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Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men

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Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men

MARC A. FAJER*

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I. INTRODUCTION

In 1986, the Supreme Court dealt a harsh blow to the gay-rights movement by deciding in *Bowers v. Hardwick*¹ that the right to privacy in the United States Constitution did not prevent states from criminalizing same-sex sexual activity.² Since *Bowers*,³ advocates and scholars have scrambled to find legal theories to protect gay men and lesbians from discrimination.⁴ They have crafted arguments based on the First Amendment, the Equal Protection Clause, state privacy

1. 478 U.S. 186 (1986).

2. *Id.* at 191.

3. I refer to the case as *Bowers*, the name of the Georgia Attorney General. After what Michael Hardwick went through, to saddle him with the opinion and reasoning of the case in addition to its result hardly seems fair. See, e.g., PETER IRONS, *COURAGE OF THEIR CONVICTIONS* 392-403 (1988).

4. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay,*

rights, equitable principles, and various statutes.⁵ In particular cases, some of these arguments have succeeded;⁶ in many cases, they have not.⁷

Yet the key to achieving gay rights may lie not in the substance of the legal arguments, but in the way they are presented. Lynne Henderson, in her critique of *Bowers*, suggested that more personalized and vivid storytelling about the lives of gay people might have changed the outcome of that case.⁸ She argued that Michael Hardwick's lawyers presented the Supreme Court with fairly abstract arguments and failed to create empathy with gay people affected by the decision.⁹

Although this failure to create empathy was undoubtedly important, the language of *Bowers* reveals that the arguments employed by the advocates had another, perhaps more significant, drawback. After describing the Court's prior privacy cases, Justice White concluded that it was "evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."¹⁰ He continued: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."¹¹ These statements indicate that before he decided the case, Justice White had a set of beliefs about what gay people and gay sex are like and about what marriage and family entail.¹² This background set of "knowledge," which Anthony Alfieri has called "pre-understanding,"¹³ infects the *Bowers* majority opinion. Justice White's pre-understanding clearly

Lesbian and Bisexual Identity, 36 UCLA L. REV. 915, 932 (1989) (suggesting that after *Bowers*, gay advocates "must reconsider their litigation strategy").

5. See, e.g., *id.*; Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055 (1990); Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

6. See, e.g., *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991); *Seebol v. Farie*, No. 90-923-CA-18 (Fla. Cir. Ct. Mar. 15, 1991); *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989).

7. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991).

8. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1638, 1642 (1987).

9. *Id.* at 1642-43.

10. *Bowers*, 478 U.S. at 190-91.

11. *Id.*

12. See Steven Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1475 (1990).

13. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2123-24 (1991).

included the common non-gay belief that gay people experience sexual activity differently from non-gays. Gay sexuality, according to this common understanding, is all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure—the civilizing influences that keep “normal” sexuality under control.¹⁴ I call this aspect of non-gay pre-understanding about gay people the “sex-as-lifestyle” assumption.

In order for gay-rights litigation to succeed, gay-rights advocates must tell the stories of the lives of lesbians and gay men with an eye not just to the creation of empathy, but also to subverting the pre-understanding of non-gay society about lesbians and gay men. To do this, gay-rights litigators, regardless of the legal theories they employ, must attack non-gay myths about gay life directly. First, they must identify the aspects of non-gay pre-understanding about gay life that motivate the discrimination being challenged. Then, they must tell stories to illustrate the existence of the pre-understanding in question followed by stories that demonstrate that the pre-understanding is flawed. This Article provides stories to facilitate this process. I begin with a story of my own.

During an interview for a law teaching position, I had a conversation with a law school administrator who clearly was nervous about my inclusion of gay activities and gay-related works-in-progress on my resume. He expressed concern because, apparently, the media recently had attacked Yale University as being a “gay school,” and he felt his law school could not afford that sort of publicity. I indicated that I had been publicly open about my sexual orientation for some time and might well publish gay-related scholarship fairly early in my career. I asked if he had any objections to hiring openly gay faculty.¹⁵ He said he did not; he was just concerned with “extremes.” When I asked what that meant, he replied, “Well, I wouldn’t want you showing up for class wearing a skirt and hose.” In one of those rare moments in life when the correct response sprang to mind immediately, rather than a half-hour later, I replied, “I don’t have the legs for it.”

This story illustrates two fairly common assumptions that, along with the sex-as-lifestyle assumption, help constitute society’s pre-understanding of gay people. First, many non-gay people believe that

14. See *infra* part III.A.

15. The interview occurred prior to the American Association of Law Schools’ adopting its policy forbidding member schools from discriminating on the basis of sexual orientation. See AMERICAN ASSOCIATION OF LAW SCHOOLS, BY-LAW 6-4 (1989), reproduced in Memorandum from Betsy Levin, Executive Director, American Association of Law Schools, to Deans of Member Schools (March 15, 1990) (on file with author).

gay issues are best not discussed; that while being gay may be acceptable, talking about being gay is not. Second, many non-gay people believe that gay men and lesbians exhibit "cross-gender" behavior: behavior stereotypically associated with the other gender.¹⁶ In this view, gay men behave like "normal" women and lesbians like "normal" men. I will call this the "cross-gender" assumption.

This Article focuses on the importance of storytelling in describing and countering these three important aspects of non-gay pre-understanding about gay people: the sex-as-lifestyle assumption, the idea that gay issues are inappropriate for public discussion, and the cross-gender assumption.¹⁷ I hope this Article will demonstrate that these myths together contribute greatly to the oppression of gay men and lesbians in our society, and that attacking the myths must be a priority for all gay-rights advocates. To assist this process, I also elaborate a legal theory based largely on the cross-gender assumption and an analogy to miscegenation: anti-gay discrimination should be prohibited as a form of gender discrimination. As I will argue, this theory is a particularly useful tool because it entails attacking the three key aspects of pre-understanding I discuss.

In Part II, I discuss the uses of personal narrative in legal discourse and elaborate their relation to the identification of and attack

16. I generally use "gender" rather than "sex" to refer to distinctions between men and women. Although the common usage of these words associates sex with biological differences between men and women, and associates gender with socially constructed differences, the distinction is difficult to make and tends to hide the extent to which most gender differences are at least partially socially constructed. See CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* xiii (1989). Moreover, because this Article often discusses sexual activity, using "sex" to refer both to lovemaking and gender is confusing. I also avoid the term "opposite" to refer to gender. I have never understood why men are viewed as the opposite of women, and the phrase tends to exacerbate our society's tendency to polarize gender distinctions falsely. See *infra* note 695.

17. One might well develop a unified theory of non-gay understanding of gay lives that encompassed all three aspects I address in this Article. Indeed, I discuss some of the inter-relationships between them at different times. See *infra* text accompanying notes 688-92. However, the focus of this Article is on legal advocacy, and I believe that developing and then attacking a unified theory would be a less effective litigation technique than identifying and attacking the more obviously harmful aspects of non-gay pre-understanding individually. My approach does not require judges to accept or reject a large, complex, socially constructed vision. Instead, it allows them to see some of the effects of non-gay pre-understanding without having to rethink everything they believe they know about lesbians and gay men. See Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 *LAW & SOC. INQUIRY* 373, 389-90 (1991) (noting limits of real world advocacy and the difficulty of applying proposals which depend on freedom "to remake the world from the bottom up"). Moreover, I think identifying and naming the component parts of the discrimination we face may help gay men and lesbians better understand and cope with it. Cf. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1, 68-69 (1991) (describing this effect from naming of "date rape").

on pre-understanding. I also discuss my use of terminology about gay men and lesbians. Part III examines the sex-as-lifestyle assumption and argues that, like anyone else, lesbians and gay men often experience sex in a context that includes love, commitment, and family. In Part IV, I attempt to show that society sends a strong message to gay people—that they should keep their sexual orientation hidden— and that the resulting concealment has severe costs. I argue, by contrast, that social interaction in our society requires discussion of sexuality by heterosexuals. Part V examines the cross-gender assumption and argues that, although gay lives challenge traditional gender assumptions, most lesbians and gay men do not fit the cross-gender stereotype. I then present evidence that much discrimination against gay people stems from the cross-gender assumption and that anti-gay bias is a form of gender discrimination. In Part VI, I elaborate the gender-based legal theory of protection for gay rights based on this evidence and on the work of Sylvia Law and others.¹⁸ I suggest that since a significant purpose and demonstrable effect of anti-gay discrimination is to rigidify existing gender-role stereotypes, a society serious about eliminating gender inequality must also eliminate discrimination against gay men and lesbians. I conclude by describing some advantages of this legal approach, including its focus on stories that tend to counteract all three forms of non-gay pre-understanding that this Article discusses.

II. STORYTELLING IN LAW AND GAY ADVOCACY

Legal advocates can use personal narratives in a number of different ways. They can recite the narratives of members of groups that previously might have gone unheard to build community among members of the excluded group and to provide a more complete picture of our society and particularly of the legal system and its effects. I call this form of storytelling “inclusive” because it implicitly values the inclusion of as wide a variety of stories as possible into the relevant discourse. Alternatively, advocates can use stories more selectively, carefully choosing narratives that best illustrate abstract points or create empathy between the storyteller and listener in order to persuade decisionmakers about a particular issue. I call this “persuasive” storytelling.

In this Part, I discuss the use of both inclusive and persuasive

18. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; see also I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

storytelling in law generally and with reference to gay issues in particular. I then note potential conflict between the two uses. I attempt to resolve the conflict, at least in part, by describing how both uses of storytelling are important to identify and counter pre-understanding about excluded groups. I conclude by discussing a type of personal storytelling that is particularly important for lesbians and gay men: naming oneself.

A. *Inclusive Storytelling*

Several legal scholars recently have focused on the importance of storytelling for members of excluded groups.¹⁹ These scholars seem to advocate "inclusive" storytelling—that is, telling as wide a variety of stories as possible.²⁰ Inclusive storytelling serves at least two functions. It both builds community among members of the storyteller's group and adds missing tiles to the mosaic of history that enrich society's understanding of itself.²¹

When members of excluded groups begin to create their own histories, the growth of a greater sense of community within the group often follows.²² Their stories often reflect circumstances and emotions common to many in the group.²³ Community building through storytelling has been a particularly important aspect of the modern women's movement. Women report finding solidarity and strength through sharing the details of their lives with each other.²⁴

The common ground that these stories reveal creates emotional

19. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea For Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); see also Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 195 (1989-90) ("Listening to women and believing their stories is central to feminist method.").

20. See SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 86 (1988) ("What we have learned from other freedom movements . . . is that there are not just some stories that must be heard, but that all the stories are of equal importance and must be heard."); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105-06 (1989) (arguing that some legal scholars advocating storytelling see maximizing "multi-voicedness" as the ultimate goal); Matsuda, *supra* note 19, at 398-99 (invoking the phrase "Lift every voice" from the song "Lift Every Voice and Sing" by James W. Johnson & J. Rosamond Johnson (1900)); see also Abrams, *supra* note 17, at 393 (describing use of multiple diverging stories in legal briefs).

21. See, e.g., Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 34-35, 43 (1987).

22. See MACKINNON, *supra* note 16, at 87, 91.

23. See, e.g., *id.* at 86; Cain, *supra* note 19, at 196; Jane O'Reilly, *Any Woman Is an Outsider*, N.Y. TIMES, Nov. 26, 1989, at § 7 (Book Review), at 1.

24. See, e.g., SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 289 (1989); MACKINNON, *supra* note 16, at 83-105; PHARR, *supra* note 20, at 71-72; Jane Gross, *Bleak Lives: Women Carrying AIDS*, N.Y. TIMES, Aug. 27, 1987, at A1.

bonds between the storyteller and the listeners, validates the listener's own undiscussed experiences, and provides both incentive and protection for the listener to relate stories of her own.²⁵ Once experiences are shared, no member of the group needs to feel as though her problems are unique.²⁶ As Richard Delgado noted:

The attraction of stories for [excluded] groups should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.²⁷

Accounts by members of excluded groups also reach beyond the group by increasing other listeners' understanding of history and society.²⁸ This function of storytelling is inclusive as well: more diverse stories create an ever richer picture of society;²⁹ excluding stories hinders complete understanding by presenting an unfairly homogeneous picture. Partly because members of these groups experience discrimination and exclusion, their perspectives on many issues differ from members of empowered groups.³⁰ These once-excluded stories can introduce new perspectives into discussions of any issue.³¹ As one scholar has noted, "Formerly excluded women now working as feminist scholars have challenged the teachings of virtually every disci-

25. See Mahoney, *supra* note 17, at 7 n.27; see also *News Roundup*, WKLY. NEWS, Oct. 9, 1991, at 28 (reporting an incident where a gay male colleague's courage standing up to anti-gay remarks made it possible for lesbian to do the same).

26. As Hannah Arendt has said, "[I]f we do not know our own history, we are doomed to live it as though it were our private fate." CAROLYN A. HEILBRUN, *WRITING A WOMAN'S LIFE* 71 (1988).

27. Delgado, *supra* note 19, at 2412.

28. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 16 (1990) (remarking that attention to stories of those who are different "remakes the boundaries of knowledge and understanding and sheds new light on the whole"); Cain, *supra* note 19, at 192 (noting use of personal stories of lesbians to attempt to raise consciousness of a group of women of mixed sexual orientation); Matsuda, *supra* note 19, at 343-44 (commenting that exposure to minority scholarship "enriches one's writing, teaching, and thought.>"). See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1051 (1991) (arguing that narratives of excluded groups represent "the struggle 'of [their] memory against [the] forced forgetting' imposed by official abstraction").

29. See Kim L. Scheppelle, *Foreward: Telling Stories*, 87 MICH. L. REV. 2073, 2075 (1989) ("Stories re-present experience, and can introduce imagination and new points of view."); see also Matsuda, *supra* note 19, at 335 (noting transformations of "standard texts and mainstream consciousness" by black Americans).

30. See, e.g., Matsuda, *supra* note 19, at 324, 335; Menkel-Meadow, *supra* note 21, at 43; see also Scheppelle, *supra* note 29, at 2091 (noting that difference in experiences causes men and women to have different perspectives on what constitutes force).

31. See, e.g., MINOW, *supra* note 28, at 198-200 (describing contributions of feminist historians).

pline—from anthropology to literary criticism, from religion to 'hard' science."³² Women's stories have added to our understanding of such important social issues as domestic violence and pornography.³³

Inclusive storytelling fits into the legal canon in precisely this manner.³⁴ Stories from previously excluded voices enrich our understanding of how the law operates³⁵ and suggest new approaches to many legal issues.³⁶ For example, women's narratives have changed legal thinking on issues like rape, pregnancy, and sexual harassment.³⁷

Inclusive storytelling is important for gay people, as it is for members of other excluded groups. Because society suppresses most discussion of gay issues,³⁸ our own stories have special meaning to us. We "cannot rely on our families to pass on our stories and validate our lives, and so it is moving to realize we have each other."³⁹ Hearing stories of gay lives has helped people struggling with their sexual orientation to accept themselves and to see themselves as part of a larger history and community.⁴⁰ The director of one lesbian oral his-

32. Menkel-Meadow, *supra* note 21, at 44. Menkel-Meadow notes that the entrance of women into the practicing bar "forced both law practice and legal doctrine to expand into areas and methods that were new and broadening to the profession." *Id.* at 39.

33. See MACKINNON, *supra* note 16, at 109; Abrams, *supra* note 28, at 988-89, 1035.

34. Because of the nature of legal publications, most storytelling in them is aimed at people outside excluded groups. Occasionally, however, storytellers in legal contexts reach specifically for other members of their own group. See Abrams, *supra* note 28, at 1044 ("There are forms of narrative scholarship that are intended to affirm the experiences of, and create solidarity among, those who have had them."); *id.* at 1008 (describing work of Marie Ashe as partially aimed to connect women with accounts of corporeal experiences).

35. See, e.g., *id.* at 1031 ("In some contexts, experience provides a vantage point outside the legal system, from which one can glimpse its partiality or subordinating effects."); Matsuda, *supra* note 19, at 324 (adopting excluding perspectives "can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice."); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2324 (1989) (noting that methodology of examining stories of outsiders "offers a unique description of law").

36. See Abrams, *supra* note 17, at 381-82 (characterizing Catharine MacKinnon's contributions to law as deriving from the use of women's experiences); *id.* at 393-97 (describing innovations of a number of feminist lawyers); Menkel-Meadow, *supra* note 21, at 49-50 (providing ways in which inclusion of unheard voices might change the law); Scheppele, *supra* note 29, at 2098 (suggesting that storytelling by excluded groups "provides a way for courts to build into the structure of legal reasoning the pluralism that it is the business of the courts to protect"); cf. Matsuda, *supra* note 19, at 344 ("A narrow culture, history, and experience will limit imagination in that realm of law and theory.").

37. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 103-06 (1987); MINOW, *supra* note 28, at 218; Abrams, *supra* note 28, at 1033, 1034; Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 76 (1987); Cain, *supra* note 19, at 197; Menkel-Meadow, *supra* note 21, at 46-48.

38. See *infra* part IV.A.

39. HALL CARPENTER ARCHIVES LESBIAN ORAL HISTORY GROUP, INVENTING OURSELVES: LESBIAN LIFE STORIES 2 (1989) [hereinafter INVENTING OURSELVES].

40. See PHARR, *supra* note 20, at 86; JAMES T. SEARS, GROWING UP GAY IN THE SOUTH

tory project noted:

I started out the project thinking we needed an oral history of lesbians, and then it came to me how much *I* needed to hear these stories. I felt strengthened by them because they confirm a reality for me which had not been acknowledged by anybody else. I felt as if a new dimension to the past had been opened to me.⁴¹

For many gay men and lesbians, the process of storytelling to help other people understand the way we live is quite familiar. Perhaps the central events in gay lives today are "coming out" experiences: the process of telling other people we are gay.⁴² This often traumatic series of experiences primarily consists of telling true stories about ourselves to make people who are important to us understand who we really are. Increasingly, our stories are reaching outside the narrow circles of family and friends to society at large. Despite this trend, few personal stories of gay men and lesbians have found their way into legal literature. This Article contains descriptions of some facets of gay life seasoned with quotes from individual gay men and lesbians. My hope is that these stories will influence legal thinking in the way women's stories have and that eventually they will find their way into legal arguments.⁴³ Yet as I argue in the following sections, inclusive storytelling alone is not a sufficient strategy for attaining gay rights.

87 (1991); see also Margaret Schneider, *Sappho Was a Right-On Adolescent: Growing Up Lesbian*, in GAY AND LESBIAN YOUTH 111, 119 (Gilbert Herdt ed., 1989) (quoting a young lesbian who recalled that "when Carol Pope sang . . . that she was in love with a woman, at least I knew there was someone on the same planet that felt like me"); sources cited *infra* note 517. One youth worker noted the importance of lesbians having their own history: "I've worked with young lesbians for a long time and they always want to know what it was like before, and there's hardly anything you can show them" INVENTING OURSELVES, *supra* note 39, at 3.

41. INVENTING OURSELVES, *supra* note 39, at 2.

42. Gay people's formation of their gay identities and their decisions to "come out" to other people tend to occur in stages over time, rather than all at once. See, e.g., PHARR, *supra* note 20, at xv. For a theoretical description of the processes involved and of related literature discussing the development of gay identity, see Richard R. Troiden, *The Formation of Homosexual Identities*, in GAY AND LESBIAN YOUTH, *supra* note 40, at 43, 43-73.

43. Although I collected the stories from generally available published works, retelling them in a legal milieu seems necessary. First of all, the suppression of gay stories in the law and elsewhere is part of the problem that I am addressing. More importantly, because lawyers and law clerks tend to employ materials that are familiar and easily available to them, the stories are less likely to appear in briefs and opinions without some appropriate legal packaging. See Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1595 n.9 (noting that "it may often seem more 'lawyerly' to a judge to rely on prior cases rather than on lived experience"). In addition, as a practical matter, a citation to the *University of Miami Law Review* may carry more weight and frighten fewer people than referring to some of my sources directly.

B. *Persuasive Stories*

Unlike the inclusive approach to narratives, persuasive storytelling is inherently very selective: the storyteller carefully chooses and crafts the story as a tool to convince others of some broader point.⁴⁴ For example, people commonly choose personal narratives to use as illustrations to make abstract points more concrete.⁴⁵ This type of storytelling already is an important part of our legal culture; common law judges create abstract rules based on evaluation of individual stories.⁴⁶

Recently, some scholars have focused on the use of stories to create empathy as an effective tool of persuasion.⁴⁷ Stories are particularly powerful when they do not merely illustrate a point, but also demonstrate common emotive ground with those who are not part of the storyteller's group.⁴⁸ This creation of empathy can forge bonds between the subject of the story and the listeners that may strongly influence decisionmaking. Generally, stories create empathy by convincing the listener that he is like the subject of the story in some significant way—often through a shared experience of a powerful emotion or an important event.⁴⁹ Stories are made believable by the

44. See Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 9, 31 (1984).

45. Abrams, *supra* note 28, at 975; see also *id.* at 1017 (noting use of stories to "bring a point home"). When a story is used to make an abstract point more concrete, the listener judges its effectiveness as an illustration of the particular point by examining the internal consistency of the story, the credibility of the teller, and the extent to which the story fits into her pre-existing world view. *Id.* at 1002; Scheppele, *supra* note 29, at 2080; see also Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2235-37 (arguing that narratives will be perceived as coherent if they conform to a particular expected structure).

46. See Scheppele, *supra* note 29, at 2073; see also Massaro, *supra* note 20, at 2112 (noting that "[t]he opportunity for contextual and empathic decision-making . . . is very much a part of our adjudicatory law").

47. See Henderson, *supra* note 8; Massaro, *supra* note 20, at 2099 & n.3.

48. See Abrams, *supra* note 28, at 994 (noting that Martha Mahoney's stories about domestic violence "provide an emotional resonance, a vivid portrait of the battering relationship from within, that th[e] debate often lacks" (citing Mahoney, *supra* note 17)); Lopez, *supra* note 44, at 10 (arguing that an "artfully told story" may lead the listener "to see the world in a way which allows if not compels him" to make the decision the storyteller desires).

49. See Abrams, *supra* note 28, at 1003; Henderson, *supra* note 8, at 1584, 1586; Lopez, *supra* note 44, at 18; Winter, *supra* note 45, at 2270, 2272; see also Matsuda, *supra* note 19, at 355-56 & n.137 (noting that some Californians overcame anti-Japanese racism when they became aware of the sacrifices of Japanese-American troops in Europe, presumably caused by empathy with the experience of patriotic sacrifice). As Toni Massaro has pointed out, "[N]arrative may be a particularly powerful means of facilitating empathic understanding: a concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory." Massaro, *supra* note 20, at 2105. Steven Winter has argued convincingly that powerful narratives generally rely on invocation of metaphors

"subtle invocation of something common and recurring."⁵⁰

As I noted in the introduction, Lynne Henderson has argued forcefully that a significant problem with the strategy of Michael Hardwick's attorneys in *Bowers* was that they presented their argument too abstractly and failed to present stories that might create empathy for gay people.⁵¹ I believe Henderson is correct that use of abstraction was a mistake, but failure to create empathy was only part of the problem. As I argue in the next Subpart, in order to use empathy to create common ground with decisionmakers, gay advocates need first to identify the specific beliefs about difference that animate the discrimination against them.

C. *The Tension Between Inclusion and Persuasion: The Problem of Difference*

The inclusive and persuasive functions of stories often overlap. The same stories that build community within an excluded group and provide perspective about it also can provide the evidence of commonality with others that creates empathy. A story that combines new perspective with an empathetic presentation is a very powerful tool that can force the reconceptualization of a problem.⁵² However, the inclusive and persuasive functions of storytelling also may conflict. Members of excluded groups may wish to tell all their stories (and in their own words) to create as full a picture as possible of their experiences. But not all their stories are likely to create empathy and some may actually destroy it.⁵³ Members of excluded groups "inevitably confront audiences that do not share" their premises,⁵⁴ and who therefore will not respond well to some of their stories.

While this tension is rarely recognized in the abstract in scholarly discussions of narrative,⁵⁵ litigators are quite familiar with it.⁵⁶

that are based in human physical experience and which therefore resonate with most people. See, e.g., Winter, *supra* note 45, at 2277.

50. Abrams, *supra* note 28, at 1003.

51. Henderson, *supra* note 8, at 1642. But see Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181, 1186 (1988) (arguing difficulty of creating empathy with Michael Hardwick's story).

52. See Abrams, *supra* note 28, at 1034; see also Scheppele, *supra* note 29, at 2096 (giving examples of judges accepting outsiders' stories and retelling them empathetically in opinions).

53. See Henderson, *supra* note 8, at 1584 (noting there are some groups with whom people cannot empathize); Lopez, *supra* note 44, at 14 (noting illegitimacy of stories encompassing lies and threats); Mark G. Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEXAS L. REV. 589, 602 (1988) (discussing possible storytelling by rapists).

54. Abrams, *supra* note 28, at 1020.

55. See Massaro, *supra* note 20, at 2113 (arguing that scholars who advocate empathic judging in fact advocate listening to some stories and silencing others).

56. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*:

Because the lawyer's function in our litigation system is to persuade, she will tend to be selective rather than inclusive. Lawyers commonly edit, translate, and recraft clients' stories so that they are both cognizable by the legal system and appealing to a judge or jury.⁵⁷

For example, gay-rights advocates often argue that a person's sexual orientation is set either at birth or by early childhood.⁵⁸ This argument has the tactical advantage of constructing sexual orientation as "immutable," strengthening a constitutional equal protection claim.⁵⁹ It also implicitly attempts to create empathy by suggesting that everyone is "stuck with" a sexual orientation (just as everyone is stuck with race or gender), and that, therefore, punishing gay people for an orientation over which they have no control is unfair. Yet, in order to make what they believe is a more appealing case, the advocates provide accounts that ignore or suppress the stories of some lesbians who perceive that they have chosen their sexual orientation.⁶⁰ They choose not to tell stories that these perspectives suggest—that many people have chosen their sexual orientation and that the categories "homosexual" and "heterosexual" are much more flexible than society tends to admit.⁶¹

As this example suggests, persuasive storytelling, especially when it seeks to create empathy, quite naturally highlights similarities and de-emphasizes difference. By contrast, inclusive storytelling highlights insights gained from formerly excluded perspectives and thus often emphasizes difference. Thus, the tension between inclusive and persuasive storytelling is a part of a larger debate about sameness and difference that legal literature has addressed more thoroughly.

To oversimplify, the sameness/difference debate concerns

Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1, 27-28 (1990). For a description of how the legal system can replace a rape victim's story with its own, see Bumiller, *supra* note 37, at 80.

57. See, e.g., Abrams, *supra* note 28, at 1043; Yudof, *supra* note 53, at 595; see also Lopez, *supra* note 44, at 12 (noting that when someone turns to another to make her case for her, she wants "help, not to have [the advocate] mindlessly repeat her version of her story"); White, *supra* note 56, at 29 & n.94 (noting that the choice of stories to employ may be a tactical decision that the lawyer is supposed to make for the client). For a discussion of the potential harm done to clients and to the lawyer-client relationship by lawyers recrafting clients' stories, see Alfieri, *supra* note 13.

58. See Halley, *supra* note 4, at 920-22 n.21.

59. For a discussion of immutability and equal protection, see *infra* text accompanying notes 799-802. The immutability argument also counteracts the myth of older gay people converting young impressionable heterosexuals. See MICHAEL RUSE, *HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY* 129 (1988) (noting rhetorical advantage of hormonal theories of gay development to counter claims about preventing exposure of young minds to gay people for fear of contamination).

60. See Halley, *supra* note 4, at 943; Law, *supra* note 18, at 211.

61. Cain, *supra* note 19.

whether advocates for disempowered groups should emphasize differences between these groups and those in power and advocate different or special treatment based on those differences, or de-emphasize differences and insist on formal equality.⁶² Those who reject formal equality worry that, in practice, it protects only those members of excluded groups who are successfully assimilated into the dominant culture and that it hides de facto discrimination.⁶³ Those who argue against emphasizing difference worry that legal recognition of difference will work to the disadvantage of excluded groups by reinforcing destructive stereotypes.⁶⁴ One insight that may help untangle the debate is that advocates never operate on a clean slate. Decisionmakers always believe that they already know something—if not everything—about an excluded group: they have pre-understanding.

Anthony Alfieri has used the term pre-understanding to describe the set of beliefs that a listener has prior to hearing an outsider's story.⁶⁵ Pre-understanding "imposes the [listener's] narrative mean-

62. See MACKINNON, *supra* note 37, at 33; MINOW, *supra* note 28, at 20-21, 25, 47-48; see also Menkel-Meadow, *supra* note 21, at 46 (describing debate in the context of California Fed. Sav. and Loan Assoc. v. Guerra, 479 U.S. 272 (1987)). Catherine MacKinnon has decried the rhetoric of the sameness/difference debate, arguing that it diverts attention from what she sees as the appropriate focus of feminism: domination of women by men. MACKINNON, *supra* note 37, at 8, 32-45.

63. See MINOW, *supra* note 28, at 9, 41-42, 146-47, 273; Mahoney, *supra* note 17, at 45. A resort to formal equality also denies the potential of different viewpoints to transform the dominant culture.

64. See, e.g., MINOW, *supra* note 28, at 34, 42; Menkel-Meadow, *supra* note 21, at 46, 50. Advocates of formal equality surely are correct that discussing differences has risks. For a discussion of a corporate defendant in a sex discrimination case using writings on difference to its advantage, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1808-10 (1990).

65. Alfieri, *supra* note 13, at 2123-24. I employ the term "pre-understanding" rather than the more common "stereotype" or "prejudice" for a number of reasons. First, it connotes something broader than a stereotype; it can include fairly complex understandings of how the world should work. The idea that gay men and lesbians are basically tolerable only if they do not discuss their sexual orientation publicly, see *infra* part IV.A., seems more than a stereotype. The idea of pre-understanding is intended to extend to situations in which we normally would not use the other terms, such as a description of a court's beliefs about how a particular business transaction might operate.

Second, "stereotype" and "prejudice" both have quite negative connotations. Pre-understanding could be unduly positive, like my naive belief before I started researching this piece that lesbians generally lived happy, satisfied lives simply because they did not have to deal with immature male sexual drives on a regular basis. I was wrong as to both premise and conclusion. Lesbians are often subject to rape, incest, and sexual harassment like other women, and, as with any other group in society, many are unhappy.

A third reason for using the term is that as a practical matter, advocates also may be more comfortable telling judges they have pre-understanding than telling them they are prejudiced. Finally, pre-understanding aptly connotes contingency. "Prejudice" suggests judgments already made. "Pre-understanding" is more ambiguous; while it worries that people think

ing onto the story, thereby displacing the narrative meaning of the [storyteller]."⁶⁶ In most conflicts involving excluded groups, the decisionmakers have pre-understanding that the groups are different from groups in power as well as pre-understanding as to the nature of those differences.⁶⁷ Most people not only believe that women are different from men, gays from non-gays, blacks from whites, but also have strong ideas as to what the differences are.⁶⁸

Pre-understanding puts advocates in a double-bind. If you argue that the excluded group is the same as everyone else, the decisionmaker may simply not believe you because he already "knows" that difference exists.⁶⁹ He may simply embroider the story with details that are consistent with his pre-understanding.⁷⁰ On the other hand, if you focus on difference, you may reinforce the negative aspects of the decisionmaker's pre-understanding about the group.

An example from *Bowers* itself may clarify the relationship between storytelling, sameness and difference, and pre-understanding. Michael Hardwick described the activity for which he was arrested as "mutual oral sex" with a "friend."⁷¹ A strategy focused on inclusive storytelling and highlighting difference might note that many gay men reject traditional notions of sexual exclusivity and, at least in the pre-AIDS era, developed norms based on joyful sharing of sexuality.⁷² According to this story, which certainly reflected the views of many gay men, our society would be enriched by incorporating some of this perspective into the mainstream, and the "mutual oral sex" should be constitutionally protected in furtherance of that vision. This story

they understand before they have enough information, it also suggests that further or more complete understanding will follow. It is for this last reason I choose the term rather than Gerald Lopez's "stock story." See Lopez, *supra* note 44, at 3, 5.

66. Alfieri, *supra* note 13, at 2124.

67. See MINOW, *supra* note 28, at 233-37. Legal decisionmakers, of course, often share unstated assumptions about many facets of the legal system, see Winter, *supra* note 12, at 1452-53, just as all people have and often share assumptions about all aspects of social life. See Lopez, *supra* note 44, at 6; Winter, *supra* note 45, at 2233.

68. See Schultz, *supra* note 64, at 1805 (noting the power of legal argument that plays into popular understanding of difference between men and women); see also HEILBRUN, *supra* note 26, at 44 ("[M]ale power has made certain stories unthinkable."); Delgado, *supra* note 19, at 2412 ("The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.").

69. See Winter, *supra* note 45, at 2273.

70. The decisionmaker may also use any differences he does find to justify denying equal treatment. See MINOW, *supra* note 28, at 56-57.

71. IRONS, *supra* note 3, at 395.

72. See TOBY MAROTTA, SONS OF HARVARD: GAY MEN FROM THE CLASS OF 1967 at 13 (1982); CHARLES SILVERSTEIN, MAN TO MAN: GAY COUPLES IN AMERICA 118 n.* (1982).

would have reinforced the sex-as-lifestyle pre-understanding that some of the justices undoubtedly already shared, and almost certainly would not have succeeded.

Counsel for Hardwick instead chose to speak of "consensual, noncommercial sexual acts"⁷³ and "sexual intimacy,"⁷⁴ implicitly assuming that adult Americans generally participated in these activities, and arguing that, like anyone else, Michael Hardwick had a right to do so. This highly abstracted sameness argument made no attempt to discuss the specifics of what Hardwick had been doing or his relationship with his partner.⁷⁵ Counsel quite clearly wanted to avoid association with the idea of frequent casual sex. Ultimately, this strategy did not work because the majority already believed that differences existed between gay and non-gay sexual activity.⁷⁶ Faced with neutral arguments, the justices read the facts of the case through the lens of their pre-understanding.⁷⁷ As one commentator noted, "[I]f the majority in *Bowers* is persuasive, it is precisely because the actual conduct of homosexual sodomy did not, traditionally, correspond to our notions of intimacy but instead seemed (perhaps erroneously) more like licentiousness."⁷⁸

One way out of the double-bind created by the existence of pre-understanding is to attack the pre-understanding directly.⁷⁹ In their

73. See Brief for Respondent at 1, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

74. *Id.* at 10.

75. Justice Blackmun's dissent described the activity as "sexual intimacy," and also failed to describe what happened in any further detail. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

76. This is not to say that another strategy would have convinced the members of the Court at that time, but rather that an approach that attacked pre-understanding directly might have had better odds of getting the fifth vote.

77. See Winter, *supra* note 12, at 1475.

78. Philip Bobbit, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1296 (1989).

79. See Massaro, *supra* note 20, at 2104-05 (noting use of counterstories to convert or deconstruct common understanding); cf. Lopez, *supra* note 44, at 3 ("To solve a problem through persuasion of another, we . . . must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story . . .").

Martha Minow proposes an alternate way out of the sameness/difference debate. She suggests a focus on the relationships of the excluded group to the rest of society, and a reconceptualization of problems of difference to view them as problems about the relationships between people rather than problems of or caused by "different" individuals. See MINOW, *supra* note 28, at 79-97, 111. For example, she reconceptualizes the "problem" of how to teach deaf children in classrooms with non-deaf children as a problem of allowing all the children to communicate with each other. See *id.* at 81-86. To some extent, the gender-based argument proposed *infra* part VI performs this sort of reconceptualization. At base, it argues that all people should have the opportunity to experience activities and emotions associated with either gender without fear of the penalties that normally attach to cross-gender behavior. However, I remain uncertain that this type of reconceptualization can be a panacea for sexual orientation issues. The examples of her theory that Minow presents generally involve disabled people and women, groups that most people agree deserve some form of "equal" treatment or at least

arguments, advocates for excluded groups need to identify the specific elements of pre-understanding that animate the particular discrimination they are challenging.⁸⁰ They then need to provide evidence that the pre-understanding is either incorrect or is a vastly overinclusive generalization. Of course, decisionmakers may incorporate their pre-understanding into their decision even when advocates attack it directly. However, the direct approach issues a challenge to the decisionmakers' own senses of fairness that may force them to keep an open mind: "Many people believe this inaccurate story; I would hope that you would recognize that it is wrong." Even if we cannot always trust the decisionmakers to put aside their beliefs and recognize and adopt the better argument, it remains true that "situated agents are nevertheless capable of acting within a given context to transform it."⁸¹ Moreover, this exposure of unstated assumptions should, at the very least, disarm and disable the sense judges might otherwise have that what they believe is objectively "true."⁸²

Thus, Lynne Henderson's call for stories that create empathy is only a partial solution. She recommends stories that stress the context of love and intimacy within which sexual activity can occur. This approach will only be useful if it, in turn, is placed in its proper context. If advocates use stories of empathy merely to argue that gay relationships are exactly the same as those of non-gays, decisionmakers may not believe them. Indeed, such claims would not be true. The experience of exclusion for gay people and members of other excluded groups affects their perceptions and behavior. Pat

some form of protection and care. There is no such consensus regarding gay men and lesbians, and so often there is no "problem of difference" to be reconceptualized. Minow may recognize this difficulty; she rarely refers to sexual orientation issues in her book, and only mentions *Bowers* once, in a footnote. *Id.* at 109 n.29.

80. See Lopez, *supra* note 44, at 10 (A person "will be a better story teller if he consciously understands the process that governs . . . decision-making."); Winter, *supra* note 12, at 1473 ("An effective constitutional politics must pay close attention to the larger cultural constructs and stabilized matrices in which lawyers, judges and laypersons are always already situated.").

81. Winter, *supra* note 12, at 1485; see also MINOW, *supra* note 28, at 74 (noting that judges sometimes have taken excluded perspectives into account in their decisions). In addition, my personal experience and that of other gay men and lesbians is that our stories do change people's ways of thinking. Thus, "[t]he experience of the struggle against oppression provides a built-in immunity against realist despair." Matsuda, *supra* note 19, at 349.

82. See MINOW, *supra* note 28, at 113; Mahoney, *supra* note 17, at 89. As Toni Massaro has noted:

Although we "know" at some level that we tend to treat people like ourselves better than those outside of our spheres of familiarity, we often ignore this knowledge. If verbal reminders of this tendency are built directly into our legal discourse, they may stimulate legal decisionmakers to reach beyond those tendencies more consistently.

Massaro, *supra* note 20, at 2123.

Cain's challenge to a group of female academics underscores the effect of exclusion on gay relationships:

I ask those of you in the audience who are heterosexual to focus on an important love relationship in your life. . . . I ask you: how would you feel about this relationship if it had to be kept utterly secret? Would you feel "at one with the world" if a slight mistake in language ("we" instead of "I") could lead to alienation from your friends and family, loss of your job? Would you feel at one with your lover if the only time you could touch or look into each other's eyes was in your own home—with the curtains drawn? What would such self-consciousness do to your relationship?⁸³

It seriously minimizes and cheapens the effects of discrimination to suggest that individuals continually subject to it can remain "the same" as those who are not.⁸⁴

On the other hand, advocates can use stories about love and intimacy to counter the non-gay pre-understanding that gay sex necessarily is obsessive, loveless, and promiscuous—the sex-as-lifestyle assumption. To do so most effectively, the advocates first need to explicitly identify the pre-understanding that they are attacking. This brings us back to the two forms of storytelling. Effectively attacking pre-understanding requires both kinds of stories. Inclusive stories, the perspectives of excluded groups, are helpful, if not necessary, to see the existence of pre-understanding at all. These stories can help people who are not members of the excluded group see their unstated assumptions. Persuasive stories—stories that create empathy by revealing common ground in human experience—provide helpful counter-examples to the gross overgeneralizations that often make up pre-understanding. To counter the story that gay people only experience sex outside of love relationships, an advocate need not demonstrate that *all* gay sex includes love; she merely must demonstrate that *some* gay love relationships exist. Persuasive narratives do this well. Moreover, this use of personal stories avoids a common concern about narrative: that the listener cannot determine how typical the

83. Cain, *supra* note 19, at 207. For further discussion of gay people living concealed lives and the costs of that concealment, see *infra* part IV.B.

84. See MACKINNON, *supra* note 37, at 37 ("[C]an you imagine elevating one half of a population and denigrating the other half and producing a population in which everyone is the same?"); Matsuda, *supra* note 19, at 346-47 (describing the effects of struggle against discrimination on its victims). The experience of exclusion is not the only source of generalizable differences between men and women, or between members of different ethnic groups. American culture (or cultures) socialize(s) women differently from men. Members of various ethnic and racial groups bring up children in unique ways with differing value systems. These processes do not create monolithic categories of people, but do produce some recognizable and generalizable distinctions in behavior and psychology.

story is.⁸⁵

In this Article, I provide narratives that both demonstrate and counter common forms of pre-understanding about gay people. Indeed, my use of the first person is itself designed to counter stories about the non-existence of gay people in certain professions and about the inappropriateness of discussing gay issues in public.⁸⁶ My hope is that gay advocates will employ the stories presented here, along with similar stories, to attack explicitly the three types of pre-understanding I discuss.

In the course of the Article, I particularly emphasize stories about long-term relationships, which I see as particularly important to counter non-gay pre-understanding.⁸⁷ By doing this, I risk accusations that I am in some sense "selling out"—that is, that I am saying we have to model ourselves after non-gay ideals to be accepted. In fact, however, I am not advocating that we change our ways of living to fit non-gay models. Instead, I am making two descriptive points. First, in many important respects, many of us *are very much like heterosexuals* in the nature of our aspirations, our relationships, and many other aspects of our lives, despite differences caused by the experience of exclusion.⁸⁸ This is not surprising. We are brought up in the same families and socialized in the same ways as everyone

85. See Abrams, *supra* note 28, at 1028.

86. See Mahoney, *supra* note 17, at 14-15 (noting that the silence of scholars about their personal stories "permits continued social blindness" about important issues); Scheppele, *supra* note 29, at 2074 (noting power of first person in storytelling). For a discussion of the stereotypes about professions that gay people adopt, see *infra* text accompanying notes 562-65.

My use of the first person also underlies a methodological issue. Many of the citations supporting assertions about gay and lesbian lives are anecdotal. I feel comfortable relying on one or two stories by other gay people where my own experiences as a member of gay communities for the past decade also confirm the proposition at issue. In a sense, much of this work represents shared knowledge from at least the relatively well-off gay communities of which I have been a part.

87. See *infra* parts III.C, IV.D; see also Harlan L. Dalton, *Reflections on the Lesbian and Gay Marriage Debate*, 1 LAW & SEXUALITY 1, 4 (1991) (noting importance of convincing American public of the existence of long-term, same-sex relationships).

88. As one 17-year-old lesbian told an interviewer, "I have the same goals and dreams. Those don't change because of your sexuality. You don't have different goals, just because you're gay." Schneider, *supra* note 40, at 128.

I think the focus on similarity is much more warranted in this context than it is with more direct forms of gender discrimination. See Dalton, *supra* note 87, at 4. The kind of generalizable differences that exist between many men and women, see generally CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND (1990), and the evidence of different socialization processes that exist from early childhood simply do not exist regarding sexual orientation issues. I am not worried about coercing gay people to behave "heterosexually" in the same way I worry about creating a world that forces all people to behave like stereotypical men in order to succeed. Cf. Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1050-51 (1987) (noting the danger of equality being interpreted as sameness in a male-defined culture).

else.⁸⁹ Second, differences between gay people and non-gay people, to the extent they are generalizable, bear little relationship to the pre-understanding of differences that non-gay decisionmakers are likely to have. Thus, advocates must emphasize similarities—not to claim that there are no differences—but to highlight instances where discrimination rests on false assumptions about what the differences are.⁹⁰ Before turning to a discussion of various aspects of pre-understanding, I want to discuss the terminology I am employing to describe gay lives and the reasons I am using it.

D. Naming

A woman recalled a meeting between a friend and the woman with whom she had been in a relationship this way: The friend said, “‘So this was your lover.’ I denied it. Then I realized that she had in fact been my lover. I had had lovers, but was not into naming. In that way I didn’t have to deal with what my actions meant politically or socially.”⁹¹

Naming is significant.⁹² One of the most important and empowering aspects of telling your own stories is the ability to choose the terms you use about yourself.⁹³ The perceived power of names is

89. See Michael S. Kimmel & Martin P. Levine, *Men and AIDS*, in *MEN & INTIMACY: PERSONAL ACCOUNTS EXPLORING THE DILEMMAS OF MODERN MALE SEXUALITY* 99 (F. Abbott ed., 1990) [hereinafter *MEN & INTIMACY*] (“Since there is no anticipatory socialization for homosexuality, boys in our culture all learn norms for heterosexual masculinity.”).

90. A risk associated with any strategy focusing on similarities is that it ignores genuine difference. That is, to the extent that we succeed with a strategy that focuses on how much our lives mirror existing social values, we may aid primarily the same groups those values already privilege: men, whites, the middle and upper classes, and those whose family arrangements most resemble stereotypical nuclear families. See MACKINNON, *supra* note 37, at 37; MINOW, *supra* note 28, at 237; Abrams, *supra* note 28, at 1028-29. However, I think the risks are worth the potential gains. Because gay advocates must influence a relatively conservative and homogeneous judiciary, some selectivity in storytelling is necessary. Moreover, because legal issues raised in a particular case will affect many people other than the parties, use of stories of similarities to open doors may also protect those who are more different. Although obviously I make no claims that the gravity of my opinions or decisions are in any way comparable, I take some comfort in my position from Mari Matsuda’s story about Frederick Douglass’ pragmatic support for Abraham Lincoln despite the racism underlying some of Lincoln’s positions. See Matsuda, *supra* note 19, at 347.

I do think advocates need to be careful to understand when their stories are not representative; solutions based on partial accounts can be harmful to other members of the group in question. See Abrams, *supra* note 28, at 1029.

91. Sister Anne, *Alternative Community*, in *LESBIAN NUNS: BREAKING SILENCE* 307, 311 (Rosemary Curb & Nancy Manahan eds., 1985).

92. See MINOW, *supra* note 28, at 4-5; Mahoney, *supra* note 17, at 68.

93. See WARREN J. BLUMENFELD & DIANE RAYMOND, *LOOKING AT GAY AND LESBIAN LIFE* 260-61 (1988) (denial of right to label oneself seen as a form of discrimination); SEARS, *supra* note 40, at 323-24 (gay man argues that the ability to name oneself creates dignity).

repeatedly demonstrated by the insistence with which people demand the right to self-denomination:⁹⁴ many women do not wish to be "girls"; many African-Americans do not wish to be "Negroes" or "blacks."

Naming is often of particular significance for gay people. A great deal of pre-understanding generally attaches to terms associated with sexual orientation. As a result, one of the most significant parts of the coming out process is people's use of the words "gay" and "lesbian" in reference to themselves or the word "lover" in reference to their partner.⁹⁵ As the story at the beginning of this Subpart demonstrates, when people apply terms indicating gay sexual orientation to themselves, they accept the consequences of the politicized nature of a gay identity in our culture.

The naming issue is further complicated for gay people by the large number of terms used to describe same-sex attractions and by their imprecision.⁹⁶ Legal writers dealing with the subject have found

94. A striking example of this is the scene in the television version of ALEX HALEY, *ROOTS* (1976), in which the African slave Kunta Kinte is whipped until he acquiesces to the slave-owner's name for him, "Toby." See John J. O'Connor, 'Roots: The Gift' is a Repackaging of Few Surprises, N.Y. TIMES, Dec. 11, 1988, § 2, at 31; Dorothy Gilliam, . . . *The Series: Historically Unbalanced*, WASH. POST, Jan. 28, 1977, at B1.

95. See, e.g., PHARR, *supra* note 20, at 47 (noting the word "lesbian holds tremendous power [and] is highly charged"); Susan Griffin, *Silences*, in THE LESBIAN PATH 110, 112 (Margaret Cruikshank ed., 2d ed. 1985) ("[W]ords are magic. . . . Words have a tremendous power and I believe that it is extremely important to use that word, to be able to say: I am a lesbian.").

