Conference March 10-11 1979
NYU Law School

Law and the Fight for Gay Rights

Keynote Speaker N.Y. Att. Gen. Robert Abrams

Workshops on:
child custody, immigration & naturalization,
trusts & estates, job & housing discrimination,
lobbying strategies & Constitutional litigation,
legal services for the gay community

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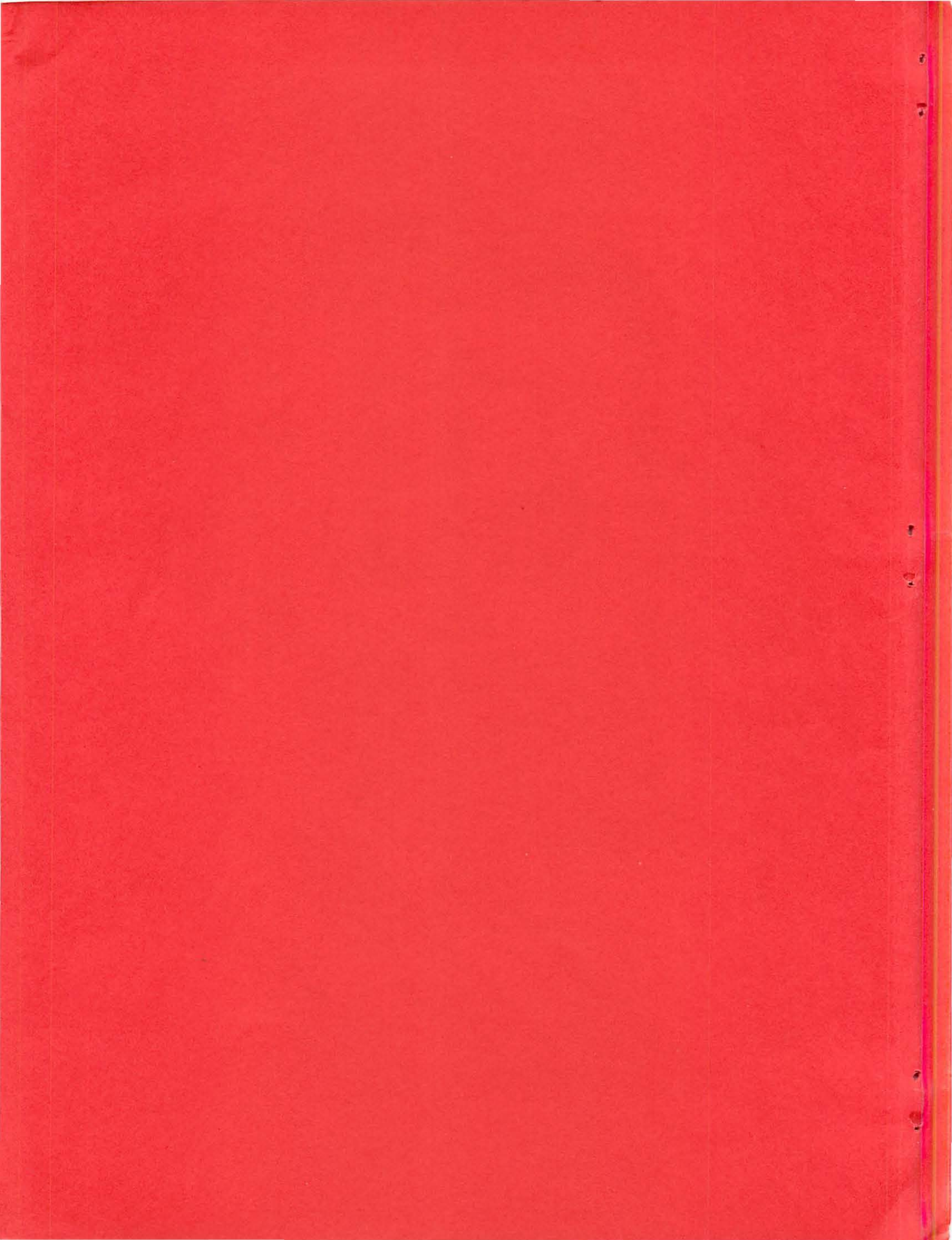

LAW AND THE FIGHT FOR GAY RIGHTS

Summaries of presentations given at the national conference on the legal status of lesbians and gay men held at New York University School of Law, March 1979.

