc.}

This homophile agenda was a pipe dream in 1966, yet fifteen years later it stood substantially achieved—usually through legislation, executive order, or judicial decisions that applied substantive due process concepts. These advances not only reflected gay political power but helped create its political \textit{doppelgänger}: a family values coalition of religious fundamentalists, anti-homosexual citizens, and traditionalist parents.
A. Employment Exclusions

In addition to personal privacy and access to the gay subculture, equal gay citizenship depended most upon assurances that homosexuality would not be the basis for losing one's job. In 1961, virtually all state and federal government agencies discriminated against employees thought to be gay or lesbian, a discrimination aped by the private sector. The first target for gay equality claims was, therefore, government employment discrimination. Outside of the armed forces and southern states, that goal was substantially advanced by 1981. Surprisingly, many urban jurisdictions also adopted laws affirmatively protecting against sexual orientation discrimination in the private sector.

1. Federal Civil Service Exclusions: Collapse

The formation of MSW was the direct result of the federal civil service's exclusion of homosexuals. Dr. Kameny's chosen career had been as an astronomer with the Army Map Service, but he had been cashiered in 1957 as a result of an arrest for lewdness the year before. He not only lost his government job, but also any prospect of employment in the private sector because security clearances were also closed to those guilty of "sexual perversion." Shocked and then angered, Kameny sued. Initially, his challenge deemphasized homosexuality and stressed neutral criteria and asserted procedural violations; the Court of Appeals for the District of Columbia Circuit rejected these arguments in 1960. Writing his own petition for review by the Supreme Court, Kameny emphasized egalitarian arguments and asserted that the civil service's action and allied federal policies reduced homosexuals like himself to second-class citizenship. Discrimination based upon homosexual orientation was "no less illegal and no less odious than discrimination based upon religious or racial grounds." The Supreme Court of Appeals for the District of Columbia Circuit rejected these arguments in 1960. Writing his own petition for review by the Supreme Court, Kameny emphasized egalitarian arguments and asserted that the civil service's action and allied federal policies reduced homosexuals like himself to second-class citizenship. Discrimination based upon homosexual orientation was "no less illegal and no less odious than discrimination based upon religious or racial grounds."
Court denied the petition without comment in 1961, and Kameny founded MSW shortly thereafter.

The central goal of MSW was to end federal employment discrimination in the civil service, the armed forces, and in grants of security clearances. Following Kameny’s Supreme Court petition, MSW’s position was egalitarian as well as libertarian. “Discrimination against the homosexual is based upon the same kind of prejudice, misinformation, ignorance, and erroneous stereotyping as is discrimination against other minorities, and is therefore equally invalid.” In 1962, the Civil Service Commission ("CSC") refused either to meet with MSW or to provide a justification for its policy, and Kameny’s tiny, ragtag band of homosexual activists and lawyers mounted a full-court press against the policy. Kameny’s strategy was a nice synthesis of the developing right to privacy and the ultimate goal of equality. At the retail level, MSW and the East Coast Homophile Organizations prepared a mimeo sheet on How to Handle a Federal Interrogation by FBI agents, military investigators, or civil service questioners. The main advice was to offer no cooperation:

If you are asked any questions at all on homosexuality, in any aspect, your ONLY answers should be: “These are matters which are of no proper concern to the Government of the United States under any circumstances whatever,” and “This is information which the Government does not have the need to know.”

The final advice was to contest, “first administratively, and then in the courts, as high as need be, all firings, less-than-fully honorable discharges, and security clearance denials based upon homosexuality. To the fullest extent possible, challenge not the mere allegations of fact, but the policies, laws, and regulations involved.” The sheet urged

426. See MATTACHINE SOC’Y OF WASH., D.C. AND EAST COAST HOMOPHILE ORGS., HOW TO HANDLE A FEDERAL INVESTIGATION (1963) (on file with the FBI, FOIA File HQ 100-403320 (Mattachine Society) § 6, Serial No. 117).
427. Id. ¶ 3. The instructions continued to state that “[o]n matters having in any way to do with homosexuality, say NOTHING; ‘nothing’ means NO thing; and ‘no’ means NONE AT ALL, with NO exceptions.” Id. ¶ 7.
428. Id. ¶ 11.
homosexuals to get coaching and advice from MSW, the Mattachine Society of New York, the New York DOB, and Philadelphia’s Janus Society.429

Like other civil rights groups which were Kameny’s model, MSW organized public protests of the federal exclusion policies. In April 1965, seven men and three women picketed the White House to protest the government’s sexual orientation exclusions. In June, twenty-five well-dressed homophiles, seventeen men and eight women, picketed the CSC. In August, twelve picketers marched in front of the State Department. On October 23, thirty-five to forty-five picketers protested in front of the White House.430 At the conclusion of the protest, Kameny presented a letter to the President, signed by Mattachine groups in Chicago, Florida, New York City, Philadelphia, and Washington, D.C., objecting to discrimination in federal employment, military service, and security clearances. The message was summed up by a couple of placards: “Private Sexual Conduct Is Irrelevant to Federal Employment” and “Denial of Equality of Opportunity is Immoral.”431 All of the demonstrations were elaborately written up and photographed by FBI observers and substantially ignored by the print media.

Consistent with its advice sheet, MSW also supported lawsuits against the government.432 MSW secretary Bruce Scott and his ACLU-allied lawyer won a landmark victory in Scott v. Macy.433 In 1962, the CSC disqualified him for employment because of “immoral conduct,” namely, his disorderly conduct arrests in 1947 and 1951. Ruling on Scott’s due process challenge, Chief Judge David Bazelon voted to remand the case to the district court, with instructions to enter summary judgment for Scott.434 “The Commission must at least specify the conduct it finds ‘immoral’ and state why that conduct related to ‘occupational competence or fitness,’ especially since the Commission’s

429. See id. ¶ 3.
430. See D’Emilio, supra note 3, at 165 & n.35; Out In All Directions, supra note 201, at 209; Homosexuals Picket in Nation's Capital, Ladder, July-Aug. 1965, at 23.
431. See D’Emilio, supra note 3, at 165 & n.35; Out In All Directions, supra note 201, at 209; Homosexuals Picket in Nation's Capital, Ladder, July-Aug. 1965, at 23.
432. See D’Emilio, supra note 3, at 165 & n.35; Out In All Directions, supra note 201, at 209; Homosexuals Picket in Nation's Capital, Ladder, July-Aug. 1965, at 23.
434. The first successful lawsuit was Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963), cert. granted, 376 U.S. 904 (1964). Dew’s dismissal as an air traffic controller for homosexual acts at age eighteen was upheld by the D.C. Circuit, but after the Supreme Court granted certiorari the government agreed to reinstate Dew. Married with children, Dew maintained throughout the litigation that he was heterosexual in orientation.
435. 349 F.2d 182 (D.C. Cir. 1965).
436. See id. at 185.
action involved the gravest consequences." Faced with this rebuke, the CSC again tried to disqualify Scott for a separate reason, his "failure to respond to the question as to whether or not [he had] ever engaged in homosexual acts," as required by regulation. On appeal to the circuit court yet again, Chief Judge Bazelon showed that he could play the procedure game as well, rejecting this attempt on the grounds that Scott had not been given sufficient notice of the dismissal by the CSC.

In response to Mattachine pressure and the first Scott decision, the CSC finally met with MSW in September 1965. At the request of the CSC, MSW submitted in December several memoranda developed by MSW and the National Capital Area Civil Liberties Union to demonstrate the irrationality of that policy. In a letter dated February 23, 1966, the CSC explained, for the first time in public, the precise rationale for its policy. (The letter is Appendix B to this Article.) Contrary to its position in 1963, that homosexuals were not suitable for federal employment, Chairman John Macy claimed that the CSC did not exclude "homosexuals" per se—only people who engaged in "overt" homosexual "conduct" which became public through an arrest or general knowledge. So long as the homosexual does not "publicly proclaim that he engages in homosexual conduct" or "prefers such relationships," Macy suggested he could serve and the CSC would not pry. But once the word is out, the CSC must consider the "revulsion" of coworkers and "offense to members of the public." In short, public mores (i.e., office morale and the government's prestige with the public) served as a heckler's veto against employment of openly homosexual individuals.

What Macy was offering was the mutually protective closet, whereby the homosexual could serve, so long as he or she were not openly gay. This early version of "don't ask, don't tell" was unacceptable to the new homophile leaders like Kameny. Public mores could not support state discrimination against people of color or Jews, as a normative matter. Why should they be enough to justify antigay

435. Id. at 184-85 (footnotes omitted). Chief Judge Bazelon wrote only for himself—there was no majority opinion. Judge Carl McGowan voted to overturn the government's action "solely for what seem[ed] to [him] to be the inadequacies, in terms of procedural fairness, of the notice given to appellant of the specific elements constituting the 'immoral conduct' relied upon as disqualifying him for all federal employment." Id. at 185 (concurring opinion). Judge, soon to be Chief Justice of the Supreme Court, Warren Burger dissented.

436. Scott v. Macy, 402 F.2d 644, 645 n.2 (D.C. Cir. 1968). Recall that this kind of argument was the Fourth Circuit's reason for upholding Montgomery County's discrimination against Joseph Acanfora. See Acanfora v. Board of Educ., 491 F.2d 498, 499 (4th Cir. 1974).

437. See Scott, 402 F.2d at 648-49.

438. The meeting is described in Franklin E. Kameny, U.S. Government Hides Behind Immoral Mores, LADDER, June 1966, at 17.
discrimination? Surprisingly, it was no longer acceptable to some judges. On the eve of Stonewall, Chief Judge Bazelon rejected the CSC's compromise in Norton v. Macy. In 1963, Clifford Norton, a National Aeronautics and Space Administration budget analyst, was interrogated but not arrested by the Morals Squad of the D.C. police for picking up a man in cruisy Lafayette Park. Failing to follow MSW's unimpeachable advice (say NOTHING), Norton coughed up his orientation, as well as his employer, which promptly discharged him for "immoral conduct." On appeal to the D.C. Circuit, Chief Judge Bazelon subjected the CSC's policy to withering scrutiny. There was no evidence that Norton's midnight incident undermined his ability to do his technical, number-crunching job; no coworkers or citizens had complained. In light of Kinsey's findings that at least thirty-seven percent of American men have at least one homosexual encounter in their lifetime, the CSC's abstract vision of morality was ridiculously broad, potentially disqualifying over one-third of the country's males from public service. Chief Judge Bazelon also noted that it was likely that such individuals were presently in public service, completely beyond the agency's competence to discover, without any noticeable impact on the efficiency of the service. Particularly in light of Griswold and new concerns about people's privacy rights, Chief Judge Bazelon held, for the most part, that homosexuality is irrelevant to federal employment and that the CSC could not dismiss an employee on the basis of sexual orientation without showing a "nexus" between orientation and job performance.

Although formally resting upon standard due process notions that government decisionmaking be rationally related to statutory goals, Norton was a wedding of the Supreme Court's privacy jurisprudence and MSW's equality jurisprudence. Its powerful critique wounded the general exclusion of lesbian and gay people, but hardly finished it off. Other federal courts either refused to apply Norton's demanding requirement of a rational nexus between the employee's homosexuality and his or her job, or distinguished Norton on its outrageous facts.

Nonetheless, the pressure of ongoing and indeed escalating litigation impelled administrative rethinking. In 1972, for example, the Post Office and the Government Printing Office, in separate actions, rejected the
CSC’s position and permitted gay employees to continue working. In early 1973, SIR brought a class action lawsuit against the CSC on behalf of its members and Donald Hickerson, a supply clerk dismissed because the CSC discovered he had been discharged from the Army for “homosexual conduct.” The federal district court in Society for Individual Rights, Inc. v. Hampton\footnote{See Postal Service Dumps CSC’s Anti-Gay Policy, ADVOCATE, Dec. 20, 1972, at 24; U.S. Agency Backs Down on Firing, ADVOCATE, Nov. 8, 1972, at 3 (GPO).} followed Norton to declare unconstitutional the Federal Personnel Manual’s blanket exclusion of “[p]ersons about whom there is evidence that they have engaged or solicited others to engage in homosexual or sexually perverted acts with them.” The court insisted upon Norton’s nexus requirement and enjoined the CSC from excluding or discharging people merely because of their homosexuality or discreet homosexual activity.\footnote{63 F.R.D. 399 (N.D. Cal. 1973), aff’d on other grounds, 528 F.2d 905 (9th Cir. 1975).} The court’s injunction came during the CSC’s own internal deliberations about how (not whether) to revise its policy.\footnote{Id. at 400 n.1.}

Responding to Society for Individual Rights, the CSC adopted the Norton nexus approach in a bulletin, dated December 21, 1973:

“Accordingly, you may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person’s homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.”\footnote{See id. at 402.}

In 1975, this instruction was formally codified in the CSC’s rules for disqualification, which also dropped “immoral conduct” from the list of disqualifying conditions.\footnote{See Postal Service Dumps CSC’s Anti-Gay Policy, supra note 443, at 24 (CSC revising policy in late 1972).} The CSC’s guidelines for “Infamous or Notoriously Disgraceful Conduct” were revised to say the following:

\begin{itemize}
\item 443. See Postal Service Dumps CSC’s Anti-Gay Policy, ADVOCATE, Dec. 20, 1972, at 24; U.S. Agency Backs Down on Firing, ADVOCATE, Nov. 8, 1972, at 3 (GPO).
\item 444. 63 F.R.D. 399 (N.D. Cal. 1973), aff’d on other grounds, 528 F.2d 905 (9th Cir. 1975).
\item 445. Id. at 400 n.1.
\item 446. See id. at 402.
\item 447. See Postal Service Dumps CSC’s Anti-Gay Policy, supra note 443, at 24 (CSC revising policy in late 1972).
\end{itemize}
Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. . . Based on these court decisions [and an] outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.450

In 1978, the statute governing the CSC was amended to prohibit discrimination against employees “on the basis of conduct which does not adversely affect the performance of the employee.”451 Although the statute and CSC rules codified the Norton nexus approach, they left open dismissals for homosexual “conduct.” What did, or could, that entail?

