

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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**DONALD ZARDA,**

Plaintiff,

-against-

**ALTITUDE EXPRESS, INC.,  
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

-----X

**REPLY  
DECLARATION IN  
SUPPORT OF ADMISSION  
OF EXPERT TESTIMONY  
AND PAYMENT OF EXPERT  
PREPARATION FEES OWED  
BY DEFENDANT**

10-cv-04334-JFB

GREGORY ANTOLLINO, an attorney admitted to this district and the courts of this state does hereby declare under penalty of perjury as follows:

1. I make this declaration in further support of my motion to deem admissible the testimony of Kenji Yoshino, as well as to reimburse Professor Yoshino for work performed in between the time he was noticed for a deposition and the time it was cancelled by Zabell, a few days before the scheduled date.

2. Attached hereto as "Exhibit A" are portions of an affirmation sworn to by Danny D. De Voe, Esq., who is currently moving in Suffolk Supreme Court for the same relief, sanctions, wherein Mr. Zabell cancelled a doctor's deposition at the last minute after he had prepared for the deposition and cleared his calendar.

3. Attached as "Exhibit B" are copies of checks that I wrote to Kenji Yoshino's Subchapter S corporation, Lexicon Industries, dated 5/2/12, 5/18/12, and 6/6/12, totaling \$10,000 for services Professor Yoshino rendered.

4. In Professor Yoshino's declaration in support of this motion dated July 18, 2012, he mentions three law professors who have testified as experts in the field of gender studies, sex stereotypes and gay discrimination. I have attached as "Exhibit C," the CV of one of those law professors, Joan Williams, of Hastings Law School, who has testified as an expert before the American Bar Association, in several divorce cases, and even was a speaker before a panel of federal judges at the Federal Judicial Center on "Understanding and Evaluating Stereotype Evidence." I have corresponded with Professor Williams, who did not write the lecture, but was willing to supply PowerPoint slides if she could find them. If I receive them and if they become relevant, I will supply them.

6. Professor Williams, who has no graduate degree other than in law and city planning, also testified before the EEOC on "Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities." See <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm#fn1>.

6. Attached as Exhibit D is a portion of the CV of Catharine A. MacKinnon, a professor at the University of Michigan Law School who is described as "a lawyer, teacher, writer, activist, and expert on sex equality[.]" While professor MacKinnon possesses a JD as well as a PhD in Political Science, her work is uniformly about gender discrimination and gender roles, and she has testified as an expert in this field in United States and Canadian courts four times. See Exhibit D, marked portions.

7. Attached as "Exhibit E" is the actual testimony before Congress of the third law professor mentioned by Professor Yoshino, William Eskridge. Professor

Eskridge is perhaps the most famous professor whose testimony is available on the subject of gay rights and his biographical notes are available at <http://www.law.yale.edu/faculty/WEskridge.htm>. Like professor Yoshino, his only doctorate is a JD. His entire testimony before Congress is attached to this motion to demonstrate how intertwined issues of law, society and psychology are intertwined when it comes to issues of gender studies and gay rights. Professor Eskridge's most advanced degree is that of a JD, yet he speaks in his testimony to Congress (on ENDA, the Employment Non-Discrimination Act) on the social sciences more than equally he does on the state of the law. When it comes to this area of the law, it is inextricably intertwined with the social sciences. I include it in these materials to rebut the suggestion, as defense counsel argues, that Professor Yoshino's lack of a graduate degree in sociology should in any way disqualify him from testifying about gender stereotypes or the link between identifying as a gay person and the discrimination that a gay person suffers when he is forced to cover as a gay man.

7. Finally, Professor Yoshino informs me that Crown publishers has agreed to publish his book "Same Sex Marriage on Trial." Professor Yoshino is currently in Kansas awaiting the birth of his second child, however, I was able to obtain a record from the University of Hawaii Law School, where he was a visiting professor, that mentions the up and coming publication of this book.

8. The suggestion that Mr. Yoshino does not deserve of the paltry \$400 per hour for which we are asking is insulting. Although Yoshino is a law professor rather than a partner, that is an argument in favor of giving him a higher hourly fee rather than a lower one. Many lawyers become partners; few become law

professors, especially so well published and at such top schools as Yale and NYU. In 2010, Ken Feinberg, in doling out money to BP oil victims, paid Yoshino's Colleague, Steven Gillers \$950 an hour. [http://www.huffingtonpost.com/2010/12/30/ken-feinberg-paying-steph\\_n\\_802703.html](http://www.huffingtonpost.com/2010/12/30/ken-feinberg-paying-steph_n_802703.html). Gillers is older and thus has some more experience as a professor than Yoshino, but the difference in their pay seems extreme – is Gillers worth more than twice Yoshino just because he is a little more experienced, and, perhaps worse, because he is offering his services in the Eastern District of New York rather than someone else? Whatever the answer to those questions, Professor Yoshino should be entitled to the entire \$400 per hour.

9. Finally, Professor Yoshino did not double dip and re-examine any of the depositions that went into his report. After his report was done, I collected the depositions I have him, *which did not include Donald Zarda's deposition transcript*. This was a strategy employed by me so that Professor Yoshino could get the gist of Mr. Zarda's claims – I provided the complaint, interrogatories, and two short media files – yet I wanted Professor Yoshino to hear the background story from all of the other players, who made all of the admissions that Yoshino relied upon. For example, Ray Maynard (dep. 281-82) and Richard Winstock (dep at 75) admitted there was nothing inappropriate that Zarda did on the video, and both witnesses – as well as the manuals admitted into evidence – showed that touching the student at the hips – where Orellana complained about being touched) was the appropriate place for the instructor to touch the student for student's safety (Maynard at 28, Winstock at 47, 74). Finally, both Orellana (dep. at 26) and Maynard (dep. at 55) admitted they never spoke to each other about what happened in the plane, which is

irrefutable evidence that Maynard did not conduct an investigation. These were points that defendants maintain that Yoshino spoke outside of his expertise. In fact, no – he was relying on Maynard’s and Winsock’s expertise entirely.

10. While I wanted Professor Yoshino to rely on the defendants’ and non-parties’ accounts of the skydiving incidents for the report, when the deposition was noticed, I gave Mr. Yoshino the Zarda deposition to read; he read it for the purposes of knowing the entire universe of the evidence in this case. Additionally, at that point, his competence in the field of gender and sexuality studies, as well as its legitimacy of a field of academic inquiry, were being questioned. He therefore legitimately billed eight and some hours to defend his conclusions, understand the universe of the evidence, and defend his expertise in, as well as the scientific authority of, gender and sexuality studies.

11. For these reasons, the motion should be granted in its entirety.

Dated: New York, New York  
August 31, 2012

\_\_\_\_\_/s/\_\_\_\_\_  
GREGORY ANTOLLINO GA 5950  
Attorney for Plaintiff  
18 West 21<sup>st</sup> Street, Suite 802  
New York, NY 10010

or move on. (Exhibit Q, p.132/L25 – p.134/L7)

....

Q: Did you ever submit fraudulent claims for services, dental services, for these three individuals?

MS. DE VOE: Objection to the question. Don't answer the question. Let's step outside and talk about it before you answer the question.

MR. ZABELL: I am going to object. There is a question pending before him. You can advise him –

MS DE VOE: Actually, it's to determine whether –

MR. ZABELL: You are going to stop and let me finish speaking, and then I will give you an opportunity to speak. (Exhibit Q, p.195/L4-21)

45. At the end of Dr. Phillips' deposition, plaintiff's counsel advised me and Ms. De Voe that he had to cancel the deposition of defendant's office manager, Andrea Grabowski, which was scheduled to take place on May 22, 2012, due to the fact that he had to appear in Supreme Court, Kings County as a result of a subpoena served upon him. (See Exhibit Q, p.203/LL14-25) After we resolved that we would adjourn Ms. Grabowski's deposition, I specifically asked Mr. Zabell whether the deposition of Dr. Peter Barkoff, a dentist in defendant's office, scheduled to take place on Friday, May 25, 2012, was still going forward as scheduled. Plaintiff's counsel confirmed that said deposition was in fact going forward.

46. On Thursday, May 24, 2012, I received a letter from plaintiff's counsel stating that he was cancelling the deposition of Dr. Barkoff, without providing any further explanation, whatsoever. Upon receipt thereof, I called Mr. Zabell to inquire as to why he was cancelling the deposition and why he did not give us the courtesy of

EXHIBIT A

providing any prior notice. Mr. Zabell said that he was cancelling the deposition because he intended to bring a motion against Ms. De Voe for sanctions based upon conduct he alleged to be improper during the deposition of Dr. Phillips. I advised Mr. Zabell that his intent to bring a motion for sanctions was not a legitimate excuse for cancelling the deposition of a doctor, who had cleared his schedule to attend said deposition. with one (1) day notice. Mr. Zabell alleged that he did not wait until the day before to cancel the deposition as he had sent me the letter via email on May 23, 2012. I did receive an email from Mr. Zabell on May 23, 2012, however, I was out of the office for the entire afternoon on May 23, 2012 and was unable to open the attachment to said email on my cell phone. I advised Mr. Zabell that he could have done the courteous thing and picked up the phone and called my office to discuss the cancellation rather than sending an email and letter. I further advised him that Dr. Barkoff had already cleared his schedule, spent time preparing for the deposition and that he would be at our office at 10:00A.M. on May 25, 2012 to be deposed and that he would not be produced again without Court Order.

47. During our telephone conversation, Mr. Zabell was extremely rude towards me. As I was trying to explain to Mr. Zabell that Dr. Barkoff was being very inconvenienced by the late notice of cancellation, Mr. Zabell was speaking over me. When I asked him to repeat what he said, as I could not hear because he began talking while I was still talking, he proceeded to speak to me in a condescending tone saying "that is what happens when you speak over people, Ms. Kircheim", alleging that I was the one speaking over him. When I told him he was grossly mistaken and that I was speaking first, he said "have a good day" and hung up on me.

Exhibit A



May 01, 2012 through May 31, 2012

Primary Account: [REDACTED]

**IMAGES** (continued)

ACCOUNT # [REDACTED]

See both front and back images of cleared checks at Chase.com. If you're not enrolled in this free service, please enroll now.

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 4/13/12

PAY TO THE ORDER OF: Christina Fonseca \$45.00  
Forty five only DOLLARS

MEMO: auto deposit

CHASE  
MORGAN CHASE BANK, N.A.

007370395592 MAY 14 #000004021 \$45.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 4/25/12

PAY TO THE ORDER OF: SDNY Clerk \$350.00  
Three hundred fifty only DOLLARS

MEMO: to pay

CHASE  
MORGAN CHASE BANK, N.A.

006280137016 MAY 01 #000004025 \$350.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 5/2/11

PAY TO THE ORDER OF: Lexicon Industries, Inc. \$4000.00  
Four thousand only DOLLARS

MEMO: ZARDA report

CHASE  
MORGAN CHASE BANK, N.A.

009280780844 MAY 08 #000004026 \$4,000.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 5/1/12

PAY TO THE ORDER OF: Anderson Rodriguez \$175.00  
One hundred seventy five only DOLLARS

MEMO: 4 sec person

CHASE  
MORGAN CHASE BANK, N.A.

009680362409 MAY 03 #000004027 \$175.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 5/2/12

PAY TO THE ORDER OF: Clerk EDNY \$350.00  
Three hundred fifty only DOLLARS

MEMO: Remedy

CHASE  
MORGAN CHASE BANK, N.A.

007070139961 MAY 10 #000004028 \$350.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 5/2/12

PAY TO THE ORDER OF: Soro Wile Investigation \$125.00  
One hundred twenty five only DOLLARS

MEMO: Gilman + Lotang

CHASE  
MORGAN CHASE BANK, N.A.

005390856008 MAY 06 #000004029 \$125.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 5/15/12

PAY TO THE ORDER OF: Appellate Division Clerk \$45.00  
Forty five only DOLLARS

MEMO: Fielding

CHASE  
MORGAN CHASE BANK, N.A.

008980815545 MAY 29 #000004030 \$45.00

Gregory Antollino, Esq.  
18-20 West 21st Street # 802  
New York, NY 10011

DATE: 5/18/12

PAY TO THE ORDER OF: LEXICON INDUSTRIES \$1,000.00  
One thousand only DOLLARS

MEMO: [REDACTED]

CHASE  
MORGAN CHASE BANK, N.A.

003180887102 MAY 29 #000004163 \$1,000.00

Ex. B



June 01, 2012 through June 29, 2012  
 Primary Account: [REDACTED]

**CHASE BUSINESS SELECT HIGH YIELD SAVINGS**

GREGORY ANTOLLINO ESQ

Account Number: [REDACTED]

**SAVINGS SUMMARY**

	INSTANCES	AMOUNT
Beginning Balance		[REDACTED]
Deposits and Additions	1	23.23
Ending Balance	1	[REDACTED]
Annual Percentage Yield Earned This Period		0.25%
Interest Earned This Period		\$23.23
Interest Paid Year-to-Date		\$145.82



Your monthly service fee was waived because you maintained an average savings balance of \$10,000 or more during the statement period.

**TRANSACTION DETAIL**

DATE	DESCRIPTION	AMOUNT	BALANCE
	Beginning Balance		[REDACTED]
06/29	Interest Payment	23.23	[REDACTED]
	Ending Balance		[REDACTED]

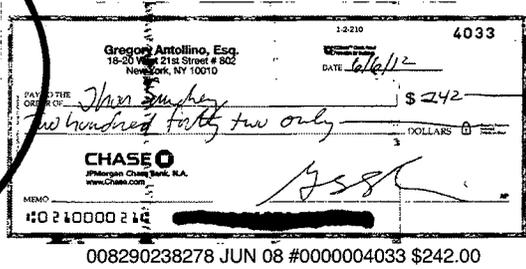
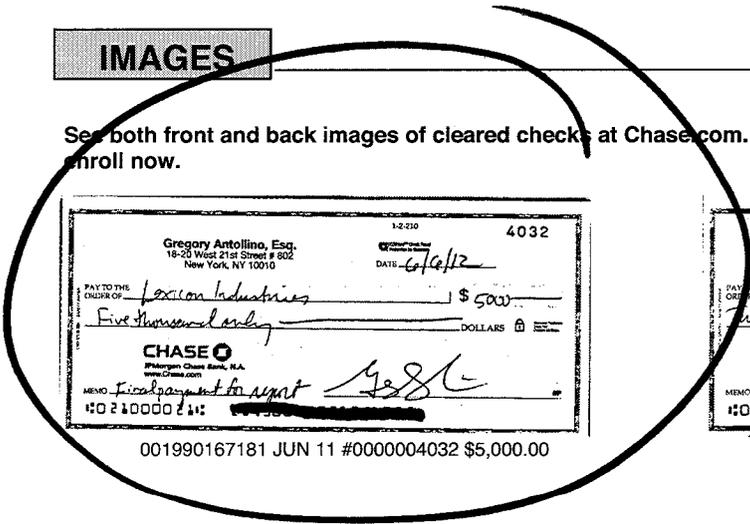
You earned a higher interest rate on your Chase Business Select High Yield Savings account during this statement period because you had a qualifying Chase BusinessClassic account.

30 deposited items are provided with your account each month. There is a \$0.20 fee for each additional deposited item.

**IMAGES**

ACCOUNT # 000214500527265

See both front and back images of cleared checks at Chase.com. If you're not enrolled in this free service, please enroll now.



001990167181 JUN 11 #0000004032 \$5,000.00

008290238278 JUN 08 #0000004033 \$242.00

EXH B

## **JOAN C. WILLIAMS**

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office: University of California, Hastings College of Law  
200 McAllister Street, San Francisco, CA 94102  
e-mail: williams@uchastings.edu or JoanWilliams@worklifelaw.org

phone: 415-565-4706  
fax: 415-581-8848

### **EDUCATION**

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**HARVARD LAW SCHOOL/MASSACHUSETTS INSTITUTE OF TECHNOLOGY**  
J.D. and Master's Degree in City Planning, June 1980.

**YALE UNIVERSITY**  
B.A. in History (Concentration: Medieval), June 1974.

**PRINCETON DAY SCHOOL**  
Class of 1970.

### **EMPLOYMENT**

---

**University of California, Hastings College of Law, San Francisco, CA**  
1066 Foundation Chair — 4/07 to present  
Distinguished Professor of Law — 7/05 to Present  
Founding Director, Center for WorkLife Law — 7/05 to Present

**American University, Washington College of Law, Washington, D.C.**  
Professor of Law — 8/82 to 7/05  
Director, Program on Work/Life Law (*formerly* Program on Gender, Work & Family) — 10/00 to 7/05  
Co-Director, Gender, Work & Family Project — 8/98 to 7/00

**University of California at Hastings Law School, San Francisco CA**  
Visiting Professor of Law — Spring Term 2004

**Harvard Law School, Cambridge MA**  
Visiting Professor of Law — Academic Year 1993 to 1994

**University of Virginia Law School, Charlottesville, VA**  
Visiting Professor of Law — Spring Term 1992

**Lane & Edson, P.C., Washington, D.C.**  
Associate — 10/80 to 6/82  
Law Clerk — Summer 1979

**Legal Action Center, New York, NY**  
Law Clerk — Summer 1977  
(Public interest law office specializing in test case litigation on civil disabilities of ex-convicts and ex-addicts.)

**National Park Service, Historic American Engineering Record, Puerto Rico**  
Project Historian — Summer 1976  
(Documenting sugar haciendas' importance in the history of technology.)

EXH C

Joan Williams, page 10

University ADVANCE Program, Providence, RI, October 14, 2008.

Speaker, "The New Norm of Faculty Flexibility," Iowa State University, Ames, IA, October 9-11, 2008.

Speaker "New Frontiers in Research on Diversity: Caregiver Bias in the 21<sup>st</sup> Century Workplace," University of Rhode Island ADVANCE Program, Kingston, RI, October 3, 2008.

Speaker, "Workplace Politics: What Women Leaders Need to Know," Shook, Hardy & Bacon LLP, Law and Women Symposium, Kansas City, MO, September 17, 2008.

Speaker, "Employment Discrimination Cases: Understanding and Evaluating Stereotype Evidence," National Workshop for District Judges III, Federal Judicial Center, San Antonio, TX, September 8-10, 2008.

Panelist, "Maternal Wall bias and Family Responsibilities Discrimination," Commission on Women in the Profession, American Bar Association, ABA Annual Meeting, August 7, 2008, New York, NY.

Speaker, "Employment Discrimination Cases: Understanding and Evaluating Stereotype Evidence," National Workshop for District Judges II, Federal Judicial Center, July 16-18, 2008, Boston, MA.

Guest Speaker, The Equal Employment Opportunity Commission End of the Month Training, San Francisco, CA, June 30, 2008.

Guest Speaker, "Women Leaders 2008: A symposium About Women in University Settings," University of San Francisco, Center for Gender Equality, San Francisco, CA June 6, 2008.

Guest Speaker, "Sociological, Psychological, Legal and Business Perspectives on Women, Work and Motherhood" Interdisciplinary Center on the Science of Diversity, Northwestern University Kellogg School of Management, Evanston, IL June 2, 2008.

Guest Lecturer, "The Massey Lectures, History of American Civilization," Harvard University, Cambridge, MA May 5-8, 2008.

Speaker, "Family Responsibility Discrimination: New Perspectives on Work/Family, Balance, Conflicts and Litigation," The Evolving Workplace 2008, The Jackson Lewis 19<sup>th</sup> Annual Corporate Counsel Conference, Las Vegas, NV, April 23, 2008.

Speaker, "Employment Rights and Responsibilities," The American Bar Association's Section of Labor and Employment Law, Dana Point, CA, April 1-5, 2008.

Speaker, "Best Practices," Persuading Lawyers to Stay: The Business Case and Best Practices for Work/Life Balance," Loyola Law School, Los Angeles, CA, March 13, 2008.

Speaker, "Employment Discrimination Cases: Understanding and Evaluating Stereotype Evidence," National Workshop for District Judges I, Federal Judicial Center, Redondo Beach, CA, March 10-12, 2008.

Panelist, "Family Responsibilities Discrimination," Bar Association of San Francisco, Yosemite Conference, Yosemite, CA, February 22-23, 2008.

Speaker, "Everything You Need to Know About Family Responsibilities Discrimination," Outten & Golden, NELA/NY, A Better Balance, NY School of Law, February 13, 2008, New York, NY.

Guest Speaker, "Women in Leadership," Utah State ADVANCE Program, Utah State University, December 6-7, 2007.

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Joan Williams, page 17

Lecture, "Work/Family Conflict and What To Do About It," Women Leading in Science ADVANCE Speaker Series, Institute for Research on Women and Gender, University of Michigan, September 26, 2003.

Speaker, American Bar Association Annual Conference: Summit on Women in the Profession, San Francisco, CA, August 10, 2003.

Speaker, "The Economic Consequences of Motherhood," Annual Institute for Women's Policy Research Conference, July 17, 2003.

Participant, "Research Roundtable on Work/Family Issues in Academics," American Association of University Professors, July 16, 2003.

Featured Speaker, Annual Morgan Stanley MD/ED Law Division OffSite Conference, spoke on Work/Life Balance issues, July 14, 2003.

Speaker, Women Under Forty Political Action Committee Conference, July 13, 2003.

Panelist, "The Economic Impact of Motherhood," National Organization for Women's National Conference, July 12, 2003.

Panelist, "Protecting Mothers and Other Family Caregivers From Discrimination in the Workplace," National Employment Lawyers' Association Fourteenth Annual Convention, "Conquering Mountains for Workers' Rights," June 28, 2003.

Panelist, "The Economic Impact of Motherhood in the US," Institute for Women's Policy Research Annual Conference on International Women's Policy Research: "Women Working to Make a Difference," June 22, 2003.

Guest Presenter, Capitol Hill Work/Family Study Group, June 20, 2003.

Participant, National Parenting Association, Center for Work/Life Policy Task Force, June 11, 2003.

Participant, Alfred P. Sloan Conference on Working Families, May 15, 2003.

Speaker, Testified before ABA Hearings, Commission on Women - Status on Women in the Law, May 9, 2003.

Panelist, "Making a Difference in the Law School Classroom," Harvard Law, "Celebration 50 - Harvard Law: Fifty Years of Women Graduates," May 2, 2003.

Featured Lecturer, "It's Just Not Working: Work/Family Conflict in Academic Careers," Washington University - Association of Women Faculty, April 30, 2003.

Speaker, Washington University Department of Medicine, Women Faculty, April 30, 2003.

Keynote Speaker, Third Annual Conference on Women and the Law, Thomas Jefferson School of Law, San Diego, April 25, 2003.

Featured Speaker, "Resolving Work/Family Conflict by Redefining Work Ideals," Cornell University, April 10, 2003.

Panelist, Peter Cicchino Memorial Awards Ceremony, Washington College of Law, April 4, 2003.

Expert witness in divorce case, March 11, 2003.

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Joan Williams, page 29

Advisory Committee, Ms. Foundation, "Take Your Sons and Daughters to Work" project

Advisory Committee, NOW LDEF, Child Care Initiative

Expert witness in "executive divorce" cases

Columnist, "The Balancing Act," The Career Network at The Chronicle of Higher Education's website (<http://chronicle.com/jobs/>). 2002 – 2005

Advisory Committee, Program on Women's Studies in Religion, Harvard Divinity School. 1993-2003

American Association of Law Schools

Chair, Section on the Humanities, 1994-1995

Chair, Section on Real Property, 1992-1993

District of Columbia Bar Association, *admitted* 1980

## **HONORS, AWARDS, AND GRANTS**

Massey Lectures in American Civilization, Harvard University, Spring 2007

Margaret Brent Women Lawyers of Achievement Award, American Bar Association, 2006

Distinguished Publication Award from the Association of Women in Psychology, 2005 (for 2004 special issue of the *Journal of Social Issues* on the maternal wall).

Myers Outstanding Book Award from Gustavus Myers Center for the Study of Bigotry and Human Rights in North America, 2001 (for *Unbending Gender*).

American Association of University Women Scholar-in-Residence, AY 2001-2002.

Alfred P. Sloan Foundation. Recipient of roughly \$1,300,000 in grants.

American University's Washington College of Law Emalee C. Godsey Scholar, 1999, for Unbending Gender.

American University's Annual Outstanding Scholarship Contributions of the Year Award, 1999-2000.

Gallivan Endowed Lecture, University of Connecticut Law School, 1999.

Rembe Endowed Lecturer for "Unbending Gender: Overwork, Masculinity, and Sex Discrimination," University of Washington Law School, 2000.

"Deconstructing Gender," cited as one of the most cited law review articles ever written. Fred R. Shapiro, "The Most-Cited Law Review Articles Revisited," 71 Chicago-Kent Law Review 751 (1996).

Cited as one of the most prolific law professors in the country, James Lindgren & Daniel Selzer, "The Most Prolific Law Professors and Faculties," 71 Chicago-Kent Law Review 71 (1996).