Lesbian and Gay Law Students
New York University, School of Law
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The Lesbian and Gay Law Students of New York University School of Law gratefully acknowledge the contributions of the hundreds of women and men who made this conference possible.

We regret that problems with our recording system prevented us from summarizing the following presentations:

Welcoming Remarks of Norman Redlich, Dean, New York University School of Law

Theoretical Perspectives on the Criminalization and Decriminalization of Homosexual Conduct

Rights of Gay Prisoners

Defending Gays in Criminal Proceedings

Fighting Job and Housing Discrimination Against Gays

Structure and Goals of Gay Law Student Groups

Plenary Session: Discussion of proposal to found a National Gay and Lesbian Legal Association

KEYNOTE ADDRESS

Speaker: Hon. Robert Abrams--Attorney General, State of New York.

I am very happy to be able to open this national conference on law and the fight for gay rights. Nothing pleases me more as the chief legal officer of New York to address you on a subject that is important to the very fabric of the concepts held in the constitution. I wish today to address specifically the role of the law and the lawyer in achieving the goal of full civil rights for lesbians and gay men, and I wish to offer my thoughts about some of the underlying considerations in reaching that goal.

The framework of our government is based upon the concept of balance. The legislative and executive and judicial powers are separated from each other, yet interrelated to function as a whole. Although in some ways this is a conservative approach, this separation of powers is, from a sociological and a historical perspective, a radical concept for governing a society and for maintaining its vitality. In forming this society one of the primary precepts was to protect the rights of the individual and the integrity of divergent groups. Though the commitment to this principle has often been severely strained and all too often forgotten, it remains central to the concept and the pluralistic structure of American society.

The balance established between the branches of government reflects the balance between the rights of each individual and the rights of society as a whole. In a society composed of many differing cultures, attitudes and perceptions, it is this balance that best promotes the viability of individual lives. But the balance is an extremely delicate one, as the framers of our constitution well understood. In the Federalist Papers they expressed their concern that "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." Thus, while attempting to provide representation for everyone, there must be a constant guard against a tyranny emerging either from a majority or a minority. And the vigilance necessary to prevent the oppression of one part of the society from the injustices of another part involves an essential task within the special role of the judiciary. It is the one branch that has the mandate to maintain our basic constitutional principles, and which is also given, at a certain level, absolute autonomy from political and partisan forces which often counter those very principles.

We are now at a point in time when the balance in government is being severely threatened, and the courts must be used with special vigor to restore that balance. Tyranny by a majority which seeks to restrict or completely deny the rights of those who are seen as different is still a threat in our society. As all of us in this room know, lesbians and gay men have experienced many recent defeats from this growing threat. A mindless hysteria has all too often taken over the legislative and electoral forums, a hysteria that is based on and fueled by people's ignorance and fear of those who are different. It is exactly this kind of uninformed and biased exercise of governmental power which the judiciary has the potential and the obligation to counter. It is certainly the role of the courts to prevent a tyranny of any sort and to restore the balance of government to our fundamental principles of equality and justice.

The focus of this weekend is not only on the issues of discrimination faced by gay people, but also on the role of the legal profession in advancing the interests of gays. The courts have the unique mission of protecting political or otherwise controversial minorities and their viewpoints. In conjunction with this mission a special interest bar of those attorneys who are involved with the concerns of lesbians and gay men has a particular role and responsibility beyond the traditional role of the attorney as advocate for individual litigants.

The attorney who seeks to assert the rights of gay people must recognize that the outcome of a particular case is of direct concern to a large number of people. The attorney must also recognize that it is usually necessary to educate the bench, other members of the bar, and very often the general public about the realities of the gay community in order to prevail on the merits in a particular case. The information and ideas to be discussed throughout the next couple of days will undoubtably enhance all of your abilities to perform this special role.

While discussing special issues in litigation workshops, it could be useful to consider a conceptual framework within which this litigation might best proceed. To my thinking, one main concept unifies the issues of gay rights, and that is the right of privacy. This right conceptually encompasses control over one's body and control over one's decisions about personal lifestyle. It is a right already recognized as a fundamental right by the United States Supreme Court in such cases as Eisenstadt v. Baird, [405 U.S. 438 (1972)] and Doe v. Bolton [410 U.S. 179 (1973)]. And as indicated in a footnote in Carey v. Population Services (431 U.S. 678, 688 n. 5), the Court has not yet determined whether the right to privacy protects private sexual activity between consenting adults.