Before the 1978 statute took effect, John Singer was dismissed from his clerical job at the EEOC, the agency charged with enforcing federal workplace discrimination law. The Ninth Circuit upheld the dismissal against a Norton-Pickering attack on the ground that Singer was engaged in offensive conduct that undermined his effectiveness as an employee.452 The “conduct” consisted of actions by Singer that the CSC said “flaunted and broadcast [Singer’s] homosexuality activities,” to wit: wearing gay pride buttons, applying for a license to marry his lover Paul Barwick, and kissing another man twice in public.453 Although it would have been unthinkable, and unconstitutional, to discharge a straight man for wearing a straight pride badge, applying for a license to marry a different-sex lover, and kissing someone of the opposite sex in public, the court upheld the penalty for expressive conduct. Singer appealed and, surprisingly, the Supreme Court granted certiorari,454 prompting the government to apply the new civil service policy to reinstate Singer.455

Norton’s nexus approach was also the basis for challenging the federal government’s policy against giving gay people security clearances. The D.C. Circuit vacillated on the issue, first holding that the government had a rational basis in denying clearances to people who

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450. Singer, 530 F.2d at 256 n.15.
452. See Singer, 530 F.2d at 255.
453. Id. at 249.
were subject to blackmail or mental instability.\textsuperscript{456} In \textit{Gayer v. Schlesinger},\textsuperscript{457} however, the court applied \textit{Norton} and insisted that security clearance decisions have some rational connection between security needs and the applicant’s sexual orientation. The court remanded the case of openly gay Richard Gayer to the Pentagon to apply the new standard, and the Pentagon ultimately reinstated his clearance.\textsuperscript{458} The Defense Department in 1974-75 appeared to be reconsidering its policy of blanket exclusion, in light of legal defeats in the courts and with its own hearing examiners. Computer scientist Otis Tabler’s security clearance was not renewed in 1972 because of his homosexuality. Represented by Kameny and the ACLU, Tabler won back his clearance after a hearing before the Pentagon’s Industrial Security Clearance Review Office.\textsuperscript{459} Although other claimants won similar reinstatements, the security clearance exclusion survived into the 1980s and was sustained in the courts.\textsuperscript{460}

2. Federal Military Exclusion: Standing Firm

The Defense Department in 1949 issued a directive which set military policy concerning homosexuals for the next generation. Adapted by each of the service branches, the directive held that a court martial and dishonorable discharge were appropriate for homosexuals who engaged in forcible intercourse or sex with minors. Administrative separation and a general discharge on grounds of unsuitability were usually appropriate for service personnel who engaged in or solicited homosexual acts or who professed “homosexual tendencies.” The armed forces asserted discretion to retain personnel who engaged in isolated homosexual acts and who could persuade a review board they would not do them again (the so-called “queen for a day” exception).\textsuperscript{461} It is

\begin{itemize}
  \item[460.] The leading case was \textit{High Tech Gays}, 895 F.2d at 563. In 1995, the President issued an executive order that may have ended the exclusion. \textit{See Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (1995).}
estimated that more than 2,500 service personnel were expelled under less-than-honorable conditions between 1950 and 1965.462

The ACLU and MSW helped personnel fight their discharges or persuade the armed forces to upgrade the discharge to honorable. This was not a difficult task if the individual followed Mattachine’s first and only rule of federal interrogations: say nothing. Since the 1940s, the armed services had relied on confessions as the primary basis for expulsions.463 In 1968, for example, MSW learned that the Army was conducting a purge of suspected lesbians from the Women’s Army Corps stationed at Fort Myer, Virginia and Fort Ritchie, Maryland.464 MSW immediately went into action—notifying the commanding officers that MSW and the press stood ready to report on any purges, leafletting the bases with Mattachine’s pamphlet on How to Handle a Federal Interrogation, and representing two women ultimately accused. MSW representatives insisted on every iota of due process for the accused WACs, both of whom were eventually cleared for lack of evidence. WACs who chose not to resist were given less than honorable discharges.

The Supreme Court held in 1958 that service personnel have a due process right to judicial review of administrative separations,465 and a fair number of accused homosexuals took advantage of that right. Lesbian and gay litigants prevailed when military procedure was so insufficient as to be bizarre. Private Fannie Mae Clackum won backpay and damages from the government for her general discharge from the Air Force, because the Court of Claims found invalid an Air Force rule allowing discretionary discharge in cases where the evidence of unsuitability was insufficient to support a court martial.466 Procedurally, attorneys for accused service personnel often requested stays, requiring the armed forces to leave them in the service pending resolution of their

and lesbians, see ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II (1990).

462. See COLIN J. WILLIAMS & MARTIN S. WEINBERG, HOMOSEXUALS AND THE MILITARY: A STUDY OF LESS THAN HONORABLE DISCHARGE 38-53 (1971). The authors’ data were taken from hearings held on military justice by the Senate Judiciary Committee’s Subcommittee on Constitutional Rights, chaired by Senator Sam Ervin, in 1962 and 1966.

463. On military interrogations where suspected homosexuals were threatened and cajoled into confessions, see RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY—VIETNAM TO THE PERSIAN GULF 124-31 (1993).


constitutional claims. Courts understood that "discharge with anything less than a record of honorable service constitutes a stigma of tremendous impact which will have a lifelong effect" but usually denied stays on the ground that the accused was not likely to prevail.467

During the 1950s and 1960s, service personnel discharged on the ground of homosexuality almost never conceded that they were homosexual (and often they were not). Hence, the only arguments available to their attorneys were the standard due process ones. Only after Stonewall did gay and lesbian service personnel openly announce their sexual orientation and challenge the military exclusion more broadly.468 Even during that period the challenges were usually phrased in substantive due process rather than equal protection language. In Champagne v. Schlesinger,469 for example, two women discharged under honorable conditions publicly admitted that they were lesbians and argued that their exclusion was irrational. After the Navy admitted that dismissal of lesbians was not mandatory, the appeals court dismissed the case so that the women could exhaust their administrative remedies.470

The Air Force had a similar discretionary policy, and the District of Columbia Circuit held in Matlovich v. Secretary of the Air Force471 that the armed forces were required to give reasons for separating openly gay Sergeant Leonard Matlovich, who concededly had an exemplary service record, while not separating many others. In a companion case, the court upheld the claims of an openly gay sailor, Vernon Berg, against the Navy's open-ended policy.472 Implicitly, the court was holding that the Norton requirement, that there be a nexus between the disapproved conduct and legitimate state needs, applied with some force in the military discharge cases. Almost as significant as the court's decision was the bad publicity the Berg case generated when the Navy, during


469. 506 F.2d 979 (7th Cir. 1974).

470. See id. at 984.


discovery, conceded that the justifications for the homosexual exclusion policy had been studied and found to be lacking in an internal report (the now-famous Crittenden Report) generated in 1957.\textsuperscript{473} The study found no evidence that homosexuals could not serve honorably and productively or that homosexuals were security risks; the only reason the policy persisted was societal homophobia—not the most rational of bases for state policy according to Norton.

In the wake of these developments, a coalition of gay service people formed in 1976 to coordinate a normalization of lesbians and gays in the military, and more service personnel came out of their closets and challenged the military’s exclusion in the courts. In 1977, to take just one case, a federal district judge rejected the military’s rationales for excluding lesbian air traffic controller Mary Saal.\textsuperscript{474} Even accepting the illegality of consensual private intercourse, the district court held that there was no legitimate reason to single out homosexuals for exclusion; most heterosexuals also committed the forbidden activities—especially oral sex. The armed forces relied strongly on the hostility of straight personnel to gay personnel, an argument identical to that stressed by opponents of racial integration in the 1940s. After Saal and other district court victories, the military exclusion seemed to be following the pattern of the civil service exclusion in 1973—to oblivion. That the President in 1977 was Democrat Jimmy Carter (ending eight years of Republican presidents) was cause for gay optimism.

Accounts of the military exclusion’s demise were exaggerated, however. In 1977, the number of gay-related discharges jumped to 1,442, up from 937 in 1975 and 1,296 in 1976.\textsuperscript{475} The Carter Administration’s Department of Defense became one of the most zealous witchhunting administrations in history. Like previous witchhunts, this new spate of purges focused disproportionately on women. In 1980, the \textit{U.S.S. Norton Sound} became a focal point for the more aggressive Carter Administration policy.\textsuperscript{476} Assisted by the ACLU, nineteen women slated for

\textsuperscript{473} See E. Lawrence Gibson & Vernon E. Berg, III, \textit{A Personal View of the Pentagon’s Homophobia}, \textit{Advocate}, June 15, 1977, at 6 (describing the Crittenden Report).


discharge as suspected lesbians announced that they would go to court; the Navy suffered through a large amount of bad press as a result. The armed services won a critical victory that same year when the Ninth Circuit reversed the decisions in Mary Saal's and two other cases. Judge Anthony Kennedy's opinion in *Belier v. Middendorf*\(^{477}\) upheld the gay exclusion against equal protection as well as due process attack, basically accepting on faith that military experts knew best how to maintain good order. *Belier* was the first of several victories at the federal appellate level, and it encouraged the Carter Administration to solve the *Matlovich* problem by devising new regulations that removed almost any discretion that would allow openly gay or lesbian people to serve in the armed forces.\(^{478}\)

*Belier* and the new Carter Administration regulations closed the military closet door for the next twelve years. Why were gay rights efforts so unsuccessful here, in contrast to their success against the civil service exclusion? Doctrinally, the key distinction was the deference courts paid to military judgments, a deference which the Supreme Court in 1981 deployed to justify discriminating on the basis of sex in draft registration.\(^{479}\) That the top brass in the armed forces strongly opposed allowing openly gay people to serve not only carried weight in the courts but, more importantly, blocked the kind of internal rethinking that undermined the civil service and security clearance exclusions. Rhetorically, the armed forces deemphasized the old, rather dopey, arguments (gay people were unstable, subject to blackmail) and recentered the exclusion around the third-party effects of allowing openly gay people to serve: given the close quarters of military life, the privacy of heterosexual soldiers would be invaded; as a consequence, morale and unit cohesion would suffer.

3. State and Municipal Governments: From Exclusion to Protection of Gay Employees

In 1961, conviction, and often just detention, for a charge of homosexual solicitation, lewdness, or sodomy theoretically disqualified a person from state or local employment and from professional licenses almost everywhere. The gay exclusion from state employment and licensing was never enforced with any thoroughness, however. The most vigorous state witchhunt in the 1960s was that of Florida's Johns

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477. 632 F.2d 788, 811-12 (9th Cir. 1980).
Committee, which by 1964 had outed several dozen state employees, mostly teachers, thereby costing them their jobs and their teaching certificates. Given the state’s sustained effort, it is remarkable that so few gays were actually apprehended. As Florida’s level of witchhunting was beyond the capacity or the desire of most other jurisdictions, discreet lesbian and gay employees could serve without much fear of dismissal so long as they were discreet (don’t ask, don’t tell). Where their homosexuality did become public, they could lose their jobs or be reassigned, as Mike McConnell and Paul Acanfora learned. Inevitably, most jurisdictions came to accept the Norton principle that an employer must establish a nexus between homosexuality and the requirements of the employee’s position before a dismissal would be considered legal. Slowest progress was made in positions where there were seriously alleged third-party effects: police work (the morale and unit cohesion argument) and teaching (harm to children).

Little progress was made in these areas until after Stonewall. The critical case was Morrison v. State Board of Education. Marc Morrison, a secondary school teacher in Los Angeles, gave counsel and advice to his colleague, Fred Schneringer, when the latter was breaking up with his wife. For a one-week period in April 1963, Morrison and Schneringer became physically intimate, although it did not appear that either violated California’s laws against sodomy and oral copulation. Guilt-ridden, Morrison reported the incident to his principal and resigned his public school position in 1964. In 1966, the California Board of Education revoked Morrison’s teaching certificate, depriving him of employment in the private, as well as public, sector. The only basis for the revocation was the one incident and Morrison’s admission of homosexual tendencies. A closely divided California Supreme Court overruled the revocation. Justice Mathew Tobriner’s opinion interpreted the “immoral conduct” provision of the Education Code to mean conduct impairing the teacher’s pedagogical effectiveness. This narrowing interpretation avoided what the court thought were three serious constitutional problems with a broad construction: it would be too vague to give teachers notice of conduct they should avoid; it would threaten teachers’ privacy by tempting states to pry into their extracurricular

480. See Florida Legislative Investigation Committee, supra note 222.
481. 461 P.2d 375 (Cal. 1969).
482. See id. at 377-78.
483. See id. at 386-87.
484. See id. at 387-90.
lives, in tension with Griswold, and it would violate the Shelton-Pickering principle that "[n]o person can be denied government employment because of factors unconnected with the responsibilities of that employment." Following the philosophy of Norton, Justice Tobriner held that "[t]he power of the state to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual to live his private life, apart from his job, as he deems fit."

Like Norton itself, Morrison was not enthusiastically received by the lower California courts. Rejecting these narrow readings, the California Supreme Court applied Morrison to overturn a school board’s effort to dismiss a teacher arrested but not charged with sexual solicitation in Board of Education v. Jack. Although the alleged homosexual conduct was not as private as it had been in Morrison, the supreme court affirmed the trial court’s findings that the teacher’s conduct did not come to public attention or impair his effectiveness as a teacher. Courts in most other jurisdictions applied Morrison’s nexus requirement in public school settings with deference to school board determinations that homosexuality alone was sufficient to undermine a teacher’s effectiveness. Even when courts found that a school board acted unconstitutionally, as in Acanfora, they often found some way to deny reinstatement.