Articles reprinted in casebooks in six different subjects (family law, jurisprudence, constitutional law, local government law, feminist jurisprudence, sports law).

EXH C

**Biographical Information**

Catherine A. MacKinnon is a lawyer, teacher, writer, activist, and expert on sex equality. She has a B.A. from Smith College (1968), a J.D. from Yale Law School (1977), and a Ph.D. in political science from Yale University Graduate School (1987). She has been Professor of Law at the University of Michigan Law School since 1990, and Visiting Professor of Law at the University of Chicago Law School since Fall 1997. She has taught at Yale, Harvard, Stanford, Minnesota, UCLA, University of Chicago, Osgoode Hall (Toronto), and the University of Basel (Switzerland).

Beginning in the mid 1970s, MacKinnon pioneered the legal claim for sexual harassment as a form of sex discrimination. Beginning in 1983, with Andrea Dworkin, she conceived and wrote ordinances recognizing pornography as a violation of civil rights. The U.S. Supreme Court accepted her theory of sexual harassment in 1986. The Supreme Court of Canada adopted, in part, approaches that she created with the Women's Legal Education and Action Fund (LEAF) to equality (1989), pornography (1992), and hate speech (1991).

Professor MacKinnon is involved in litigation, legislation, and policy development on women's human rights domestically and internationally. She is currently representing *pro bono* Croatian and Muslim women and children victims of Serbian genocidal sexual atrocities seeking remedies under international law.

EXHIBIT D

*Quinn v. LeVoy and Gayme*, (1991) 83 D.L.R. 4th 193

*Quinn v. LeVoy and Gayme*, (1991) 83 D.L.R. 4th 193

*Quebec v. Fullerton and Lemay*, (1991) 63 C.C.C. 3rd 97

*Quebec v. Fullerton and Lemay*, (1991) 63 C.C.C. 3rd 97

*R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1991)

*R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1991)

Brief *Amicus Curiae* for National Black Women's Health Project in U.S. Supreme Court supporting statute prohibiting crossburning on equality grounds against free speech attack (lost).

**Litigation in the 1980s**

*Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991), 118 F.R.I.D. 525 (1988)

*Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991), 118 F.R.I.D. 525 (1988)

*Anders v. Law Society of British Columbia*, (1989) 1 S.C.R. 143

*Anders v. Law Society of British Columbia*, (1989) 1 S.C.R. 143

*Barowski v. A-G, Canada*, (1989) 1 S.C.R. 342

*Barowski v. A-G, Canada*, (1989) 1 S.C.R. 342

*Daigle v. Tremblay*, (1989) 2 S.C.R. 530

*Daigle v. Tremblay*, (1989) 2 S.C.R. 530

*Dworkin v. Hustler*, 867 F.2d 1188 (9th Cir. 1989) *cert. denied* 493 U.S. 812 (1989)

*Dworkin v. Hustler*, 867 F.2d 1188 (9th Cir. 1989) *cert. denied* 493 U.S. 812 (1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

*Tomney v. Ontario Teachers Federation*, 61 D.L.R. (4th) 565 (Ont. Ct. App. 1989)

EXHIBIT 10

**Take a Closer Look ...**

Catharine A. Mackinnon was admitted to the Connecticut Bar in 1978 and the Bar of the U.S. Supreme Court in 1986. Here is a closer look at her participation in litigation.

**Litigation in the 1990s**

*K. v. Genovese*, 866 F. Supp. 734 (S.D.N.Y. 1994), 70 F. 3d 232 (2d cir. 1996)

Lead counsel, filed 1993 under Alien Tort Claims Act and Torture Victim Protection Act, (NOW LDEF, local counsel) *pro bono* representation of named individuals and women's groups of Bosnian Muslim and Croat survivors of Serbian sexual atrocities seeking international justice for genocide. Dismissed for lack of subject matter jurisdiction, won Second Circuit appeal and denial of certiorari. Moving toward default judgment and hearing on relief.

*United States v. Lanier*, 73 F. 3d 1380 (6th Cir. 1996), 117 S. Ct. 1219 (1997)

Wrote Brief Amicus Curiae for Vivian Archie and the National Coalition Against Sexual Assault for survivor or real rape by judge, arguing that her equality rights were thereby violated, in federal criminal prosecution under sec. 242 for substantive due process liberty violations. Reversed and remanded by U.S. Supreme Court, brief on remand in process.

*United States v. Althobaz (aka Jake Baker)*, 890 F. Supp. 1375 (E.D. Mich. 1995), 104F. 3d 1492 (6th Cir. 1997)

Advised Jane Doe, victimized by Baker's snuff pornography of her by name on Internet, wrote Brief Amicus Curiae for the Victim Jane Doe and the national Coalition Against Sexual Assault, arguing that the pornography of Jane Doe and other evidence constituted a threat to her and other women under federal First Amendment law and sec. 18 U.S.C. 875 (c). Lost in Sixth Circuit cert. decision by Solicitor General pending.

*R. v. Bernardo*, No. 274/94 Ontario Court (General Division) (10 Feb. 1995) (LeSage, J.) and *Estates of French and Mahaffey v. Ontario A.G.*, (Feb. 1996) (Gravelly, J.)

Expert witness on effects of showing videotapes of sexual assault of Leslie Mahaffey and Kristin French, 14 and 15 years old, at trial of perpetrator accused of their murder on behalf of families of girls; legal consultant to counsel for families. (Result: videotape heard but not seen, defendant convicted of first degree murder.) Oral expert testimony in civil action against Crown for control of future availability of videotapes. Appeal in process.

*Kenn. Church of Jesus Christ Christian - Aryan Nations*, Board of Inquiry Decision (Edmonton, Alberta), Feb. 28, 1992.

Expert testimony for LEAF against white supremacists on harm of discriminatory symbols (swastika and crossburning) in support of human rights statute prohibiting them, before Board of Inquiry in Alberta (won). (Defendant fled jurisdiction.)

*The Owners v. Bunter*, (1992) 2 W.W.R. 577 (S.C.C.)

Affidavit and factum in Supreme court of Canada for intervenor of Women's Legal Education and Action Fund (LEAF) arguing sex equality as basis for obscenity provision challenged as violation of freedom of expression under charter of Rights and Freedoms (won, approach largely adopted).

*Thorsen v. Guccione*, 584 N.X.S. 2d 506 (1992)

Expert brief arguing that punitive damages are available for sexual harassment in case involving woman used in pornography, in new York Appellate Division (lost).

*Kesler v. The Queen*, (1991) 2 W.W.R. 1 and *Regina v. Andrews and Smith*, (1991) 77 D.L.R. (4th) 128, and *Taylor v. Canadian Human Rights Comm'n*, (1990) 75 D.L.R. (4th) 577

Affidavit and factum for interveners Women's Legal Education and Action Fund (LEAF) in Supreme court of Canada arguing that criminal provision prohibiting promotion of group-based hatred does not violate guarantee of free expression because it advances constitutional equality (statute upheld in part on equality grounds) and that human rights provision restricting telephonic hate speech outweighs expressive violations (won, approach largely adopted).

EXHIBIT D

**House Committee on Education and Labor  
111<sup>th</sup> Congress, First Session**

**Statement of Professor William N. Eskridge  
John A. Garver Professor of Jurisprudence, Yale Law School**

**September 23, 2009**

**EXECUTIVE SUMMARY**

The proposed Employment Non-Discrimination Act of 2009 (ENDA) would bar sexual orientation and gender identity discrimination in the workplace by the states as well as by private employers. To cover state employees and provide them with damage remedies, ENDA abrogates the states' Eleventh Amendment immunity, pursuant to Congress's authority to enforce the Fourteenth Amendment. The Supreme Court has said that Congress has Fourteenth Amendment authority *both* to create a remedy for state violations of constitutional rights *and* to establish prophylactic rules to head off harder-to-discern constitutional violations (so long as the prophylactic remedy is congruent and proportional to constitutional violations Congress identifies). Is ENDA a proper exercise of Congress's Fourteenth Amendment authority?

The history of employment discrimination against sexual and gender minorities by government employers suggests three independent reasons why ENDA is a proper exercise of Congress's Fourteenth Amendment authority. **First**, most of the state employment decisions actionable under ENDA are properly viewed as state action violating the Equal Protection Clause. ENDA reaches only discriminatory workplace treatment because of the employee's homosexual, bisexual, or heterosexual orientation or gender identity; unlike most other job discrimination statutes, it does not reach policies that only have discriminatory effects. In most cases where the state is discriminating solely on this basis, the discrimination is based upon either emotional prejudice or erroneous stereotypes and is constitutionally questionable on this ground alone. ENDA is like Title VII, which constitutionally abrogates the states' damages immunity for job discrimination because of race or sex. Both statutes target classifications that typically have no bearing on whether a person can do his or her job capably.

For an example explained in my statement, I was denied tenure at the University of Virginia School of Law in 1985 based in part on my sexual orientation. The hysterical behavior and deployment of anti-gay epithets by key state officials indicates that the decision was influenced by anti-gay prejudice. The inability of state officials to explain their decision without engaging in libel underlines the irrationality of the state discrimination and its vulnerability to equal protection attack.

**Second**, many of the state employment decisions actionable under ENDA violate other constitutional guarantees as well as equal protection. (The Supreme Court has ruled that Congress has the greatest remedial leeway when it has found multiple constitutional problems that are interrelated.) The history of state discrimination reveals that when

officials harass or exclude sexual and gender minorities, they often trample upon a variety of constitutional rights. Traditionally, lesbian, gay, bisexual, or transgendered (LGBT) persons are denied job opportunities because officials look with disgust upon their consensual activities protected by the constitutional privacy right. Today, a gay person who is outspoken in favor of gay rights might be disciplined for both his sexual orientation and for his expression; indeed, merely self-identifying as lesbian, gay, bisexual, or transgendered often leads to official penalties. Additionally, officials determined to usher an LGBT worker out of the workplace often cut procedural corners in ways that violate the Due Process Clause.

In my own case, the state official who verbally assaulted me with hysterical claims and anti-gay epithets also withheld information he was required to provide me regarding my process rights. Denying me a right to respond to fabricated arguments, the official violated both explicit law school rules *and* constitutional due process requirements. It is also possible that animus surrounding my tenure case was related to my leadership in the movement to have the law school divest itself of investments in South Africa during the apartheid era, core First Amendment activities.

**Third**, even if ENDA reaches many cases where the state is not acting unconstitutionally in discriminating against LGBT employees, Congress has leeway to adopt prophylactic rules so long as they are congruent and proportional to the constitutional harms found by Congress. The history of state discrimination against LGBT employees is not only a long one, but is also a deep one. For most of the twentieth century, the state helped entrench the prejudice that gay people are immoral and dirty and insisted upon the false stereotypes that sexual and gender minorities are predatory and disrupt public order. While public policy in most states is no longer explicitly homophobic, the legacy of earlier policies perseveres. Some officials will consciously discriminate but cover up their discrimination in neutral rhetoric, while others will carry unconscious biases into the decisionmaking process. ENDA provides a mechanism whereby closeted or unconscious discrimination can be uncovered and remedied.

If my University of Virginia tenure case were come up today, and the same officials were responsible for deciding my employment fate, I think those officials would be more careful to avoid the appearance of impropriety. The officials would probably follow the required procedures and would behave themselves in my presence, but would still deny tenure. For many of them, tenure would still be hard to swallow, because of prejudice against “dirty” or “immoral” gays or because of stereotypical thinking about predatory and untrustworthy “homosexuals.” Concerns about immoral behavior and disruption of public order would more likely be kept in the closet and would be impossible to uncover under administrative remedies usually provided by state law.

Affording a federal cause of action, ENDA would offer LGBT public employees more options for discovering the underlying reasons for job discrimination against them. ENDA would also provide incentives for the states to educate supervisors about the facts regarding sexual and gender minorities, as well as the costs of homophobia.

**House Committee on Education and Labor  
111<sup>th</sup> Congress, First Session**

**Statement of Professor William N. Eskridge  
John A. Garver Professor of Jurisprudence, Yale Law School**

**September 23, 2009**

**STATEMENT**

I appreciate the Committee's invitation for me to make a contribution to its deliberations in connection with the proposed Employment Non-Discrimination Act, which would prohibit employment discrimination on the basis of sexual orientation or gender identity. I come to your Committee in three capacities.

**First**, I am a professor of constitutional law and may be of assistance in interpreting Supreme Court's precedents that might pose difficulties for ENDA.<sup>1</sup> The current version of the bill would protect municipal, state, and federal employees, as well as most private employees. H.R. 3017, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009). Congress has undisputed authority to set rules for employees of the federal government, and its Commerce Clause authority easily justifies its regulation of employment relations that have effects on interstate commerce. As to state employees, however, the Supreme Court has ruled that Congress's Commerce Clause power does not allow it to override state Eleventh Amendment immunity from damage lawsuits. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). States can waive their Eleventh Amendment immunity, and § 11(b) of ENDA imposes such a waiver on states accepting federal funds for designated programs or activities. Also, Congress can override Eleventh Amendment immunity when it is acting pursuant to its power to "enforce" the Fourteenth Amendment, U.S. Const., XIV Am., § 5. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Section 11(a) of ENDA abrogates state immunity pursuant to Congress's § 5 power. The issue that will be the focus of my testimony is whether ENDA is a proper exercise of Congress's Fourteenth Amendment power.

The Supreme Court has construed the § 5 enforcement power to include *both* remedying situations that the Court itself considers a constitutional violation *and* providing prophylactic rules that deter harder-to-detect violations (so long as those rules are "congruent and proportional" to the constitutional injuries Congress uncovers). See *City of Boerne v. Flores*, 521 U.S. 507, 519-20, 536 (1997) (rejecting a § 5 basis for Congress to bar states from adopting rules with disparate impacts upon religious free exercise); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000) (rejecting a § 5 basis for Congress to impose age discrimination rules on state employers); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) (rejecting a § 5 basis for Congress to impose disability discrimination rules on state employers); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003) (accepting a §

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<sup>1</sup> I am the John A. Garver Professor of Jurisprudence at the Yale Law School, where I teach Constitutional Law, among other courses. I am the co-author of a leading Constitutional Law casebook and several dozen law review articles. Overall, I am one of the most cited scholars of "public law" in the legal academy.

5 basis for Congress to impose family and medical leave rules on state employers); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (accepting a § 5 basis for Congress to impose disability access rules on state public services).

Under the *Boerne-Lane* line of cases, Congress must first identify what Fourteenth Amendment rights it is enforcing, either directly or through prophylactic rules. Then, Congress must create a record of violations of such rights that it is remedying. Finally, Congress must persuade the Supreme Court that its remedy is either a direct enforcement of existing constitutional rights **or** is a prophylactic rule needed to head off rights violations (and the remedy is congruent and proportional to the violations found by Congress).

The primary Fourteenth Amendment right enforced in ENDA is the right of persons to the equal protection of the laws. If sexual orientation were a suspect or quasi-suspect classification (like race and sex, respectively), then most or all of ENDA's rules would be a direct enforcement of constitutional guarantees. See *Fitzpatrick v. Bitzer* (accepting a § 5 basis for Congress to impose sex and race discrimination rules upon state employers; these included disparate impact rules that went beyond what the Court would have enforced under the Fourteenth Amendment). Judges have been grappling with discrimination because of gender identity, and the better reasoned decisions treat it as a form of sex discrimination. If an employer refuses to hire Jane because the employer does not want to hire women, it is discrimination because of sex: the regulatory variable (the item that changes to produce the exclusion) is Jane's presentation as a woman. If the employer refuses to hire Jane because the employer does not want to hire transsexuals, that is also discrimination because of sex: the regulatory variable is Jane's presentation as a woman.<sup>2</sup> Consider this analogy: an employer who will hire Jews or Christians but will not hire a Jew who "converts" to Christianity discriminates "because of religion." See *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008).

Another kind of argument has been accepted as well. The Supreme Court has ruled that employers cannot discriminate against female employees because they do not present themselves along traditional "feminine" lines. See *Price Waterhouse Co. v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination against a female employee because she did not meet the employer's understanding of how a woman should behave and present herself violated Title VII's sex discrimination rule). Based on *Hopkins*, lower courts have reasoned that gender role discrimination includes employer discrimination against transsexuals. If an employer cannot ordinarily discriminate against female employees who wear pants rather than dresses, the same principle bars those employers from discriminating against "female" employees who present themselves as males.<sup>3</sup>

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<sup>2</sup> The European Court of Justice ruled in 1996 that a European Union directive banning sex discrimination in employment must be interpreted to cover transsexuals. *P. v. S. and Cornwall County Council*, Case C-13/94, [1996] 1 CEL 574.

<sup>3</sup> See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000) (ruling that discrimination against a transsexual because of her gender preference violated the Gender Motivated Violence Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1<sup>st</sup> Cir. 2000) (discrimination against a transgendered person can be a sex discrimination under federal equal credit law).

The federal constitutional status of sexual orientation classifications is not settled. For example, the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), declined to decide whether sexual orientation is a suspect classification. Contrast *Kimel* and *Garrett*, involving classifications (age and disability, respectively) where the Court had repeatedly ruled that only the easy-to-pass rational basis scrutiny was applicable, because age and disability are often relevant to one's ability to do a job;<sup>4</sup> this point of equal protection doctrine raised the bar that Congress had to meet under § 5. In my view, sexual orientation is a suspect classification under the criteria the Supreme Court has followed to require closer scrutiny for race and national origin classifications; that is, it is a factor "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy of deserving as others."<sup>5</sup> State courts applying this criterion (as well as others sometimes mentioned, such as how hard to change the trait is) have moved decisively toward the stance that sexual orientation is a suspect or quasi-suspect classification, because laws or policies discriminating based on sexual orientation have typically reflected prejudice or stereotypes and not rational public-regarding policy.<sup>6</sup> Indeed, the history in this statement provides a record that supports these conclusions.

It is not clear that the U.S. Supreme Court would be willing to go this far at the present time, but the Court has ruled, in *Romer*, that sexual orientation discrimination against lesbians and gay men that is apparently motivated by anti-gay "animus" violates the Equal Protection Clause. 517 U.S. at 632. As my statement will document in some detail, municipal, state, and federal employers have long discriminated against sexual and gender minorities based upon prejudice against or false stereotypes about these minorities. As applied to sexual minorities in *Romer* and in Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003) (voting to invalidate a sodomy law applicable only to "homosexual conduct"), the "rational basis" test has had more bite than it does in cases involving age or disability discrimination: the *Romer* Court (517 U.S. at 634-35) and Justice O'Connor in *Lawrence* (539 U.S. at 582-84) refused to consider public sentiment or traditional morality as a state interest sufficient to

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<sup>4</sup> *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (age-based groups have not been subjected to a long history of purposeful discrimination, nor discrimination unrelated to their abilities); *Cleburne, v. Cleburne Living Center*, 473 U.S. 432, 442-45 (1985) (mental disability is not a suspect classification because the state often has legitimate reasons for taking it into account, and there is a long history of public sympathy for, rather than antipathy to, the mentally disabled).

<sup>5</sup> See Eskridge, *Gaylaw*, 207-18; *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973) (plurality opinion, indicating that sex discriminations should receive heightened scrutiny for precisely these reasons); *Cleburne*, 473 U.S. at 440-42 (similar analysis suggesting that mental disability does not qualify for heightened scrutiny).

<sup>6</sup> Several state courts have recently held that sexual orientation is a suspect or quasi-suspect classification, following the criteria noted in text, as well as additional criteria often mentioned, namely, whether the classified trait is hard or impossible to change and whether the group has been marginalized in the political process. See *In re Marriage cases*, 183 P.3d 384 (Cal. 2008) (suspect classification); *Kerrigan v. Connecticut Dep't Pub. Health*, 957 A.2d 407, 431-61 (Conn. 2008) (quasi-suspect); *Varnum v. O'Brien*, 763 N.W.2d 862, 889-96 (Iowa 2008) (quasi-suspect). See also *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447 (Or. App. 1998) "[W]e have no difficulty concluding that plaintiffs are members of a suspect class").

justify state discrimination against minorities, as the Court had been willing to do in earlier rational basis cases. Most judges and commentators have concluded that *Romer* and *Lawrence* were applying something more scrutinizing than the traditional rational basis approach.<sup>7</sup> In Justice O'Connor's words, "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence*, 539 U.S. at 580.

This fact not only differentiates ENDA from the age and disability discrimination statutes invalidated (as applied to state treasuries) in *Kimel* and *Garrett* (respectively), but ought to give Congress greater leeway to adopt prophylactic rules protecting lesbian, gay, bisexual, and transgendered ("LGBT") employees than it was allowed to protect the aged and disabled in the earlier Eleventh Amendment cases. Specifically, if Congress finds that state employers have typically discriminated against gay employees based upon *animus*, and not genuine public policy, Congress has authority under § 5 of the Fourteenth Amendment to provide a statutory claim for relief for this direct violation; if Congress further finds that a lot of state discrimination against gay employees is based on *animus*, but that it is hard to tell which cases also involve legitimate considerations (such as workplace misconduct by the employee), then Congress has authority under § 5 to provide a statutory claim for relief under a prophylactic theory, so long as the remedy is congruent with or proportional to the constitutional harm Congress has found. It is also worth noting that ENDA is a much more limited statutory remedy than were the age (*Kimel*) and disability (*Garrett*) discrimination statutes. Section 4(g) says that ENDA provides relief only for disparate treatment claims, and not for disparate impact claims (i.e., a neutral policy has a disparate impact on a protected group)—in contrast to the Age Discrimination in Employment Act of 1967 (ADEA), as interpreted by the EEOC (see *Smith v. City of Jackson*, 544 U.S. 228 (2005)), and to the Americans with Disabilities Act of 1990 (ADA), as written to require accommodations for people with disabilities. In short, the constitutionally fishier classifications that form the basis for ENDA (sexual orientation and gender identity) would justify broader prophylactic rules than Congress adopted in the ADEA and ADA—yet ENDA remedy is actually narrower, and hence much more tightly related to animus-based discrimination.

Additionally, the Supreme Court has held that Congress has broader § 5 leeway when its abrogation of state Eleventh Amendment immunity addresses not just

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<sup>7</sup> See, e.g., *Ramos v. Town of Vernon*, 353 F.3d 171, 175 (2d Cir. 2003) (referring to *Romer*'s "less deferential form of rational basis review"); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 768 (7th Cir. 2003) (Posner, J., dissenting) ("[D]iscrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities."); *State v. Limon*, 280 Kan. 275, 287 (2005); Nan D. Hunter, "Sexual Orientation and the Paradox of Heightened Scrutiny," 102 Mich. L. Rev. 1528, 1528 (2004); Pamela S. Karlan, "Foreword: Loving *Lawrence*," 102 Mich. L. Rev. 1447, 1450 (2004) ("*Lawrence*, however, does to due process analysis something very similar to what . . . *Romer* . . . did to equal protection analysis: it undermines the traditional tiers of scrutiny altogether."); Robert C. Post, "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," 117 Harv. L. Rev. 4, 50 (2003) ("The Court will apply more exacting judicial scrutiny, however, when it believes that state action threatens a constitutional value specifically protected by the Equal Protection Clause") (citing *Lawrence*); Cass Sunstein, "Foreword: Leaving Things Undecided," 110 Harv. L. Rev. 4, 78 (1996) ("*Romer* is part of the *Moreno-Cleburne* line, using rationality review "with bite" when prejudice and hostility are especially likely to be present.").

constitutional equality violations, but also violations of other constitutional rights. See *Tennessee v. Lane*, 541 U.S. at 522-29 (upholding the application of ADA Title II to the states on this ground). Like Title II of the ADA, which requires states to provide people with disabilities with access to public services, ENDA does more than enforce equal protection rights of sexual and gender minorities. As a prophylactic measure, it also protects three other fundamental constitutional rights that have frequently been violated by public employers:

**(1) Right to Privacy.** Traditionally, state and local governments have discriminated against LGBT employees because of their supposed “immoral” and “illegal” conduct, namely, consensual sodomy. The Supreme Court ruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), that Americans have a privacy right to engage in sodomy and oral sex in the home with another consenting adult. If the state discriminates against an employee because of the immorality of her or his supposed private activities, that discrimination impinges on a privacy right and so is subject to constitutional scrutiny that has some bite.<sup>8</sup> As I shall show in my statement, this is a pervasive reason for anti-gay discrimination, but it often hides in a constitutional closet now that open homophobia is subject to public ridicule. Hence, Congress ought to ground ENDA, in part, as a prophylactic rule aimed at such in-the-closet discrimination grounded on personal animus against sexual minorities because of their supposed immoral sexual activities. I shall provide a first-hand example of this phenomenon at the end of my statement.