The footnote indicated that the Court did not view its summary affirmance in Doe v. Commonwealth's Attorney [425 U.S. 901 (1976)] as deciding that precise issue.

Before the police power of the state can be invoked to justify an intrusion into an individual's personal decisions, compelling reasons to do so must be shown. The state clearly has a legitimate interest in protecting its citizens from violence and other clearly defined harm. The state must certainly be involved in protecting children from violence and from situations in which their inability to make mature judgments is manipulated and used against them. But justifications for discrimination against lesbians and gay men, which are based on prejudices, religious dogma, and unsubstantiated, unfounded and false presumptions are not compelling. It is not justifiable to continue criminal sanctions against private sexual activity between consenting adults because the majority of people are outraged at the thought. Nor is it justifiable to deny employment, or housing, or other basic rights to lesbians and gay men because of these prejudices. Nor can such rights be denied because of a presumption that homosexuals molest children when the facts indicate overwhelmingly that it is young girls who are sexually molested, and that they are molested by adult men who are heterosexual and all too often members of the girl's immediate family.

The right of privacy protects not only activities which are private acts between consenting adults, but also private and personal decisions, even if publicly acknowledged. The issue of privacy as broadly defined should encompass the right to live one's life unhindered, no matter how controversial or unconventional that lifestyle is. Defined in this way, the right of privacy is a central issue for the gay community as well as for racial, ethnic and religious communities and for women. Intense opposition to all of these groups often focusses on the right of individual members to make personal lifestyle decisions that are unacceptable to the majority. The right of women to control their own bodies, for example, has been a source of vehement and often violent opposition. The underlying argument against passage of the ERA and against equal opportunity principles is that the social fabric of the country would be destroyed by legitimizing unstereotypical behavior or lifestyles. The opposition to lesbians and gay men is also based on a prejudice toward a particular lifestyle decision. Thus, this broadly defined privacy right is a concern to each of these groups. It is a common interest in which all are linked, and around which all could join forces to achieve the basic rights that each are seeking.

The strength of the opposition to the rights of gay people as well as the irrationality of that opposition requires an organized approach to counter it. While it is the judicial role to adjudicate issues, even novel or controversial ones, within the constitutional guidelines, we must remember that the members of the bench are not immune to the prevailing attitudes and biases of the society in which they live and work. Most cases should be prepared with extensive documentary evidence and expert testimony which conveys information that is not only directly on point, but that also counters any unspoken presumptions that a judge may have about lesbians and gay men. For this reason in particular I referred earlier to the concept of the special interest bar. Considering yourselves as part of a structure, no matter how loosely defined, allows for the development of additional ways to share information, to define coordinated stratagies and to centralize resources, all of which will facilitate the litigation of a particular case.

The underlying premise of this weekend acknowledges that just such a structure is already developing. The participants in this conference on both sides of the podium are from all parts of the country and have arrived with experience, with information and with ideas about litigating gay rights issues. The purpose of this weekend is to share and expand that expertise in order to further the struggle for these rights.

THE RIGHT OF SEXUAL PRIVACY

Speaker: E. Carrington Boggan--Partner, Boggan & Thom, New York, New York; Chairperson-elect, Section on Individual Rights and Responsibilities, American Bar Association; Co-author, The Rights of Gay People (ACLU handbook)

The search for the constitutional foundation of the right of sexual privacy leads one back further into constitutional history than the 1965 case of Griswold v. Connecticut, 381 U.S. 479 (1965), to which the origin of that inchoate right of sexual privacy is often traced. It leads back to the earlier cases in which the Court first began to define the contours of the express guarantee under the Fifth and Fourteenth Amendments against infringement of the right of liberty without due process of law, and the ramifications of the Fourth Amendment's guarantee against unreasonable searches and seizures.

The Griswold Court itself referred to this heritage. "The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life,'" said Justice Douglas in Griswold, 381 U.S. at 479.

This protection is, in turn, rooted in a more fundamental right of personal liberty that lay at the very foundations of the Declaration of Independence and the Bill of Rights, and derived from the common law's recognition of this area or zone of personal privacy. In Boyd, the Court was guided by the earlier English articulation of the principle of personal liberty in Entick v. Carrington, 19 How. St. Tr. 1029 (1765). The Boyd Court held that the principles laid down by Lord Camden in Entick v. Carrington

> affect the very essence of constitutional liberty and security. They . . . apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction

> of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. 116 U.S. at 630.