96. Non-gay society has used tremendous numbers of terms to describe and categorize gay people. One of my favorite lists comes from the military bureaucracy of World War II:

Homosexual personnel were identified as either latent, self-confessed, well-adjusted, habitual, undetected or known, true, confirmed, and male or female. They were homosexual nonoffenders who admitted only tendencies or acts; heterosexual malingerers and homosexual reverse malingerers; normal offenders who were casual homosexuals, first-timers, curious, drunk, immature, submissive, or regressive; offenders who still possessed salvage value; the aggressors and willing followers, regardless of their sexuality; the sexual psychopath, moral pervert, and sexual deviate.

ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* 146 (1990).

Even within the gay community, there is no agreement as to which terms should be used or what they mean. For example, one woman, a nun, says: "I identify with Lesbian sensibility and sensuality; I love women. Intimacy and physical tenderness are important to me. But I'm not sure I would fit in the category if 'Lesbian' means specific physical behavior, membership in political groups, or other signs of authenticity." Eileen Brady, *Lesbian Nun: On The Boundary*, in LESBIAN NUNS: BREAKING SILENCE, *supra* note 91, at 315, 316; see also SEYMOUR KLEINBERG, *ALIENATED AFFECTIONS: BEING GAY IN AMERICA* 91 (1980) (drawing distinction between "homosexual" and "gay" based on knowledge of a gay lifestyle).

One man in a study of gay couples, who was in a long-term relationship with another man, told his interviewers:

Most of the public queers scare me a little. I get embarrassed seeing pictures of

it necessary to explain their choices of terms, usually in footnotes.⁹⁷ I perform this exercise in the text to call added attention to the reasoning behind my choices. By doing this, I do not mean to imply that the use of particular terms has a talismanic affect that immediately alters power relationships.⁹⁸ The history of race relations in America shows that changes in terminology do not necessarily translate to changes in status.⁹⁹ However, I would like to make a number of distinctions, some of which are different than those normally employed in this area, and which themselves may challenge some non-gay pre-understanding about sexual orientation.

Often, people divide the world into "homosexuals" and "heterosexuals" without carefully defining where the line is. Opponents of gay rights refer to a homosexual or gay "lifestyle" in the singular, as though one way of living was characteristic of everyone who is gay.¹⁰⁰ Thorough analysis of gay issues requires more careful

men in dresses on TV. *Time* magazine has a cover story of a faggot soldier! And he says he's proud to be "gay." I don't even like that word. I don't want to be called "gay." All this public openness in showing homosexuals too much like they are, queer!

DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 158 (1984). Similarly, one retired physical education teacher preferred to be called anything but lesbian: "The word conjures up jeans, boots, men's shirts, rough, loud-talking, intimidating females trying to look and act like men but doing a damned poor job of it." MONIKA KEHOE, *LESBIANS OVER 60 SPEAK FOR THEMSELVES* 46-47 (1989). Apparently, many gay women share this view. See Dianne Klein, *Lesbianism: Affirmation of Women*, L.A. TIMES, Apr. 18, 1988, part 5, at 1.

97. See, e.g., Halley, *supra* note 4, at 916 n.5; Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 134 n.2 (1991); Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 873 n.47 (1991).

98. See Massaro, *supra* note 20, at 2123 n.95.

99. See MINOW, *supra* note 28, at 236.

100. See, e.g., Paul Varnell, *The Observer's Notebook*, WKLY. NEWS, July 18, 1990, at 5 (three different opponents refer to the same poster as advocating, evangelizing for, and enticing children into a gay "lifestyle"); *Anita Bryant Launches Comeback Bid, Says She Has "No Regrets" About Anti-Gay Rights Crusade*, WKLY. NEWS, May 23, 1991, at 10 (Bryant refers to "that lifestyle"); *Calif. City OKs Domestic-Partner Benefits*, WKLY. NEWS, August 15, 1990, at 8 (head of Traditional Values Coalition refers to domestic partners legislation as "a biased-related policy to advocate and promote the homosexual lifestyle"); *Clergy, Activists Protest Anti-Gay AIDS Video*, WKLY. NEWS, May 30, 1990, at 14 (clergyman describes AIDS documentary as portraying the results of "a dangerous lifestyle that needs to be overcome"); *Legislators Try to Kill Gay-Positive Posters*, WKLY. NEWS, July 4, 1990, at 8 (Illinois state senator refers to poster of two men kissing as defining "a certain lifestyle and almost condon[ing] that lifestyle"); *Madison Wis., OKs Rights Measure*, WKLY. NEWS, June 13, 1990, at 8 (opponent of anti-discrimination measure labels it "a social endorsement of the homosexual lifestyle."); see also BLUMENFELD & RAYMOND, *supra* note 93, at 243 (reporting 1983 poll that found that 66% of Americans believe that "homosexuality" is an unacceptable "lifestyle").

differentiation.¹⁰¹

First of all, we need to distinguish between those people who have some sexual or affectional attraction for members of their own sex and those who do not. By affectional attraction, I mean more than just a desire for friendship; I mean a tendency to form primary emotional attachments, to fall in love, or both.¹⁰² I refer to all people who currently have sexual fantasies about, affectional preferences for, or sexual activity with members of their own gender as "homophiles" rather than the more common "homosexual."¹⁰³ Homosexual is somewhat confusing, as people use it to refer both to people whose self-identity is not heterosexual and to the more-inclusive group I call homophiles. Homosexual also suggests that the sexual act is the central defining factor of those it describes;¹⁰⁴ "homophile" suggests caring about or preference for members of the same sex, rather than just sexual activity.¹⁰⁵ It thus helps counter pre-understanding of gay people as defined by the sexual act.¹⁰⁶ Perhaps most importantly, homophile is a term apparently coined by gay people to refer to ourselves, rather than a pejorative descriptive term developed by a medical profession that basically believed those it called homosexual to be physically or mentally ill.¹⁰⁷ Because discrimination on the basis of sexual orientation often is aimed at people who others assume to be homophiles on the basis of stereotypes or rumors, I often will refer to "perceived homophiles," that is, people who others assume, for one reason or another, to have same-sex attractions.¹⁰⁸

101. I realize that by emphasizing new categories, I risk reifying them and denying the extent to which categories regarding sexual orientation are artificial social constructions imposed upon a wide range of human sexual and affectional desires and behaviors. See MINOW, *supra* note 28, at 113; Sears, *supra* note 40, at 324. However, I think it is more effective at this stage in the battle for gay rights to attack the monolithic view of gay life than to attack our culture's entire conception of sexuality.

102. See SASHA G. LEWIS, *SUNDAY'S WOMEN: A REPORT ON LESBIAN LIFE* 11 (1979); Nancy Manahan, *What Silence Does This Book Break?*, in *LESBIAN NUNS: BREAKING SILENCE*, *supra* note 91, at xxxv, xlii.

103. See, e.g., RUSE, *supra* note 59, at 1 (defining "homosexuals" as people erotically attracted to members of their own sex).

104. See KARLA JAY & ALLEN YOUNG, *THE GAY REPORT* 3 (1979); Schnably, *supra* note 97, at 873 n.47.

105. See BLUMENFELD & RAYMOND, *supra* note 93, at 294. But see Mary Mendola, *Life-Long Lovers*, in *LESBIAN NUNS: BREAKING SILENCE*, *supra* note 91, at 327 (reporting one woman's description of "homophile" as appropriate for relationships that do not include a sexual dimension.).

106. See *infra* part III.A.

107. Some gay people object to the term "hemophile" as being derived from fear of the heterosexual majority. See Jay Weiser, *A Nation of Joiners: A Brief History of Gay Community Organizations*, in *GAY LIFE* 283, 285 (Eric E. Rofes ed., 1986).

108. See JAY & YOUNG, *supra* note 104, at 3.

The second distinction I'd like to make is between those homophiles who consider their same-sex attractions central to their self-identity—who consider themselves different from most people because of those attractions—and those homophiles who do not self-identify on the basis of these attractions—who think of themselves as heterosexual.¹⁰⁹ This distinction is different from the question of whether people identify themselves *publicly* as gay; it is about whether they have that understanding about themselves *in their own minds*. Many people self-identify as other than heterosexual while revealing their identity to few people or even to no one at all.¹¹⁰

Those who self-identify by their same-sex sexual or affectional preferences, I call "gay men and lesbians" or "gay people."¹¹¹ I use these terms for anyone who has determined that part of who they are is related to these preferences, whether or not they choose to reveal their sexual orientation publicly, and whether or not they accept gay political activism or belong to a gay subculture. To distinguish those who publicly identify as gay and those who do not, I will use the common terms "out" and "closeted," respectively. Thus, I see three classes of people with same-sex attractions: non-gay homophiles,

109. See Herek, *supra* note 97, at 134-35.

110. See Halley, *supra* note 4, at 947; Herek, *supra* note 97, at 135. Conversely, some people who identify themselves as heterosexual, the public may see as "homosexual" because they fit social stereotypes of "homosexuals." See *infra* text accompanying notes 570-72. For example, in a recent case, a non-gay teacher proffered evidence that his supervisor fired him because the teacher reminded the supervisor's secretary of her husband, "whom she believed to be a homosexual." *Jantz v. Muci*, 759 F. Supp. 1543, 1545 (D. Kan. 1991). The supervisor later told someone else that the teacher was fired because of his "homosexual tendencies". *Id.*

111. This usage is fairly common in literature about gay people. See, e.g., McWHIRTER & MATTISON, *supra* note 96, at 146; Halley, *supra* note 4, at 916 n.5; Herek, *supra* note 97, at 134 n.2. "Gay" is, to my mind, a useful term in part because we coined the usage ourselves. See SEARS, *supra* note 40, at 323. As one gay man explained,

In the early days of the gay liberation, we called ourselves "gay," not "homosexual." We didn't know where the word came from, but "gay" didn't have the clinical overtones of "homosexual," the associations of abnormality and immorality. By calling ourselves "gay," we were rejecting traditional labeling by an oppressive society and defining for ourselves this new-found identity.

SILVERSTEIN, *supra* note 72, at 13.

I am aware that some groups of gay people are adopting the word "queer" as their form of self-definition. In part, they intend to turn the traditional insult into "an ironic badge of honor" using the word's shock value for "political potency." See Alessandra Stanley, *Militants Back 'Queer,' Shoving 'Gay' the Way of 'Negro'*, N.Y. TIMES, Apr. 6, 1991, at 23. However, many in the gay community who have felt the word's edge as a weapon object to its use as a shield. See *id.* at 24. Although I sympathize with the desire for shock value, I am uncomfortable using a word that others designed to describe us and that brands us as inevitably different and apart. My continued use of the word gay risks my being branded a "white, middle-class, assimilationist homosexual," *id.* at 23, but since this Article will largely confirm that view of me for many people, I will live with the risk.

closeted gay people, and out gay people.¹¹²

I choose to stress the distinction between those who self-identify as gay and those who do not because once people identify themselves as gay, they become concerned with the way other gay people are treated,¹¹³ even if they have not chosen to come out. Indeed, their decisions about coming out necessarily will be influenced by their beliefs about the public's response.¹¹⁴ Coming out allows gay people to live healthier and more satisfactory lives.¹¹⁵ Closeted gay men and lesbians may thus be the most important audience for the changes in public beliefs and practices that this Article hopes to encourage.

Another important distinction is between male and female gay people. Gender is a crucial element in gay lives as in any others, and the experience of being gay differs greatly in our society for men and women. I use "gay people" to refer to people of both genders in situations in which I believe the experience of men and women to be similar, particularly in reference to non-gay beliefs that do not acknowledge distinctions arising from gender.¹¹⁶ In other circumstances, I refer to "lesbians" and "gay men," as "lesbians" is the word

112. By definition, we can know little with certainty about non-gay homophiles since they do not respond to surveys or self-identify in interviews. See Halley, *supra* note 4, at 945. The stories of gay people describing their lives prior to developing a gay identity may be helpful in thinking about the lives of the non-gay homophiles, particularly those who will eventually come out to themselves. However, a group of non-gay homophiles may exist who, for whatever reason, can or will never come out. We have no way of knowing what these people are like.

113. This is not to say that those lesbian and gay men who do not self-identify as gay will treat other gay people well. Many closeted gay people will publicly attack open gays, but one suspects the cause is precisely an awareness of themselves as gay and of the way openly gay people are treated. To avoid stigma and to maintain any power they might have, they attack other gay people to deflect suspicion from themselves. See *infra* text accompanying note 473.

114. See Halley, *supra* note 4, at 934, 958.

115. See *infra* part IV.B.2.

116. I am aware that some lesbians object to use of the term "gay" to refer to people of both genders, fearing, with justification, that they will be subsumed into the group of males who fit the category and consequently will become invisible. See, e.g., Dell Richards, *Historians Have History of Ignoring Lesbians*, WKLY. NEWS, June 6, 1990, at 13 (reporting lesbian scholars complain that lesbian contributions to gay-rights movement ignored). As recently as 1986, a book published with the title "Gay Life" dealt only with gay men. See GAY LIFE, *supra* note 107. Similarly, a gay man writing in 1990 about the controversy over National Endowment for the Arts funding stated that "homoeroticism" was a vague term: it "could include any depiction of the male body or male sexuality, or even any art that gay men like (even if by a woman)." Paul Varnell, *Making the Argument for Gay Art*, WKLY. NEWS, May 30, 1990, at 10.

I hope my attempts to retell lesbian stories throughout this Article lessen that concern somewhat here. However, I also think it important that we recognize similarities as well as differences. As long as people continue to draw lines on the basis of sexual orientation and make assumptions about others they perceive to be "homosexuals," retaining a category to refer to all gay people is useful. See MINOW, *supra* note 28, at 55; cf. Matsuda, *supra* note 19, at 330 n.33 (noting that it "weakens [a] movement to deny its commonalities").

many gay women prefer to use to identify themselves.¹¹⁷

I refer to the rest of the people as either "heterosexual"¹¹⁸ or "non-gay," a term that includes homophiles who do not self-identify as gay. Following Rhonda Rivera, I avoid the use of the word "straight" since it implies that because I am not "straight," I must be "bent," which I am not.¹¹⁹

Despite evidence that many people relate emotionally and sexually to people of both genders,¹²⁰ bisexuality always presents a particular problem of characterization.¹²¹ Many lesbians and gay men view self-professed bisexuals as untrustworthy because they can always present themselves as non-gay, avoiding the stigma and risks of open gay life.¹²² On the other hand, bisexuals often resent being lumped either with gay people or heterosexuals, since either label creates undue assumptions about their desires and their lives.¹²³ Because society polarizes sexual orientation, I include self-identified bisexuals with gay men and lesbians. Generally speaking, similar kinds of discrimination from non-gay society await them when they make their bisexual interests known and so as to the issues that I address, their interests are similar.

I refer to gay and lesbian long-term love interests as "partners" or "lovers."¹²⁴ Avoiding terms associated with non-gay marriages highlights the fact that we are not allowed to marry. Also, I like an explanation given by Ida V.S.W. Red: "I delight in being introduced by [my partner] as 'my lover.' Somehow 'lover' seems more active than 'wife.' One becomes a lover by loving and being loved. One

117. However, not all gay women prefer the label "lesbian." See *supra* note 96.

118. I employ "heterosexual" where I find "homosexual" unacceptable because I operate under the assumption that people should have the right to call themselves anything they want; forcing people to respond to appellations they do not like disempowers them.

119. See Letter from Rhonda Rivera to author (Nov. 25, 1991) (on file with author).

120. See, e.g., RUSE, *supra* note 59, at 5-6.

121. See, e.g., Gilbert Herdt, *Introduction: Gay and Lesbian Youth, Emergent Identities, and Cultural Scenes at Home and Abroad*, in GAY AND LESBIAN YOUTH, *supra* note 40, at 1, 10 (describing pressures on bisexuals to choose either gay or heterosexual orientation); Kehoe, *supra* note 96, at 48 (describing lives of very different women who all call themselves bisexual).

122. See, e.g., JAY & YOUNG, *supra* note 104 at 48, 127, 129; SEARS, *supra* note 40, at 418.

123. See, e.g., FRED KLEIN, *THE BISEXUAL OPTION: A CONCEPT OF ONE HUNDRED PERCENT INTIMACY* 3, 95, 107 (1978).

124. Gay people do not necessarily agree on the use of these terms either, but this is a result of differences in the forms of people's primary love relationships. See, e.g., Marotta, *supra* note 72, at 213. Toby Marotta reports that most people in the gay male subculture use the term lover "to refer to a man with whom to share sexual and emotional intimacy over time, but not necessarily someone to count also as an exclusive sexual partner, a joint economic provider, a constant social companion, or even a roommate." *Id.* See generally *infra* part III.B.3 (discussing the varying forms gay relationships can take).

hardly becomes a wife by wifing and being wifed."¹²⁵

As the story with which I began this Subpart shows, some homophiles resist labels, partly to avoid thinking about their implications. Some are made uncomfortable by any labelling because it perpetuates relatively arbitrary divisions based on sexual orientation.¹²⁶ Some resent having to make self-identification decisions that are politically charged and perhaps irrevocable in the eyes of the world.¹²⁷ However, we live in a society that attaches labels based on sexual orientation without our consent;¹²⁸ we need to attempt to take control of the naming process by using our own terms. Moreover, a refusal to name ourselves seems akin to submitting to the oppressed silence about gay issues that is a significant part of the discrimination we fight.¹²⁹

III. STORIES OF SEX, LOVE, AND RELATIONSHIPS

The first element of non-gay pre-understanding to which we turn is the belief that gay people are defined by and obsessed with sexual activity—what I call the sex-as-lifestyle assumption. In this Part, I present stories to demonstrate that this pre-understanding is common and that it infects the legal system. I then present stories that counter the sex-as-lifestyle assumption in two key ways: by showing that gay identity is a separate phenomenon from same-sex sexual behavior and that gay men and lesbians experience much of their sexual activity in the context of love, relationships, and family, just the same as anyone else. I conclude this Part with some suggestions about how advocates for gay people can attack the sex-as-lifestyle assumption in particular cases.

A. *Non-Gay Stories: Sex as Lifestyle*

[I]t should be permissible for the General Assembly to find *as legislative fact* that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few. Homosexual sodomy is often practiced outside the home such as in public parks, rest rooms, "gay baths," and "gay bars," and is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, *and*,

125. Ida V.S.W. Red, *Naming*, in *THE LESBIAN PATH*, *supra* note 95, at 44, 46.

126. See BLUMENFELD & RAYMOND, *supra* note 93, at 78-79.

127. See SEARS, *supra* note 40, at 286; Halley, *supra* note 4, at 720, 721.

128. See *supra* notes 108, 110.

129. See *infra* part IV.

indeed, a possible relationship to crimes of violence.¹³⁰

This excerpt from the State of Georgia's brief in *Bowers* sums up the non-gay stories that make up the sex-as-lifestyle assumption. These stories demonstrate a belief that sexual activity is the essence of what makes people gay¹³¹ and portray gay men and lesbians as promiscuous, predatory, and obsessed with sex.¹³² This Subpart retells and refers to a variety of stories that illustrate this set of beliefs and show their adoption into legal discourse.

In its simplest form, the sex-as-lifestyle assumption leads non-gay people to assume that sex is an element of every aspect of gay people's lives.¹³³ They may assume that gay men or lesbians cannot be left alone without having physical encounters.¹³⁴ They also may assume

130. Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 36-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 45-140), quoted in Henderson, *supra* note 8, at 1640.

131. See, e.g., Varnell, *supra* note 116, at 10 (quoting a critic of public funding for gay-related art describing gay "lifestyles" as perhaps "little more than a euphemism for florid and varied sexualities").

132. See BERUBE, *supra* note 96, at 118 (reporting popular belief at time of World War II that homosexuals were "'perverts' obsessed with sex who could not love and were not worth loving"); BLUMENFELD & RAYMOND, *supra* note 93, at 232-33 (discussing the myth of predatory homosexuals); *id.* at 376 (commenting on the common misconception that all gay men are promiscuous); LEWIS, *supra* note 102, at 10 (relating the perception of lesbians as essentially sexual creatures dominated by lust for other women); Jesse Montegudo, *Books and the Gay Identity, A Personal Look*, in GAY LIFE, *supra* note 107, at 210, 211 (recounting the 1960s view of gay life as "a twilight world of drag queens, child molesters, and sex in public toilets"); Mitzi Simmons, *For You . . . For Us*, in THE LESBIAN PATH, *supra* note 95, at 7, 7-9 (telling the story of two young women researching information about homosexuals in the library who find that they are supposed to be promiscuous and perverted and that they molest children).

133. As one lesbian noted:

If two lesbians are walking down a street, laughing together, homophobic observers think that of course they are heading toward a place to have sex or are just coming from having had sex. If a lesbian asks a heterosexual woman to dinner, a walk, a movie, then the homophobic response is that it is a movement toward the hope of sex. The homophobic view allows no possibility for friendship, companionship, business associations, the ordinary interactions of a person's life.

PHARR, *supra* note 20, at 30-31; see also Koppelman, *supra* note 18, at 161 (arguing that State of Georgia in its *Bowers* brief conflated "all [same-sex] intercourse with loveless sexual gratification"); Joyce Murdoch, *Fighting for Control of a Loved One: Guardianship Dispute Pits Disabled Woman's Partner, Family*, WASH. POST, Aug. 5, 1988, at A1 (reporting father's belief that the revelation that his daughter was a lesbian destroyed the daughter's "dignity by talking about her in sexual terms").

134. See, e.g., Simmons, *supra* note 132, at 13 (reporting incident where assistant principal assumed that two lesbian teenagers were making out when they were just talking and studying; he insisted "I know what goes on down there."); see also *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1320-21 (5th Cir. 1984) (university argued that gay student group designed to provide information and exchange of ideas was likely to "incite, promote and result" in sexual activity); *id.* at 1323 ("expert" witness testified that "it would be a shock really, if there were not homosexual acts engaged in at or immediately after" a gay student

that they themselves are not "safe" if alone with gay people.¹³⁵ One woman recalls her experience coming out to her mother:

"Are you and Annie . . . that way?" my mother asks me one day.

"What way?" I returned stubbornly, annoyed by her refusal to even speak the word.

"Well, you know."

"No, I don't know."

"Are you . . . lesbians?" There, she finally said it!

"Yes, we love each other."

"Well, I don't understand that at all."

"What's so hard to understand?"

"I don't see what two women can possibly do in bed together," she replies, reducing a very complex, loving relationship to sex.¹³⁶

The common male retort that if a lesbian had one good sexual experience with a man, she would become heterosexual also demonstrates the reduction of lesbian relationships to sex.¹³⁷ The unstated assumption in this "analysis" is the speaker's belief that heterosexual sex can change lesbians because he presumes that a lesbian relationship has no purpose but sex. In addition, it may suggest that lesbian

group meeting); Halley, *supra* note 4, at 962 n.167 (anti-gay group sent letter to parents of students participating in a gay organization telling them that their children were involved in "frequent sexual contact with people of the same gender" on the strength of the participation alone).

135. See, e.g., JAY & YOUNG, *supra* note 104, at 73 (heterosexual woman expressed fear of being raped when lesbian friend came out to her); PHARR, *supra* note 20, at 32 ("many heterosexual women believe that lesbians will pursue them sexually against their will just as men will"); Sears, *supra* note 40, at 325 (lesbian complains that other women "always think a gay woman automatically wants to sleep with them or will rape them"); Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 896 (1989) (disabled woman's parents suggested that her lover would sexually molest their daughter if left alone with her).

136. Simmons, *supra* note 132, at 10-11. For a similar story, see SUSAN E. JOHNSON, *STAYING POWER: LONG-TERM LESBIAN COUPLES* 144-45 (1990). While the mother's comment might seem to reduce *any* relationship to sex, I find it hard to believe the mother would have made a similar comment if the daughter had disclosed that she had a boyfriend.

Another woman described being interrogated by the police after she told another woman she was a lesbian. They asked her explicit questions about what sexual acts she had performed, making "reference to genitals and so on, and even some things I hadn't heard of, and some suggestions that hadn't occurred to me, which I remember thinking about with curiosity." Barbara Grier, *The Garden Variety Lesbian*, in *THE LESBIAN PATH*, *supra* note 95, at 171-72.

137. As one woman reported, "The few times I've told straight men that I'm gay, their first response is invariably, 'It's nothing a good male fuck can't cure.'" JAY & YOUNG, *supra* note 104, at 74; accord LEWIS, *supra* note 102, at 28.

sex is not "real," but merely a substitute for heterosexual sexual activity.

Anti-gay advocates' constant discourse about choice may be the clearest evidence that non-gays equate "gay lifestyle" with sex. Gay people are supposedly unsuited for legal protection because we have "chosen" to be gay.¹³⁸ This myth persists despite evidence that most gay men and many lesbians perceive their sexual orientation as beyond their control.¹³⁹ It also persists despite a cultural belief that people cannot control falling in love.¹⁴⁰ The myth of gay "choice" makes sense only if you equate being gay with sexual activity rather than with falling in love. While you can not choose who you love, you always can choose whether or not to have sex.¹⁴¹

138. See, e.g., Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1799 & n.90 (1988); Brad Buchman, *Sound-Off: Vote Yes for the Miracle of America*, WKLY. NEWS, Aug. 29, 1990, at 5.

139. See, e.g., RICHARD A. ISAY, *BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT* 16 (1989); SILVERSTEIN, *supra* note 72, at 320; Manahan, *supra* note 102, at 106. In addition, social science evidence suggests that sexual orientation generally is set by early childhood. See BLUMENFELD & RAYMOND, *supra* note 93, at 85; Lewis, *supra* note 138, at 1799 & n.91. Some lesbians perceive their sexual orientation to be a matter of choice. See, e.g., *INVENTING OURSELVES*, *supra* note 39, at 166; see also Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 223 n.16 (1988) (arguing for use of the term "sexual preference" "because it emphasizes that we can make choices with respect to our sexuality"). That the perception of choice (or lack of it) is gendered strikes me as unsurprising. Our culture includes an understanding that men are not really in control of their sexual behavior. When issues like rape and sexual harassment are discussed, the culture often attempts to limit the culpability of the male on the theory that once a woman arouses a man, he cannot help himself. On the other hand, we train women to feel responsible for sexual activity and to believe they should be in control of it. Thus, a gay man's perception that he has no choice and a lesbian's perception that she chooses are consistent with cultural understandings of sexuality in general.

140. "Everyone who has ever fallen in love knows that you don't [choose] to fall in love with Jim or Janet; you just do." Buchman, *supra* note 138, at 5.

141. Ironically, the military regulations banning gay people assume that they cannot exercise choice; once we admit to being gay, we admit a likelihood of breaching military regulations about sexual activity and forego the option of a celibate but military life. See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989).

I develop the argument about choice to make clear that gay people exercise no more (or less) choice than non-gay people in undertaking their affectional and sexual relationships. The analysis should not be taken for agreement with the premise of some anti-gay activists that choice is an important factor in determining how the law should treat issues related to sexual orientation.

Significantly, anti-abortion advocates use rhetoric of choice in the same way: pregnant women choose to have sex and therefore must live with the consequences and not expect special treatment. See *MACKINNON*, *supra* note 37, at 94. Ironically, this view assumes that men who impregnate are either not exercising choice or are not as responsible for the consequences of their choices. The bottom line seems to be that those who wish to deviate from a model of sex that is both heterosexual and reproductive—a heterosexual, male-centered model—are exercising illegitimate "choice." This connection further bolsters the ties between anti-gay discrimination and gender-role stereotypes discussed *infra* part V. See *PHARR*, *supra*

The most vicious form of the sex-as-lifestyle assumption portrays gay people, particularly men, as child molesters.¹⁴² This stereotype exists despite evidence that the vast majority of child abuse incidents involve men abusing girls,¹⁴³ and that many men who abuse boys self-identify as heterosexual or have no interest in adult males.¹⁴⁴ A variation on the child abuse myth is the belief that gay people "recruit" children.¹⁴⁵ One state legislator said of advertisements that displayed

note 20, at 16-17 (suggesting that a desire to maintain patriarchal power underlies conservative opposition to both homosexuality and abortion).

142. See, e.g., JAY & YOUNG, *supra* note 104, at 4; MCWHIRTER & MATTISON, *supra* note 96, at 139; LEWIS, *supra* note 102, at 31; Wendy Sequoia, *Voices from Ghosts, Including the Holy*, in LESBIAN NUNS: BREAKING SILENCE, *supra* note 91, at 41-42; Simmons, *supra* note 132, at 7-9; see also *Clergy Activists Protest Anti-Gay AIDS Video*, WKLY. NEWS, May 30, 1990, at 14 (gay activist argues that anti-gay AIDS documentary conflates pedophiles with all gay people). The assumption that the seduction of young children causes gay sexual orientation is belied by the facts. Although gay men and lesbians frequently recall having same-sex sexual attractions at quite young ages, see, e.g., JAY & YOUNG, *supra* note 104, at 42-47, 83-88, 90-92, many either have their first sexual experience with a person of the other sex or do not have their first same-sex sexual encounter until well into adulthood, or both, see, e.g., *id.* at 52.

143. See BLUMENFELD & RAYMOND, *supra* note 93, at 372-73; Lorra Douglass, *Education Needed*, OTTAWA CITIZEN, Sept. 26, 1991, at A16; see also *Seebol v. Farie*, No. 90-923-CA18, slip op. at 14 (Fla. Cir. Ct. Mar. 15, 1991) (noting gay people have not been proven more likely to be child molesters); JAY & YOUNG, *supra* note 104, at 4; RUSE, *supra* note 59, at 263. Michael Ruse argues that an openly gay man in a job like a teaching position would probably be much less likely to abuse children—because he would be under more intense scrutiny, given the stereotype—than one who was closeted, suggesting that fear of molestation is a poor reason not to hire an openly gay man. RUSE, *supra* note 59, at 263.

Obviously there are incidents where men have sex with underage boys. Some of the boys involved experience these incidents as awful; others remember themselves as being active and willing participants. See JAY & YOUNG, *supra* note 104, at 92-99; STUART TIMMONS, *THE TROUBLE WITH HARRY HAY* 36 (1990). I am a bit ambivalent about inter-generational sexual activity, at least when it involves male teenagers. Obviously there exists great potential for coercion and abuse which probably justifies a prophylactic ban. On the other hand, pubescent male sexuality often makes adolescent boys fully willing participants in almost unlimited sexual activity, and our society does not seem to have very strong taboos on involvements between teenage boys and older women. Some relatively inter-generational affairs have resulted in long-term relationships. See, e.g., Johnson, *supra* note 136, at 117-18 (describing 18-year relationship which began when one woman was 24 and the other 16).

144. BLUMENFELD & RAYMOND, *supra* note 93, at 372-73; accord HOWARD BROWN, *FAMILIAR FACES, HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY* 237-38 (1976). One study found 80% of those who abuse boys to be heterosexual in their adult relationships. Patrick Boyle, *Pedophilic Preference Is Class All Its Own*, WASH. TIMES, May 21, 1991, at B5. "[S]tudies also show that the majority of those apprehended for molesting boys have also molested girls." Brown, *supra*, at 238; cf. Lois Timnick, *Expert on Pedophilia Testifies: Rebuts Buckey's Contention on Abuse of Children*, L.A. TIMES, Sept. 20, 1989, pt. 2, at 3 (reporting expert's testimony that 60% of molesters in study who claimed to be heterosexual molested both boys and girls).

145. See, e.g., Meecham: *Gays Shouldn't Work for Government*, WKLY. NEWS, Sept. 12, 1990, at 8 (statement of former Arizona Governor Evan Meecham) ("I don't think [gay people] should teach children and be able to prey upon children and to convert them to their lifestyle."); *GOP Judge Candidate Blasted for Having Gay Support*, UPI, Sept. 20, 1991,

two people of the same sex kissing, "I think this entices children to a particular lifestyle."¹⁴⁶ The fear seems to be that because we do not reproduce (also a fallacy),¹⁴⁷ we must entice young people to join us in order to have a continuing existence as a group.¹⁴⁸ Although the myths of abuse and recruitment are not grounded on strong empirical evidence,¹⁴⁹ anti-gay activists seem to trot them out every time there is an issue about public actions by openly gay people.¹⁵⁰ These myths can be effective weapons: Anita Bryant's highly publicized, successful campaign to limit gay rights in Dade County, Florida, in 1977 was called "Save Our Children."¹⁵¹

A corollary to gay people's supposed obsession with sex is the belief that same-sex long-term relationships are impossible.¹⁵² Indeed non-gay stories sometimes seem to deny any possibility of closeness between gay people. For example, Solicitor General Kenneth Starr,

available in LEXIS, Nexis Library, UPI File (reporting that letter in opposition to candidate cites "proselytization of school children" as part of gay agenda). Interestingly, as Janet Halley points out, people primarily seem to fear seduction by gay people rather than rape. Halley, *supra* note 4, at 955-56. One wonders what it is about a gay "lifestyle," given the amount of discrimination that adheres to it, that can make it so fascinating to impressionable youth that they will regularly be seduced if in the presence of gay people.

146. Varnell, *supra* note 100, at 5.

147. See *infra* text accompanying notes 295-300.

148. This myth persists despite the evidence noted above that many gay people do not perceive that they choose their sexual orientation, see *supra* note 139, and therefore were not "recruited." In addition, one study concluded that gay men are no more likely than heterosexual men to seek younger partners as they grow older. See Mary R. Laner, *Growing Older Male: Heterosexual and Homosexual*, 18 GERONTOLOGIST 496, 500 (1978).

149. There is, of course, some child abuse by gay men. However, the recruitment myth is based in fact only in the following limited sense: although few social scientists believe that teenagers who are not homophiles to some extent can be "converted," young homophiles may be more willing to accept their sexual orientation and to come out if they are aware of gay role models and of the existence of large numbers of lesbians and gay men. See *infra* part IV.B.2. Thus, gay visibility probably encourages some homophiles or closeted gays to come out. To the extent their agenda includes forcing people to live outwardly heterosexual lives, regardless of their sexual orientation, anti-gay activists are correct to see gay visibility as a "recruitment" tool in the sense described here. At least one court has explicitly endorsed this concern. See *Acanfora v. Board of Educ.*, 350 F. Supp. 843, 847, 849 (D. Md. 1973) (accepting this argument made by psychiatrist), *aff'd*, 491 F.2d 498 (4th Cir. 1974). This may also explain why many non-gays view seduction, rather than rape, as the primary concern. See *supra* note 145.

150. *Legislators Try to Kill Gay-Positive Posters*, WKLY. NEWS, July 4, 1990, at 8.

151. See John M. Leighty, *Gay Leaders Denounce Falwell*, UPI, July 12, 1984, available in LEXIS, Nexis Library, UPI File; *Gay Adoption Ruling Will Have Statewide Effect*, ACLU Says, UPI, March 19, 1991, available in LEXIS, Nexis Library, UPI File. One additional and particularly sad result of the myths about child molestation is that gay adults may be afraid to interact with gay teens, for fear of accusations of molestation or recruitment. See Schneider, *supra* note 40, at 124-25.

152. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 373; ROBERT H. HOPCKE, *MEN'S DREAMS, MEN'S HEALING* 147 (1990); ISAY, *supra* note 139, at 115; Donald Vining, *Myths About Gay Men That Even Gay Men Believe*, in GAY LIFE, *supra* note 107, at 251, 252.

while a judge for the United States Court of Appeals for the District of Columbia Circuit, made the following statement:

It simply cannot seriously be maintained under existing case law that the right of privacy extends beyond such traditionally protected areas as the home or beyond traditional relationships—the relationship of husband and wife, or parents to children, or *other close relationships*, including decisions in matters of childbearing

...¹⁵³

His point appears to be that same-sex sexual activity does not fall within the category of “close relationships.” Gay people’s supposed rejection of traditional relationships even extends to their own children. One Ohio judge, in denying a lesbian mother custody of her children, said, “Orgasm means more to [lesbians] than children or anything else.”¹⁵⁴ This is part-and-parcel of a belief anti-gay advocates commonly express—that gayness somehow is antithetical to some idealized notion of family.¹⁵⁵ The State of Georgia succinctly expressed this view in its brief in *Bowers*: “the most profound legislative finding that can be made is that homosexual sodomy is the anathema of the basic units of our society—marriage and the family.”¹⁵⁶

As the statements in the last paragraph suggest, the pervasive sex-as-lifestyle assumption has infected legal discourse and governmental behavior.¹⁵⁷ For example, officials from West Palm Beach, Florida (ironically, located in a county with a sexual orientation anti-discrimination ordinance),¹⁵⁸ recently characterized an establishment as an “adult bookstore” for zoning purposes merely because its business license application indicated that it sold gay and lesbian books. According to the owner, city officials never visited the store: “They classified it as an adult bookstore before ever seeing what I have in

153. *Dronenburg v. Zech*, 746 F.2d 1579, 1584 (D.C. Cir. 1984) (*Dronenburg II*) (Starr, J., concurring in denial of rehearing en banc) (emphasis added).

154. LEWIS, *supra* note 102, at 116 (citing Randy Shilts, *LMDF's 'Apple Pie' Battles*, *ADVOC.*, Oct. 22, 1975).

155. See PHARR, *supra* note 20, at 18; Koppelman, *supra* note 18, at 158 & n.82; Law, *supra* note 18, at 218. For an examination of this concept in discussions of African-American families and culture, see SEARS, *supra* note 40, at 159-63.

156. Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 37, *Bowers* (No. 85-140), cited in Henderson, *supra* note 8, at 1640; see also Amicus Brief for Concerned Women For America (legal protection for gay people is “an affront to the public morality and our dedication to the family life”), cited in Henderson, *supra* note 8, at 1641.

157. As one commentator has noted, “One of the greatest hurdles for enforcement of unwritten contracts [between gay couples] may be the practical problem of persuading a judge unfamiliar with the gay community that lesbian and gay couples enter committed relationships and may expect support from each other.” Gina M. Torielli, *Protecting the Nontraditional Couple in Times of Medical Crises*, 12 *HARV. WOMEN'S L.J.* 220, 229 (1989).

158. PALM BEACH COUNTY, FLA., CODE ORDINANCE No. 90-1, § 1 (1990).

here."¹⁵⁹

A majority of the Supreme Court appears to share the view that gay men and lesbians are sexual creatures divorced from intimacy, relationships, and family. *Bowers* limits the scope of the right to privacy to issues involving marriage, family, and child-raising—issues to which homosexuality, the opinion says, is unrelated.¹⁶⁰ Yet the Supreme Court has held that the right to privacy does govern non-procreative sex between unmarried heterosexuals, even teenagers,¹⁶¹ so it must see a connection between these acts and marriage, family, and child-raising. But for the Court's pre-understanding, it is hard to see why the same connection does not exist for gay sexual activity.¹⁶² This is particularly true since the most significant barriers to gay people marrying and raising children come from the legal system itself.¹⁶³

Perhaps the legal system's most harmful post-*Bowers* application of the sex-as-lifestyle assumption lies in recent federal court of appeals cases that hold that government classifications based on sexual orientation cannot receive heightened scrutiny under the Equal Protection Clause because, after *Bowers*, there is no fundamental right to engage in same-sex sexual conduct.¹⁶⁴ In other words, these cases read *Bowers*' limit on the scope of the right to privacy necessarily to limit the scope of the Equal Protection Clause as well.

Both the District of Columbia and the Ninth Circuits claim not to equate gay identity with same-sex sexual conduct, but instead to be ruling only on the rights of a class defined as people who engage in that conduct.¹⁶⁵ There are a couple of problems with this definition. First, by relying on *Bowers*, these cases seem to define "homosexual" as someone who engages in the type of activity at issue in that case—

159. John F. Kiriakon, *W. Palm Officials Revoke, Then Reinstate Lesbian, Gay Bookstore's License*, WKLY. NEWS, June 12, 1991, at 12. According to the owner, the store sold "men's and women's fiction, recovery titles, spiritual books, AIDS information, T-shirts, tapes, magazines, as well as artwork on consignment." After a story appeared about the incident in a local newspaper, the city reissued the license. *Id.*

160. *Bowers*, 478 U.S. at 190-91. Other judges have made similar statements. *Dronenburg v. Zech*, 741 F.2d 1388, 1395-96 (D.C. Cir. 1984) (*Dronenburg I*); *Dronenburg II*, 746 F.2d at 1584 (Starr, J., concurring).

161. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 452-55 (1972).

162. See *Commonwealth v. Bonadio*, 415 A.2d 47, 51-52 (Pa. 1980) (striking down state sodomy statute in part because it read *Eisenstadt* to forbid distinctions between married and unmarried persons with regard to sexual activity).

163. See Law, *supra* note 18, at 218-19; Lewis, *supra* note 138, at 1790; see also *infra* text accompanying notes 359-60, 369-77.

164. See *High Tech Gays v. Defense Indus. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Todd v. Navarro*, 698 F. Supp. 871, 874 (S.D. Fla. 1988).

165. See *High Tech Gays*, 895 F.2d at 573 n.9; *Padula*, 822 F.2d at 102.

criminal sodomy. Janet Halley has noted the ironies inherent in this definition:

Lesbians who forego cunnilingus, the many gay men who have abandoned fellatio and anal intercourse to protect themselves and their lovers from AIDS, self-identified gay men and lesbians who remain celibate—the *Padula* court has determined that none of these groups belongs to the class “homosexual.” . . . Note, furthermore, that not all states define sodomy as Georgia does. The definition imposed in *Padula* produces the amusing result that the contours of the class “homosexuals” vary from state to state. And some states do not criminalize homosexual sodomy at all: how, in those states, is the class to be defined?¹⁶⁶

In other words, the courts seem to have created a highly contingent and fluctuating class. If my lover and I choose not to engage in anal or oral sex, we do not belong to it. If we engage in some acts of “sodomy,” as we travel across the United States, we move in and out of the class as we travel through states that define sodomy differently or do not define it at all. This hardly creates an identifiable class.¹⁶⁷

Even if we assume that a coherent class of “people who engage in same-sex sexual activity” exists and that the courts intend their opinions to govern only those people, later courts will find it all too easy to extend the cases to govern sexual identity as well.¹⁶⁸ Courts also can simply say that a gay sexual identity is evidence that a person engages in the forbidden conduct. In the Ninth Circuit case, for example, as far as one can determine, the defendant presented no evidence of same-sex sexual activity except people’s admission of their sexual orientation.¹⁶⁹ And the Seventh Circuit, in upholding the army’s refusal to re-enlist a lesbian, explicitly said that her declaration of her sexual orientation “is compelling evidence that [she] has in the past and is likely to again engage in” same-sex sexual activity.¹⁷⁰ While this is true to a certain extent, it is certainly not compelling evidence she will engage in those acts *while under the jurisdiction of the army*, unless you believe that, as a lesbian, she is simply incapable of self-control. These cases together probably stand for the proposition that classifications disadvantaging gay people receive no heightened scrutiny

166. Halley, *supra* note 4, at 949 (footnotes and citations omitted).

167. Perhaps the courts mean to say that any state, regardless of its own sodomy laws, can discriminate against a class of people defined as those who commit criminal sodomy as defined by any (or the most far-reaching) state statute.

168. See *Ben-Shalom*, 881 F.2d at 465 (discussing *Padula* without noting the narrow definition of “homosexual” that the case employed).

169. *High Tech Gays*, 895 F.2d at 565-70 (noting that the named plaintiffs were “homosexuals” and that one of them belonged to a “gay organization”).

170. *Ben-Shalom*, 881 F.2d at 464.

because conduct that states can criminalize under *Bowers* essentially defines the class. Again, to be gay means to engage in sex.

The assumption that gay people's identities are reducible to sexual acts is peculiar and insulting, particularly in the context of a long-term relationship between two people who consider themselves married and are raising children together.¹⁷¹ Our society does not perceive heterosexual identity merely as sexual acts; we certainly do not view marriage as a formalized excuse to fuck.¹⁷²

B. *Gay Stories: Putting Sex in Context*

I want someone to share my life with, someone I can count on. Respect for another person's mind and needs and trying to fulfill them. You may not succeed, but you try. I know I have to compromise. Sex isn't everything. . . . It wears off, and it has to be someone who you can wake up with in ten years, you know, and still turn around and say, "I love you." I think it's hard to do.¹⁷³

This excerpt from an interview with a young, gay male demonstrates a search for love and commitment that is inconsistent with the sex-as-lifestyle assumption. Indeed, the young man exhibits traits and concerns that we would identify as virtues in a young heterosexual. The emotions the youth expressed are not atypical of gay people.

In this Subpart, I discuss similar stories that can be used by advocates to counter the sex-as-lifestyle assumption and its corollaries that appear in legal opinions: that gayness is somehow equivalent to same-sex sexual activity, and that gay sexual activity occurs outside the protective shields of love and family that make non-gay sexual behavior acceptable in our culture. I include three groups of stories: first, those that illustrate that gay identity and same-sex sexual activity overlap, but are not identical; second, those that illustrate that gay relationships often involve the love and intimacy we associate with idealized heterosexual relationships, and that these relationships are quite common given the social constraints that gay lovers face; and

171. See Law, *supra* note 18, at 218-19; Lewis, *supra* note 138, at 1790.

172. Cf. Kehoe, *supra* note 96, at 46 ("For most female homosexuals, being a lesbian is only an extracurricular part of their lives, just as being non-gay is with heterosexuals who are not, as a rule, designated solely by their preference for a sleeping partner. More often, people are identified by their occupations . . .").

The use of the expletive in the text is intended to underscore the harshness of the bleak vision of gay life that is associated with a sex-as-lifestyle assumption, a harshness mainstream society clearly does not associate with marriage.

173. SILVERSTEIN, *supra* note 72, at 136. For similar sentiments, see TIMMONS, *supra* note 143, at 29; John M., *Fastforwarding to Intimacy: An Honest Look at Love*, in MEN & INTIMACY, *supra* note 89, at 57, 58.

third, those that illustrate the ways gay people have constructed families for ourselves.

1. SEX VERSUS IDENTITY

Sex is important to most gay people, as it is to almost everyone. However, sex is not all there is to being gay. Engaging in same-sex sexual activity or fantasy is different from having a gay identity.¹⁷⁴ The process of forming a gay identity is long and complicated; a significant gap often exists between the first same-sex sexual activity and the moment of epiphany when people connect the word "gay" or "lesbian" to themselves.¹⁷⁵ This epiphany may happen at any age,¹⁷⁶ sometimes years after the first same-sex sexual contact,¹⁷⁷ and it may not be permanent.¹⁷⁸

Some people have extensive same-sex intimate interaction before developing a gay identity. This account by a woman who had lived with a female lover for some time is typical:

I still didn't consider myself a Lesbian, just a woman who happened to love another woman. It wasn't until I met another Lesbian in a NOW consciousness-raising group that I began to think I might really be one. I resisted the idea since I still had hopes of fitting into the mainstream. But finally I looked myself in the eye and said, "Yes, you are a Lesbian."¹⁷⁹

Some people who engage in same-sex sexual activity never

174. See RUSE, *supra* note 59, at 2; Halley, *supra* note 4, at 920. For some of the history of the distinction, see *id.* at 935-37 and sources cited therein.

175. See, e.g., BROWN, *supra* note 144, at 43; JAY & YOUNG, *supra* note 104, at 46, 49, 55; KLEINBERG, *supra* note 96, at 70; Halley, *supra* note 5, at 943.

176. See BLUMENFELD & RAYMOND, *supra* note 93, at 86-87; KLEINBERG, *supra* note 96, at 70; LEWIS, *supra* note 102, at 19; Halley, *supra* note 4, at 942-43. Some gay people report being aware they were gay by early adolescence. See McWHIRTER & MATTISON, *supra* note 96, at 157 (7 years old); INVENTING OURSELVES, *supra* note 39, at 199 (early teenage years). Others do not develop a gay self-identity until well into middle age and beyond. See, e.g., KEHOE, *supra* note 96, at 23 (72-year-old woman); KLEINBERG, *supra*, at 221 (64-year-old man). See generally KEHOE, *supra* note 96, at 67 (several women unaware until midlife or later).

177. See, e.g., KEHOE, *supra* note 96, at 26 ("I had a strongly lesbian youth, then a strongly heterosexual stage, then survived on friendships for years, and am now just beginning to return to the passions of my youth. I recognized my lesbian cravings only [recently]."); JAY & YOUNG, *supra* note 104, at 109 (describing 17-year gap between sexual activity and identity); Halley, *supra* note 4, at 945 (noting that gay identity may not develop "until quite late stages in a person's sexual career").