**(2) Freedom of Expression.** As the immoral or illegal conduct justification for anti-LGBT discrimination in public employment has receded as a public justification for such conduct, public employers have shifted to explanations that rest upon the supposed disruption of the workforce when openly LGBT employees work for the government. Discrimination of this sort—or discrimination against a gay person for *not* coming out of the closet—is unconstitutional because it burdens each person’s freedom of expression, a fundamental right grounded in the First Amendment. See *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995)

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<sup>8</sup> *Lawrence* did not announce exactly what level of scrutiny the Court was applying. Because the Court held that traditional morality (a justification acceptable under the traditional rational basis approach) could not justify Texas’s Homosexual Conduct Law, most judges and commentators have reasoned that state employment rules penalizing gay employees for consensual private activities must be subjected to some form of heightened scrutiny. See, e.g., *Witt v. Department of Air Force*, 527 F.3d 806 (9<sup>th</sup> Cir. 2008); **Error! Main Document Only.** *Cook v. Gates*, 528 F.3d 42 (1<sup>st</sup> Cir. 2008); *Doctor John’s, Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005, 1033 (N.D. Iowa 2006) (*Lawrence* “recognize[ed] and firmly establish[ed] a fundamental right to privacy”). Accordingly, state supreme courts have noted that *Lawrence* designates a fundamental right to privacy. See *Jane Doe I v. Phillips*, 194 S.W.3d 833, 844 n.9 (Mo. 2006) (unanimous) (citing *Lawrence* for the proposition that “[t]he right to privacy is fundamental”); *Nixon v. Dep’t of Pub. Welfare*, 576 Pa. 385, 402 (Pa. 2003) (citing *Lawrence* as “reaffirming fundamental privacy rights”). Even jurists who oppose extending *Lawrence* to encompass claims for same-sex marriage believe that it established a “due-process-derived fundamental right.” *In re Marriage Cases*, 43 Cal. 4th 757, 876 n.11 (Cal. 2008) (Baxter, J., dissenting). A divided Eleventh Circuit has taken a narrower view of *Lawrence* in *Lofton v. Secretary of the Dep’t of Children and Soc. Servs.*, 377 F.3d 1275 (11<sup>th</sup> Cir. en banc 2004); but see *id.* at 1290 (Barkett, J., dissenting and arguing for the broader reading of *Lawrence*).

(dictum) (LGBT people’s expression of pride in their sexual orientation is expression protected against state action by the First Amendment). The state cannot condition continued employment on employees’ willingness to forego protected expression, including identity speech. *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979) (“coming out” speech by gay people is protected “political” expression); cf. *Wieman v. Updegraff*, 344 U.S. 183 (1952) (state cannot condition employment on a loyalty oath that imposes conformity of belief on employees).

**(3) Procedural Due Process.** Most state employees have a constitutional property interest in not losing their jobs for arbitrary reasons (such as those noted above). See *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.9 (1970), dictum followed in *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972); *Slochower v. Board of Higher Education, City of New York*, 350 U.S. 551, 555-56 (1956). The procedural feature of the Due Process Clause requires that when the state deprives people of their property interest in their state jobs, it give them notice of the termination, reasons, and a fair opportunity to respond before a neutral decisionmaker. *Goldberg*, 397 U.S. at 267, 271. There are many examples in this statement of public employees driven from their jobs because of their sexual orientation or gender identity, and done so without the process that is constitutionally due. Again, my own case, described at the end of the statement, is an example where procedural rules were ignored as state actors sought to discipline a gay employee.

The primary question my testimony addresses is whether there has, historically, been state employment discrimination violating constitutional guarantees that might meet the *Boerne/Lane* standard allowing congressional abrogation of states’ Eleventh Amendment immunity.

Thus, my **second** role is that of a legal historian.<sup>9</sup> In the (many) pages that follow, I shall present a mini-history of governmental workplace discrimination against sexual and gender minorities. The history will document not only (a) the longstanding discrimination by state and federal governments against LGBT employees, but also (b) the underlying reasons frequently invoked to support such discrimination (namely, animus against LGBT people, revulsion against people whose private conduct is considered immoral, censorship of LGBT self-expression), and (c) the harmful and sometimes devastating effects of that discrimination upon human lives and the public interest.

As to the last point, employment discrimination by the government did not just echo discrimination by private employers, which was often irrational and vicious as well. Government discrimination often involved coordinated efforts by law enforcement and

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<sup>9</sup> I have a Masters of Arts in History from Harvard University (1974) and have published several well-regarded historical studies of lesbian and gay legal history. See Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (1999); Eskridge, *Dishonorable Passions: Sodomy Law in America* (2008), both of which were awarded the Stonewall Award in Nonfiction by the American Library Association. Much of this statement and my oral testimony will draw from these two books.

civil administrators to expose “closeted homosexuals” and expunge them from civil society. More important, governments aggressively encouraged private discrimination. Because most sexual and gender minorities have been (and remain to this day) in the “closet,” state exposure facilitated private discrimination. Governmental policy also served as a model for discrimination by others. Thus, the federal government created and publicized justifications for excluding “homosexuals” from the workplace; state governments followed the federal leadership, with their own variations; municipal and private employers followed the leadership of federal and state governments.

The foregoing chain explains why my statement devotes some attention to the federal government’s workplace exclusions of sexual and gender minorities. Relatedly, this explanation also suggests the need for and justice of ENDA. The federal government helped create a society where attitudes are poisoned toward LGBT persons—but the same federal government can also reverse some of that poisonous effect, through ENDA and its implementation.

My statement will focus on the brutal history of state discrimination; other witnesses will comprehensively discuss the ongoing history of discrimination. Nonetheless, I shall conclude with a case example of irrational, and unconstitutional, state employment discrimination against LGBT persons. I am one of those persons, a gay man denied tenure at the University of Virginia’s School of Law in part because of my sexual orientation.<sup>10</sup> This will be my **third** role in your Committee’s deliberations. I offer my story as an account of how anti-gay animus can affect employment decisionmaking at America’s toniest state institutions; how that animus impacts upon human lives; and how that animus undermines the state’s ability to serve its citizens.

## **I. Early Government Employment Discrimination against Sexual and Gender Minorities, 1917-45**

Walt Whitman (1819-92) was perhaps the greatest poet the United States has ever produced. His *Leaves of Grass* (1855) was a celebration of American diversity and democracy. In “Song of Myself,” the poet befriends and identifies with long lists of Americans—the carpenter, duck-shooter, spinning-girl, farmer, lunatic, journal printer, “quadron girl,” gentleman dancers, “newly-come immigrants,” the “squaw wrapt in her yellow-hemm’d cloth,” steamboat deck-hands, the Yankee-girl working in the mill, drovers and peddlers, the opium-eater, a prostitute, the train fare-collector, and so forth. Hundreds of different Americans populate “Song,” and Whitman merged them all into American democracy, which (in the person of Whitman!) embraced them all.

America’s great poet was a lover of men, the antecedent to the “homosexual” of the early twentieth century and the gay man of today.<sup>11</sup> He believed in the concept of

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<sup>10</sup> I was an assistant professor at the University of Virginia School of Law from 1982 to 1988. My application for promotion to associate professor and my application for tenure were denied in academic year 1985-86. I relocated as an associate professor at the Georgetown University Law Center in academic year 1987-88. Since 1998, I have been the John A. Garver Professor of Jurisprudence at the Yale Law School.

<sup>11</sup> On Whitman’s relations with other men, see Justin Kaplan, *Walt Whitman: A Life* (1980); Martin Duberman, *About Time* 219-20 (1991).

“adhesion,” or mutual devotion, between men, and this attitude served the public interest well during the Civil War, when Whitman contributed to the Union cause as a nurse for wounded soldiers in Washington, DC. By contemporary accounts, he was not only a dedicated nurse, but also a joy to the men he served and a helper on their rocky road to rehabilitation. Perhaps partly as a reward for his selfless service during the war, Whitman subsequently secured a job as a clerk at the Indian Bureau—a position he lost as part of Interior Secretary James Harlan’s campaign to establish “rules of decorum & propriety prescribed by a Christian civilization.” The Secretary allegedly saw a copy of *Leaves* on Whitman’s desk and fired him on the spot.<sup>12</sup> (Today’s First Amendment would bar the Secretary from firing a governmental employee for writing poems celebrating human relationships of the sort that *Leaves* did.)

Whitman was not discharged for being a “homosexual,” an identity unknown in 1865 (the word “homosexual” did not even enter the English language until the 1890s), but his discharge was a harbinger of things to come. By the time he died, in 1892, there were discernible subcultures of sexual and gender minorities in most of America’s largest urban areas. “Fairies” (effeminate, often cross-dressing, men) and woman-affiliated (often cross-dressing) women were objects of social disgust, governmental study and regulation, and scientific speculation. Whitman would have been just as unwelcome in the federal or state civil service of the twentieth century as he was in the nineteenth—but the reasons for discrimination against him would have been more complicated. This first part of my statement will outline the ideas underlying discrimination against sexual and gender minorities in the early twentieth century and will reveal how these ideas formed the basis of pervasive discrimination in federal and state employment practices.

#### **A. The Conceptual Basis for Anti-Homosexual and Gender-Conformity State Policies**

By the time the United States entered World War I, there were highly visible populations of sexual and gender minorities in San Francisco and New York, as well as discernible populations in Baltimore, Boston, Chicago, Los Angeles, Long Beach, Milwaukee, New Orleans, Philadelphia, Portland (Oregon), St. Louis, Seattle, and presumably other cities.<sup>13</sup> These subcultures included “homosexual” men and some women, cross-dressing men and women, and bisexual and even straight men and women who engaged in same-sex sexual activities on an episodic basis. Once these subcultures became visible, respectable middle class society reacted with alarm, and moralists such as

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<sup>12</sup> What inflamed the Secretary was not Whitman’s “homosexuality,” a concept unavailable to an American in 1865, but instead his sensual view of women. See generally Jerome M. Loving, “Whitman and Harlan: New Evidence,” 48 *Am. Lit.* 219-22 (1976).

<sup>13</sup> Xavier Mayne (aka Edward Stevenson), *The Intersexes: A History of Similsexualism as a Problem in Social Life* (1908) (Appendix C, listing most of the cities as “homosexual capitals” circa 1908); Eskridge, *Dishonorable Passions*, 421 n.20 (supplementing Stevenson’s list). There is a large historical literature on these early subcultures, including Brett Beemyn, editor, *Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Community Histories* (1997); Nan Alamilla Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965* (2003); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay World, 1890-1940* (1994); Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006).

Anthony Comstock and his successors pressed for governmental purification campaigns aimed at these minorities. These campaigns enjoyed a general coherence, at least on paper, as they directed the efforts of police, censors, public bureaus and agencies to harass and prosecute these minorities. There were three foundational ideas that were the basis for governmental rules targeting, stigmatizing, or penalizing people contemporaries called “fairies” (effeminate, often cross-dressing, men), “inverts” (women and men who “inverted” their gender roles), “degenerates” (immoral or degraded classes of people generally), “sexual perverts” (a broad term for persons with “abnormal” sexual preferences), and increasingly in the twentieth century “homosexuals.”

**1. Immoral Outlaws.** The primary basis for state policies targeting these early sexual and gender minorities was that they were moral as well as legal *outlaws*. The conduct of men who had anal sex with other men was understood to violate deep cultural and religious values. Although the notion of women having sexual intercourse with other women was beyond the imagination of most Americans in the nineteenth century, it would probably have been equally disapproved. Americans did become aware that women sometimes cross-dressed as men (and vice-versa), and that conduct too was disapproved. (Deuteronomy 5:22 condemns cross-dressing as an “abomination” to the Lord.) From colonial times, American criminal law roughly followed traditional morality. Although sexual relations between women were not clearly a crime in any jurisdiction by the end of the nineteenth century, every state in the union made the “infamous crime against nature” a felony, and many cities made cross-dressing a criminal offense as well.<sup>14</sup>

In the early twentieth century, as subcultures of sexual and gender minorities became more prominent in more cities, increasing numbers of officials believed that the criminal law should have been tougher on these minorities. Anthony Comstock, an official enforcing both federal and state morals laws between 1873 and 1921, said this about such minorities: “These inverts are not fit to live with the rest of mankind. They ought to have branded in their foreheads the word ‘Unclean,’ and as the lepers of old, they ought to cry ‘Unclean! Unclean!’ as they go about, and instead of the [crime-against-nature] law making twenty years imprisonment the penalty for their crime, it ought to be imprisonment for life.” Such “inverts” were legally as well as morally unclean, for their characteristic conduct—the crime against nature and cross-dressing—violated both God’s Law and positive law in the United States. This was a class of *outlaws*, soiled human beings who moralists felt should be separated from civil society. Consistent with Comstock’s rhetoric, campaigns to harass and oppress such minorities were *purity* campaigns, aimed at cleansing public culture.

As anti-vice study commissions documented the increasing public presence of fairy culture and cross-dressing in the early decades of the new century, the state responded with ever-harsher criminal sanctions. Specifically, between, 1880 and 1921, most states expanded their crime against nature laws to include oral sex as well as traditional sodomy.<sup>15</sup> Between 1917 and 1945, state and local police significantly

<sup>14</sup> Eskridge, *Dishonorable Passions*, 387-407 (appendix tracing the sodomy and related laws for each state, from colonial times to the present).

<sup>15</sup> Eskridge, *Dishonorable Passions*, 50-53.

stepped up their enforcement of such laws, mainly against “homosexuals” or “inverts.”<sup>16</sup> Although most adult Americans engaged in these illegal practices in the early twentieth century, they were culturally and legally considered illegal when engaged in by “inverts” or “moral perverts,” namely, sexual or gender minorities. (This cultural phenomenon suggests, early on, the link between prejudice against sexual minorities and prejudice against gender-benders; both groups of citizens were subject to social hatred because they violated traditional gender roles that are psychologically important to some Americans.<sup>17</sup>) The “homosexual” and the cross-dresser were, literally, outlaws because of the state’s brand of immorality on them.

**2. Predation and Seduction Against Innocent Persons.** In addition to denouncing these “homosexuals” or “inverts” as immoral outlaws from society, many moralists also depicted them as aggressive and predatory, soliciting innocent (young) people to join their unlawful practices. “Every new generation of youth is sent out into the world as sheep in the midst of wolves. The danger, however, is not that they will be devoured by them, but that they will turn into wolves.”<sup>18</sup> Gender-bending women were depicted as vampires, preying on innocent women and girls and, literally, sucking their purity out of them.<sup>19</sup>

For an early example of how this discourse made its way into legal reform, New York City’s Committee of Fourteen (1902-34), a good government coalition, warned that “the pervert . . . is constantly seeking converts to his practice,” through invitations in public places.<sup>20</sup> The Committee and the Comstock Society pressed the police to enforce the state disorderly conduct law more aggressively against these citizens; arrests for “degeneracy” increased from 92 in 1916 to 605 in 1921. Most of the defendants were men arrested for lewd advances toward other adult men. After a judge questioned the legality of such a broad application of the vaguely written disorderly conduct law, a coalition of prosecutors and citizen groups persuaded the legislature to specify the crime in 1923. The new law made it illegal for “[a]ny person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . . [f]reque[n]ts or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness.”<sup>21</sup>

<sup>16</sup> Chauncey, *Gay New York*, 331-49; Eskridge, *Dishonorable Passions*, 55-59.

<sup>17</sup> This is the argument of Eskridge, *Gaylaw*, especially 218-28.

<sup>18</sup> Anthony Comstock, *Traps for the Young* 135-36 (1883); Rev. James Monroe Buckley, Introduction to *Traps for the Young 2*.

<sup>19</sup> See Clemence Dane, *The Regiment of Women* 337 (1917).

<sup>20</sup> F.H. Whitin, “Sexual Perversion Cases in New York City Courts, 1916-1921,” Bulletin No. 1480, Committee of Fourteen (Nov. 13, 1921), in Committee of Fourteen papers, Box 87, New York Public Library.

<sup>21</sup> 1923 N.Y. Laws ch. 642 (new degeneracy crime).

California followed a pattern similar to New York. California's vagrancy law was simplified and broadened in 1903 to include anyone who was an "idle, lewd, or dissolute person, or associate of known thieves."<sup>22</sup> Another 1903 statute made it a misdemeanor to "outrage[] public decency" and to "personif[y] any person other than himself or herself" with "intent of accomplishing any lewd or licentious purpose." These two laws were applied in the same broad way New York's vagrancy statute was—to permit police to harass and sometimes arrest so-called "fairies," "inverts," and cross-dressers.<sup>23</sup>

Every state at the turn of the century had a broad vagrancy statute, and almost all had public lewdness, disorderly conduct, or indecent exposure laws that could be used to regulate gay people's dating overtures. (If a young man touched a young woman's arm and asked her out on a date, that was romance; if the man did the same thing with another man, that was a crime, with serious consequences if the other man were an undercover agent inviting such attention.) Such laws were enforced against apparent male "inverts" in big cities where so-called "fairies" were becoming a public presence—not just New York and San Francisco, but also Chicago, St. Louis, Los Angeles, Cleveland, Detroit, Boston, Philadelphia, Baltimore, and Washington, D.C.<sup>24</sup> The gay populations of southern cities were much smaller and less visible and for that reason there was little enforcement in Richmond, Atlanta, Miami, Birmingham, New Orleans, Houston, Dallas, Nashville, and Memphis in the early twentieth century.

**3. Destabilizing or Undermining Public Order.** In the twentieth century, moralists were joined in their concerns for sexual corruption and predation by scientists, who analyzed sexual and gender minorities as human "degenerates," evolutionary reversions.<sup>25</sup> Early American sexologists argued that racial, sexual, and gender minorities were biological reversions to a more primitive stage in human evolution.<sup>26</sup> Some psychiatrists and psychologists took the argument one step further, maintaining that sexual minorities in particular were predatory as a matter of their psychological make-up (a point that complemented the views of the moralists). Dr. Paul Bowers of the Indiana State Prison, to take a typical example, observed that sexual "perverts" are typically

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<sup>22</sup> 1903 Cal. Stats. ch. 89, § 1, amending Cal. Penal Code § 647(5) and (10) (now superseded); see also Cal. Penal Code § 311 (indecent exposure law).

<sup>23</sup> 1903 Cal. Stats. ch. 201, adding Cal. Penal Code § 650½ (now § 650.5) (public indecency). On enforcement against sexual minorities, see Arthur H. Sherry, "Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision," 48 Cal. L. Rev. 557 (1960); Note, "Use of Vagrancy-type Laws for Arrest and Detention of Suspicious Persons," 59 Yale L.J. 1351 (1950).

<sup>24</sup> See, e.g., Boyd, *Wide-Open Town*, 38-62 (San Francisco); Chauncey, *Gay New York*, 332-54; Faderman & Timmons, *Gay L.A.*, 44-47; David Johnson, "Gay Male Culture on Chicago's Near North Side in the 1930s," in Beemyn, ed., *Creating a Place for Ourselves*.

<sup>25</sup> See, e.g., Jennifer Terry, *American Obsession: Science, Medicine, and Homosexuality in Modern Society* (1999).

<sup>26</sup> See, e.g., Siobhan Sommerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (2000).

“psychopathic,” unable to control their sexual emotions. Because “inverse and perverse sexual habits may be acquired early in life by the association with vicious and depraved individuals,” Bowers concluded that “sexual perverts are at any rate an exceedingly dangerous and demoralizing class which should be permanently isolated to prevent their mingling with others.”<sup>27</sup>

Put more broadly, the supposedly out-of-control depravity or just the challenge to gender role posed by these minorities was a threat to public order itself.<sup>28</sup> Recall the 1923 “disorderly conduct” law adopted in New York: even private invitations to engage in the crime against nature or other “lewdness” was a threat to the public order. Congress and many states adopted the same kind of statute explicitly,<sup>29</sup> while others enforced the same rule without explicit statutory authorization. In the same spirit, California in 1929 adopted a law making it a crime for anyone to loiter near a public schoolyard (1929 Cal. Stats. 697); this law, too, was widely copied (e.g., 1951 Ariz. Stats. chs. 110-111; 1953 Ark. Acts No. 94; 1929 Minn. Acts ch. 181; 1954 N.Y. Laws ch. 519), for it combined fears of predation by “homosexuals” with fears that their mere presence would disrupt an especially tender portion of the public culture.

Another upshot of this kind of thinking was that state governments in the second third of the twentieth century experimented with medical approaches to homosexuality and cross-gender behaviors. Many states adopted laws allowing the sterilization of “moral degenerates and sexual perverts.”<sup>30</sup> (Most of these laws were publicly justified as measures against child molestation, which is mostly a crime by men against girls, but the laws were written broadly enough to apply to activities between consenting adults, especially those violating gender roles.) A few states allowed castration of sexual outlaws.

But the most popular response to concerns about the threat posed by sexual and gender minorities to public culture was the “sexual psychopath laws” adopted by a majority of state legislatures after 1935.<sup>31</sup> The pioneering Michigan law created special

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<sup>27</sup> Dr. Paul Bowers, “A Survey of Twenty-Five Hundred Prisoners in the Psychoapthic Laboratory at the Indiana State Prison,” 33 (no date), attached to Los Angeles Police Dep’t, *Annual Report* (1924).

<sup>28</sup> For a fascinating account of how cross-dressers and other gender-benders are thought to destabilize situations in our western culture, see Marjorie B. Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (1992).

<sup>29</sup> See Act of Aug. 14, 1935, 49 Stat. 651 (crime to invite a person to go somewhere for any “immoral or lewd purpose”); 1939 Colo. Laws ch. 97 (crime to solicit consenting adult to commit “any unnatural carnal copulation”); 1974 Ky. Acts ch. 36 (crime to solicit consenting adult to engage in “deviate sexual intercourse”); 1920 Md. Laws ch. 739 (crime to solicit consenting adult to engage in “any unnatural sexual practice”); 1915 Mass. Acts ch. 180 (crime to resort to saloons etc. for “immoral solicitation”); 1931 Mich. Pub. Acts No. 328, § 448 (crime to solicit to commit any “lewd or immoral act”); 1930 N.J. Laws ch. 205 (crime to solicit consenting adult to commit “lewd or lascivious acts”); 129 Ohio Laws 1670 (1961); 1943 Okla. Laws ch. 39 (crime to solicit sex from consenting adults). 1860 Pa. Laws No. 374 § 33 (crime to solicit consenting adult to commit sodomy).

<sup>30</sup> E.g., 35 Iowa Gen. Ass. Ch. 187 (1913) (requiring sterilization for violent criminals and “moral and sexual perverts”); 1929 Mich. Acts No. 81 (procedures for sterilization of “moral degenerates and sexual perverts”).

<sup>31</sup> The sexual psychopath laws are surveyed in Eskridge, *Gaylaw*, 40-43.

procedures for identifying people convicted of sex offences who “appear to be psychopathic, or a sex degenerate” or a “sex pervert.”<sup>32</sup> Once identified, the “sex degenerate or pervert” could be committed for an indeterminate time in a state mental hospital, where under a 1929 statute the inmate might be sterilized as well as rehabilitated. The early Illinois law was more specific, allowing incarceration (until permanently recovered from psychopathy) in a mental institution only for defendants shown to have “criminal propensities to the commission of sex offenses.” In the first ten years of its operation, the only reported case of psychopathic recovery in Illinois involved a hairdresser who served four years under the psychopath law before facing sodomy charges.<sup>33</sup>

### **B. Early State Employment Discrimination Against Sexual and Gender Minorities: Masquerade and the Closet**

By the 1930s, every state had a crime against nature law that made anal sex a felony, and most states also made oral sex (at least upon a man) a felony. Laws criminalizing various forms of sexual invitations or lewd vagrancy made public speech criminal as well; obscenity laws barred the promulgation of sexually “deviant” literature, plays, and movies. Cross-dressing laws directly applied to sartorial departures from established gender attire. After the end of Prohibition (1933), states with prominent gay populations—New York, California, New Jersey, and the like—barred the sale of alcohol in establishments that were havens for sexual and gender minorities.

The agenda represented by these laws sought a purification of public culture by purging it of so-called “homosexuals and other sex perverts” (to use the terminology of the era). Open flaunting of the norm of sexual and gender conformity was typically met with immediate and brutal reprisals. A dramatic example involved the first American group formed to protect the rights of “people [with] mental and physical abnormalities,” the Society for Human Rights.<sup>34</sup> The Chicago-based Society was chartered in December 1924 under the leadership of Henry Gerber, who borrowed the idea from German homophile groups he had encountered during his military service in World War I. The Society had a minuscule membership and a modest agenda, to educate citizens of Illinois about homosexuality and to seek repeal of the state sodomy law. The wife of one of the members complained to the police, who without a warrant arrested Gerber and two others on disorderly conduct charges; in connection with the arrest, the police seized the Society’s records and Gerber’s personal diary. One of the defendants pled guilty to disorderly conduct, but Gerber retained lawyers and won a dismissal of his case. In a sad aftermath, however, he lost his job as a postal worker. The “parting jibe” of one Chicago

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<sup>32</sup> 1935 Mich. Acts Nos. 87-88 (sexual psychopath law, quoted in text).