The right of sexual privacy has its foundation in the principle of the indefeasible individual right of personal security and personal liberty. The delineation of the content and the scope of this substantive right of personal liberty has been the task of the Court at least since Boyd.

In Griswold, Justice Douglas perceived that the foundation of the right of sexual privacy which the Court would there protect was the principle of personal liberty and security. Lacking an explicit constitutional reference to sexual privacy, however, the Court sought a place for it among various other guarantees of the Bill of Rights.

Referring by analogy to other rights that had been found by the Court to be implicit in the specific guarantees enumerated in the Bill of Rights -- the right of association as an aspect of the First Amendment, for example -- Justice Douglas concluded that "the guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. at 484.

Douglas found the right of privacy inherent in the right of association contained in the penumbra of the First Amendment; the Third Amendment's prohibition against the quartering of soldiers in any house in peacetime without the owner's consent; the Fourth Amendment's guarantee of the right to be secure in one's person, house, papers and effects against unreasonable searches and seizures; the Fifth Amendment's prohibition against self-incrimination; and the Ninth Amendment's reservation of rights to the people. Id.

Prior to Griswold, the Court had begun to approach the area of sexual privacy and its right to constitutional recognition and protection. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court struck down an Oklahoma statute that proscribed sterilization for "habitual criminals." The basis of the Court's holding was that the statutory classification which defined "habitual criminals" ran afoul of the equal protection clause, because it failed to classify all persons who had committed similar acts as habitual criminals.

In determining how to judge the extent of the infirmity in the state's classificatory scheme, the Court looked to the nature of the right which was infringed by the sta-

tutory provisions which, in Skinner, was the right to procreate. The Court held that

> We are dealing here with legislation which involves one of the basic civil rights of man. . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. 316 U.S. at 541.

Thus, the Court concluded, strict scrutiny was required in any classification a state made in a sterilization law.

In Griswold, the Court had before it another reproductive freedom issue: the right to use contraception. The Connecticut law before the Court in Griswold did not merely regulate the sale and manufacture of contraceptives; it prohibited their actual use. It had, therefore, the "maximum destructive impact" on the right of privacy Douglas found present in the marital association.

Other members of the Griswold Court preferred to rest the right of privacy even more firmly on the fundamental concept of liberty than did Douglas' opinion, which reached out to penumbral rights emanating from amendments held applicable to the states through the Fourteenth Amendment.

Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, in a concurring opinion stated that while he had not accepted the view that the due process clause of the Fourteenth Amendment incorporated all of the first eight amendments, he did agree that

> the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. Griswold, 381 U.S. at 486 (Goldberg, J., concurring).

Justice Goldberg also rooted the right to privacy in the judicial history of the constitutional guarantee of liberty by reciting the Court's previous decisions holding that the Fourteenth Amendment's due process clause "protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id. at 487.

The Court had stated, in Meyer v. Nebraska, 262 U.S. 390, 399 (1923) with respect to the Fourteenth Amendment's due process clause, that

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the

included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right . . . to marry, establish a home and bring up children.

Goldberg's concurring opinion in Griswold also placed special emphasis on the Ninth Amendment.[1]

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. 381 U.S. at 488.

Reliance on the reservation of rights to the people for the source of the right of privacy presents greater problems of delineation of the scope of the right reserved than does looking to a specific constitutional text that may be found to imply the right. It is perhaps for this reason that the Court's subsequent decisions have based the right of privacy instead on the explicit guarantee of liberty protected from infringement without due process, rather than on the Ninth Amendment or on Douglas' penumbral theory.

In Loving v. Virginia, 388 U.S. 1 (1967), the Court struck down Virginia's statutory prohibition on interracial marriages on two grounds. First, the Court held that the restriction on the freedom to marry solely on the basis of racial classifications violated the Equal Protection Clause of the Fourteenth Amendment. Second, and more relevant for our purposes here, the Court held that the restrictions constituted a denial of liberty without due process in violation of the Fourteenth Amendment. "The freedom to marry," the Court said, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Id. at 12. The Court held that to deny this "fundamental freedom" on the basis of the Virginia law's racial classifications "is surely to deprive all the State's citizens of liberty without due process of law . . . Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." Id.

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1. The Ninth Amendment states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

It is significant that the Loving Court defines the fundamental right in issue as the freedom to marry "or not marry." The fundamental personal liberty interest involved is not one incidental only to the marital relationship; rather, it is the more basic right of a person's freedom to determine whether or not to enter a marital relationship at all, and, if an individual does determine to marry, not to have that decision restricted by the State on racial grounds.