485. See id. at 390-91.
486. Id. at 391.
487. Id. at 394.
488. For example, in McLaughlin v. Board of Medical Examiners, 111 Cal. Rptr. 353 (Ct. App. 1973), California’s intermediate appellate court upheld the board’s discipline of a doctor who had been convicted of lewd solicitation in a public place due to his fondling of a decoy policeman. See id. at 354, 359. The court assumed the need to show a nexus between the crime and McLaughlin’s fitness to practice medicine, but offered only the theory that “appellant’s problem apparently stays with him most, if not all of the time; and in light of his present conduct, there is little assurance that it will be relegated to isolated places and occasions away from his patients.” Id. at 357; see also Governing Bd. of Mountain View Sch. Dist. v. Metcalf, 111 Cal. Rptr. 724, 728 (Ct. App. 1974) (dismissing homosexual teacher based on invalid criminal charge); Purifoy v. State Bd. of Educ., 106 Cal. Rptr. 201, 208 (Ct. App. 1973) (revoking teacher’s certificate); Moser v. State Bd. of Educ., 101 Cal. Rptr. 86, 88 (Ct. App. 1972) (same).
489. 566 P.2d 602 (Cal. 1977).
490. See id. at 609-10.
The public school remained a charged setting for openly lesbian or gay teachers because of parental concerns about sexual predation or progay role models who might influence their children's budding sexualities. On the other hand, courts were willing to strike down state policies discriminating against teachers because of their abstract (non-identity speech) discussions of homosexuality. Note the close fit with Pickering.

The police cases followed the same pattern: courts were unwilling to invalidate policies against openly gay police officers but did intervene—and apply Pickering—when someone was discharged for non-identity speech. Other state professional exclusions that discriminated against gay people were more successfully challenged. States as divergent as New York and Florida rejected sexual orientation as a criterion for membership in the legal bar. An ABA survey in 1976 found that no state bar asked applicants about their sexual orientation, and all but a handful reported that they would not ordinarily consider such information.

492. See, e.g., Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 512 F.2d 850 (9th Cir. 1975), aff'd 353 F. Supp. 254 (D. Or. 1973). Both the district court and the circuit court agreed that Peggy Burton had been wrongfully terminated by the school board because of her status as a practicing homosexual—the statute the school board relied on was found to be unconstitutionally vague. The award of damages was limited to money damages and an order that the school board expunge any references of the dismissal from her personnel file. See id. at 851-52. The courts refused, however, to order her reinstatement, on the grounds that she was nontenured and there were no guarantees that her contract would have been renewed. See id. at 854.


495. See Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981) (en banc) (per curiam).

496. Compare In re Florida Bd. of Bar Exam'rs, 358 So. 2d 7, 10 (Fla. 1978) (requiring the bar to admit an openly gay attorney unless there is a "substantial connection between [his] antisocial behavior and his ability to carry out his professional responsibilities"), with State ex rel. Florida Bar v. Kimball, 96 So. 2d 825, 825 (Fla. 1957) (disbarring a homosexual attorney because of "behavior contrary to good morals and in violation of the laws of the state"). Years later, Kimball applied for admission to the New York bar. See In re Kimball, 301 N.E.2d 436 (N.Y. 1973). He was initially turned down, based upon his 1956 arrest for "committing an indecent and lewd act in a public place" in Florida. This was what led to his disbarment there; ironically, the statute under which he had been arrested was declared unconstitutional by the Florida Supreme Court in 1971. See id. at 436-37 (Gabrielli, J., dissenting). The New York court held, however, that his application should be reconsidered, noting that "the Committee on Character and Fitness found [him] to be of good character and qualified." Id. at 436. "While [Kimball's] status and past conduct may be now and has been in the past violative of accepted norms, they are not controlling, albeit relevant, in assessing character bearing on the right to practice law." Id.

497. See Rivera, supra note *, at 859.
Ironically, the principles of Jack M. and Norton were more readily followed by city councils and state legislatures (although not without a fierce struggle) than by state or federal judges. The first big victory came in February 1972, when New York Mayor John Lindsey issued an executive order banning sexual orientation discrimination in city employment. More than forty cities adopted similar policies (usually by vote of the city council) between 1971 and 1984, including Atlanta (1971), Boston (1982), Chicago (1982), Detroit (1979), Los Angeles (1977), Minneapolis (1974), Philadelphia (1982), San Francisco (1978), Seattle (1975), and Washington, D.C. (1973). (Appendix C of this Article lists other jurisdictions, including counties and states.) Notably, there were no states that formally ended antihomosexual public employment policies before the federal government more or less did in 1975. Pennsylvania was the first state to bar such discrimination, in April 1975, when Governor Milton Shapp issued a controversial executive order.498 Similar executive orders were issued by the governors of California (1979), New York (1983), and Ohio (1983); legislatively, similar measures were enacted in Illinois (1981), Michigan (1981), and Wisconsin (1982).

In parallel fashion, most of these foregoing jurisdictions considered broader measures to prohibit sexual orientation discrimination by private employers as well. The first jurisdictions to do so were university towns in Michigan (Ann Arbor and East Lansing, both in 1972), but the first significant law was adopted by Washington, D.C.499 Starting as early as 1971, activists Frank Kameny, Eva Freund (of NOW), and Cade Ware and Bill Bricker (both of GAA) were mobilizing information and lobbying pressure for Mayor Walter Washington and members of the District's City Council to prohibit sexual orientation discrimination. In 1973, Councilmember Marjorie Parker was persuaded to include sexual orientation as a prohibited classification in her human rights bill, which prohibited discrimination in employment, housing, public accommodations, real estate, and credit practices. With the key support of the mayor and Representative Ronald Dellums (a member of the House

498. In response to Governor Shapp's order, the legislature passed a bill prohibiting "anyone" who had been convicted of committing "deviate sexual intercourse" or "who ha[d] admitted to acts that would constitute deviate sexual intercourse" from performing "any duties relating to (I) persons confined in a penal, reform or correctional institution, (II) juveniles, (III) law enforcement as a police officer, (IV) the mentally ill or (V) the mentally retarded." Governor Shapp successfully vetoed the bill, calling it vindictive and overbroad. Governor Shapp Vetoes Anti-Gay Bill Passed in Unanimous Senate Vote, ADVOCATE, Nov. 19, 1975, at 9.

committee overseeing the District), the human rights bill was adopted in 1973.\textsuperscript{500} Contrast the success of local gay activists with the District’s government, with their failure to persuade Congress to adopt a similar law nationwide. On May 14, 1974, Representative Bella Abzug introduced a federal gay rights bill that would have protected against sexual orientation discrimination in public and private workplaces, public accommodations, and housing. Although similar bills were introduced in every Congress after 1974, none even received a congressional hearing until 1994.\textsuperscript{501}

Other important jurisdictions prohibiting private workplace discrimination included Detroit (1979), Los Angeles (1979), Minneapolis (1974), Philadelphia (1982), and San Francisco (1978).\textsuperscript{502} The first statewide ban was created when the California Supreme Court interpreted the state labor code’s prohibition of political activity discrimination to include sexual orientation in the \textit{Gay Law Students} case. Wisconsin adopted the first state statute barring such discrimination in 1982. Just as notable as these success stories were the stories of frustration, however. Like the federal bill, job protection proposals in most states and localities were not adopted during this period. New York City was the most surprising holdout: starting in 1973 and every year thereafter, the well-organized gay lobby would push for adoption of a nondiscrimination ordinance and would lose in committee or on the floor of the council. Similarly frustrating were annual defeats in the legislatures of Massachusetts, Oregon, and California (legislation proposed by Willie Brown to codify and clarify \textit{Pacific Telephone & Telegraph}).

More sobering was the limited efficacy of the measures that were adopted. Many cities that officially or informally stopped discriminating against gay people still had police departments that did. In 1975, virtually every city in the United States (San Francisco being the main exception) either had a policy against hiring gay people as police officers or informally indicated that they would not do so.\textsuperscript{503} The list of “willing to hire” was longer in 1981 (New York, Los Angeles, Washington, D.C.,

\begin{itemize}
\item \textsuperscript{500} In 1977, two years after D.C. received home rule from Congress, the council reenacted the Human Rights Act as D.C. CODE ANN. §§ 1-2501 to 1-2557 (1992 & Supp 1996). It was this Act that Georgetown was successfully charged with violating by its gay rights groups.
\item \textsuperscript{501} The repeatedly unsuccessful bills to prohibit job discrimination against gay people came back to haunt gay rights. Courts invoked Congress’s disinterest in these bills as evidence that Title VII’s prohibition of sex discrimination did not extend to sexual orientation claims. \textit{See}, \textit{e.g.}, \textit{DeSantis v. Pacific Telephone & Telegraph Co.}, 608 F.2d 327 (9th Cir. 1979).
\item \textsuperscript{502} See Appendix C for the gay rights protections afforded by these and other cities.
\end{itemize}
and Chicago being prime additions), but most continued to discourage such applications or, at best, followed a don’t ask, don’t tell approach.\textsuperscript{504} Additionally, the measures that were adopted were, in the words of reporter Randy Shilts, “toothless paper tigers.”\textsuperscript{505} Most of the laws provided only an administrative mechanism and no damages relief for grievants. Because of their fear of publicity, gay employees were less likely than others to risk a lengthy process for so little payoff, and virtually no one filed charges in most cities (San Francisco again being an exception proving the rule).

The most alarming limitation of gay rights measures was how easily some of them triggered antigay political backlash. One of the first jurisdictions to adopt a job nondiscrimination measure, Boulder, Colorado, was also the first to see it repealed, by a popular referendum in May 1974.\textsuperscript{506} An ironic consequence of sexual orientation nondiscrimination laws was their contribution to a new politics of traditional values.\textsuperscript{507} Seasoned by local tryouts in Colorado (1974) and California (1976), the new politics made its national debut in Dade County, Florida in 1977. When Dade County adopted a law broadly protecting against sexual orientation, singer and former beauty queen Anita Bryant formed a coalition, “Save the Children,” to repeal the law by popular referendum. In May of that year, 50% of Dade County’s voters turned out for the referendum and voted 69% to 31% for repeal.

“Save the Children” was significant, first, as the first nationally prominent antigay campaign; second, as a hugely successful one, showing risk-averse politicians that there was a large and mobile constituency adverse to progay legislation; and, third, as an example of the rhetorical shift first prominent in the California sodomy law battle, and abortive referendum, in 1976. Consistent with her own thinking and

\textsuperscript{504} See Brett Averill, \textit{On the Beat with Gay Cops: Caution and Closets in New York}, \textit{Advocate}, May 14, 1981, at 15. At the same time progress was occasionally made in some locales, setbacks occurred elsewhere. Atlanta in 1977 not only reaffirmed its antigay policy but reinstituted questions focusing on police applicants’ homosexual experiences. Commissioner Reginald Eaves found no fault with gay officers per se but feared “antagonism” from homophobic straight officers. “I don’t think I need that additional problem. . . . I’m still fighting the feeling against hiring women and blacks,” he said. \textit{Gay Police: Controversy Heats Up}, \textit{Advocate}, Oct. 5, 1977, at 12. Mayor Ralph Perk of Cleveland was less enlightened, justifying his opposition to gay police: “[P]eople who feel it is necessary to have sex with animals, or with children, or rubber dolls, or themselves or with the same sex are not practicing what is normal. I call them pornomaniacs.” \textit{Id.}

\textsuperscript{505} See Randy Shilts, \textit{City Rights Laws—Are They Just Toothless Paper Tigers?}, \textit{Advocate}, Mar. 10, 1976, at 6 (generally, yes).


that of her core constituency, Bryant argued that “homosexuality is immoral and against God’s wishes,” the traditionalist argument in favor of sodomy laws and, now, against sexual orientation discrimination laws that would “encourage” such immorality. Following a nonbiblical but also traditionalist line of thinking, Bryant charged that the gay rights law would encourage people to cross-dress, to molest children, and even to have sex with animals. But as its tag name revealed, her campaign most often maintained that gay rights infringed the rights of third parties, namely, parents and their children. “‘Miami’s law infringed upon my rights,’” Bryant said, “‘or rather discriminates against me as a citizen and a mother to teach my children and set examples of God’s moral code as stated in the holy scriptures.’”

After the votes were counted, Bryant gloated:

“We will now carry our fight against similar laws throughout the nation that attempt to legitimize a lifestyle that is both perverse and dangerous to the sanctity of the family, dangerous to our children, dangerous to our freedom of religion and freedom of choice, dangerous to our survival as one nation, under God.”

True to her word, Bryant traveled from locale to locale preaching against nondiscrimination laws. More important, a national network of money and organizational know-how was available in other states to fuel repeal campaigns. Wichita, Kansas; St. Paul, Minnesota; and Eugene, Oregon immediately followed Dade County in repealing their gay rights ordinances by referenda. California in 1978 faced a statewide initiative sponsored by state Senator John Briggs which would have overridden Jack M. and disqualified from public school employment anyone engaged in the “advocating, soliciting, imposing or encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other employees.” The Briggs initiative was defeated in part because its strategy was too broad: eager to merge homosexual conduct with status, Briggs wrote an initiative that directly implicated First Amendment concerns and

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508. Joe Baker, Anita... With the Smiling Cheek, ADVOCATE, Apr. 20, 1977, at 6. “‘The recruitment of our children is absolutely necessary for the survival and growth of homosexuality. Since homosexuals cannot reproduce, they must recruit and freshen their ranks,’” presumably stealing children from heterosexuals. Id.


510. For the unsuccessful challenge to the St. Paul referendum, see St. Paul Citizens for Human Rights v. City Council, 289 N.W.2d 402 (Minn. 1979).

placed gay-friendly heterosexuals at risk as well. The failure of the initiative revealed the electoral riskiness of blatant antigay appeals and the limits of both the old (sodomites and child molesters) and new (rights of parents) antigay rhetoric.