<sup>33</sup> See William Haines et al., “Commitments Under the Criminal Sexual Psychopath Law in the Criminal Court of Cook County, Illinois,” 1949 *Procs. Am. Psychiatric Ass’n* 420, 422-23 (1949).

<sup>34</sup> The account in text is taken from Henry Gerber, “The Society for Human Rights – 1925,” *One, Inc.*, Sept. 1962, at 10; Jonathan Ned Katz, *Gay American History* 581-97 (1976) (reprinting documents associated with the Society and Gerber’s arrest).

detective was, “What was the idea of the Society for Human Rights anyway? Was it to give you birds the legal right to rape every boy in the street?”

Gerber’s loss of government employment raises a host of normative problems that legislators and judges today ought to recognize as violations of core constitutional commitments. First, and probably most fundamental, Gerber’s First Amendment rights of free association and expression were directly violated by his arrest and by his discharge. The latter violation assumes that Gerber was discharged because of his involvement in the Society, but he was apparently never informed of the precise reasons for his discharge. This kind of summary treatment, with no notice or an opportunity to respond, violates the Due Process Clause. If Gerber was dismissed because of his supposed sexual orientation, which was a possible justification given the detective’s statement (quote above), such a dismissal would probably be considered an equal protection violation today, especially if the underlying reason were the inaccurate stereotype that “homosexuals” are child molesters. Under *Romer*, the justification was so distant from any conceivable fact about Gerber’s service to the government that a judge ought to conclude that the dismissal was grounded in anti-homosexual animus.

If Henry Gerber had been a state rather than federal civil servant in the 1920s or 1930s, it is likely that he would have suffered the same fate, dismissal from his government job. In most states, the dismissal would have been without anything but the vaguest explanation, and certainly without any opportunity for Gerber to respond to any justifications. If there had been an explanation, it would most likely have been that Gerber was charged with a crime (disorderly conduct) under circumstances suggesting that he was personally engaged in unlawful and immoral activities. During the middle third of the twentieth century, most states enacted (or reenacted and updated) laws stipulating that governmental employment opportunities should be denied or revoked if the person were engaged in “immoral activities,” convicted of a crime of “moral turpitude,” or was not of “good moral character.” The enacted laws reflected governmental practices all over the country.

To take a rather typical state, Texas in 1943 updated its sodomy law to include any kind of “carnal copulation” (including oral and anal sex between consenting adults), 1943 Tex. Laws ch. 112, and its vagrancy law to include any kind of “lewdness” or invitation for a consenting adult to engage in “unlawful sexual intercourse” (as updated). *Id.* ch. 154. This broad criminalization of activities engaged in by sexual minorities (women as well as men) then triggered a broad array of civil exclusions for these sexual outlaws. For example, Texas required the state liquor commission to revoke the liquor license for any establishment that permitted “any conduct by any person whatsoever that is lewd, immoral, or offensive to public decency.” 1937 Tex. Laws ch. 13, § 19(e). At the same time, the legislature imposed “good moral character” requirements as a prerequisite to secure professional licenses for the practice of chiropractic, 1943 Tex. Laws ch. 359, § 8; dentistry, *id.* ch. 340, § 2; pharmacy, *id.* ch. 395, § 9; public accountancy, 1945 Tex. Laws ch. 315, § 11; plumbing, 1947 Tex. Laws ch. 115, § 8; cosmetology and hairdressing, 1949 Tex. Laws ch. 415, § 1 (illegal conduct); and real estate sales, *id.* ch. 149, § 6(f) (good reputation).

Of particular importance were the state rules relating to teachers and other employees in public education. At the same time the state was expanding its morals-based criminal and licensing rules, the Texas Department of Education established this

rule for educators: “No person shall receive a certificate authorizing his employment in the public free schools of Texas without showing to the satisfaction of the county superintendent that he is a person of good moral character.” Tex. Dep’t Educ., Bulletin No. 413, ch. 17, art. 2880 (1941). Being a sexual outlaw would be disqualifying under this administrative rule, and even suspected lesbians and gay men might be denied teaching positions, if they could not *prove* their good moral character. In this period and shortly thereafter, states all over the country established or confirmed such morals-based requirements for state teacher certification that would exclude the lesbian or gay man, and probably bisexual and transgendered persons from this profession.<sup>35</sup>

Neither these laws nor more informal administrative practices produced many documented examples of sexual or gender minorities being dismissed by state or local governments in Texas and other similar states. The reason is that the state campaign to erase open sexual or gender variation was largely successful.<sup>36</sup> Even in New York City, home to the largest community of sexual and gender minorities in that period, gay subcultures substantially disappeared from public view—and persons with nontraditional gender identities and sexual orientations almost without exception engaged in what was known as the “masquerade.” Wearing the mask of heterosexuality and gender conformity, closeted “variants” (a term for these minorities in the 1930s) masqueraded as “straight” people as best they could. Many “variants” got married to someone of the opposite sex. Confirmed bachelors and spinsters kept their private feelings to themselves and refused to make the same mistake Henry Gerber did in the 1920s. This regime, where minorities engaged in an exhausting process of wearing phony masks and lying about their feelings and identities, later came to be known as the “closet.”<sup>37</sup>

The power of the closet and of discrimination against sexual and gender minorities was illustrated by one of the theatrical sensations of the pre-war period, Lillian Hellman’s Broadway hit, *The Children’s Hour* (1934), which was based on an actual case documented by historians. Two devoted schoolteachers, Karen Wright and Martha Dobie, discipline a disobedient girl, Mary Tilford. In revenge, Mary concocts a story of lesbian love between the two schoolmistresses—and her story ruins the lives of the two women, even though they have not actually engaged in sexual activities of any sort. At the end of the play, Martha realizes that in fact she does have romantic feelings for Karen

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<sup>35</sup> See, e.g., 1943 Ill. Laws 1288, § 16 (authorizing superintendents to suspend or revoke the state certificate for teachers “for immorality, incompetency or other just cause”); 1961 Ill. Laws 31 (similar); Ohio Rev. Code §§ 143.27 (1953) (officers and employees of school districts can be removed for “immoral conduct”); *id.* § 319.15, .31 (same rule for teachers); N.Y. Educ. Law § 3012 (McKinney 1953) (even tenured teachers can be removed for “immoral character or conduct unbecoming a teacher”); S.C. Code Ann. § 1184 (1902) (state board of education authorized to revoke teaching certificates for “immoral or unprofessional conduct”).

<sup>36</sup> “The anti-gay laws of the 1920s and 1930s were enacted in response to the growing visibility of the gay world and to the challenge it seemed to pose to fragile gender and social arrangements.” Chauncey, *Gay New York*, 356; see *id.* at 355-54 (surveying legal changes in New York motivated by the state desire to purify public culture and erase “sexual perversion”). “The new regulations not only codified the ban on gay visibility but raised the stakes for those who considered violating it.” *Id.* at 356.

<sup>37</sup> On the transition from masquerade to a regime of the closet, see Eskridge, *Gaylaw*, 52-56.

and commits suicide, just before news arrives that Mary's story has been falsified and the teachers cleared of "homosexuality."

Although Hellman wrote the play to criticize the prejudice-based attitudes of communities that were too quick to judge women who do not conform to traditional expectations that they marry men and bear children, the play also captures the deep and riveting fears of women and men whose livelihood was premised upon their ability to hide their sexual feelings (perhaps even from themselves). This was the ultimate power of the state law regime that criminalized consensual sodomy, cross-dressing, dating invitations, loitering, publication of lesbian romances, serving liquor to known "homosexuals," and so forth: so long as public culture was substantially purged of so-called "homosexuals" and other "variants," governmental employees would not make Henry Gerber's mistake and would self-censor. To the extent their masks slipped or the closet door tipped open, the authorities could probably usher such employees out of their jobs with no public fuss, because the scandal of even being labeled a "homosexual" outlaw was enough to ruin someone's life.

### C. **Opening the Closet Door: Seeking Out and Excluding Alleged "Degenerates" and "Inverts" from the Armed Forces**

The regime of the closet described above is one that was *mutually protective* in the period between 1921 and 1941. The "homosexual" or "cross-gendered" person of that era usually welcomed the opportunity to purchase continued employment at the expense of discretion. In turn, most local, state, and federal officials were willing to look the other way so long as there was no scandal of the sort that conjured up the three tropes described above: (1) immoral and illegal practices (sodomy, cross-dressing); (2) predatory behavior and recruitment of others; and (3) disruption of public order. On occasion, however, the government broke the bargain of the mutually protective closet by its own aggressive efforts to lure suspected "homosexuals" into inviting undercover agents to engage in unlawful practices, thereby creating state-supported ruptures in public culture that would destroy the so-called "perverts" who were exposed. Consider the following early episode, involving a dramatic example of government employment discrimination—the expulsion and court-martialing of military personnel.

Records from a Naval Court of Inquiry in March 1919 provide modern documentation of a subculture of sexual and gender minorities at the naval base in Newport, Rhode Island during World War I.<sup>38</sup> The local commander had assigned operatives to investigate and apprehend sailors described as a "coterie of so-called moral degenerates whose pastime and pleasure is given to lewd purposes." This "coterie" was a social network of sailors and civilians (including a prominent Newport priest). Based upon evidence gathered by the operatives, the sailors were branded as "fairies" or "inverts," defined as someone who "is extremely effeminate and does not care for the

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<sup>38</sup> The account in text is taken from the transcript of the 1919 Court of Inquiry, which can be found in the National Archives, Record Group 125, Records of Proceedings of Courts of Inquiry etc., No. 10821-1. An excellent secondary account is Lawrence R. Murphy, *Perverts by Official Order: The Campaign Against Homosexuals in the United States Navy* (1988).

opposite sex,” that is, “who is morally degenerated.”<sup>39</sup> Members of the network such as David (nicknamed “Beckie”) Goldstein were self-consciously feminized men who combined gender nonconformity with a “homosexual” social (dating) life. A favorite social activity was “drags,” or “parties where the different men dressed in female attire and offered themselves in the same manner which women do.”<sup>40</sup> The Navy’s undercover operatives socialized with and went on dates with the so-called “fairies.” Based upon the operatives’ testimony, sailors in the subculture were expelled from the armed forces for engaging in consensual activities in private places, now constitutionally protected under *Lawrence*.

The “fairies” of Newport epitomized early twentieth century anxieties about sexuality and gender role. Although the formal charges against them were “sodomy” and “scandalous conduct,” the regulatory community was mostly electrified by their status as “moral degenerates” who committed the triple crime of abandoning their male role, shedding inhibitions about sex with other consenting adults, and inviting “normal” men (including the Navy’s undercover operatives) to join in their activities. Most of those investigated were dishonorably discharged and jailed; several were left in prison for long periods of time without pending charges. Court-martialed for consensual “oral coition” and “scandalous conduct,” Beckie Goldstein was sentenced to 30 years in prison, a sentence overturned after Goldstein had been imprisoned for two years.<sup>41</sup> Notice that the federal government’s actions would be considered unconstitutional today: the defendants were detained without charges in violation of due process and were drummed out of the service because of their sexual orientation and, in some cases, their gender identity.

The Newport investigation triggered several regulatory responses. Congress and the War Department quietly updated the Articles of War in 1920-21 to criminalize (well after the fact) the oral sex Goldstein and company had been imprisoned for committing.<sup>42</sup> A subcommittee of the Senate Naval Affairs Committee in 1921 recommended “arbitrary and wholesale discharge” of any and all “suspected perverts.” According to the subcommittee, “if perversion is known or believed to exist in the Navy, even the suspicion of such a condition should immediately lead to the undesirable discharge of the accused.”<sup>43</sup> Thus encouraged, the Army determined not only to discharge sodomites and inverters, but also, for the first time in its history, adopted a mechanism for screening them out in the first place. In 1921, Army Regulation 40-105 announced that army recruits

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<sup>39</sup> The quotations are taken from 1919 Court of Inquiry Transcript, 268-269, plus 125 and 398 (“moral degenerates”). Also called “moral perverts,” *Id.* at 270, 300.

<sup>40</sup> *Id.* at 375.

<sup>41</sup> See Murphy, *Perverts by Official Order*, 63-64.

<sup>42</sup> “Sodomy” was not a crime under the Articles of War of 1916, although “assault to commit sodomy” was. Like the common law, the *Manual for Courts-Martial, 1917*, ¶ 443, defined sodomy to exclude oral sex. Congress included sodomy as one of the “miscellaneous crimes and offenses” in the 1920 Articles of War, Act of June 4, 1920, art. 93, 41 Stat. 787, and the *Manual for Courts-Martial, 1921*, ¶ 443, redefined sodomy to include oral sex.

<sup>43</sup> U.S. Senate Committee on Naval Affairs, *Alleged Immoral Conditions at Newport (R.I.) Naval Training Station* 35-36 (1921).

would be examined and could be rejected for evidence of medical defects or diseases, including “serious nervous affections.” The first nervous disease identified was “degeneration,” which was to be diagnosed by both anatomical and functional “stigmata.” “The degenerate physique as a whole is often marked by diminished stature and inferior vigor; males may present the general body conformation of the opposite sex.” Functional stigmata included “moral delinquencies, such as willfulness, deceitfulness, indecency; . . . sexual perversion.”<sup>44</sup> The regulation also excluded recruits who showed signs of a “constitutional psychopathic state,” including “sexual psychopathy,” which made them “incapable of attaining a satisfactory adjustment to the average environment of civilized society.”<sup>45</sup>

Between the end of World War I and the beginning of World War II, officials in the War Department and the armed forces continued to debate these issues. In 1940, the United States reinstated the draft, and the matter of who could serve in the armed forces became freshly urgent. There was a broad range of views: some officials viewed sexual and gender minorities as simple outlaws, others saw them as “degenerates” and “psychopaths” who could not control themselves, while others viewed them as sick persons who were susceptible to medical treatment. All of these perspectives were willing to accept the notion that sexual and gender minorities should be excluded from governmental positions of responsibility, including military service. Psychiatrists Harry Stack Sullivan and Winfred Overholser persuaded the Selective Service to screen inductees for psychiatric as well as physical problems and, then, to include “homosexual proclivities” in the list of disqualifying “deviations.”<sup>46</sup> In 1941, Sullivan and Overholser developed materials to train doctors to screen for homosexuality, which was repeatedly described in the old-fashioned argot of sexual psychopathy and gender deviance (sissies).<sup>47</sup> Overholser worked a paragraph on “Sexual Perversions” into the 1942 revisions of the Army’s mobilization regulations, again emphasizing effeminacy as well as “perverted” acts as a basis for rejecting men for service.<sup>48</sup> These intricately worked-out screening rules were applied unevenly, as there was a great need for soldiers and the criteria were hard for many examiners to apply seriously. Of the millions of Americans

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<sup>44</sup> Medical Department, War Department, Army Regulation 40-105, “Standards of Physical Examination for Entrance Into the Regular Army, National Guard, and Organized Reserves,” § XX, ¶ 93(a)-(b).

<sup>45</sup> *Id.* § XX, ¶ 93(p).

<sup>46</sup> See Allan **Error! Main Document Only**.Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War II* 12 (1990), discussing “**Error! Main Document Only**.Neuropsychiatric Examination of Applicants for Voluntary Enlistment and Selectees for Induction,” War Dep’t Circular Letter No. 19 (Mar. 12, 1941), reprinted in *War Medicine* 418-25 (May 1941).

<sup>47</sup> See Bérubé, *Coming Out Under Fire*, 14-18.

<sup>48</sup> **Error! Main Document Only**.War Dep’t, Mobilization Regs. No. 1-9, “Standards of Physical Examination During Mobilization” § 20-93(h) (“Sexual Perversions,” a subcategory of “Personality Disorders”); see Bérubé, *Coming Out Under Fire*, 19-20.

inducted into the Army during the war, only 4,000 or 5,000 were explicitly rejected for “homosexuality.”<sup>49</sup>

As a large number of sexual and gender minorities were not detected by the porous gatekeepers, the armed forces also developed policy documents dealing specifically with homosexuality in military service. One approach was education. Thus, the Women’s Army Auxiliary Corps (WAAC) developed, as one of its sex hygiene lectures, a lecture on homosexuality, which acknowledged the possibilities of sexual intimacy between women and urged administrative solutions, with separation from the service reserved for lesbian “addicts.”<sup>50</sup> Another approach was the one followed in Newport: criminal prosecution through court-martials. Under war conditions, this was an unrealistic policy. A third option was separation of known “homosexuals” from the armed forces (but not criminal prosecution), and with the possibility that “reclaimable” ones could be treated and returned to service.<sup>51</sup> This option became the official policy in the last years of the war; as applied, it reflected the tropes that form the cognitive basis for discriminating against sexual and gender minorities in governmental employment (the armed forces are our nation’s largest employer).

An example of the operation of these tropes came in spring 1944. A concerned mother wrote the Women’s Army Corps, complaining that the WAC training camp at Fort Oglethorpe, Georgia “is full of homosexuals and sex maniacs,” one of whom had molested her “little [twenty-year-old] girl” and who “will continue to use her spell over other innocent girls who join up with the WAC.” The Army assigned Lieutenant Colonel Birge Holt and Captain Ruby Herman to investigate. The investigators recommended separation or treatment only against women who were having sex with other women (sodomites) *and* were not interested in relationships with men (homosexuals) *and* displayed other cross-gender habits, such as dressing in men’s attire (gender nonconformity). The Fort Oglethorpe investigation was a revealing experience: hysterical concerns with immoral and illegal sexuality, obsession about predatory wolves, and concern that lesbianism would destroy military discipline and cohesion were already converging upon the notion of the “Homosexual” as Public Enemy Number One.<sup>52</sup>

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<sup>49</sup> See Bérubé, *Coming Out Under Fire*, 33 (drawing this conclusion from internal War Department documents).

<sup>50</sup> War Department Pamphlet No. 35-1, “Sex Hygiene Course, Officers and Officer Candidates, WAAC: Lecture V: Homosexuality (May 27, 1943), discussed in Allan Bérubé & John D’Emilio, “The Military and Lesbians During the McCarthy Years,” 9 *Signs* 759, 761 (1984).

<sup>51</sup> E.g., War Dep’t, Army Regulation No. 615-368, “Enlisted Men: Discharge—Undesirable Traits of Character,” ¶ 2.b.2 ½ (as amended Apr. 10, 1945).

<sup>52</sup> The account of the Fort Oglethorpe investigation is taken from the Report of Lt. Col. Birge Holt & Capt. Ruby Herman to the Acting Inspector General of the Army (July 29, 1944), in Suitland (Federal) Archives, Record Group 159 (Office of Inspector General), File 333.9 (Third WAC Training Center). See also Leisa Meyer, *G.I. Jane: Sexuality and Power in the Women’s Army Corps During World War II* 173-76 (1996).

## II. The Anti-Homosexual State and Government Employment, 1945-1969

The 1944 Fort Oglethorpe investigation focused on capable soldiers singled out because of their supposed sexual behavior, their deviation from preferred gender roles, and the alarmed reaction of third parties. Some of the women lost their war-time jobs in the WACs, even though they did not publicly present themselves as lesbians or transgendered persons. As in *The Children's Hour*, rumors and gossip were sufficient to mobilize community concern, harassment, and professional ruin. What was different from *The Children's Hour* was that the resources of the government were mobilized to rip off these women's masks. The same cultural tropes that justified job discrimination against sexual and gender minorities before World War II (attribution of immoral activities, predatory conduct, and subversion to sexual and gender minorities) continued with ever-greater force, and they were implemented by a much more powerful and nosy government apparatus of investigation, discipline, and potentially terror. Fort Oglethorpe was a mild harbinger of harsher things to come, and most of the harshness involved civilian rather than military employees.

Consider the case of Miriam Van Waters, the longtime Superintendent of the Massachusetts Reformatory for Women. If actual rehabilitation of prisoners is the metric of success, she was perhaps the most successful prison administrator of the twentieth century—yet in 1947 she was criticized for tolerating female relationships among inmates and retaining suspected lesbians as reformatory officers; there were suspicions that the unmarried Van Waters was herself a lesbian. Her deputy, Margaret O'Keefe, was also targeted, as a leader of a “doll racket” of intimacy among women, because of her “mannish” dress and a vice charge against her two decades earlier. Replying candidly that female friendships were a good way to rehabilitate lost women, Van Waters was vulnerable to a new postwar political climate, where public concern about sexual and gender minorities in government service was heightened. Under mounting public pressure and wanting to avoid a scandal, the State Commissioner of Corrections dismissed Miriam Van Waters from her position in January 1949.<sup>53</sup> What happened to Van Waters could happen to virtually any LGBT state employee (and some straight ones) in the period after World War II. Several developments paved the way for her dramatic story.

To begin with, World War II itself created larger and more open communities of sexual and gender minorities. The federal government's war effort threw millions of men and women into homosocial environments, where feelings of affection and sometimes sexual attraction flourished, as they did at Fort Oglethorpe. As entertainment for the troops, the armed forces created drag shows where gender roles were reversed and manly affection trumpeted in ways that Walt Whitman would have appreciated. Although the armed forces only episodically enforced the anti-homosexual and gender-conformity rules described above, medical screeners routinely interviewed men and women entering

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<sup>53</sup> An excellent account of Van Waters' life, career, downfall, and partial rehabilitation is Estelle Freedman, *Maternal Justice: Miriam Van Waters and the Female Reform Tradition* (1996). As Freedman's book recounts, Van Waters was reinstated in her position, but when she retired her presumed successor (O'Keefe) was dismissed.

the service and asked them about their homosexual feelings—the first time most of these young persons had ever entertained the possibility that they might have such feelings. Untold thousands of Americans had their first homosexual encounters while serving their country during World War II. When they returned to civilian life after the war, they populated new as well as established gay subcultures all over the United States.

At the same time these minority subcultures were growing more visible, traditional gender roles and family values were making a big comeback. Between 1946 and 1955, more Americans wed than at any other point in modern history, they had children immediately, and even the divorce rate dipped (temporarily).<sup>54</sup> The comeback of marriage reassured men and women that traditional boundaries were intact after the great traumas of war and depression. The post-1945 thirst for normalcy fed into what Elaine May calls a culture of containment that reassured Americans anxious about their security in the wake of external threats from the Nazis and Communists.<sup>55</sup> Containment required that traditional lines be reaffirmed—and in the process redefined. Thus, young Americans having oral as well as procreative sex within marriage came to understand their own conduct as consistent with a new “traditional” norm, companionate marriage. Containment entailed a conformism that was deeply suspicious of the *unmarried* American. The “homosexual” or the gender-bender not only epitomized the unmarriageable American, but he or she was a threat to the marriageability of the next generation—the children. The postwar focus on protecting children against predatory sexuality (most of which is committed by men against girls) swept into its ambit LGBT persons who had no interest in children but were, culturally, also considered “perverts.”

Between 1946 and 1969, these phenomena (together with the powerful disciplinary state noted above) combined to produce the most powerful anti-homosexual terror of the twentieth century. Untold resources were expended to purify national, state, and local public cultures from this supposed menace. As a result of the terror, the federal government, the states, and municipalities expanded criminal sanctions aimed at sexual and gender minorities and radically expanded police forces designed to flush out and apprehend these persons. Additionally, thousands of capable public servants lost their jobs, tens of thousands were harassed, and hundreds of thousands lived in fear that they would be exposed as “homosexuals or other sex perverts” (the key phrase of this era). Informal or vague employment policies that had previously been episodically invoked to harass or exclude sexual and gender minorities continued in force, but were usually supplemented with policies explicitly targeting these minorities. Anti-homosexual witch hunts and manias generating scores of victims replaced the occasional firing of the lesbian or gay man who was accidentally outed. Most important, the increased criminalization of sexual and gender “deviance” and the expanded and more aggressive employment discrimination saturated American culture with prejudice and stereotypes about “homosexuals”: they are disgusting subhumans who engage in immoral practices,

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<sup>54</sup> Glen Elder Jr., *Children of the Great Depression: Social Change and Life Experience* (1974); Andrew J. Cherlin, *Marriage, Divorce, Remarriage* 6-43 (1992).

<sup>55</sup> Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (1988); see also Cherlin, *Marriage, Divorce*, 18-19, 35-43; Steven Mintz & Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* 133-201 (1998).

they are predators who victimize children and other vulnerable persons, and they are subversives, worse than Communists (the supposed public enemies of that era).