178. See Halley, *supra* note 4, at 943.

179. Mary Brady, *Finding My Way*, in LESBIAN NUNS: BREAKING SILENCE, *supra* note 91, at 197, 201-02. For other reports of women who are involved in same-sex relationships before developing a gay identity, see Johnson, *supra* note 136, at 77, 150-51; Ruth Baetz, *I See My First Lesbian*, in THE LESBIAN PATH, *supra* note 95, at 3, 5-6; David Behrens, *The Case of Sharon Kowalski*, NEWSDAY, Aug. 5, 1988, at A4; Halley, *supra* note 4, at 945.

develop a gay self-identity. Same-sex sexual activity is a normal part of many people's childhood and adolescent experimentation.¹⁸⁰ In addition, men who have sex with other men in situations when they are deprived of any access to women may not have gay self-identities.¹⁸¹ For example, men who rape or have sex with other men in prison often do not think of themselves as gay.¹⁸² One gay writer noted the irony of the term "homosexual rape" used in federal regulations to characterize "the sexual violence committed by men who will fight to kill if their heterosexuality is impugned but who assault other men, usually [heterosexuals], who are younger and weaker than their assailants."¹⁸³

The dichotomy between act and identity is also demonstrated by people who do think of themselves as gay, but because of personal choice, lack of opportunity, or social context, do not participate in same-sex sexual activities.¹⁸⁴ For example, one female couple had sex only once in the forty-one years they were together because of the religious beliefs of one partner.¹⁸⁵

In addition, most people who have gay identities engage in heterosexual sexual activity at some point in their lives.¹⁸⁶ Some of those

180. See *Acanfora v. Board of Educ.*, 350 F. Supp. 843, 848 (D. Md. 1973) (testimony of expert), *aff'd*, 491 F.2d 498 (4th Cir. 1974); cf. *INVENTING OURSELVES*, *supra* note 39, at 46 (describing woman who remembers that it was common at her all-girls school for the girls to be in love with each other).

One study found more than half the boys and more than a third of the girls age four to 14 have had same-sex sexual experiences generally involving mutual masturbation, fondling or touching their genitals, and exhibitionism. "These homosexual activities, a common part of sexual development, are unrelated to sexual preference in adulthood." Thomas J. Long & Lynette Long, *Sexuality and Latchkey Children*, 64 *PEABODY J. EDUC.* 173, 179 (1987); see also *SILVERSTEIN*, *supra* note 72, at 102-03 (arguing that the difference between gay and straight adolescents is the amount of emotional attachment that accompanies same-sex sexual acts).

181. See, e.g., *BERUBE*, *supra* note 96, at 187-91 (describing "buddy" relationships in the military during World War II).

182. See JUNE M. REINISCH & RUTH BEASLEY, *THE KINSEY INSTITUTE NEW REPORT ON SEX* 143 (1990).

183. *KLEINBERG*, *supra* note 96, at 204.

In 1978, under pressure from gay organizations, federal prison authorities were ordered to stop using the term "homosexual rape," since more often than not homosexual prisoners (or prisoners who happened to be younger, smaller, effeminate, or sexually desirable) are the victims of rape perpetrated by heterosexual males who see their victims as surrogate females.

JAY & YOUNG, *supra* note 104, at 717.

184. See, e.g., *JAY & YOUNG*, *supra* note 104, at 57; *LEWIS*, *supra* note 102, at 93; Halley, *supra* note 4, at 943-44. This seems to be more often the case with women than with men. Indeed some commentators have defined "lesbian" as being about deep emotional relationships with women, with or without sex. See sources cited *supra* note 102.

185. *JOHNSON*, *supra* note 136, at 174-75.

186. See *JAY & YOUNG*, *supra* note 104, at 58-59, 123-24; *LEWIS*, *supra* note 102, at 28;

who do are truly bisexual;¹⁸⁷ many others are gay people who entered into marriages before their sexual identity was fully developed. The latter often remain in the marriages because they genuinely care about their spouses or wish to protect their children or their public image.¹⁸⁸ Still others get and stay married because they want to have children.¹⁸⁹

As one woman makes clear, this heterosexual activity does not by itself determine a person's sexual orientation:

Something that people don't understand is that it's not *who* you go to bed with that determines if you're straight or gay. Sex has nothing to do with it. You can be celibate and gay. Identification as gay or straight is an emotional thing — do you relate primarily emotionally to women or to men in an intimate situation? . . . That was what was missing in my marriage. Sex was okay with him. What was missing was the emotional intensity. I was never in love with him or with any other man. I didn't know what "in love" meant until I had my first lesbian relationship.¹⁹⁰

In sum, although overlapping, the group of people who engage in same-sex sexual activity and those who have a gay identity are by no means the same.¹⁹¹ In fact, some courts have explicitly rested pro-gay decisions on the distinction between act and identity.¹⁹² Yet demonstrating the distinction is not always enough to counteract the non-

Troiden, *supra* note 42, at 54; cf. JOHNSON, *supra* note 136, at 52 (reporting that almost half of women in study of long-term lesbian couples had had a relationship with a man at some point in their lives).

187. By "true" bisexuality, I mean having sexual and affectional attractions for people of both genders, as opposed to engaging in sexual intercourse with one or the other gender without any real attraction.

188. See, e.g., BROWN, *supra* note 144, at 116-19, 130; INVENTING OURSELVES, *supra* note 39, at 63-64; ISAY, *supra* note 139, at 117; Caroline Ferguson, *A Long Struggle, in THE LESBIAN PATH*, *supra* note 95, at 94, 99.

189. See, e.g., BROWN, *supra* note 144, at 112; KLEINBERG, *supra* note 96, at 74-75.

190. LEWIS, *supra* note 102, at 11. For other gay people expressing similar sentiments, see *id.* at 67; PHARR, *supra* note 20, at 20; SEARS, *supra* note 40, at 248.

191. The dichotomy between sexual act and sexual identity also can be seen in the existence of separate gay male and lesbian subcultures, at least in large urban areas. It is difficult to describe these subcultures briefly in a way that does not reduce complex social phenomena to caricatures. For our purposes, it is enough to note that many lesbians and gay men could identify a number of behavioral characteristics, leisure-time pursuits, and sets of beliefs and aspirations that they strongly associate with being a lesbian or a gay male. The very awareness of these characteristics of the subcultures—a set of norms, stereotypes, and inside jokes—is itself a part of the gay identity of many people. For some small flavor of what the subcultures are like, for gay men, see, e.g., GAY LIFE, *supra* note 107; PAUL MONETTE, AFTERLIFE (1990), SILVERSTEIN, *supra* note 72; for lesbians, see, e.g., MARTHA B. BARRETT, INVISIBLE LIVES: THE TRUTH ABOUT MILLIONS OF WOMEN-LOVING WOMEN 181-93 (1990); LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS 270-308 (1991).

192. See, e.g., Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317, 1328 (5th Cir. 1984); benShalom v. Secretary of Army, 489 F. Supp. 964, 975 (E.D. Wis. 1980).

gay assumptions about gay sexuality. In addition to showing that we are not defined by sex, we must show that our sexual activity often takes place in contexts familiar to non-gay society.

2. LOVE AND RELATIONSHIPS

In its more extreme forms, the sex-as-lifestyle assumption depicts the lives of gay people as being empty and promiscuous, devoid of love, warmth, commitment, or stability. In fact, however, being part of a couple is an aspiration of many lesbians and gay men.¹⁹³ This is not surprising; we, like the non-gays around us, are raised in a culture that sees being part of a couple as a natural and necessary indicator of emotional maturity.¹⁹⁴ In this Subpart, I discuss stories that illustrate that our relationships generally are built on the ideals of love and romance that society generally associates with coupling. In addition, I examine stories that illustrate that the formation of significant same-sex relationships is quite common considering the social pressures that gay couples face.

a. Emotional Intimacy, Love, and Romance

Gay people's models of coupling, like those of non-gays, center around more than a mere desire to have a relatively steady sexual partner.¹⁹⁵ Studies and interviews repeatedly show that warmth, love, friendship, and emotional commitment are extremely important to gay people.¹⁹⁶ One gay man noted the importance of companionship: "[T]he bottom line is that the porch light is on when I come home at night and either of us would do anything for that hug at the top of the

193. *E.g.*, JOHNSON, *supra* note 136, at 19; LEWIS, *supra* note 102, at 83; McWHIRTER & MATTISON, *supra* note 96, at 207; Herek, *supra* note 97, at 162. *But see* MAROTTA, *supra* note 72, at 213 ("[D]omestic arrangements of the type traditionally favored by heterosexuals are rarely found, or aspired to, among men who call themselves gay.").

194. *See* McWHIRTER & MATTISON, *supra* note 96, at xiii, 128; *cf.* John P. DeCecco, *Obligation Versus Aspiration*, in *GAY RELATIONSHIPS 2* (John P. DeCecco ed., 1988) (noting that in the gay community, a gay relationship "has become a symbol of self-acceptance of one's homosexuality, an index of psychological health, of self-esteem"); Law, *supra* note 18, at 196 (noting "dominant understanding" that life as part of heterosexual couple is easier, more pleasant, and more satisfying).

195. *See* SILVERSTEIN, *supra* note 72, at 121 (reflecting on importance of sense of continuity, which is absent in purely sexual encounters).

196. *See, e.g.*, BERUBE, *supra* note 96, at 209-10; JOHNSON, *supra* note 136, at 58, 192-93, 324-26; KEHOE, *supra* note 96, at 50, 51; LEWIS, *supra* note 102, at 144; McWHIRTER & MATTISON, *supra* note 96, at 92, 103, 208, 225; SILVERSTEIN, *supra* note 72, at 122, 166. Even one man who described himself as a pederast noted that "this constant talk about sex in relationships is overdone. I can love someone without having sex with him. It is more important to have a loving relationship whether there's sex or not." KLEINBERG, *supra* note 96, at 228.

stairs.”¹⁹⁷ Another man wanted to help start a Harvard Gay Alumni club, “if only because he could think of no better place to find Mr. Right.”¹⁹⁸ Surely if he were looking only for a partner with sexual prowess, seeking out Harvard men would have been unnecessary.¹⁹⁹

Gay lovers often use the stereotypical language of romance to express their feelings for each other.²⁰⁰ This should not be surprising; we are brought up on the same fables of idealized romantic love as anyone else.²⁰¹ Gay couples in one survey, for example, generally indicated they believed their relationship would last “a long time” or “forever.”²⁰² Gay lovers describe the magic feelings of first being in love in familiar terms:

It was as if we became one person,” Joe says, his eyes misting. “It was so peaceful. We talked with our eyes. We moved with the same motions. Even when I was at work it felt like Patrick was inside me. The experience was like walking on air—calm, reassuring. I felt whole.”²⁰³

Significantly, lesbians and gay men often use the word “love” to describe their feelings for their partners.²⁰⁴ One lesbian describes entering a relationship with another women despite both being married to men at the time: “We fell in love and it was just such a tremendously powerful force that there was no way I felt we could ever

197. MCWHIRTER & MATTISON, *supra* note 96, at 25; *see also* JOHNSON, *supra* note 136, at 96, 139.

198. MAROTTA, *supra* note 72, at 25.

199. If not counterproductive.

200. Of course, not everyone accepts traditional romantic symbolism. *See* LEWIS, *supra* note 102, at 170 (rejecting traditional symbols as “overly materialist”).

201. *See* LEWIS, *supra* note 102, at 71; SILVERSTEIN, *supra* note 72, at 31; *see also* RAYMOND M. BERGER, GAY AND GRAY: THE OLDER HOMOSEXUAL MAN 166 (1982) (referring to gay men’s search for Prince Charming); *cf.* Merkin, *Prince Charming Comes Back*, N.Y. TIMES, July 15, 1990, § 6 (Magazine), at 18 (describing young career women falling for romantic charm of the movie PRETTY WOMAN (Touchstone 1990), with some embarrassment). Some of us also adopt more prosaic, albeit still idealized, role models. A lesbian writer recently described herself and her lover as “the lesbian Mertzes (with alternating Fred and Ethel days), leading a slightly shabby but ultimately happy life, hanging out with our friends, the lesbian Ricardos and their kid.” Yvonne Zipter, *Inside Out: Saying Good-Bye to Illusions*, WKLY. NEWS, Aug. 29, 1990, at 4, 21.

202. MCWHIRTER & MATTISON, *supra* note 96, at 223. Other gay couples express the same feelings. *See, e.g.*, JOHNSON, *supra* note 136, at xvii, 97.

203. MCWHIRTER & MATTISON, *supra* note 96, at 23; *see also id.* at 21, 27.

204. *See, e.g.*, JOHNSON, *supra* note 136, at 55 (“we fell desperately in love, passionately, unreasonably, obsessively”); KEHOE, *supra* note 96, at 48 (“a deep love relationship”); MCWHIRTER & MATTISON, *supra* note 96, at 27 (“head over heels in love with him”); *Gay Couple Sue D.C. Over Marriage License Denial*, WKLY. NEWS, Dec. 5, 1990, at 18 (“[W]e love each other. . . . We are here in an attempt to formalize our relationship”). The use of the term “love” can aid non-gay people’s understanding of gay relationships. One of my heterosexual friends describes understanding what a gay relationship meant when she watched two of her gay male friends together and realized, “They really love each other.”

have done anything else.”²⁰⁵ Public use of the term “love” can be very powerful to a society that thinks of gay relationships solely in terms of sex. One gay man describes his testimony at a sanity hearing for his lover when the opposing attorney tried to show bias by bringing out his sexual orientation:

He said, “Isn’t it true that you’re roommates?” And I said, “No, we’re not roommates. We share a house.” He said, “Well, it is true, isn’t it, that you feel a deep affection for Mr. X?” You know, by then I was just tired of playing games, and I just said, “Yes, I love him with all of my heart.” And you could have heard a pin drop in the courtroom. It was a very dramatic moment to simply admit what the prosecutor was being so coy about.²⁰⁶

Many gay couples adopt familiar romantic images and symbols as part of their own relationships. Love letters,²⁰⁷ walks on the beach,²⁰⁸ secluded public places for necking,²⁰⁹ candlelight dinners,²¹⁰ flowers,²¹¹ and Niagara Falls²¹² have the same meaning for many gay couples as for anyone else who has been in love in our society. Gay couples facing family or social disapproval invoke traditional images of star-crossed lovers.²¹³ And perhaps most significantly, many same-sex couples describe their relationships as “marriages” or “like marriages.”²¹⁴ Some have marriage ceremonies.²¹⁵ Many celebrate

205. JOHNSON, *supra* note 136, at 48.

206. SILVERSTEIN, *supra* note 72, at 276.

207. See, e.g., CAROL S. BECKER, UNBROKEN TIES: LESBIAN EX-LOVERS 22 (1980); BERUBE, *supra* note 96, at 31, 129-30; TIMMONS, *supra* note 143, at 48. During World War II, gay couples had to use code and slang in these letters to avoid revealing themselves to censors. BERUBE, *supra*, at 120; MCWHIRTER & MATTISON, *supra* note 96, at 249.

208. See, e.g., DAVE PALLONE & ALAN STEINBERG, BEHIND THE MASK: MY DOUBLE LIFE IN BASEBALL 155 (1990).

209. During World War II, both same-sex and heterosexual couples used the cover of blackouts to neck on public beaches and in parks. BERUBE, *supra* note 96, at 110.

210. See, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 225-26; SILVERSTEIN, *supra* note 72, at 161.

211. See, e.g., LEWIS, *supra* note 102, at 68; JOHNSON, *supra* note 136, at 165; MCWHIRTER & MATTISON, *supra* note 96, at 225-26.

212. See SILVERSTEIN, *supra* note 72, at 301.

213. See MAROTTA, *supra* note 72, at 252.

214. E.g., JOHNSON, *supra* note 136, at 58-63, 145; SILVERSTEIN, *supra* note 72, at 141; Grier, *supra* note 136, at 174; see also SILVERSTEIN, *supra* note 72, at 140 (“Beliefs about heterosexual marriage are the foundations on which gay love relationships have been constructed. Whenever there is discussion about gay relationships, what form they should take and how lovers should act towards one another, talk invariably centers on the similarity or dissimilarity to heterosexual marriage.”); Allan Johnson, *Gays Push for Right to Marry*, CHICAGO TRIB., Dec. 1, 1991, at 5 (reporting gay activist “marry-in” at which at least 10 same-sex couples applied for marriage licenses).

215. See, e.g., INVENTING OURSELVES, *supra* note 39, at 116-17 (two lesbians have a “romany wedding”); SILVERSTEIN, *supra* note 72, at 232-33 (wedding between “two perfectly average young men”); *id.* at 277-78 (two gay men have marriage ceremony because one of their

anniversaries.²¹⁶ They also develop joint traditions that provide stability to relationships.²¹⁷ These can include special activities for holidays or for anniversaries, or special vacation spots or eating places.²¹⁸ One male couple returned to Europe to find the place they had met during World War II, twenty-five years earlier.²¹⁹

Many stories also attest to the profound feelings that can accompany these relationships and the care that partners can have for each other.²²⁰ For example, like many couples in love, one lover speaks of sometimes knowing exactly what the other is thinking.²²¹ Another example of the strength of feeling in some gay relationships is the following:

When Albert was six years old he had a set of puppets, and his favorite was a red one. Albert's father crushed it in his hand because he didn't want Albert to grow up a sissy; this memory is a wound that still bleeds. But one day . . . , Albert's lover, Gilbert, gave him a present—a little red puppet with a note saying, "I'll never take it away from you."²²²

For a number of gay couples (as with many non-gay couples), the sexual fire often burns quite low after a while.²²³ When this happens,

mothers insisted); *Methodist Leader Nixes Lesbian Marriage*, WKLY. NEWS, May 23, 1990, at 8 (lesbian couple has to move wedding ceremony due to disapproval of local bishop). Other gay couples have ceremonies to celebrate their commitment to each other, but do not describe them as "marriages." See, e.g., JOHNSON, *supra* note 136, at 46; Christine & Sheila, *Union Activists, Lovers and Parents*, in *BREAKING SILENCE*, *supra* note 91, at 163, 168; *Episcopal Priest to Perform 'Rites' For Gay Couples*, WKLY. NEWS, Nov. 28, 1990, at 8. Three-quarters of the women in a study of long-term lesbian couples had formalized their commitment to each other in some fashion, and about the same number, though not always the same women, had exchanged rings. JOHNSON, *supra*, at 67-68. Same-sex marriage is legal in Denmark and Swaziland, presumably because there is some demand for it. See Karlyn Barker, *D.C. Gay Couple to Press Fight for Marriage License; Kelly Assailed for Alleged Reversal on Issue*, WASH. POST, Jan. 7, 1992, at D1.

216. See JOHNSON, *supra* note 136, at 69.

217. See MCWHIRTER & MATTISON, *supra* note 96, at 76 ("Traditions are an outward sign of a couple's special partnership. Traditions announce the existence of a past history and the expectation of a future one.").

218. See, e.g., BECKER, *supra* note 207, at 141; MCWHIRTER & MATTISON, *supra* note 96, at 82, 100; SILVERSTEIN, *supra* note 72, at 176.

219. MCWHIRTER & MATTISON, *supra* note 96, at 6-7.

220. See, e.g., SILVERSTEIN, *supra* note 72, at 133, 165.

221. See MCWHIRTER & MATTISON, *supra* note 96, at 24, 84.

222. SILVERSTEIN, *supra* note 72, at 169.

223. See, e.g., JOHNSON, *supra* note 136, at 303. The majority of lesbian couples in one survey reported that the frequency of sexual contact decreased over time and 18% had had no activity in the prior year. *Id.* at 152-53, 159. This decline in sexual activity is not universal. One of my favorite snippets is the following excerpt from an interview of two women in their mid-70s who had been together for 41 years. The interviewer told them that many couples together for a long time are no longer sexual and the women registered surprise:

Maud: Really? I find that rather strange.

often lovers continue to get emotional support and companionship from (and live with) each other.²²⁴ One member of a long-term gay

Agnes: Had they grown apart, or

[Interviewer]: No. They still feel affectionate, hug and kiss, sleep in the same bed, but they're not genitally sexual any more. They explain away their sexual urge. They say, for instance, "Well we hit menopause."

Agnes: Why, that's ridiculous!

Maud: That is.

Agnes: What difference does that make?

[Interviewer]: Well, they think it's hormones, that without those hormones, they don't feel as sexual.

Agnes: Well, it's all a matter of mind! If you're just too bored with each other to create any sort of imaginative stimulus, I can see where sex would die out.

Maud: Well, we certainly stimulate each other.

Id. at 134-35.

224. See, e.g., BERGER, *supra* note 201, at 71-73, 134; INVENTING OURSELVES, *supra* note 39, at 116-17; JOHNSON, *supra* note 136, at 6, 48, 102-03; MAROTTA, *supra* note 72, at 61, 254-56; MCWHIRTER & MATTISON, *supra* note 96, at 261; cf. MAROTTA, *supra*, at 63 (interviewee comment: "Coupling is one thing. Sex is another thing. And friendship and love are still other things. Sometimes they overlap, and sometimes they don't."). More than a quarter of women in long-term relationships in one study reported that sex was not very important to either the quality or the permanence of their relationships. JOHNSON, *supra* note 136, at 154-55; see also *id.* at 167-77 (describing lives of female couples who had little or no sex).

Couples who stop having sex may also remain together in a primary relationship, but seek sex from others. Despite other similarities with legally sanctioned marriages, gay relationships often differ in at least one important respect: there is less tradition of sexual exclusivity among gay couples. Prior to AIDS, many lesbian and almost all gay male partnerships were not monogamous. See, e.g., LEWIS, *supra* note 102, at 102, 147. Both lesbians and gay men had political explanations for this; many argued that sexual exclusivity was a holdover from the property-based vision of heterosexual marriage. See, e.g., JOHNSON, *supra* note 136, at 249; Lewis, *supra* note 102, at 66, 169-70, 180. In the last decade, mainly in response to AIDS, monogamy obviously is much more important than it had been previously, at least to gay men. See Phil Nash, *Sexual Arrangements Between Lovers*, in GAY LIFE, *supra* note 107, at 123, 128. However, the issue of whether to be sexually exclusive remains a difficult one for same-sex couples. See, e.g., BECKER, *supra* note 207, at 33; Johnson, *supra* note 136, at 182; Bryan Monte, *Living with a Lover, or How to Stay Together Without Killing Each Other*, in GAY LIFE, *supra* note 107, at 103, 107-08. See generally H.W. Seng, *Loving Friendship*, in GAY LIFE, *supra*, note 107 at 145, 146 ("It's crucially important to always remember that we didn't establish the cult of the exclusive couple. All of us forget that the moral imperative sustaining that institution is imposed from without. It didn't grow out of our more numerous ways of expressing desire.").

I remain unsure of the significance of the rejection of exclusivity by many gay people. Arguably, it is of less importance than in a heterosexual marriage; there is no possibility of unwanted pregnancy and there are likely to be fewer children whose stability is jeopardized. Moreover, sexual exclusivity is not the practice in many marriages as well. See REINISCH & BEASLEY, *supra* note 182, at 73 (estimating that 37% of husbands and 29% of wives have had extramarital affairs); cf. LEWIS, *supra* note 102, at 188-89 (reporting 1970s study which found 86% of lesbian couples in sample living monogamously, approximately the same percentage reported by several observers in the heterosexual married female population).

In the end, I fall back on the testimony of those involved: most people in non-exclusive gay relationships claim to rely on their primary relationship for emotional support, love, and affection, and considered themselves bonded to the other person, regardless of outside sexual activity. Just as outsiders have no standing to question the legality of a marriage because one

relationship said:

We don't have a sexual relationship anymore, but there are these other important things that hold the relationship together, like love and affection, and having a house together, and security and companionship. These are ultimately the things that are the most important to us.²²⁵

As this story suggests, gay long-term partnerships, like marriages, entail sharing. Many gay couples share financial resources and own homes together.²²⁶ The process of creating a shared living space can be an especially significant part of a relationship, which, unlike heterosexual marriage, generally lacks established rituals of formation.²²⁷ One man described furnishing a new apartment with his lover:

Each minor decision was invested with great importance, even joy—where the bookshelves should go, what shade of paint was best for every corner of the place. We did most of the work ourselves—enthusiastically. We were not just making a comfortable living space; we were building the home that we would share.²²⁸

Same-sex couples also share many other aspects of their lives. Tennessee Williams, for example, who was extremely protective and possessive about his works in progress, would show drafts only to his lover.²²⁹ Some couples undertake joint projects, such as starting a

of the couple commits adultery, it seems fair to ignore the issue of exclusivity when examining the legitimacy of gay partnerships.

225. SILVERSTEIN, *supra* note 72, at 122-23; *see also* BERGER, *supra* note 201, at 72 ("Together we have endured all the adversity that life can throw at two people in eighteen years. . . . The relationship is strong enough and always has been strong enough to withstand the problems of each day."). Gay men describe similar feelings to justify staying with partners who sleep with other men. *See* MCWHIRTER & MATTISON, *supra* note 96, at 255-56; SILVERSTEIN, *supra* note 72, at 138.

226. *See, e.g.*, ISAY, *supra* note 139, at 86; JOHNSON, *supra* note 136, at 49, 64-65, 95; Kehoe, *supra* note 96, at 17; MCWHIRTER & MATTISON, *supra* note 96, at 82, 100, 221, 233; Barbara Lightner, *O! We Are Just Begun!*, in *THE LESBIAN PATH*, *supra* note 95, at 190, 190-96; SILVERSTEIN, *supra* note 72, at 151. One study observed that "the gradual merger of money and possessions is clearly a symbolic and actual commitment to the relationship, often unspoken and unrecognized." MCWHIRTER & MATTISON, *supra* note 96, at 89. In some cases, one partner may provide financial support while the other goes to school. *See, e.g., id.* at 87, 234; SILVERSTEIN, *supra* note 72, at 152. In addition, coupled lesbians and gay men often make out wills that insure their partner is provided for when they die. *See, e.g.,* MCWHIRTER & MATTISON, *supra* note 96, at 106, 222.

227. *See* MCWHIRTER & MATTISON, *supra* note 96, at 44-45. For examples of this sharing, *see* JOHNSON, *supra* note 136, at 57 (buying washer and dryer as symbol of commitment); *id.* at 62-63 (buying home as symbol of commitment).

228. BROWN, *supra* note 144, at 138.

229. *See* FIVE O'CLOCK ANGEL: LETTERS OF TENNESSEE WILLIAMS TO MARIA ST. JUST 1948-1982 at 14-16 (1991) [hereinafter FIVE O'CLOCK ANGEL] (narrative of Maria St. Just).

business or renovating a house,²³⁰ that effectively become "children" of the couple, taking up the same kind of focused energy.²³¹ For some couples, pets are an important focus.²³² And of course lesbian couples in particular raise real children.²³³

People interviewing long-term same-sex couples have commented on the intimacy that was apparent from the couples' conversations.²³⁴

Often when a man cried, remembering either a sad event or a happy one, sympathetic tears appeared in the eyes of the lover listening. Lovers sat side by side, moving hands or feet slowly toward each other to bridge the physical gap; it was striking how often during an interview this physical connection was made and how important it became after discussing some crisis in the relationship. How amused they were to find their hands or feet touching, as if to say, "How did this happen?"²³⁵

A telling characteristic of many gay relationships is the grieving associated with separation or with the illness or death of a partner, all too frequent occurrences in the past decade. Gay couples describe in terms similar to those used by non-gay couples the pain of being separated by interfering parents or the fortunes of war.²³⁶ They pine over broken romances.²³⁷ One woman remembers:

Janice and I ended our relationship after living together for twenty-three years. The hardest part was living alone; not being without friends, but without that other person to shout, "Bring me coffee if your [sic] coming," or "Come on in and see the news; look what's happening." Just the other voice in the house. I have to call it loneliness. I always had friends, but during that period even friends who stopped by didn't fill that vacancy—the other person in the house.²³⁸

Gay partners care for each other when they are sick.²³⁹ One

230. See, e.g., JOHNSON, *supra* note 136, at 248-49 (opening bookstore).

231. See MCWHIRTER & MATTISON, *supra* note 96, at 88; Arch Brown, *Seven Deadly Questions*, in GAY LIFE, *supra* note 107, at 158, 160.

232. See, e.g., JOHNSON, *supra* note 136, at 66-67.

233. See *infra* text accompanying notes 295-300.

234. See MCWHIRTER & MATTISON, *supra* note 96, at 123, 294; see also JOHNSON, *supra* note 136, at 309 (quoting woman in 20-year relationship: "[T]here's a real bonus in having a history of experiences together. More time means more knowing and understanding. I like having all the shared memories.").

235. SILVERSTEIN, *supra* note 72, at 166.

236. See, e.g., INVENTING OURSELVES, *supra* note 39, at 96 (two teen girls separated by parents); SILVERSTEIN, *supra* note 72, at 297 (male couple separated by World War II).

237. See BECKER, *supra* note 207, at 26, 75.

238. *Id.* at 75.

239. See, e.g., INVENTING OURSELVES, *supra* note 39, at 71, 106; MCWHIRTER & MATTISON, *supra* note 96, at 8, 83, 178, 234; SILVERSTEIN, *supra* note 72, at 304-08.

member of a couple explains why:

An important thing for me all my life has been a need to be needed. Russ has needed me more since his illness. The satisfaction I have gotten from that fact alone has been as great as anything in my life. We're closer now than ever. Russ doesn't really need me because he's blind. He could function very adequately without my eyes, but the real truth is that I need him as much as he needs me.²⁴⁰

Gay "widows" and "widowers" experience the same emotions as their non-gay counterparts.²⁴¹ The experience of grieving for a lost companion after a lifetime spent together can be devastating for anyone. For the gay survivors, the experience can be made even worse because the traditional consolations of the bereavement process may not be available.²⁴² If they are not out, they must hide their pain from others to avoid difficult questions.²⁴³ Surviving partners have provided many moving descriptions of their emotions,²⁴⁴ such as Allan Berube's dedication of his book on gay experiences during World War II.

Finally I want to express my gratitude to Brian Keith, my life partner and best friend from 1983 until his death from AIDS in March 1987. He gave me many things, not the least of which was a stronger commitment to my work. Before he died he asked me to promise him not to let my grief keep me from finishing this book. It hasn't been easy, but with these words, Brian, I keep my promise.²⁴⁵

In sum, lesbians and gay men aspire to, and participate in, emotionally rich and fulfilling partnerships that have most of the charac-

240. McWHIRTER & MATTISON, *supra* note 96, at 118-19.

241. See, e.g., FIVE O'CLOCK ANGEL, *supra* note 229, at 195 (death of Tennessee Williams's lover "overwhelmed him"); KEHOE, *supra* note 96, at 49 (surviving woman "became a hermit"); SILVERSTEIN, *supra* note 72, at 286 (gay man became alcoholic when lover died); see also JOHNSON, *supra* note 136, at 138-39 (women in 40-year relationship emotionally discuss the possibility of one of them dying).

242. See BROWN, *supra* note 144, at 140-41. In addition, the emotional uncertainty that follows a partner's death may be compounded by the difficult property distribution questions that often accompany the death of gay people. See *infra* text accompanying notes 361-68.

243. See BERUBE, *supra* note 96, at 199; BROWN, *supra* note 144, at 141.

244. See, e.g., BERUBE, *supra* note 96, at 198; PALLONE & STEINBERG, *supra* note 208, at 190; SILVERSTEIN, *supra* note 72, at 270. One description that reads like a Hollywood script comes from a man whose policeman lover was killed in his presence outside a bar one night: "I looked up right away and I see him get shot in the head. And then another one hit his chest, another one his neck. There were 5 shots. He fell to the ground, and I took him in my arms, and he looked at me. He was bleeding from his mouth. And he said, 'I love you . . . this hurts . . . call the police . . . take me to a doctor . . . this hurts a lot . . . I love you.'" SILVERSTEIN, *supra* note 72, at 279.

245. BERUBE, *supra* note 96, at xiii.

teristics of idealized marriage.²⁴⁶ Studies have found the partners in exclusive gay relationships at least as happy and well adjusted as those in heterosexual marriages.²⁴⁷ To say of these people that the sexual act is the defining characteristic of their sexual orientation is to insult the love and commitment that makes these relationships work.

b. The Prevalence of Long-Term, Same-Sex Relationships

In a culture saturated with the sex-as-lifestyle assumption, it is natural to question the typicality of these stories. In other words, how many gay people really experience these rich relationships? This question is difficult to answer because empirical survey data are hard to come by and many gay people are closeted, although evidence suggests that the number of gay couples is large and increasing. Moreover, the formation and continuance of gay relationships is continually challenged by social pressures. A further complication is that relationship issues in our society are highly gendered.

The purely libidinous version of gay sexuality presented in non-gay stories has been reinforced by the highly publicized sexual aspects of the gay male subculture. Certainly in the late 1970s and early 1980s, many gay men made promiscuity and heightened awareness of their sexuality important parts of their lives for a variety of reasons.²⁴⁸ However, even participation in the more promiscuous parts of the gay

246. See McWHIRTER & MATTISON, *supra* note 96, at 5 ("Gay men can and do establish long-term, committed relationships, which are characterized by stability, mutual caring, generosity, creativity, love, support, and nurturing."); Koppelman, *supra* note 18, at 158 ("Many homosexual relationships are, except for the sex of the participants and the legal status of the union, indistinguishable from heterosexual marriages.").

Problems encountered in some gay relationships parallel those of troubled marriages as well. ISAY, *supra* note 139, at 86; Yvonne Zipter, *Inside Out: Saying Good-Bye to Illusions*, WKLY. NEWS, Aug 19, 1990, at 4; see, e.g., JOHNSON, *supra* note 136, at 223-24 (battering); SILVERSTEIN, *supra* note 72, at 51 (use of relationships as parent substitutes); *id.* at 339-40 (some long-term couples "really didn't like each other too much"); Jean O'Leary, *God Was an Innocent Bystander*, in BREAKING SILENCE, *supra* note 91, at 231, 236 (jealousy); Jay Vail, *Lesbian Gets Probation For Beating Lover*, WKLY. NEWS, Nov. 7, 1990, at 8 (battering).

247. See Herek, *supra* note 97, at 162; see also KEHOE, *supra* note 96, at 50 (noting that coupled women in survey generally "had the intelligence and good fortune to achieve happiness from their long-term relationships.").

248. See MAROTTA, *supra* note 72, at 13. Despite the prevalence of this behavior, and the public attention it has received, one psychotherapist that has worked with gay men has said that a need for random sexual encounters is uncharacteristic. ISAY, *supra* note 139, at 16.

Some gay men have explained their promiscuity in political terms. See MAROTTA, *supra* note 72, at 153 (arguing that promiscuity is liberating to individuals and society); see also ISAY, *supra* note 139, at 84 ("Rage at social injustice has made [gay men] assert their rights to have social relations that seemingly [flout] social convention."). Other explanations for promiscuity include the lack of social support for gay lives and relationships, see *id.* at 84; MAROTTA, *supra* note 72, at 213, and that gay men are just exhibiting stereotypical male sexuality unencumbered by female sexuality. See *infra* text accompanying notes 250-59.

male subculture has not precluded the eventual formation of relationships. Stories abound of male couples whose long-term relationships began with casual sexual encounters.²⁴⁹

Generally, lesbians are believed to be somewhat more likely to enter long-term relationships than gay men;²⁵⁰ the frenzied sexual energy of the gay male subculture of a decade ago rarely has been a part of the lesbian experience.²⁵¹ Indeed, within the gay community, the stereotype for lesbians is that they rarely engage in sex except in the context of a strongly emotional relationship.²⁵² And gay male promiscuity has certainly been a subject of negative comment in the lesbian community.

The gendered difference in attitudes toward relationships is easily explainable: lesbians are women and gay men are men. As children, since we are not readily identifiable as homophiles, we receive the same socialization into our gender roles as anyone else.²⁵³ Thus, differences between gay men and lesbians primarily are products of gender socialization.²⁵⁴ As one gay man put it:

There is no question in my mind . . . that male homosexuality is predominantly a phenomenon of masculinity, that lesbianism is predominantly a phenomenon of femininity. Male gays are first and foremost men; they act like men and feel like men, and this is particularly true with regard to their sexual inclinations. In a sense, I am suggesting that straight men and gay men are far more similar than they are dissimilar when it comes to sexual behavior and attitudes toward sex. Similarly, lesbians are first and foremost women and only secondarily gay.²⁵⁵

249. See, e.g., BERGER, *supra* note 201, at 53-56 (long term relationship began with encounter at baths); BERUBE, *supra* note 96, at 119 (two GIs met at a bathhouse and had a 15-year relationship after the war); MCWHIRTER & MATTISON, *supra* note 96, at 21 (couple that met in baths described encounter as "love at first sex"); SILVERSTEIN, *supra* note 72, at 126 (meeting in a steam room led to 32-year relationship); *id.* at 281 (10-year relationship started with one-night stand). See generally MCWHIRTER & MATTISON, *supra* note 96, at 210-11 (more than half the couples in the study met at baths, discos, bars, or gay beaches); Craig G. Harris, *How to Find a Husband*, in GAY LIFE, *supra* note 107, at 117, 122 (gay men have found long-term partners in cruising spots like public parks and bathhouses).

250. See, e.g., BERUBE, *supra* note 96, at 118; BLUMENFELD & RAYMOND, *supra* note 93, at 91-92, 374.

251. See LAW, *supra* note 18, at 218 & n.147.

252. This is not to say that lesbians never engage in casual sex. See, e.g., JOHNSON, *supra* note 136, at 83-87. It just seems to be considerably less common among lesbians than among gay men.

253. See RUSE, *supra* note 59, at 136-37; SILVERSTEIN, *supra* note 72, at 195; Kimmel & Levine, *supra* note 89, at 99. One study of male psychology uses a gay man as an example of problems facing all men. See HOPCKE, *supra* note 152.

254. See KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 138 (1991).

255. SILVERSTEIN, *supra* note 72, at 328-29.

The clearest example of this lies in the way gay people treat relationships. Stereotypically, heterosexual men prefer sex without commitment; heterosexual women require commitment or emotional involvement before having sex. The stereotypes within the gay community are the same: gay men prefer sex without commitment, lesbians want emotional involvement.²⁵⁶

Seen in this light, gay male promiscuity is not an aberration, but archetypal male behavior.²⁵⁷ As one study of masculinity concluded, "Real men . . . seek many sexual partners . . ."²⁵⁸ Unlimited sex without commitment is the "predictable" result of men operating on a sexual playing field where they do not have to respond to a female need for commitment or emotional intimacy.²⁵⁹ The energetic sex life experienced by many gay men in the pre-AIDS era was a fraternity boy's dream: constant sex with no emotional ties. The sexual experiences of heterosexual male professional athletes, revealed in the wake of the Magic Johnson's revelation that he had contracted Human Immunodeficiency Virus ("HIV") disease, further suggest that masculine norms, rather than homosexuality, drive both promiscuity and high-risk sexual behavior.²⁶⁰

Lesbians, on the other hand, are more likely to adopt stereotypi-

256. See SEARS, *supra* note 40, at 313-14; WESTON, *supra* note 254, at 140; Herdt, *supra* note 121, at 26.

257. See MCWHIRTER & MATTISON, *supra* note 96, at 69-70 (commenting that persistence of outside sexual contacts in established male couples is "a thing about being men"); SILVERSTEIN, *supra* note 72, at 114 (suggesting that "reluctance to commit . . . to domestic love affairs reflects masculine identification rather than neurotic instability").

258. Kimmel & Levine, *supra* note 89, at 93. The same authors conclude that the early reluctance among gay men to reduce risky sexual practice in light of AIDS also was due to conformance with norms of masculinity. *Id.* at 93, 101.

At least one study suggests a physiological explanation for this. Researchers injected masculinizing hormones into a group of men to test the effect on their sexual orientation. Somewhat to the researchers' surprise, the additional male hormones had no effect on the sexual orientation of the subject group. However, sexual drive increased both for homophile and heterosexual participants. Conversely, the injection of female hormones resulted in a decrease in male sexual drive. BLUMENFELD & RAYMOND, *supra* note 93, at 129; RUSE, *supra* note 59, at 97-98. Thus, it seems that the "masculine" characteristic is not heterosexual orientation but powerful sex drive, ironically a characteristic which has been traditionally associated with gay men.

259. See BLUMENFELD & RAYMOND, *supra* note 93, at 377; KLEINBERG, *supra* note 96, at 106; RUSE, *supra* note 59, at 136-37, 148. I am not suggesting that gay men or men in general do not need intimacy in their lives, but rather that they are often socialized to undervalue it or distrust their need for it.

260. Most notably, Wilt Chamberlain has claimed to have had sexual relations with as many as 20,000 women. See Kevin Sherrington & Mitch Lawrence, *Sex and Sports: Many Athletes Say Barrage of Sex Offers Blurs Their Judgment*, OTTAWA CITIZEN, Nov. 18, 1991, at C5; E.M. Swift, *Dangerous Games: In the Age of AIDS, Many Pro Athletes are Sexually Promiscuous, Despite the Increasing Peril*, SPORTS ILLUSTRATED, Nov. 18, 1991, at 40.

cal female sex and relationship patterns.²⁶¹ One study concluded:

It is common for women in general, and lesbians in particular, to move from one intimate relationship into another with little time to be alone between relationships. Becoming involved with a new partner enables women to experience limerence [the warmth and exhilaration usually associated with people newly in love] with someone new rather than confronting dissatisfactions with a lover they have been with for some time.²⁶²

Gender differences aside, long-term gay partnerships are quite common,²⁶³ and appear to be growing more frequent. Pre-AIDS studies found significant percentages of both lesbians and gay men involved in long-term relationships.²⁶⁴ And in the last several years, gay male sexual practices have altered dramatically as more accurate information about the transmission of HIV has become available.²⁶⁵ As a group, gay men tend to place even more emphasis than before on one-on-one relationships, emotional intimacy, and long-term commitments.²⁶⁶ As more and better-paying jobs have become available to women, lesbian couples have found it easier to exist independently of

261. See Schneider, *supra* note 40, at 111; see also LEWIS, *supra* note 102, at 188-89 (reporting about same percentage of coupled lesbians and heterosexual married women chose sexual exclusivity).

262. BECKER, *supra* note 207, at 39.

263. See BERGER, *supra* note 201, at 72 (mentioning many gay male couples of 10 years or more); ISAY, *supra* note 139, at 85 (noting "many more long-lasting gay relationships than we generally acknowledge"); Herek, *supra* note 97, at 161 (noting that 60% of gay men and 64% of lesbians in one study were in relationships); see also Johnson, *supra* note 136, at 25 (entire book devoted to examination of lesbian couples of 10 years or more). One estimate in the early 1980s placed the total number of gay male couples living together in the United States at 2.5 million. MCWHIRTER & MATTISON, *supra* note 96, at 149 (extrapolating from studies). The existence of books addressing gay couples attests to some publishers' belief that a substantial audience of gay couples exists. See, e.g., HAYDEN CURRY & DENNIS CLIFFORD, *LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (1980); TINA B. TESSINA, *GAY RELATIONSHIPS: HOW TO FIND THEM, HOW TO IMPROVE THEM, HOW TO MAKE THEM LAST* (1989).

264. See BERGER, *supra* note 201, at 133 (32% of older gay men presently in relationships of one year or more); BLUMENFELD & RAYMOND, *supra* note 93, at 374 (60% of lesbians and 40% of gay men involved in long-term relationships). Given the incidence of deaths and break-ups, the number of men who at some point in their lives are involved in such relationships is obviously greater. See, e.g., BERGER, *supra* note 201, at 133 (51.8% of older gay men in relationship of one year or more at sometime in their lives).

The existence of very long-term relationships also attests to the fact that same-sex couples of both genders predate AIDS, the sexual revolution, and the modern women's movement. See, e.g., JOHNSON, *supra* note 136, at 1-2 (lesbians, 52 years); *id.* at 325 (lesbians, 45 years); SILVERSTEIN, *supra* note 72, at 291-311 (gay men, 51 years); Ann Campbell, *God's Love is Priceless*, in *BREAKING SILENCE*, *supra* note 91, at 243, 249 (lesbians, 60 years).

265. See Douglas A. Feldman, *Gay Youth and AIDS*, in *GAY AND LESBIAN YOUTH*, *supra* note 40, at 185, 186; Marshall H. Becker & Jill G. Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 AM. J. PUB. HEALTH 394, 407 (1988); Law, *supra* note 18, at 195.

266. See, e.g., ISAY, *supra* note 139, at 91-92; RUSE, *supra* note 59, at 11; Michael Helquist,

men.²⁶⁷ In addition, it seems likely that the increasing acceptance of gay rights in at least some parts of the country has made it easier to carry on same-sex long-term relationships.

This last point suggests the importance of the social context in which relationships exist. That gay people enter into marriage-like arrangements less frequently than do non-gay people may be due largely to social pressures that make these relationships difficult.²⁶⁸ The normal social tugs toward marriage—from the comments of elderly aunts at weddings to the favorable treatment married couples receive in terms of insurance and job-related benefits—work against the formation of gay relationships.²⁶⁹ For same-sex couples to hold themselves out as married is to invite discrimination and condemnation.²⁷⁰

Moreover, the gay couples that do form have less difficulty ending their relationship than do married couples.²⁷¹ "Lacking legal ties, a [same-sex] couple can dissolve a relationship simply by packing their suitcases."²⁷² The couple themselves may not believe that their relationship can last because they may accept the myth that such relationships are impossible²⁷³ and may lack awareness of other same-sex

Safe Sex: Guidelines That Could Save Your Life, in *GAY LIFE*, *supra* note 107, at 58, 66; Kimmel & Levine, *supra* note 89, at 98; Nash, *supra* note 244, at 127-28.

Isay notes, however, that "social discrimination against gay men during the AIDS crisis has increased the conflict many men feel about their sexuality, and also has heightened their fear of being more visible—which, paradoxically, has made forming lasting attachments more difficult." ISAY, *supra* note 139, at 92.

267. See JOHNSON, *supra* note 136, at 108.

268. See LEWIS, *supra* note 102, at 70-71 (attributing shortness of gay relationships in part to lack of social approval); PHARR, *supra* note 20, at 75-76 (suggesting that social isolation makes gay relationships too important and leads to unreasonable expectations and then disappointment by the partners).

269. See MAROTTA, *supra* note 72 at 213; DeCecco, *supra* note 194, at 4. As one therapist explained:

[B]rief sexual encounters, both anonymous, recreational encounters and short-term relationships, cannot be considered apart from the social context in which they occur. There are no legal sanctions to bind gay men in relationships, as there are for heterosexuals: no marriage certificates, no tax advantages, and usually, no children. Although we know that legitimization does not guarantee the monogamy of heterosexual couples or the stability of a relationship, the lack of validation has discouraged the formation and maintenance of gay relationships.

ISAY, *supra* note 139, at 84.

270. See *infra* part IV.A.2.

271. See BERGER, *supra* note 201, at 72; JOHNSON, *supra* note 136, at 74.

272. McWHIRTER & MATTISON, *supra* note 96, at 58; accord BLUMENFELD & RAYMOND, *supra* note 93, at 374-75.

273. See PHARR, *supra* note 20, at 226; Tina Tessina, *Gay Relationships and Homophobia*, WKLY. NEWS, Dec. 5, 1990, at 5. For specific stories of people who have accepted the myth,

couples who have "made it."²⁷⁴ Pressures from family and friends and from the larger culture to stay together may be much less than with those who participate in non-gay marriage,²⁷⁵ particularly because relatively few gay couples have children.²⁷⁶

Another explanation for the short length of some gay relationships is that heterosexuals often use their adolescence to experiment with long-term relationships by going steady and the like. Gay men and lesbians, often denied these learning experiences by social pressures or by lack of awareness of their sexual orientation, may not do these "practice runs" until early adulthood.²⁷⁷ Thus, many gay men and lesbians experience relationships of less than five years their first few times trying to establish a long-term arrangement.²⁷⁸ The failure of these early attempts to last may well be due to the inexperience of the participants, rather than to their sexual orientation.²⁷⁹

Given the difficulty of behaving like a couple and the ease of breaking up, the large number of long-term couples bespeaks a significant commitment by many lesbians and gay men to the ideal of coupling. Yet when gay relationships fail, society often attributes the failure to the sexual orientation of the parties rather than to their

see, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 29, 107, 139; SILVERSTEIN, *supra* note 72, at 14, 82.