B. Immigration and Naturalization Exclusions

The Nationality Act of 1940 required that the Immigration and Naturalization Service ("INS") deny citizenship to people who could not demonstrate "good moral character." The statute listed various actions that could be treated as evidence of bad moral character, including adultery, but not homosexuality. The Immigration and Nationality Act of 1952 (McCarran-Walter Act) prohibited immigration into the United States of persons "afflicted with psychopathic personality, epilepsy, or a mental defect," as well as persons "who have been convicted of a crime involving moral turpitude" or have admitted committing acts constituting such a crime. The statute also required deportation of these noncitizens. Notwithstanding the ambiguity of both statutes, the INS in the 1950s interpreted them to exclude homosexuals and bisexuals from the country and from the privileges of citizenship. The Public Health Service ("PHS"), charged with administering the psychopathic personality exclusion in conjunction with the INS, read the McCarran-Walter Act the same way. By these actions, the federal government reinforced the impression that gay and lesbian people were not true "citizens" of this country. Both exclusionary policies were challenged and partially nullified, between 1961 and 1981.

1. Unsuccessful Challenges to the Exclusions, 1961-1969

During the 1960s, noncitizens challenged these policies without success. In Posusta v. United States, Judge Learned Hand overruled the INS’s decision to deny citizenship to Marie Posusta on the ground that she had committed adultery with the man she later married. Judge Hand ruled that the moral character requirement was not penal and could

513. See 8 U.S.C. § 1101(f) (good moral character refuted if noncitizen is a drunkard, adulterer, murderer, prostitute, gambler).
not be invoked to punish past conduct, but rather “to admit as citizens those who are likely to prove law-abiding and useful.”

Posusta, when read together with the Supreme Court’s decision in Griswold, suggested that noncitizens must engage in public and not just private immorality, a distinction which was usually not applied to homosexuals prior to Stonewall. In 1968, for example, a New York state judge denied naturalization to Olga Schmidt on grounds of “immoral conduct” because she had engaged in intimate relations with a female friend in her home. In response to Schmidt’s contention that she had limited her activities to consensual and private settings, the court said that “[f]ew behavioral deviations are more offensive to American mores than is homosexuality.” The exclusion of homosexuals from citizenship never reached the Supreme Court during this period. The same was not true of the immigration exclusion.

The Ninth Circuit, in Fleuti v. Rosenberg, held that the term “psychopathic personality” was too vague to be constitutionally applied to homosexuals generally. The court explicitly relied on medical studies and experts’ skeptical of the precision or usefulness of the old term “psychopathic personality.” Reflecting severe internal division, and surely uncertainty, on the issue, the Supreme Court decided the case on narrower grounds.

The Supreme Court squarely overruled Fleuti’s holding in Boutilier v. Immigration & Naturalization Service. The case involved Clive Michael Boutilier, a Canadian national who was first admitted to this country in 1955. Eight years later, he applied for citizenship but admitted that he had been arrested in New York on a charge of sodomy, later reduced to simple assault and dismissed on default of the complainant. Boutilier affirmed that he was bisexual, and an affidavit from Professor

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518. Id. at 536.
521. 302 F.2d 652, 658 (9th Cir. 1962), vacated on other grounds, 374 U.S. 449 (1963). Fleuti rejected the analysis used in Quiroz v. Neelly, 291 F.2d 906, 907 (5th Cir. 1961), which had applied 8 U.S.C. § 1182(a)(4) to exclude a lesbian, notwithstanding expert testimony that lesbians are not necessarily psychopathic personalities.
522. See Fleuti, 302 F.2d at 658 n.19.
525. See id. at 119-20.
of Psychiatry Montague Ullman stated: "'The patient has sexual interest in girls and has had intercourse with them on a number of occasions. . . . His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility.'"526

Based upon this evidence, the PHS and INS excluded Boutilier on the ground that he was afflicted with "psychopathic personality." The Supreme Court affirmed. The majority opinion, by Justice Clark, not only read the term "person afflicted psychopathic personality" as a code word for "homosexual," a reading with support in the statute's antihomosexual legislative history, but also extended the exclusion to an apparent bisexual who was undisputedly functional, an extension with little support in the legislative history.527 Justice Clark not only ignored Fleuti's concern with vagueness, he also failed even to mention the equal protection problems of reading a broad sexual orientation classification into an ambiguous statute. Echoing the Ninth Circuit's decision in Fleuti, Justice Douglas's dissent scolded the Court for ignoring the expert consensus that psychopathic personality was a meaningless term.528

After Boutilier, the exclusion of homosexuals from immigration was firmly in place under the psychopathic personality provision, which made the mere admission of homosexuality a basis for exclusion.529 Indeed, Boutilier's force was strengthened by Congress's addition of "sexual deviation" as a basis for exclusion in 1965. Often overlooked was the fact that persons who engaged in homosexual acts could also be excluded on the grounds that they committed crimes of moral turpitude. For example, in ordering the deportation of a man who had lived in the United States for thirty-nine years, the Second Circuit held that a conviction under New York's disorderly conduct (degenerate) statute constituted a crime of moral turpitude justifying exclusion.530 Interestingly, because

526. See Boutilier v. Immigration & Naturalization Serv., 363 F.2d 488, 499 (2d Cir. 1966) (alteration in original).
528. See Boutilier, 387 U.S. at 126-27, 135 (Douglas, J., dissenting). Justice Douglas also noted that even the "Public Health Service, from whom Congress borrowed the term 'psychopathic personality' admits that the term is 'vague and indefinite.'" Id. at 130 (citation omitted).
529. See, e.g., Lavoie v. Immigration & Naturalization Serv., 418 F.2d 732, 736 (9th Cir. 1969) (finding that an admitted homosexual was a per se "psychopathic personality" as required by Boutilier); Campos v. United States Immigration & Naturalization Serv., 402 F.2d 758, 760 (9th Cir. 1968) (ordering deportation of gay man seeking change of status from nonimmigrant-student to permanent resident).
530. See Babouris v. Esperdy, 269 F.2d 621, 622-23 (2d Cir. 1959); see also Wyngaard v. Kennedy, 295 F.2d 184, 185 (D.C. Cir. 1961).
the challenges in the immigration cases were to agency policies and not
to the statutes themselves, the equality arguments were not constitutional
arguments. Rather than sailing under the banner of due process and the
First Amendment, as in the employment cases, equality arguments in the
immigration cases sailed under the banner of statutory interpretation. In
the 1960s, however, the arguments sank like the Spanish Armada.

2. The Courts and the Immigration and Naturalization Service
Limit the Naturalization Exclusion, 1971-1981

Two years after Stonewall, in *In re Labady*, federal Judge
Walter Mansfield pressed the INS on the naturalization issue. His opinion
ordering citizenship for a law-abiding, sexually discreet, but openly gay
Cuban immigrant, explained that when homosexual conduct "is entirely
private, the likelihood of harm to others is minimal and any effort to
regulate or penalize the conduct may lead to an unjustified invasion of
the individual's constitutional rights." He recognized that there was
some tension between his construction of the 1940 naturalization law and
Boutilier's construction of the 1952 law, but reconciled the two by noting
that one of Boutilier's moral offenses had been sexual activity in a public
park. Although merely a district court opinion, *In re Labady* was
followed by other courts.

Under pressure from increasing losses sustained in court and having
already abandoned its prior view that private adultery and fornication
barred a finding of good moral character, the INS relented on the issue
of lesbian and gay naturalization as well. In an August 1976 policy
change, the INS announced:

"The fact that a petitioner for naturalization is or has been a practicing
homosexual during the relevant statutory period is not, in itself, a
sufficient basis for a finding that he lacks the necessary good moral
character. However, where there has been a conviction of a homosexual
act or the admission of the commission of such an act in a jurisdiction
in which it is a criminal offense or when the homosexual act involves
minors, or the use of threat or fraud, or the taking or giving of money
or anything of value, or the act of solicitation thereof is in a public

532. Id. at 927.
533. See id. at 926 n.2.
534. See, e.g., Nemetz v. Immigration & Naturalization Serv., 647 F.2d 432, 436 (4th Cir.
F.2d 843, 844-45 (2d Cir. 1973) (refusing petition for citizenship by gay man who lied about his
sexual orientation).
place, the Service['s] view is that a showing of good moral character is precluded.\textsuperscript{535}

It is not clear how many lesbians and gay men were affected by this change in policy, but one case illustrates the potential effect. A Danish lesbian was granted citizenship in 1978 after twenty-five years of unsuccessful petitioning.\textsuperscript{536} No explanation was provided for the sudden \textit{volte-face}, but the new policy surely played a role. On the other hand, the INS still treated gay applicants differently. Richard Longstaff, a resident for fifteen years, was quizzed intensely about his sex life by the INS, which not only denied him citizenship but ordered him deported under \textit{Boutilier}.\textsuperscript{537}

3. The Public Health Service Pushes the Immigration and Naturalization Service to End the Immigration Exclusion, 1970-1981

The struggle to reverse \textit{Boutilier} was a medical as well as legal struggle, given the involvement of the PHS as well as the INS. In 1970, the first spring after Stonewall, gay activists confronted their tormenters at the American Psychiatric Association's ("APA") annual convention in San Francisco. They wanted to remove the characterization of homosexuality as a psychiatric disorder from the APA's diagnostic manual, the \textit{DSM-II}.\textsuperscript{538} Irving Bieber, then the leading antigay psychiatrist, was laughed off the stage by gay protesters. "'I've read your book, Dr. Bieber,'" yelled one protester, "'and if that book talked about black people the way it talks about homosexuals, you'd be drawn and quartered and you'd deserve it.'"\textsuperscript{539} A paper on electroshock treatment for sexual deviation met with shouts of "'torture'" and "'Where did you take your residency, Auschwitz?'" The crowd, not only the activists but psychiatrists, as well, erupted in pandemonium at the conclusion of the paper. While some psychiatrists clamored for air fare refunds, others called on the police to shoot the protesters.\textsuperscript{540}


\textsuperscript{536} See Rivera, supra note *, at 942 n.900.

\textsuperscript{537} See Hassled Briton Tells Story, ADVOCATE, Sept. 20, 1979, at 13; see also In re Longstaff, 716 F.2d 1439 (5th Cir. 1983).


\textsuperscript{539} BAYER, supra note 538, at 103.

\textsuperscript{540} See Alinder, supra note 479, at 144; see also BAYER, supra note 538.
Dr. Kent Robinson, a psychiatrist, believed that the protesters’ claims had possible merit and negotiated a panel at the 1971 APA convention, which would include gay representatives. Robinson contacted gay activist Frank Kameny to organize the panel. Despite securing an official panel at the 1971 convention in Washington, D.C., the activists did not want to appear mollified by the limited participation, and continued to organize street protests. On May 3, 1971, gay activists stormed the stately Convocation of Fellows at the APA Convention, and Kameny seized the microphone to deliver a diatribe against the profession: “Psychiatry is the enemy incarnate. Psychiatry has waged a relentless war of extermination against us. You may take this as a declaration of war against you.” Gay activists later went on to conduct their panel. At the end of the convention, Kameny and his fellow panelists demanded that the APA revise its diagnostic manual to delete references to homosexuality as a psychiatric disorder.

Two years later, after continued pressure from gay activists, as well as pressure from within the profession that included declarations by gay psychiatrists and a review of the medical literature, the APA’s Nomenclature Committee was poised to accept the change. Bieber and Charles Socarides organized an Ad Hoc Committee Against the Deletion of Homosexuality and mobilized psychoanalysts to protest any caving in to gay pressure (as they would understand the matter). The proposal was presented and discussed at the 1973 APA Convention, where it received strong support. On December 15, 1973, the Nomenclature Committee voted to drop homosexuality’s classification as a disease in DSM-II. The decision survived an unprecedented “referendum” (a vote among APA members) instigated by the Ad Hoc Committee. When the new DSM-III was issued later in the 1970s, homosexuality as an illness was a nonissue.

On July 17, 1974, Dr. John Spiegel, president of the APA, wrote the INS to inform the agency of the APA’s official action delisting
homosexuality as a sexual "deviance." Dr. Spiegel urged the INS to "use [its] statutory powers of discretion to refrain from the exclusion, deportation or refusal of citizenship to homosexual aliens." The INS General Counsel responded, first, with Boutilier as binding precedent on his agency and, second, with the assertion that "homosexuals" must, in any event, be denied citizenship on the ground that they lack "good moral character," required by 8 U.S.C. § 1427(a). The Menninger Foundation wrote the INS, "congratulating" it and criticizing the APA. "Soon homosexuals will want to ‘marry,’ have control of children, advocate their way of life as being normal to young people and so on." The matter was not reopened during the Nixon-Ford Administration.

At the beginning of the Carter Administration in 1977, INS, Department of Justice, and White House officials met with ACLU and NGTF leaders to discuss the latter’s petition for the INS to change its policy. I do not know exactly what assurances were made at this meeting, but it is clear that Boutilier was an important agenda item for the INS by 1977. In November, the PHS notified the INS that it no longer felt professionally capable of participating in the exclusion of gay people as “psychopathic personalities” or “sexual deviates” after the APA actions. The INS’s General Counsel’s office was unwilling to allow the PHS off the hook, though, and insisted that Boutilier required the PHS’s continued participation.

Matters stood in bureaucratic impasse until the summer of 1979, when the administrative debate was ruptured by legal developments. Carl Hill, an openly gay British news photographer, was detained on June 13, 1979, by the INS because he was wearing a “gay pride” button. Attorney

547. Letter from John P. Spiegel, President, American Psychiatric Association, to Leonard F. Chapman, Jr., Director, INS (July 17, 1974) (on file with author). This letter and subsequent unpublished materials referred to in this section were obtained by the Author under the Freedom of Information Act.