#### A. Federal Government's Civil Service Exclusion, 1945-69

Testifying before a Senate subcommittee in 1947, Secretary of State George Marshall was given a memorandum admonishing him about “the extensive employment in highly classified positions, of admitted homosexuals, who are historically known to be security risks.”<sup>56</sup> Concerned legislators accused the Truman Administration of running a government crawling with subversives. Responding, the Truman Administration adopted the loyalty security program to weed out Communists and started looking for “homosexuals and other sex perverts” in earnest. Between January 1947 and April 1950, the administration investigated 192 cases of “sex perversion” in civil government, most of whom were discharged or resigned.<sup>57</sup> During the same period, 3245 personnel were separated from the military for this reason, at triple the discharge rate during World War II. Contrary to the War Department's policy as late as 1946, the discharges were generally the less-than-honorable “blue” discharges, thereby depriving these personnel of veterans benefits promised in the G.I. Bill of Rights and exposing them to discrimination in the private sector when the nature of the discharge was leaked by local boards.<sup>58</sup>

A Defense Department memorandum of October 11, 1949 codified a sterner policy for excluding sexual minorities from the armed forces. The new policy made mandatory the prompt separation of all “known homosexuals.” (Heterosexuals who fell into homosexual offenses could, implicitly, be retained.) “Homosexuals” fell into three groups: Class I, who engaged in coercive sex or sex with minors, were to be court-martialed; Class II, who engaged in “one or more homosexual acts” or proposals or attempts “to perform an act of homosexuality,” were to be court-martialed or allowed to resign under less-than-honorable conditions; and Class III, who “only exhibit, profess, or admit homosexual tendencies” but had not engaged in forbidden conduct, could be retained or could be discharged depending upon the recommendation of a personnel board.<sup>59</sup>

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<sup>56</sup> See David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* 20-21 (2004), for this and other stories of sexual and gender minorities harassed or discharged from federal employment during this era.

<sup>57</sup> See Subcomm. on Investigations, Senate Comm. on Expenditures in the Executive Departments, “Employment of Homosexuals and Other Sex Perverts in Government,” Appendix (Dec. 15, 1950). This is the famous “Hoey Subcommittee Report” (after the Chair of the Subcommittee) and will be cited as such in subsequent footnotes.

<sup>58</sup> See Bérubé, *Coming Out Under Fire*, 262, 354 n.14.

<sup>59</sup> Dep't Defense, “Discharge of Homosexuals from the Armed Services” (Oct. 11, 194), Appendix 5 to the Crittenden Report (Mar. 15, 1957), implemented in Army Regulation 635-443 (Jan. 12, 1950); SECNAV Instruction 1620.1 (Dec. 10, 1949); Air Force Regulation 35-66 (Jan. 12, 1951).

When Lieutenant Roy Blick of the D.C. Vice Squad told the Senate in 1950 that there were 5000 homosexuals working for the government, a figure Blick made up, public figures openly worried that “sexual perverts” just as “dangerous as the actual Communists” had “infiltrated the government.”<sup>60</sup> Under media as well as political scrutiny, the Truman Administration stepped up its enforcement efforts, investigating 382 civil servants (most of whom resigned) in the next seven months. At the same time, the Senate created a subcommittee, chaired by North Carolina Senator Clyde Hoey, to evaluate the threat to the public service and perhaps even national security by the sexual minorities identified by the media and various public figures.<sup>61</sup>

In December 1950, the Hoey Subcommittee issued its report, entitled “Employment of Homosexuals and Other Sex Perverts in Government.” The bipartisan subcommittee unanimously concluded that “homosexuals and other sex perverts” should be excluded from consideration for civil service positions, closeted ones who had sneaked into the government should be expelled, and the government should expend significant resources to hunt them down and expose them. Although adducing no evidence, the report endorsed and elaborated upon all three tropes justifying job discrimination against sexual and gender minorities. **First**, the so-called “homosexuals and other sex perverts” are degraded persons whose immorality undermines their ability to do their jobs. “[T]hose who engage in overt acts of perversion lack the emotional stability of normal persons,” and “indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.” **Second**, “perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. . . . One homosexual can pollute an entire office.” **Third**, the existence of these people inside the government subverts the ability of government to carry out its public mission. “The social stigma attached to sex perversion is so great that many perverts go to great lengths to conceal their perverted tendencies,” making them easy prey for “gangs of blackmailers.”<sup>62</sup>

The Hoey Subcommittee Report is probably the classic translation of anti-homosexual cultural tropes into the public employment setting. “Homosexuals and other sex perverts” (1) are unfit for public service because they lack appropriate judgment and are irresponsible, and actually undermine the government because (2) they are predatory and (3) treacherous. The last point is especially interesting: Americans and their government leaders viewed “homosexuals and other sex perverts” as Trojan Horses or Third Columns: they undermine the government from within and are prone to treason. Historian David Johnson has demonstrated that this was a powerful charge during that era, when Americans were highly fearful of Communist subversion. Indeed, government

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<sup>60</sup> See Neil Miller, *Out of the Past: Gay and Lesbian History from 1869 to the Present* 259, 274-75 (1995); Johnson, *Lavender Scare*, 79-99; Jack Tait & Lee Mortimer, *Washington Confidential* 91 (1954).

<sup>61</sup> See generally Johnson, *Lavender Scare*, 101-18, for a thorough account of the subcommittee’s investigation, the “evidence” it ignored, and its report.

<sup>62</sup> The quotations in text are all from Hoey Subcommittee Report, 3-4.

officials engaged in a purposive campaign to associate homosexuality with Communism: “homosexual” became a synonym for “Communist” and “traitor” in fifties America.<sup>63</sup>

The subcommittee found that progress had already been made against this supposed menace. The report held up the armed forces’ large-scale purge of “homosexuals” as the model, which was being followed by civilian agencies. The Hoey Subcommittee approvingly explained that the Civil Service Commission’s regulation barring from federal employment people who engage in “immoral conduct” had been interpreted by the Commission to include “homosexuality and other types of sex perversion” as “sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service.”<sup>64</sup> To enforce this policy, the Commission began checking fingerprints of job applicants against FBI files of arrests across the country. Between 1947 and 1950, the agency denied government employment to 1700 applicants because they had “a record of homosexuality or other sex perversion.” The subcommittee applauded this energy and criticized the “false premise” that what a government employee did on his own time was his private business, when the employee engaged in “sex perversion or any other types of criminal activity or similar misconduct.”<sup>65</sup> Agencies were expected to investigate all complaints as aggressively as possible, and the FBI beginning in 1950 correlated morals arrests everywhere in the country against lists of government employees. After the subcommittee report, the investigations and separations continued, until the anti-homosexual witch-hunt exceeded the anti-Communist witch-hunt in its impact. In 1951, the State Department fired 119 employees for homosexuality, and only 35 as other security risks (Communists); the figures were 134 and 70, respectively, in 1952.<sup>66</sup>

At the same time the Hoey Subcommittee was studying ways to purge sexual and gender minorities inside the government, a subcommittee of the Senate Judiciary Committee was drafting a law to keep such persons out of the country. The immigration subcommittee headed by Senator Patrick McCarran developed a comprehensive redraft of the immigration law in 1950-1952. A major focus of the McCarran bill was to exclude Communists, anarchists, and other subversives. Reflecting fears that sexual minorities were subversive, the McCarran bill excluded all “persons afflicted with psychopathic

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<sup>63</sup> Johnson, *Lavender Scare*, 30-38. One senator said this: “You can’t hardly separate homosexuals from subversives. Mind you, I don’t say every homosexual is a subversive, and I can’t say every subversive is a homosexual. But a man of low morality is a menace to the government, whatever he is, and they are all tied up together.” *Id.* at 37-38 (quoting a senator leading the anti-homosexual witch-hunt).

<sup>64</sup> See Letter from James Hatcher, Civil Serv. Comm’n, Investigations Div’n, to Donald Webster Cory (May 31, 1951), reprinted in Cory, *The Homosexual in America* 269 (1951). According to its Personnel Director in 1963, “persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them without evidence of rehabilitation are not suitable for Federal employment.” Memorandum from D.J. Brennan Jr. to W.C. Sullivan, “Re: Mattachine Society of Washington” (Dec. 24, 1963), in FBI File No. HQ 100-403320, Serial 106. This document, like the other FBI documents referred to, is part of the FBI’s FOIA release files on the general topic of homosexuality and gay rights.

<sup>65</sup> Hoey Subcommittee Report, 9.

<sup>66</sup> See John D’Emilio, *Sexual Politics, Sexual Communities* 44 (1981).

personality, or who are homosexuals or sex perverts.”<sup>67</sup> Upon the assurance of the Public Health Service that the term “psychopathic personality” was broad enough to “specify such types of pathologic behavior as homosexuality or sexual perversion,” the Senate as well as House Judiciary Committees settled for an exclusion simply of “persons afflicted with psychopathic personality,” and that was the exclusion finally enacted as section 212(a)(4) of the McCarran-Walter Act of 1952.<sup>68</sup> The immigration service read the exclusion as simply reiterating the pre-1952 exclusion of people afflicted with “constitutional psychopathic inferiority” and enforced it against persons with records of consensual homosexual offenses, which also fell under the “crimes of moral turpitude” exclusion which the McCarran Act had similarly carried forward.<sup>69</sup> The significance of the immigration legislation is that the same cultural tropes underlying federal employment exclusions (immorality, predation, subversion) repeated themselves in legislation excluding immigrants from entering or staying in this country. This bespeaks an integrated campaign of purification, whereby various organs of government were increasingly working in the same direction: to purge the country of sexual and gender minorities and, failing that, to persecute them without mercy.

The Eisenhower Administration (1953-61) carried forward the aggressively anti-homosexual civil service policies of the Truman Administration and expanded upon them.<sup>70</sup> In April 1953, President Eisenhower issued Executive Order 10405, which officially added “sexual perversion” as a ground for investigation and dismissal under the federal loyalty-security program.<sup>71</sup> In the next two years, more than 800 federal employees resigned or were terminated because they had files indicating “sex perversion,” typically charges—but not convictions—involving loitering, invitations for dates, or disorderly conduct. Bruce Scott, for example, was fired from his Labor Department job because of a 1947 arrest for loitering in LaFayette Park.<sup>72</sup> Altogether, historian David Johnson estimates that more than 5000 allegedly homosexual civil servants, virtually all of them capable employees and decent people, lost their jobs because of the purges between 1947 and 1961; thousands more were rejected for federal employment because of lavender stains on their records.<sup>73</sup>

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<sup>67</sup> Senate Bill 716, 82d Cong., § 212(a)(7) (1951) and 2550, 82d Cong., § 212(a)(13) (1952); Senate Report No. 81-1515, 344-45 (1950).

<sup>68</sup> Public Law No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952) (repealed 1990); House Report No. 82-1365, at 47 (1952), reprinted in 1952 USCCAN 1653, 1701 (quoting original McCarran bill); Senate Report No. 82-1137, at 9 (1952).

<sup>69</sup> See *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956); *In re La Rochelle*, 11 I&N Dec. 436 (Bd. Imm. App. 1965).

<sup>70</sup> Johnson, *Lavender Scare*, 119-46.

<sup>71</sup> Executive Order No. 10,450, § 8(a)(1)(iii), 18 Fed. Reg. 2489 (Apr. 29, 1953), codified at 3 C.F.R. 936, 938 (1953).

<sup>72</sup> See D’Emilio, *Sexual Politics*, 44; Johnson, *Lavender Scare*.

<sup>73</sup> Johnson, *Lavender Scare*, 166-67.

The rate of expulsion abated in the late 1950s, but unabated was the executive department's industrial security program, which denied security clearances to private as well as public employees who engaged in "immoral" conduct or "sex perversion."<sup>74</sup> Thus an employee of a defense contractor as well as the defense department itself was subject to explicitly anti-homosexual policies. Over two million private sector employees were subject to this program by the 1960s. Another way federal anti-homosexual policy spilled over into the private sector was by sharing police and military records with private employers. For all these reasons, a person discharged from a federal agency as a "sex pervert" often found himself blacklisted by private employers as well.

One example was Dr. Franklin Kameny, an astronomer with a Ph.D. from Harvard University who was hired by the Army Map Division in 1957, where he helped perfect techniques for more precise measurement of the distances between points in the United States and points across the ocean.<sup>75</sup> The brainy astronomer had aspirations to join the country's space exploration program—but those aspirations came crashing down when civil service investigators confronted him: "We have information that leads us to believe that you are a homosexual." Forthwith, Dr. Kameny lost his federal job. Like thousands of other gay men and lesbians denied employment opportunities because of their sexual or gender identities, Dr. Kameny's illustrates the typical constitutional problems with government action in this area. To the extent Dr. Kameny was dismissed because of his homosexual orientation, the government was violating both equal protection and due process principles, as there was no rational connection between his sexual orientation and his fitness to do his job with the Map Service. It is likely that the government was discriminating against Dr. Kameny simply because of his supposed "immoral" and "illegal" practices with other consenting adults, which would violate his right of privacy as announced in *Lawrence*. If the government agents were also assuming that Dr. Kameny's sexual orientation disposed him to prey on other persons in the workplace or to subvert the public service, those assumptions are unfounded, irrational, and quite insane.

The consequences of this act of prejudice- and stereotype-based employment discrimination were pervasively bad. They were bad for Dr. Kameny. Because of the 1953 executive order, he was unemployable in any federal agency; because of the security program, he was unemployable by private firms as well, as security clearances were necessary for the scientific work he did. Kameny almost starved to death as he sought to adjust to a life without his chosen career. The consequences were just as bad for the United States. At the very beginning of the space race, aggressive civil service moralists were denying our country of the talents of a promising Harvard Ph.D. in astronomy, a potential astronaut. Moreover, the terrorizing features of the government's

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<sup>74</sup> Executive Order 10,865, 25 Fed. Reg. 1583 (Feb. 20, 1960), codified at 3 C.F.R. § 398 (1959-1963 compilation), and Department of Defense Directive No. 5220.6, § VI.P (December 7, 1966). Eisenhower's previous security clearance exclusionary policy was invalidated for procedural reasons in *Greene v. McElroy*, 360 U.S. 474 (1959).

<sup>75</sup> The account of Dr. Kameny's job discrimination is taken from Eskridge, *Dishonorable Passions*, 136-39.

persecution of Dr. Kameny cannot have been anything but baleful for the morale of other staff members in the Map Service and perhaps other departments.<sup>76</sup>

Washington, D.C. in the 1950s was a city where charges of homosexuality were tossed around like hand grenades.<sup>77</sup> The anti-homosexual campaign in Washington was accompanied by a similar nationwide campaign pursued by the armed forces to warn against homosexuality. The Navy's revised indoctrination lectures, for example, went well beyond those developed during World War II, asserting that "homosexuals" were aggressive psychopaths who preyed upon normal people. Women were warned that association with known or suspected "homosexuals" could render them unfit for future marriage or friendships and that "deterioration and destruction of character and integrity are the end results of homosexuality. Even such gross crimes as robbery, suicide, and murder often grow out of homosexuality."<sup>78</sup> Officials told men as well as women that so-called "homosexuals" used insidious methods to lure them into vice and urged them to monitor their same-sex friendships and report friends they believed to be homosexual.<sup>79</sup>

Military policy directed not only that confirmed "homosexuals" be separated, but that they be sought out as well. The Army's 1950 regulation said: "It is the duty of every member of the military service to report to his commanding officer any facts which may come to his attention concerning overt acts of homosexuality. Commanding officers receiving information indicating that a person has homosexual tendencies or has engaged in an act of homosexuality shall inquire thoroughly and comprehensively."<sup>80</sup> Personnel were repeatedly questioned for clues to roust them from their closets, and undercover investigators sought out soldiers in homosexual bars, known male cruising areas, and women's softball teams. More important, once military investigators had evidence (or just accusations) against one soldier, they often threatened that person with court-martial and unfavorable publicity unless he or she reported other names. Once one person gave names, others often rushed forward, lest they receive the sucker's payoff. An early witch-hunt of this type was conducted at the Kessler Air Force Base in Biloxi, Mississippi. The investigators reportedly promised suspected lesbians general discharges if they cooperated by naming sexual partners and suspected homosexuals, but eleven women were dishonorably discharged contrary to the promises, and others resigned.

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<sup>76</sup> Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights* 72, 94-95 (1992).

<sup>77</sup> E.g., Lait & Mortimer, *Washington Confidential*, 90-98 (contemporary accusation that D.C. was hotbed of perversion); Miller, *Out of the Past*, 270-271 (charges that McCarthy counsel Roy Cohn was gay; threats by Cohn to expose Senator Lester Hunt's son as homosexual, and Hunt's subsequent suicide); David Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* 310 (1983) (Drew Pearson suggestion that McCarthy was homosexual).

<sup>78</sup> Chaplain's Presentation (WAVE Recruits), 1953, at 3, reprinted in Appendix 23 to the Crittenden Report.

<sup>79</sup> *Id.*; Chaplain's Presentation (Male Recruits), 1953, 1-2; Indoctrination of Male Recruits on Subject of Homosexuality, 1953, at 5, all reprinted in Appendix 23 to the Crittenden Report. See generally Allan **Error! Main Document Only.**Bérubé & John D'Emilio, "The Military and Lesbians During the McCarthy Years," 9 *Signs* 749 (1984).

<sup>80</sup> Army Regulation 600-443; Air Force Regulation 35-66, "Discharge of Homosexuals" (May 31, 1956).

Twenty women at Lackland Air Force Base were similarly kicked out, and two committed suicide as a result of their disgrace.<sup>81</sup>

Between 1950 and 1965, the Navy cashiered as Class II and III homosexuals an average of more than 1000 enlisted personnel per year, about 40% of the Navy's total undesirable discharges for those years. All told, it is estimated that between 2000 and 3000 personnel were separated each year for that period, at a rate of one person separated each year for each 1000 serving in the armed forces and with a significantly higher rate of discharge for women than for men.<sup>82</sup> These figures strongly understate the effect of the policy, as many personnel left the armed forces before investigators got to them or upon the slightest pressure.

## **B. State Campaigns: The California Approach**

At the same time the federal government was formalizing its rules for excluding and exposing sexual and gender minorities from military and civil employment, states with visible gay subcultures were doing the same thing. The leading jurisdiction was California, which was surpassing New York as the nation's largest state and the epicenter of state discrimination against these minorities. During the tenure of Governor Earl Warren (1943-53), California even eclipsed the federal government in formalizing legal rules branding sexual minorities (especially) as outlaws and excluding them from civic life as well as government employment.<sup>83</sup>

Central to Governor Warren's (and the California Legislature's) progressive vision for the state was the obligation of government to maintain a "decent society." Between 1949 and 1953, California transformed its sex crime laws. The core prohibitions against sodomy, oral copulation, lewd vagrancy (offers to date), loitering, and cross-dressing were left in place but augmented by greater penalties, new prohibitions, and new civil consequences for persons practicing, or accused of practicing, immoral activities. For example, not only were the penalties for sodomy and oral copulation increased, but an early "three-strikes" law decreed that a third conviction for consensual sodomy would land the offender in prison for the rest of his life.<sup>84</sup> Even worse was the possibility that sexual minorities engaging in consensual activities could be sent to Atascadero State Hospital (funded during Warren's tenure but opened after he

<sup>81</sup> See D'Emilio, *Sexual Politics*, 46; Bérubé & D'Emilio, "McCarthy Years," 770-74 (reprinting letters from women expelled). Other investigations are discussed in Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* 150-55 (1991).

<sup>82</sup> See Colin Williams & Martin Weinberg, *Homosexuals and the Military* 46-53 (1971); Crittenden Report, 40 (rate of discharge for women), 51-52 (general rate).

<sup>83</sup> On Warren's anti-homosexual legal agenda, see Eskridge, *Dishonorable Passions*, 88-105.

<sup>84</sup> 1950 Cal. Stats., First Extr. Sess. ch. 28 (Apr. 26, 1950) (creating the new "three strikes" rule for sodomy and oral copulation). There was one liberalization, giving judges the option of a lighter jail sentence for oral copulation (at the judge's discretion), *id.* ch. 56, but that was motivated by prosecutors' and legislators' concerns that juries were sometimes reluctant to convict homosexuals accused of purely consensual behaviors. See Eskridge, *Dishonorable Passions*, 91.

had left office) under the state's ever-expanding sexual psychopath law. There, sex offenders were subjected to experimental medical procedures, including lobotomies and a pharmacological version of waterboarding (a muscle relaxant administered to patients rendered them temporarily unable to breathe, which simulated the sensation of drowning). No wonder Atascadero was known in gay circles as the "Dachau for Queers."<sup>85</sup>

In 1947, the California Legislature unanimously passed a law to require convicted sex offenders to register with the police in their home jurisdictions. Some state officials objected to the breadth of the law, for it included consensual sodomy and oral copulation defendants. "Congenital homosexuals may often be convicted" under these provisions, which posed no problem, "but very often one party to the act is not abnormal, but merely of low moral character and sometimes the person so involved is only partially responsible because of intoxication."<sup>86</sup> The Governor's chief legal adviser, who was probably a closeted "homosexual," urged Warren to think hard before signing this law, but Warren thought "we should give it a trial."<sup>87</sup> At Warren's suggestion, the Legislature then extended the registration law to include the thousands of persons (almost all of them homosexual men) convicted of lewd vagrancy, an infinitely elastic crime.<sup>88</sup>

The main purpose of registration was to create a statewide data bank with information about convicted "homosexuals" and other sex offenders. In 1950, during Warren's special session, the Legislature required local sheriffs to send fingerprints of people arrested for sodomy, oral copulation, lewd vagrancy, and various crimes against minors to the state Bureau of Criminal Investigation.<sup>89</sup> The state bureau shared this and other information with FBI, which in 1950 was assembling a national data bank of sex offenders and known "homosexuals," information which Director J. Edgar Hoover used to pressure officials to cooperate with him and to punish perceived enemies. Some of those enemies were civil rights leaders, such as Bayard Rustin, who organized the August 1963 March on Washington. In 1953, Rustin had been arrested in Pasadena for engaging in consensual oral sex with adult white males. On August 13, 1963, Senator Strom Thurmond of South Carolina inserted into the Congressional Record the Los Angeles County Jail's booking slip for Rustin's 1953 arrest, a sheet the local police provided the state Bureau of Criminal Investigation, which passed it on to the FBI, and which Hoover

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<sup>85</sup> John LaStala, "Atascadero: Dachau for Queers?" *The Advocate*, Apr. 26, 1972, at 11, 13; Rob Cole, "Inside Atascadero: Life, Liberty, and the Pursuit of Treatment," *The Advocate*, Oct. 11, 1972, at 5.

<sup>86</sup> **Error! Main Document Only.** Letter from Director of Corrections Richard McGee to Governor Warren, July 2, 1947, in *Cal Leg Hist* for ch. 1124.

<sup>87</sup> **Error! Main Document Only.** 1947 *Cal. Stats.*, Extr. Sess. ch. 1124 (June 7, 1947) (requiring registration of persons convicted of sodomy, oral copulation, and various crimes against children); Memo from Beach Vasey to Governor Warren, July 3, 1947, in *Cal. Leg. Hist.* for ch. 1124.

<sup>88</sup> **Error! Main Document Only.** 1949 *Cal. Stats.*, Extr. Sess., ch. 13 (January 6, 1950) (expanding registration requirement to persons convicted of lewd vagrancy). The state law was patterned on Los Angeles Municipal Registration Law, L.A. Code chap. V, §52.39(a) (1945).

<sup>89</sup> **Error! Main Document Only.** 1949 *Cal. Stats.*, Extr. Sess. ch. 12 (Jan. 6, 1950) (information-sharing law).

slipped to his allies in Congress in order to discredit the civil rights campaign for laws prohibiting race discrimination in the workplace.<sup>90</sup>

Governor Warren's purpose in creating a data bank of sexual outlaws was certainly *not* to harass civil rights leaders, but it was designed to expose and expunge sexual and gender minorities from the state education system and the state government. Under California law, a person who engaged in "immoral conduct"—explicitly including consensual sodomy and oral copulation—stood to lose her state job or her teacher's certificate or both.<sup>91</sup> Because most "homosexuals" and gender-bending persons prosecuted by the state were convicted of (or pled guilty to) lesser crimes, they were technically not eligible for automatic exclusion under the immorality laws. In 1952, Governor Warren and the California Legislature expanded the bases for revoking teaching certificates to include any conviction for lewd vagrancy and loitering at a public toilet, misdemeanor sex crimes enforced almost entirely against gay and bisexual men.<sup>92</sup> California also required applicants for teaching credentials to furnish their fingerprints and the state crime bureau to furnish all records pertaining to the applicants, so that the board of education could screen out people with sex crime records.<sup>93</sup>

These exclusionary rules were applied to an indeterminate number of sexual and gender minorities who lost their jobs (or were not offered jobs) in public education. The reason the numbers are indeterminate is that the large majority of applications involved closeted teachers and administrators who were allowed to leave their positions as quietly as possible under the circumstances. (Also, even if the teacher or administrator wanted to fight the charges, there were few attorneys who would take such cases; even with assistance of counsel, the preference of the client was to minimize publicity.<sup>94</sup>) It was not until the 1960s that there was a case where a full defense was presented and the issue was pressed on appeal. The case involved Thomas Sarac Jr., a schoolteacher arrested in 1962 for touching another adult man in an apparent effort to suggest that they engage in private homosexual activities.<sup>95</sup> In a typical scenario, Sarac was charged with lewd vagrancy (a state crime) and disorderly conduct (a minor municipal crime) and was allowed to plead guilty to the lesser offense. Nonetheless, the circumstances of his arrest were circulated to the state board of education, which revoked his teaching credentials on

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<sup>90</sup> 109 Cong. Rec. 14,838 (Aug. 13, 1963) (Senator Thurmond, inserting Rustin's booking slip into the Record). On Rustin's homosexuality (and the Pasadena arrest), see John D'Emilio, *Lost Prophet: The Life and Times of Bayard Rustin* 191-92 (2003).