274. See JOHNSON, *supra* note 136, at xvi (noting lack of role models for female couples); LEWIS, *supra* note 102, at 70-71 (attributing shortness of relationships in part to lack of role models). For some purposes the myriad heterosexual long-term couples may not suffice as role models. The existence of non-gay couples does not counteract the myth that same-sex couples do not work. Cf. Yvonne Zipfer, *Inside Out: Saying Good-bye to Illusions*, WKLY. NEWS, Aug. 29, 1990, at 4, 21 ("I relished meeting or hearing about [gay] couples that had been together 10, 12, 14 years: proof that lesbian relationships are not condemned to a lifespan of two or five years.") Moreover, the highly gendered behavioral patterns of many non-gay couples may not provide suitable models for two people of the same gender. See, e.g., Tina B. Tessina, *Sound Off: Guidelines for Gay/Lesbian Dating*, WKLY. NEWS, May 30, 1990, at 5 (noting that heterosexual dating patterns involve traditional gender roles and therefore are inadequate for gay couples); see also *infra* text accompanying notes 598-603 (discussing equality in gay relationships).

275. See BLUMENFELD & RAYMOND, *supra* note 93, at 374-75.

276. Cf. JOHNSON, *supra* note 136, at 191, 273 (discussing lesbian couples unwilling to break up because they are raising children).

277. See Schneider, *supra* note 40, at 117.

278. See, e.g., JOHNSON, *supra* note 136, at 51 (describing woman who was in several relationships of two to five years before entering the 26 year relationship she was in at the time of the study).

279. See LEWIS, *supra* note 102, at 73; SEARS, *supra* note 40, at 363; see also SILVERSTEIN, *supra* note 72, at 14 ("It never occurred to us that we broke up so frequently because we were young, not because we were homosexual."); cf. JOHNSON, *supra* note 136, at 53 (noting that many women in long-term relationships have experience in prior relationships). A related claim made by the author of one study of lesbian couples is that when lesbians change partners quickly they often really are "dating"—testing potential partners—rather than quickly committing to and then "divorcing" different people. JOHNSON, *supra* note 136, at 74.

interpersonal skills, incompatibility of the partners, masculine norms, or social pressure.²⁸⁰

3. GAY FAMILY STRUCTURES

As we have seen, anti-gay advocates often hold up the gay "lifestyle" as antithetical to some ideal of "family."²⁸¹ Yet "[o]nly a pathological twist of the social memory forgets that [gay people] are born into and raised by families."²⁸² This Subpart will attempt to undermine the Supreme Court's claim in *Bowers* that gay life does not involve "family."

The variety of living arrangements exhibited by gay people parallels the experience of the heterosexual community in post-industrial America with its high divorce rates and frequent incidence of single parenthood.²⁸³ Although the exclusive couple model remains strong, both gay and non-gay people today are more likely to engage in serial monogamy than to have one lifelong relationship.²⁸⁴ And like heterosexuals, gay individuals who are not involved in exclusive relationships have devised a variety of living structures to cope with the personal and economic demands of our time.

A number of gay people, like some of their non-gay counterparts, seem to be happier living without a primary love relationship or without a traditional family structure.²⁸⁵ Many gay men and lesbians who

280. See MCWHIRTER & MATTISON, *supra* note 96, at xiii; cf. HOPCKE, *supra* note 152, at 147 (attributing shortness of some relationships to individual problems rather than sexual orientation).

281. See *supra* note 155 and accompanying text.

282. Lewis, *supra* note 138, at 1791.

283. The divorce rate in the United States is the highest among industrialized countries, see *USA Leads in Divorce*, USA TODAY, July 9, 1991, at 1A, and is double what it was 30 years ago, see Ramon G. McLeod, *Marin is Bay Area's Divorce Capital*, S.F. CHRON., June 10, 1991, at A1. About 25% of American children live with single parents. Lynn Smith, *All Alone Together: O.C. Single Fathers and How They Cope*, L.A. TIMES, June 16, 1991, at A1; *Family, Marriage Patterns Undergoing Change*, CHICAGO TRIB., June 7, 1991, at 16.

On the variety of family forms in modern America, see BLUMENFELD & RAYMOND, *supra* note 93 at 371; JUDITH STACEY, *BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA* 17, 254, 258 (1990); Beverley Beyette, *Tallying New Family Ties: The 1990 Census Recognizes Non-Traditional 'Families' From Single-Parent Households to Unmarried Couples*, L.A. TIMES, March 23, 1990 at E1. For a fascinating account of unconventional family structure within a group of people who subscribed to fairly fundamentalist Christian beliefs and gender ideology, see STACEY, *supra*, at 41-112.

284. See BECKER, *supra* note 207, at 39; BLUMENFELD & RAYMOND, *supra* note 93, at 374; MCWHIRTER & MATTISON, *supra* note 96, at xiii-xiv.

285. See ISAY, *supra* note 139, at 17; LEWIS, *supra* note 102, at 83; MCWHIRTER & MATTISON, *supra* note 96, at xiv; SILVERSTEIN, *supra* note 72, at 16, 339; John E. Jones, Jr., *Living Alone and Loving It*, in GAY LIFE, *supra* note 107, at 101-02.

consider themselves part of a couple do not live with their partner.²⁸⁶ For some, this separation is caused by a desire to avoid detection.²⁸⁷ Others have career commitments that keep them in separate places.²⁸⁸ Still others like the freedom that comes with having their "own space."²⁸⁹

Many lesbians and gay men adopt versions of the most traditional family form—heterosexual marriage—at some point in their lives.²⁹⁰ Although many of these marriages end in divorce, some gay people work out accommodations with their spouse that allow them to have gay relationships outside the marriage.²⁹¹ Others simply live apart from their spouse.²⁹² Still others develop complicated family relationships that involve both their legal spouse and their same-sex lovers.²⁹³ One lesbian

had a particularly accommodating household. [She and her husband] along with their young son and the mother's female partner, lived together congenially, with the father and son occupying one floor of their suburban home while the two women had the other. Of course, all socialized together in their free time. The son grew up under "aunt's" love and supervision, having two mothers as well as a caring male parent. Now, at middle age himself, the son continues to have a warm relationship with his mother, who is alone, and his father. Aunt died of cancer more than a decade ago.²⁹⁴

Gay people with increasing frequency attempt to adopt children,²⁹⁵ raise children from prior marriages, often with a gay part-

286. See, e.g., *INVENTING OURSELVES*, *supra* note 39, at 17, 39-40; JOHNSON, *supra* note 136, at 99; KEHOE, *supra* note 96, at 23; LEWIS, *supra* note 102, at 80, 147; MCWHIRTER & MATTISON, *supra* note 96, at 9-10; Matile Poor, *A Loving Friendship*, in *THE LESBIAN PATH*, *supra* note 95, at 26, 26-29.

287. See, e.g., BROWN, *supra* note 144, at 8; JOHNSON, *supra* note 136, at 43-47; MCWHIRTER & MATTISON, *supra* note 96, at 9; SILVERSTEIN, *supra* note 72, at 295.

288. See, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 10; John Preston, *In Praise of Long Distance Affairs*, in *GAY LIFE*, *supra* note 107, at 129-134.

289. See, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 10; Preston, *supra* note 288, at 134.

290. See ISAY, *supra* note 139, at 105 (10-17% of gay men); JAY & YOUNG, *supra* note 104, at 130 (almost 20% of gay men in survey); LEWIS, *supra* note 102, at 117 (between 23-37% of lesbians in different studies).

291. See, e.g., ISAY, *supra* note 139, at 117; JAY & YOUNG, *supra* note 104, at 63, 121, 132; MCWHIRTER & MATTISON, *supra* note 96, at 11; Kate Quigley, *Certified Straight*, in *BREAKING SILENCE*, *supra* note 91, at 87, 95.

292. See, e.g., BERGER, *supra* note 201, at 96-98.

293. See, e.g., *id.* at 44; SILVERSTEIN, *supra* note 72, at 260.

294. KEHOE, *supra* note 96, at 32.

295. See Joyce Price, *Adoptions by Homosexuals Test Precedence of Courts, Activists*, WASH. TIMES, Jan. 31, 1990, at A5 (lesbian advocate says adoptions by gay people have taken place in seven different states); Catherine Toups, *Judge Approves Adoptions by District Lesbian Couple*,

ner,²⁹⁶ or, in the case of lesbians, bear their own.²⁹⁷ Many other gay people hope to raise children sometime in the future.²⁹⁸ Occasionally, the non-biological parent in a gay relationship will end up with primary parenting responsibilities or even with custody of the child.²⁹⁹ Gay parenting arrangements bring both tensions and rewards. One male couple had custody of the seven-year-old son of one of the men at the time they were interviewed:

The couple admits that their own lives are constricted to a certain degree by the boy's presence, but each feels they receive such enrichment from the experience that the rewards are well worth the sacrifices. The boy's father came from a disrupted family background . . . [and] is eager to supply stability and continuity for the child. The couple views routines, dependability, and traditions as important features of being together. When the child entered school, the couple had some difficulties in situations where a parent's presence was expected and necessary. The boy understands that the two men love each other and live together like other children's parents even though they are both men. The couple reports no difficulty with the school or other parents up to the present. Each has functioned as a parent in the school setting, with the step-father parenting more frequently than the father.³⁰⁰

Gay couples have varying relationships with their original families—parents and blood relatives. Although some gay people are estranged from their relations, many remain part of their family's life and incorporate their partners as well.³⁰¹ One gay man describes his

WASH. TIMES, Sept. 11, 1991, at A1 (single-parent adoptions by gay people are "fairly common").

296. See, e.g., JAY & YOUNG, *supra* note 104, at 134; JOHNSON, *supra* note 136, at 268-71; MCWHIRTER & MATTISON, *supra* note 96, at 242-43. Very recently, some lesbian couples have been allowed to adopt their partner's biological children and become legal co-parents. See Toups, *supra* note 295.

297. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 372; JOHNSON, *supra* note 136, at 271-77; Yvonne Zipter, *Are You Ready For Parenthood?*, WKLY. NEWS, Nov. 7, 1990, at 4.

In addition, some divorced gay men and lesbians have visitation rights to or joint custody of their children. See, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 59; Sharon E. Budd, *Proud Lesbian Motherhood*, in THE LESBIAN PATH, *supra* note 95, at 131, 132. Numerous cases have addressed custody battles of gay parents. See Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part II*, 11 U. DAYTON L. REV. 275, 327 (1986).

298. See, e.g., JAY & YOUNG, *supra* note 104, at 138; Zipter, *supra* note 297, at 4.

299. See, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 242 (primary parenting); STACEY, *supra* note 283, at 151 (primary parenting); *In re Pearlman*, No. 87-24926 DA (Fla. Cir. Ct. 1989) (awarding custody to deceased mother's lesbian lover). Other gay men and lesbians will continue relationships with their ex-lover's children after a break-up. See, e.g., BECKER, *supra* note 207, at 99.

300. MCWHIRTER & MATTISON, *supra* note 96, at 242.

301. See, e.g., JOHNSON, *supra* note 136, at 247 (lesbian couple and their children incorporated into family events).

experience in positive terms:

My mom in particular has made a real effort to get to know the gay community. . . . Both my mom and my sister attended the holy union services for me and Bob. Bob's family also knows about our relationship and has been very supportive. When we go home for visits, we are expected to visit both families, and we are always made to feel at home.³⁰²

Many couples end up caring for or supporting elderly parents.³⁰³ Some even live with them for extended periods of time.³⁰⁴ There also are instances of people staying in contact with an ex-lover's family after a break-up.³⁰⁵

Gay men and lesbians often develop non-sexual friendship networks that serve as families.³⁰⁶ These groups provide emotional support, meet together for special occasions and holidays, and serve the same role for gay people as extended families do for many heterosexuals. One gay man told interviewers: "Glen and Ernie are like my family. . . . No, they *are* my family. We always have Thanksgiving together. I take my new boyfriends over for them to meet and decide about. It seems funny, but that's how it is."³⁰⁷ In addition, groups of gay friends may arrange to live together to provide a sense of security and family.³⁰⁸ Similarly, one male couple that had been together twenty years built a new house, and had to decide what to do with the old one next door.

We talked it over and decided we should make it more than an investment of money. So, when we rented the old place, we looked for younger guys who were settled with each other and would want to visit back and forth. We usually see them two or three times a week for dinner or lunch. I know my sister doesn't have anything that good with her kids.³⁰⁹

In an important case, the New York Court of Appeals recognized that the structures and relationships created by gay people deserve legal recognition. In deciding to declare one gay male couple

302. BERGER, *supra* note 201, at 83.

303. See, e.g., JOHNSON, *supra* note 136, at 260; MCWHIRTER & MATTISON, *supra* note 96, at 98, 206, 237.

304. See, e.g., BROWN, *supra* note 144, at 71; JOHNSON, *supra* note 136, at 261; see also *id.* at 133 (lesbian couple lived for 20 years with aunt of one of the women).

305. See, e.g., BECKER, *supra* note 207, at 25, 98.

306. See, e.g., BERUBE, *supra* note 96, at 104. For lesbians, these groups often include a network of ex-lovers. See, e.g., BECKER, *supra* note 207, at 144, 155, 209; LEWIS, *supra* note 102, at 76.

307. MCWHIRTER & MATTISON, *supra* note 96, at 79.

308. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 372.

309. MCWHIRTER & MATTISON, *supra* note 96, at 124.

a statutory "family," the court stated that "it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control" the definition of family.³¹⁰ Although this definition is controversial—many non-gays would limit "family" to more traditional relationships³¹¹—gay people certainly have created relationships and friendship networks that fit within it. Our "dedication, caring and self-sacrifice" deserve the same recognition given to other family forms.³¹² Again, it is an insult to the love and intimacy we create outside traditional structures to maintain that gay life is at odds with family values.

C. *Advocacy: Re-Presenting the Gay Lifestyle*

Justice White claimed in *Bowers* that "[n]o connection between family, marriage and procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."³¹³ As the foregoing discussion makes clear, plenty of evidence exists that same-sex sexual activity is as related to family as constitutionally protected non-procreational heterosexual sexual acts and that the most significant restraints on marriage come from the legal system rather than from a "gay lifestyle." Gay-rights advocates bear the responsibility of introducing this evidence to courts in future cases, thereby providing the "connection" that Justice White failed to see.

In order to do this, regardless of the particular legal theory they espouse, advocates will need to counter the pre-understanding of non-gay decisionmakers. They should point out and identify as myths the common beliefs about gay sexuality discussed in Part II. In private discrimination suits, advocates should try to establish that the defendant in fact subscribes to one or more of the myths. For example, a lawyer may well be able to elicit deposition testimony from, or find evidence of remarks by, a decisionmaker about gay promiscuity or child molestation. These remarks can both be used as evidence that

310. *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 55 (N.Y. 1989). Interestingly, Justice Scalia seemed to endorse a similar view when he referred to a husband's desire to raise with his wife her child of an adulterous affair as an attempt "to preserve the integrity of the traditional family unit." *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). At least one other court has acknowledged that gay ties can constitute "families." *Seebol v. Farie*, No. 90-923-CA18, slip op. at 17 (Fla. Cir. Ct. Mar. 15, 1991) (gay adoptive parents and children).

311. See *STACEY*, *supra* note 283, at 4.

312. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing right of grandmother to live with grandchildren); *Michael H.*, 491 U.S. at 130 (allowing states to protect existing family unit over blood ties). See generally *Law*, *supra* note 18, at 220-21 (noting that the positive benefits of families do not require traditional family structures).

313. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

the sex-as-lifestyle assumption exists and that it animated the discrimination in the particular case. To counteract the power of the myths, the advocates need to use the empirical evidence that contradicts them, some of which I have cited here. In addition, they should present stories that portray a more complete picture of gay sexuality and lifestyles.

I believe that the most effective of these stories are accounts of long-term relationships.³¹⁴ These stories have several strengths. First, they allow a presentation of gay life that contains many aspects other than sex. The stories included in this Part illustrate the richly textured picture of gay life that advocates can present—a picture that shows that the sex-as-lifestyle myth is wrong. Moreover, the stories help build empathy because they are likely to be familiar to non-gay decisionmakers. Even if non-gay people are not part of long-term relationships, they are likely to share the general social understanding and approval of long-term intimate bonding.

The focus on relationships also allows advocates to emphasize the positive values that accrue to people and society from long-term stable relationships. Some commentators have criticized the attorneys in *Bowers* for their over-reliance on ostensibly value-neutral abstractions.³¹⁵ They argue that constitutional jurisprudence should focus more on normative visions of why individual choice is good or why community values are helpful and that it should take into account how well particular claims fit into these visions.³¹⁶ Regardless of whether one agrees with this position in the abstract, advocates should find it easier to present and support any legal argument if they talk about generally shared values like stability and mental health—values that our culture identifies with long-term, emotional commitments.

Finally, discussing same-sex relationships in cases may serve the wider goal of educating actors in the legal system and the public as a

314. Obviously, many gay advocates cannot choose their clients or their cases. They may need to create arguments for lesbians and gay men who are not part of a significant relationship. Even if that is true, where the issues in the case raise the sex-as-lifestyle assumption, they should present a court with evidence that the relationships do exist and the decision will effect long-term partners as well as the litigants in the particular case. All though this obviously is an uphill battle, it is not an uncommon problem. Lawyers faced with "bad facts" constantly must refer to other cases that will be governed by a general rule in order to convince the court to decide for their clients. Of course, those advocacy groups that do choose their clients should actively seek out cases involving long-term relationships.

315. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 537 (1989); Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 539-45 (1988).

316. Sandel, *supra* note 315, at 521; West, *supra* note 315, at 545-50.

whole, even if an advocate loses a particular case. As Mary Coombs has stated in a related context:

Allowing parties to testify about their relationships does more than provide a basis for decision. It may also serve to educate the judiciary, both directly and, to the extent that relational facts become part of published opinions, indirectly. As precedent becomes transformed, the gap between precedent and real life may narrow.³¹⁷

The public's pre-understanding that a gay lifestyle equals sex runs deeply. Gay advocates should grasp any opportunity to tell counter-vailing stories.

IV. FLAUNTING SEXUAL ORIENTATION AND THE FALSE VISION OF PRIVATE LIFE

Non-gays who favor some form of gay rights may not believe lesbians and gay men are obsessed with sex, but often believe that gayness is essentially a private matter: "After all, it isn't anyone's business what you do in the bedroom." Justice Blackmun's dissent in *Bowers* characterizes the issue in that case as "the right to be left alone."³¹⁸ Although his argument certainly was appropriate to the case as the advocates had framed it, the right to be left alone is not the fundamental issue in gay rights.³¹⁹ Most discrimination, particularly by private individuals or business entities, is not directed at private behavior, but at some type of public behavior or speech that acknowledges and calls attention to a person's gay sexual orientation.

In this Part, I discuss stories that illustrate the non-gay pre-understanding that gay issues are inappropriate for public discussion. I then present stories to counter this pre-understanding in two ways. First, I demonstrate that it causes the concealment of gay lives, a concealment which creates severe costs to gay individuals. Second, I show that heterosexual sexual orientation is considered appropriate for public discussion in our culture. I conclude by arguing that advocates need to highlight the parallels to public discussions of heterosexual relations in order to counter the belief that sexual orientation is a private matter. Advocates must make clear that if lesbians and gay

317. Coombs, *supra* note 43, at 1656 (discussing the need to incorporate the idea of privacy in relationships into Fourth Amendment jurisprudence).

318. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

319. See Sandel, *supra* note 315, at 534 (criticizing Justice Blackmun for relying entirely on the value of individual choice and ignoring the positive good that can come out of same-sex intimate bonds).

men are to be fully included in American social life, we must have the right to carry on our lives in public to the same extent as anyone else.

A. *Non-Gay Stories: "Flaunting Homosexuality"*

I was involved in a campaign [at a highly-reputed college] . . . to get a statement forbidding discrimination on the basis of sexual orientation on the official records. The initial response was to the effect: "Look, we're not going to discriminate. We don't really care about what people do in their personal lives. But let's not talk about gay life, let's not single out that group in the by-laws. It's bad publicity for the school." . . . What we wanted was not that homosexuality be tolerated as something that's okay as long as it's in its place—that is, its hiding place, the closet—but that it have an open place, that it have its say, that it find its own overt expression. So I don't have much patience with people . . . who might say, "Of course, there have always been plenty of homosexuals in academe. One knows who they are, and they know that people know. But at least they have the decency and the manners not to go around proclaiming it."³²⁰

This story reflects the prevalent non-gay pre-understanding that public discussion of gay issues is inappropriate—that gay men and lesbians are tolerable *only if* they keep their sexual orientation secret. In this Subpart I describe several types of discrimination that demonstrate this pre-understanding: discrimination against speech and related public behavior, discrimination against gay relationships, and our culture's suppression of information about gay existence. I then present stories that illustrate that the concern behind each of these forms of discrimination is not so much a desire to eliminate gay people as to eliminate public discussion about them.

1. SPEECH AND OTHER PUBLIC BEHAVIOR

Occasionally discrimination against gay people arises when someone inadvertently discovers their sexual orientation.³²¹ More often, discrimination follows from some public act.³²² When gay people try to exert their rights publicly, they often are punished for it.

320. MAROTTA, *supra* note 72, at 277-78.

321. While these events are rare, *see, e.g.*, Halley, *supra* note 4, at 956, they do happen. For example, a high school girl dropped by her teacher's home unexpectedly and realized that there was only one bedroom, but that the teacher lived with another woman. The teacher subsequently was fired. LEWIS, *supra* note 102, at 88. Another woman was in an auto wreck. The police looked "through her wallet for identification [and] found a photo of her lover, signed on the back with a scribbled note of romantic tenderness." The woman lost her job. *Id.*

322. One form of discrimination evoked by public behavior arises when gay people publicly engage in activities that violate gender role norms. *See infra* part V.C.

Gay activists frequently are targets of intimidation and violence. Michael Hardwick, who made perhaps the most visible attack on discrimination, lost his job when he chose to challenge the Georgia sodomy statute.³²³ One woman, an activist in Cincinnati in the late 1970s, was a victim of the following treatment: "my house was egged several times, obscenities were written on its sides (lezzie sucks, bitch go to hell) and my car was doused with a corrosive substance that stripped its finish."³²⁴ Similar harassment is not uncommon.³²⁵

Police mistreatment of openly gay people is legendary.³²⁶ People report being harassed or arrested because the police thought they looked gay,³²⁷ or because they participated in gay activism. Recently, for example, federal marshals forced a group of ACT-UP members who they had arrested at an AIDS demonstration to strip and then

323. Henderson, *supra* note 8, at 1639.

324. Sequoia, *supra* note 142, at 46 (emphasis removed).

325. See, e.g., Jay Vail, *U. of Utah Gay/Lesbian Leaders Report Threats*, WKLY. NEWS, Nov. 7, 1990, at 8 (reporting that gay student leaders received anonymous letters with swastikas and anti-gay slogans).

Verbal harassment of public speakers on gay issues is commonplace. For example, two Harvard students, making announcements about Bisexual, Gay, and Lesbian Awareness Days in a Harvard dining hall, were interrupted by another student who coughed loudly and reportedly called the speakers "fucking faggots." Although the student denied doing more than coughing, the university ruled that even if he had insulted the speakers, the action would not constitute hate speech or gay-bashing, since it was not a "sustained, repeated action or words." *Roundup News*, WKLY. NEWS, May 30, 1990, at 32. While I remain unsure about the wisdom of university regulations about hate speech, the failure to invoke those that are already in place for individual instances of name-calling seems likely to encourage further incidents.

326. See John D'Emilio, *Gay Politics and Community in San Francisco Since World War II*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY & LESBIAN PAST* 456, 470-71 (Martin B. Duberman et al. eds., 1989) (describing anti-gay police actions in San Francisco in the 1970s); *West Palm Beach to Implement Sexual-Orientation Sensitivity Training For Workers—Including Cops*, WKLY. NEWS, July 18, 1990, at 13 (referring to the "historically poor treatment of gay men and lesbians" by police officers.).

According to a 1989 study, 73 percent of victims of anti-gay violence did not report the incident to the police. Sixty-seven percent of these "had experienced or perceived the police themselves as homophobic. And 14 percent were afraid the police would bash them." Nat Hentoff, *A Case of Loathing*, PLAYBOY, May, 1991, at 94, 96.

Police mistreatment of gay people is a fairly consistent theme in post-war gay history in America. For example, one woman describes being dragged to the police station and interrogated in 1948 after telling another woman she was a lesbian. Grier, *supra* note 136, at 172-73; see also BERUBE, *supra* note 96, at 270 (describing police sweeps in the 1950s). In recent months, some American cities have attempted sensitivity training of the police to combat this problem. See, e.g., *West Palm Beach to Implement Sexual Orientation Sensitivity Training For Workers—Including Cops*, *supra*, at 13.

327. See, e.g., Marce Martin, *15 Years Ago*, in *THE LESBIAN PATH*, *supra* note 95, 89. The author was arrested at a traffic stop because the police thought she and her companion looked like lesbians and had a minor with them. Later, at the police station, the officers coerced the younger woman into saying that the older woman had made advances at her. *Id.* at 89-90.

searched them in full view of other detainees and employees.³²⁸

Merely coming out publicly may result in sanctions. For example, parishioners recently "expelled" a Roman Catholic priest who admitted in a published interview that he was gay and had AIDS.³²⁹ A gay legal writing instructor at the University of Oregon was forced to apologize both for coming out to his class on National Coming Out Day and for discussing cases about gay issues.³³⁰ One suspects that a writing instructor with a business background who used her personal experiences to explain to her students how a case harmed a particular industry she worked with would not have been told "it had no relationship to the subject matter of the course."³³¹

Even simple advocacy of gay rights can trigger the usual sanctions that attend public gay speech,³³² as well as the assumption that the speaker is gay.³³³ One lesbian recalls, "While my economics instructor lectures about the economic impact of discrimination against women and racial minorities, I comment on discrimination against gays. Threatened by homosexuality, he calls me a freak, and orders me never to mention the subject again in his class."³³⁴ Recently, a group of men were discussing gay rights issues at a restaurant, when men from a nearby table began calling them "faggot" and tossed one of them through a plate glass window.³³⁵

Gay organizations and their members also are victims of discrimination. The Defense Department uses membership in gay organizations, including gay churches and synagogues, as a ground for

328. LAMBDA UPDATE (Lambda Legal Defense & Educ. Fund, Inc., New York, N.Y.), Spring 1991, at 10, 12. A lawsuit against the marshals is pending. *Id.* Other examples of anti-gay harassment by police are less serious. See, e.g., *Unknown Police Employee Douses Activists*, WKLY. NEWS, August 1, 1990, at 8 (reporting that police employee dumped bag of water on gay demonstrators).

329. *Ohio Priest Evicted Over AIDS Interview*, WKLY. NEWS, May 23, 1990, at 8. Similarly, the army discharged a captain after she spoke to the press about her sexual orientation. See *Pruitt v. Cheney*, 943 F.2d 989, 990-91 (9th Cir. 1991).

330. See Jay Vail, *School Forces Instructor's Apology For Coming Out*, WKLY. NEWS, Nov. 21, 1990, at 8.

331. See Jay Vail, *Gay U. of Oregon Professor, Dean Settle Dispute*, WKLY. NEWS, November 28, 1990 at 8.

332. See, e.g., JAY & YOUNG, *supra* note 104, at 72 (supervisor encouraged to fire a woman who spoke out on behalf of gay rights); *GOP Judge Candidate Blasted for Having Gay Support*, UPI, Sept. 20, 1991 (New York Republicans attacked one of their own judicial candidates because he "actively solicited the support of the homosexual community"), available in LEXIS, Nexis Library, UPI File.

333. See Halley, *supra* note 4, at 959.

334. Simmons, *supra* note 132, at 13.

335. Jeffrey Newman, *AIDS Columnist Thrown Through Window*, WKLY. NEWS, June 6, 1990, at 8.

military discharge.³³⁶ A number of universities have tried to deny recognition or use of facilities to gay student groups.³³⁷ Anti-gay students at the University of Chicago sent letters to the parents of students who participated in events sponsored by the University's gay organization. The letters told the parents that their children were "homosexuals" and threatened unspecified further action if the children did not renounce their "deviant sexuality."³³⁸

When gay people publicly attempt to gather or communicate directly with each other, they often are subject to censorship or worse. For example, the California Department of Motor Vehicles recently struck from the official list of traffic schools an entity called "Finally . . . A Gay Traffic School" because the name was "inappropriate."³³⁹ A landlord tried to evict a tenant who ran a gay bar because it violated a lease provision requiring "first-class operations."³⁴⁰ At one time, the Postal Service made lists of people who received gay and lesbian publications and sent them to employers.³⁴¹ Print media of various sorts have often rejected advertising for gay businesses, associations, and functions.³⁴² This is not surprising, given that ads seen as pro-gay often elicit an angry response from members of the public.³⁴³

Attempts by gay people to meet in gay-identified public places do not merely invite discrimination, but often danger as well. Violence against lesbians and gay men often occurs outside gay bars,³⁴⁴ which

336. BERUBE, *supra* note 96, at 276.

337. See, e.g., *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 845 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir. 1974).

338. See Halley, *supra* note 4, at 962 n.167 (quoting HARPER'S MAGAZINE, Sept. 1987, at 16).

339. See LAMBDA UPDATE, *supra* note 328, at 10, 15. A California trial court found the action unconstitutional. See *id.* In a similar and more highly publicized incident, the U.S. Olympic Committee successfully sued to prevent a group of gay and lesbian athletes from using the name "Gay Olympics" for their sporting event. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 525-28 (1987).

340. See *In re B & F Assocs.*, 55 Bankr. 19, 19-20 (Bankr. D.C. 1985).

341. BLUMENFELD & RAYMOND, *supra* note 93, at 255.

342. See LAMBDA UPDATE, *supra* note 328, at 10, 15 (describing *Essence* magazine's refusal to publish an ad for an African-American gay and lesbian conference until a complaint was filed with the New York City Human Rights Commission).

343. See, e.g., *Penn State Attacked for Pro-Gay Ad*, WKLY. NEWS, July 25, 1990, at 8; Paul Varnell, *Observer's Notebook*, WKLY. NEWS, July 18, 1990, at 5.

344. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 248; George James, *A Survey Finds Gay-Bias Cases Go Unreported*, N.Y. TIMES, June 19, 1991, at B12; John F. Kiriakon, *Fi. Lauderdale Robber Preys on Bar Patrons*, WKLY. NEWS, June 12, 1991, at 3; Jay Vail, *Roundup News*, WKLY. NEWS, August 1, 1990, at 36; see also Daniel Goleman, *Homophobia: Scientists Find Clues to its Roots*, N.Y. TIMES, July 10, 1990, at C1 ("Those who attack gays often travel to a gay neighborhood to attack . . ."); Bruce Stanley, *Furor Over Gay Cruising*,

are places where gay people come to look for relationships and sex, and to establish community. The very experience of going to a gay-identified establishment is a public statement of sexual orientation that can be traumatic in and of itself.³⁴⁵ For me and for many other gay people, the first act proclaiming our gay orientation to strangers was walking in the door of such an establishment. The incidence of violence directed at such establishments is directly related to the public statement made by their very existence.

2. RELATIONSHIPS

Society's discomfort with public acknowledgements of gay sexual orientation also is demonstrated by its treatment of gay relationships. Relationships are inherently public in nature. A couple in love wants to spend time together, to socialize together, to live together. Even if they don't discuss their feelings for each other in public, the constant proximity of a same-sex couple sends messages to the outside world. Discrimination against gay relationships often results from this public quality.³⁴⁶ It also can take the form of refusal to allow legal, and therefore public, recognition of the relationship.

Many gay people have star-crossed lover stories about interference with their relationships. One woman recalls the following:

When I was at the University of Kansas my mother discovered one of my letters or something and concluded that I was having an affair with my "best friend." She went to the university dean and I was called in for warning number one and last: if I was seen with Anne again, I would be kicked out of school. So would she.³⁴⁷

Although the mother discovered this relationship through an invasion of privacy, the school's response indicates concern with the public nature of the relationship. The message is not simply, "You are a lesbian. We must be rid of you." Rather, it is, "Although we think you are a lesbian, we will allow you to stay if you don't rub our noses in it by engaging in public contact with your lover."

Some discrimination results from a couple openly behaving as a couple: acts such as outward expression of their affection or trying to make joint living or financial arrangements.³⁴⁸ For example, some

Bronx Neighbors Claim Area is Besieged by Male Prostitutes, *NEWSDAY*, Dec. 16, 1991, at 21 (reporting violence in area "known as a gay cruising area").

345. See *BLUMENFELD & RAYMOND*, *supra* note 93, at 365.

346. The military, for example, will discharge service personnel who enter into or attempt to enter into same-sex marriages. *BERUBE*, *supra* note 96, at 276. Thus, the public declaration of a relationship becomes the source of discriminatory treatment.

347. *LEWIS*, *supra* note 102, at 85.

348. See, e.g., *BERUBE*, *supra* note 96, at 43. Berube notes that

landlords and realtors refuse to show one-bedroom apartments to same-sex couples.³⁴⁹ Gay people who try to dance together in places other than gay bars will often run into problems as well.³⁵⁰ In fact, a great deal of harassment and violence is aimed at this sort of quasi-overt behavior.³⁵¹ Recently, Cincinnati police arrested two men who were holding hands in a parked car and charged them with disorderly conduct.³⁵² One woman recalls a more serious run-in with the police:

[A] friend of mine was arrested in New York City for being a lesbian. The incident began with an insignificant traffic squabble. Nothing was serious at first. But when the cops heard my friend call the woman her "baby," they handcuffed her and arrested her. On the way to police headquarters in the car they beat her while she was still handcuffed. At headquarters, there was no camera to be found when it came time to take her mug shots. Quite a coincidence, of course, since her face was badly bruised.³⁵³

Some discrimination against gay couples simply takes the form of disfavoring all unmarried people or couples.³⁵⁴ For example, some

[t]he affectionate milieu of barracks life made it difficult for trainers to tell exactly when [women's close] friendships became "strange" or "queer." [Although they] drew the line when two women were always with each other, went behind closed doors together, smoked off the same cigarette, kissed long kisses or called each other "darling, sweetheart."

Id. Officers in the women's branches of the armed forces "directly tried to control behavior that the public could perceive to be lesbian. *Id.* at 59. A handbook for women in the Army Aircorp warned that it was taboo for women to dance together in public places in uniform. *Id.*; see also *McConnell v. Anderson*, 451 F.2d 193, 194 (8th Cir. 1971) (University of Minnesota withdrew job offer from gay man who sought marriage license with his lover); *BERGER*, *supra* note 201, at 30, 89 (male couples have difficulty getting joint charge accounts at department stores); *SEARS*, *supra* note 40, at 91 (openly gay couple not allowed to enter certain stores).

349. *BLUMENFELD & RAYMOND*, *supra* note 93, at 253; see also *BERGER*, *supra* note 201, at 30, 88-89 (male couples denied rental units on many occasions).

350. See, e.g., *Dancing Lesbians Ousted From Bar Win Apology*, WKLY. NEWS, Sept. 19, 1990, at 13 (two women dancing together asked to leave country and western bar); *Gay Man Wins Round 1 in Boy Scout Lawsuit*, WKLY. NEWS, Nov. 14, 1990, at 8 (gay teen asked to leave scouting organization when he took another boy to the senior prom).

351. The consequences of publicly behaving as a couple can range from verbal harassment, see, e.g., *BERGER*, *supra* note 201, at 30 (openly gay couple harassed by neighbors), to violence, see, e.g., *BLUMENFELD & RAYMOND*, *supra* note 93, at 248 (man follows lesbian couple home and "following a forced entry, ties up one of the women and in clear view rapes the other").

352. *Rex Wockner, Cincinnati Cops Arrest Gays For Holding Hands*, WKLY. NEWS, Oct. 31, 1990, at 9. A local judge dismissed the charge as too vague. *Id.*

353. *Martin*, *supra* note 327, at 92-93. Recently, a gay male couple sued DEA agents over a similar incident. They alleged that after three agents began beating up one, his lover intervened, and was beaten in turn. According to the couple, the agents called them "ugly faggots" during the incident. *Jay Vail, Gay Couple Sue DEA Over Alleged Beatings*, WKLY. NEWS, Nov. 7, 1990, at 8.

354. See generally *Jennifer Jaff, Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207 (1988).

employers prefer to hire married people.³⁵⁵ Married people receive privileged treatment regarding various property rights.³⁵⁶ And a decision by a private institution or a government entity to treat unmarried and married couples alike invariably raises controversy.³⁵⁷ This has been particularly true for domestic partners legislation³⁵⁸—legislation that requires the government or employers to provide various benefits to unmarried couples. While it is at least arguable that unmarried heterosexual couples forfeit their right to the package of benefits available with marriage by choosing not to marry, gay couples do not have that option.³⁵⁹

The prohibition on gay marriage may be the most significant form of discrimination against gay couples. It denies gay relationships public legitimacy and has significant monetary and legal consequences. Marriage helps couples in a number of concrete financial ways, including the availability of medical, pension, and insurance benefits.³⁶⁰ Married couples also can rely on a set of established legal rules to determine property rights in the event of death or splitting

355. See, e.g., McWHIRTER & MATTISON, *supra* note 96, at 162 (some men in long-term gay relationships "failed to get business or academic promotions because they were single."); SILVERSTEIN, *supra* note 72, at 225 (gay seminarians got married as "career enhancement" because they needed wives to obtain jobs as ministers).

356. See Jaff, *supra* note 354, at 215, 217-18 (discussing co-op transfers, zoning, and federal housing regulations); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1613, 1615-17 & n.73 (hereinafter *Developments in the Law*) (discussing discrimination in zoning and leasing).

357. See, e.g., Beyette, *supra* note 283, at E1; Keith Clark, *Backlash Over Domestic-Partners Policy Rocks Stanford University*, WKLY. NEWS, Nov. 28, 1990, at 26; Rex Wockner, *U. of Illinois Reverses Gay Eviction Order*, WKLY. NEWS, June 12, 1991, at 33.

358. STACEY, *supra* note 283, at 4. Legislation giving some marital-like benefits to unmarried domestic partners currently exists in a few jurisdictions. See, e.g., *Calif. City OK's Domestic-Partner Benefits*, WKLY. NEWS, Aug. 15, 1990, at 8 (noting legislation in Laguna Beach, Berkeley, Santa Cruz, and Seattle); Rex Wockner, *Ithaca, N.Y., Approves Domestic Partnerships*, WKLY. NEWS, Aug. 29, 1990 at 6; Rex Wockner, *Madison, Wis., OK's Domestic Partnerships*, WKLY. NEWS, July 18, 1990, at 24. Since these provisions are rare and often limited to city employees, the analysis in this Subpart assumes such protection is unavailable.

359. See Law, *supra* note 18, at 191; Beyette, *supra* note 283, at E1. All reported cases addressing the issue refuse to allow same-sex marriages. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); see also TEX. FAM. CODE ANN. § 1.01 (West 1975) ("A license may not be issued for a marriage of persons of the same sex."); Rex Wockner, *Chicago Gays Seek Marriage Licenses*, WKLY. NEWS, Nov. 28, 1990, at 13 (reporting that Chicago marriage license bureau refuses to issue same-sex licenses). A gay couple currently is mounting a legal challenge to the District of Columbia's refusal to grant them a license. Barker, *supra* note 215, at D1; *Gay Couple Sue D.C. Over Marriage License Denial*, WKLY. NEWS, Dec. 5, 1990, at 18.

360. BERGER, *supra* note 201, at 201; BLUMENFELD & RAYMOND, *supra* note 93, at 254; Law, *supra* note 18, at 192 & n.18; Torielli, *supra* note 157, at 224; see also STACEY, *supra* note 283, at 221 (VA mortgage loan available to veteran because he married); Jaff, *supra* note 354, at

up.³⁶¹ To obtain rights that mirror those available to legal spouses, gay couples generally must draw up written contracts or wills,³⁶² which are not always enforceable.³⁶³ Moreover, blood relations will often try to break the will of a deceased member of a gay relationship,³⁶⁴ sometimes alleging undue influence or lack of capacity,³⁶⁵ thus insulting the memory of the deceased. These challenges are particularly effective if the deceased had AIDS at the time he died.³⁶⁶ When there is no will, a survivor who is not out of the closet may be at the mercy of the family of the deceased.³⁶⁷ One gay man recalled:

I know of a homosexual couple who had lived together for twenty-one years. One of the men died suddenly of pneumonia. A week after the funeral, his brothers appeared at the apartment; they had come to pack up and move out his furniture, paintings, tableware

214-15 (certain Social Security and Worker's Compensation benefits available only to married people).

A case is pending in New York challenging AT&T's denial of spousal death benefits to a woman whose longtime lover worked for the company; AT&T has a "much-touted" personnel policy which promises not to discriminate on the basis of sexual orientation. See LAMBDA UPDATE, *supra* note 328, at 10, 13. In addition, a legal challenge is pending to New York City's denial of benefits to unmarried long-term couples. See *id.* at 13 (citing Gay Teachers Assoc. v. Board of Educ. No. M-6078, 1992 N.Y. App. Div. LEXIS 1113 (1992)).

361. For example, a surviving spouse gets rights to the property of the deceased spouse. See WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES 3 (1988) (describing spouse's intestate share). Married people have the right to sue for the wrongful death of their spouse. 2 STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH 127 (2d ed. 1975). Gay couples generally do not get these benefits. See, e.g., BERGER, *supra* note 201, at 195; MCGOVERN ET AL, *supra*, at 65, 67; W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 947-48 (5th ed. 1984). In addition, no established legal procedures exist for property division at the end of a gay relationship. See Lewis, *supra* note 138, at 1794.

362. See LEWIS, *supra* note 102, at 133-37; Torielli, *supra* note 157, at 226-27; *Developments in the Law*, *supra* note 356, at 1623-24; see also Monte, *supra* note 224, at 104 (describing members of male couples making inventories of belongings to protect against claims by relatives or creditors of their partners).

363. See CURRY & CLIFFORD, *supra* note 263, at 2:7; Jones v. Daly, 176 Cal. Rptr. 130 (Ct. App. 1981).

364. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 372; McWHIRTER & MATTISON, *supra* note 96, at 106. These challenges often are successful. See Law, *supra* note 18, at 192 & n.19.

365. See, e.g., BERGER, *supra* note 201, at 195; LEWIS, *supra* note 102, at 129; *Developments in the Law*, *supra* note 356, at 1623 n.137.

366. See Torielli, *supra* note 157, at 234. I use the male pronoun here because almost no lesbians have AIDS. As of 1989, there are no reported cases of a woman acquiring the disease through sexual contact with another woman. Darrell Y. Rist, *The Deadly Costs of an Obsession*, NATION, Feb. 13, 1989, at 196.

367. "The ownership of a home or business may be left in one partner's name if the couple is concerned about hiding the relationship. If this partner dies, all of the property will pass to his family, despite the surviving partner's contributions." BERGER, *supra* note 201, at 195. In extreme cases, "the surviving partner . . . has been barred from the funeral because the relatives would not acknowledge the relationship." BLUMENFELD & RAYMOND, *supra* note 93, at 372.

— everything. The two lovers had bought many of these things together over the years, but the apartment belonged to the deceased. The surviving partner told me that he believed that his lover's brothers had long suspected that theirs was a homosexual relationship and that now the brothers were, in effect, challenging him to defend his right to any of the belongings. He said nothing, and was left with nothing.³⁶⁸

The legal system also puts hurdles in the way of gay couples attempting to create traditional family structures by becoming parents. Most courts and relevant state agencies refuse to allow adoptions by individual gay people or with same-sex couples,³⁶⁹ although a few jurisdictions have authorized them.³⁷⁰ The courts register concern for the fate of the children, despite evidence that the sexual orientation of the parent has little effect on the sexual orientation or the psychological adjustment of the child.³⁷¹

The legal system's interference with the construction of alternate family forms also is evident in its treatment of custody issues following the break-up of lesbian couples raising children together. Recent cases in New York, California, and Wisconsin (states relatively supportive of gay rights on some issues)³⁷² all have held that the woman without blood or adoptive ties to the child in question has no standing to seek visitation or custody from a court.³⁷³ This means that even if

368. BROWN, *supra* note 144, at 140.

369. See BLUMENFELD & RAYMOND, *supra* note 93, at 254; LEWIS, *supra* note 102, at 124. Even insemination services sometimes insist on long-term heterosexual relationships. BLUMENFELD & RAYMOND, *supra* note 93, at 372.

370. See *In re N.L.D. and D.J.H.*, No. 17945 (Cal. Super. Ct. Feb. 24, 1986), cited in Lewis, *supra* note 138, at 1795 n.68; see also *In re Adoption of M by S & A*, No. d8503-61930 (Or. Ct. App. Sept. 4, 1985) (lesbian partner allowed to adopt partner's child as a "second parent"), cited in Lewis, *supra* note 138, at 1795 n.67; *Seebol v. Farie*, No. 90-923-CA18 (Fla. Cir. Ct. Mar. 15, 1991); *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990); *Adoption Granted in L.A. to Gay Couple*, LAMBDA UPDATE, *supra* note 328, at 16.

371. See *Seebol*, slip op. at 3-4, 14; BLUMENFELD & RAYMOND, *supra* note 93, at 372; Herek, *supra* note 97, at 157-61; Lynda H. Walters & Audrey W. Elam, *The Father and the Law*, 29 AM. BEHAV. SCIENTIST 78, 91 & n.30 (1985); see also McWHIRTER & MATTISON, *supra* note 96, at 244 ("What is clear from the couples we observed is that whenever the father accepts and feels good about his sexuality and his love relationship, he can carry out the duties of parenting in a way that enriches his own life and that of his children."). One counselor referred to a child growing up with a lesbian couple as "the most well-adjusted child I have ever dealt with." Johnson, *supra* note 136, at 276.

372. See WISC. STAT. ANN. § 111.31(1) (West 1988) (enacting state policy against employment discrimination on the basis of sexual orientation); *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 595 P.2d 592, 597 (Cal. 1979) (holding that discrimination by public utility against gay people violates California constitution and statute); *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (holding that a gay male couple can be "family" for purposes of rent control regulations); *People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980) (striking down sodomy statutes as unconstitutional under privacy and equal protection theories).

373. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991); *Alison D. v.*

the woman was the children's primary caretaker, she may not even attempt to show that it would be in their best interests to remain in contact with her.³⁷⁴

One of the most tragic aspects of these cases in the eyes of the gay community is that in each, a lesbian who chose to set up household with another woman to raise children jointly as a family has argued in court that the family she set up deserves no legal recognition, a position hardly in the interest of other lesbian families.³⁷⁵ Moreover, these cases may well imply that the biological parent cannot sue her ex-partner for child support,³⁷⁶ which hardly is in the children's interest.³⁷⁷

In a case reflecting a similar view of gay families, a trial court in Ohio ruled as a matter of law that an abused woman in a lesbian household could not be considered to be "living as a spouse" (within the meaning of the words in the Ohio Domestic violence statute)³⁷⁸ with the woman who abused her, and thus was not entitled to legal protection.³⁷⁹

Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991); *In re Z.J.H.*, 471 N.W.2d 202, 208-09 (Wis. 1991). After its decision against a lesbian co-parent in *Alison D.*, the New York Court of Appeals added insult to injury by holding that grandparents (and, presumably from the language of the case, other blood relatives) have standing to seek visitation rights, *even if both parents object*. Emanuel S. v. Joseph E., 577 N.E.2d 27, 29 (N.Y. 1991) This formalistic elevation of blood ties over de facto parental relationships may make cases simpler for courts to decide, but surely does not reflect the realities of modern family life or advance the best interests of children, ostensibly the primary concern in custody cases. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 788, 797-98 (2d ed. 1988).

374. Two other states' appellate courts have indicated that they would permit visitation rights for the non-birth mother under certain circumstances. See *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991) (holding that a non-birth mother can establish visitation rights if she can demonstrate, inter alia, that the visitation will not interfere with the relationship between the child and the birth-mother); *A.C. v. C.B.*, No. 12,335, 1992 WL 55748, at *6 (N.M. Ct. App. Jan. 30, 1992) (holding that non-birth mother may be able to establish right to maintain continuing relationship with child). One California trial court has granted visitation rights to a non-biological lesbian parent. See *Lewis*, *supra* note 138, at 1795 n.67 (citing *Loftin v. Flournoy*, No. 569630-7 (Cal. Super. Ct. Jan. 2, 1985)). The precedential value of the case is obviously in question after *Nancy S.* See 279 Cal. Rptr. at 219.