548. Letter from INS Acting General Counsel to Dr. Walter F. Barton, Medical Director, American Psychiatric Association (Aug. 8, 1974) (on file with author).

549. Letter from The Menninger Foundation to Leonard F. Chapman, Jr., Director, INS (Sept. 12, 1974) (on file with author).

550. See Letter from William H. Foege, Assistant Surgeon General Director, Center for Disease Control (CDC), to Leonel J. Castillo, Commissioner, INS (Nov. 7, 1977) (on file with author). The INS punted for the time being. The PHS made the same pitch to the White House the next year. See Memorandum from Julius B. Richmond, Assistant Secretary for Health and Director, PHS, to the Hon. Margaret Constanza, Assistant to the President (May 5, 1978) (on file with author).

551. See Memorandum from David Crosland, General Counsel, INS, to Carl J. Wack, Associate Commissioner of Examinations, INS (June 30, 1978) (on file with author); Letter from Carl J. Wack, Associate Commissioner of Examinations, INS, to William H. Foege, Assistant Surgeon General, PHS (Nov. 20, 1978) (on file with author).
Don Knutson of Gay Rights Advocates obtained an order from federal Judge Stanley Weigel restraining the INS from excluding Hill, because Hill suffered from no medically cognizable "deviation" or "psychopathy" as the statute required. In August, and apparently in response to the Hill litigation, the PHS formally abandoned any role in diagnosing gay people as "sexual deviates" or people afflicted with "psychopathic personality." Invoking the 1974 edition of DSM-II and the forthcoming 1979 edition of DSM-III, the Surgeon General justified the change as reflecting "current and generally accepted canons of medical practice with respect to homosexuality... This change in the policy of the PHS with respect to the physical and mental examination of aliens has been made to reflect the most current judgments of health professionals on this subject.

Enforcement of the psychopathic personality exclusion directly involved the PHS, which was not only charged with examining immigrants for physical and mental defects, but a PHS certificate was also required before the INS could exclude an immigrant under one of the "medical" exclusions. Thus, when the PHS refused to issue certificates or examine homosexuals, the statutory scheme was thrown into turmoil. The INS suspended exclusions of homosexuals and sought a legal opinion from the Office of Legal Counsel of the Department of Justice. That office advised the INS that it was required to enforce Boutilier even without the PHS’s cooperation.

In 1980, the INS devised an ingenious don’t ask, don’t tell policy:

3. Primary Inspection—An alien shall not be asked any questions concerning his or her sexual preference during primary inspection.
4. Referral to Secondary Inspection—An alien shall be referred to secondary inspection for examination as to homosexuality only under the following circumstances: (1) When an alien makes an unsolicited, unambiguous oral or written admission of homosexuality.

553. Memorandum from Julius B. Richmond, Assistant Secretary for Health and Surgeon General, to William H. Foege, Director, CDC, and George I. Lythcott, Administrator, HSA (Aug. 2, 1979) (on file with author).
555. See id. § 1226(d) (if the PHS certifies that an immigrant “is afflicted with... any mental disease, defect, or disability” excludable under 8 U.S.C. § 1182(a)(1)-(5), the INS decision to exclude “shall be based solely upon such certification.” (emphasis added)); cf. id. § 1225(a) (“inspection, other than the physical and mental examination” shall be done by the INS).
556. See Memorandum from Leonel J. Castillo, Commissioner, INS, to Executive Group (Aug. 10, 1979) (on file with author).
literature or other materials referring to "gay rights" or describing or supporting homosexuality shall not be considered unambiguous admissions of homosexuality. . . .

5. Secondary Inspection—An alien referred to secondary inspection for examination as to homosexuality shall be questioned privately. Inspectors must perform their duties in a professional manner and not allow personal beliefs to taint the inspection of the alien. An alien referred under paragraph 4 shall be asked only whether he or she is homosexual. If the answer is "no", the alien shall not be detained for further examination as to homosexuality. If the answer is "yes", the alien shall be asked to sign a statement to that effect. . . .

6. No search under section 287(c) is to be performed for the purpose of seeking evidence of homosexuality.558

The INS applied this new policy anemically in the 1980s, yet still suffered the further indignity of having it invalidated by the Ninth Circuit when Carl Hill returned to the United States and sought an injunction against INS enforcement of Boutilier without the required PHS certificate of deviancy or psychopathy. The Ninth Circuit upheld the injunction against INS enforcement due to its inconsistency with the statute’s reliance on the still-uncooperative PHS to conduct an examination and issue a certificate before the psychopathic personality exclusion could be applied.559

At this point, the government had several options. The INS eventually chose the following: (1) The INS did not ask for an appeal of its loss in Hill. In light of the earlier INS attitude about the case, this is

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558. Telegraph Memorandum from David Grosland, Acting Commissioner, INS, to All Regions (Sept. 8, 1980) (on file with author).

In response to the refusal of the PHS to make medical determinations of homosexuality and the determination of the office of legal counsel that the INS was nonetheless obliged to exclude homosexuals, the INS has adopted a new policy, "Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexuals." This statement provides that an arriving alien will not be asked any questions regarding his sexual preference. If an alien "makes an unambiguous oral or written admission of homosexuality" (which does not include exhibition of buttons, literature, or other similar material), or if a third person who is also presenting himself for inspection "voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time . . . is a homosexual," the alien may be examined privately by an immigration officer and asked to sign a statement that he is a homosexual. That statement forms the evidentiary basis for exclusion.

In re Langstaff, 716 F.2d 1439, 1449-50 (5th Cir. 1983) (footnotes omitted) (quoting Press Release of the Department of Justice, Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexuals (Sept. 9, 1980)).

559. See Hill v. United States Immigration & Naturalization Serv., 714 F.2d 1470, 1480 (9th Cir. 1983). But cf. Langstaff, 716 F.2d at 1449-50 (allowing exclusions of homosexuals who admit that fact, even without a PHS examination and certificate).
puzzling and suggests some shift in Executive Department internal decisionmaking. (2) The INS agreed to follow Hill, but only within the Ninth Circuit, and continued to follow its earlier policy in all the other circuits. It is not unusual for agencies to “nonacquiesce” in a court decision and follow it only in the circuit where it was issued. (3) The PHS was directed by the Department of Justice and agreed to issue a certificate for “self-proclaimed homosexual aliens presented by the U.S. Immigration and Naturalization Service”—but only in the Ninth Circuit. Elsewhere in the country, the PHS would refuse to have anything to do with “homosexuals.”

Perhaps dissatisfied with this compromise solution, the INS adopted policies more consistent with those already followed by the PHS. Instituting a practice of telling “self-proclaimed homosexual aliens” that they could apply for a “waiver of excludability,” the INS deferred action, excluding them for the duration of their stay in the United States. Moreover, the alien could apply for the waiver before he or she came to the United States, and the suggestion was that such waivers would be routinely granted. In 1990, after a decade of limping along in this manner, Congress, with the support of the INS and PHS, repealed the statutory provision mandating exclusion of people afflicted with psychopathic personality and sexual deviation.

C. Families We Choose

The most intimate private space, outside of the bedroom, was the family living in a common home. For lesbians and gay men, this also became the most contested public space, as most states were substantially or completely unwilling to recognize gay families of choice. The intensity of the antihomosexual opposition, unheard of elsewhere in the world, was a consequence of three different kinds of anxieties: that gay people molest children or “recruit” impressionable children into homosexuality and, therefore, must be stopped; that gay families of choice are at war with natural gender roles necessary for successful relationships and child rearing and, therefore, should not be encouraged; and that the traditional family, already in decline, would be lost on a slippery slope.

560. See Letter from D. Lowell Jensen, Acting Deputy Attorney General, to Edward N. Brandt, Jr., Assistant Secretary for Health (Apr. 5, 1984) (on file with author); Letter from Laurence S. Farer, Acting Director, PHS Division of Quarantine, to Andrew J. Carmichael, Jr., Associate Commissioner, Examinations (June 8, 1984) (on file with author); see also Philip J. Hilts, Agency to Use Dormant Law to Bar Homosexuals from U.S., N.Y. TIMES, June 3, 1990, at 24.

of horribles if gay families were recognized and, therefore, society should draw the line against any such recognition.

1. Same-Sex Marriage

Although their members were keenly interested in the issues, the Mattachine Society and DOB did not make the right of lesbian and gay couples to marry a prominent item on their agendas in the 1950s and 1960s. In light of police harassment of private gay spaces and employer witchhunts, it was impractical for homophile groups to invest any of their scarce resources in a positive agenda such as marriage. Stonewall liberated pent-up gay energy on the topic of marriage, much of it radical. GLF said in 1969: “We expose the institution of marriage as one of the most insidious and basic sustainers of the system. The family is the microcosm of oppression.” By insisting on monogamy, marriage suppresses the sexual liberty that is a chief aim of gay liberation, the radicals maintained. Drawing from Marxist theory, radicals also argued that marriage is an extension of the capitalist system. Through the customs of courtship and marriage, “[c]ompetition and exclusive possession, traits of the marketplace, are extended to erotic relations among persons.” The most important radical criticism of marriage drew from feminist and lesbian feminist theory. Radicalesbians denounced marriage because it had traditionally been

562. In 1953, E.B. Saunders stated that any serious effort to attain rights for homosexuals must advocate marriage rights, but he admitted that marriage was not then a “prominent” item in the homophile agenda. See Reformers’ Choice: Marriage License or Just License?, ONE, Aug. 1953, at 10; see also CORY, supra note 416, at 135-44 (ch. 13, “Love Is a Wonderful Thing”). Writers for The Ladder, published by DOB, did not even discuss the possibility of legal marriage between two women, but were instead fascinated by cases where one woman “passed” as a man in order to obtain a marriage license. See, e.g., Two Women Married, LADDER, Sept. 1961, at 8; Sequel, Two Women Married, LADDER, Feb. 1962, at 21. On the value of lesbian marriage, compare Gene Damon, Lesbian Marriage, LADDER, Aug. 1958, at 12 (recounting her seven-year relationship as one in which “nothing, except of course death, will separate us”), with Jody Shotwell, Gay Wedding, LADDER, Feb. 1963, at 4 (sarcastic account of nuptials between two lesbians, which reported that after “the invited guests had assembled, the performance (pardon, the ceremony) began,” and characterized the guests as ambivalent).


564. GAY LIBERATION 12 (Red Butterfly 1971).

deployed to enslave and brutalize women. Women were enslaved by the role of housekeeper, dependent upon the male breadwinner, and brutalized by the law’s refusal to recognize a husband’s rape of his wife as criminal, or at least tortious.

Many gay activists, however, did not wholly subscribe to the ideas and rhetoric of GLF and the Radicalesbians. For example, the National Coalition of Gay Organizations drew up a comprehensive list of demands for law reform in February 1972, reflecting both the ideas of gay marriage advocates and radical critics. The last demand was to “[r]epeal . . . all legislative provisions that restrict the sex or number of persons entering into a marriage unit and exten[cl] legal benefits of marriage to all persons who cohabit regardless of sex or numbers.”

More importantly, lesbian and gay couples increasingly began to apply pressure on local officials—demanding marriage licenses from shocked clerks, who usually denied their applications. In response to these denials, gay couples went to court. Activists Jack Baker and Mike McConnell were the first gay couple to file a lawsuit seeking recognition of their marriage, the license for which they obtained by tricking a clerk into assuming they were a different-sex couple. Unfortunately, McConnell lost his job and the plaintiffs lost their lawsuit in Baker v. Nelson, but they were followed by a steady stream of lesbian and gay couples seeking legal recognition for their unions.

Because the gay marriage issue was an unformed one in the early 1970s, marriage license clerks sometimes were unsure precisely how to respond to these new kinds of applicants. In Kentucky, for example, when Tracy Knight (a dancer) and Marjorie Ruth Jones (a mother of three) applied for a marriage license with the Jefferson County Clerk of the Circuit Court, James Hallahan, he asked the district attorney for a legal opinion. District Attorney J. Bruce Miller stated that the application should be denied, because it represented “the pure pursuit of hedonistic and sexual pleasure.” Hallahan denied the application. He later

566. Demanded of the National Coalition of Gay Organizations, State, No. 8 (Feb. 1972). Federal Demand No. 4 was: “Elimination of tax inequities victimizing single persons and same-sex couples.” Id.
568. 191 N.W.2d 185 (Minn. 1971). Baker and Nelson then sought official recognition of their spousehood from the federal government, as they filed joint tax returns and applied for spousal benefits under the veterans benefits program. See McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976) (rejecting the claim).
569. Stan MacDonald, Two Women Tell Court Why They Would Marry, LOUISVILLE COURIER-J., Nov. 12, 1970, at A14. The Kentucky Supreme Court upheld this action in Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973), the second published decision denying a same-sex couple their marriage
testified that their marriage "might cause a 'breakdown' of government and 'retard' the continuity of the human race. The problem 'could spread throughout the world.'”

A few clerks and district attorneys were more open-minded. In March 1975, Boulder County Clerk Cela Rorex issued marriage licenses to no fewer than six same-sex couples in Colorado, after District Attorney William C. Wise told her that the state’s gender-neutral marriage law did not clearly forbid same-sex marriages. "I don’t profess to be knowledgeable about homosexuality or even understand it," Rorex said. ‘But it’s not my business why people get married. No minority should be discriminated against.” Rorex and Wise received nearly 100 telephone calls, some of which threatened them with God’s punishment or violence because of their understanding of the law. Responding to citizen complaints, the state attorney general put a stop to the Boulder County experiment in same-sex marriage. A series of unsuccessful lawsuits by the gay married couples followed.