<sup>91</sup> Cal. Education Code §§ 13202, 13209 (certificates for state teachers), 24306(a) (state college employees) (West 1960); Cal. Gov't Code § 19572(l) (civil service workers) (West 1954).

<sup>92</sup> 1952 Cal. Stat. chs. 389-390, codified at Cal. Education Code §§ 13207, 12912 (West 1954).

<sup>93</sup> 1951 Cal. Stat. ch. 1482, codified at Cal. Education Code § 12105.1-.2 (West 1955).

<sup>94</sup> As late as 1964-65, attorney (later Mayor) Willie Brown in San Francisco was one of the few attorneys who would represent teachers terminated under these statutes. See Interview of William N. Eskridge Jr. with the Honorable Willie Brown, San Francisco (Embarcadero), Jan. 10, 2005.

<sup>95</sup> *Sarac v. State Board of Education*, 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967) (setting forth the circumstances of Sarac's loss of his teaching certificate and his case on appeal; relief was denied by the appellate court).

grounds of immorality and improper conduct. The administrative proceedings considered not only the lewd vagrancy charge and the facts alleged in that charge, but also Sarac's alleged "admission" to the arresting officer that he had a "homosexual problem" and had engaged in "homosexual relations" with other adult men. Sarac denied that he had made these admissions to the officer. Moreover, his attorney introduced an expert medical witness, who testified that there was no relationship between homosexuality and unfitness to teach; twenty-three character witnesses testified that Sarac was in fact a responsible person and an excellent teacher.<sup>96</sup>

The appeals court upheld the board of education and the trial judge and rejected all of Sarac's arguments. The court's reasoning closely tracks the three justifications I have developed above. First, and most important, the court accepted the trial court's strongly contested conclusion that Sarac had committed a "homosexual act" (not sodomy or oral copulation, but touching another man) and that was sufficient to revoke his teaching credentials under the statute:

Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of Education Code, section 13202. It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children.<sup>97</sup>

Second, the court was probably responsive to widely held prejudices and stereotypes that "homosexual" men preyed on children, which was of particular concern for public school teachers. The court expressed this concern in a manner that also mobilized the notion that "homosexual" teachers would destabilize the entire educational project:

In view of appellant's statutory duty as a teacher to "endeavor to impress upon the minds of the pupils the principles of morality" (Ed. Code, s. 7851) and his necessarily close association with children in the discharge of his professional duties as a teacher, there is to our minds an obvious rational connection between his homosexual conduct on the beach and the consequent action of respondent in revoking his secondary teaching credential on the statutory grounds of immoral and unprofessional conduct and evident unfitness for service in the public school system of this State.<sup>98</sup>

At the very least, the administrators and judges were violating the Due Process Clause, given their willingness to accept as "fact" suppositions that were at most charges and that were denied by Thomas Sarac. To the extent that these state actors were also inclined to penalize Sarac because of his homosexual orientation or the consensual and private homosexual relations the police officer asserted in his report, their disciplinary action against Sarac violated both his equal protection (*Romer*) and privacy (*Lawrence*) rights.

Like teachers, other professionals could not ply their trade without state licenses, and most states had prohibitions that enabled regulators to deny or revoke licenses of people exposed as homosexuals. In California, as in virtually all the other states, "gross

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<sup>96</sup> See *id.* at 61-62, 57 Cal. Rptr. at 71-72.

<sup>97</sup> *Id.* at 63, 57 Cal. Rptr. at 72.

<sup>98</sup> *Id.* at 63-64, 57 Cal. Rptr. at 72-73.

immorality” was a statutory basis for professional disciplinary action against doctors, dentists, pharmacists, embalmers, and guardians.<sup>99</sup> A common basis for revoking a professional license in most states, conviction of a “crime involving moral turpitude,” reached dozens more occupations in California.<sup>100</sup> The California Supreme Court summarized the state’s rules in *Morrison v. State Board of Education*, 1 Cal. 3d 214, 227-29 & n.21 (1969), where a gay schoolteacher was unconstitutionally discharged because of his sexual orientation:

Along with public school teachers, all state college employees (Ed. Code, § 24306, subd. (a)), all state civil service workers (Gov. Code, § 19572, subd. (1)), and all barbers (Bus. & Prof. Code, § 6582) can be disciplined for “immoral conduct.” The prohibition against “acts involving moral turpitude” applies to attorneys (Bus. & Prof. Code, § 6106) and to technicians, bioanalysts and trainees employed in clinical laboratories (Bus. & Prof. Code, § 1320), as well as to teachers. The ban on “unprofessional conduct” is particularly common, covering not only teachers, but also dentists (Bus. & Prof. Code, § 1670), physicians (Bus. & Prof. Code, § 2361), vocational nurses (Bus. & Prof. Code, § 2878, subd. (a)), optometrists (Bus. & Prof. Code, § 3090), pharmacists (Bus. & Prof. Code, § 4350), psychiatric technicians (Bus. & Prof. Code, § 4521, subd. (a)), employment agency officials (Bus. & Prof. Code, § 9993), state college employees (Ed. Code, § 24306, subd. (b)), certified shorthand reporters (Bus. & Prof. Code, § 8025), and funeral directors and embalmers (Bus. & Prof. Code, § 7707) . . . .

Gross immorality” constitutes ground for disciplinary measures against doctors (Bus. & Prof. Code, § 2361, subd. (d)), dentists (Bus. & Prof. Code, § 1680, subd. (8)), optometrists (Bus. & Prof. Code, § 3105), pharmacists (Bus. & Prof. Code, § 4350.5, subd. (a)), funeral directors and embalmers (Bus. & Prof. Code, § 7698) and guardians (Prob. Code, § 1580, subd. (4)) . . . . [T]he most common basis for revocation of licenses and certificates is conviction of a crime involving moral turpitude. Among those covered by such a provision are trainers of guide dogs for the blind (Bus. & Prof. Code, § 7211.9, subd. (d)), chiropractors (Bus. & Prof. Code, § 1000-1010), laboratory technicians and bioanalysts (Bus. & Prof. Code § 1320, subd. (k)), dentists (Bus. & Prof. Code, § 1679), doctors (Bus. & Prof. Code, § 2361, subd. (e)), physical therapists (Bus. & Prof. Code, § 2660, subd. (d)), registered nurses (Bus. & Prof. Code, § 2761, subd. (f)), vocational nurses (Bus. & Prof. Code, § 2878, subd. (f)), psychologists (Bus. & Prof. Code, § 2960, subd. (a)), optometrists (Bus. & Prof. Code § 3094), pharmacists (Bus. & Prof. Code, § 4354), psychiatric technicians (Bus. & Prof. Code, § 4521, subd. (f)),

<sup>99</sup> Cal. Business and Professions Code §§ 2361(d) (doctors), 1680(8) (dentists), 3105 (optometrists), 4350.5 (pharmacists), 7698 (funeral directors and embalmers) (West 1954); Cal. Probate Code § 1580(4) (guardians) (West 1954).

<sup>100</sup> E.g., Cal. Business and Professional Code §§ 1000-10(b) (chiropractors), 1679 (dentists), 2383 (doctors), 2685(d) (physical therapists), 3105 (optometrists), 4214 (pharmacists), 6775 (engineers) (West 1954).

veterinarians (Bus. & Prof. Code, § 4882, subd. (b)), attorneys (Bus. & Prof. Code, § 6101), barbers (Bus. & Prof. Code, § 6576), engineers (Bus. & Prof. Code, § 6775, subd. (a)), collection agency officials (Bus. & Prof. Code, § 6930), private detectives (Bus. & Prof. Code, § 7551, subd. (d)), shorthand reporters (Bus. & Prof. Code, § 8025, subd. (a)), geologists (Bus. & Prof. Code, § 7860, subd. (a)), social workers (Bus. Prof. Code, § 9028, subd. (a)), and employment agency officials (Bus. & Prof. Code, § 9993, subd. (e)).

It is unclear how many professionals lost their licenses, but California courts construed these laws to allow state professional boards and the state bar association to revoke licenses for such minor crimes as lewd vagrancy and public indecency. Because these crimes were a matter of public record, which the state police supplied to relevant agencies, professionals suspected of being gay or lesbian did frequently see their licenses challenged or withdrawn.<sup>101</sup>

Much like the federal approach described above, the California regime for discriminating against sexual and gender minorities in employment rested upon broad and vaguely defined criteria whose application was left up to local and state administrators who were free to apply their own moral values, prejudices, and stereotypes against these minorities. For men, exclusion was typically the result of a charge (but usually not a conviction) of sexual solicitation for adult consensual activities; hearsay statements, charges of misconduct, and implications about the offender's outlaw sexual or gender orientation were usually the basis for discipline. Thus, the state Alcoholic Beverage Control (ABC) Board "expanded the definition of illegal acts" by "collaps[ing] the difference between homosexual status (a state of being) and homosexual conduct (behavior) and suggested that any behavior that signified homosexual status could be construed as an illegal act," justifying the state in revoking a bar's liquor license (and thereby closing down the bar). Thus, "[s]imple acts such as random touching, mannish attire (in the case of lesbians), limp wrists, high-pitched voices, and/or tight clothing (in the case of gay men) became evidence of a bar's dubious character."<sup>102</sup>

The ABC Board's rules and practices, described by historians, mock the Constitution's requirement of due process, its assurance of freedom of expression, and its guarantee of the equal protection of the laws. LGBT people enjoyed none of those freedoms and instead were subjected to pervasive state discrimination based upon their sexual orientation, gender identity and presentation, or some combination. In most of the cases I have mentioned where suspected LGBT persons lost their jobs or their licenses in California, the penalties would not withstand scrutiny under at least one of the constitutional rights recognized today—due process; equal protection; and privacy.

### C. State Campaigns: The Florida Approach

<sup>101</sup> See, e.g., *In re Boyd*, 307 P.2d 625 (Cal. 1957) (lawyer disbarred, lewd vagrancy); *McLaughlin v. Board of Medical Examiners*, 111 Cal. Rptr. 353 (Cal. App. 1973) (doctor, fondling of decoy policeman); Marcus, *Making History*, 57 (hairdresser, lewd vagrancy), 149-151 (lawyers and teachers, copulation and lewd vagrancy); Frank Wood Jr., "The Homosexual and the Police," *One, Inc.*, May 1963, at 21-22 (doctor, lewd indecency).

<sup>102</sup> *Boyd*, *Wide-Open Town*, 136-37 (all quotations in text).

Although California apparently pursued these cases vigorously, it was not alone in purging the professions of homosexuals, and indeed the most systematic campaign was in Florida. In the generation after World War II, Florida's population grew rapidly, and the largely small town and rural state of 1930 was by 1969 an urban and suburban state with increasingly visible subcultures of gay men, cross-dressing men, butch women, lesbians, and transgendered persons. Like California and all other jurisdictions, Florida made consensual sodomy and consensual oral sex serious crimes. There were also catch-all crimes of disorderly conduct, obscenity, and public indecency that were often applied to sexual and gender minorities. Even more than in California, Miami, Miami Beach, Tampa, and several other cities in Florida created municipal crimes that were targeted at cross-dressers and "homosexuals."<sup>103</sup>

Starting in 1952-53, at the height of the anti-homosexual campaigns in Washington, DC and in California, law enforcement officials in Dade County (which includes Miami and Miami Beach) mounted a series of bar raids, police sweeps, and prosecutions to drive transgendered and "homosexual" persons out of the county.<sup>104</sup> As the Miami Beach police chief put it, his officers rounded up "effeminate" men and cross-dressers, even though "[w]e had no charges we could book them on," for "it's just a question of cleaning up a bad situation and letting undesirables know they're not wanted here. . . . We intend to continue to harass those men who affect female mannerisms in public places and let them know in no uncertain terms that they are unwelcome."<sup>105</sup> Police also raided bars and other "homosexual" hangouts, harassing patrons with arrests based only on their cross-gender behavior or supposed sexual orientation. This kind of police harassment occurred all over the United States, but it was rare for public officials to brag about it to the press.

Harassment of sexual and gender minorities by the police was so widespread that even the openly gendered purity campaign in Dade County was not the feature that was most prominent in Florida. Institutionally, what was distinctive about Florida was that the Legislature created a public organ of government that soon took as its mission the purging of state and local governments (especially schools) of sexual and gender minorities. More important, the organ generated both public reports and detailed records of its activities and can give us a concrete snapshot of attitudes and practices that were common throughout the United States—and remain common today.

Beginning in 1956, the Florida Legislature authorized a series of "Legislative Investigating Committees" to expose subversion in the state. The original targets were Communism and integrationism, but the "Johns Committee" (as it was called, after its most frequent chair, Senator and former Governor Charley Johns) ultimately settled on homosexuality as its near-exclusive concern.<sup>106</sup> In 1959, the committee found that

<sup>103</sup> See William N. Eskridge Jr., "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703, 827-28 (1997) (Appendix 5, reprinting laws adopted in Miami, 1945-58).

<sup>104</sup> See *id.* at 727-33.

<sup>105</sup> Bureau of Public Information, "Miami Junks the Constitution," *One, Inc.*, Jan. 1954, at 16.

<sup>106</sup> On Florida's anti-homosexual campaign, see James T. Sears, *Rebels, Rubyfruit, and Rhinestones: Queering Space in the Stonewall South* 48-84 (2001); Eskridge, "Apartheid of the Closet"; James Schnur,

“[s]ome of the State’s instructional personnel at the higher educational level have been and are recruiting young people into homosexual practices and these young people have been and are becoming teachers in the public school system of Florida, and some of them are recruiting teen-age students into homosexual practices.”<sup>107</sup> Invoking the three tropes justifying anti-gay employment discrimination, the Johns Committee argued that this was a public calamity:

**(1) Immorality.** “The existence of homosexual practices among faculty members and students in our public educational system is an established fact, the extent to which is, to the Committee, absolutely appalling.”<sup>108</sup>

**(2) Predation.** “Some of the State’s instructional personnel at the higher education level have been and are recruiting young people into homosexual practices and these young people have been and are becoming teachers in the public school system of Florida, and some of them are recruiting teen-age students into homosexual practices.”<sup>109</sup>

**(3) Disruption.** “Whether it be with youth or with older individuals, homosexuality is unique among the sexual assaults considered by our laws in that the person affected by the practicing homosexual is first a victim, then an accomplice, and finally himself a perpetrator of homosexual acts.”<sup>110</sup>

In response, the Johns Committee engaged in a six-year campaign to purge state schools of sexual and gender minorities. The campaign involved identifying suspected “homosexuals” who were high school teachers, college students, and university professors; confronting them with accusations of homosexuality, often on the record at inquisitorial hearings, and asking them to confirm their homosexuality and that of other suspects; and then pressing for state dismissal if the accused did not resign voluntarily. (The process raises a host of due process problems: the committee generally did not provide suspects with notice of the allegations against them, discouraged suspects from consulting with attorneys, and failed to warn them that their confessions of illegal activities could be used against them.) The committee also pressured the state board of education to revoke teachers’ certificates, which the Legislature seconded with a 1959 statute authorizing certificate revocation for “moral misconduct” and a 1961 statute setting forth expedited procedures for revocation.<sup>111</sup>

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“Closet Crusaders: The Johns Committee and Homophobia, 1956-1965,” in *Carryin’ On in the Old South* 132-63 (John Howard ed., 1997).

<sup>107</sup> Fla. Legislative Investigation Comm. (“FLIC”), Report to Legislature, Apr. 13, 1959, at 4-5, in Florida Archives, Series 1486, Box 1, Folder 21 (“Florida Archives, Johns Committee Files”).

<sup>108</sup> *Id.* at 4.

<sup>109</sup> *Id.* at 5.

<sup>110</sup> Florida Legislative Investigation Committee, *Homosexuality and Citizenship in Florida* 10 (1964) (quotation from the final report of the committee).

<sup>111</sup> 1959 Fla. Laws ch. 59-404; 1961 Fla. Laws ch. 61-396, both codified at Fla. Stat. § 231.28.

Near the end of its rolling tenure, the Johns Committee announced that the board had revoked seventy-one teachers' certificates (sixty-three more cases pending), fourteen professors had been removed from the state universities (nineteen more cases pending), and thirty-seven federal employees had lost their jobs; fourteen state employees faced removal in pending cases. According to the University of Florida's records, sixteen students were suspended or withdrew from the university, and twenty-five placed on probation because of the committee's revelations.<sup>112</sup> These figures do not reflect the hundreds of state employees who departed "voluntarily" from their positions, as many of the interrogated employees did after confessing their crimes to state investigators, or the dozens of university students who were scarred when the contents of their closets spilled out during the investigation.

### **III. Perseverance of State Employment Discrimination Against Sexual and Gender Minorities, 1969-Present**

The height of governmental persecution of sexual and gender minorities was the half generation after World War II (described above). In the 1960s, sexual and gender minorities, along with allies such as the ACLU, mounted a public response to pervasive discrimination against them, and starting in the 1970s many of the official policies of discrimination were officially revoked at both the federal and state level. The process by which these policies have been revoked contributes to our understanding of how deeply irrational, and unconstitutional, discriminatory policies are and how unconstitutionally they have been applied.

There are limits to the existing reforms. Through executive order or statute, more than half (twenty eight) of the states and the federal government prohibit sexual orientation discrimination against civil service employees—but almost half (twenty two) of the states do not prohibit such discrimination, and forty two states do not prohibit state job discrimination because of gender orientation (see the references below). There is a huge gap in coverage, and even in states with anti-discrimination rules there is usually no effective enforcement mechanism. Most important, the cultural attitudes that motivate and justify sexual and gender orientation discrimination (immorality, predation, subversion) have persevered. Indeed, the legislative history of some of the most important anti-discrimination laws to date reveals that public opposition rested upon false and prejudicial claims that sexual and gender minorities are disgusting because they engage in immoral activities, prey on children and other vulnerable persons, and selfishly subvert public projects.

Thus, open discrimination in public employment by state governments and their entities covered by the Eleventh Amendment continues. The concluding portion of this statement will provide a few examples; many others will come from other witnesses. But even more pervasive is "closeted" discrimination against LGBT persons in public

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<sup>112</sup> See Florida Legislative Investigation Comm., Revocation Memorandum, in Johns Committee Files, Box 1; Memorandum from William Tanner, Security Officer, to Dr. Gordon Blackwell, President, both of University of Florida, Jan. 31, 1961, at 19-20, reprinted in the Revocation Memorandum.

employment. By closeted, I mean denial of job opportunities, harassment, and discharges that are not openly defended as sexual or gender orientation discriminations, but which rest upon the underlying tropes of immorality, predation, and subversion. As an example of such discrimination I shall provide the outlines of the harassment and discrimination against me by the University of Virginia School of Law, one of the most prestigious public institutions of legal education.

**A. Public Acknowledgment that Job Discrimination Against Sexual and Gender Minorities Is Irrational, 1969 Onward**

Many of the victims of employment discrimination against sexual and gender minorities lived in or near the District of Columbia. Under the leadership of Dr. Frank Kameny (the Harvard Ph.D. astronomer discharged in 1957) and the ACLU, a handful of outed gay men and lesbians challenged that discrimination in the 1960s, through lawsuits, picketing, and written protests.<sup>113</sup> In response to this pressure, the Civil Service Commission met with a gay group in September 1965 and explained, for the first time in public, its policy in a February 1966 letter.<sup>114</sup> Civil Service Chair John Macy claimed that the Commission did not exclude “homosexuals” per se, only people who engaged in “overt” homosexual “conduct” which became public through an arrest or general knowledge. So long as the homosexual does not “publicly proclaim that he engages in homosexual conduct” or “prefers such relationships,” Macy suggested he could serve and the Commission would not pry. But once the word is out, the Commission would categorically exclude such person, because an admission of “homosexual conduct” is an admission of behaviors that the state had condemned as “criminal, infamous, dishonest, immoral, or notoriously disgraceful.” The Commission also invoked the “revulsion” of coworkers and “offense to members of the public.” The primary ground for per se exclusion was the supposed immorality of gay people, with disruption of public projects (and workplaces) a secondary ground.

What Chairman Macy was offering was the mutually protective closet, whereby the “homosexual” could serve so long as she or he were not openly gay. This was unacceptable to the new homophile leaders like Kameny, and to judges. In 1969, Chief Judge David Bazelon of the federal D.C. Circuit rejected the Commission’s police in *Norton v. Macy*.<sup>115</sup> Clifford Norton, a NASA budget analyst, had been interrogated but not arrested by the morals squad of the D.C. police for picking up a man in Lafayette

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<sup>113</sup> The Mattachine Society of Washington was the primary gay group involved in these challenges, with attorneys usually provided through the ACLU or its contacts. See Johnson, *Lavender Scare*, 179-208, for a comprehensive history of their successful campaign.

<sup>114</sup> Letter from J.W. Macy Jr., Chairman, U.S. Civil Serv. Comm’n, to The Mattachine Society of Washington, DC (Feb. 25, 1966), reprinted in William N. Eskridge Jr., “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981,” 25 Hofstra L. Rev. 817, 966-68 (1997) (Appendix B). The quotations in text for this paragraph are all from this letter.

<sup>115</sup> 417 F.2d 1161 (D.C. Cir. July 1, 1969).

Park. Norton confessed his sexual orientation as well as his employer, which promptly discharged him for “immoral conduct.” Chief Judge Bazelon subjected the Commission’s policy to withering scrutiny. There was no evidence that Norton’s dating activities undermined his ability to do his technical, number-crunching job; no coworkers or citizens had complained.<sup>116</sup> In light of Kinsey’s findings that 95% of American men had violated state sodomy and other sex laws, the Commission’s abstract vision of morality was irrationally broad, potentially disqualifying all of us, and completely beyond the agency’s competence or statutory mandate, the efficiency of the service.<sup>117</sup> Particularly in light of *Griswold v. Connecticut*<sup>118</sup> and constitutional privacy concerns, Chief Judge Bazelon indicated that homosexuality is irrelevant to federal employment unless the Commission could demonstrate a “nexus” between sexual orientation and ability to do one’s job.

Chief Judge Bazelon’s nexus requirement laid down a challenge for state employment policies discriminating against sexual and gender minorities: you cannot exclude these minorities just because of their supposed “immorality” or hypothetical “disruption” of the workplace; if you claim that these persons are predatory or otherwise unfit to do their jobs, you have to produce evidence. That challenge was tossed down exactly forty years ago. It has never been met. Instead, medical experts and social scientists have documented, over and over, that lesbians, gay men, bisexuals, and transgendered people are just as functional and cooperative as straight people. Indeed, an important landmark, issued several months after *Norton*, was the report of a blue ribbon task force sponsored by the National Institute of Mental Health (NIMH). The Final Report of the Task Force on Homosexuality found that none of the common stereotypes about “homosexuals” had any scientific foundation and endorsed Dr. Evelyn Hooker’s notion that homosexuality is a “social problem” because of “injustice and suffering” borne by homosexuals and their loved ones. There was no evidence that sexual or gender variation reflected either a mental defect or a psychological pathology; indeed, the primary pathology was homophobia, which impelled persons to behave irrationally and sometimes harmfully against others who posed no threat to them. The task force recommended the repeal of state sodomy laws, not only because they were enforced abusively and had no positive effects, but also because they had collateral effects on the lives of lesbian and gay men. “The existence of legal penalties relating to homosexual acts means that the mental health problems of homosexuals are exacerbated by the need for concealment and the emotional stresses arising from this need and from the opprobrium of being in violation of the law.”<sup>119</sup>

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<sup>116</sup> *Id.* at 1166-67.

<sup>117</sup> *Id.* at 1167 n.28.

<sup>118</sup> 381 U.S. 479 (1965) (striking down state anti-contraception law as applied to married couples and announcing a constitutional right to [sexual] privacy).

<sup>119</sup> U.S. National Institute of Mental Health, Task Force on Homosexuality, Final Report 4, 18 (Oct. 10, 1969); Interview by William N. Eskridge with Professor Stanton Wheeler (member of the Task Force), New Haven, CT, Mar. 14, 2005.