375. There are a number of reasons why a lesbian litigant might pursue this strategy. For example, she may wish to maintain some relationship with her ex-partner, but not trust the woman sufficiently to feel comfortable giving her permanent legal rights to interact with the child or children. Attacking the legal validity of the relationship allows such a woman to maintain control over her children without launching personal attacks on her former partner.

376. See *Lewis*, *supra* note 138, at 1795.

377. This problem arises in heterosexual contexts as well. See *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) (finding no liberty interest in relationship between natural father and child where mother is married to someone else); *Pittsley v. Warish*, 927 F.2d 3, 9 (1st Cir. 1991) (finding no liberty interest in relationship between parent's child and her live-in lover).

378. OHIO REV. CODE ANN. § 2919.25 (Anderson Supp. 1990).

379. See *State v. Hadinger*, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (reviewing trial court's unpublished opinion). The trial court's decision was reversed on appeal. *Id.*

Some of the most tragic stories caused by society's refusal to recognize gay relationships involve the helplessness of the partner of an ill or incapacitated person. In a passage relevant today for AIDS cases as well, one study of older gay men noted:

[M]ost hospital intensive care units allow only immediate relatives to visit. The patient's lover of twenty years may be excluded. If the elderly homosexual is unconscious or otherwise unable to make a decision about his treatment, only the signature of a blood relative is sought. This puts the elderly homosexual in the unenviable situation of having life-and-death decision-making entrusted to an estranged or distant relative, rather than to a partner of long standing.³⁸⁰

Because gay men and lesbians usually lack legal standing to make decisions for an incapacitated partner, conflicts with the blood relatives inevitably arise. The *Kowalski* case is the most notorious example of this, although the underlying conflict is by no means unique.³⁸¹ The details of the conflict between Kowalski's parents and her partner vividly illustrate the discrimination that gay couples face.

In 1983, a drunk driver struck Sharon Kowalski's car, leaving her physically and mentally impaired.³⁸² At the time, she and Karen Thompson had been together as a couple for four years.³⁸³ They had exchanged rings, purchased a house together, and named each other as beneficiaries of their life insurance policies.³⁸⁴ The women had not, however, told their parents they were lesbians.³⁸⁵

The hospital where Sharon Kowalski was taken treated Karen Thompson as a stranger, refusing to inform her of Sharon's status and denying her visitation rights.³⁸⁶ Hours passed before the hospital even told Thompson that Sharon was still alive.³⁸⁷ In the initial period after the accident, Sharon's parents stayed at the couple's house when they visited their daughter and allowed Thompson to visit her in the hospital.³⁸⁸ Thompson spent hours each day with Sharon, assisting with her personal care and therapy.³⁸⁹ After Sharon's father began to

380. BERGER, *supra* note 201, at 194-95.

381. See, e.g., LEWIS, *supra* note 102, at 113; Murdoch, *supra* note 133, at A18.

382. *In re Kowalski*, 382 N.W.2d 861, 862-63 (Minn. Ct. App.), *cert. denied*, 475 U.S. 1085 (1986).

383. Belinda S. Stradley, *Why Can't Sharon Kowalski Come Home?*, 4 BERKELEY WOMEN'S L.J. 166, 169 (1988-89).

384. *Kowalski*, 382 N.W.2d at 863; see also Murdoch, *supra* note 133, at A1.

385. Behrens, *supra* note 179, at A4; Rivera, *supra* note 135, at 896.

386. See Rivera, *supra* note 135, at 896; Ruthann Robson & S.E. Valentine, *Lov[h]ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 515 (1990).

387. Stradley, *supra* note 383, at 168.

388. *Id.* at 170.

389. *Id.*

question the amount of time Thompson spent with Sharon, Thompson told the Kowalskis about the relationship.³⁹⁰

The Kowalskis then began a long fight to keep Thompson apart from their daughter. They successfully petitioned a court to move Sharon several times to locations farther from the couple's home.³⁹¹ Yet Thompson continued to visit Sharon.³⁹² The Kowalskis successfully petitioned to court to give them power to determine visitation, then denied Thompson access to their daughter.³⁹³ During their last visit together, Sharon typed out, "Karen help me. Get me out of here. Take me home with you."³⁹⁴ Thompson would not see Sharon again for three-and-a-half years.³⁹⁵ During a rehabilitation session, Sharon typed "yes" when asked whether she was gay and typed "karen t" when asked the named of her lover.³⁹⁶ In February, 1989, Thompson finally was allowed to see Sharon again.³⁹⁷ At first, Sharon did not recognize her, but then her eyes welled up with tears.³⁹⁸

During the court battles over guardianship and visitation, the Kowalskis consistently denied that their daughter was in a lesbian relationship.³⁹⁹ They claimed, implausibly, that Thompson had made up the story and risked the discrimination that attended her coming out to profit herself and advance the cause of gay rights.⁴⁰⁰ Somewhat inconsistently, Sharon's father accused the court that granted Thompson visitation rights of "legalizing a lesbian relationship."⁴⁰¹ When Sharon's father resigned as guardian, Sharon's court-appointed law-

390. Joanne Linsley, *A Right to Care*, PROGRESSIVE, July 1986, at 15.

391. See *Kowalski*, 382 N.W.2d at 863.

392. Behrens, *supra* note 179, at A4, A6.

393. See Torielli, *supra* note 157, at 221 (1989). This decision was affirmed by a Minnesota Court of Appeals in two different procedural postures. *Kowalski*, 382 N.W.2d at 866-867; *Kowalski*, 392 N.W.2d 310, 314 (Minn. Ct. App. 1986).

394. Murdoch, *supra* note 133, at A18. One of Sharon's doctors testified she reliably communicated a desire to go home with Karen. See John Yewell, *After Tug of War Ends, Sharon Kowalski is Sure to be the Loser*, ST. PAUL PIONEER PRESS-DISPATCH, Dec. 2, 1990, at A9. The trial court in the guardianship proceeding, however, found that Sharon's ability to communicate was inconsistent and unreliable. *Kowalski*, 382 N.W.2d at 865. Sharon did express desire to live with her parents as well. See Behrens, *supra* note 179, at A7.

395. Murdoch, *supra* note 133, at A18. The Kowalskis also prevented Sharon from receiving mail from Thompson. Nadine Brozan, *Woman's Hospital Visit Marks Gay Rights Fight*, N.Y. TIMES, Feb. 8, 1989, at D25.

396. Murdoch, *supra* note 133, at A18.

397. See Stradley, *supra* note 383, at 179.

398. Joyce Murdoch, *Minn. Woman Allowed to See Disabled Lover*, WASH. POST, Feb. 6, 1989, at A18.

399. See Linsley, *supra* note 390, at 15; Torielli, *supra* note 157 at 220 n.3; Rivera, *supra* note 135, at 896. Their attorney called Thompson's claim that the two women were lovers "libelous, slanderous, and defamatory." Robson & Valentine, *supra* note 386, at 515 n.26.

400. Betty Cuniberti, *Just Whose Life Is It?*, L.A. TIMES, Aug. 5, 1988, pt. V, at 4.

401. Murdoch, *supra* note 398, at A18.

yer determined that Thompson was the "best qualified" potential guardian.⁴⁰² The trial court, however, appointed a friend of the Kowalski family rather than Thompson.⁴⁰³ Late in 1991, a Minnesota appellate court finally appointed Thompson as Sharon's guardian.⁴⁰⁴

Obviously, the dispute would not have arisen if Thompson and Sharon Kowalski could have married.⁴⁰⁵ The hospital and the courts, if not the parents, would have allowed Thompson both visitation and guardianship rights without question.⁴⁰⁶ Instead, by 1990, Thompson had been to court more than twenty times and had spent well over \$125,000 in legal fees.⁴⁰⁷

Perhaps the crowning insult was the accusation by the Kowalskis' attorney and the court that Thompson had violated Sharon's rights by making the relationship public.⁴⁰⁸ While the court order barred Thompson from visiting Sharon, the Kowalskis' attorney made a comment which might stand as the moral of the story for non-gay society: "If she had just kept her mouth shut, Thompson would still be visiting Sharon today."⁴⁰⁹

The Kowalski affair and the other cases described in this Subpart reflect our society's unabating refusal to acknowledge or accept gay relationships. The state does not forbid two lesbians from living together or raising children together;⁴¹⁰ it merely denies them the benefits that would require it to publicly recognize the relationship. The comment of the Kowalskis' attorney is part of a pattern: society tol-

402. Yewell, *supra* note 394, at A8.

403. Nadine Brozan, *2 Sides Are Bypassed in Lesbian Case*, N.Y. TIMES, Apr. 26, 1991, at A12.

404. See Tamar Lewin, *Disabled Woman's Lesbian Partner Is Granted Right to Be Her Guardian*, N.Y. TIMES, Dec. 18, 1991, at A15.

405. Stradley, *supra* note 383, at 172.

406. For example, Sharon's parents and friends argued that Thompson was unqualified because she was domineering and manipulative and wanted to run Sharon's life. See, e.g., Behrens, *supra* note 179, at A5-A6; Yewell, *supra* note 394, at A8, A10. A court almost certainly would not have entertained this argument if Thompson were Sharon's husband.

Commentators have suggested that the dispute also would have been avoided had Sharon executed a durable power of attorney. See, e.g., Murdoch, *supra* note 133, at A18; Stradley, *supra* note 383, at 169. Of course, this requires a gay couple to take a step that married couples do not have to take, a step that requires them to think about the uncomfortable subjects of severe illness and accidents.

407. David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOYOLA L.A. L. REV. 1055, 1135 (1990).

408. See Behrens, *supra* note 179, at A7; LAMBDA UPDATE, *supra* note 328, at 10, 13.

409. Behrens, *supra* note 179, at A6.

410. The state could do more. For example, it could attempt to enforce sodomy statutes by investigating two adults of the same sex who live together, it could locate children living with gay couples and remove them, et cetera.

erates gay men and lesbians so long as they carefully hide their sexual orientation.

3. CONCEALMENT OF GAY LIFE BY NON-GAY SOCIETY

Our culture does not merely punish open expressions of gay sexual orientation. It also ignores or actively represses information about gay issues.⁴¹¹ Editors have censored references to same-sex love and relationships, sometimes going so far as to alter pronouns.⁴¹² The military has constantly suppressed information on the contributions of lesbians and gay men and its own internal reports of their fitness for service.⁴¹³ And society generally fails to acknowledge that many famous people have been homophiles.⁴¹⁴ As one gay author noted,

[H]omosexuals have been a people almost totally without a history. Moreover, the fragments of history that do exist are still largely kept from the view of the general public. High school teachers generally do not mention Leonardo da Vinci's sexual proclivities, or Walt Whitman's or Oscar Wilde's or Henry James's or E. M. Forster's or W. H. Auden's; they usually treat the homosexuality of ancient Greece as classified information, if they are familiar with it at all.⁴¹⁵

High school sex education courses often do not mention homophile behavior except as a form of deviance that students should avoid,⁴¹⁶ and college-level sex-education texts tend to confine same-sex couples to separate chapters,⁴¹⁷ reinforcing the pre-understanding that gay sexuality is different in kind.⁴¹⁸

Until recently, few books were available that discussed gay issues

411. See BLUMENFELD & RAYMOND, *supra* note 93, at 258-59; HIDDEN FROM HISTORY, *supra* note 326, at 1, 3-4; Del Martin & Phyllis Lyon, *Anniversary*, in THE LESBIAN PATH, *supra* note 95, at 143, 145.

412. BLUMENFELD & RAYMOND, *supra* note 93, at 258-59; LEWIS, *supra* note 102, at 9.

413. See BERUBE, *supra* note 96, at 270.

414. See Eric Rofes, *Opening Up the Classroom Closet: Responding to the Educational Needs of Gay and Lesbian Youth*, 59 HARV. EDUC. REV. 444, 452 (1989).

415. BROWN, *supra* note 144, at 41.

416. BLUMENFELD & RAYMOND, *supra* note 93, at 30; LEWIS, *supra* note 102, at 122; Law, *supra* note 18, at 194 & n.33. In South Carolina, "any discussion of homosexuality is barred by law in sex education for grades K-7, and any discussion of homosexuality beyond grade 7 must be placed in the 'context of instruction concerning sexually transmitted diseases.'" SEARS, *supra* note 40, at 25 (quoting S.C. CODE ANN. § 59-32-30 (Law. Co-op. 1976)).

417. Marilyn Myerson, *Sex Equity and Sexuality in College Level Sex Education Courses*, 64 PEABODY J. EDUC. 71, 74 (1987). The same article notes that "marriage functions as the ultimate point of reference" in these texts, two of which classify sexuality in the following categories: "premarital, marital, extramarital, postmarital." *Id.* at 79. This classification scheme reinforces the notion that gay relationships are both different and unimportant.

418. See *supra* part III.A.

in anything like a positive way.⁴¹⁹ One author remembers trying to explore his gay identity during the 1960s:

[M]ost books written about homosexuality—including those found in school and public libraries—treated the condition negatively, as a crime, a sickness or a sign of moral disorder. Sometimes these books were kept in a special section of the library. Young people could obtain them only with a special pass or their parents' consent. This reinforced the idea that homosexuality was something so gruesome that it had to be hidden from impressionable children.⁴²⁰

More recently, gay activists gave copies of books presenting positive information about gay life to a high school after one of its gay students committed suicide. The school refused to put the books in its library.⁴²¹

The popular media, until very recently, largely ignored the existence of homophilic behavior and of gay people.⁴²² Even in recent years, most of the few gay characters in television and movies conform to negative stereotypes.⁴²³ When gay people are portrayed in movies or on television, their "gayness" is often an "issue" being "dealt with"; rarely are there gay people who are comfortable with their own sexual orientation.⁴²⁴

The mainstream press, partially out of a desire not to expose the private lives of public figures, consistently has withheld information

419. See, e.g., *INVENTING OURSELVES*, *supra* note 39, at 4 ("Before the 1970s most of the literature about lesbianism promised us desperate, lonely lives which would end in suicide or alcoholism . . ."); *TIMMONS*, *supra* note 143, at 41 (noting that Harry Hay was discouraged from entering the practice of law by negative statements about homosexuality in *Blackstone's Commentaries*).

420. Monteagudo, *supra* note 132, at 210; see also *LEWIS*, *supra* note 102, at 25. Note that the arrangement Monteagudo describes also requires the young people to reveal their interest in gay issues to an adult to get any information, which certainly would have a deterrent effect on their use of the materials.

421. *SEARS*, *supra* note 40, at 369.

422. See Camille J. Gerstel et al., *Widening Circles: An Ethnographic Profile of a Youth Group*, in *GAY AND LESBIAN YOUTH*, *supra* note 40, at 75, 76; see also *BLUMENFELD & RAYMOND*, *supra* note 93, at 352 (noting that television for a long time portrayed only white, middle-class, heterosexual families).

423. See, e.g., *BLUMENFELD & RAYMOND*, *supra* note 93, at 367; *BROWN*, *supra* note 144, at 41-42; see also *Law*, *supra* note 18, at 193 (noting that movies and television seldom present ordinary people who are gay); *INVENTING OURSELVES*, *supra* note 39, at viii; Steve Weinstein, *Back into the Closet*, L.A. TIMES, Apr. 7, 1991 (Calendar Section), at 5.

424. See Larry Gross, *Out of the Mainstream: Sexual Minorities and the Mass Media*, in *GAY PEOPLE, SEX, AND THE MEDIA* 19, 31-32 (Michelle A. Wolf & Alfred P. Kielwasser eds., 1991); Weinstein, *supra* note 423, at 5; see also Rex Wochner, *CBS Should Interview Us*, WKLY. NEWS, July 4, 1990, at 5 (complaining about television program that looked only at people who had problems being gay and did not present those who accepted their sexual orientation).

about homophile behavior. The controversy about "outing" public figures⁴²⁵ has a distinguished lineage. John Steinbeck, a correspondent during the Second World War, acknowledged that he and his colleagues knew about same-sex sexual activity in the military during the war, but had not reported it "to protect the armed services from criticism."⁴²⁶

Lesbians are even more invisible than gay men.⁴²⁷ This is hardly surprising, given the relative invisibility of women's issues and viewpoints throughout our culture.⁴²⁸ Many women as they grow up are unaware of the existence of women who loved women⁴²⁹ or even of the word "lesbian."⁴³⁰ One lesbian emigree, interviewed in the late 1970s, noted,

Where would you learn in America until a year ago that there are lesbians? Your history books do not mention famous lesbians—that some were even queens, like Queen Christina of Sweden, that some were fighters in your revolution, like Deborah Samson. Your children's fairy tales are full of Prince Charmings and their women. Your afternoon television that shows everything from drugs and adultery and murder and abortion does not mention it. Even in your obituaries it is not written that 'Gertrude Stein was survived by her lover of forty years, the woman Alice B. Toklas.' Your commercial advertising tells women to buy perfumes, clothes, makeups, stockings, hair dyes—all to attract *him*. Your novels do not mention it. Even your literary classics do not mention it.⁴³¹

425. "Outing" is the recent practice of some more militant gay activists of publicly revealing the gay sexual orientation of public figures. The practice has proved controversial within the gay community. See, e.g., *To "Out" Or Not To "Out": Activists Debate the Ethics of Forcing Public Figures Out of the Closet*, WKLY. NEWS, Apr. 18, 1990, at 3. For a good discussion of the legal and moral issues raised by outing, see David Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 U. MIAMI L. REV. 711 (1992).

426. BERUBE, *supra* note 96, at 272.

427. See, e.g., BERGER, *supra* note 201, at 13; Herdt, *supra* note 121, at 12, 25; Schneider, *supra* note 40, at 111; Julie Temaki, *Q & A: Her Mission: Directing Outreach to Gays and Lesbians*, L.A. TIMES, Dec. 22, 1991, at J1. On the silence surrounding lesbian issues generally, see, e.g., JOHNSON, *supra* note 136, at 15; THE LESBIAN PATH, *supra* note 95, at xi. Some lesbians have complained that their contributions even to the gay rights movement and to the women's movement have been ignored. See PHARR, *supra* note 20, at 50-51; Dell Richards, *Historians Have History of Ignoring Lesbians*, WKLY. NEWS, June 6, 1990, at 13; see also Cain, *supra* note 19, at 198-204 (noting absence of discussion of lesbian issues in feminist legal theory).

428. See Sallyanne Payton, *Releasing Excellence: Erasing Gender Zoning from the Legal Mind*, 18 IND. L. REV. 629, 641 (1985).

429. THE LESBIAN PATH, *supra* note 40, at xi.

430. See, e.g., LEWIS, *supra* note 102, at 20; cf. Behrens, *supra* note 179, at A5 (reporting that woman didn't hear the word "gay" until she was in college).

431. LEWIS, *supra* note 102, at 21.

By contrast to even the recent past, discussion of gay issues in the United States in the past two or three years probably is at an all-time high.⁴³² Even today, however, when networks attempt gay plots on established shows, they risk boycotts from advertisers and nasty letter-writing campaigns.⁴³³ The publicity surrounding these controversies sends to gay people the message that public presentation of gay lives and discussion of gay issues is inappropriate. As the next Subpart demonstrates, this message is one that we receive all the time.

4. "FLAUNTING"

One *Time* magazine story began with the charming phrase, "The love that once dared not speak its name now can't seem to keep its mouth shut."⁴³⁴ This phrase demonstrates the source of much of the discrimination already described in this Subpart: even non-gays who favor some measure of gay rights may be uncomfortable with public discussions or reminders of a person's gay sexual orientation.⁴³⁵ A common complaint is, "I don't care what those/you people do in the bedroom, but do they/you have to flaunt it?"⁴³⁶ Even where gay people participate fairly fully in non-gay community life, they understand that they must be more "discreet" than their heterosexual counterparts.⁴³⁷ Again, the message is that the "problem" is not being gay, but letting people know that you are.⁴³⁸

432. For example, the *New York Times*, which at one point refused to use the word "gay" at all, now seems to run gay-related stories on a daily basis. The daytime talk shows seem to do sensationalist gay stories every couple of weeks. AIDS also has brought gay issues to the attention of the media.

433. Steve Weinstein, *supra* note 423, at 5 (describing advertisers withdrawing sponsorship of episodes with gay characters and television executives' resulting reluctance to air them); Rex Wockner, *American Family Association Targets PBS*, WKLY. NEWS, June 12, 1991, at 33 (describing letter-writing campaign against PBS stations running gay and lesbian programming).

434. See BLUMENFELD & RAYMOND, *supra* note 93, at 354.

435. See, e.g., *id.* at 354 (noting that gay liberation's attempts to make gay issues matters of public discussion challenged even liberal intellectuals, who tended to see them as private matters); Dalton, *supra* note 87, at 7 (commenting that society's acceptance of gay people "is usually conditioned on a tacit agreement to keep silent about much that matters, and much that marks the self as distinctive").

436. See, e.g., LEWIS, *supra* note 102, at 12, 87; PHARR, *supra* note 20, at 28-29, 33; SEARS, *supra* note 40, at 115; Jay Vail, *News Round Up*, WKLY. NEWS, Aug. 1, 1990, at 36.

437. See PHARR, *supra* note 20, at 27-28; SILVERSTEIN, *supra* note 72, at 137.

438. See, e.g., SEARS, *supra* note 40, at 185 (noting that in Southern culture, private sexual behavior is tolerated until it becomes public knowledge); Weinstein, *supra* note 423, at 5 (reporting talk show audience member's statement: "I liked it better when they were in the closet."). Some people, of course, feel discomfort from any open displays of sexuality. See, e.g., *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990). In *Pfeiffer*, a pregnant high school girl chose to bear her child rather than abort it as many teens would have done. The school removed her from the National Honor Society. The Third Circuit suggested

Many stories reinforce the idea that gay people are tolerated less than children: we should neither be seen nor heard.⁴³⁹ For example, officials of a Kentucky bank required that an employee step down as President of a gay organization if he wanted to retain his job. They allowed him to remain a member of the organization, so long as his participation "did not become public knowledge."⁴⁴⁰ A school district official indicated that the "central issue" in the district's decision to transfer a gay teacher to a non-teaching position was "that he was an advertised, activist homosexual."⁴⁴¹

One lesbian couple was awarded an official certificate of honor on the occasion of their twenty-fifth anniversary "and for their years of devoted service to San Francisco." The debate on the resolution to grant the award included comments that reflect the flaunting issue. One supervisor "claimed that some citizens had moral reservations about such relationships and that the Board 'shouldn't rub their noses in it.'" Another "declared he could sum up his feelings in just four words: 'Toleration, yes—glorification, no!'"⁴⁴²

Gay people receive the clear message that to defend our rights is to step out of our place. One woman, opposing a gay-rights bill in Rhode Island, said, "We know there are many homosexuals working in [jobs in religious schools and service organizations] now and as long as they are afraid of discrimination because of their behavior, they won't act up."⁴⁴³

that the removal would have been illegal sex discrimination if prompted by her pregnancy, but that the evidence supported the trial court's finding that the cause was her sexual activity. They remanded the case to require the District Court to hear evidence that the school treated sexually active boys differently from sexually active girls. *Id.* at 780. The court neglected to observe that, in most cases, it is considerably easier to determine if a pregnant girl has had sex than to make the same judgment about a boy. The court also neglected to observe that the effect of their decision was to punish the girl for calling attention to her misconduct by not having an abortion, an act that many people would consider a greater sin than sexual activity. While the case may suggest that society disfavors any public proclamations of sexual activity, I think it also suggests that society exercises discretion in these matters in discriminatory ways.

439. See, e.g., *Acanfora v. Board of Educ.*, 350 F. Supp. 843, 847 (D. Md. 1973) (recounting expert testimony that homosexual high school teachers are detrimental to education when "known" to students), *aff'd*, 491 F.2d 498 (4th Cir. 1974); see also KLEINBERG, *supra* note 96, at 71 ("Men who are suspected of being homosexual but are married or living in a heterosexual arrangement are usually tolerated more than open homosexuals, though the rationale for this is complicated.").

440. See *Dorr v. First Kentucky Nat'l Corp.*, 796 F.2d 179 (6th Cir. 1986).

441. *Acanfora*, 491 F.2d at 503 n.4. A study of high school and junior high principals found that less than 10% indicated they would fire teachers simply for being gay; more than one half would fire teachers for disclosing their gay sexual orientation to the children. SEARS, *supra* note 40, at 399-400.

442. Martin & Lyon, *supra* note 411, at 144.

443. Jeffrey Newman, *Opposition Attacks R.I. Gay-Rights Bill*, WKLY. NEWS, June 6, 1990, at 8.

Blood relatives of gay people often are concerned with flaunting, perhaps because they are concerned that a family member's gay orientation will reflect badly on them. While parents may tell their gay children they love and accept them, they also are likely to warn them not to "advertise it" or not to participate in gay activities.⁴⁴⁴ These concerns also can arise for heterosexual children of gay parents. One lesbian mother explains:

Before my oldest child will invite his friends over, he combs the house to make sure that all books with "lesbian" in the title are in my room and that the "*Lesbian Concentrate*" record is safely hidden behind *Tosca*. The other children seem less afraid of people outside the family knowing I am a lesbian, although they always remind me not to wear my "Support Gay Teachers and School-workers" button to Open House at their school.⁴⁴⁵

Military regulations regarding same-sex sexual activity also demonstrate the idea that public statements are more offensive than private behavior. The military now allows people who commit same-sex acts to stay in service if they do not "profess or demonstrate proclivity to repeat such an act."⁴⁴⁶ On the other hand, the military continues to try to discharge gay service personnel who come out, even without evidence of any sexual activity.⁴⁴⁷ Thus, gay personnel who get caught once doing same-sex sexual activity, but successfully convince authorities they will not do it again, are less likely to be discharged than those who do not violate regulations but tell the truth about their sexual orientation.⁴⁴⁸

Unsurprisingly, court decisions reflect society's belief that gay sexual orientation is not appropriate stuff for public discussion. In *People v. Onofre*,⁴⁴⁹ for example, the New York Court of Appeals justified its extension of a right to privacy to cover consensual same-sex sexual activity, in part, by relying on *Stanley v. Georgia*,⁴⁵⁰ in which the Supreme Court found that people have the right to have obscene material in their homes.⁴⁵¹ While the court's reliance on *Stanley*

444. See, e.g., JAY & YOUNG, *supra* note 104, at 72; Mike Hippler, *Ride 'em Cowperson, The National Reno Gay Rodeo*, in GAY LIFE, *supra* note 107, at 219, 221.

445. Cathie Nelson, *A Flower for Judith*, in THE LESBIAN PATH, *supra* note 95, at 19, 25.

446. SEC/NAV Instruction 1900.9C para. 6b (Jan. 20, 1978), *quoted in* Dronenburg v. Zech, 741 F.2d 1388, 1389 n.1 (D.C. Cir. 1984).

447. See, e.g., *Pruitt v. Cheney*, 943 F.2d 989, 990-91 (9th Cir. 1991); *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990) (per curiam); *benShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989).

448. For similar analyses of army and CIA policies, see Halley, *supra* note 4, at 951-53, 956-58.

449. 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981).

450. 394 U.S. 557 (1969).

451. *Id.* at 568.

might have been simply an attempt to distinguish the conduct at issue from public sexual activity, its use of the case shows that the court "tolerates homosexuality at the price of demeaning it; it puts homosexual intimacy on a par with obscenity—a base thing that should nonetheless be tolerated so long as it takes place in private."⁴⁵²

In *McConnell v. Anderson*,⁴⁵³ a gay man challenged the decision of the University of Minnesota to withdraw a job offer to him after he applied for a marriage license with his partner.⁴⁵⁴ The court, after referring to the application as an "antic,"⁴⁵⁵ held that the University had not violated McConnell's rights.⁴⁵⁶ Its language demonstrates the concern about flaunting:

[T]his is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is, instead, a case in which . . . the prospective employee demands . . . 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. . . . We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands.⁴⁵⁷

This statement reveals some of what is at stake here. If gay people lead "clandestine" lives, others need not admit that they know of them or approve of them. The "extravagant demand" inherent in public acknowledgement of a gay sexual orientation is forcing onlookers to take sides. And, as we have seen, if people appear to support gay rights, they risk accusations that they are gay as well.

While custody battles are difficult for divorced gay parents in general,⁴⁵⁸ the nature of some divorce decrees allowing visitation

452. Sandel, *supra* note 315, at 537. Sandel argues that if the Court intended to positively value same-sex intimacy, it would have relied more on *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its positive view of the role of sex in intimate relations. Sandel, *supra* note 315, at 537.

453. 451 F.2d 193 (8th Cir. 1971).

454. *Id.* at 194.

455. *Id.* at 195 n.4.

456. *Id.* at 196.

457. *Id.* (emphasis in original). The court made a similar argument in *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 856 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), noting that "a sense of discretion and self-restraint must guide [a gay teacher] to avoid speech or activity likely to spark . . . public controversy" and referring to the teacher's attempts to raise public support after he was transferred to a non-teaching position as "repeated, unnecessary, appearances on local and especially national news media."

458. See, e.g., LEWIS, *supra* note 102, at 115-16; Law, *supra* note 18, at 190 & n.12; Walters & Elam, *supra* note 371, at 109. Gay people involved in custody situations have to be careful

rights further illustrates the flaunting issue.⁴⁵⁹ In one New Jersey case, the court told a divorced gay father he had a right to spend time with his child regardless of his sexual orientation. However, the terms of the custody order forbade him from seeing his children in the presence of his lover or in their joint home, or from discussing gay issues with the children.⁴⁶⁰ In another case, two lesbian lovers were awarded custody of their respective children on condition that the women live apart.⁴⁶¹ In these cases, the court simply could deny custody or visitation if it felt that gay sexual orientation itself made the parent unfit to associate with the child. Instead the court chose only to limit public acknowledgement or display of the parents' gay identity.

The message about flaunting is heard loud and clear by most lesbians and gay men.⁴⁶² One woman put it succinctly:

As long as we don't mention anything explicitly, the "outside world" is willing to tolerate us, in fact, to like and value us. We know, though, that they have little conscious awareness, really, of who we are. And if they did know, we fear their friendship and support would evaporate. We maintain a constant vigilance, no less damaging just because it has become second nature.⁴⁶³

As the next Subpart demonstrates, substantial costs accompany the concealment, the "constant vigilance," that results from discrimination against public behavior and society's concern with flaunting.

B. *Gay Stories: Concealment and Its Costs*

[W]e were woefully uninformed and unutterably lonely. Hiding from heterosexuals, we simultaneously succeeded in concealing who we were from one another. And, of course, the homosexual

not to let their ex-spouse know of their sexual orientation to avoid the risk of losing rights to custody or visitation. See, e.g., KLEINBERG, *supra* note 96, at 75.

459. See Law, *supra* note 18, at 191 & n.15 (citing cases).

460. *In re J., S. and C.*, 324 A.2d 90, 92, 97 (N.J. Super. 1974). Parents sometimes reach similar arrangements in settlements without judicial intervention. See JAY & YOUNG, *supra* note 104, at 135.

461. DAVID ROSEN, *LESBIANISM: A STUDY OF FEMALE HOMOSEXUALITY* 74 (1974); see also Brown, *supra* note 144, at 127 (noting situation where ex-wife threatened to cut off visitation unless gay man sees children without lover present); MCWHIRTER & MATTISON, *supra* note 96, at 100 (reporting arrangement in which gay man could see his children only once a month and only without his lover present).

462. In the context of constant strong messages about flaunting, liberal arguments that focus on abstract neutral principles often feel like variations on the same theme. These arguments begin to sound a lot like: "We will tolerate you because of the principles for which we stand, which include the tolerance of those we despise, but we have no interest in hearing your stories or doing anything others might see as validating your lives." This certainly was my gut-level reaction to the Respondent's Brief in *Bowers*.

463. JOHNSON, *supra* note 136, at 286-87.

physicians on the faculty hid, too. Thus, there was not a single older homosexual we could talk to or in whose life we could find a model on which to pattern our own. We were a doubly lost generation.⁴⁶⁴

This reminiscence of a gay medical student demonstrates the natural result of the discrimination against public gay behavior: most gay people lead a hidden existence with significant details of their lives kept from most, if not all, of their acquaintances, friends, and family members. This Subpart details the lengths gay people go to remain in the closet and the serious emotional costs that concealment generates.

1. SELF-CONCEALMENT

At a gay-pride parade in Fort Lauderdale last year, one man "wore a lone ranger mask to avoid recognition. 'I'm proud to be in this campaign,' he said, 'but I don't want to lose my job either. I have to make a living.'"⁴⁶⁵ Although there is more openness about sexual orientation today than there has been in the past,⁴⁶⁶ gay people still often feel that they must mask aspects of their lives, though not often in quite so literal a fashion.

Homophiles who have not self-identified as gay rarely advertise their same-sex sexual attractions or sexual activity.⁴⁶⁷ Many who do self-identify as gay pretend to be heterosexual in most public situations.⁴⁶⁸ This often can be done merely by being secretive about one's private life;⁴⁶⁹ most people will assume a person is heterosexual in absence of contrary "evidence," such as behavior "appropriate" to the other gender.⁴⁷⁰

However, since people tend to discuss their family life and romantic interests with their relatives and co-workers, extended silence on these topics may raise suspicions. Rather than deal with

464. BROWN, *supra* note 144, at 39.

465. *1,500 March in Gay Pride Parade*, MIAMI HERALD, July 1, 1991, at 3B. Similarly, in Idaho, an organizer of the first gay march in Boise in 1990 warned that people would wear paper bags over their heads to preserve their jobs. See *Activists Plan Boise's 1st Gay Pride March*, WKLY. NEWS, May 30, 1990, at 31.

466. See, e.g., BROWN, *supra* note 144, at 244-46; LEWIS, *supra* note 102, at 182.

467. We know this not because of any studies of non-gay homophiles, but rather because we have never seen it happen. Try to remember the last time you heard a man say to a group of apparently non-gay people, "Well, I'm straight, but I have slept with other men a few times." As Janet Halley has pointed out, "The legal burdens imposed on homosexuality in our society deter people from *appearing* gay." Halley, *supra* note 4, at 947.

468. See *Seebol v. Farie*, No. 90-923-CA18, slip op. at 15 (Fla. Cir. Ct. Mar. 15, 1991); BLUMENFELD & RAYMOND, *supra* note 93, at 30; PHARR, *supra* note 20, at 72.

469. See BLUMENFELD & RAYMOND, *supra* note 93, at 369.

470. See Herdt, *supra* note 121, at 5. For discussion of the cross-gender stereotype, see *infra* part V.A.

curious questions or the potential costs of coming out to family⁴⁷¹ or employers,⁴⁷² some gay people employ deception of one form or another. Some will participate in anti-gay joking.⁴⁷³ Some change the relevant pronouns when they refer to their lovers.⁴⁷⁴ Others may "date" members of the other sex.⁴⁷⁵ One woman recalled:

I got by for years with made-up boyfriends. I had to have something to tell the women I worked with. Finally, after they kept pressing to meet this fabulous guy, I invented a fiance in the war in Vietnam to keep them off my back. On the day I split up with my lover I couldn't hide my heartbreak from my coworkers. I told them my fiance had been killed in the war. That got me by for about a year. Then I quit and moved on to another job.⁴⁷⁶

The sanctions for public behavior are sufficiently strong that people are discouraged from connection with any gay activity; gay literature, or, worst of all, advocacy of gay issues.⁴⁷⁷ Every gay organization to which I have belonged has had to go through complex machinations to notify its members of events without letting anyone

471. Gay people find coming out to their families extremely difficult. See, e.g., LEWIS, *supra* note 102, at 107-08. The process is not aided by the knowledge of horror stories of what happens when families find out. Parents tell their children they would rather see them dead than gay. See, e.g., *id.* at 109; PHARR, *supra* note 20, at 68. One Jewish family read the Prayer for the Dead for their daughter after she came out to them. LEWIS, *supra* note 102, at 12. One teenager was beaten and thrown out of his house with his arm broken by his parents after they discovered gay informational literature in his bedroom. See Hentoff, *supra* note 326, at 166.

Perhaps the worst story I came across concerned a fire in a New Orleans gay bar in which 32 gay men lost their lives. One gay man recalled, "Relatives were asked to come to the city morgue to identify the bodies. Do you know that many of the parents of these gay men refused to come down and identify the bodies of their own children? That is the very lowest point of tolerance on the human scale—to refuse to claim the remains of your own flesh and blood." BERGER, *supra* note 201, at 75.

This rejection by family distinguishes us from most other disadvantaged groups. As one writer bluntly put it, "Other disrespected groups of people—Blacks, Jews, women—though they suffer stigma and injustice, learn at least a feeble sense of self-worth and belonging from their families. At worst they have a meager social place. Fags have none." Darrell Y. Rist, *On Hating Ourselves*, in GAY LIFE, *supra* note 107, at 45, 50.

Not all family responses are negative. See, e.g., BERGER, *supra* note 201, at 83. Some families, including my own, have been loving and supportive.

472. See, e.g., Law, *supra* note 18, at 192 (federal and state governments frequently deny employment to openly gay people and most jurisdictions tolerate private discrimination). Again, not everyone's experiences are negative. See, e.g., SILVERSTEIN, *supra* note 72, at 132 (co-workers held reception for two gay men when they married).

473. See, e.g., JAY & YOUNG, *supra* note 104, at 75, 141; LEWIS, *supra* note 102, at 90; Troiden, *supra* note 42, at 57.

474. See BLUMENFELD & RAYMOND, *supra* note 93, at 369.

475. See LEWIS, *supra* note 102, at 89; SEARS, *supra* note 40, at 126-27.

476. LEWIS, *supra* note 102, at 89.

477. See, e.g., *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 974 (E.D. Wis. 1980); *Seebol v. Farie*, No. 90-923-CA18, slip op. at 15 (Fla. Cir. Ct. Mar. 15, 1991); BERGER, *supra* note 201, at 9; SEARS, *supra* note 40, at 32-33.

else know that the members were part of a gay organization.⁴⁷⁸

Gay couples constantly deal with issues of self-disclosure.⁴⁷⁹ They may invent stories to explain their spending time together.⁴⁸⁰ When together in public places, they often refrain from public displays of affection that might be considered normal for heterosexual couples.⁴⁸¹ When relatives visit, gay couples may rearrange the furniture to make it appear as though they have separate bedrooms and may hide items they believe are "incriminating."⁴⁸² One lesbian couple that lived together installed a timer for the lights in the unused bedroom "so our neighbors, should they look, would see that two bedrooms appeared to be in use."⁴⁸³ Sometimes couples will live apart to avoid detection.⁴⁸⁴

Perhaps the ultimate form of concealment for homophiles is to enter into a heterosexual marriage,⁴⁸⁵ perhaps under the impression

478. I remember one meeting of a gay organization at which we discussed putting notices in people's mail slots. Because the slots were open to the public, we decided to staple any correspondence so that a non-gay person thumbing through the materials in someone else's slot would not inadvertently see the contents. Someone then expressed concern that word would get out that the gay organization used staples and that stapled material in the mail slot would then give people away.

A related concern exists about press interviews. For example, at the opening of a Connecticut gay community center, a local reporter was generally given only the first names of those attending. See Hentoff, *supra* note 326, at 98. This type of concern exists even for people who are not gay. Janet Halley notes a story about a group of New York lawyers who did not wish to be photographed at a gay rights benefit, for fear others would assume they were gay. See Halley, *supra* note 4, at 970 (citing *Concern Over AIDS Helps Rights Unit*, N.Y. TIMES, May 3, 1987, at 43).

479. McWHIRTER & MATTISON, *supra* note 96, at 3.

480. See, e.g., SILVERSTEIN, *supra* note 72, at 309 (reporting that one member of a couple called the older man his uncle to avoid detection).

481. See PALLONE & STEINBERG, *supra* note 208, at 156-57; Jane Gross, *A Milestone in the Fight For Gay Rights: A Quiet Suburban Life*, N.Y. TIMES, June 30, 1991, at 16 (noting that suburban men and women curb displays of affection "in deference to their heterosexual neighbors"). This is true even with couples who are open about and comfortable with their sexual orientation. McWHIRTER & MATTISON, *supra* note 96, at 224.

482. See, e.g., Richard Plant, *I Was a Double Alien: An Emigre Faces Gay Life in America*, in GAY LIFE, *supra* note 107, at 267, 271; Rist, *supra* note 471, at 51-52.

483. LEWIS, *supra* note 102, at 90.

484. See, e.g., BROWN, *supra* note 144, at 8.

485. See, e.g., BARRETT, *supra* note 191, at 98; see also KLEINBERG, *supra* note 96, at 71 (noting that gay men who have been married avoid suspicion or detection far more easily than those who have not); ISAY, *supra* note 139, at 65; JAY & YOUNG, *supra* note 104, at 130; SILVERSTEIN, *supra* note 72, at 225; Halley, *supra* note 4, at 934 ("[H]omosexuals who experience their sexual desire as immutably oriented towards persons of their own sex nevertheless may be coerced to pretend that they conform to the norm of heterosexuality."). Sometimes gay men and lesbians will marry each other as a form of joint concealment. See, e.g., BERUBE, *supra* note 96, at 262; LEWIS, *supra* note 102, at 92.

that marriage will end same-sex attractions.⁴⁸⁶ These marriages can be disastrous for the participants because the element of sexual desire may be totally lacking on the part of one party.⁴⁸⁷ Many of these marriages end in divorce,⁴⁸⁸ although sometimes the parties work out amicable arrangements within the marriage.⁴⁸⁹

Even for those of us who choose to be completely open about our sexual orientation, the choice to hide constantly recurs. Each time gay men and lesbians meet a new person or interact with a new group of people, we must decide whether to come out yet again.⁴⁹⁰ This repeated decisionmaking and coming out can be quite stressful. Yet avoiding the costs of concealment, detailed in the next Subpart, make the tensions of coming out worthwhile for many of us.

2. COSTS OF CONCEALMENT

The concealment that gay people impose on ourselves and that is imposed on us by society harms us in several respects.⁴⁹¹ It puts at

486. See, e.g., JAY & YOUNG, *supra* note 104, at 58-59, 120; BERGER, *supra* note 201, at 131.

487. See, e.g., BROWN, *supra* note 144, at 113; COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, GREAT BRITAIN, WOLFENDON REPORT (1957), *quoted in* ISAY, *supra* note 139, at 108; *see also* BROWN, *supra*, at 26 (reporting belief of a gay man who was married and had three children that "a man's failure to discover his sexual nature before he married could result only in bitterness and pain for both partners"). Many stories exist about gay people unhappy in marriages with heterosexual partners. See, e.g., BERGER, *supra* note 201, at 132; McWHIRTER & MATTISON, *supra* note 96, at 98; SILVERSTEIN, *supra* note 72, at 99.

488. ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES* 161, 163, 167 (1978).

489. See *supra* text accompanying notes 291-93.

490. See, e.g., JAY & YOUNG, *supra* note 104, at 144; LEWIS, *supra* note 102, at 161. This constant set of choices makes our experience different from that of other excluded groups such as racial minorities, who have no choice about whether to disclose their status as "other." While some have argued that this makes our experience easier (and perhaps less worthy of empathy) than that of, for example, African-Americans, *see, e.g.*, Paul Varnell, *Observer's Notebook*, WKLY. NEWS, June 27, 1990, at 5 (citing examples), I would argue that the experience simply is different and that trying to decide who has it "easier" is an unhelpful exercise. Gay men and lesbians are not generally instantly identifiable and therefore often are spared disdainful looks and remarks from people they do not know. On the other hand, the costs of hiding otherness are high, *see infra* part IV.B.2., and gay people must face the stress of constantly making decisions about coming out.

Perhaps a comparable experience in our society is the extent to which women need to make decisions about "where and when to walk, whom to talk with, and what to wear" in order to try to avoid being subject to male violence. Dick Bathrick & Gus Kaufman, Jr., *Male Privilege and Male Violence: Patriarchy's Root and Branch*, in *MEN & INTIMACY*, *supra* note 89, at 111, 114.

491. Concealment does have certain limited advantages. Because many people don't suspect people of being gay unless they conform to certain stereotypes, same-sex couples can often carry on relationships or sexual activity without arousing suspicion. See Sears, *supra* note 40, at 319. One woman reported that she and her lover never had trouble checking into the same room in a hotel because they were "two nice looking women"—"Who would suspect [we] were going to go up and make love!" BERUBE, *supra* note 96, at 105-06.

risk our self-esteem and mental health. It limits our ability to build community. And it prevents young homophiles from coming to terms with their gay identities. This Subpart documents some of these costs.⁴⁹²

a. Individual Mental Health

Many gay people speak of coming out as liberating and emotionally helpful.⁴⁹³ One commentator noted: "The most tangible, personal result of coming out is being more comfortable with ourselves about being gay. Because then we discover how much better it feels to be honest than to hide. Less nervous. More relaxed. Happier."⁴⁹⁴ Conversely, the inability to talk about one's life yields high emotional costs. The pressure to maintain a concealed identity can be extremely stressful.⁴⁹⁵ As one lesbian noted, "the need to lie to the world about the most important part of my life has always been painful."⁴⁹⁶ If you must make sure that your family or co-workers are in the dark, you must constantly think about everything you say and much of what you do to insure both secrecy and consistency with whatever stories you are telling.⁴⁹⁷

Being out makes it easier to find potential partners and to enter and carry on long-term relationships.⁴⁹⁸ In addition, the stresses of concealment often make it difficult to maintain those relationships that do form.⁴⁹⁹ One man who believes his most significant relation-

492. Concealment also can interfere with assertion of some legal claims. Karen Thompson found people questioned her claim that she and Sharon Kowalski were lovers because they hadn't been public. *See supra* text accompanying notes 399-400. She commented bitterly, "I spent four years hiding [the relationship] and 4 1/2 years trying to prove it." Murdoch, *supra* note 133, at A1. One gay advocate said "the lesson to be learned is not to hide your relationships." Linsley, *supra* note 390, at 15. A number of gay people who did not report anti-gay violence to the police expressed fear that reporting might result in disclosure of their sexual orientation to the public at large. *See* Henthoff, *supra* note 326, at 96.

493. TIMMONS, *supra* note 143, at 29 (quoting one boy, after realizing that there were other gay men: "Suddenly my world was transformed into a whole wonderful different place . . ."); *see also* Law, *supra* note 18, at 212; Varnell, *supra* note 100, at 4 (reporting gay man's description of coming out as "exhilarating," noting that it made him feel "liberated").

494. Mort Jonas, *We Have Special Role to Play*, WKLY. NEWS, Oct. 31, 1990, at 5, 19.

495. *See* Herek, *supra* note 97, at 146.

496. KEHOE, *supra* note 96, at 15; *see also* PALLONE & STEINBERG, *supra* note 208, at 56 (author's "toughest chore" while he was a major league baseball umpire was "living a lie"); PHARR, *supra* note 20, at xiii (author's alienation due to "life of invisibility" was "extreme and dangerous to [her] mental health").

497. *See* PHARR, *supra* note 20, at xiii-xiv.

498. *See* ISAY, *supra* note 139, at 91-92 (noting that fear of being visible makes entering into long-term relationships harder); *see also* INVENTING OURSELVES, *supra* note 39, at 152-53 (noting woman who broke off relationship for fear that social workers would discover it and take her children away).

499. *See* Herek, *supra* note 97, at 146-47.

ship was undermined by concealment, suggested that "[b]y bowing to the constant, needling reminder that no matter how happy and natural they feel, theirs is a socially unacceptable union, homosexuals themselves undermine what could be the most rewarding aspect of their lives."⁵⁰⁰ Since relationships add to the self-esteem and mental stability of the participants,⁵⁰¹ the negative effects of concealment are compounded when they interfere with the process of finding and maintaining a lover.