A few months later in Maryland, the Montgomery County Clerk’s Office issued a marriage license to Michelle Bush and Paulette Hall, even though Maryland had adopted a 1973 statute specifically prohibiting same-sex marriages. The clerk grumbled that he had been misinformed as to the exact nature of the applicants, but a state attorney opined that the clerk could not revoke the license once he had issued it. In any event, the lesbian couple moved to the District of Columbia, where Councilmember Arrington Dixon had introduced a bill to legalize gay marriage. The local GAA chapter lobbied for the bill, and longtime gay activist Frank Kameny proclaimed the bill necessary to assure lesbian and gay residents first-class citizenship. Once alerted to Dixon’s proposal, however, the local Roman Catholic Church and various local Baptist Churches mobilized in fervent opposition to the bill. Succumbing to these larger constituencies, Dixon withdrew his proposal.

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570. MacDonald, supra note 569, at A14.
572. Lichtenstein, supra note 571, at 49.
574. See Sullivan v. Immigration & Naturalization Serv., 772 F.2d 609 (9th Cir. 1985); Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), aff’d, 673 F.2d 1036 (9th Cir. 1982); Lichtenstein, supra note 571, at 49.
The difficulty of obtaining gay marriage rights by the political process was vividly illustrated by experiences in Wisconsin and California. In October 1971, Manomia Evans and Donna Burkett applied for a marriage license from Milwaukee County Clerk Thomas Zablocki. Like other clerks, Zablocki obtained a legal opinion before acting; the county’s lawyers told him not to issue the license. Suing Zablocki, Evans and Burkett were the first African-American couple to bring legal proceedings in pursuit of same-sex marriage. At the same time, S.B. 1410 was introduced in the Wisconsin legislature to amend the state’s marriage law to include same-sex couples. Both the bill and the lawsuit went nowhere.

The California legislature, as part of a general review of domestic relations law in 1971, revised its authorization for marriage to include “[a]ny unmarried person,” gender-neutral language that replaced the previous statutory language “[a]ny man or woman.” When the California legislature decriminalized consensual sodomy law, effective in 1976, gay activists interpreted California law to permit gay marriage and filed a lawsuit to that effect. An alarmed County Clerks Association went to the legislature to modify the statute by changing “any person” back to “any man and woman.” After a gay-bashing debate over same-sex marriage, both chambers of the legislature voted by overwhelming margins to amend the marriage law as requested. Recall that California had the most gay-friendly state politics in the country. Yet even in that state, same-sex marriage had virtually no mainstream political support.

The stories of same-sex marriage petitions in Colorado, Maryland, the District of Columbia, Wisconsin, and California reveal typical patterns of action and reaction. Lesbian and gay couples eagerly grasped for the right after Stonewall and sometimes had initial success, but once the community at large was alerted to the possibility of “gay marriage,” political opposition surfaced with a vengeance and crushed the effort. For two decades after the 1975 defeats, lesbian and gay couples continued to

petition clerks, attorneys general, and, on rare occasion, legislators for recognition of their right to marry. For two decades, these officials said "no."582 Many of these petitions were accompanied by lawsuits alleging that state statutory or constitutional law assured gay people of same-sex marriage rights.583

Relying on the Supreme Court's invalidation of states' prohibition of different-race marriages in Loving v. Virginia,584 attorneys for lesbian and gay couples invoked two different kinds of arguments. Most invoked the argument that homosexuals had a fundamental "right to marry,"585 a right established for heterosexual couples in Loving as arising from the Due Process Clause,586 and required heightened equal protection scrutiny following the 1978 Supreme Court decision in Zablocki v. Redhail.587 In the Baker-McConnell decision, the Minnesota Supreme Court held that the right to marry was inapplicable to homosexuals, because marriage by definition required a man and a woman, not two men.588 The Kentucky Court of Appeals reached the same conclusion for women in the Knight-Jones case.589 Through 1997, no judge in the United States has disagreed with this proposition.590

Another argument employed by same-sex marriage plaintiffs built on Loving's first ground for decision, that a state's prohibition of
marriage for different-race couples is invidious racial discrimination. Attorneys for John Singer and Paul Barwick argued that the state’s prohibition of marriage for same-sex couples constituted sexual discrimination in violation of the state of Washington’s newly enacted Equal Rights Amendment (“ERA”), which provided that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex.”

After Loving, a ban on different-race marriages became an impermissible classification on the basis of race—the white-white couple could get married, while the white-black couple could not—because it did not pass the heightened justification required under Supreme Court equal protection precedents. Read together with Washington’s ERA, a ban on same-sex marriages should similarly be considered an impermissible classification on the basis of sex—the woman-man couple can get married, while the woman-woman cannot—requiring the same type of heightened scrutiny. The state court of appeals rejected this argument in 1974, stating that the ERA could be construed only to ensure equality “between men and women,” and did not extend protection for same-sex marriages.

Although the sex discrimination argument was accepted by the Hawaii Supreme Court in 1993, it saw no further action in the 1970s. The right of two lesbians or two gay men to marry one another was rejected as firmly in the 1970s as the legal system has ever rejected a minority right. The only arguable victory in the 1970s was a New Jersey decision recognizing a marriage between a post-operative male-to-female transsexual and a biological male, but the judges reached this result only because they were able to persuade themselves that the partners were different sexes. Otherwise, legal agitation for gay marriage during the 1970s completely failed. The stated reasons were definitional and viciously circular: two women have no right to marry because “marriage” means a man and a woman. The underlying reason, surely, was that
permitting gay marriages seemed like a recognition of complete equality, when virtual equality was all society was willing to offer or accept. Furthermore, such an equality was antithetical to the beliefs of numerous religious groups, which continued to protest the creation of a legal right to enter into same-sex marriage.

2. Legal Relationships Short of Marriage

One response of gay activists to these developments proved more successful: the domestic partnership movement. The first major domestic partnership bill was passed by the San Francisco Board of Supervisors in 1982, but Mayor Diane Feinstein vetoed it on the ground that anything that even faintly "mimics a marriage license" was unacceptable to her vision of straight society. Two years later, the Berkeley City Council adopted the first operative municipal domestic partnership policy, which ultimately allowed city employees to obtain health benefits for their registered domestic partners. Eventually, local coalitions of gay activists and allies obtained similar or slightly broader domestic partnership ordinances, executive orders, or policies during the late 1980s into the 1990s. While domestic partnership gives legal title to same-sex relationships, it does not, however, unite couples sexually and financially in the way that marriage does.

Practical response to the unavailability of economic rights for lesbian and gay couples was marriage by private contract. Same-sex couples can replicate some of the advantages of marriage by contractually merging their lives along lines that marriage law does as a matter of right. Thus, lesbian and gay couples have long been able to purchase property in joint tenancy, establish joint checking accounts, grant one another power of attorney, and name one another primary beneficiaries.

599. See Eblin, supra note 597, at 1072.
in their respective wills. These mechanisms are mainly available to couples with substantial incomes, and no one knows how often such legal devices are deployed to create do-it-yourself marriages.

Joint tenancy and joint bank accounts are all but invulnerable to legal challenge, but the same is not true of wills and contracts, creating monetary and legal rights in favor of a homosexual lover over blood relatives. Wills, for example, can be challenged on grounds of "undue influence," and courts often consider a will that prefers strangers (including unmarried lovers) to the testator's relatives as evidence of undue influence. Such challenges were brought by relatives against the homosexual lovers of testators as early as the 1940s. After Gertrude Stein's death in 1946, for example, the Stein family stripped her forty-year life partner, Alice B. Toklas, of virtually all inheritance and left her penniless. There have been few reported decisions, but In re Will of Kaufmann is probably not atypical of the situation faced by homosexuals in the 1960s and early 1970s.

Kaufmann, an heir to the Kay Jewelry company, became intimately involved with attorney Walter Weiss, who became Kaufmann's lover and business adviser. When Kaufmann died, his last will named Weiss as sole executor and primary beneficiary. Kaufmann's brother challenged the will, and the New York courts invalidated it on the basis of undue influence. The court stated that Kaufmann was completely dominated by Weiss, but a subtext of the decision was the judges' antihomosexual feelings. A letter declaring Kaufmann's love for Weiss and gratitude for his care was interpreted by the court as reflecting, not sincere gratitude or love, but "gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy." The dissenting judge believed the
result rested upon "surmise, suspicion, conjecture and moral indignation and resentment."

The only reported case in the 1970s, also from New York, held that a homosexual lover/heir could not rely on the Fifth Amendment to refuse to testify about the sexual relations he enjoyed with the testator. It seems likely that an increasing number of wills probably were executed in the 1970s but at some risk of nonenforcement, a hypothesis supported by the other contracting cases reported in that decade. In some cases, courts were willing to enforce contract rights, notwithstanding the sexual orientation of the participants, but typically they just ignored evidence of the parties' homosexual relationship. In other cases, courts refused to enforce such contracts because of undue influence. This was the holding of the Maryland Court of Appeals in Knowles v. Binford. Binford and Florence Knowles were "like sisters for more than 70 years," and they lived together for the last decade of Binford's life. During that period, Binford amended a trust instrument to settle all its income on her friend Knowles, thereby cutting out her nephews and nieces. As in Kaufmann, the blood relatives successfully challenged the amended trust; in Knowles, however, there was no probative evidence of undue influence. A final contract-based mechanism for imposing spousal obligations outside of marriage arose out of Marvin v. Marvin. In that case, the California Supreme Court held that unmarried partners could sue for enforcement of explicit or implicit promises of support or financial sharing upon the dissolution of a relationship outside of marriage. Marvin was immediately applied to direct support payments to a partner in a lesbian relationship who could point to an express contract, but was not applied to a gay male relationship which the appeals court characterized as predominately sexual and which lacked any such express contract rights.

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608. Id. at 689 (Witmer, J., dissenting).
610. See Weekes v. Gay, 256 S.E.2d 901, 904 (Ga. 1979) (holding that property passed to decedent's gay lover under theory of implied trust; the court politely deemed the parties' sexual relationship inconclusive).
611. 298 A.2d 862 (Md. 1973).
612. Id. at 866.
613. Although the court acknowledged that Knowles was well-to-do financially—indicating a lack of motive, an essential element for a determination of undue influence—that fact "did not necessarily extinguish the spark of cupidity." Id.
615. See Lesbian to Pay Support, ADVOCATE, July 12, 1978, at 12.
contract. As in the marriage cases and the will and trust cases, the courts often found a way to discriminate against lesbian and gay couples. In any event, Marvin was not immediately followed in most other states and, even in California, was not interpreted to give a non-marital partner rights against third parties. Ultimately, contract was little better as a path to lawful partnership rights than domestic partnership.

3. Custody of Children from Prior Marriages

Many of the people who came out of the closet after Stonewall were married with children. It was rare for the state to try to take away a homosexual parent’s children, in part because the Supreme Court recognized a person’s fundamental right to the companionship and care of their children in other contexts. But where there was a dispute between two parents over custody or visitation, judges in most of the early cases created a variety of statutory common law discriminations against lesbian and gay parents. The rhetorical basis for such discriminations shifted in the 1970s—from per se rules against gay or lesbian parental custody, based on the notion that homosexuality was criminal or bound to have adverse effects on children, toward Norton-like rules requiring (and finding) a connection between a parent’s homosexuality and harm to children because of third-party reactions. Even courts that rejected homosexuality as a decisive factor in custody determinations tended to impose special requirements on lesbian and gay parents’ visitation and custody rights.

One discrimination was a per se rule that homosexuality disqualified a parent from custody. Early cases rested the per se rule on the

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618. Another option for family formation was adult adoption. See Sherman, supra note 603, at 254-55; Developments in the Law—Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1628 (1989). This proved unfeasible for most, because many states limited adoption to persons substantially younger than the adopter, or created an exception banning homosexual adopters altogether. See, e.g., Act of June 8, 1977, ch. 77-140, § 1, 1977 Fla. Laws 466, 466 (codified at FLA. STAT. ANN. § 63.042(3) (West 1985)); In re Adoption of Robert Paul P., 471 N.E.2d 424, 425, 426 (N.Y. 1984).

619. See, e.g., Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that the state may not assume custody of the children of unwed fathers without allowing a hearing on parental fitness and presenting proof of neglect).

620. Excellent overviews of these cases can be found in Nan D. Hunter & Nancy D. Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 BUFF. L. REV. 691 (1976); Rivera, supra note *, at 883-904.
immorality of the gay parent's lifestyle. Courts either referred to sodomy laws as reason enough to disapprove gay parenting or expressed stereotyped views about "predatory" homosexuality. These rationales were undermined by state sodomy repeals and by medical evidence that homosexuality is a normal form of sexual development.

When lesbian or gay male parents introduced such expert evidence in states that had deemphasized sodomy laws (either by repeal or reduction to misdemeanor), they often won custody. A key case was *Schuster v. Schuster*, where a lesbian couple, Sandy Schuster and Madeleine Isaacson, presented expert psychiatric evidence that parental sexual orientation is irrelevant to the child's development and that their children were healthy and normal. The courts involved maintained custody with the mothers, but with conditions. The trial court admonished the mothers not to "use" the children as a showcase for "homosexuality," and the appeals court refused to allow the mothers to live together. This was not an unusual condition. The first open lesbian to win custody of her children, Camille Mitchell, was shackled with severe constraints on same-sex socializing by Santa Clara County Judge Gerald Chargin.

During the 1970s, the antihomosexual discourse shifted from the per se rule, based upon the intrinsic immorality of the lesbian or gay parent, to a rule requiring judges to focus on the best interests of the child. That inquiry was slanted, however, by insisting that homophobic third-party reactions be considered. In *S v. S*, the Kentucky Court of Appeals reversed a trial court for failing to change child custody from mother to father when the mother came out as a lesbian. Based upon a journal article, the court accepted as a fact that "the lesbianism of the

621. See, e.g., *Immerman v. Immerman*, 1 Cal. Rptr. 298, 301 (Dist. Ct. App. 1959) (holding that, in determining custody, it was error to exclude evidence of a mother who had been observed with her head between the bare legs of another woman); *Bennett v. Clemens*, 196 S.E.2d 842, 843 (Ga. 1973) (awarding custody to the grandparents because the mother, among other things, had taught the child about the "gay life"); *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379, 382 (Pa. Super. Ct. 1952) (awarding the mother custody because of the undesirable influences stemming from the father's homosexuality).