Days before *Norton* was handed down, drag queens, butch lesbians, gay men, and other outraged citizens had fought back against police abuses in and around the Stonewall Inn, a gay bar in New York City. The Stonewall protests of June 1969 had a galvanizing effect on long-closeted LGBT people all over America. Thousands of them came out of the closet in the next few years, and they formed organizations that more forcefully challenged irrational discriminations against them—especially job discriminations by public employers. Responding to subsequent lawsuits, the Civil Service Commission in 1973 abandoned its policy of open discrimination and adopted the *Norton* approach:

You may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness--excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.<sup>120</sup>

In 1975, this instruction was formally codified in the Commission's rules for disqualification, which also dropped “immoral conduct” from the list of disqualifying conditions.<sup>121</sup> In 1978, the statute governing the civil service employment was amended to prohibit discrimination against employees “on the basis of conduct which does not adversely affect the performance of the employee.”<sup>122</sup>

The country has had more than thirty years’ experience with a federal civil service where lesbian, gay, and bisexual persons can serve openly. The federal experiment seems to have worked well: lesbians, gay men, and bisexuals have shown themselves to be capable public servants; these public servants have not engaged in predatory activities, nor have they disrupted the workplace; sexual orientation per se has had no relationship to one’s ability to do one’s job. Although openly gay people are still not allowed to serve in the armed forces,<sup>123</sup> there has been no problem with their service in the nation’s civilian workforce. In 1998, with no public controversy, President William Clinton issued an executive order explicitly prohibiting federal civilian job discrimination on the basis of sexual orientation.<sup>124</sup>

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<sup>120</sup> The Commission’s statement is reported in *Singer v. United States Civil Serv. Comm’n*, 530 F.2d 247, 255 n.14 (9<sup>th</sup> Cir. 1976).

<sup>121</sup> Civil Service Commission Rules and Regulations, 40 Fed. Reg. 28047 (1975), codified at 5 C.F.R. 731.202(b) (1976).

<sup>122</sup> Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101(a), 92 Stat. 1114, 1115 (1978), codified at 5 U.S.C. § 2302(b)(10) (1994).

<sup>123</sup> In 1993, Congress and President William Clinton codified in statutory form the exclusion of openly gay persons from the armed forces.

<sup>124</sup> Executive Order No. 13,087 (May 29, 1998).

Just as the federal government was the pioneer in discriminating against LGBT persons in government employment, so it has been the pioneer in realizing the irrationality of such discrimination. There is no rational connection between sexual orientation and one's ability to do one's government job—and this is just as true for “sensitive” jobs involving public trust (such as being an FBI agent) as it is for more routine government jobs.<sup>125</sup> Without a rational connection, it is a violation of both constitutional due process and equal protection principles for the government to exclude a class of people. The Committee, of course, can and ought to make its own findings as to the rationality of such discrimination.

At the same time the federal government was re-examining the rationality of its civil service discrimination against gay people, some municipalities were doing the same thing. Between 1971 and 1984, at least forty cities adopted similar measures,<sup>126</sup> and today that number has swelled to over two hundred. Like the experience of the federal government, municipalities in all regions of the country examined the evidence and concluded that openly LGBT people can and do perform capably as public servants, that they do not disrupt the workplace, and that even the feared “backlash” (citizens or co-workers would not be able to deal with open “homosexuals”) almost never materialized. Even on police forces, where integration of openly gay officers occurred slowly if at all, municipalities adopting anti-discrimination rules found that sexual orientation had nothing to do with job fitness.<sup>127</sup> On the other hand, these local anti-discrimination measures almost always provided only administrative mechanisms for relief, and most provided no damages remedy for aggrieved employees.<sup>128</sup>

Of course neither the federal civil service reform nor the municipal anti-discrimination orders and ordinances had any formal application to LGBT employees of the state and institutions of state government. The same rationality and good government pressures that underlay the federal and municipal anti-discrimination laws also motivated some early action at the state level. The earliest measure that I have found was an executive order by Pennsylvania Governor Milton Shapp; issued in April 1975, the order barred sexual orientation discrimination in state employment. Although the Legislature passed a bill overriding the governor's order, Shapp successfully vetoed it.<sup>129</sup> Similar executive orders or protective laws were adopted in California (1979), Wisconsin (the first state to bar sexual orientation discrimination in the workplace by

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<sup>125</sup> The longtime sexual orientation discrimination in federal security clearances (and thus also a reason gay people were not supposed to work for the FBI and the CIA) was criticized as irrational and ended with Executive Order No. 12,968 (Aug. 7, 1995).

<sup>126</sup> See Eskridge, “Challenging the Apartheid of the Closet,” 969 (Appendix C, listing municipal actions, either by executive order or ordinance, 1971-84).

<sup>127</sup> E.g., Brett Averill, “On the Beat with Gay Cops: Caution and Closets in New York,” *The Advocate*, May 14, 1981, at 15.

<sup>128</sup> See Randy Shilts, “City Rights Laws—Are They Just Toothless Paper Tigers?” *The Advocate*, Mar. 10, 1976, at 6.

<sup>129</sup> See “Governor Shapp Vetoes Anti-Gay Bill Passed in Unanimous Senate Vote,” *The Advocate*, Nov. 19, 1975, at 9.

statute, 1982), New York (1983), Ohio (1983), and New Mexico (1985). These measures rested upon the same constitutional rationality notion that underlay federal civil service reform.

Another constitutional dimension to this issue was revealed by the California Supreme Court's decision in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*<sup>130</sup> The Court held that the anti-gay discrimination by a public utility should be evaluated under constitutional equal protection principles and held that such discrimination violates the constitutional guarantee of equal protection, on the ground that the sexual orientation classification is an "arbitrary" basis for consideration with respect to fitness for public service.<sup>131</sup> (In this holding, the Court's decision in May 1979 was following and constitutionalizing the April executive order by the Governor, which formally banned sexual orientation discrimination in state employment.) Another basis for relief to the plaintiffs rested in the state labor code, which barred employment discrimination based upon "political activities"; the Court interpreted that bar to include discrimination against openly gay employees. The Court's reasoning was as follows:

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.<sup>132</sup>

Because the First Amendment prohibits the state from penalizing citizens (including state employees) because of their political expression, association, and other activities, this decision has First Amendment underpinnings with regard to state employment.

Since 1979, there has been a steadily increasing consensus among experts and other impartial observers that sexual orientation and gender identity have no rational connection to job fitness, especially in state employment. Legislatures that have studied the matter in states where there are a significant number of openly LGBT persons as well as a larger number of persons who oppose equal rights for gay people, have found that there are no solid arguments against the presence of openly LGBT state employees. The Massachusetts Gay Civil Rights Act of 1989 was the first comprehensive civil rights law barring sexual orientation discrimination in both public and private employment, as well as public accommodations, education, and other services.<sup>133</sup> The proposed legislation was first introduced in 1973 by Barney Frank when he was in the Massachusetts Legislature; it took sixteen years of arduous effort for the bill to work its way through the legislature and be signed into law. In the process, advocates had to persuade skeptical legislators that opponents' fears were not valid. Probably the main argument advanced

<sup>130</sup> 24 Cal.3d 458, 595 P.2d 592 (Cal. 1979).

<sup>131</sup> *Id.* at 470-71, 595 P.2d at 599-600.

<sup>132</sup> *Id.* at 488, 595 P.2d at 610.

<sup>133</sup> Act of Nov. 15, 1989, ch. 516, 1989 Mass. Acts 796.

by opponents was that providing “special rights” to gay people would be “a step toward legal approval of the homosexual lifestyle,” which opponents characterized as immoral.<sup>134</sup> Relatedly, opponents characterized gays as people afflicted with “mental illness” and as predators toward children.<sup>135</sup> For sixteen years, supporters of the bill had to persuade skeptical legislators that gay people are good workers and pose no threat to the normal operation of workplaces and other institutions in the state.<sup>136</sup>

The pioneering Massachusetts law of 1989, and the Connecticut law adopted in 1991, were cautious measures, but they accepted the norm that lesbians, gay men, and bisexuals are not per se unfit to work in the public sector and that they posed no disruptive threat to the workplace. I went to school in both Massachusetts and Connecticut and have taught at law schools in both states (Harvard, 1994; Yale 1998-present). I am aware of no calamities of the sort predicted by opponents: there has not been any disruption of workplaces because of the supposed “mental illness” of gay people; there has been no wave of child molestation; governments in both states have operated pretty well, or as well as governments in other states.

The lessons of Massachusetts and Connecticut have now been accepted in a majority of states all over the country. Specifically, at least twenty-eight states and the District of Columbia formally prohibit state public employment discrimination on the basis of sexual orientation.<sup>137</sup> Eight of those states also formally prohibit state public employment discrimination on the basis of gender orientation.<sup>138</sup> I am not aware that a single state has experienced predatory conduct, disruption of the workplace, or public turmoil because they adopted such policies and now have out-of-the-closet LGBT persons in positions of state public service.

Likewise, local governments have been formally renouncing their discriminatory policies and endorsing the non-discrimination norm at a rapid clip. According to a 2008 report by Human Rights Watch, 181 cities and counties have outlawed employment discrimination on the basis of sexual orientation; of those, 81 also prohibit such

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<sup>134</sup> See Peter M. Cicchino et al., Comment, “Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill,” 26 Harv. C.R.-C.L. L. Rev. 549, 594 (1991) (quoting a religion-based opponent of the bill, 1988).

<sup>135</sup> Cicchino, “Massachusetts Gay Civil Rights Bill,” 573-74 (this and other quotations from opponents of the bill).

<sup>136</sup> See *id.* at 573-99 (describing the session-after-session struggle to persuade skeptical legislators, none of whom was openly gay or lesbian).

<sup>137</sup> The states are, in alphabetical order, Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. State-by-state policies as regards public employment are collected and regularly updated in the website for Lambda Legal, <http://www.lambdalegal.org/states-regions/> (viewed September, 12, 2009).

<sup>138</sup> Those states are California, Colorado, Iowa, Minnesota, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, and Washington. See the state-by-state reviews in <http://www.lambdalegal.org/states-regions/> (viewed September, 12, 2009).

discrimination on the basis of gender identity.<sup>139</sup> The National Gay and Lesbian Task Force (“NGLTF”) compiles data on local laws prohibiting employment discrimination based on gender identity. “As of Jan. 1, 2009, 103 cities and counties prohibit employment discrimination on the basis of gender identity in employment ordinances that governed all public and private employers in those jurisdictions.”<sup>140</sup> Although the online list excludes jurisdictions whose laws do not affect private employers, a 2008 NGLTF fact sheet identified 19 additional cities and counties with “explicitly transgender-inclusive discrimination prohibitions that cover only employees of that jurisdiction.”<sup>141</sup> As before, I am not aware that these anti-discrimination policies have produced any significant disruptions in the workplace.

### **B. The Continuing Power of Anti-Gay Animus and State Workplace Discrimination, 1969-Present**

That most state governments have now disavowed state employment discrimination because of sexual orientation (and increasing numbers have disavowed discrimination because of gender orientation), does not mean that LGBT state employees are no longer discriminated against. Quite the contrary, state employment discrimination against LGBT people remains quite significant and without effective legal remedy in this country. On the one hand, twenty-two states have no executive order or legislation disapproving of public workplace discrimination because of sexual or gender orientation. On the other hand, some LGBT persons remain subject to discrimination in the majority of states that have such protections, because the state remedies are insufficient, because it remains unclear exactly what is protected under state law, or (especially) because discriminating officials evade state law through subterfuges. I’d like to start with an explanation why public employment discrimination against LGBT persons persists, even as the anti-discrimination norm has become accepted. The reason relates directly to why such discrimination is irrational.

Recall the three cultural tropes undergirding discrimination against sexual and gender minorities: their supposedly immoral practices, alleged predation against children and other vulnerable people, and their asserted disruption or even subversion of workplaces. For most of the twentieth century, not only was discrimination against sexual and gender minorities a core public policy at the federal and state level in the United States (part II of this statement), but the foregoing philosophy of immorality, predation, and disruption was the official justification for governmental policy. Whatever traction these beliefs had earlier in the twentieth century, their pervasiveness in

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<sup>139</sup> Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual, and Transgender Americans, 2007-2008* (2008) (“HRW Report”), <http://www.hrc.org/issues/workplace/7061.htm>.

<sup>140</sup> NGLTF, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, <http://www.hrc.org/issues/9602.htm>.

<sup>141</sup> NGLTF, *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws* (August 1, 2008), [http://www.thetaskforce.org/reports\\_and\\_research/transgender\\_inclusive\\_laws](http://www.thetaskforce.org/reports_and_research/transgender_inclusive_laws)

the second half of the century owes much to the federal and state governments. With a drumbeat of governmental support for these beliefs, can it be any surprise that millions of Americans still believe that sexual and gender minorities should be despised and penalized because of their supposedly immoral activities, should be cut off from civil society to protect children and other vulnerable persons, and should be excluded from public projects because they would disrupt or even sabotage them?

I pause here to stress that these beliefs have never been backed up by systematic evidence. The latter two beliefs are inconsistent with the systematic evidence that has been gathered.<sup>142</sup> All these beliefs are inconsistent with the experience of almost all the workplaces that have been integrated with openly lesbian, gay, bisexual, or transgendered employees. Put another way, all of these beliefs are associated with anti-gay *prejudice* (dislike or hatred based on emotional and irrational feelings) and *stereotypes* (erroneous cognitive understandings about groups of people). Social psychologists have found that anti-gay prejudice and stereotyping remain pervasive in the United States, in part because so many gay people remain in the closet and in part because so many anti-gay people displace their own sexual and gender anxieties onto sexual and gender minorities.<sup>143</sup> This is hardly to say that everyone who opposes workplace rights for LGBT persons is a homophobe. It is to say that the primary reasons for opposing workplace anti-discrimination rights for LGBT people have been, and continue to be, reasons that are rooted in anti-gay animus and stereotypes, and not in rational public policy. In part because of aggressive state sponsorship, that animus and those stereotypes have been deeply rooted in American popular culture and, therefore, hard to dislodge. Consider some examples.

James Gaylord was dismissed as a high school teacher in Tacoma, Washington, after he allegedly confessed that he was gay in a private conversation. Tacoma School Board of Directors Policy No. 4119(5) permitted the board to treat “immorality” as sufficient cause for discharge. “Immorality” as used in policy No. 4119(5) did not stand alone. The Revised Code of Washington (RCW) § 28A.67.110 made it the duty of all teachers to “endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism . . .” Other parts of the law required

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<sup>142</sup> Empirical studies have refuted the stereotype that gay men are more likely to abuse children than straight men. All studies have found that men abuse children more than women (lesbian or straight). Some studies have found straight men more likely to abuse children than gay men. E.g., Mary DeYoung, *The Sexual Victimization of Children* 98 (1982); Seth Goldstein, *The Sexual Exploitation of Children* 30 (1987). A particularly important study is Carole Jenny et al., “Are Children at Risk for Sexual Abuse by Homosexuals?” 94 *Pediatrics* 41 (1994), which reported that girls are three to six times as likely to be molested as boys and are almost always molested by men; boys are almost always molested by men, 40-50% of whom the researchers found were involved in a sexual relationship with the boys’ mothers and a tiny percentage of whom were openly gay men. *Id.* at 42. The implication of this study is that the regime of the closet (and not homosexuality) is directly responsible for a significant amount of child abuse in this country.

<sup>143</sup> See Elizabeth Young-Bruehl, *The Anatomy of Prejudices* (1996); **Error! Main Document Only**. Gregory M. Herek, “The Psychology of Sexual Prejudice,” 9 *Current Directions in Psychological Science* 19 (2000). See also **Error! Main Document Only**. N. Eugene Walls, “Toward a Multidimensional Understanding of Heterosexism: The Changing Nature of Prejudice,” 55 *J. Homosexuality* 20 (2009).

an applicant for a teacher's certificate be "a person of good moral character" (RCW § 28A.70.140) and made "immorality" a ground for revoking a teacher's certification (RCW § 28A.70.160). According to judges who heard Gaylord's appeal, "[t]he sole basis for his discharge is James Gaylord's status as a homosexual"; his sexual orientation was the only evidence that Gaylord had poor character and lived an immoral lifestyle. While the case was on appeal, the state repealed its consensual sodomy laws. Nevertheless, the state supreme court found that "[g]enerally the fact that sodomy is not a crime no more relieves the conduct of its immoral status than would consent to the crime of incest." *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1344-46 (Wash. 1977). This discrimination, accepted by the state and endorsed by its highest court, violates the Equal Protection Clause as interpreted in *Romer* and may violate the First Amendment as well, as Gaylord was disciplined for what he said in a purely private conversation.

The first well-documented public debate on whether to allow LGBT people to work in state or local government occurred in Dade County, Florida in 1977. The county board adopted a measure barring governmental job discrimination on the basis of sexual orientation—which stimulated an immediate campaign to revoke that law through a popular initiative. Celebrity and family values activist, Anita Bryant led the "Save Our Children" campaign to repeal the anti-discrimination law. Her public justifications for revoking the law closely tracked the anti-gay tropes that I have outlined. Thus, Bryant argued that "homosexuality is immoral and against God's wishes," a precept which she maintained was undermined by the law, especially its protection of "homosexual schoolteachers."<sup>144</sup> Her main argument, and the inspiration for her campaign, was a direct invocation of the predation stereotype: "The recruitment of our children is absolutely necessary for the survival and growth of homosexuality. Since homosexuals cannot reproduce, they must recruit, fresh their ranks."<sup>145</sup> In addition to open recruitment and predation, even tolerated homosexuality was seductive: "Public approval of admitted homosexual teachers could encourage more homosexuality by inducing pupils into looking upon it as an acceptable lifestyle."<sup>146</sup> Some of Bryant's supporters were even more blatant. On May 22, two weeks before the vote, Reverend Jerry Falwell addressed thousands of families at a Miami rally and warned them: "So-called [gay] folks would just as soon kill you as look at you."<sup>147</sup> Two weeks later, Dade County voters approved the initiative, and overrode the law, by a two-to-one margin.

"Save Our Children" triggered a wave of anti-gay initiatives that continues to this day. Between 1974 and 1993, almost all of those initiatives sought to overturn ordinances or laws protecting gay people against job discrimination. Although I have not reviewed the public records for all of those debates, it appears that most (and perhaps all)

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<sup>144</sup> Anita Bryant, *The Anita Bryant Story: The Survival of Our Nation's Families and the Threat of Militant Homosexuality* 117 (1977).

<sup>145</sup> *Id.* at 6.

<sup>146</sup> **Error! Main Document Only.***Id.* at 114; see Joe Baker, "Anita . . . With the Smiling Cheek," *The Advocate*, Apr. 20, 1977, at 6, col. 2.

<sup>147</sup> Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* 306 (1999) (quoting Falwell's address).

of them followed a strategy similar to that of Anita Bryant: urge voters not to endorse or promote “immoral” homosexuality; warn voters that gay people are predatory and can disrupt workplace environments. These initiatives enjoyed an unprecedented 79% success rate between 1974 and 1993.<sup>148</sup> More recent studies have demonstrated that the success rate of anti-gay initiatives has remained astoundingly high.<sup>149</sup>

The most famous anti-gay initiative is Amendment 2 to Colorado’s constitution. Prior to 1992, the Governor had issued an executive order barring sexual orientation discrimination in state workplaces; Denver, Aspen, and Boulder had adopted ordinances banning such discrimination in private as well as public (municipal) workplaces. While it was drafted more broadly than needed, Amendment 2 was primarily designed to override these job protections for gay people. The arguments made by proponents of Amendment 2 were very similar to those raised by supporters of the Dade County initiative years earlier: so-called “homosexuals” are promiscuous (“[t]heir lifestyle is sex-addicted and tragic”) and consumed by venereal disease (according to the official Amendment 2 ballot materials, the average gay man dies at 42 years old, the lesbian at age 45); they are predatory, seeking to invade decent people’s houses and schools, take away their jobs, recruit their children, and “destroy the family”; and Coloradans should undo “special rights” given by some communities to “homosexuals and lesbians” that disrupt traditional family values and good institutions such as churches.<sup>150</sup> These “moderate” arguments (supporters of Amendment 2 considered but rejected harsher rhetoric) were open appeals to anti-gay prejudice and stereotypes, and they prevailed with the electorate by a 53.4 to 46.6% margin. Although not citing to the ballot materials, the U.S. Supreme Court in *Romer v. Evans* reasoned that Amendment 2 was so broadly written that it lacked a connection to any state policy except “animus” against gay people, which was inadmissible.

Amendment 2 was a low point in popular discourse about sexual and gender minorities, and after the Court struck it down in *Romer* some and probably most anti-gay initiatives modernized their discourse—avoiding bad language but still making strong emotional appeals to the traditional anti-gay tropes surveyed here. Indeed, recent public opinion polls indicate that the legacy of the gay-bashing state remains important to many Americans. Forty-eight percent (48%) of Americans polled for Gallup’s 2008 Values and Beliefs poll indicated they consider homosexual relations “morally wrong.”<sup>151</sup> In spite of the Supreme Court’s decision striking down statutes criminalizing homosexual sodomy in *Lawrence v. Texas*, forty percent (40%) still believe that homosexual relations

<sup>148</sup> See Barbara Gamble, “Putting Civil Rights to a Popular Vote,” 41 Am. J. Pol. Sci. 245 (1997).

<sup>149</sup> See **Error! Main Document Only.** Donald Haider-Markel et al., “Win, Lose, or Draw: A Re-Examination of Direct Democracy and Minority Rights,” 60 Pol. Res. Q. 304–14 (2007) (documenting that 71% of anti-gay ballot initiatives prevailed in the period 1972–2005).

<sup>150</sup> The Amendment 2 ballot materials are reprinted in Robert Nagel, “Playing Defense,” 6 Wm. & Mary Bill of Rights J. 167, 191–99 (1997), and William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 1524–31 (2d ed. 2003) (Appendix 3).

<sup>151</sup> Lydia Saad, “Americans Evenly Divided on Morality of Homosexuality,” GALLUP, June 18, 2008, available at: <http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx>

between consenting adults should not be legal and that homosexuality should not be considered an “acceptable lifestyle.”<sup>152</sup> Polls geared specifically towards measuring the public’s attitudes towards the transgendered persons are more infrequent, but they suggest cause for concern as well. A 2002 poll commissioned by the Human Rights Campaign found that thirty-seven percent (37%) of people found being transgender to be “wrong.”<sup>153</sup> While many of these Americans can surely work with and supervise LGBT workers, more than a few of them will not be able to treat such workers fairly, and some of them will affirmatively harass and denigrate LGBT workers. Although 80-90% of Americans accept the principle that gay people should not be subject to job discrimination because of their sexual orientation, some of those Americans will not be able to implement that principle in actual cases—especially where core anti-gay prejudices are mobilized.

Recall that public education is a venue where anti-gay stereotypes have been unusually powerful. A 2008 *Newsweek* poll confirms that only one in ten Americans still opposes equal employment opportunities for gays and lesbians.<sup>154</sup> But the poll also found that thirty-three (33%) of respondents said they believed that gay men and lesbians should **not** be hired as elementary school teachers; a full quarter of the respondents (26%) said that gay men and lesbians should not be hired as high school teachers.<sup>155</sup> Nearly one fifth of Americans (18%) said that a gay couple that is in a “long-term, committed, sexual relationship” is more morally objectionable than a married heterosexual having sex with someone other than his or her spouse.<sup>156</sup>

The impulse to discriminate against LGBT employees remains strong. Are there adequate remedies at the local and state level? No. Municipal ordinances barring sexual orientation or gender identity discrimination usually have no enforcement mechanism at all, and the same is true of most of the state executive orders.<sup>157</sup> Even states with anti-discrimination statutes usually have poor enforcement mechanisms or remedies, such as allowing for only administrative relief, requiring the exhaustion of all administrative remedies before receiving access to the courts, limiting damage awards, or not allowing for any damages. Some of the state remedial schemes include the following:

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<sup>152</sup> *Id.*

<sup>153</sup> Press Release, “HRC Releases Ground-breaking Public Opinion Research on Transgender Issues,” Sept. 30, 2002, *previously available at*: <http://www.genderadvocates.org/News/HRC%20Poll.html>. (The full original press release is no longer on the HRC website).

<sup>154</sup> “Newsweek Poll on Gay Marriage/President-Elect Obama,” Princeton Survey res. Assocs. Int’l, Dec. 5, 2008, at 8, *available at*: <http://www.newsweek.com/id/172404>.

<sup>155</sup> *Id.* at 8-9.

<sup>156</sup> *Id.* at 11.

<sup>157</sup> See Norma M. Riccucci & Charles W. Gossett, “Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience,” 26 *Am. Rev. Pub. Admin.* 175 (1996); Roddrick A. Colvin, “Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation,” 20 *Rev. Pub. Personnel Admin.* 5 (2000).