The negative effects of leading a closeted life become particularly acute when a person is upset by gay-related problems, such as the separation from, or the death or illness of, a long-term companion. Distraught gay people may have no outlet for their grief without going through the dangerous process of coming out. One man reported having to sit alone in the back of the church at his lover's funeral because he couldn't explain his relationship to the family.⁵⁰² One World War II soldier whose lover was killed recalls, "I couldn't cry and I couldn't tell anybody. Just alone. No way I could release any of the emotion or express any of it. It was the most terrible day I've spent [in my life]."⁵⁰³

The following letter, written by a closeted man in response to a questionnaire on gay issues, gives some sense of the complex emotions created by hiding:

What makes it something to hide? How long must this nonsense go on? Hiding generation after generation? Won't someone tell someone it is a nice, pleasant, friendly thing to relate to another human being as a human being. Oh, I know you know the answers, so many of us do. Please don't forget those of us out here with families and wives and jobs that pay well, that we enjoy. Smile at us. Please understand us. We understand. Believe me, we understand. And in our way we are raising sons and daughters who will understand too. Don't you realize, we are the future? Please speak to me! I love you and wish you good fortune. Will I join you? Sorry, but I guess I must stay behind. I *am* sorry. I

500. BROWN, *supra* note 144, at 139-40.

501. See, e.g., ISAY, *supra* note 139, at 61 (stating that positive sexual and nonsexual relationships are essential to healthy integration of the gay identity and positive self-image); Sandel, *supra* note 315, at 535 (noting that gay relationships recreate positive effects of marriage); Coombs, *supra* note 43, at 1596-97 (commenting that we "need to . . . share with others to become fully human" and "draw[] from our relationships much of our sense of identity"); cf. De Cecco, *supra* note 194, at 2 (remarking that in the gay community, a gay relationship "has become a symbol of self-acceptance of one's homosexuality, an index of psychological health, of self-esteem").

502. PALLONE & STEINBERG, *supra* note 208, at 190.

503. BERUBE, *supra* note 96, at 199; see also KEHOE, *supra* note 96, at 49 (reporting positive experience coming out, making grieving for lost partner easier).

can't sign my name. I'm sorry and I'm crying. God bless you gentle people.⁵⁰⁴

b. Costs to the Gay Community

Concealment also interferes with the creation and cohesion of a gay community. Closeted gay men and lesbians generally are afraid to take the steps necessary to join gay organizations or participate in gay events.⁵⁰⁵ This deprives them of an important potential source of support. Participating in gay community activities improves mental health directly,⁵⁰⁶ and also makes possible and strengthens gay relationships.⁵⁰⁷ Thus, closeted gay people who do not join the community lose these benefits as well.

Another cost of concealment is tension within the gay community about the issue of concealment itself. Closeted gay men and lesbians often voice the same concerns about "flaunting" as non-gays.⁵⁰⁸ They may resent visible and politically active lesbians and gay men, who they feel bring undue attention to gay rights issues and harm those who perceive themselves to be getting along adequately in the closet.⁵⁰⁹ This resentment can extend even to those who engage in litigation to try to vindicate common rights. One gay man said after the *Bowers* decision, "Why did Michael Hardwick do this, why did he

504. JAY & YOUNG, *supra* note 104, at 128.

505. This is a common problem for members of excluded groups: "people who fit within a category of 'difference' often choose not to avail themselves of programs designed for them because they fear the risk of stigma or other negative social attitudes if they identify themselves by the difference." MINOW, *supra* note 28, at 91.

506. See Gerstel et al., *supra* note 422, at 86; Schneider, *supra* note 40, at 123; Troiden, *supra* note 42, at 62; see also Herek, *supra* note 97, at 146 (noting that isolation from community can cause "significant psychological distress").

507. See, e.g., JOHNSON, *supra* note 136, at 252-53, 280-81 (noting that being part of lesbian community helped keep relationships together).

508. See, e.g., JAY & YOUNG, *supra* note 104, at 145; JOHNSON, *supra* note 136, at 130; Rist, *supra* note 471, at 45-46; see also JAY & YOUNG, *supra* note 104, at 139 (reporting one gay male respondent to survey who said, "I don't feel that gays should raise their children in an open gay lifestyle. [The children] should be free to choose their own sexuality without undue influence.").

This concern is not limited to those completely in the closet. A group of AIDS activists expressed concern, according to one account, that the National March on Washington for Lesbian and Gay Rights would be "a political embarrassment for AIDS lobbyists." See Rist, *supra* note 366, at 200.

509. One writer to Ann Landers said, "I have never been discriminated against at work or anywhere else. Maybe it's because I don't march in parades, make speeches, or dress in a bizarre fashion that would draw attention to myself." Ann Landers, *Some Parents Don't Disapprove of Gay Children*, MIAMI HERALD, June 25, 1991, at 3D. It also seems possible that few people are aware the writer is gay. Cf. BERUBE, *supra* note 96, at 117-18 (noting disagreement in gay community during World War II about the extent to which one should be at gay hangouts and concern about more open or stereotypical gay people revealing the hangouts and causing raids and arrests).

have to push this? If he just stayed quiet we would all be OK. Now we have this decision and this is terrible."⁵¹⁰ Those who are out, in turn, can be resentful (and often not particularly understanding) of those who do not feel able to come out for emotional, or often financial, reasons.⁵¹¹ This tension can prevent the two groups from providing necessary mutual support.⁵¹²

Concealment also can hinder personal connection between people who are out and those who are not. I remain vaguely surprised that closeted students are uncomfortable around me. The phenomenon is fairly easy to explain, however. When closeted people meet in semi-public places (gay bars, for example) there is an element of mutual vulnerability that acts as a bond. "I don't have to worry about your telling anyone I'm gay; you cannot tell without effectively giving *yourself* away." People who are out do not provide this security to closeted individuals; because I am out, I arguably have little to lose by "outing" other people. Indeed, closeted people (as well as heterosexuals concerned with their image) are often afraid to be seen in public with gay men and lesbians who are out; they fear that mere proximity will lead others to believe they are gay.⁵¹³ This has the unfortunate effect of limiting the usefulness of those of us who are out as bases of support and encouragement to lesbians and gay men who are not.⁵¹⁴

Concealment also has larger political costs to the gay community. It prevents non-gay people from knowing that their friends and relations are gay. This hurts gay people because "people who report that they know gay persons have more tolerant attitudes, and are more skeptical of stereotypes about them."⁵¹⁵

510. Abby R. Rubinfeld, *Lessons Learned: A Reflection upon Bowers v. Hardwick*, 11 NOVA L. REV. 59, 62 (1986).

511. See, e.g., *Boating Club Shows Signs of Homophobia*, WKLY. NEWS, June 12, 1991, at 7, 17 (reporting gay man's complaint that gay boating club would not use words "gay" or "homosexual" in its newsletter).

512. This problem is somewhat different from the concern within the women's movement about the exclusion of race issues. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Women of color may resent the exclusion, but they still share some common goals and methods with their cohorts. By contrast, closeted gay people often see silence as the best strategy for gay people, a strategy almost completely incompatible with the coming-out tactics espoused by many activists.

513. It is intimidating to involve yourself with other gay people while you are in the coming-out process. See MAROTTA, *supra* note 72, at 12. For most of my freshman year in college, I carefully avoided a student who lived in my dorm who was out and politically active.

514. In addition, gay men often are reluctant to help gay teens in part because of the myths of child molesting and "converting" young people. See *Gay/Lesbian Teenagers Find Themselves Locked In Last Closet of Social Taboo With Little Hope of Help*, WKLY. NEWS, June 6, 1990, at 13, 34.

515. Law, *supra* note 18, at 194; accord Goleman, *supra* note 344, at C1.

c. Developing Positive Gay Identities

Homophiles' experience with society's treatment of gay issues strongly affects their ability to develop and accept a gay identity.⁵¹⁶ Many lesbians and gay men believe that accurate information about gay issues and awareness of gay role models aided the development of their gay identities.⁵¹⁷ For example, Marvin Liebman, co-founder of the *National Review*, said his decision to come out was based in part on exposure to positive visions of gay people in books and films.⁵¹⁸ Noted gay activist Harry Hay reports being "happily stunned" by his first visit to a gay bar, realizing he was entering a room of more than 200 other gay men.⁵¹⁹ One study of gay men found:

Initially most gay persons feel they are totally alone with their gayness and the discovery of others like them affects their thoughts and feelings about themselves. The development of self-identity and acceptance is greatly advanced by support and validation from other members of the same stigmatized group. Replacing former negative ideas and feelings with positive experiences with others like themselves who are happy and well adjusted makes a necessary bridge in the process of coming out.⁵²⁰

In the absence of positive experiences or role models, society's myths about gay people leave young homophiles with a negative impression of gay life. They often grow up without much self-esteem,⁵²¹ believing that all gay people are sick and conform to warped stereotypes.⁵²² They may even believe they are the only ones in the world who experience homophilic feelings.⁵²³ For many peo-

516. See BLUMENFELD & RAYMOND, *supra* note 93, at 244; Halley, *supra* note 4, at 945.

517. See, e.g., INVENTING OURSELVES, *supra* note 39, at 64-65; SEARS, *supra* note 40, at 180; Timmons, *supra* note 143, at 27-28; Schneider, *supra* note 40, at 123.

518. See Varnell, *supra* note 144, at 6.

519. See TIMMONS, *supra* note 143, at 46.

520. McWHIRTER & MATTISON, *supra* note 96, at 141; accord Troiden, *supra* note 42, at 61.

521. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 30 (suggesting that lack of role models results "in self-hatred and isolation"); BROWN, *supra* note 144, at 41-42 (noting that gay male adolescents faced with negative media portrayals of gay men may wonder, "Am I fit only to be laughed at?").

522. See, e.g., JAY & YOUNG, *supra* note 104, at 3; LEWIS, *supra* note 102, at 25; Monteagudo, *supra* note 132, at 210-11; see also BERGER, *supra* note 201, at 15 (noting that negative stereotypes combined with lack of role models deter young people from selecting gay lifestyles).

523. See, e.g., JAY & YOUNG, *supra* note 104, at 85; Schneider, *supra* note 40, at 119. At least some of the people who got their information from very negative sources recall a positive reaction to realizing they were not alone. One lesbian read "terrible stories about poverty, mental illness and suicide" of lesbians in reference books, yet "just discovering the concept that women could love and live with women exhilarated me." See LEWIS, *supra* note 102, at 25.

ple, these beliefs last well into adulthood.⁵²⁴

There are so few models of comfortable, intelligent, relationship-ped gay men for kids to model themselves after and make them feel that they, too, can be healthy. For gays in adolescence, the stereotypes and models are so skewed, so unconventional—usually campy and not masculine or just strange and bizarre—that they look at these models and think I must be strange and bizarre.⁵²⁵

In the alternative, young homophiles who do not see themselves as similar to the negative portrayals and question whether they are gay at all.⁵²⁶ One woman recalls that as a college freshman, she checked out books listed under homosexuality in the college library:

I was unprepared for what I found. Sick, sordid, depraved wreck-ages of humanity were paraded through the pages of those abnormal psychology texts. The homosexual case histories revealed gruesome childhoods, psychological (and often physical) deformities and a fondness for sexual acts in public lavatories. The few female homosexuals who were discussed sounded even more revolting than the males. I compared this information with my own "case history." My childhood had been relatively happy, I possessed no glaring deformities that I had noticed and my biggest sexual thrill had been holding Joanie's hand. Half of me felt relieved. If that was homosexuality, clearly I had nothing to worry about. The other half of me was terrified. What if I were already tainted and would eventually become as perverted as the creatures in these books? This latter possibility didn't bear thinking about, and the doors of my mind slammed shut to that idea for several years.⁵²⁷

The extremely high rate of suicide among gay teenagers⁵²⁸ attests to the social cost of neglecting the healthy development of young gay identities.

Because the cost of hiding our lives to ourselves and to others in need of information and role models is so high, the answer to the

524. See, e.g., BROWN, *supra* note 144, at 22 (reporting that one successful doctor, until he was in his mid-40's, "accepted many of the psychiatric clichés about homosexuals—that we were emotionally impaired narcissists who could never love as fully as heterosexuals, that we were innately superficial and irresponsible").

525. Dell Richards, *Gay Psychiatrist Documents Damage Done to Gay Men Growing Up in an Intolerant Society*, WKLY. NEWS, July 25, 1990, at 6 (quoting psychiatrist Richard Isay).

526. See, e.g., Klein, *supra* note 93, pt. 5, at 1; Simmons, *supra* note 132, at 7-9.

527. Nancy Manahan, *Lesbian Books: A Long Search*, in THE LESBIAN PATH, *supra* note 95, at 103, 103-04.

528. See *Gay/Lesbian Teenagers Find Themselves Locked In Last Closet of Social Taboo With Little Hope of Help*, *supra* note 514, at 13 (citing government report estimating that suicide rate of gay teens is two to three times that of non-gay teens); Herdt, *supra* note 121, at 31 (reporting that best available evidence suggests 20-35% of gay youth have made suicide attempts).

question, "Do you have to flaunt it?" is unequivocally, "Yes!"⁵²⁹ Moreover, because Americans have made discussions of sexual orientation so much a part of our culture, genuine participation in American social life requires "flaunting it." Flaunting *non-gay* sexual orientation is so much a part of American life, we barely notice it.⁵³⁰

C. *Flaunting Heterosexuality*

One of my students complained in a teaching evaluation that I should not have discussed my sexual orientation with the class. "I don't go around telling people I'm straight," he said.⁵³¹ I doubt that he is correct; he simply is not aware of the number of commonplace statements he makes that reveal his sexual orientation. Moreover, I doubt seriously he complains about my non-gay colleagues who mention their spouses, and therefore their heterosexuality, in the course of their teaching. As this Subpart demonstrates, charges that we "flaunt" homosexuality seem even less just in the context of a culture that constantly flaunts heterosexuality.

In everyday public life, we are bombarded with people asserting, directly and indirectly, their non-gay sexual orientation. Advertising screams at us the desirability of desirability. Given the strong non-gay presumptions that exist in our culture, most people assume that public allusions to sex, intimate association, and desire refer to non-gay interactions.⁵³² To give one obvious example, Old Milwaukee has been selling its beer with commercials featuring a group of men in the wilderness and the unexpected appearance of a group of buxom,

529. Indeed, some gay activists believe that the lack of role models for gay young people justifies "outing" closeted gay celebrities. See, e.g., *To "Out" Or Not To "Out,"* *supra* note 425, at 3. I am not convinced that the violation of privacy involved in outing is justified. My argument is intended to encourage gay men and lesbians to come out voluntarily, rather than to encourage outing.

530. Blumenfeld and Raymond point out that because homophile behavior does not fit the norm, people notice it more. Thus non-gays who make accusations of flaunting do not necessarily see *differences* in behavior, but are more likely to *notice* the homophile behavior because they consider it abnormal. BLUMENFELD & RAYMOND, *supra* note 93, at 117.

531. I assume the student was male both from the content of the evaluation and from the handwriting. His statement is fairly typical. One gay person wrote to Ann Landers, saying that he or she made a mistake coming out to his/her parents: "The sexual preferences of my five siblings was never mentioned so why should mine be? Sex should be a private matter, not discussed with relatives, whether you are gay or straight." Landers, *supra* note 511, at 3D; see also Jay Vail, *News Round-Up*, WKLY. NEWS, Aug. 1, 1990, at 36 (quoting member of Christian Coalition: "Why do they have to flaunt it? I don't flaunt my sexual preference."); Letter from Gerri Smith, USA TODAY, Oct. 3, 1991, at 10A ("I would guess that the only reason an employer would fire gay people would be if those people discussed their sexual preference so that it distracted from business. How else would the employer know? Keep you sex life—gay or heterosexual—out of the business area.").

532. See Law, *supra* note 18, at 196.

scantily dressed, platinum-blond young women, whom the narrator identifies as the "Swedish Bikini Team." It is difficult to imagine what value the women are intended to have for the men if not sexual.⁵³³

While I am sure many people today barely notice scantily clad women and other heterosexual imagery in advertising, similar imagery regarding same-sex attractions is taboo. In Chicago, for example, a set of AIDS awareness posters showed both same-sex and different-sex couples kissing. Only the same-sex couple posters drew criticism.⁵³⁴

Much advertising that does not focus on sex and desirability contains strong "family" imagery that implicitly conveys the non-gay orientation of the persons involved while at the same time promoting the product by tying it to nostalgic renderings of nuclear families.⁵³⁵ Almost no advertising contains reference to the vast number of single-parent families,⁵³⁶ let alone the even less traditional family structures in which gay people engage. Implicitly, these commercials value the heterosexual relationships that most people would presume are part of the idealized families.

Perhaps more importantly, flaunting heterosexuality is not only an appropriate part of American social life, it is expected behavior. We carry on our social interactions at functions in which people generally are included as part of a heterosexual couple.⁵³⁷ Frequently, if a person doesn't have a partner (of the other gender), a host will invite an unattached person of the appropriate gender "for balance" or ask the unattached individual to bring a date. In either case, all concerned likely assume that the two unattached individuals may use the social event to begin considering each other as non-gay life partners.

An important part of this system is that people's choices as life partners or even dates generally are treated as sacrosanct. For most social activities, the host would not consider inviting only one of a married couple or denying an unattached individual the right to bring

533. Obviously many more examples exist. See, e.g., Lorianne Donne, *Beer's Sexy Ads Have Sizzle, but '89 Sales Fizzle*, PUGET SOUND BUS. J., May 21, 1990, at 1.

534. See Paul Varnell, *Observer's Notebook*, WKLY. NEWS, July 18, 1990, at 5.

535. See Dana Leonardo, *Use of Sexy Advertising May Be Cooling*, ARIZ. BUS. GAZETTE, Jan. 5, 1990, at 15 (noting advertising trend toward families and away from explicit sex).

536. Contemplate how rarely you hear anything like the following: "I'm a divorced mother of three and my husband has not paid his child support in six months. I hold down two jobs to support my family, but I have very little money and less time. That's why I like Duckson's children's microwave dinners: cheap, quick, nutritious and so simple that my eight year old can fix them herself on nights when my daytime boss makes me work late. And the kids love them. Thank you, Duckson's."

537. See Law, *supra* note 18, at 196.

an other-sex date of his/her choice.⁵³⁸ This presents a striking contrast to the lot of gays in these social circles. Social hosts may consider it inappropriate for a gay person to bring a date or life-partner or may deliberately choose not to invite the life partner.⁵³⁹

An additional aspect of the public prevalence of heterosexuality in American social life is the fact that it is expected and appropriate for people to discuss their non-gay family life in social and work settings. Roberta, who is married to Chuck, may say any of the following at her office without causing a stir: (1) "Hang on a second; let me call Chuck and tell him I'll be late"; (2) "Chuck was sick all last night and kept me awake"; or, (3) "The kids are going to my mother's this weekend; Chuck and I will have the whole place to ourselves." Each of these statements seems familiar and almost certainly would not generate comment by co-workers. Yet each of these statements contains the unstated premise that Roberta is a heterosexual involved in an intimate relationship of some sort with Chuck. Were Roberta "Robert" instead, the same statements would take on additional significance, and if Robert were not fired or reprimanded for making them, he might well be accused of flaunting his gayness.

For those who are not yet ensconced in heterosexual life-partnerships, it is expected and appropriate to discuss the process of forming couples.⁵⁴⁰ Questions like "Are you seeing anyone?"; "How was your date?"; or, "I have a friend who just broke up with her boyfriend; would you like to meet her?" are normal parts of social/office conversation.

In all-male settings (and all-female settings as well if we believe the popular media), it is expected and appropriate to comment publicly, if sometimes obliquely, about your sexual desires. Common-place statements ranging in explicitness from "Gee, she's cute" to "Wow, look at those legs" (and beyond) implicitly contain assertions of the speakers' heterosexual orientation. Should a gay male make similar comments, particularly in an all-male setting, he risks ostracism and perhaps violence.

In addition, people conduct their non-gay social lives in public settings such as their workplace or university. Romances between co-workers are common and most people will not receive serious neg-

538. Although obviously there are social conventions that define who an appropriate date is. However, the level of tolerance for otherwise non-conforming dates of the "appropriate" gender is surely much higher than for same-sex partners.

539. Analogous problems apparently occur when hosts wish to include one or both of a couple who are divorced or separated.

540. Cf. TANNEN, *supra* note 88, at 13 ("We are expected to pair off with people of the other gender" (emphasis omitted)).

ative responses from their employer if they ask a co-worker on a date. For many adults, their work-setting is the only place outside bars they can meet people. It is not surprising that romances blossom there. The consequences for a gay employee who asks a co-worker on a date may be more serious.

People also flaunt their non-gay sexual orientation by public gestures of affection. Men and women hold hands in public, walk arm-in-arm, and make out on park benches. Certainly these actions implicitly announce the heterosexuality of the participants, yet most people don't think twice when they see them. As the authors of one textbook on gay issues noted, "Where heterosexual couples might kiss in public, embrace at the airport, walk arm in arm, wear wedding bands, and talk about their most recent 'date,' similar behavior in same-sex couples is judged quite differently."⁵⁴¹

The message of all of this is quite simple: to be full participants in American social life, people must be able to publicly discuss their partners and their search for partners—in fact, their sexual orientation.⁵⁴² It is generally expected and appropriate to do so. To grant to gay people the right merely to perform sexual acts without the related right to participate honestly in everyday discourse effectively banishes us from normal social life or reduces us to lying about some of the most important aspects of our lives: our relationships and our families.

D. *Advocacy: Highlighting Parallels and Costs*

To allow gay men and women to become complete members of our society, gay-rights advocates need to focus on trying to establish the right to carry on our lives in public. An emphasis on public behavior will not only attack some of the most serious aspects of discrimination, but will help to break the silence that engulfs and oppresses so many gay people.

When arguing for the right to live out of the closet, gay-rights advocates need continually to emphasize the parallels between the public gay conduct at issue and "normal" heterosexual behavior.⁵⁴³

541. BLUMENFELD & RAYMOND, *supra* note 93, at 260.

542. See SEARS, *supra* note 40, at 400 ("[H]omosexuality ceases to be a private matter when heterosexuality is woven through our institutions, policies, and culture."); Schnably, *supra* note 97, at 886-87 ("[O]ne way to understand the debate over homosexuality is as an effort to deny *public* participation by certain citizens in the socially constitutive dialogue. . . . Forcing gays to maintain a discreet silence about an aspect of their identity is clearly an attempt to exclude their participation as gays in the myriad forms of dialogue.").

543. See PHARR, *supra* note 20, at 29 (noting that society treats parallel public conduct by gays and non-gays differently).

As the last Subpart demonstrates, heterosexuals "come out" constantly. We have to make decisionmakers see the similarities. In addition, we must try to make decisionmakers see that the continued refusal to allow us to have public lives has high costs.

Advocates also can point out that the costs of concealment are not unique to gay people. For example, the feelings of frustration that accompany hidden relationships are shared by heterosexual couples. The following account by a female former West Point cadet of a forbidden date could easily have been written by a gay man:

Tonight Mike picked me up at about 7:30. We went to a little place that sells ice cream and hamburgers, then to a bar where we could slow dance. He started to walk me home, and we were right in the middle of a kiss when a car drove by. It's awful when you can't show your feelings without being scared someone will see you. Mike and I walked all the way back to my barracks tonight and then *shook hands*. It's so sad.⁵⁴⁴

The same stories of relationships that I suggested would be effective to combat stereotypes about gay sexual behavior also will be useful here. As I have noted, relationships are inherently public. The parallels to non-gay public behavior are clear. Moreover, the non-gay assumptions about the loveless nature of gay sexual behavior clearly are one source of the concern about flaunting. Because many non-gay people assume that homosexuality is simply about sexual activity, they view public discussion of gay issues as inappropriate discussion of sexual acts.⁵⁴⁵ Thus, were I to mention that I went away for the weekend with "Robert," I might be accused of talking inappropriately about my sex life in public.⁵⁴⁶ As noted, if someone else said he went away with his wife, nobody would think twice.

One closeted gay man who seems to have internalized this connection responded to a questionnaire with the following revealing statement: "Men (straight) don't go around telling that they have fucked their wives or that they have had oral sex. I don't go around talking about my sexual activities. It is my business and it should be of no concern to anyone."⁵⁴⁷ The writer ignores the fact that "men

544. CAROL BARKALOW & ANDREA RABB, IN *THE MEN'S HOUSE* 88 (1990). This is not to suggest that military rules against fraternization are necessarily bad. My point is rather that the emotions caused by forcing relationships into the closet are not unique to lesbians and gay men.

545. PHARR, *supra* note 20, at 28.

546. See, e.g., *Acanfora v. Board of Educ.*, 350 F. Supp. 843, 855 (D. Md. 1973) (equating a gay teacher creating publicity that allows children to know about his sexual orientation with a teacher discussing "his sex life in the school environment"), *aff'd*, 491 F.2d 498 (4th Cir. 1974).

547. JAY & YOUNG, *supra* note 104, at 145.

(straight)) *do* “go around talking about” the fact that they *have* wives. Only the conflation of any discussion of gay matters with sexual activity makes this analogy meaningful. Gay advocates can use this type of story to demonstrate that gay public behavior is treated differently from parallel heterosexual behavior.⁵⁴⁸

V. THE CROSS-GENDER STEREOTYPE AND ITS IMPACT: ANTI-GAY BIAS AS GENDER DISCRIMINATION

A third element of non-gay pre-understanding of lesbians and gay men is that we all exhibit stereotypical characteristics of the other gender,⁵⁴⁹ what I call the cross-gender stereotype. In this Part, I first discuss stories that demonstrate the existence of the stereotype. I then present stories that counter the stereotype by showing the complicated relationship between gay life and gender norms. Finally, I present evidence that one important result of the cross-gender stereotype is that anti-gay discrimination acts as an enforcement mechanism for “appropriate” gender-role behavior, and conclude that anti-gay bias is, in practice, a form of gender discrimination.

A. *Non-Gay Stories: The Cross-Gender Stereotype*

In our society, many people commonly assume that the set of people who deviate from gender norms is identical with the set of people with homophile tendencies.⁵⁵⁰ A number of studies demonstrate that most people believe that homophiles display characteristics

548. Another approach that helpfully focuses on public behavior is Janet Halley’s argument that public disclosure of sexual identity is a form of political discourse protected either by the First Amendment or the Equal Protection Clause. See Halley, *supra* note 4, at 960, 970-73; see also *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (Brennan, J., dissenting from denial of certiorari) (arguing that revelation of bisexual sexual preference necessarily embroils a person in public debate over gay rights); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1323 n.9 (5th Cir. 1984) (finding organization of gay group “clearly” constitutes “a ‘message’ that its members reject society’s traditional expectations that they associate furtively and in fear that their homosexuality will be detected”).

549. Unsurprisingly, gay people, raised in the same culture as everyone else, often accept these stereotypes. See, e.g., Brown, *supra* note 144, at 34-35; Marotta, *supra* note 72, at 27; Budd, *supra* note 297, at 133. For example, gay men use the term “straight-appearing” in personal ads to refer to men having stereotypically masculine gestures and appearance. See Rex Wockner, *What to Make of ‘Straight-Appearing’ Ads*, WKLY. NEWS, Oct. 3, 1990, at 5.

550. See Goleman, *supra* note 344, at C1 (noting that cross-gender stereotype persists although it is counterfactual); see also PHARR, *supra* note 20, at 31 (discussing the belief that because lesbians are attracted to women they must be like men); Halley, *supra* note 4, at 948 (discussing the belief “that men who desire men must be like women”). Within the urban gay subculture a different stereotype has developed of very masculine gay men with highly developed bodies. However, this counter-image of gay masculinity does not appear to have permeated into popular knowledge or culture outside a few major metropolitan areas.

of the other gender.⁵⁵¹ For example, one sample of 100 men, not identified as gay, believed "male homosexuals" to be "more delicate, more passive, more womanly, smaller, softer, and more yielding than heterosexual men."⁵⁵²

These studies' findings are bolstered by common experience.⁵⁵³ As one researcher noted, "the most frequent complaint—often in the form of jokes or ridicule—made about homosexuals is that lesbians are masculine and male homosexuals are feminine."⁵⁵⁴ Non-gay people assume that homophiles exhibit physical or personality traits stereotypically associated with the other gender.⁵⁵⁵ They assume gay people enjoy wearing clothing "appropriate" to the other gender,⁵⁵⁶ or

551. See, e.g., Stephen F. Morin & Ellen M. Garfinkle, *Male Homophobia*, 34 J. Soc. ISSUES 29, 40-41 (1978) (citing unpublished studies); Carol Tavris, *Men and Women Report Their Views on Masculinity*, PSYCHOL. TODAY, Jan. 1977, at 35. (reporting that 70% of heterosexual respondents believed that "homosexual men are not fully masculine").

552. See Morin & Garfinkle, *supra* note 551, at 40-41 (citing unpublished studies).

553. See BLUMENFELD & RAYMOND, *supra* note 93, at 368 (noting that society focuses on those exhibiting reverse gender stereotypes as models of all gay people).

554. A.P. MacDonald, Jr., *Homophobia: Its Roots and Meanings*, 3 HOMOSEXUAL COUNSELING J. 23, 30 (1976); see also ISAY, *supra* note 139, at 20 ("In our society a gay man is labeled 'feminine' simply because he desires or loves other men.").

555. See, e.g., *Gay Inmates of Shelby County Jail v. Barksdale*, 819 F.2d 289 (6th Cir. 1987) (evaluating jail personnel classification of male arrestees as "homosexual" if they appear "weak, small, or effeminate"); BERGER, *supra* note 201, at 189 ("Common descriptions associated with the label 'homosexual' are . . . effeminate, flighty, and unstable."); BERUBE, *supra* note 96, at 176 (noting World War II military caricature of a male homophile as "passively effeminate and asexual, timid, weak, and soft—he was a frivolous mama's boy, a crybaby, and fought 'like a woman.'"); *id.* at 60 (noting that female officers during World War II were often perceived as lesbians in part because they were selected for the same qualities that made good male officers, "including strong voices and an aggressive manner"); JAY & YOUNG, *supra* note 104, at 139-40 (commenting that instant "recognition" of gay men by non-gays is related to feminine behavior); LEWIS, *supra* note 102, at 5 ("Assertive women within the women's movement had always been branded 'lesbians' whether they were or not . . .").

The following excerpt from Shelby Foote's history of the Civil War, contrasting effeminate habits and masculine traits, illustrates the way this stereotype is embedded into the culture:

An epicure and sportsman, a breeder and racer of horses, forty-five years old, high-voiced and dandified in dress—"a velvet-collared esthete" one observer called him—Fred Steele was rumored by his enemies to live in the style of an Oriental prince, surrounded by silk-clad servants and pedigreed lapdogs, although this alleged limp-wristed aspect was considerably at odds with a lifetime habit of blasphemy, a full if silky beard, and a combat infantry record going back to the Mexican War, in which he had won two brevets for gallantry as an officer of the line.

3 SHELBY FOOTE, *THE CIVIL WAR* 64 (1974).

556. See, e.g., *Barksdale*, 819 F.2d 289 (6th Cir. 1987) (noting that wearing women's clothing seen as "fairly probative evidence" that male arrestees are gay); BLUMENFELD & RAYMOND, *supra* note 93, at 46 ("It is a common misconception that all gay males . . . enjoy wearing dresses . . ."); BROWN, *supra* note 144, at 238-239 (noting common argument against anti-discrimination laws protecting gay people is that they would encourage transvestism); *Juneau OKs Compromise Rights Bill*, WKLY. NEWS, Sept. 19, 1990, at 8 (opponents of

that we are incapable of performing tasks thought appropriate for our own gender.⁵⁵⁷ The popular media often replicate these stereotypes,⁵⁵⁸ reinforcing them in the minds of gays and non-gays alike.⁵⁵⁹

Non-gay people tend to believe that homophiles are attracted to professions "appropriate" to the other gender;⁵⁶⁰ gay men become hairdressers or decorators,⁵⁶¹ gay women become gym teachers or truck drivers.⁵⁶² One young medical student, worried about his homophile urges, confided in

the aging chairman of the department of psychiatry at the medical school. He told me I couldn't possibly be homosexual. I was going to become a doctor, wasn't I? Homosexuals didn't become doctors; they became hairdressers, interior decorators, that sort of thing. He explained away my urges as "delayed adolescence."⁵⁶³

Even ostensibly objective researchers often accept the stereotype that homophiles exhibit characteristics "appropriate" to the other gender. Scientists, looking for a hormonal "cause" for sexual orientation, generally have started with the premise that male homophiles have too much female hormone, too little male hormone, or both, and that the reverse is true for female homophiles.⁵⁶⁴ Until recently, psychoanalysts' theories suggested that male homophiles "suffer from a deficiency in their masculinity."⁵⁶⁵ Psychiatrists have seen cross-gen-

provision banning sexual orientation discrimination distributed fliers warning that it would allow transvestites to teach in public schools); JAY & YOUNG, *supra* note 104, at 54 (reporting that teenager who wore boots, work shirts, and jeans to school called a "lez").

557. See BERUBE, *supra* note 96, at 157 (noting that gay men during World War II "were described as pseudomen who did not fit the profile of the masculine, aggressive soldier"); SEARS, *supra* note 40, at 391 (reporting that classmates of closeted gay youth apologized for calling him queer after he joined the wrestling team).

558. See, e.g., BROWN, *supra* note 144, at 42.

559. See, e.g., ISAY, *supra* note 139, at 49. The author describes one adolescent homophile who "associated homosexuality with being effeminate, since that was the way homosexuals were portrayed in the movies and those were the only men he could readily identify as gay. Therefore he did not believe that he was really homosexual." *Id.*

560. For example, classification officers in the military have assigned people exhibiting cross-gender characteristics to jobs they considered appropriate for homophiles. See, e.g., BERUBE, *supra* note 96, at 58, 60.

561. See BLUMENFELD & RAYMOND, *supra* note 93, at 351; GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 109 (1991); MCWHIRTER & MATTISON, *supra* note 96, at 161-62. Comstock points out that these stereotypes are both feminine and marginal. Comstock, *supra*, at 109.

562. See BLUMENFELD & RAYMOND, *supra* note 93, at 351.

563. BROWN, *supra* note 144, at 35.

564. For descriptions of some of these studies, see BLUMENFELD & RAYMOND, *supra* note 93, at 127-30; RUSE, *supra* note 59, at 97, 103-12. Military researchers during World War II made the same assumptions when trying to develop biological tests to identify male homophiles. BERUBE, *supra* note 96, at 154.

565. ISAY, *supra* note 139, at 17. Isay adds that "traditional analysts believe a man cannot

der behavior in children as indicators of adult homophobic tendencies.⁵⁶⁶ Tellingly, some male therapists visiting gay bars for the first time expressed amazement that many of the men in the bar appeared "more masculine" than the therapists themselves.⁵⁶⁷

The converse assumption also is common: people who attempt jobs or pastimes considered appropriate for the other gender risk accusations that they are gay.⁵⁶⁸ For example, women in the "masculine" military have always risked being called lesbians.⁵⁶⁹ And children are quick to label other children, particularly boys, as "sissies" or "queers" if they attempt cross-gender play activities.⁵⁷⁰ Often the

be homosexual without also being and/or feeling effeminate." *Id.* at 18; see also RUSE, *supra* note 59, at 49, 218 (giving examples of psychologists operating on cross-gender assumption).

566. See Howard E. Kaye et al., *Homosexuality and Women*, 17 ARCHIVES GEN. PSYCHIATRY 626 (1967); see also BLUMENFELD & RAYMOND, *supra* note 93, at 142 (discussing data).

567. Morin & Garfinkle, *supra* note 551, at 42-43. I resist the temptation to make therapist jokes here. However, many stories support the idea that analysts believe the cross-gender stereotype. For example, one psychiatrist told a gay man that "homosexuals weren't built like [him] and weren't interested in sports—or if they were, they weren't good at them." BROWN, *supra* note 144, at 123; see also *supra* note 565.

568. See, e.g., BARKALOW & RABB, *supra* note 544, at 65 (noting that a West Point instructor "might take it upon himself to go on a ten-minute tirade in class about how he thought the women on the basketball team were dykes"); KLEINBERG, *supra* note 96, at 73 (noting myth that hair dressing, interior decoration, and clothing design are dominated by gay men); MACKINNON, *supra* note 37, at 122 ("[W]omen athletes are routinely accused, explicitly or implicitly, of being lesbian.").

569. See BERUBE, *supra* note 96, at 262 (noting that after World War II, women were encouraged to return to traditional gender roles; those who stayed in the military after the war "increasingly stood out as members of a deviant group that was easily stereotyped as lesbian"); INVENTING OURSELVES, *supra* note 39, at 176 (reporting British tabloid opinion that if the military rid itself of all lesbians, there would be no women left).

The movie UP THE ACADEMY (Mad Magazine Films 1985) contains a wide variety of offensive versions of this stereotype. The women's military school is called the Mildred S. Butch Academy; scenes at the academy show women engaged in masculine activities such as shaving their faces and boxing; one woman refers to "working my nuts off." The series of "jokes" culminates with the masculine female school bus driver reading *Hustler* magazine.

This questioning of their sexual orientation places women in the military in a double bind:

A woman at West Point was judged not only for the inescapable fact of her sexuality but for how she projected it, and always according to what was deemed appropriate—however arbitrarily—by men. We seemed to be continually stuck in a tiresome stereotype—if we were not socializing heavily with male cadets, then it meant we must be lesbians. If we were socializing heavily with male cadets, then it meant we must be whores.

BARKALOW & RABB, *supra* note 544, at 39; see also *id.* at 168.

Perhaps concern with the image of military women as lesbians affected the publisher of Carol Barkalow's book on her life as a cadet at West Point. Interior photos show a quite butch-looking woman with a short military haircut performing martial arts, soldiering, and body-building, but the cover photo shows Barkalow looking considerably more feminine with curled hair, make-up, and jewelry. See *id.*

570. See, e.g., JAY & YOUNG, *supra* note 104, at 42-43 (reporting incident where girl who played boys' sports and played with toy army men labeled a "dyke").

parents of these non-conforming children follow suit.⁵⁷¹ However, as the following section demonstrates, these assumptions are unfounded: the cross-gender stereotype simply does not accurately describe most gay people.

B. *Gay Stories: Variety and Challenge*

A gay man went through the emotional trauma of having his mother visit him and his lover at their home for the first time. After observing them for several days, she sat down with her son and said, "I have to ask you . . . I don't quite understand . . . which of you does what?" Abashed at the prospect of having to explain the intimate details of his sexual life to his mother, the son cautiously asked, "What do you mean?" "Well," she continued, "somebody does the laundry, somebody cleans the house. Which of you does what?"⁵⁷²

This story suggests some of the complexity of the interaction of gay life with gender role norms. If two people of the same gender live together, how do they know which tasks they are supposed to perform? In this Subpart, I try to counter the cross-gender stereotype first by presenting evidence that it is inaccurate and then by discussing the ways in which gay lives challenge traditional conceptions of "which of you does what."

1. THE INACCURACY OF THE STEREOTYPE

Undoubtedly, many gay people do exhibit stereotypical characteristics of the other gender.⁵⁷³ Many remember being considered sissies or tomboys as children.⁵⁷⁴ Many have jobs that defy traditional

571. See, e.g., BROWN, *supra* note 144, at 33; SEARS, *supra* note 40, at 55; SILVERSTEIN, *supra* note 72, at 39.

572. I am grateful to Mary Coombs for this story.

573. See, e.g., LEWIS, *supra* note 102, at 39; McWHIRTER & MATTISON, *supra* note 96, at 132; Rist, *supra* note 471, at 48.

574. See, e.g., BERGER, *supra* note 201, at 92; ISAY, *supra* note 139, at 23-24; KEHOE, *supra* note 96, at 16, 28 n.4; ROSEN, *supra* note 461, at 53, 55-56; RUSE, *supra* note 59, at 13-14, 69; TIMMONS, *supra* note 143, at 20; Rosemary K. Curb, *What is a Lesbian Nun?*, in BREAKING SILENCE, *supra* note 91, at xix, xxiv. This evidence, of course, is suspect because gay people, raised in culture that accepts the cross-gender stereotype, may read it back into the memories of their early lives. See Andrew M. Boxer & Bertram J. Cohler, *The Life Course of Gay and Lesbian Youth: An Immodest Proposal for the Study of Lives*, in GAY AND LESBIAN YOUTH, *supra* note 40, at 315, 328. Non-gay people may interpret these memories differently, see Sears, *supra* note 40, at 260, or suppress them entirely.

A number of studies have found ties between adult sexual orientation and childhood gender identity and role. See ISAY, *supra* note 139, at 18 (citing studies); RUSE, *supra* note 59, at 80-82 (same). Yet as one researcher noted, "One should not conclude from these studies . . . that most gay men are 'feminine' in childhood or that the origin of [male] homosexuality is linked to a lack of masculinity." ISAY, *supra* note 139, at 39. To the extent these studies rely

gender role norms.⁵⁷⁵ Yet these stereotypes simply are not true for most gay people.⁵⁷⁶ Even experts on gay issues cannot distinguish lesbians and gay men from non-gays based on physical appearance.⁵⁷⁷ Many gay people think of themselves as conforming to traditional gender stereotypes.⁵⁷⁸ Perhaps the most glaring example of this is the large-scale adoption of hypermasculine roles within the gay male urban subculture of the last twenty years⁵⁷⁹—the more extreme forms of which one author called the “cult of masculinity.”⁵⁸⁰ As one author noted: “Twenty years ago the notion of a gay man achieving success through bodybuilding would have caused snickers everywhere—even among the gay populace. In those days muscles and homosexuals didn’t go together. They do now.”⁵⁸¹

Lesbians and gay men (and presumably non-gay homophiles as well) exist in every profession and walk of life.⁵⁸² As one writer commented on Provincetown, Massachusetts, admittedly a magnet for lesbians and gay men: “Gay people are everywhere in Provincetown. We’re integrated into every aspect of society. We serve you food, write you speeding tickets, sell you nail polish, babysit your children, remodel your home, harvest shellfish, serve on boards of directors, regulate zoning policies, sweep streets, write for local newspapers.”⁵⁸³ Many gay people have jobs from which they are supposed to be

on memories of gay people, they again are suspect. Moreover, studies have found that many gay men “defeminize”—eliminate or reduce cross-gender behavior—during adolescence. See SEARS, *supra* note 40, at 250, 260.

575. See, e.g., BERUBE, *supra* note 96, at 60; McWHIRTER & MATTISON, *supra* note 96, at 161-62.

576. See BLUMENFELD & RAYMOND, *supra* note 93, at 367; McWHIRTER & MATTISON, *supra* note 96, at 132; SEARS, *supra* note 40, at 261.

577. See ISAY, *supra* note 139, at 131; RUSE, *supra* note 59, at 12; see also INVENTING OURSELVES, *supra* note 39, at 56 (describing a study finding no physiological differences between lesbians and non-gay women); JAY & YOUNG, *supra* note 104, at 139 (reporting that 78% of gay male survey recipients said most people could not tell instantly whether they were gay). One study found that the same percentage of gay men as straight men were effeminate. BLUMENFELD & RAYMOND, *supra* note 93, at 368.

578. See, e.g., JAY & YOUNG, *supra* note 104, at 194; PALLONE & STEINBERG, *supra* note 208, at 34.

579. See MAROTTA, *supra* note 72, at 261-62.

580. See SILVERSTEIN, *supra* note 72, at 180-83, 195.

581. Roy F. Wood, *Body building—Gateway to a Better Life*, in GAY LIFE, *supra* note 107, at 25, 29.

582. For example, many gay people hold “respectable” professional positions. See, e.g., McWHIRTER & MATTISON, *supra* note 96, at 161-62. Many lesbians and gay men also are in religious life. See, e.g., MAROTTA, *supra* note 72, at 68-84; Keith Clark, *Lutherans Suspend 2 S.F. Churches That Hired “Practicing” Gay/Lesbian Clergy*, WKLY. NEWS, July 25, 1990, at 10. See generally BREAKING SILENCE, *supra* note 91.

583. Rondo Mieczkowski, *Living the Gay Life in a Resort Community*, in GAY LIFE, *supra* note 107, at 97, 98. For a similar list, see JOHNSON, *supra* note 136, at 35.

excluded or unfit because of the cross-gender stereotype.⁵⁸⁴ There are and always have been gay people in great numbers in the military.⁵⁸⁵ The authors of one study noted:

An interesting social group we encountered during the course of this research is a hidden community of mostly blue-collar workers who meet to drink beer, share stories, and watch sports events on TV. If they go to bars at all they frequent non-gay ones where they encounter their fellow workers, be they telephone linesmen, construction workers, or firemen.⁵⁸⁶

The converse is also true: the fact that people choose non-traditional jobs simply is not a definitive indication of sexual orientation.⁵⁸⁷ Of course, there is some tendency for gay people to end up in stereotyped jobs. This is true because openly gay people often are not welcome in other jobs, and entering careers that are supposedly peopled by other gay men and lesbians holds out to us the possibility of safety, support, and acceptance.⁵⁸⁸

This suggests a more general point. We should not be surprised if a greater percentage of *openly* gay people fit the cross-gender stereotypes than of the population as a whole. A feminine man or masculine woman, faced with society's strong presumption that they are gay, and already experiencing the discrimination that accompanies that presumption, has little to lose by coming out.⁵⁸⁹ By contrast, gay

584. See, e.g., JOHNSON, *supra* note 136, at 35 (lesbian nurses, librarians, and secretaries); MCWHIRTER & MATTISON, *supra* note 96, at 7, 161-62 (gay male plumbers, construction workers, and firemen); PALLONE & STEINBERG, *supra* note 208, at 338-39 (gay male major league baseball players); ROSEN, *supra* note 461, at 18 (lesbian secretaries and teachers).

585. See MCWHIRTER & MATTISON, *supra* note 96, at 196; RUSE, *supra* note 59, at 240. The military's own studies indicate gay people perform as well or better than their non-gay counterparts. See BERUBE, *supra* note 96, at 180-81, 270; Rex Wockner, *Navy Official Issues Memos Praising Lesbians As Top Performers But Still Calls For Their Ouster*, WKLY. NEWS, Sept. 19, 1990, at 3 (quoting Navy report saying that "the stereotypical female homosexual in the Navy is hard working, career oriented, willing to put in long hours on the job, and among the command's top professionals."). A number of gay service personnel involved in legal challenges to anti-gay regulations also demonstrate exemplary service records. See, e.g., Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991); Bob Lane, *Lesbian Ex-Army Nurse Finds Acceptance at Civilian Job—She's Waging Court Fight Against Her Discharge*, SEATTLE TIMES, Aug. 24, 1991, at A14.

586. MCWHIRTER & MATTISON, *supra* note 96, at 246.

587. See, e.g., CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK 120-23 (1989) (noting that most male nurses are non-gay); Schultz, *supra* note 64, at 1822 (commenting that studies refute "the claim that only unusual women who managed to escape early conditioning to feminine sex-roles will aspire to nontraditional work"). Similarly, most transvestites are heterosexual. See BLUMENFELD & RAYMOND, *supra* note 93, at 367; BROWN, *supra* note 144, at 239; RUSE, *supra* note 59, at 3.

588. See RUSE, *supra* note 59, at 9; LEWIS, *supra* note 102, at 48-49. For example, one lesbian joined the Army because she heard there were many lesbians in the military. INVENTING OURSELVES, *supra* note 39, at 176-77.

589. Those who conform to cross-gender stereotypes may also have less trouble adjusting to

people who conform to stereotypes of their own gender can "pass" as heterosexual much more easily,⁵⁹⁰ and avoid discrimination by staying in the closet.⁵⁹¹ In other words, if we assume, for example, that fifteen percent of the male population, gay and non-gay alike, is effeminate,⁵⁹² the following scenario seems likely. The fifteen percent of non-gay men who are effeminate go to great lengths to try to prove they are heterosexual to try to avoid discrimination. The eighty-five percent of gay men who are "masculine" mostly stay in the closet, again to avoid discrimination. A significant percentage of the fifteen percent of gay men who are effeminate, subject to vilification for feminine traits anyway, come out because they believe they have little to lose. The appearance to the public will be that almost all gay men—in reality all of whom people are aware—are effeminate. In fact, however, as prior discussion about gay relationships indicated, many of those who have studied lesbians and gay men have concluded that many aspects of their behavior conforms strongly to that stereotypically associated with their own gender.⁵⁹³ And as the next Subpart demonstrates, the relationship between gay life and gender norms is often quite complex.

2. CHALLENGING GENDER-ROLE NORMS

Society simultaneously socializes everyone to adhere to traditional gender role norms and teaches gay people that it assumes we will violate those norms. The tension this creates in our lives affects us in many ways, one of which is to free some of us to challenge gender norms and the false dichotomy they represent.

One form this challenge takes is the gay-male style called "camping." Camping involves adopting exaggerated feminine behavior, not as a way of life, but as a carefully chosen act in particular situations. A common example is that some gay men refer to each other using feminine pronouns and forms of address.⁵⁹⁴ Many gay men who

their gay identities. See Troiden, *supra* note 42, at 69-70. In addition, gay individuals may conform to the stereotypes simply because the stereotypes themselves create an understanding of how gay people are *supposed* to behave. See Rist, *supra* note 473, at 48; cf. LEWIS, *supra* note 102, at 37 (reporting women who conformed to masculine/feminine role-playing in relationships because they lacked other models).