623. 585 P.2d 130 (Wash. 1978) (en banc); see also *Rivera*, supra note *, at 898-90.

624. See *Schuster*, 585 P.2d at 133.


627. 608 S.W.2d 64, 66 (Ky. Ct. App. 1980).
mother, because of the failure of the community to accept and support such a condition, forces on the child a need for secrecy and the isolation imposed by such a secret, thus separating the child from his or her peers.\footnote{628} Although courts in coastal states adopted a more neutral approach to the best interests of the child,\footnote{629} awarding custody to the nonhomosexual parent remained the typical outcome almost everywhere else in 1981.\footnote{630} The leading case which insisted upon a more neutral best interests of the child inquiry was Bezio v. Patenaude,\footnote{631} wherein the Massachusetts Supreme Court held that there had to be a specific showing of harm to the child, exclusive of general cultural prejudice, to justify depriving a lesbian or gay parent of custody.

Another form of discrimination was a rule disallowing unsupervised visitation by the gay or lesbian parent. Although the New Jersey Superior Court ruled that a gay father’s constitutional interest in the companionship of his children militated against a per se rule prohibiting visitation or contact with the children altogether, the court held that the welfare of the children justified severe restrictions on that visitation.\footnote{632} The court relied on the father’s advocacy of gay rights (he was a member of GAA) and the speculative possibility that the children, according to the mother’s expert, “would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development.”\footnote{633} Accordingly, the court limited the gay father’s visitation time and conditioned any visitation on the father’s agreement that he “not involve the children in any homosexual related activities or publicity,” or have his lover present at any time.\footnote{634} Similar discriminatory conditions, imposed upon the visitation rights of gay parents, were commonly approved by state appellate courts.\footnote{635}

\footnote{628} Id. (citing Karen G. Lewis, \textit{Children of Lesbians: Their Point of View}, 25 J. Nat’l Ass’n Soc. Workers 198 (1980)).


\footnote{631} 410 N.E.2d 1207, 1215-16 (Mass. 1980).


\footnote{633} \textit{Id.} at 96.

\footnote{634} \textit{Id.} at 97.

\footnote{635} See, e.g., Irish v. Irish, 300 N.W.2d 739, 741 (Mich. Ct. App. 1980) (allowing visitation provided that there was no intimate sexual conduct in the children’s presence and disallowing
Related to the state’s concern about lesbian custody was a concern about gay adoption. I was surprised to find so little law on the subject from the 1970s. The main development was Florida’s enactment in 1977 of a statutory prohibition of adoption by gay people.\(^6\) Apparently, the reason for the lack of case law is that there was a widely held but tacit discretion for case workers to look the other way if they felt an adoption or foster care placement with a gay person or couple was in the best interests of the child—so long as there was no publicity.\(^6\) The adoption issue was yet another example of the perseverance of a don’t ask, don’t tell philosophy.

**CONCLUSION: GAYLEGAL EXPERIENCE AND AMERICAN PUBLIC LAW**

The foregoing analytical account of the gaylegal experience between 1961 and 1981 is brimming with implications for larger themes of American public law and jurisprudence. I offer three provocative theses that are supported by my survey.

*Thesis Number I* is that evolution in public law is driven by changes in society, culture, and politics.\(^6\) In the larger time frame, public law is not just the application of “neutral” principles, but is really a conflictual struggle to determine what in the short term will be considered “neutral” application of agreed-upon principles and criteria. Thus, from today’s vantage point, there is little that is neutral about the position

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overnight visitation if the parent’s lover was present); White v. Thompson, 569 So. 2d 1181, 1185 (Miss. 1990) (upholding restriction that provided for visitation only outside the presence of mother’s lesbian lover); J.L.P. (H.) v. D.J.P., 643 S.W.2d 865, 866, 872 (Mo. Ct. App. 1982) (upholding a restriction that prohibited overnight visitation and taking the child to gay activist social gatherings); Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985) (allowing visitation provided that the child be shielded from the knowledge of the father’s homosexuality); see also In re June B., 380 N.Y.S.2d 848, 860-61 (Sup. Ct. 1976) (prohibiting overnight stays and limiting visits to instances when her lesbian lover, or other homosexuals, were not present).


\(^6\) See Illinois Agency Boiling: New Row Over Gay Foster Homes, ADVOCATE, July 3, 1974, at A-6 (gay state social worker placed children in gay foster homes for years, until he presented a paper on the topic and ran into a buzzsaw of protests).

\(^6\) This idea is connected with legal realism but has been given particularly pungent articulation by political scientist Jack Knight. See JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (1992).
taken by the medical establishment, the INS and the PHS, and the federal judiciary in *Boutilier*, that a bisexual man is inevitably afflicted with a "psychopathic personality." The general principle was at best arguably neutral—diseased people should be excluded from entering the country and deported when found out—but the particular rule or precept was completely partial, and in the worst way because it rested upon inaccurate information and, worse, prejudice. Its partiality was recognized by conservatives and liberals alike when Congress repealed that part of the immigration law in 1990, but that recognition was only possible because a generation of openly gay people—including litigants like Carl Hill, attorneys such as Don Knutson, and elected representatives such as Barney Frank (a lead sponsor of the 1990 law)—changed people's minds about the neutrality of the psychopathic personality criterion as applied to gay or bisexual people.

A lot of public law issues that were settled in 1981 were settled in the opposite way in 1961, including the validity of making cross-dressing a crime (criminal almost everywhere in 1961, nowhere in 1981), the right of gay people to congregate in bars (prohibited in most places in 1961, in few places by in 1981), the right of states to bar gay people from public education (allowed everywhere in 1961, in sharp dispute by 1981), the admissibility of gay people as citizens (prohibited in 1961, generally allowed by 1981), and granting lesbian mothers custody of their children over the objection of their heterosexual former spouses (unheard of in 1961, increasingly heard and done in 1981, albeit often with restrictions). The issues remained the same, and for the most part the language of relevant statutes or constitutional provisions was stable as well. Change was generated by a new political equilibrium that treated gay people as a relevant perspective or interest, by practical difficulties in administering the old policies in light of newly visible and emboldened gay communities, and by new attitudes among some straight people based upon their experience with gay friends and relatives and new information relevant to the policies at issue.

The first thesis can be illustrated horizontally (different law at the same time) as well as vertically (different law over time). Many public law issues were resolved quite differently in different jurisdictions by 1981, including the applicability of the criminal law to consensual private intimacy between adults of the same sex, to public solicitation for same-sex intimacy in private, and to homoerotica that displayed or graphically described copulation or fetishes (such as sado-masochism). Generally speaking, nonsouthern jurisdictions with big cities resolved these issues
in gay-friendly, libertarian ways, while jurisdictions dominated by rural and small town populations resolved these issues against gay people and in favor of traditional values. The former had organized gay populations centered in big cities, and the political community realized it had to accommodate that constituency, albeit not necessarily at the expense of other groups. The latter had smaller and less-organized gay populations and stronger animus to gay people generally. Another way of explaining the different levels of gay rights protection is to focus on how intense opposition was in different jurisdictions. One interesting variable was religion: states dominated by the Southern Baptist and Mormon religions were more likely to deny gay people rights than states dominated by Roman Catholic, mainstream Protestant, and Jewish religions.

An interesting corollary of the first thesis is that the particular sources of public law make less difference than the evolving political equilibrium. Thus I am skeptical of the idea that the Due Process Clause is backward-looking (traditionist), while the Equal Protection Clause is forward-looking (reformist). The gaylegal experience between 1961 and 1981 is inconsistent with this idea. The vagueness and criminal procedure cases, all traveling under the due process umbrella, were especially dynamic and forward-looking for gay people. The cross-dressing cases are an even better illustration of the error one makes when the Due Process Clause is viewed as nothing more than a repository of static tradition. If due process invokes tradition at all, it is the general principles confirmed by tradition (for example, the criminal law must give fair notice of its commands) and the application of those principles


640. Notably, southern and western states, including states with big cities but still politically dominated by small town and rural values—Texas, Arizona, Georgia, Alabama, Louisiana, Florida, Tennessee, Kentucky, North Carolina, and Virginia. These issues did not even surface in southern and western states that had no big cities, such as Mississippi, South Carolina, Wyoming, New Mexico, Nevada, Alaska, and others.

641. Baptists are strongest in the South and Mormons in Arizona, Idaho, Montana, and Utah, all states strongly resistant to gay rights.

642. See Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161 (1988). This would be a facile way to reconcile Romer v. Evans, 116 S. Ct. 1620 (1996), and Bowers v. Hardwick, 478 U.S. 186 (1986), for example: the latter due process decision defers to traditionalist sodomy laws, while the former equal protection decision looks ahead to equal gay citizenship. This attempted reconciliation slight the possibility that Romer provides an occasion to rethink and someday overrule Hardwick. The case is made in William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet ch. 4 (forthcoming 1998).
in light of ever-evolving social conventions (for example, dress of one's sex is unclear today in ways that would not have been unclear in 1864).

Relatedly, it is simplistic to distinguish sharply between equal protection and due process. Consider the equal employment cases, in which the Mattachine Society and other gay rights organizations saw their challenges to civil service exclusions of gay people as forward-looking and as an important step toward equal citizenship. But their lawyers always made due process arguments, and often won with them. Both due process and equal protection ensure that state action cannot be arbitrary, and it is little more than formalism to distinguish sharply between a due process and an equal protection victory in cases like Norton and Society for Individual Rights, Gayer, Morrison, Jack M., and Matlovich—all of which were due process decisions that contributed strongly to equal rights for gay people.

Thesis Number 2 is that public law nonetheless is an independent variable affecting minority group experiences, by shaping cultural consensus and by empowering or confining the power of authority figures and their subjects.\(^{643}\) Without denying the primacy of social, cultural, and intellectual phenomena, public law powerfully affected the gay experience in America during the period 1961 to 1981. The introduction to this Article shows how law made a difference in the daily lives of lesbians, gay men, bisexuals, and transgendered people. Consider a couple of broader contributions that law has made. The Warren Court's jurisprudence was a major reason the closet culture collapsed; the Justices, most of whom were homoignorant or homophobic (Justice Douglas's charge in Boutilier), laid the necessary groundwork for Stonewall, which occurred the year Chief Justice Warren retired from the Court. How is this so? The Court's main contribution was to establish a public law consensus, inspired by the First Amendment, that state and federal censors could not obtain \textit{ex parte} prior restraints (Marcus and Bantam Books), educational gay publications could not be censored at all (One, Inc. v. Olesen), homoerotic materials could not be censored unless they met fairly stringent requirements (Manual Enterprises), unpopular people were entitled to associate and form political action groups without state harassment or inquiry (Rumely and \textit{NAACP v. Alabama}), public

\(^{643}\) This insight is mainly derived from the work of Michel Foucault, especially his \textit{The History of Sexuality} (three volumes published in English 1978, 1985, and 1986). See the discussion of Foucault in Eskridge & Hunter, supra note 98, ch. 3, § 2(B). The idea also inspires some critical race theory. See Kimberlé Crenshaw, \textit{Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law}, 101 Harv. L. Rev. 1331 (1988) (responding to critical legal studies' critique of liberal rights theory, from a race perspective).
employers could not discipline employees for addressing issues of public concern (Pickering) nor pry into their private business and association (Shelton and Griswold), the state could not even indirectly burden the exercise of deviant religious faith (Sherbert), public schools and universities could not censor students' expression (Tinker) and association (Healy), and, most important of all, every American had a right to express her identity and convictions, no matter how unpopular (Brandenberg).

This complex web of constitutional expectations, some of which were well ahead of American public opinion, facilitated the spirals of coming out stories following Stonewall. Just as legislative and administrative organs of the state had created the closet during the McCarthy era (1947-1956), judicial organs had laid the foundation for its partial collapse during the Warren Court era (1953-1969). Indeed, the two phenomena worked together: the McCarthy era pushed people like Frank Kameny out of the closet by hunting them, and the Warren era gave Kameny and like people enough legally protected room to organize gay liberatory organizations, publications, and churches which flowered after 1969. The Warren Court's equal protection (race) decisions inspired closeted gay people to think that they too might be entitled to human dignity, and the Court's due process decisions (criminal procedure, privacy, public employment) empowered allies of gay liberation (the ACLU, gay-friendly attorneys) and shackled its enemies (chiefly, the police and censorious legislators).

Given the law's important effect on gay history, I am surprised that gay experience had so little effect on the law during this period. I can detect no effect on the Warren Court, but a discernible effect on the California Supreme Court. For the latter, gay rights cases gave the court opportunities and challenges that pressed state public law in ever more progressive directions between 1961 and 1981. The court grew from cautiously gay-friendly (Vallerga and Bielecki) to strongly gay-affirming, almost visionary (Jack M. and Pacific Telephone & Telegraph). The U.S. Supreme Court, ironically, was pressed in a different direction by the gay rights cases. Although serving in the post-Stonewall era, Chief Justice Warren Burger led a more antihomosexual Court than Earl Warren had, with gay people receiving no scintilla of rights from the Court. In a Court that was resolutely middle-of-the-road, the cases forcing the Court to confront "sexual deviancy" were red flags that pressed the Court into lurches rightward. Among the Burger Court's more reactionary and sometimes procedurally offbeat precedents were those denying gay and transgendered people the benefit of Papchristou's vagueness doctrine (Rose and Stone, as well as the denial of certiorari in Mayes), Griswold's
and Roe v. Wade's right of personal privacy (Doe and later Hardwick), Loving's right to marry (the denial of appeal for lack of a substantial federal question in Baker v. Nelson and the denial of certiorari in McConnell), Roth/Memoirs' right to pornography deemed nonobscene according to national standards (Miller), and Stanley's right to possess obscene materials in the privacy of one's home (Kaplan). In a small way, post-Stonewall gay liberation and the litigation it pressed onto the Warren and Burger Courts contributed to the Supreme Court's hysterical rightwing lurches.