- Colorado – only administrative relief, which can be subject to judicial review after the exhaustion of all administrative remedies. COLO. REV. STAT. § 24-34-306. The Colorado statute further does not provide for the award of damages. *Id.* § 24-34-405.
- Delaware – requires the exhaustion of all administrative remedies before one can be granted the right to sue, which is necessary in order to have a private cause of action. DEL. CODE ANN. tit. 19 § 712(5). Caps damages at the levels available under Title VII.
- Illinois – only administrative procedures, 774 ILL. COMP. Stat. 5/7-101, 5/7A-102, can only appeal to the courts for temporary relief, expedition of proceedings or enforcement of the administrative order. *Id.* 5/7A-104.
- Iowa – only administrative procedures, no private cause of action, IOWA CODE § 216.15; access to the court is limited to judicial review of the administrative decision, *Id.* § 216.15.
- Nevada – only administrative procedures, NEV. REV. STAT. § 233.170. However, the Nevada Code allows, where the commission does not conclude that an unfair employment practice has occurred, for the complainant to seek an order instating their rights from the district court. *Id.* § 613.420. Damages awarded by the commission are limited to economic loss, *id.* § 233.170, and action in the court under § 613.420 does not allow for damage awards.
- New Hampshire – only administrative procedures, which must be initiated within 180 days of the discrimination, N.H. REV. STAT. § 354-A:21. Judicial review is available to all parties only after the determination of the commission. *Id.* § 354-A:22.
- New Mexico – while having private enforcement mechanisms, New Mexico limits the anti-discrimination provision regarding sexual orientation to employers with more than 15 employees, while the anti-discrimination provisions for other classes apply to all employers. N.M. STAT. § 28-1-7.
- Washington – only administrative, no private right of action. WASH. REV. CODE § 49.60.230. In lieu of an administrative proceeding, the complainant can pursue arbitration. *Id.* § 49.60.250(11). Damages are limited to \$20,000. *Id.* § 49.60.250.
- Wisconsin – administrative procedures must be exhausted first, WIS. STAT. § 111.39, and they can only provide for reinstatement or compensation based upon the hourly wage, *id.* § 111.39. There is a private right of action only after the administrative procedures where the complainant can seek damages. *Id.* § 111.397.

A number of states require the complainant to receive leave from the applicable state agency in order to be able to file a civil action; the initial filing must be made to the appropriate commission. These include Connecticut, Hawaii, Maine, New Mexico and Rhode Island. Of these, Maine limits civil damages to \$20,000 for a first offense, \$50,000 for a second, and \$100,000 for a third or subsequent. ME. REV. STAT. ANN. tit. 5, § 4619(7).

### C. Continuing State Employment Discrimination Against Sexual and Gender Minorities in Public Education

Starting in Fall Term 1982, I was an assistant professor at the University of Virginia School of Law, one of the most prominent state institutions of higher learning about law in the United States. My time there was both happy and productive. I taught more students, and to great reviews, than virtually any other faculty member and participated actively in the institutional life of the school. For example, I was chair or co-chair of the Clerkship Committee for two years; during that time, I doubled the number of Virginia law students who secured judicial clerkships after graduation and probably more than doubled the number of prestigious federal appellate clerkships those students secured. I also served on the usual array of faculty committees and was the administrator of a fund for sponsoring international law conferences at the law school.

Intellectually, my research work fell into three broad categories: (1) regulation of home sales and financing, based upon a realistic understanding of the bounded rationality of consumers;<sup>158</sup> (2) international business transactions, with a focus on the transnational debt crisis of the early 1980s;<sup>159</sup> and (3) legislation and statutory interpretation.<sup>160</sup> I am not aware of any junior faculty member at Virginia's School of Law who had as extensive a publication record as I had when I came up for tenure in academic year 1985-86. Although I was gay and was dating men in Washington, DC during my tenure at Virginia, I was never publicly "out," largely because I thought that such a status would be lethal for tenure purposes; from time to time, I heard snide anti-homosexual comments from senior faculty.

But because I was closeted, I was vaguely optimistic about tenure when my case came up in the Fall Term, 1985. There was not only a large volume of materials, but the work was pathfinding in three different legal intellectual fields: (1) my home financing

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<sup>158</sup> My primary publication on home financing was William N. Eskridge Jr., "One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction," 70 Va. L. Rev. 1083 (1984). This work was also the basis for written and oral congressional testimony, *Adjustable Rate Mortgages (ARMs)*, Subcomm. on Housing and Community Development of the House Comm. on Banking & Urban Affairs, 98<sup>th</sup> Cong., 2d Sess. (1984).

<sup>159</sup> See William N. Eskridge Jr., *A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem* (1985) (translated into Spanish and Portuguese), and "Les Jeux Sont Faits: Structural origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985).

<sup>160</sup> While I was at Virginia, Professor Philip Frickey and I developed a legislation casebook that was mostly original writing (rather than just edited cases and articles). It was substantially completed in 1985 and was published in 1987 as Eskridge & Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (copyright date, 1988).

article (70 Va. L. Rev. 1083) was one of the first and perhaps the first law review article to deploy the new cognitive psychology literature about bounded rationality in great detail to rethink the need for regulation of markets (in this case the home sale and loan market); (2) the work on the international debt crisis was less important, but was an early example of law professors developing the field of “international business transactions,” which I also taught as a course at the law school, with enrolments usually well above 100 students; (3) the most important work was on legislation and statutory interpretation; I worked on a landmark article about “dynamic statutory interpretation” while I was at Virginia and integrated this theoretical framework into the casebook I drafted with Professor Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (published 1987-88).

Starting in August 1985, a four-person faculty subcommittee conducted a thorough investigation of my record, focusing on the three primary criteria for tenure (teaching, collegiality, scholarship). The subcommittee promulgated its 50-page report to the Appointments Committee on October 22, 1985. The report concluded that (1) I was “one of the most popular teachers in the Law School” and that the subcommittee’s own observations demonstrated me to be a “first-class teacher” (report p. 33); (2) my “collegial contributions are outstanding for a young teacher” (p. 43); and (3) my scholarship (including the law review articles, the legislation casebook, and the congressional testimony) reflected substantial intellectual energy, ability, and originality (pp. 3-6, summarizing more than 30 pages of detailed evaluation). The last point was backed up by very positive letters from outside referees expert in the fields where I was writing.

My understanding was that the subcommittee’s report was supposed to serve as the factual record for the Appointments Committee to consider in making its tenure recommendation to the faculty. Before my case, the Appointments Committee had generally included at least one faculty member who was also on the subcommittee, and the report was always accepted as the primary basis for the final recommendation. In my case, however, there was no overlap of personnel, and the Appointments Committee wrote its own report, apparently the first time that happened under this bifurcated system. As it was later explained to me, the committee held its primary meeting on my candidacy on or around November 19, 1985. The committee was opposed to tenure, but a majority was also willing to favor a short extension of my untenured contract. (A formal vote along these lines was taken on November 23, I was later told.) According to faculty colleagues, the committee’s meeting was an emotional one, filled with tension and anxiety.

Unknown to me, the Law School’s established but unpublished tenure policy required the committee to notify me immediately of the unfavorable preliminary recommendation and to give me an opportunity to meet with the committee and respond to objections before the final committee recommendation to the faculty.<sup>161</sup> The chair of

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<sup>161</sup> The official policy described in text can be found in University of Virginia Law School, Tenure Policies and Procedures ¶ A.4.e (Nov. 14, 1975), attached to Memorandum from [Associate Dean] Lane Kneeder to [Dean] Richard Merrill et al., Law School Promotion and Tenure Policies and Procedures (Aug. 28, 1985). Neither of these memoranda was supplied to me until 1986, and only then at my insistence, and over the informal resistance on the part of the dean and the chairman of the committee.

the committee had never informed me of any of these procedures, nor did he ever arrange for a meeting even to discuss the results of the committee's deliberations. The morning after the committee's negative meeting, I remained unaware of the committee's recommendations and of its substantive objections (noted below). Apparently, other senior faculty members became aware of the committee's negative leanings and the fact that the committee had kept me in completely in the dark and was not following the procedures that had been duly established by the faculty. While I sat in my office preparing for class that morning, stormy conversations were apparently occurring at various parts of the law school's building. Late in the morning, as I was finishing up my class preparation, the chair of the committee stormed into my office and screamed at me for 10 minutes or so. With clenched fists and a beet-red face, the chair of the committee threw a tantrum that included a string of accusations, such as "stabbing me in the back" and behaving in the treacherous manner that he and his colleagues ought to have expected of a "faggot." Apparently, the chair thought I had complained to the dean that he had been derelict in following the established law school procedures and that I was sneaking behind his back to discredit him. In fact, I remained utterly clueless as to what those procedures were and was reduced to tears as the chair of the committee spat on me and called me dirty names. During this tirade, the chair of the committee never shared with me his committee's reasons, their recommendation, or the news that I had a right to appear before the committee. Nor did he share this information with me thereafter. (Nor did he apologize for unfairly screaming at me, spitting on me, or calling me a "faggot.")

Hence, the committee conveyed its recommendation to the faculty without any input from me (still unaware of the lawful procedures in my own tenure case). It also distributed to the faculty a 24-page memorandum (plus an addendum) explaining why its unanimous judgment on the scholarship (which was the only basis for the tenure denial) was so different from the unanimous apparent judgment of the subcommittee. The document distributed by the committee to the faculty was also not shown to me until January 1986, a month after the faculty vote ratifying the committee's recommendations. I did not request a copy before January 1986, in part because I was shell-shocked by the personal attack represented by the committee chair's tirade, in part because I did not know I was entitled to a copy (under the still secret-to-me procedures that the committee chair never shared with me), and in part because when I did raise a tentative question the committee chair and dean bullied me into not pursuing it.

I did secure a copy in January 1986 and found that the committee's report was built on a series of fabrications and factual misrepresentations. For just one example that occurs early in the document, the committee's report informed the faculty that my home financing article complained that consumers do not shop adequately for adjustable rate mortgages (ARMs), many of which have low "teaser" rates at the beginning, and that I claimed to solve that problem through disclosure of "worst case" scenarios to consumers (committee report pp. 9-10). This was problematic, the committee objected, because my proposal "never grapples with the problem of how a shopper can compare mortgage terms" (p. 10). The committee was making a logical point—but one that should have led an honest reader to appreciate my article. The article posits several cognitive problems home buyers face: **one** of those problems is choosing among hard-to-compare mortgage instruments, including ARMs; **another** problem is that consumers take on too much risk when the ARMs offer teaser rates (this problem is explored in great detail, 70 Va. L. Rev.

at 1154-62). The proposal of worst case scenarios was aimed at this **latter** problem of too much risk (p. 1172), and not the **former** problem of comparability. In fact, the article argues that the comparability problem cannot be solved through mere disclosure rules (including my worst case scenario idea), because homebuyers suffer from cognitive overload (p. 1178). For the comparability/overload problem, I recommended greater standardization of ARMs (pp. 1183-93). For a faculty member reading the committee report and not my entire article, the committee report not only falsified my claims but also appropriated an argument that I made myself and misrepresented this as the committee's criticism of the article. This pattern of factual misstatement and fabrication recurred on almost every page of the committee's report.

To make matters worse, the committee refused to follow the subcommittee in providing a thorough evaluation of the original scholarship contained in the work I had done on the Eskridge and Frickey legislation casebook, which was on the verge of publication. (In a letter, Phil Frickey had carefully laid out for the subcommittee exactly what I had written.) "Several members of the Committee reviewed all or parts of Eskridge's course materials on Legislation" and found them "undiscriminating," too detailed (especially the extensive and in the committee's view excessive attention paid to "rules and maxims of statutory interpretation"), and "poorly structured and integrated" (committee report, p. 20). This was a short-sighted and unbalanced evaluation of the book, which Professor Frickey and I sent to the publisher that academic year in substantially the same form that the committee saw. When the book was published, Judge Richard Posner, an eminent scholar who is one of the world's great authorities on statutory interpretation, said this of the casebook:

The Eskridge and Frickey casebook on legislation is far and away the best set of teaching materials on the subject of legislation that has ever been published. Moreover, it has the potential to alter the law school curriculum; of few casebooks can *that* be said. \* \* \*

With the Eskridge and Frickey book in print, law schools no longer have an excuse for relegating legislation to the periphery of the law school curriculum. The casebook makes the course teachable; it demonstrates not only that there is much to be said of great interest to the legal profession about the theory of legislation and its interpretation, but also that this material can be conveyed effectively with well-chosen cases and academic commentary. The book has done for legislation what Hart and Sacks did for legal process, or Hart and Wechsler for federal courts: it has demonstrated the existence of a subject.<sup>162</sup>

Many other leading academics have agreed with Judge Posner. I am aware of no law professor outside of that year's Appointments Committee of the University of Virginia who would agree that the Eskridge and Frickey casebook "provide[s] far more detail than can be pedagogically justified, e.g., the treatment of rules and maxims of statutory interpretation" (committee report, p. 20). Indeed, Professor Frickey and I were in the process of helping stir a revival of statutory interpretation scholarship while I was at

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<sup>162</sup> Richard A. Posner, Book Review, 74 Va. L. Rev. 1567, 1567, 1571 (1988) (reviewing the Eskridge & Frickey legislation casebook).

Virginia, and today that field is again central to legal education. “[F]ar more detail than can be pedagogically justified”? That statement is one of those “aha” moments: the chair of the committee was not alone in judging my case through the lens of passion and prejudice; the entire committee was willing to sign onto a statement so far removed from a neutral or fair evaluation of pathfinding materials that a neutral post-*Romer* decisionmaker would be justified in concluding that the committee was not engaged in a rational evaluation. That much of the report affirmatively misstated facts supports such a conclusion.

After the committee’s report was ratified by the faculty, blood was in the water. For the remainder of my tenure at the University of Virginia School of Law, I was harassed on a regular basis by faculty colleagues and parts of the law school’s administration. Several faculty friends and at least one member of the committee explicitly urged me to get out of Charlottesville as quickly as possible, partly because there was so much hatred toward me on the faculty and partly just for my own mental sanity and physical safety (during the tirade by the chair of the committee, I believed that he was going to assault me). So I visited at the Georgetown University Law Center in academic year 1987-88 and accepted a permanent position there in 1988.

I considered suing the University of Virginia School of Law; at the very least, I had a good libel case based upon the factual misstatements and fabrications. Under a proper interpretation of the Constitution, I also had excellent constitutional claims: the state had discriminated against me at least in part because of anti-gay animus, and its own documents indicated that there was not a rational basis at work; I was lied to and denied the process long established by the law school’s own procedures and probably also guaranteed by the Due Process Clause; and I was probably also being disciplined for various intellectual positions I had taken on matters of law school policy, including my leadership in a faculty motion for the law school to divest itself of investments in South Africa during apartheid, and matters of legal theory, such as my critique of leave-markets-alone law and economics, based upon cognitive psychology. In the end, I decided against a lawsuit but would have appreciated at least an administrative mechanism where I could have aired my case.

What lessons can we learn from my experience? One lesson is that discrimination against LGBT employees in public education is commonplace and almost always goes unremedied, for the various reasons suggested above. I am sure that other witnesses will provide detailed case histories of other public educators discriminated against because of their (supposed) sexual orientation or gender identity. The ABA has a website with some of these case histories,<sup>163</sup> others have been collected in books;<sup>164</sup> other stories are told in reported cases.<sup>165</sup> Overall, these case studies and my own experience reflect the findings of the National Education Association, whose Task Force on Sexual Orientation made the following report in 2002:

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<sup>163</sup> Christine Yared, “Where Are the Civil Rights for Gay and Lesbian Teachers?” 24 Human Rights No. 3 (1997), available at <http://www.abanet.org/irr/hr/yared.html> (viewed Sept. 17, 2009).

<sup>164</sup> E.g., Kevin Jennings, ed., *One Teacher in Ten: Gay and Lesbian Educators Tell Their Stories* (1994).

<sup>165</sup> E.g., *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6<sup>th</sup> Cir. 1983); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998).

Employment discrimination directed at GLBT education employees is commonplace. Such employees frequently face dismissal or other adverse employment actions on the basis of their sexual orientation/gender identification, often as a result of private declarations of their sexual orientation/gender identification. \* \* \*

\* \* \* Because many GLBT education employees are vulnerable to adverse employment action if they reveal their sexual orientation/gender identification, victims of such discrimination are caught up in a Catch-22 situation. Challenging a discriminatory employment action serves to draw attention to the victim's sexual orientation/gender identification, and thus increases the risk of further discrimination. Consequently, the cases that do arise are surely only the tip of the iceberg.<sup>166</sup>

This is exactly the way I felt in 1985-86. And please do not forget that I am an attorney (in good standing as an active member of the D.C. Bar since 1979), yet the prospect of informal remedies and possibly some state law litigation claims was daunting for me.

Another lesson from my experience is that discrimination on the basis of sexual orientation (and gender identity) is unpredictable; it can pop up anywhere and from virtually anyone. Otherwise decent state officials discriminate against state LGBT employees, not because they are raving bigots or because they are foolish and stupid, but for the intangible reasons (disgust with supposed immoral behavior, fears of predation, and concerns about disruption) mentioned above. In my case, it seems clear that the chair of the committee considered me a troublemaker of the highest order, and that mobilized hysterical and destructive emotions in him. (He was normally as mild mannered and polite as Clark Kent, but in my office he turned into Bizarro Superman.) Almost all the discrimination goes completely unremedied, especially in jurisdictions that still have consensual sodomy laws (even if they are unenforceable, as Virginia's is) and have no protections against discrimination.

A final lesson of my experience is that discrimination against LGBT state employees is not only bad for the employees, but is also sometimes bad for the larger public project and the common good. After recovering from the shock of tenure denial at Virginia, I moved on to the Georgetown University Law Center, an eminent Roman Catholic law school, where I was able to be openly gay and where my scholarship flourished, in part because Georgetown had just settled an anti-discrimination lawsuit and was more open to its LGBT students and faculty than Virginia was. I think Virginia suffered more than I did from this incident. Certainly, the students viewed the faculty's action with disdain; there were dozens of anguished letters objecting to the faculty's action from individual students, clusters of students, and student organizations. I think Virginia lost a very good Civil Procedure and Legislation teacher when they ran me off. And in terms of scholarship, my legal academic work has landed me in Top Ten Lists among legal academics for years; I am not aware that anyone from Virginia's law school has made any of these lists. Indeed, if the Virginia law and economics crowd had actually read my home financing article with any degree of care or interest, they might

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<sup>166</sup> Report of the NEA Task Force on Sexual Orientation 5 (2002).

have been persuaded that neither the free market nor federal disclosure rules were addressing the increasing problem of consumer assumption of too much risk in their home loans. In light of the financial meltdown of 2008, partly as a result of insufficient regulation of mortgages that were too risky, it would have been in the national interest for those scholars and me to have presented a united front relentlessly urging greater regulatory attention.

Of course, Virginia, like the nation, is changing. The University says it no longer discriminates on the basis of sexual orientation, and there is at least one openly gay law professor at the law school now. In 2002, Virginia Governor Mark Warner issued an executive order that prohibited discrimination in the public workforce based on, *inter alia* sexual orientation.<sup>167</sup> Although the executive order did not create a judicially enforceable cause of action for lesbian or gay employees subject to discrimination, it was an important step for the Commonwealth. But it remains doubtful that LGBT employees are safe in Virginia.

In 2006, the Virginia Attorney General issued an opinion in response to an inquiry by Delegate Robert Marshall:

[W]hile Executive Order No. 1 is permissible to the extent the Governor is ensuring that the laws are faithfully being executed, the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth. It is further my opinion that changing the public policy of the Commonwealth is within the purview of the General Assembly; therefore, that portion of Executive Order No. 1 is beyond the scope of executive authority and, therefore, unconstitutional.<sup>168</sup>

Recently, Michael Moore, an employee at the Virginia Museum of Natural History, has alleged that he was forced to resign for being gay. Moore claimed that the museum's executive director informed him: "Michael, there are board members that are aware you are gay, and I do not appreciate you hiding that from me."<sup>169</sup> In an appeal from the administrative investigation of Moore's firing to a Virginia Circuit Court,<sup>170</sup> the Virginia Attorney General argued, "Sexual orientation is not a protected classification under either state or federal law. Attempts to make sexual orientation a protected category under the Virginia Human Rights Act have been continually and consistently rejected by the Virginia General Assembly. The only source of protection for this classification is

<sup>167</sup> See Exec. Order No. 1, 18:11 Va. Reg. Regs. 1431 (Feb. 11, 2002), revised 22:10 Va. Reg. Regs. 1701 (Jan. 23, 2006).

<sup>168</sup> Va. Att'y Gen. Op. No. 05-094, issued Feb. 24, 2006.

<sup>169</sup> Quoted in the Washington Blade. <http://www.washblade.com/2009/7-3/news/localnews/14808.cfm>. Further details at <http://www.washblade.com/2007/1-26/news/localnews/localnews.cfm>.

<sup>170</sup> [http://dc.bilerico.com/2009/08/bob\\_mcdonnell\\_disingenously\\_claims\\_his\\_c.php](http://dc.bilerico.com/2009/08/bob_mcdonnell_disingenously_claims_his_c.php)

provided by the Governor's Executive Order #1, which by itself, does not provide a cause of action."<sup>171</sup> The trial court agreed with the Attorney General earlier this summer.<sup>172</sup>

For states like Virginia, it would be good for Congress to take leadership on the principle that sexual orientation and gender identity discrimination is irrational on the part of state as well as private employers, tends to deny LGBT employees due process as well as free speech, and is bad for local polities and states as well as the national community. I appreciate the opportunity to share these thoughts with your Committee.

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<sup>171</sup> <http://www.pamshouseblend.com/diary/9658/> (quoting a press release by Moore's attorney).

<sup>172</sup> <http://www.roanoke.com/editorials/wb/210908>

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## Law School January Term brings outstanding scholars to Hawai'i

University of Hawai'i at Mānoa

Contact: Cynthia D. Quinn, (808) 956-7966

Interim, Associate Dean for Student Services, William S Richardson School of Law

Posted: Jan. 12, 2012

UH Mānoa's William S. Richardson School of Law brings five outstanding visiting faculty members to Hawai'i this year for J-Term (January Term) to teach intensive courses during the break between semesters that began this week. Visiting J-Term faculty include Federal District Judge Edward M. Chen from San Francisco; Harvard Law Professor Christine Desan; Stanford Law Professor Lawrence M. Friedman; Brooklyn Law Professor Elizabeth Schneider, and New York University Law Professor Kenji Yoshino.

The J-Term program, launched in 2005, gives law students the bonus of specialized mini-courses taught by stellar professors and judges. Frank Boas, a generous supporter of the Law School, annually sponsors one visiting Harvard professor each J-Term. Christine Desan is the 2012 Frank Boas Visiting Harvard Professor.

The Wallace S. Fujiyama Distinguished Visiting Professor Fund supports many of the other J-Term professors.

"We are particularly excited to host these great scholars who come to the Law School to inspire and to teach and who broaden our tradition of excellence throughout our curriculum," said Law School Dean Avi Soifer.

"This program, offers a tremendous opportunity for everyone at the Law School, and throughout the community, to learn directly from world-renowned scholars who are wonderfully accessible and who also learn about us and about Hawai'i."

EXHIBIT

**Kenji Yoshino, NYU Law School, will teach "Law 546E Diversity - "Same Sex Marriage on Trial." This course will examine the legal issues surrounding same-sex marriage in *Perry v. Schwarzenegger* (now *Perry v. Brown*), a case challenging California's ban on same-sex marriage on federal constitutional grounds. This case, which many think will go to the U.S. Supreme Court, has been widely compared to the 1925 *Scopes* trial because of the breadth of the issues it addresses. Yoshino is currently writing a book on this subject; the readings for the course will include draft chapters of the manuscript.**

Yoshino is the Chief Justice Earl Warren Professor of Constitutional Law at the NYU School of Law. Prior to moving to NYU, he was the inaugural Guido Calabresi Professor of Law and Deputy Dean of Intellectual Life at Yale Law School, where he taught from 1998 to 2008. He received his undergraduate degree from Harvard College, took a Rhodes Scholarship to Oxford University, and earned his law degree at Yale Law School. A specialist in constitutional law, antidiscrimination law, and law and literature, Yoshino has published in major academic journals, including the *Columbia Law Review*, *Harvard Law Review*, *Stanford Law Review*, and *Yale Law Journal*. His award-winning book, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006) has been chosen as the "first-year book" by Pomona College, University of North Carolina, University of Richmond, and Virginia Commonwealth University. His second book *A Thousand Times More Fair: What Shakespeare's Plays Teach Us About Justice* (Harper Collins 2011) was published last spring. Yoshino was elected an Overseer of Harvard University in 2011.