590. See, e.g., BERGER, *supra* note 201, at 30.

591. The decision to try to "pass" is not without its costs. See *supra* part IV.B.2.

592. This also assumes that a clear line between effeminacy and masculinity can be drawn.

593. See *supra* text accompanying notes 256-62.

594. See, e.g., BERUBE, *supra* note 96, at 55 (gay male soldier referred to another gay male as "she" and "her" in a letter to gay civilian friend); FIVE O'CLOCK ANGEL, *supra* note 229, at 86-87 (noting that Tennessee Williams referred to male acquaintance as "Miss Priss" and "she"); *id.* at 227-28 (noting Williams' reference to male companion as "Mary Poppins").

otherwise exhibit masculine behavioral traits often quickly adopt a camp posture if the situation seems right.⁵⁹⁵ When gay men camp, usually they are not revealing a stereotypical "true feminine self." Rather, they are responding to the tension created by the conflicting social expectations of male and gay male behavior.⁵⁹⁶ As one analyst noted:

It is important to keep in mind the exaggerated feminine behavior, or "camp," that some adult gay men enjoy is not causally linked to the development of their sexual orientation. Such behavior contains varying degrees of conscious self-mockery designed to [flout] conventional gender labeling. In our society a gay man is labeled "feminine" simply because he desires or loves other men. It is the angry recognition and [flouting] of this conventional cultural stereotype that to a large extent accounts for "camp" behavior, rather than a disturbance in gender identity.⁵⁹⁷

A more significant type of challenge occurs in the way that gay people conduct themselves in relationships. Heterosexual men and women "come into marriage with implicit 'gender ideologies'—expectations about appropriate marital roles for themselves and their mates—which are the product of their own childhoods, habits and acquired values."⁵⁹⁸

By contrast, gay couples, operating without gender-based expectations of their proper roles during marriage, often create new rules for themselves based on sharing and equality rather than on gender stereotypes.⁵⁹⁹ Thus, many gay relationships operate on a more equal

595. See, e.g., MCWHIRTER & MATTISON, *supra* note 96, at 132.

596. See BERUBE, *supra* note 96, at 86-87 (defining camping described as a survival strategy to cope with gender role tension); KLEINBERG, *supra* note 96, at 149-50 (explaining camping as both a weapon and a complicated comment on gender roles in society); SEARS, *supra* note 40, at 256 (describing camp as a "shield against the world where sissies become outcasts and faggots are bashed"). Other excluded groups also challenge the process of exclusion through coded language. See White, *supra* note 56, at 8-9.

597. ISAY, *supra* note 139, at 20.

598. Robert Kuttner, *She Minds the Child, He Minds the Dog*, N.Y. TIMES, June 25, 1989, § 7 (Book Review), at 3 (reviewing ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 1989); accord Nan B. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991); see also Tina B. Tessina, *Guidelines for Gay/Lesbian Dating*, WKLY. NEWS, May 30, 1990, at 5 (making a similar observation regarding heterosexual dating practices).

599. See KEHOE, *supra* note 96, at 50-51; MCWHIRTER & MATTISON, *supra* note 96, at 5, 31-35, 75, 231-33; Herek, *supra* note 97, at 163; Tessina, *supra* note 598, at 5; cf. BECKER, *supra* note 207, at 38 (describing a woman's discomfort with relationship because the other woman was not interested in sharing chores and activities).

Gay couples' attempts to recreate heterosexual norms can harm their relationship. See, e.g., BECKER, *supra* note 207, at 92-93; MCWHIRTER & MATTISON, *supra* note 96, at 194. One man recalled,

I was expecting to take care of Mark. I didn't want him to work. I made plenty

basis than most heterosexual marriages,⁶⁰⁰ and might well serve as a model of equality for marriage.⁶⁰¹ In fact, one non-gay woman indicated she looked to lesbians as models for her own relationships because "heterosexuals have no role models for positive, equal relationships."⁶⁰²

The rejection of gender-based roles in relationships is part of a greater challenge to gender norms implicit in openly gay lives: the strict dichotomy between male and female. Like the mother in the story that began this Subpart, most people have strong assumptions about "which one of you does what" based on gender. One of the biggest contributions that gay people can make to society is to demonstrate the weaknesses of the bipolar model of gender and to attempt to rectify some of the harms it creates. Lesbians and gay men constantly redefine in our own lives what is appropriate gender behavior and can share what we learn by doing so. As one gay man noted:

Psychologists say that within every human being is a combination of masculine and feminine natures, and that keeping these in balance is a large part of mental health. In general, we have more experience and knowledge of this part of life than most straight people do As keepers of this special knowledge, we have a special role in the world. We heal. We heal through our campy humor, through the way we break down preconceptions and stereotypes, through the innate skills many of us have in a variety of the arts, and many other ways.⁶⁰³

In sum, lesbians and gay men have a complex relationship with gender-role norms. Some of us conform to them; some of us do not. Some of us strain to adhere to them; others challenge their very existence. Yet the pre-understanding of the cross-gender stereotype continues in our society and is the source of much anti-gay discrimination.

Advocates for gay rights face a significant challenge overcoming the pre-understanding of the cross-gender stereotype. In cases where it appears to be implicated, they can rely on evidence of the kind presented here to try to overcome it. In addition, advocates can use the stereotype to their own advantage by presenting the argument

of money for both of us. I guess I really wanted him to act just like a wife. Wow, did that cause us problems! He tried to do what I wanted, but it just didn't work. He told me he wasn't my wife.

Id. at 58.

600. See JOHNSON, *supra* note 136, at 120-24; McWHIRTER & MATTISON, *supra* note 96, at 5, 31.

601. See MACKINNON, *supra* note 37, at 27; Hunter, *supra* note 598, at 16-17.

602. JOHNSON, *supra* note 136, at 15-16.

603. Jonas, *supra* note 494, at 5, 19.

made in the next Subpart: that anti-gay discrimination, particularly that based on the cross-gender stereotype, is a form of gender discrimination.

C. *Sexual Orientation Discrimination is Gender Discrimination*

Many commentators have suggested that a primary reason for discrimination against perceived homophiles is concern about violation of gender-role norms,⁶⁰⁴ and thus that anti-gay bias is a form of gender discrimination.⁶⁰⁵ Sylvia Law has developed this thesis at length, amassing historical and sociological evidence to support it.⁶⁰⁶ Here, rather than repeating her analysis, I demonstrate that the psychological literature and the experiences of individual lesbians and gay men also support the thesis. In particular, I show evidence that homophobia is caused, at least in part, by a desire to preserve traditional gender roles; that homophobia is a highly gendered phenomenon generally; and that homophobia has the effect of enforcing gender-role norms.⁶⁰⁷

1. PRESERVATION OF GENDER-ROLE NORMS AS A CAUSE OF HOMOPHOBIA

Much of the psychological literature examining homophobia has concluded that support for the traditional gender-role structure is a primary cause of homophobia.⁶⁰⁸ A 1979 survey by Stephen Morin and Ellen Garfinkle, perhaps the leading work in the field, concluded

604. See HOPCKE, *supra* note 152, at 101; JAY & YOUNG, *supra* note 104, at 2; RUSE, *supra* note 59, at 121; Capers, *supra* note 18, at 1159; Law, *supra* note 18, at 187.

605. See MACKINNON, *supra* note 16, at 248. By saying that anti-gay discrimination is a form of gender discrimination, I do not mean to suggest that lesbians experience them identically. As a number of lesbians have pointed out to me, they clearly experience sexism as a separate set of problems and interactions from discrimination on the basis of their sexual orientation. Yet the experiential difference does not alter the thesis that anti-gay discrimination reinforces, and is partly caused by, sexist attitudes. Rape, beauty pageants, and "protective" gender-based wage and hour laws may all arise from sexism, but they surely are not experienced by women as the same thing.

606. See Law, *supra* note 18, at 197-206.

607. I use "homophobia" here to mean negative attitudes toward gay people and homophobic behavior. See RUSE, *supra* note 59, at 2. A number of recent works use the somewhat broader term "heterosexism," which has been defined as the "system by which heterosexuality is assumed to be the only acceptable and viable life option," and under which the existence of homophiles is effectively ignored. BLUMENFELD & RAYMOND, *supra* note 93, at 244; see also Law, *supra* note 18, at 195. The term may be preferable because it suggests that anti-gay discrimination arises from a complicated set of attitudes and beliefs akin to racism and sexism, rather than merely fear of gay people. I employ "homophobia" instead, however, because it is used consistently in the psychological literature that I describe, and I do not want to mischaracterize the studies I cite.

608. Koppelman, *supra* note 18, at 159 & n.86.

that "cultural learning" about appropriate gender role behavior "is a powerful force associated with fear, dread, and hatred of homosexuals."⁶⁰⁹ The survey found that "the need to preserve a double standard between men and women" was a "basic component" of homophobia.⁶¹⁰ The study's findings are well supported by the literature.⁶¹¹

609. Morin & Garfinkle, *supra* note 551, at 31.

610. *Id.* The survey also found that the concern about gender roles was a greater component of homophobia than conservative attitudes toward sexual issues generally. *See id.* at 31.

611. *See, e.g.,* A.P. MacDonald, Jr. & Richard G. Games, *Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals*, 1 J. HOMOSEXUALITY 9, 19 (1974) ("[A] major determinant of negative attitudes toward homosexuality is the need to keep males masculine and females feminine, that is, to avoid sexual confusion."); MacDonald, *supra* note 554, at 30 (Sex role confusion "is the most important determinant of attitudes towards homosexuals. I am referring to the need to preserve the double standard between the sexes."); Linda E. Weinburger & Jim Millham, *Attitudinal Homophobia and Support of Traditional Sex Roles*, 4 J. SEXUALITY 237, 244 (1979) (finding homophobia related to traditional masculinity-femininity distinction).

Using the *Social Science Citation Index*, I examined all English-speaking sources through 1991 that cited Morin & Garfinkle, *supra* note 551. None of those sources disagree with the notion that discomfort about violations of gender role norms is correlated strongly with homophobia. Only one disagrees with the position that that discomfort is a *cause* of homophobia. *See* Michael D. Storms, *Attitudes Toward Homosexuality and Femininity in Men*, 3 J. HOMOSEXUALITY 257 (1978). Storms concludes that Morin and Garfinkle have the causal link exactly backwards: fear of homosexuals causes people to dislike those who violate gender norms. However, at least to a layperson, Storms's results do not appear to support his conclusions. In his study, college students were asked to read descriptions of a college-age young man who was described as having heterosexual sexual activity in some versions and homosexual sexual activity in others. The young man also was described as having stereotypical masculine interests and clothing in some versions, and more feminine interests and clothing in others. Students were asked to rate (on a scale of 1 to 17) how much they liked the young man. *Id.* at 258-59. The students responded most favorably to versions describing a masculine students who engaged in heterosexual activity (average of 10.53), followed by the feminine homosexual (8.38), the feminine heterosexual (7.63) and then the masculine homosexual (7.24). *Id.* at 260.

Storms explains his data in the following way:

It appears that attitudes about sexual orientation are predominant; people primarily dislike homosexuals. Beyond that, people probably adhere to the stereotype that homosexual men are feminine. Thus, to the extent that people dislike feminine men, it may be because of suspected homosexuality. When a feminine man turns out to be heterosexual and when a homosexual man turns out to be masculine, they are disliked even more for violating the stereotype.

Id. at 261. Yet the strength of the negative reaction to the feminine heterosexual seems to me to support Morin and Garfinkle's conclusions. If in fact, the primary negative reaction is to homosexuality, why is the feminine homosexual more liked than the feminine heterosexual? On the other hand, if you assume that the two ingredients operating on Storms's subjects are dislike of feminine men and dislike of a kind of dishonesty—hiding your "true" nature by behaving against stereotype—the results make sense. Thus, feminine gay men, while significantly less "likable" to the subjects than masculine heterosexuals, at least are "doin' what they oughta," and thus are preferable to feminine heterosexuals.

Another run through the *Social Science Citation Index* through 1991 demonstrated that

For example, studies demonstrate that those opposed to gender equality are more likely to be homophobic,⁶¹² and suggest that positive attitudes toward traditional gender-role behavior contribute to anti-homosexual attitudes.⁶¹³ In one unpublished study, the experimenter's confederates labelled one of a group of men working together as homosexual. The confederates who performed the labeling were all perceived as significantly more masculine and more sociable when they labeled someone homosexual than when they did not.⁶¹⁴ The author suggested that "men who demonstrate ability to simply identify another man as a homosexual are rewarded and reinforced by other men in our culture for possessing that 'skill.'" ⁶¹⁵

Although most psychological studies of homophobia suggest that the strongest contributing factor is belief in the importance of maintaining traditional gender-role stereotypes, a number of studies identify other factors that may be partially responsible as well. These factors include conservative attitudes about sexual issues in general, religious beliefs, and the belief that homophiles are dangerous.⁶¹⁶ Notably, however, each of these factors can be attributed in part, or at least correlated to, fear of deviation from gender-role norms.⁶¹⁷ The authors of a study that identified conservative attitudes about sex as

Storms's view has not been adopted by other authors. In any event, Storms acknowledges that there is a strong correlation between homophobia and gender-role norms, *id.* at 261, so even if he is correct as to the direction of the causal link, my general conclusions about the effect of anti-gay discrimination remain valid.

612. See Kathryn N. Black & Michael R. Stevenson, *The Relationship of Self-reported Sex-role Characteristics and Attitudes Toward Homosexuality*, 10 J. HOMOSEXUALITY 83 (citing studies); Fred A. Minnigerode, *Attitudes Towards Homosexuality: Feminist Attitudes and Sexual Conservatism*, 2 SEX ROLES 347 (1976); MacDonald, *supra* note 554, at 31; MacDonald & Games, *supra* note 611, at 19. But see Weinburger & Millham, *supra* note 611, at 244 (finding no connection between homophobia and amount of support for women's rights).

613. See Black & Stevenson, *supra* note 612, at 83 (summarizing studies); Weinburger & Millham, *supra* note 611, at 244; see also Minnigerode, *supra* note 612, at 347-48 (describing relationship as "correlation" rather than "contribution"). Minnigerode also found that sexual conservatism was related to both anti-homosexual and anti-feminist attitudes, reinforcing the idea that traditional attitudes toward sexuality and gender are related. *Id.* at 351.

614. Morin & Garfinkle, *supra* note 551, at 40-41 (citing unpublished study).

615. *Id.*

616. Jim Millham et al., *A Factor Analytic Conceptualization of Attitudes Toward Male & Female Homosexuals*, 2 J. HOMOSEXUALITY 3 (1976); Bob Tremble et al., *Growing Up Gay or Lesbian in a Multicultural Context*, in GAY AND LESBIAN YOUTH, *supra* note 40, at 253, 257; SEARS, *supra* note 40, at 44.

617. Obviously "causation" oversimplifies the relations between various social phenomena; all these factors can be viewed as part of a larger understanding of society shared by many people that incorporates "traditional" values like conservative attitudes toward sex, women, and religion. I adopt the language of causation that is used in some of the studies because I attempt to use this information to craft an equal protection argument. See *infra* part VI. To the courts that will decide the constitutional question, causation matters.

contributing to homophobia⁶¹⁸ also noted the obvious ties between sexual conservatism and maintenance of traditional gender-role stereotypes: the bedroom is one of the most important settings in which gender-role norms are played out.⁶¹⁹ Religious objections to homophiles may stem from a patriarchal vision of society.⁶²⁰ People may find homophiles "dangerous" because they flaunt "necessary" gender-role strictures.⁶²¹

A wide variety of stories from gay people's lives support the psychologists' conclusion that concern about maintaining gender-role norms contributes to homophobia. Many stories reveal discrimination purely on the basis of failure to conform to gender stereotypes. Society is hard on "butch" women and effeminate men, whether or not they are gay. For example, employers may try to limit cross-gender behavior, particularly in matters of dress and grooming, to prevent the perception that their workers are gay.⁶²² "Experts" on children have urged parents to encourage their offspring to engage in gender-appropriate behavior as a way to prevent their becoming gay,⁶²³ and parents often comply.⁶²⁴ Gay activist Harry Hay recalls

618. Minnigerode, *supra* note 612, at 351.

619. See generally MACKINNON, *supra* note 37, at 93-102. A similar point was made by the author of a study that compared attitudes toward premarital sex, traditional gender roles, and homosexuality. The study found that "[p]ermissive attitudes toward premarital sex were only mildly associated with attitudes toward homosexuality," and the small correlation between the two was attributable to attitudes toward gender roles generally. MacDonald, *supra* note 554, at 32. This finding supports the conclusion that at least part of the correlation between "sexual conservatism" and homophobia is due to attitudes toward gender-role deviation.

620. Even if religious beliefs are the cause of homophobia, they cannot justify state action furthering the discrimination. See Law, *supra* note 18, at 216-17.

621. In addition, one study found that males, people living in rural areas, and white people were more likely to have negative attitudes toward perceived homophiles. Eugene E. Levitt & Albert D. Klassen, *Public Attitudes Toward Homosexuality: Part of the 1970 National Survey by the Institute of Sex Research*, 1 J. HOMOSEXUALITY 29, 41 (1974). Since rural white males as a category tend to be sexually and politically conservative and to hold strong beliefs about religion and the importance of gender-role stereotypes, it is obviously hard to map out cause and effect among these factors (to the extent that it is meaningful to talk about cause and effect at all).

622. During World War II, the military prohibited certain behavior "that the public could perceive to be lesbian," such as dancing together in public in uniform (which requires one to play the man by leading) or wearing "mannish" haircuts. BERUBE, *supra* note 96, at 59; see also BROWN, *supra* note 144, at 163 (noting employment agencies discriminating against effeminate men).

623. BLUMENFELD & RAYMOND, *supra* note 93, at 30. Similarly, Nan Hunter has argued that concern about gay parents arises from "the fear that the children will be exposed, not to negligent or inept parenting, but to the wrong models of gender, implicitly marked as legitimate." Hunter, *supra* note 598, at 18.

624. See, e.g., Jeanne Cordova, *Trauma in the Heterosexual Zone*, in THE LESBIAN PATH, *supra* note 95, at 52, 56. See generally HOPCKE, *supra* note 152, at 148 (noting that the typical relationship between fathers and gay sons includes attempts by the father to "make a man" out of a son whose interests often differ from those socially defined as masculine").

that his father had "tried to beat the sissy out of [him]." ⁶²⁵ One lesbian remembers receiving a number of dolls for Christmas when she was six:

I only liked one of the dolls. It was one of the smaller ones. She had dark hair and wore a cowboy costume, complete with red plastic boots, blue pants, black holster, and a tiny tin six-shooter. I called her Annie, and she was the only one I ever played with. The others just stayed in the closet. Finally, my mother got mad that I wouldn't play with the feminine dolls and took all of them, including Annie, to the Salvation Army. ⁶²⁶

Anti-gay violence often takes the form of attacks on men who seem effeminate. ⁶²⁷ One teenager who participated in gay-bashing excursions explained, "What would happen is, the whole gang would be hanging out and some feminine guy would walk by and someone would say 'let's get the fag!' We'd all surround the guy, scare him half to death, and rough him up a little." ⁶²⁸

Derogatory terms applied to gays—butch, queen, fairy—often reflect concern with gender-role variation. ⁶²⁹ One aspect of this discrimination is the use of phrases like "real man" or "real woman," as a contrast to homophiles, who are seen as not "real" in some way. ⁶³⁰ For example, male West Point cadets generally would refuse to dance with female cadets, but would wait for the "real" women who the military bused in from nearby women's colleges for dances. ⁶³¹

A corollary to this perception is that gay men are described as not being men. ⁶³² When one man came out to his family, his mother cried that he had lost his manhood and his brother raved that he "had

625. TIMMONS, *supra* note 143, at 20.

626. LEWIS, *supra* note 102, at 22.

627. See COMSTOCK, *supra* note 561, at 53. For example, one man reported being surrounded and beaten up because his jacket was "too effeminate." George James, *A Survey Finds Gay-Bias Cases Go Unreported*, N.Y. TIMES, June 19, 1991, at B12.

628. COMSTOCK, *supra* note 561, at 70.

629. MacDonald, *supra* note 554, at 30.

630. See BERUBE, *supra* note 96, at 157 (reporting that military during World War II viewed male homophiles as pseudo men); BROWN, *supra* note 144, at 33-34 (reporting father who complained that his son didn't want to go out and play "like a real boy"); John R. Nierenberg, *Thoughts of a Putative Pornographer*, in MEN & INTIMACY, *supra* note 89, at 84 (reporting that gay pornography not taken seriously in discussions of pornography because "[g]ays are not *real* men after all; only queers"); PHARR, *supra* note 20, at 9 (noting that women who are lesbians or who stand up to men are not "real women" in eyes of abusive men).

631. BARKALOW & RABB, *supra* note 544, at 54.

632. See, e.g., HOPCKE, *supra* note 152, at 56; INVENTING OURSELVES, *supra* note 39, at 67; Ronald E. Hellman, *Facing Up to Compulsive Lifestyles*, in GAY LIFE, *supra* note 107, at 30, 33-34.

turned out not to be a man."⁶³³ People may suggest that effeminate men participate in stereotypical masculine activities to find their manhood or "make a man out of" themselves.⁶³⁴ Many gay men internalize these concerns and try to prove their manhood by joining the military or sleeping with women.⁶³⁵ One gay teenager believed he "was less a man for kissing his cousin . . . [a] way of proving his masculinity was required and [he] chose two of the more popular methods, joining the navy and getting married."⁶³⁶ Similarly, women may be encouraged to "accept" their female role⁶³⁷ and may opt out of "masculine" activities such as sports programs out of fear of being labeled a "dyke."⁶³⁸ The language people use in the role enforcement process is itself evidence of its gendered and hierarchical nature: a male "proves" his manhood, a female "accepts" her womanhood.

Another variation of gender-related discrimination occurs when people, having decided that gay men share female characteristics, discriminate against them in a way that mirrors discrimination against women generally. As one author has noted:

The stereotype of gay men as passive and womanly trapped them in a double bind. When they did act aggressively, they were dismissed, like women, as petulant, impulsive, or silly; when they complied or withdrew, they were perceived, also like women, to be characteristically weak, oversensitive, and unable to defend themselves.⁶³⁹

For example, a recent *New York Times* article analyzed the treatment by music critics of Tchaikovsky in the period since he was revealed to be gay. The author suggests that negative attitudes toward the composer result from this type of gender-based homophobia: "All of the prejudices commonly directed against women composers have been directed at him."⁶⁴⁰ Similarly, the masculine stereotype associated with lesbians may contribute to their difficulties in custody cases. As

633. BROWN, *supra* note 144, at 76-77.

634. See, e.g., *id.* at 78.

635. See, e.g., BERUBE, *supra* note 96, at 5, 178; MCWHIRTER & MATTISON, *supra* note 96, at 196; see also Hellman, *supra* note 632, at 35 (reporting gay man who began weightlifting because he felt effeminate). Hellman suggests that compulsive sexual behavior among gay men also is related to a need to prove masculinity. See *id.* at 34.

636. SILVERSTEIN, *supra* note 72, at 257.

637. See, e.g., Budd, *supra* note 297, at 132.

638. See Dolores A. Grayson, *Emerging Equality Issues Relating to Homosexuality in Education*, 64 PEABODY J. EDUC. 132, 135 (1987). "In some cases, an adolescent girl may purposely become pregnant as a means of 'proving' that she couldn't possibly be homosexual." Troiden, *supra* note 42, at 57.

639. BERUBE, *supra* note 96, at 157.

640. See Richard Taruskin, *Tchaikovsky, Fallen From Grace*, N.Y. TIMES, June 30, 1991, § 2, at 21-22 (noting criticism of composer as weak, emotional, sentimental and hysterical).

one author noted, the "butch stereotype of lesbians seems diametrically opposed to the nurturance and caretaking so closely associated with motherhood in the United States."⁶⁴¹

One particularly significant form of gender-related discrimination is that non-gay people often assume that gay men prefer sexual positions associated with heterosexual females: the active role in oral sex and the passive role in anal sex.⁶⁴² This stereotype is so powerful that men who perform sexual activity with other men, but only assume the "male" role may not be considered gay by others or by themselves.⁶⁴³ Indeed, even cultures that treat some forms of gay activity as acceptable have denigrated adult men who performed the "female" role during sexual activity.⁶⁴⁴

Many stories support the idea that the perception that a male is acting like a female is a significant component of some people's discomfort with male-male sexual activity. The extensive use of the derogatory term "cocksucker" suggests that people see some distinction between men who perform the "female" role in fellatio and those who merely like having other men perform that role for them. *Newsweek* quoted one man referring to male sodomy as "the most degrading thing one human being can do to another."⁶⁴⁵ In this century of highly-publicized horrors, and in light of the prevalence of rape, this is a remarkable statement.⁶⁴⁶ A clue to its meaning is found in the

641. WESTON, *supra* note 254, at 172.

642. See, e.g., BERUBE, *supra* note 96, at 19, 160; RUSE, *supra* note 59, at 49.

643. See SILVERSTEIN, *supra* note 72, at 91; BERGER, *supra* note 201, at 153; BERUBE, *supra* note 96, at 41; BLUMENFELD & RAYMOND, *supra* note 93, at 83, 165-66; KLEINBERG, *supra* note 96, at 155; cf. JAY & YOUNG, *supra* note 104, at 717 (noting that male prisoners see rape victims as female; therefore they can see their acts as not homophobic in nature); KLEINBERG, *supra* note 96, at 200 (reporting convict who had trouble explaining to prisoners that he was "gay" but always took the active position in anal sex).

644. For example, there is evidence that the Ancient Greeks, who tolerated homosexuality in certain circumstances, ridiculed adult males who were effeminate and who continued to prefer the passive role in male-male sex after reaching adulthood. See Law, *supra* note 18, at 198; MacDonald, *supra* note 554, at 30. In Latin American cultures today, the stigma of homosexuality primarily attaches to men who adopt the passive role during sex. See Joseph M. Carrier, *Gay Liberation and Coming Out in Mexico*, in GAY AND LESBIAN YOUTH, *supra* note 40, at 225, 226-27; Richard Parker, *Youth, Identity, and Homosexuality: The Changing Shape of Sexual Life in Contemporary Brazil*, in GAY AND LESBIAN YOUTH, *supra* note 40, at 269, 273.

645. *Overheard*, NEWSWEEK, July 1, 1991, at 19. This is hardly an isolated opinion. Norman Podhoretz, editor of the *New Republic*, described homosexuality as "brutish degradation." Kimmel & Levine, *supra* note 89, at 96 (quoting Alan M. Dershowitz, *Crucial Steps in Combatting the Aids Epidemic*, N.Y. TIMES, Mar. 18, 1986, at 727 (quoting Podhoretz)).

646. Chief Justice Burger apparently endorsed this position in his concurring opinion in *Bowers*, quoting Blackstone for the proposition that "sodomy" was an offense of "deeper malignity" than rape. *Bowers v. Hardwick*, 478 U.S. 187, 197 (1986) (Burger, C.J.,

use of the transitive verb.⁶⁴⁷ The speaker is not imagining a mutual experience, such as the conduct at issue in *Bowers*. Rather, he almost certainly is thinking of anal sex, which he sees as one person degrading another. Why? Presumably because one man is forcing the other to behave like a woman.⁶⁴⁸

These stories together lend support to the conclusion that homophobia is based primarily in "anxiety about the boundaries of gender."⁶⁴⁹

2. THE GENDERED CHARACTER OF HOMOPHOBIA

If homophobia is related to people's attempts to preserve gender-role stereotypes, then we would expect to see it play out in a highly gendered fashion. Men, who have more to lose if the gender-role lines are eliminated, should be more uncomfortable with people they perceive as challenging those lines. Lesbians should be perceived and treated differently from gay men. After all, according to the stereotype, male homophiles adopt female roles, roles of less prestige within society. A deliberate adoption of less prestigious roles might well be inexplicable to a member of the dominant group and might well be viewed with contempt. Female homophiles, on the other hand, adopt more prestigious and powerful male roles. This type of "deviation," an attempt to move "up," would be threatening to the patriarchal male order in a different way.

In fact, as I demonstrate in this Subpart, men tend to be more homophobic than women and society treats male and female perceived homophiles differently. In addition, the very nature of the

concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215). As Lynne Henderson has noted, this position demonstrates "lack of empathy for gays and women simultaneously, a real tour de force." Henderson, *supra* note 18, at 1646-47.

647. See California Energy Res. Conserv. & Dev. Comm'n v. Johnson, 807 F.2d 1456, 1466 (9th Cir. 1986) ("[v]erbs are telling").

648. This is degrading because to be a man, one has to do male things—and particularly the act of "fucking" during sex. See JOHN STOLTENBERG, REFUSING TO BE A MAN 14, 33, 39 (1990); see also MACKINNON, *supra* note 37, at 112 (noting men's definition of woman is "one who exists to be sexually done to"). One can not be a man while being used as a woman. See SILVERSTEIN, *supra* note 72, at 193; Koppelman, *supra* note 18, at 160 & n. 91; see also MACKINNON, *supra* note 37, at 56 (noting that men "know" they have been "feminized" when they have been raped).

This idea has been internalized by many gay men. One gay man said, "With men I'm chauvinistic; nobody is going to touch me, nobody is going to fuck me. I don't like it. I have to play the male. I have to be the male in the action, I'm not the female." Silverstein, *supra* note 72, at 219. A common theme in gay male literature is the question of whether you can retain your masculinity if you are the "passive" participant in anal sex. See, e.g., *id.* at 153-54.

649. KOPPELMAN, *supra* note 18, at 159.

debate about gay issues suggests that gender plays an important role in anti-gay attitudes.

a. Gender-Based Differences in Attitudes
Toward Homophile Behavior

Gay men and lesbians generally share with researchers the belief that women are less homophobic than men.⁶⁵⁰ A variety of evidence supports this belief. Surveys tend to show that men disapprove of gay sexual orientation more than women.⁶⁵¹ Psychological studies have found anti-gay attitudes generally stronger among men.⁶⁵² For example, one study concluded that "males are more likely than females to view the male homosexual as a sexual failure and more likely to perceive him as personally threatening and dangerous."⁶⁵³

Violence against gay people is almost exclusively a male phenomenon.⁶⁵⁴ Although a partial cause of this might be more non-violent socialization of women,⁶⁵⁵ males account for a higher percentage of anti-gay violence than they do for violence against the general population.⁶⁵⁶

Two factors seem to determine one's participation in many examples of anti-gay/lesbian violence: one of these is being an adolescent male; the other is being in the company of other adolescent males. In other words, expected or acceptable behavior for an adolescent male who socializes with other adolescent males is physically attacking lesbians and gay men.⁶⁵⁷

This male anti-gay violence is not an isolated or underclass phenomenon. The perpetrators are more likely to be middle-class or average kinds of people than are perpetrators of violence in general.⁶⁵⁸ One informal survey found that sixteen percent of a group of male college freshmen admitted to physically attacking lesbians or gay men at least once.⁶⁵⁹

The relationships between gay people and their blood relatives

650. See ISAY, *supra* note 139, at 78; JAY & YOUNG, *supra* note 104, at 750; RUSE, *supra* note 59, at 197.

651. See, e.g., COMSTOCK, *supra* note 561, at 111, 168-69; Goleman, *supra* note 344, at C1; Hentoff, *supra* note 326, at 98.

652. Morin & Garfinkle, *supra* note 551, at 38 (citing studies); see also Minnigerode, *supra* note 612, at 349; Darrell Steffensmeier & Renée Steffensmeier, *Sex Differences in Reactions to Homosexuals: Research Continuities and Further Developments*, 10 J. SEX RES. 52, 63 (1974).

653. Morin & Garfinkle, *supra* note 551, at 34.

654. COMSTOCK, *supra* note 561, at 58-59.

655. See *id.* at 106, 112.

656. *Id.* at 90-91.

657. *Id.* at 93.

658. *Id.* at 90-91.

659. *Id.* at 108. Thirty-seven percent admitted to verbally harassing gay people. *Id.* at 167.

also tend to support the idea that women are less homophobic.⁶⁶⁰ Gay people tend to be more open to their mothers than their fathers,⁶⁶¹ and feel they get more support from their mothers.⁶⁶² Similarly, gay people report being closer to sisters than brothers.⁶⁶³

Even non-gay observers note the gendered nature of homophobia. A female West Point cadet observed: "Women at the Academy . . . don't really care as much about homosexuality existing among the cadets. The males, of course, are adamant about it, but they're particularly adamant when it comes to females."⁶⁶⁴

b. Differential Treatment of Perceived Male and Female Homophiles

The last observation suggests a second way in which homophobia is gendered. In many circumstances, people perceive and treat male homophiles differently from female homophiles. A variety of evidence demonstrates this gendered difference,⁶⁶⁵ including the treatment of the sexual act itself.

The law in western societies always has been stricter about prohibiting male than female same-sex sexual acts "despite no apparent moral difference."⁶⁶⁶ One explanation is that our society doesn't take lesbian sexual activity—that is sex without men—particularly seriously.⁶⁶⁷ Common myths assert that one lesbian in a couple must play the "male" role⁶⁶⁸ and that lesbians must use penis substitutes of one sort or another.⁶⁶⁹ "Heterosexual males seem obsessed with the

660. This may stem, at least in part, from our culture's socializing women to be more sympathetic in general.

661. JAY & YOUNG, *supra* note 104, at 68, 141; JOHNSON, *supra* note 136, at 256-57. This may be because they have gendered expectations about their responses. One study found that gay people expected their mother to be more understanding and "tended to interpret the parents' responses in ways that carried and perpetuated gendered distinction." WESTON, *supra* note 254, at 53-54.

662. JAY & YOUNG, *supra* note 104, at 144; JOHNSON, *supra* note 136, at 263.

663. See KEHOE, *supra* note 96, at 30; MCWHIRTER & MATTISON, *supra* note 96, at 239. One study also found sons of lesbians less receptive to their mothers' sexual orientation than daughters. KEHOE, *supra* note 96, at 30.

664. BARKALOW & RABB, *supra* note 544, at 135.

665. See generally BLUMENFELD & RAYMOND, *supra* note 93, at 105 (noting that male and female "homosexuals" are treated differently in many cultures).

666. RUSE, *supra* note 59, at 201-02; see also, e.g., BERUBE, *supra* note 96, at 142 (noting that military treated male same-sex activity more strictly during the initial stages of World War II); BLUMENFELD & RAYMOND, *supra* note 93, at 360-61 (noting that women's same-sex sexual activity not mentioned in the British criminal statute of 1885).

667. This may just be a subset of not taking female sexuality seriously in general. See KEHOE, *supra* note 96, at 71; ROSEN, *supra* note 461, at 5.

668. See, e.g., LEWIS, *supra* note 102, at 31 (noting that women are often asked whether they play male or female role in sex).

669. See, e.g., BLUMENFELD & RAYMOND, *supra* note 93, at 360-61.

idea of dildos and other penis substitutes [as part of sex for lesbians]—no doubt they find it difficult to imagine that women could find sexual satisfaction without their own presence, at least by proxy.”⁶⁷⁰ In addition, heterosexual men, while believing gay male sex “degrading,”⁶⁷¹ often find the idea of lesbian sex erotic.⁶⁷² By contrast, I know no heterosexual women who have claimed to be turned on by thoughts or images of gay men in bed together.

A number of commentators have expressed the view that our society subjects perceived male homophiles to harsher sanctions than their female counterparts.⁶⁷³ Some psychological studies suggest that people view male homophiles’ activity more harshly.⁶⁷⁴ The authors of one of these studies attribute their results to their perception that “male homosexuality is defined as being more incongruent with the culturally defined sex role than is female homosexuality.”⁶⁷⁵ I think this is true only for certain activities, particularly traditionally male realms such as the work world.

One example of harsher treatment of male homophiles in the work world was revealed in a study of people applying for jobs traditionally held by the other gender. The study’s authors found that employers discriminated against males inquiring after “female” jobs much more clearly than against females inquiring for “male” jobs.⁶⁷⁶ The authors offered the following explanation:

[F]or women to seek more highly desired and prestigious jobs may be perceived as rational, understandable, and sometimes admirable. However, the male seeking a less valued “female” position is

670. RUSE, *supra* note 59, at 8. Ruse goes on to point out that, “although dildos do have their role in lesbian love-making, they seem not to figure as large as popular imagination would have it. If anything, they find more of a role in self-masturbation.” *Id.*

671. See *supra* text accompanying notes 645-46.

672. RUSE, *supra* note 59, at 201-02; see also, e.g., JAY & YOUNG, *supra* note 104, at 799 (reporting the author observed only men buying sex manual for lesbians); Cordova, *supra* note 624, at 64 (noting that after woman placed ad that said young, lonely, gay woman would like to meet similar woman for friendship, “[t]hirty-seven men and two women called”).

673. See BLUMENFELD & RAYMOND, *supra* note 93, at 81 (quoting Laud Humphries, *Exodus and Identity: The Emerging Gay Culture*, in GAY MEN: THE SOCIOLOGY OF MALE HOMOSEXUALITY (M.P. Levine ed., 1979)); ISAY, *supra* note 139, at 16; RUSE, *supra* note 59, at 197. Many commentators have noted that society often takes lesbians less seriously than gay men. See, e.g., BLUMENFELD & RAYMOND, *supra*, at 366; KLEINBERG, *supra* note 96, at 152; see also *supra* notes 427-31 (discussing lesbian invisibility).

674. See, e.g., Millham et al., *supra* note 616, at 9; Steffensmeier & Steffensmeier, *supra* note 652, at 62-63. But see MacDonald & Games, *supra* note 611, at 17 (showing slightly more favorable reaction to “male homosexuals” than to “lesbians”).

675. Steffensmeier & Steffensmeier, *supra* note 652, at 64.

676. See Richard M. Levenson, *Sex Discrimination and Employment Practices: An Experiment with Unconventional Job Inquiries*, in WOMEN AND WORK: PROBLEMS AND PERSPECTIVES 60, 61 (R. Kahn-Hut et al. eds., 1982).

likely . . . to be seen as peculiar. . . . Interestingly, several male . . . callers were questioned about their "masculinity" (e.g., "Are you a queer?"), while no female . . . callers reported such comments.⁶⁷⁷

Thus, in the work world, women may be freer, at least up to a point,⁶⁷⁸ to defy gender stereotypes in some circumstances than are men.⁶⁷⁹ Of course, women who attempt the most macho work, such as blue-collar jobs in construction or on assembly lines, usually are subject to daily harassment from their co-workers.⁶⁸⁰ This would explain the female cadet's observation about her male cohorts retold at end of the last Subpart: cadets particularly resented supposedly masculine women interfering on their macho turf. By contrast, it is hard to believe that female nurses or secretaries harass male colleagues in similar ways. Still, despite the harassment that women receive for entering male preserves, males probably risk greater loss of status by taking on public female roles.

By contrast, lesbianism may be most threatening to society in the private realm when women live together and raise children without the help of men.⁶⁸¹ As one author noted:

[W]hen the press notices lesbian issues, it is often in connection with custody cases. There the issue of saving the children for heterosexuality and precisely for patriarchy is clear. These lesbians who once lived as straight women, who married and had children, are objects of the most extreme wrath, and one which has used the

677. *Id.* at 61.

678. Of course, women who are perceived as *too* masculine run into problems as well. In the most famous example, Price Waterhouse denied partnership to Ann Hopkins at least in part because of perceptions of this type. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989).

679. Allan Berube's account of the military's treatment of gay men and lesbians during World War II supports this view.

Butch women occupied a higher social status in basic training than did effeminate men, although each could be stigmatized as sexually queer. Effeminate men were not powerless, but they generally were teased, tolerated, or protected by the other men. Butches were more likely to take charge, to be the protectors, teachers, and even leaders and NCOs of a unit. Sissies could be taunted and made to feel incompetent in a military environment; butches could be the objects of hero worship and were expected to know how to function well in a man's world.

BERUBE, *supra* note 96, at 56; see also *id.* at 29.

680. See Elvia R. Arriola, "What's the Big Deal?" *Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 1 (1990).

681. See Cain, *supra* note 19, at 203, 212 (arguing that lesbian relationships can create a sphere where women are free from subordination by men); Koppelman, *supra* note 18, at 160 (noting that lesbianism "challenges male privilege" because it "denies that female sexuality exists, or should exist, only for the sake of male gratification").

judicial system as its instrument to punish them.⁶⁸²

Similarly, a study of anti-gay violence found that lesbians, unlike gay men, often are subject to violence at the hands of spouses or ex-spouses.⁶⁸³ The author offers the following explanation: "Husbands who come out as gay men . . . give up a patriarchal privilege. Household Wives who come out as lesbians, on the other hand, deny a [man] his privilege by refusing to serve, to be owned, to be subordinate to him, and to produce and raise children for him."⁶⁸⁴

In sum, the gendered differences in the way society treats perceived homophiles support the idea that preservation of gender-role stereotypes is a major component of homophobia. In the public sphere, men who eschew male privilege are contemptible; women who aspire to male roles are understandable, if often disliked and harassed. In the private sphere, women who try to exist without men are difficult to understand and ultimately dangerous because they refuse to provide expected services to men.⁶⁸⁵

c. Gender and the Debate About Gay Issues

The very terms of the debate about gay issues provide further, if more subtle, evidence of the gendered nature of homophobia. I pointed out in Part III the pre-understanding of non-gay society that gayness is equivalent to desire for and performance of the sexual act. At least one author has suggested that because men in our society are socialized to equate heterosexual masculinity with the performance of the sexual act, they view gay sexuality in the same (masculine) terms.⁶⁸⁶ Similarly, the assumption that gay people are anti-family rests on other assumptions related to gender-role norms.⁶⁸⁷

Homosexuality threatens not the family as such, but a certain traditional ideology of the family. That ideology is one in which men, but not women, belong in the public world of work and are

682. KLEINBERG, *supra* note 96, at 152.

683. See COMSTOCK, *supra* note 561, at 112.

684. *Id.* Suzanne Pharr argues that a male abuser often will label the women they abuse "lesbians" out of related concerns:

[H]e is not so much labeling her a woman who loves women as he is warning her that by resisting him, she is choosing to be outside society's protection from male institutions and therefore from wide-ranging, unspecified, ever-present violence. When she seeks assistance from woman friends or a battered women's shelter, he recognizes the power in women bonding and fears loss of her servitude and loyalty: the potential loss of his control. The concern is not affectional/sexual identity: the concern is disloyalty and the threat is violence."

PHARR, *supra* note 20, at 14-15.

685. See PHARR, *supra* note 20, at 18.

686. See STOLTENBERG, *supra* note 648, at 39.

687. See Law, *supra* note 18, at 218-21.

not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands. . . . Homosexuals are a threat to the family only if survival of the family requires that men and women follow traditional sex roles.⁶⁸⁸

In Part IV, I identified the common belief that gay issues are inappropriate for public discussion. Arguably, this belief is also gendered. Clearly, the people who express concerns about flaunting are not all male. However, according to Deborah Tannen, discussion of relationships and personal issues in public is a typically "female" form of discourse that most men do not engage in and often find uncomfortable.⁶⁸⁹ In public settings where both genders are present, everybody tends to use the "male" form of discourse.⁶⁹⁰ Thus, even if non-gay people do not assume that lesbians and gay men are talking about sexual acts when they discuss their relationships, they may well believe that their discussions are excessively "personal." We therefore should not be surprised that non-gay people view public discussions of gay relationships and families as inappropriate.

Another gendered aspect of treatment of sexual orientation issues comes in the very insistence on duality. While sometimes recognizing the category "bisexual," our society generally thinks of sexual orientation as highly polarized despite much evidence that it exists on a continuum.⁶⁹¹ "Straight" and "gay" remain the predominant categories. I suggest that this is because of the connections to gender. We divide sexual orientation in two because the dominant images are of masculine or feminine men; and of feminine or masculine women.⁶⁹² As long as the cross-gender stereotype is part of pre-understanding about gay people—as long as we map sexual orientation to gendered traits—we will have trouble conceptualizing sexual orientation on a continuum. If a homophilic woman is masculine and a heterosexual female is feminine, what is a bisexual women? We simply do not have categories for entities which are partly male and partly female; there are

688. Koppelman, *supra* note 18, at 159-60.

689. See TANNEN, *supra* note 88, at 80, 91, 98, 118, 236; Jack W. Sattel, *The Inexpressive Male: Tragedy or Sexual Politics*, in WOMEN AND WORK, *supra* note 676, at 168. One possible explanation is that idealized masculinity in our society requires rationality, toughness, and self-reliance, so men are expected to show no emotion and admit no weaknesses. See Kimmel & Levine, *supra* note 89, at 92. Talking about "personal" matters like family or relationships in any detail requires demonstration of emotion, therefore we would not expect those matters to be part of normal "male" discourse. See Sattel, *supra*, at 168.

690. See TANNEN, *supra* note 88, at 236.

691. See STOLTENBERG, *supra* note 648, at 28-29; Halley, *supra* note 4, at 940; Herdt, *supra* note 121, at 10; see also Halley, *supra* note 4, at 938-39 (noting that later Kinsey Institute studies polarized study participants, ignoring continuum concept used in Kinsey's early work).

692. See Herdt, *supra* note 121, at 6.

only yin and yang. "We live in a world divided absolutely into two sexes, even though nothing about human nature warrants that division."⁶⁹³

3. THE EFFECTS OF HOMOPHOBIA: ENFORCEMENT OF GENDER-ROLE STEREOTYPES AND PERPETUATION OF GENDER INEQUALITY

Homophobia circumscribes the lives of both non-gays and closeted gay people. People go out of their way to avoid accusations of homosexuality,⁶⁹⁴ and in particular, they avoid behavior that violates gender-role norms.⁶⁹⁵ This is particularly true for men.⁶⁹⁶ Men learn early in life that the ultimate insult is to be called "queer" or "fag" or "homo" or "fairy."⁶⁹⁷ As one gay man remembered, "During the 1960s, when I was in my teens, those words were used as weapons. Getting labeled a 'faggot,' a 'queer,' or a 'homo' was considered worse than being called a communist. It was ostracism."⁶⁹⁸

As one commentator has noted, the male in our society "steels himself against the dread that he be found not male enough. And his dread is not stupid; for he sees what happens to people when they are treated as nonmales."⁶⁹⁹ To avoid the stigma attached to being perceived as gay, gay and non-gay men alike who wish to be perceived as heterosexual limit the things they do and say in public.⁷⁰⁰ The size and strength of the barriers created by homophobia are hard to overestimate:

693. STOLTENBERG, *supra* note 648, at 31; *see also* MACKINNON, *supra* note 37, at 3, 44 (arguing that polarity of gender is socially constructed).

694. "One college gay group, for example, announced that on a certain day homosexuals should wear jeans. It turned out that many students who unwittingly wore jeans to school that day went home to change." BLUMENFELD & RAYMOND, *supra* note 93, at 369.

695. *See, e.g.*, Grayson, *supra* note 638, at 135-36.

696. *See* Sattel, *supra* note 689, at 162 (noting that greater social pressures placed on men to conform to gender norms); Goleman, *supra* note 344, at C1 (commenting that men are more anxious about cross-gender behavior).

697. *See* BROWN, *supra* note 144, at 41-42.

698. PALLONE & STEINBERG, *supra* note 208, at 31. This is still true today. One commentator noted that "[i]n the era of AIDS, 'faggots' have become the new 'niggers' of the American South." SEARS, *supra* note 40, at 349.

699. STOLTENBERG, *supra* note 648, at 33. For example, men who use stereotypically female argument patterns are taken less seriously by male counterparts. *See* TANNEN, *supra* note 88, at 238-39.

700. *See, e.g.*, BLUMENFELD & RAYMOND, *supra* note 93, at 368-69 ("People—straight and gay—may go to great lengths to 'prove' that they are not homosexual."); BROWN, *supra* note 144, at 10 (noting that cooking is a taboo discussion topic in public for gay men trying to hide); JAY & YOUNG, *supra* note 104, at 141 (gay men learn to squelch non-masculine behavior patterns); *see also* sources cited *supra* note 635. It also has been suggested that male violence against gay people is caused in part by insecurity about homophile desires or insufficient masculinity. *See* Hentoff, *supra* note 326, at 98.