The Burger Court, in turn, contributed in minor but discernible ways to the antihomosexual reaction in 1970s America. The Court's privacy and vagueness decisions discouraged state court and perhaps also state legislative revocations of laws criminalizing consensual sodomy, public lewdness, and solicitation; the Court's criminal procedure decisions, its wacky Twenty-First Amendment opinion in LaRue, and its pornography decisions empowered antigay police forces, liquor licensing agencies, and censors, respectively; the Court's move toward deference of military, educational, and other institutions in First Amendment cases laid the foundation for lower courts to deny gay rights claims in those areas (Beller). By treating sex as dirty conduct rather than sexual expression, gay people as criminal sodomites, and cross-dressers as sickos, the Burger Court was aligned with Anita Bryant, John Briggs, and Jerry Falwell. At the very least, the Court avoided any opportunity to help gay and transgendered people correct what appear now to be outmoded concepts and unproductive forms of state regulation.

Thesis Number 3 is that legal rights have ambiguous social legacies for their beneficiaries. Consider the ordinances adopted in the 1970s protecting gay people against job discrimination in the public and private sector. On paper, these laws look like great legal victories, but in practice they were often found to be toothless or worse. They were often toothless in that employees rarely invoked them and largely remained in the job closet. They were worse than toothless when their enactment contributed to a sense of complacency within the gay community, a feeling that the state had actually done something for them, when in fact little was going to change without struggle within the workplace, which few were willing to initiate. The change in people's lives did not come when consensual sodomy laws were repealed or nondiscrimination laws adopted, but when gay pressure was brought to bear on police and employers to stop...
harassing and discriminating against gay people. On the other hand, gaylegal history illustrates how the enactment of progay laws could and did contribute positively to gay life. San Francisco’s ordinance prohibiting sexual orientation discrimination in the private sector and the California Supreme Court’s decision in *Pacific Telephone & Telegraph* were key reasons for a radical change in policy by one of the state’s largest employers, Pacific Telephone & Telegraph Company. The company became one of the best employers in the state for gay people, and the legal prods over several years were the main reason for that *volute-face*.

In a similar vein, lesbian and gay communities ran the risk of overrelying on judges. Especially in the 1960s, this was an inevitable temptation, because the political process was so hostile to gay rights everywhere. It remained a temptation in the 1970s, for even after Stonewall only a fraction of the gay population was openly gay, and a tiny fraction did all the political work. The free rider problem applied to gay political power with a vengeance, and appeals to the judiciary were a useful way to rescue a largely invisible minority from the apartheid of the closet. A problem was that judges were themselves political creatures and tended to reflect the same antihomosexual culture that dominated the political process. What judges were most useful for was to force part of the political process to listen to factual material and to rethink antihomosexual policies. Significantly, trial judges who actually heard gay-friendly witnesses and gay people themselves in person were somewhat more willing to rethink antigay policies than appellate judges. Progay judicial decisions were only useful, however, when gay groups followed up on them to press for more

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646. The gaylegal experience in fact inverts the idea in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), that a special province of the judiciary is to protect minorities against whom there is great prejudice in the political process. So long as gay people were despised and completely invisible in political culture, the courts did not help the group and even contributed to gay marginalization (*Boutilier, Mishkin, Rose*, and *Doe*). It is only after the group has established its political power that it can expect the courts to sweep away old legal disabilities and discriminations. Having said that, I should note that judges with life tenure or the functional equivalent were marginally more willing to challenge antigay policies earlier than most politicians. Consider the ever-Stonewall examples of Chief Judge David Bazelon (*Norton*), Justice William O. Douglas and Judge Leonard Moore (*Boutilier* dissenters in the Supreme Court and Second Circuit, respectively), and Justice Mathew Tobriner (*Morrison*).
647. This was most true in the litigations involving the armed forces exclusion (*Beller* was the first in a long line of appellate decisions reversing district court injunctions for lesbian and gay service personnel), the security clearance exclusion (*Gayer*), constitutional challenges to sodomy and public lewdness or solicitation crimes (the District of Columbia cases reported in Appendix A), the lesbian child custody cases (*S. v. S.*), and the challenges to the immigration exclusions (*Labady*).
permanent change in the administrative and legislative processes. A central lesson of gaylaw is the importance for minority groups of working in all the processes of the state and exploiting policy windows in whichever branch seems most open to rethinking.

The most ambiguous feature of new gay rights was the response they engendered from opponents. Gay visibility and rights triggered an organized political response in Idaho in 1972, Arizona in 1975, California in 1976, and a nationwide traditional values network—which gay journalist Randy Shilts dubbed the "polyester conspiracy"—was in place by 1977, when it won referenda in Dade County and three medium-sized cities. The new "religious right," as it has come to be called, did not sweep the field, as it suffered a big setback with the Briggs initiative in 1978 and watched as city after city adopted nondiscrimination ordinances in response to a reinvigorated gay rights movement.

The most important feature of the antigay lobby in the mid-1970s was the way it reconfigured the justifications for antigay policies. Antigay policies were justified in the 1960s by arguments that homosexuals are immoral and disgusting, medically sick and gender-bending, and predatory to children. These arguments were less robust in the 1970s because of new medical evidence against the sickness and child molestation myths, feminist consciousness-raising as to issues of gender and sexuality, and the popular embrace of the privacy philosophy. Although traditionalists still made those arguments, their discourse shifted in the mid-1970s to emphasize this modern argument: even if homosexuals should be tolerated (i.e., not put in jail), homosexuality should not be "promoted" by the state; and in many contexts homosexual presence would be an invasion of heterosexuals' privacy. The shift in emphasis from the "evil homosexuals" rationale to the "no promo homo"/"protect heteroprivacy" ones was substantially accomplished by 1981.

This is what Reva Siegel calls the modernization of justification. From women's experience, she argues that opposition to minority rights can be strengthened by rejustifying old policies under modernized rhetoric. The gaylegal account in this Article does not much support her thesis. Two antigay policies (the armed forces and marriage bans) emerged in this period as strong as ever, and their continued robustness today (1997) may be due in part to modernized rhetorical justifications, though the more likely explanation is that both bans are mythically too central to heterosexual culture to abandon easily. Other antigay policies—laws criminalizing sodomy, public lewdness, and cross-dressing; rules against gays congregating in bars, student clubs, and the
workplace; censorship of homoerotica; employment discrimination against gay people, especially in education and police forces; and bars to lesbian and gay parenting—decisively lost ground even though there were plenty of defenders who refocused their arguments on no promo homo and heteroprivacy. The dynamic of evolving justification that Siegel excavates is genuine and interesting, but I do not think it has strong normative consequences for gay or other minority rights.
# Appendix A

**Attacks and Dilutions of State Consensual Sodomy Laws, 1961-1996**

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Challenges</th>
<th>Legislative Repeals and Amendments</th>
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*This Appendix includes any law criminalizing anal or oral sex between consenting adults and includes statutes prohibiting the crime against nature, gross indecency, lewd and lascivious conduct, and carnal copulation.*
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<thead>
<tr>
<th>State</th>
<th>Constitutional Challenges</th>
<th>Legislative Repeals and Amendments</th>
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</tr>
<tr>
<td>State</td>
<td>Constitutional Challenges</td>
<td>Legislative Repeals and Amendments</td>
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The Mattachine Society of Washington
P. O. Box 1032
Washington, D.C. 20013

Gentlemen:

Pursuant to your request of August 15, 1965, Commission representatives met with representatives of the Society on September 8, 1965, to enable the Society to present its views regarding the Government policy on the suitability for Federal employment, of persons who are shown to have engaged in homosexual acts.

The Society was extended 30 days to submit a written memorandum in support of the positions set forth at these discussions to ensure that full consideration could be given to its contentions and supporting data by the Commissioners. On December 13, 1965, the Society filed five documents, which, along with the substance of the September discussions, have been considered by the Commissioners.

The core of the Society's position and its recommendations is that private, consensual, out-of-working hours homosexual conduct on the part of adults, cease to be a bar to Federal employment. In the alternative it is asked that the Commission activate continuing discussions with representatives of the Society to take a "progressive, idealistic, humane, forward-looking, courageous role" to elicit the holding of objective hearings leading to the adoption of the Society's recommendation.

The Commission's policy for determining suitability is stated as follows:

"Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexual conduct or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct."

We have carefully weighed the contentions and recommendations of the Society, and perceive a fundamental misconception by the Society of our policy stemming from a basic cleavage in the perspective by which this subject is viewed. We do not subscribe to the view, which indeed is the rock upon which the Mattachine Society is founded, that "homosexual" is a proper metonym for an individual. Rather we consider the term "homosexual" to be properly used as an adjective to describe the nature of overt sexual relations or conduct. Consistent with this usage pertinent considerations encompass the types of deviate sexual behavior engaged in, whether

isolated, intermittent, or continuing acts, the age of the particular participants, the extent of promiscuity, the aggressive or passive character of the individual's participation, the recency of the incidents, the presence of physical, mental, emotional, or nervous causes, the influence of drugs, alcohol or other contributing factors, the public or private character of the acts, the incidence of arrests, convictions, or of public offense, nuisance or breach of the peace related to the acts, the notoriety, if any, of the participants, the extent or effect of rehabilitative efforts, if any, and the admitted acceptance of, or preference for homosexual relations. Suitability determinations also comprehend the total impact of the applicant upon the job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

In the light of these pervasive requirements it is upon overt conduct that the Commission's policy operates, not upon spurious classification of individuals. The Society apparently represents an effort by certain individuals to classify themselves as "homosexuals" and thence on the basis of asserted discrimination to seek, with the help of others, either complete social acceptance of aberrant sexual conduct or advance absolution of any consequences which come to the attention of the public authority. Homosexual conduct, including that between consenting adults in private, is a crime in every jurisdiction, except under specified conditions, in Illinois. Such conduct is also considered immoral under the prevailing mores of our society.

We are not unaware of the numerous studies, reports and recommendations pertaining to the criminal aspects of aberrant sexual conduct and the unequal and anomalous impact of the criminal laws and their enforcement upon individuals, who for whatever cause, engage in homosexual conduct. It is significant to note, however, that the renowned Wolfenden Report, which recommended that consensual homosexual conduct, in private between persons over 21 years of age, be excluded as an offense under the criminal law of England, nevertheless recognized that such conduct may be a valid ground for exclusion from certain forms of employment. Id. p. 22. Whether the criminal laws represent an appropriate societal response to such conduct is a matter properly addressed to the state legislatures and the Congress. It is beyond the province of this Commission.

We reject categorically the assertion that the Commission intrudes into the private sex life of those seeking Federal employment, or that it discriminates in ferreting out homosexual conduct. The standard against criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct is uniformly applied and suitability investigations underlying its observance are objectively pursued. We know of no means, consistent with American notions of privacy and fairness, and limitations on governmental authority, which could ascertain the nature of individual private sexual behavior between consenting adults. As long as it remains truly private, undisclosed to all but the participants, it is not the subject of an inquiry. Whether, however, due to arrest records, or public disclosure or notoriety, an applicant's sexual behavior, be it heterosexual or homosexual, becomes a matter of public knowledge, an inquiry may be warranted. Criminal or licentious heterosexual conduct may equally be disqualifying, and like homosexual conduct, may become the subject of legitimate concern in a suitability investigation. In all instances the individual is apprised of the matter being investigated and afforded an opportunity to rebut, explain, supplement or verify the information.
To be sure if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences, as some members of the Mattachine Society openly avow, the Commission would be required to find such an individual unsuitable for Federal employment. The same would be true of an avowed adulterer, or one who engages in incest, illegal fornication, prostitution, or other sexual acts which are criminal and offensive to our mores and our general sense of propriety. The self-revelation by announcement of such private sexual behavior and preferences is itself public conduct which the Commission must consider in assaying an individual's suitability for Federal employment.

Hence it is apparent that the Commission's policy must be judged by its impact in the individual case in the light of all the circumstances, including the individual's overt conduct. Before any determination is reached the matter is carefully reviewed by a panel of three high level, mature, experienced employees, and all factors thoroughly considered. The fairness of this result, in the light of the investigative evidence including the applicant's statements, is subject to administrative review and may also be judicially reviewed. Hence there are safeguards against error and injustice.

We can neither, consistent with our obligations under the law, absolve individuals of the consequences of their conduct, nor do we propose by attribution of sexual preferences based on such conduct, to create an insidious classification of individuals. We see no third sex, no oppressed minority or secret society, but only individuals; and we judge their suitability for Federal employment in the light of their overt conduct. We must attribute to overt acts whether homosexual or heterosexual, the character ascribed by the laws and mores of our society. Our authority and our duty permit no other course.

By direction of the Commission:

Sincerely yours,

John W. Macy,
Chairman
### APPENDIX C

**JURISDICTIONS PROTECTING GAY & LESBIAN CIVIL RIGHTS (1971-84)**

<table>
<thead>
<tr>
<th>Municipality</th>
<th>Year Enacted</th>
<th>Public Employment</th>
<th>Public Accommodations</th>
<th>Employment</th>
<th>Housing</th>
<th>Education</th>
<th>Real Estate Practices</th>
<th>Credit</th>
<th>Union Practices</th>
<th>Affirmative Action</th>
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* This Appendix is taken from a table developed by the National Gay Task Force.
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