Nothing is more frightening to a heterosexual man in our society. It threatens at one stroke to take away every vestige of his claim to a masculine identity—something like knocking out the foundations of a building—and to expose him to the ostracism, ranging from polite tolerance to violent revulsion, of his friends and colleagues. A man can be labeled as homosexual not just because of overt sexual acts but because of almost any sign of behavior which does not fit the masculine stereotype.⁷⁰¹

In sum, homophobia is an extremely strong weapon in confining men to the traditional masculine roles.⁷⁰² “[A]nything that even remotely hints at femininity is prohibited. A real man must avoid any behavior or characteristic associated with women.”⁷⁰³

Women may find it even more challenging to adjust their behavior because the lines defining “acceptable” behavior for females are less clear.⁷⁰⁴ After all, our society socializes women to value certain feminine traits while simultaneously favoring masculine ones in concrete material ways like status and pay. Thus, as Vicki Schultz has noted, “[g]irls receive ambiguous and inconsistent signals that encourage them in some stereotypically masculine behavior as well as stereotypically feminine behavior.”⁷⁰⁵ Women are left in the awkward position of needing to adopt some masculine traits to succeed materially in the work world, while risking dislike or accusations of lesbianism as a result.⁷⁰⁶

The gendered limitations on behavior associated with homophobia are incompatible with almost any conceivable vision of gender equality. Obviously, if women who behave in ways seen as “too masculine” become victims of discrimination, they never can achieve true equality in the work force. The legal system is beginning to address this issue. In *Price Waterhouse v. Hopkins*,⁷⁰⁷ the Supreme Court recognized a Title VII cause of action for a woman injured by

701. McWHIRTER & MATTISON, *supra* note 96, at 137 (citing MARC F. FASTEAU, *THE MALE MACHINE* 15 (1974)).

702. See PHARR, *supra* note 20, at 8; Grayson, *supra* note 638, at 135; Morin & Garfinkle, *supra* note 551, at 29.

703. Kimmel & Levine, *supra* note 89, at 92; accord STOLTENBERG, *supra* note 648, at 34.

704. See SEARS, *supra* note 40, at 281. For example, Deborah Tannen found that women who adopt masculine modes of speech “may command more attention and be more respected, but they may also be disliked and disparaged as aggressive and unfeminine.” TANNEN, *supra* note 88, at 239; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989) (describing negative responses generated by woman perceived as adopting masculine demeanor).

705. Schultz, *supra* note 64, at 1821.

706. Suzanne Pharr argues that a woman may be called a lesbian any time she does “anything that threatens the status quo, anything that steps out of role, anything that asserts the rights of women, anything that doesn’t indicate submission and subordination.” PHARR, *supra* note 20, at 23-24.

707. 490 U.S. 228 (1990).

this type of discrimination. However, the legal system has yet to address the more rigid barriers facing men in our society.

Significantly, limiting men to stereotypically masculine behavior harms both men and women. Men are restricted, because of their gender, from behaving in certain ways and performing certain activities.⁷⁰⁸ Perhaps more importantly, these barriers allow men to continue to view stereotypical feminine behavior and activity as inferior.⁷⁰⁹ Women cannot possibly attain equality if men simultaneously create a woman's sphere by refusing to engage in certain activities, and devalue the sphere with their belief that the behavior in it is degrading.⁷¹⁰ To be blunt, we hardly can expect that boys who learn that their peers who cry or play with dolls are sissies and faggots will grow into men interested in displaying sensitivity or in taking on child-care responsibilities.⁷¹¹ And we hardly should be surprised that these same grown-up boys do not value the feminine activities that they learned were contemptible. Homophobia is both a symptom and a primary weapon of gender discrimination; any serious attempt to attain gender equality must aim to remove it.⁷¹² In the next Part, I propose a legal theory to begin to do so.

VI. A NEW LEGAL STORY: THE GENDER-BASED APPROACH TO LEGAL PROTECTION FOR GAY MEN AND LESBIANS

Three recent works of legal scholarship have argued that discrimination against lesbians and gay men is a form of illegal gender discrimination.⁷¹³ In this Part, I build on their work and on the evidence presented in the last Part to elaborate this position. I then address some of the difficult questions the argument raises. I conclude by elaborating some of the argument's strengths, including its focus on the very types of stories that can counter the three types of pre-understanding about gay people that this Article has described.

708. Moreover, psychologists indicate that it is unhealthy for men to deny their "feminine" sides. See HOPCKE, *supra* note 152, at 91, 95, 100.

709. Gendered restrictions on behavior tend to work to the disadvantage of women in the workplace. See Littleton, *supra* note 88, at 1047; Schultz, *supra* note 64, at 1801.

710. Christine Littleton has categorized these two forms of discrimination as "gender oppression" and "sexual subordination," respectively. Littleton, *supra* note 88, at 1045-46.

711. In this regard, it is interesting to note that Hasbro, manufacturer of the popular G.I. Joe toy soldier, is careful to refer to him always as a "mannequin" or "action figure" and took a case to the United States Court of Appeals for the District of Columbia to challenge a Customs Service decision to classify Joe as a "doll." After the decision, a Hasbro official felt compelled to note, "G.I. Joe is still one of the guys Boys know who he is." *Say It Ain't So, Joe: Court Rules Hasbro Toy is a Doll*, N.Y. TIMES, July 20, 1989, § 2, at 9.

712. See PHARR, *supra* note 20, at 26, 43.

713. See Capers, *supra* note 18; Koppelman, *supra* note 18; Law, *supra* note 18.

A. *Sexual Orientation Discrimination as Gender Discrimination:
The Miscegenation Analogy*

In this Subpart, I provide one version of a gender-based argument that anti-gay discrimination is unconstitutional. I first present an argument that courts have rejected: that any classification based on sexual orientation is literally gender discrimination. I then develop a more sophisticated argument, based on an analogy to anti-miscegenation laws.

1. THE LITERAL GENDER DISCRIMINATION ARGUMENT

On a literal level, discrimination against a gay couple amounts to gender discrimination in the sense that it requires a decisionmaker to take into account the gender of the parties. For example, a manager fires Gregg for openly discussing his weekend at Key West with "Bill." Because the manager almost certainly would not fire Mary or Joanne for precisely the same behavior—discussing a weekend away with "Bill"—the manager is discriminating against Gregg because he is male.

Now, any lawyer worth her salt immediately could find the hole in this literal argument. Arguably, Mary or Joanne talking about "Bill" is not "precisely the same behavior" because it does not involve homosexuality. "Precisely the same behavior" would entail Mary or Joanne talking about a weekend with "Susan." According to this line of reasoning, the manager does not engage in gender discrimination unless he treats male same-sex relationships differently from female ones. When advocates have raised the literal gender argument in the past, courts have responded in exactly this way.⁷¹⁴

While the literal gender argument has not been successful, and may appear to be little more than a makeweight, it is a useful place to start the analysis. It allows the decisionmaker to see that very similar behavior is being treated differently, which suggests an equal protection approach. Moreover, it calls attention to gender as an element in anti-gay discrimination, setting the stage for the more complex analysis to follow.

2. THE MISCEGENATION ANALOGY AND THE GENDER-BASED
CONSTITUTIONAL ARGUMENT

Andrew Koppelman recently suggested an analogy that helps

714. See, e.g., *State v. Walsh*, 713 S.W.2d 508, 510 (Mo. 1986) (en banc); cf. *Valdes v. Lumberman's Mut. Casualty Co.*, 507 F. Supp. 10, 13 (S.D. Fla. 1980) (finding that as long as male and female "homosexuals" treated alike, no gender-based discrimination); Koppelman, *supra* note 18, at 150 n.30 (citing cases).

elucidate that anti-gay activity is gender discrimination in more than just a literal sense. Addressing the constitutionality of sodomy laws, Koppelman points out parallels between gay issues and miscegenation that suggest that similar legal analysis should apply to both.⁷¹⁵ His analysis applies equally well to all forms of anti-gay discrimination.

Miscegenation is taboo in many cultures and against the principles of some religious groups. Like same-sex intercourse, it was illegal in many of the states that ratified the Fourteenth Amendment.⁷¹⁶ Like gay relationships, miscegenation is a matter of choice: people may not be able to control having erotic or emotional attractions to people of other races, but they certainly have a choice about whether to act on those attractions. The public act of marriage clearly is a matter of choice.⁷¹⁷

Arguably anti-miscegenation regulation is not racially discriminatory in the same way that the Gregg-Bill example is not gender discrimination. It is possible to argue that if a state does not permit members of different races to intermarry, it does not discriminate against members of any race. Indeed, the Reconstruction Era Supreme Court came to just that conclusion.⁷¹⁸

Most importantly, in the same way that homophobia is a method of enforcing gender norms and male superiority, miscegenation taboos help enforce cultural beliefs regarding white racial superiority.⁷¹⁹ "They are calculated to segregate and hence to rigidify racial divisions in communities, cultural institutions, and various practices of everyday life. They drive individuals into invidiously differentiated racial identities and normalize the permissible relations between the "superior" and "inferior" groups thus defined."⁷²⁰

In *Loving v. Virginia*,⁷²¹ the Supreme Court held an anti-miscege-

715. Koppelman, *supra* note 18, at 147.

716. *See id.* at 148 (citing *Bowers v. Hardwick*, 478 U.S. 190, 210 (1986) (Blackmun, J., dissenting)). In addition, as Sylvia Law has noted, "Opponents of the fourteenth amendment claimed that a constitutional guarantee of racial equality would authorize interracial marriage. Opponents of the Equal Rights Amendment claimed it would require gay and lesbian marriage. In both cases, those who supported expanded equality denied the charge." Law, *supra* note 18, at 232 (footnotes omitted).

717. The point here is not that choice ought to be a significant element in analyzing these issues, or that a decision to act on feelings of love is really a free choice. Rather, because anti-gay advocates have made "choice" part of the discourse about gay issues, *see supra* text accompanying notes 138-41, it is important to demonstrate that other issues of "choice" are constitutionally protected.

718. *See Pace v. Alabama*, 106 U.S. 583, 585 (1883).

719. Koppelman, *supra* note 18, at 147; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 759-60 (1989).

720. Rubenfeld, *supra* note 719, at 791-92.

721. *Loving v. Virginia*, 388 U.S. 1 (1967).

nation statute unconstitutional, stressing that the state's purpose was to promote white supremacy.⁷²² Of course, the particular statute at issue did treat different interracial relationships differently.⁷²³ However, it is inconceivable that a "race-neutral" miscegenation statute could pass constitutional muster today. In 1991, the Court cited *Loving* for the proposition that "racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."⁷²⁴ In holding that race-based peremptory challenges to potential jurors are unconstitutional in civil cases, the Court rejected the notion that a race-based classification could survive equal protection scrutiny simply "because members of all races are subject to like treatment."⁷²⁵ And even before it decided *Loving*, the Supreme Court rejected the argument that restrictions on the behavior of interracial couples could be considered race-neutral. In *McLaughlin v. Florida*,⁷²⁶ the Court addressed the constitutionality of a statute that made it illegal for an interracial unmarried couple to spend the night together. The Court rejected Florida's argument that the statute withstood equal protection scrutiny because whites and blacks were treated alike.⁷²⁷ It found no reason to treat interracial unmarried couples differently from white or black unmarried couples.⁷²⁸

Because of the power of gender-role stereotypes in society, many people, including the dissenting Justices in *Bowers*, have noted the striking parallels to race issues.⁷²⁹ Like legalization of interracial marriage, recognition of gay couples threatens elements of society that remain committed to clear distinctions between the appropriate roles of men and women and undermines institutions that support

722. *Id.* at 11.

723. The statute at issue in *Loving* prohibited marriages between whites and African-Americans or Native Americans, but did not prohibit marriages between Native Americans and African-Americans. *See id.* at 5 n.4.

724. *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991).

725. *Id.*

726. 379 U.S. 184 (1964).

727. *Id.* at 188-89.

728. *Id.* at 192-94. *McLaughlin* may be stronger precedent than even *Loving* for protection of gay relationships because it does not even arguably rest on a fundamental right to marry.

729. *See, e.g., Naragon v. Wharton*, 737 F.2d 1403, 1408 (5th Cir. 1984) (Goldberg, J., dissenting); Hunter, *supra* note 598, at 14-15; Koppelman, *supra* note 18, at 148 (citing *Bowers* dissents); Law, *supra* note 18, at 233. One gay author noted:

It's no wonder . . . male homosexuals are so despised. They offer no comforting promise to women. They pledge no unified purpose with heterosexual men. They're fakes, traitors to the birthright of their genitals, specious patriots. Because they don't own women, they weaken the structure of power: white slave masters in an ante-bellum South who liberate their Negroes and implicitly incite new vision and unrest.

Rist, *supra* note 471, at 50.

male domination. Just as anti-miscegenation statutes were part of a larger social regulation of race relations, discrimination against gay couples is more than literal gender discrimination. It both results from, and supports, a system of stereotypes that suggest that some activities are appropriate only for women and others are appropriate only for men.⁷³⁰ As was the case with race issues at the time the Supreme Court decided *Loving*, there is a clear understanding today that the Equal Protection Clause generally prohibits state discrimination on the basis of gender.⁷³¹ To be consistent with the reasoning in *Loving*, if we are serious about eliminating gender-role-based discrimination, we have to allow relationships that violate many people's sense of morality.

Once we recognize that homophobia is often caused by gender-role stereotypes and always has the effect of perpetuating the stereotypes and the subordinate position of women, we add substance to the literal gender argument. Race-based classifications are not "neutral" merely because "members of all races are subject to like treatment"; we know that they perpetuate white supremacy. Similarly, classifications based on sexual orientation cannot be considered gender-neutral merely because gay men are treated like lesbians; they perpetuate male supremacy. The fact that interracial couples "choose" to act on their physical and affectional attractions when they marry does not affect their equal protection claim. Neither should the "choice" of gay people to act on our attractions affect our legal status. Thus, the law should analyze anti-gay discrimination under the Equal Protection Clause like any other gender-based classification.⁷³²

Support for this approach also can be found in the Supreme Court's decision in *Mississippi University for Women v. Hogan*.⁷³³ In that case, the Court rejected the State of Mississippi's arguments that it should be allowed to maintain a separate nursing school for women. The Court explicitly rejected the idea that a state could use gender-based classifications to perpetuate gender-role stereotypes.⁷³⁴ If courts are serious about ending the states' use of gender-role stereo-

730. See *supra* part V.

731. Even though the Supreme Court employs a more lenient level of scrutiny to classifications based on gender than to those based on race, see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985), it has permitted very few gender-based classifications in the last 20 years, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-25 to -29 (2d ed. 1988).

732. See Koppelman, *supra* note 18, at 151.

733. 458 U.S. 718 (1982).

734. *Id.* at 724-25. Numerous lower courts have cited *Mississippi University for Women* for the proposition that the state may not constitutionally perpetuate those stereotypes. See, e.g., *Hinson v. City of Chester*, 864 F.2d 1026, 1029 (3d Cir. 1988); *Saint v. Nebraska Sch.*

types, they also must end the anti-gay discrimination that enforces the stereotypes. Of course, the gender-based legal argument raises a number of questions, some of which I try to address in the next Subpart.

B. *Addressing Some Concerns About the Argument*

1. REACHING PRIVATE DISCRIMINATION

One concern with the gender-based argument is that because it is rooted in the Equal Protection Clause, it only governs state action. However, although I elaborated the argument in federal constitutional terms, gay advocates can apply it equally well to statutes and state constitutional provisions forbidding gender discrimination by private actors, including Title VII. In *Price Waterhouse v. Hopkins*,⁷³⁵ the Supreme Court recognized that conduct premised on gender stereotyping can constitute actionable gender discrimination. The Court stated that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."⁷³⁶ Surely this must mean that an employer who acts on the basis of a belief that a man should not display "feminine" characteristics also has acted on the basis of gender.

The logic of *Hopkins* and the relationship between stereotyping and homophobia suggest that Title VII also prohibits discrimination based on sexual orientation.⁷³⁷ Moreover, the miscegenation analogy applies to Title VII as well; courts have treated discrimination based on the race of a person's spouse or partner as actionable under Title VII.⁷³⁸ Discrimination based on the gender of a person's spouse or partner should similarly be actionable. Thus, the gender-based approach to gay advocacy is not necessarily limited by the state action doctrine.

Activities Assoc., 684 F. Supp. 626, 629 (D. Neb. 1988); *People v. Craft*, 509 N.Y.S.2d 1005, 1009-10 (Rochester City Ct. 1986).

735. 490 U.S. 228 (1989); see also *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("[E]mployment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.").

In *Hopkins*, an accounting firm denied partnership to a woman partially because it gave "credence and effect to partners' comments that resulted from sex stereotyping." 490 U.S. at 237. In particular, partners complained that her behavior was too masculine or inappropriate for a woman. See *id.* at 235. The Court concluded that such comments were evidence of gender discrimination. *Id.* at 251 (plurality opinion), 277 (O'Connor, J., concurring).

736. 490 U.S. at 250.

737. For a careful elaboration of this argument, see Capers, *supra* note 18.

738. See *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361-62 (9th Cir. 1987); *McGowan v. General Dynamics Corp.*, 794 F.2d 361, 363 (8th Cir. 1986); *Moffett v. Gene B. Glick Co.*, 604 F. Supp. 229, 232-34 (N.D. Ind. 1984); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366-67 (S.D.N.Y. 1975).

In practice, the federal courts have refused to apply Title VII to sexual orientation cases, primarily relying on conclusions about lack of legislative intent.⁷³⁹ Only one case has addressed the affect of *Hopkins* on these precedents. In an unpublished opinion, *Dillon v. Frank*,⁷⁴⁰ the Sixth Circuit rejected the sex discrimination claim of a gay man. The plaintiff had been subject to harassment focusing on his supposed adoption of the female role in oral sex with another man,⁷⁴¹ and argued he was a victim of sex stereotyping—that his harassment resulted from his being insufficiently macho.⁷⁴² The court concluded that he was not harassed because of his gender: “[H]e has not argued that a lesbian would have been accepted at [his job-site], nor has he argued that a woman known to engage in the disfavored sexual practices would have escaped abuse.”⁷⁴³ *Dillon* demonstrates the difficulty advocates may have making the stereotype argument. However, it also leaves open the possibility that better lawyering might enable a court to see that a woman would be much less likely to be subject to harassment focusing exclusively on the performance of the “female” role in oral sex merely because her co-workers found out she was in a relationship with a man. Moreover, the plaintiff in *Dillon* did not raise the miscegenation analogy, which also might have helped the court accept the argument.

2. THE EFFECT OF *BOWERS*

Another important concern with the gender-based argument is that several courts have stated that *Bowers* forecloses heightened equal protection scrutiny for classifications based on sexual orientation.⁷⁴⁴ They seem to believe that if sexual orientation were a suspect class, the Supreme Court necessarily would have found the conduct at

739. See, e.g., *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975).

740. 952 F.2d 403 (6th Cir. 1992) (text available in Westlaw).

741. *Id.* at *2.

742. *Id.* at *6.

743. *Id.* at *9.

744. See, e.g., *High Tech Gays v. Defense Indus. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Gay Inmates of Shelby County Jail v. Barksdale*, 819 F.2d 289 (6th Cir. 1987); *Doe v. Sparks*, 733 F. Supp. 227, 231 (W.D. Pa. 1990); see also *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (reaching same conclusion based on its own determination that the right to privacy does not protect private consensual same-sex sexual activity). Some commentators have suggested these courts may be right. See ALIDA BRILL, *NOBODY'S BUSINESS: PARADOXES OF PRIVACY* 126 (1990) (“The road back to a campaign for public equality when you have sought, and lost, private sexual control is not one that may exist in any obvious way, at least at this time.”); Schnably, *supra* note 97, at 881-82 (*Bowers* might be read “as a case in which the Court . . . concluded that we as a society do not wish to live in an atmosphere in which certain types of homosexual conduct are regarded as legitimate”).

issue in *Bowers* constitutionally protected. However, the Court stated in *Bowers* it was not deciding any equal protection issue,⁷⁴⁵ "and that disclaimer would be puzzling indeed if the Court's interpretation of the Due Process Clause were understood to resolve the equal protection issue."⁷⁴⁶

In addition, as Cass Sunstein has argued, due process analysis addresses different concerns from the Equal Protection Clause. In his view, substantive due process analysis sets outer limits on what governments can do to anyone; equal protection analysis deals with distinctions that the government makes and necessarily only comes into play when the government exercises powers that do not violate the Due Process Clause.⁷⁴⁷ As Sunstein argues,

it may be plausible to interpret the Due Process Clause to permit the regulation of homosexual sodomy but to proscribe the regulation of heterosexual sodomy. Such an interpretation would not, however, immunize from attack on equal protection grounds a law that drew a line between heterosexuals on the one hand and gays and lesbians on the other.⁷⁴⁸

Under this approach, the gender-based equal protection argument would not be foreclosed by *Bowers* any more than an attack on a state law making extramarital sex illegal for women, but not for men.

Another weakness of the argument that *Bowers* decides the equal protection issue is that it assumes that the conduct discussed in *Bowers* defines the class of gay people. As I noted in Part III, this effectively has been the position of several courts that have addressed this issue.⁷⁴⁹ However, as we have seen, being a lesbian or a gay man is not defined exclusively or primarily by sexual acts, any more than is being heterosexual. My self-identity as a gay man is as much tied up with my wanting another man with whom to buy a car, attend dinner parties, and redecorate the house as it is with sexual fantasies and acts. A state's prohibition of certain acts should not be read to criminalize the entire lives of people who sometimes wish to engage in them. Sodomy statutes do not prohibit two women from sharing a household or being intimate in many ways; they just preclude certain specific sexual acts. Many equal protection issues still can arise.⁷⁵⁰

745. *Bowers*, 478 U.S. at 196 n.8.

746. 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, 1169-70 (1988); accord *High Tech Gays v. Defense Indus. Clearance Office*, 909 F.2d 375, 378 (Canby, J., dissenting from denial of rehearing en banc).

747. Sunstein, *supra* note 746, at 1166-67, 1169-70.

748. *Id.* at 1169-70.

749. See *supra* text accompanying notes 164-70.

750. For an elaboration of this argument, see Halley, *supra* note 4, at 918-19.

3. THE LIMITED REACH OF INTERMEDIATE SCRUTINY

Another concern with using the gender-based approach is that gender discrimination only receives intermediate scrutiny, which means that a state can justify its gender discrimination by showing that it is "substantially related" to an "important" state interest.⁷⁵¹ Thus, the state still may be able to discriminate under some circumstances.

However, if discrimination against gays triggers some heightened scrutiny, courts are likely to examine the state's claims more closely than under the notoriously lenient "rational basis" standard. Certain types of arguments simply will no longer be available to the state. *Mississippi University for Women* has made clear that reinforcing stereotypical gender norms is not the type of state interest that can support the constitutionality of state action.⁷⁵² The imposition of traditional gender roles is not merely an unimportant state objective; it is "not even a permissible one."⁷⁵³

For example, if a state claims that anti-gay discrimination stems from its important interest in "morality," a judge using heightened scrutiny ought to reject the claim as inconsistent with existing caselaw. After all, a state presumably would not prevail if it claimed that its power to regulate morals allowed it to prohibit women (and not men) from being bartenders or purveying X-rated movies. Moreover, in *Loving*, the Supreme Court rejected the state's argument that miscegenation was immoral.⁷⁵⁴ And the Court in *Mississippi University for Women* put the burden on the government, not merely to articulate, but to *prove* it has a factual basis for any non-discriminatory purpose for a gender-based classification.⁷⁵⁵ This burden should make it even more difficult for a government to justify sexual orientation discrimination.

Heightened scrutiny also should dispose of arguments by government entities that the history of antipathy towards gay people supports discrimination in various contexts. For example, the military has argued that discomfort of non-gay service personnel justifies

751. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

752. *Id.*; see also Koppelman, *supra* note 18, at 155-57.

753. Koppelman, *supra* note 18, at 157.

754. *Loving*, 388 U.S. at 9-10. But see *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991) (plurality opinion) (finding interest in morality sufficient to justify limitations on expressive activity).

755. See *Mississippi University for Women*, 458 U.S. at 727-29 (rejecting Mississippi's articulated purpose and finding that it had made "no showing" that the purported justification was based in fact).

excluding lesbians and gay men from the military.⁷⁵⁶ Cases involving adoption or custody issues often note that even if gay people are good parents, subjecting children to the discrimination they will receive because of their parents' sexual orientation justifies placing the children elsewhere. One court accepted an expert's opinion that "prevention of homosexuality is a desirable goal, essentially because of the cultural stigma and repression for which it is the target."⁷⁵⁷

The Supreme Court has explicitly rejected this argument in the context of race. In *Palmore v. Sidoti*,⁷⁵⁸ a divorced father argued, and a Florida court agreed, that his ex-wife should lose custody of her child because when she entered an interracial marriage, she subjected the child to social stigma.⁷⁵⁹ The Supreme Court reversed the custody award to the father, concluding that social biases did not justify Florida's drawing a distinction based on the race of the persons involved.⁷⁶⁰ The Court concluded: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁷⁶¹

The Supreme Court also rejected a social-stigma justification of a classification involving the mentally retarded. In *City of Cleburne v. Cleburne Living Center*,⁷⁶² a city council relied in part on negative attitudes and fears of neighbors to justify a zoning ordinance limiting homes for mentally retarded people.⁷⁶³ The Court held that negative attitudes or fears "unsubstantiated by factors which are properly cognizable in a zoning proceeding" could not supply a rational basis for the city's action.⁷⁶⁴ This language suggests that even under a rational basis analysis, to rely on a social stigma argument, the government needs to demonstrate that the public's fears are substantiated and relevant.⁷⁶⁵

If sexual orientation discrimination receives some heightened

756. See *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (accepting this argument).

757. *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 855 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974).

758. 466 U.S. 429 (1984).

759. *Id.* at 430-31.

760. *Id.* at 433-34.

761. *Id.* at 433.

762. 473 U.S. 432 (1985).

763. *Id.* at 448-49.

764. *Id.* at 448; *see also id.* at 455 (Stevens, J., concurring) (rejecting "irrational fears" as permissible basis for zoning ordinance).

765. 473 U.S. at 448. The Court also noted that a "bare . . . desire to harm a politically unpopular group [is] not a legitimate state interest." *Id.* at 446-47 (citing *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)).

scrutiny under either a gender-based or a suspect class approach, gay advocates should be able to rely on *Palmore* to argue that the social stigma attaching to gay sexual orientation does not justify discrimination. At least two courts have accepted this argument explicitly, and a third suggested that it might. A Florida trial court recently struck down a state statute prohibiting "homosexuals" from adopting children.⁷⁶⁶ Relying on *Palmore*, the court ruled that "the argument that children should not be parented by homosexuals because they will be subjected to community and peer harassment is constitutionally unsound."⁷⁶⁷

In *In re B & F Associates*,⁷⁶⁸ the bankruptcy court rejected an argument by a landlord that a tenant's use of leased premises as a gay bar would offend other tenants and thereby violate lease provisions requiring "first class" operations in the building.⁷⁶⁹ The court found the landlord's interpretation of the lease "an unlawful discriminatory practice" in light of a District of Columbia statute prohibiting landlords from discriminating on the basis of sexual orientation.⁷⁷⁰ The court, citing *Palmore*, held that the statute "prohibits a Landlord from obtaining redress on account of perceived private biases against a tenant."⁷⁷¹ Even though the case did not involve constitutional analysis, it shows that when a court recognizes that anti-gay discrimination is specifically disfavored, it will not accept a social-stigma argument.

In *Pruitt v. Cheney*,⁷⁷² the Ninth Circuit reversed the dismissal of equal protection claims by a lesbian discharged from the army purely because of her sexual orientation. While the court applied only a rational basis standard to test the army's classification,⁷⁷³ it remanded the case to force the army to articulate such a basis.⁷⁷⁴ Citing *Palmore* and *Cleburne*, the court suggested, but did not decide, that even under a rational basis analysis, prejudice of others against gay people could not serve as a rational basis for discrimination.⁷⁷⁵ If the social stigma argument fails under a rational basis standard, it should not survive any heightened scrutiny.⁷⁷⁶

766. *Seebol v. Farie*, No. 90-923-CA18 (Fla. Cir. Ct. Mar. 15, 1991).

767. *Id.* slip op. at 14 (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

768. 55 B.R. 19 (Bankr. D.D.C. 1985).

769. *Id.* at 21.

770. *Id.* (citing D.C. CODE ANN. § 1-2515(a)(4) (1981)).

771. *Id.*

772. *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991).

773. *Id.* at 993-95.

774. *Id.* at 995.

775. *Id.* at 994-95 n.4.

776. Concurring and dissenting judges in other cases also have indicated they would reject

4. REACHING THE JUDICIARY

A final drawback to the gender-based argument is that courts may have trouble seeing how it applies in cases that do not involve couples or coupling. In a case involving, for example, employment discrimination against an individual lesbian, it is harder to say that if a man had done precisely the same thing as the woman who was fired, he would have been treated differently. Gay advocates will have to use information and stories like those presented in Part V to convince courts that sexual orientation discrimination is often intended to, and always has the effect of, perpetuating gender-role stereotypes, thus harming men and particularly women in the long run.⁷⁷⁷ However, that courts may not accept the argument in all cases does not change its usefulness in other contexts. The argument will be most effective as part of an arsenal of constitutional arguments relying on privacy rights, speech, and association rights, as well as equal protection. Moreover, the gender-based argument has a number of strengths as compared to the most widely discussed constitutional approaches to attaining gay rights: privacy, suspect class analysis, and the First Amendment.

C. *The Power of a Gender-Based Approach to Gay-Rights Issues*

1. BREADTH OF COVERAGE

The gender-based argument, like other equal protection arguments, addresses discrimination relating to both public and private activities and to both speech and conduct. By contrast, the scope of the right to privacy is relatively narrow. Even if the Supreme Court reversed *Bowers*, the effects would be fairly limited without some attendant equal protection guarantees.

the social stigma argument. See, e.g., *High Tech Gays v. Defense Indus. Security Clearance Office*, 909 F.2d 375, 381 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc); *Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment); *Naragon v. Wharton*, 737 F.2d 1403, 1407-08 (5th Cir. 1984) (Goldberg, J., dissenting). Although Justice Blackmun also raised a version of this argument in dissent in *Bowers*, see 478 U.S. at 211-12 (Blackmun, J., dissenting), the majority never addressed it since it did not reach the potential equal protection argument in the case, see *Bowers*, 478 U.S. at 190, 196 n.8.

777. Arguably, if a court had trouble seeing that a gay man was harmed by gender discrimination, he could assert third-party standing to protect women's interests. However, one of the elements necessary to make such a claim is a close relationship between the litigant and the party being harmed by the action. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991); *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991). This test has generally been met by relationships that are contractual in nature, see *id.* at 1372, and probably would not be met by the attenuated connection between one fired gay man, for example, and women in general.

In practice, the right to privacy has proved to be limited even for those activities—such as abortion and contraception—it currently protects. That is, just because the government cannot totally ban abortion or birth control does not seem to mean that partial restrictions are impermissible. The government may restrict the access of poorer women to abortion by declining to fund abortion equally with other medical problems or childbirth,⁷⁷⁸ and may prevent doctors in federally funded clinics from giving advice about abortion “as a method of family planning.”⁷⁷⁹ A state-run school system may dismiss a young woman from an honor society for engaging in premarital sex,⁷⁸⁰ presumably protected activity under *Eisenstadt* and *Carey*. The government may ban the sale of sexually explicit material that its citizens have a constitutional right to own.⁷⁸¹ Similarly, that an American citizen has a fundamental right to marry⁷⁸² does not mean she has a fundamental right to have her alien spouse remain in the United States.⁷⁸³ All of this strongly suggests that a fundamental right to engage in same-sex sexual activity would not protect gay people from the type of discrimination against public behavior catalogued in Part IV.⁷⁸⁴

The First Amendment is also relatively limited in scope. Whenever a court chooses to draw the difficult line between speech and conduct, it must draw one somewhere.⁷⁸⁵ In doing so, a court necessarily will categorize as unprotected “conduct” many important activities commonly subject to discrimination. And the Supreme Court in its 1990-1991 Term showed no inclination to extend broad First

778. See *Harris v. McRae*, 448 U.S. 297, 326 (1980); *Maier v. Roe*, 432 U.S. 464, 474 (1977).

779. *Rust v. Sullivan*, 111 S. Ct. 1759, 1765 (1991).

780. See *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990).

781. Compare *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that Constitution guarantees right to have obscene materials in one's home), with *United States v. Reidel*, 402 U.S. 351 (1971) (holding that Constitution does not guarantee right to receive obscene material through the mails).

782. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

783. See *Bright v. Parra*, 919 F.2d 31, 34 (5th Cir. 1990); *Anetekhai v. INS*, 876 F.2d 1218, 1222 n.5 (5th Cir. 1989). But see *Manwani v. United States Dep. of Justice*, 736 F. Supp. 1367 (W.D.N.C. 1990).

784. See, e.g., *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973) (finding same-sex sexual activity protected by right to privacy, but upholding school district's refusal to allow openly gay man to teach), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974).

785. For an amusing view of the Court wrestling with the problem, see the description of the oral argument in the Indiana nude dancing case, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), in 59 U.S.L.W. 3473-75 (1991). For an argument that the speech/conduct distinction represents a helpful analytic tool for gay-rights advocacy because it focuses attention on the political aspects of coming out, see Halley, *supra* note 4, at 966-70.

Amendment protection to expressive activity infringed by laws of general application.⁷⁸⁶ An equal protection argument simply reaches more forms of discrimination. Thus it can attack both the view that gay people are acceptable only if they are hidden⁷⁸⁷ and the view that people deserve protection of their gay identities only if they never act on them.⁷⁸⁸

2. JUDICIAL RESTRAINT CONCERNS

The right to privacy also raises legitimacy and line-drawing problems. Despite the Court's long history of going beyond the literal constitutional text,⁷⁸⁹ the *Bowers* majority saw the legitimacy of the Court's privacy decisions as an issue worthy of extended discussion.⁷⁹⁰ And because of its concerns with legitimacy, the Court also raised the difficult line-drawing problems inherent in privacy analysis: What types of conduct are sufficiently important that we must protect them from government interference? If you have a right to freedom from

786. See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

Rust v. Sullivan also has chilling implications for future First Amendment protection of government-funded programs that deal with unpopular issues like gay rights. In *Rust*, the Court held that, within apparently broad limits, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." 111 S. Ct. at 1773. In *Rust*, this extended to limitations on what doctors could say to their patients when engaging in a funded doctor-patient relationship, a restriction that three dissenting Justices characterized as "clearly viewpoint-based." *Id.* at 1781 (Blackmun, J., dissenting). Although the Court apparently would exempt universities from its holding, *id.* at 1776, its failure to exclude public schools, for example, raises the specter of the government conditioning federal funding on a school district's not educating students about gay issues or AIDS. See *id.* at 1776 (suggesting that as long as funding recipients were free to engage in the speech in question outside the funded program, government could limit their speech in the course of the funded activity). *Rust* strongly suggests that the First Amendment cannot be the only bulwark for gay rights.

787. See *supra* part IV.A.

788. While this view rarely is explicitly stated, it is implicit in statements that restrictions on "homosexuality" are somehow worse when they affect people who do not engage in "homosexual behavior." See, e.g., *Seebol v. Farie*, No. 90-923-CA18, slip op. at 7 (Fla. Cir. Ct. Mar. 15, 1991). This view is reflected in the application of the Christian homily, "love the sinner; hate the sin" to gay issues. See, e.g., Jody Becker & Nancy Andrews, *Old Order with a New Mission: N.C. Convent Addresses Need for AIDS Housing*, WASH. POST, Aug. 31, 1991, at C7; *Cal Thomas on Modern Church*, L.A. TIMES, March 20, 1991, at B6.

Courts that try to distinguish harmful precedent on gay sexual conduct also draw this distinction. See, e.g., *Pruitt v. Cheney*, 943 F.2d 989, 993 (9th Cir. 1991).

789. See *Rubinfeld*, *supra* note 719, at 222.

790. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Of course, many people share Justice White's concern about the proper role of the Court and the arguably countermajoritarian nature of non-textual constitutional rights. See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* 101-02 (1980); Robert Goodman, *Substantive Due Process Comes Home to Roost: Fundamental Rights, Griswold to Bowers*, 10 WOMEN'S RTS. L. RPTR. 177, 193 (1988) (citing comments of former Solicitor General Charles Fried).

government interference with your choice to be sexually intimate with one other person, why not two or three or six? If we protect same-sex sexual activity, why are bigamy, incest, and adultery unprotected?⁷⁹¹

By contrast, equal protection arguments avoid some of the legitimacy concerns that attend non-textual rights because they are based in the text of the constitution. Some judges and commentators have made clear that they would accept text-based arguments to protect the same behavior they believe is inappropriately dealt with by substantive due process arguments.⁷⁹² Moreover, under a gender-based approach, courts will not have to worry about whether to protect incest and bigamy. Those activities are generally defined (and the laws against them applied) without any reference to the gender of the participants. Thus, their prohibition would not constitute gender discrimination.

791. *Bowers*, 478 U.S. at 195-96; see also *Dronenberg v. Zech*, 741 F.2d 1388, 1396 (D.C. Cir. 1984) (making same argument). Of course, some people would argue that prohibitions on bigamy or adultery also are remnants of a patriarchal system that equates marriage and ownership, and that these forms of human intimacy should be protected as legitimate choices. These arguments, about which I am uncertain, are beyond the scope of this Article.

The Supreme Court's legitimacy and line-drawing concerns arguably are post hoc justifications for substantive moral decisions by the Court. See Rubinfeld, *supra* note 719, at 747-48 (arguing that the *Bowers* majority made a substantive and unprincipled decision to draw the line where it did); cf. MINOW, *supra* note 28, at 356 (noting that legitimacy concerns often arise when courts act on behalf of excluded groups). But see West, *supra* note 315, at 532 (arguing that the legitimacy argument is truly central to the *Bowers* holding and that the Court genuinely was trying to avoid expressing opinions on the value of sodomy). The Supreme Court majorities did not seem too concerned with these issues in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and appeared to endorse non-textual non-traditional rights in *Cruzan*. See *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2851-52 (1990) (plurality opinion); *id.* at 2856 (O'Connor, J. concurring); *id.* at 2864, (Brennan, J. dissenting); *id.* at 2879, 2885 (Stevens, J. dissenting). However, the Supreme Court repeated its *Bowers* warnings in *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2341 (1989), and other courts seem to take them very seriously. A number of courts have refused to define new privacy or liberty interests, noting the legitimacy or line-drawing concerns. See, e.g., *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991) (refusing to extend liberty interest in parental association rights to relationship between parent's children and her live-in lover, noting the "myriad of situations" that would become constitutional issues) (citing *Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986)); *In re Alcala*, 271 Cal. Rptr. 674, 686 (Dist. Ct. App. 1990) (refusing to find liberty interest in prisoner's wearing specific kind of clothing); see also *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1105 (7th Cir. 1990) (Coffey, J. dissenting) (relying on illegitimacy language in *Bowers* to argue that nude dancing is not within ambit of First Amendment).

792. See, e.g., *Cruzan*, 110 S. Ct. at 2863 (Scalia, J. concurring) (noting that our "salvation" from arbitrary state action is not substantive due process, but rather "the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me"); Vieira, *supra* note 51, at 1188-89 (arguing that privacy analysis is inherently suspect and suggesting utilizing text-based Thirteenth amendment standard to address abortion issue); cf. Schnably, *supra* note 97, at 868 n.28 (citing sources arguing that equality analysis should govern abortion issues instead of or in addition to privacy analysis).

The gender-based argument also avoids additional line-drawing problems raised by a suspect class analysis. The Court has never articulated a clear test for what constitutes a suspect class.⁷⁹³ Since the initial growth in suspect class jurisprudence in the early 1970s,⁷⁹⁴ the Supreme Court has been reluctant to identify new suspect classifications.⁷⁹⁵ However, the heart of the gender-based approach is that discrimination against perceived homophiles is not merely *like* gender discrimination, but that it *is* gender discrimination—an established constitutional category already meriting heightened judicial scrutiny. Courts will not have to ponder the standards for creating new suspect classes because, to adopt the theory, they merely use an existing category.

3. EASE OF ADVOCACY

Unlike the suspect class argument, a gender-based equal protection argument avoids the immutability controversy. While immutability is not a litmus test for heightened scrutiny,⁷⁹⁶ courts and commentators discussing classifications based on sexual orientation generally seem to rely heavily on it. Many who support heightened scrutiny argue that sexual orientation is immutable;⁷⁹⁷ some who reject heightened scrutiny argue it is not.⁷⁹⁸ Because mutability is a difficult issue,⁷⁹⁹ gay advocates are better off avoiding it if possible.

793. See Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 133 (1990).

794. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (treating gender as a suspect class); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972) (suggesting use of heightened scrutiny for classifications involving illegitimacy); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding that alienage is a suspect class like race).

795. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (rejecting heightened scrutiny for classification based on mental retardation); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (per curiam) (rejecting heightened scrutiny for classification based on age). See generally *City of Cleburne*, 473 U.S. at 441-42 (indicating reluctance to find new suspect classes).

796. See Halley, *supra* note 4, at 923-32. Even race and gender, which do receive heightened scrutiny, are mutable to some extent. See *Watkins v. United States Army*, 847 F.2d 1329, 1347 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc). Moreover, the Supreme Court refused to extend strict scrutiny to the mentally retarded, a concededly immutable group. See *City of Cleburne*, 473 U.S. at 442.

797. See, e.g., *Watkins*, 847 F.2d at 1347; *Seebol v. Farie*, No. 90-923-CA18, slip op. at 15 (Fla. Cir. Ct. Mar. 15, 1991).

798. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *State v. Walsh*, 713 S.W.2d 508, 510-11 (Mo. 1986) (en banc).

799. "The conclusion most readily drawn from th[e] literature is that immutability characterizes the sexual orientation of *some*, perhaps most, homosexuals, but that many individuals, homosexual and heterosexual alike, are capable of making decisions as to their sexual orientation." Halley, *supra* note 4, at 934; see also sources cited *supra* note 139.

To the extent the gender-based argument rests on immutability, it is the immutability of gender, not of orientation.

An additional strength of the gender-based approach is that the category of gender discrimination is one with which the Supreme Court in the past decade has shown some inclination to be flexible.⁸⁰⁰ By contrast, the Court has explicitly rejected the privacy argument as applied to sexual orientation, it has shown no inclination to recognize new suspect classes, and its First Amendment jurisprudence has hardly been expansive. Advocates, at least in federal court, need to focus on constitutional theories that have some chance of appealing to the present Supreme Court.

4. ATTACKING PRE-UNDERSTANDING

Finally, and perhaps most importantly, these cases are excellent vehicles for educating the courts and the public.⁸⁰¹ Being able to say the relationship at issue in this case is "much like yours, but for the gender of one of the parties," may resonate enough with at least some non-gay judges and members of the public to challenge people's pre-understanding of gay issues and allow for significant social change. For example, suppose gay advocates challenge a state's decision to dismiss a lesbian from a government job because she brought her lover to a work-related social function. A presentation of the case that focused on gender would emphasize that male employees brought their wives to the same event. To make clear that the situation was analogous, the advocates could highlight the complexity of the relationship between the two women, attacking the pre-understanding that their relationship was simply about sex.⁸⁰² The parallel to the

800. See, e.g., *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (finding that "fetal-protection" policies constitute gender discrimination); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (finding that sexual harassment constitutes gender discrimination); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), discussed *supra* in text accompanying notes 737-38.

801. The focus on gender also encourages coalition-building with the women's movement.

802. The focus on relationships that the gender-based approach encourages is an advantage over privacy approaches, which necessarily focus on sex. If gay advocates treat sodomy statutes and privacy rights as the highest priority, we risk reinforcing non-gay society's concern that all we care about is sexual activity. See Schnably, *supra* note 97, at 932; cf. Henderson, *supra* note 8, at 1644 (noting that briefs in *Bowers* focusing on sex alone "may have been unfortunate. . . . At times the briefs read more like sex manuals than life stories of human beings who happened to be attracted to the same gender.").

Jed Rubenfeld's thought-provoking analysis of the right to privacy may suggest a way that the privacy argument can be divorced from focus on sexual acts and also provide additional support for the gender-based constitutional argument. See Rubenfeld, *supra* note 719. Rubenfeld argues that the Constitution should prevent state decisionmaking that forces people into state-approved life patterns by essentially reconstituting their lives completely. *Id.* at 740, 784. He believes that the privacy cases prior to *Bowers* support his position. See *id.* at

married couples would also emphasize that heterosexuals make their relationships part of normal social interaction, thus implicating the pre-understanding that gay people should not make their relationships public. Finally, the advocates could use the existence of the cross-gender stereotype to demonstrate the gender-related effects of anti-discrimination. Thus, the gender-based approach to the single case allows discussion of all three forms of pre-understanding about gay people I have identified as significant. While advocates using any legal theory should try to counter non-gay pre-understanding, the gender-based approach necessarily does so.

VII. CONCLUSION

According to press reports, Justice Powell initially voted in *Bowers* to strike down the Georgia sodomy laws, but changed his mind, and the case's result, by concurring in Justice White's opinion.⁸⁰³ A story in circulation in the gay community, perhaps apocryphal, is that Powell later indicated that he would have voted the other way if he had ever met anybody who was gay. At the time the Supreme Court decided *Bowers*, Powell was seventy-nine years old and had been a

783-99. He argues that sodomy statutes violate this concept of privacy by forcing people into a heterosexual, reproductive life pattern that they otherwise would eschew. *Id.* at 799-800.

I disagree with his analysis as applied to sodomy statutes. I think as a practical matter, they do not have the pervasive effect on people's lives that he claims. They are neither enforced nor obeyed sufficiently to have that effect and the particular sexual acts involved are not as central to people's lives as other examples he cites.

However, if we look more broadly at gay issues, Rubinfeld's analysis may be more helpful. The panoply of state and private anti-gay discriminatory measures (not just sodomy statutes) do indeed "inform the totality of a person's life" by "forcing . . . lives into well-defined and highly confined institutional layers." *Id.* at 784. The resulting and intended behavior, however, is not merely heterosexual or reproductive activity, but the narrow range of behavior in all areas of life that conforms to stereotypical gender roles. The restrictions have the effect of directing the lives not just of gay people but of non-gay people as well.

Rubinfeld's emphasis on the way state prohibitions can mold people's lives is apt here: anti-gay discrimination creates a world with sharply defined gender roles, where men must guard every move with care, for fear of stepping over the often-bright line that labels them queer and brings down the whole complex array of penalties associated with being perceived as gay. Women may have an even harder problem: carefully attempting to be male enough to fit in, yet always having to worry about when they have gone too far over a much more gauzy boundary, become too masculine, and risked the same types of censure. Although I choose to treat this as an equal protection issue to fit more neatly into existing and accepted doctrine, as redefined here it certainly fits into Rubinfeld's privacy structure, should any court adopt his analysis.

803. See Al Kamen, *Powell Changed Vote in Sodomy Case; Different Outcome Seen Likely if Homosexual Had Been Prosecuted*, WASH. POST, July 13, 1986, at A1. Powell since has indicated that he regretted this decision. See Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong: Powell on Sodomy*, NAT'L. L.J., Nov. 5, 1990, at 3; Linda Greenhouse, *Washington Talk; When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at 414.

public figure for decades.⁸⁰⁴ The fact that it is plausible that he believed no one he knew was gay is an indication of the lack of adequate information about lesbians and gay men that exists in our society.⁸⁰⁵

In order to insure that later Justices will know that they know someone who is gay, we must pave the way for people to be able to tell their stories publicly and to live in a public way in society. The gender-based argument presented here is one important way for lesbians and gay men and our advocates to tell the stories that can make this happen. Coming out publicly is difficult and often against our short-term self-interest.⁸⁰⁶ But if we do not tell our own stories, surely nobody else will tell them for us.

804. See ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 877 (2d ed. 1990).

805. In 1979, the authors of the Gay Report noted that "[m]any Americans state that they do not even know a single gay man or woman." JAY & YOUNG, *supra* note 104, at 3. A national poll cited in a 1990 work indicated that only one quarter of adults surveyed indicated "they had a homosexual friend or acquaintance." REINISCH & BEASLEY, *supra* note 182, at 148.

806. As Catherine MacKinnon has said about gender oppression, "One genius of the system we live under is that the strategies it requires to survive it from day to day are exactly the opposite of what is required to change it." MACKINNON, *supra* note 37, at 16.