The right of privacy took on added dimensions in Stanley v. Georgia, 394 U.S. 557 (1969). That case involved a challenge to the constitutional validity of a Georgia statute prohibiting mere private possession of obscene materials. The Court held that mere private possession for one's own use of obscene materials could not be proscribed under the Constitution.

The decision was based on two grounds: first, freedom of speech and the press as protected by the First Amendment; and, second, the right of privacy. The Court held that none of its prior decisions which had rejected constitutional protection for obscene materials had been made in the context of purely private possession of such materials for personal use, and that the First Amendment did protect the private possession of such materials. "This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." Id. at 564.

This holding on the First Amendment aspects of the case, however, resulted solely from the private nature of possession of obscene materials, and thus, the Court found, another constitutional right, the right of privacy, was implicated:

> Moreover, in the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right [to receive information and ideas] takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Id.

The Court concluded that this right to be free from unwanted governmental intrusions into one's privacy included the right to read or observe what one pleased, and to satisfy one's "intellectual and emotional needs in the privacy of his own home." Id. at 565.

The Stanley case has extremely significant implications for the right of sexual privacy, for it recognizes a personal zone within which the individual is guaranteed the liberty even to possess and use explicit sexual literature and films which, in any other arena, would be unlawful. The basis of this right is the individual's right to freedom of thought, sensation, and emotion, even as against the state's claim of "right to protect the individual's mind from the effects of obscenity." Id.

Stanley is as close as the Court has yet come to considering the constitutional status of sexually-oriented private activity, and even there the activity involved was only the viewing of sexually explicit literature and films, and not sexual conduct itself. The great deference expressed by the Court in Stanley, however, for the right of individuals to be free in the privacy of their thoughts, sensations and emotions from unwanted governmental intrusions lends substantial weight to the conclusion that private consensual sexual conduct would of necessity be included within the protected realm of personal autonomy and privacy.

In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court extended the Griswold decision to make it clear that the right of privacy relied on by the Court in Griswold was not limited to the marital relationship. Eisenstadt involved a conviction for exhibiting and then distributing contraceptive articles to an unmarried woman. Under the Massachusetts law involved, it was unlawful for anyone other than a licensed physician or pharmacist to dispense any contraceptive articles, and they could only be distributed as follows: physicians or pharmacists acting on a prescription could dispense contraceptives to married persons for the purpose of preventing pregnancy; to married or single persons to prevent disease; but not to single persons for the purpose of preventing contraception.

The Court held that the statutory prohibition on the availability to single persons of contraceptive devices for the purpose of preventing pregnancy violated the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment:

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right to privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be

> free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. 405 U.S. at 453.

Thus Eisenstadt makes it clear that the right of privacy, or the right to be let alone by the government, in the decision to use or not use contraceptive devices for the purpose of preventing pregnancy, is an aspect of individual personal liberty, and is not a derivative of the marital state.

Eisenstadt's elucidation of the individual nature of the right of privacy has sometimes gone unnoticed. In Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), sum. aff'd 425 U.S. 901 (1976), a three-judge federal district court upheld Virginia's "crime against nature" statute as applied to private, adult consensual homosexual conduct. In dismissing a challenge to the statute on the grounds that it infringed on the right of privacy, the majority of the court concluded that in Griswold v. Connecticut, . . . plaintiffs' chief reliance . . . was put on the right of marital privacy -- . . . and was also put on the sanctity of the home and family." Id. at 1200-1201.

The majority of the Doe court not only fails to explain how the "marital" right of privacy could have been extended outside the marital state in Eisenstadt; it does not even acknowledge the existence of Eisenstadt.

Judge Merhige in his dissent notes the difficulties in the majority opinion:

> To say, as the majority does, that the right of privacy, which every citizen has, is limited to matters of marital, home or family life is unwarranted under the law. Such a contention places a distinction in marital-nonmarital matters which is inconsistent with current Supreme Court opinions and is unsupportable . . . After Griswold, by virtue of Eisenstadt v. Baird ... the legal viability of a marital-nonmarital distinction in private sexual acts if not eliminated, was at the very least seriously impaired. Id. at 1204.

Despite the failure of the majority in Doe v. Commonwealth's Attorney to take the Eisenstadt decision into account, the judgment dismissing the challenge to the

constitutionality of the Virginia statute was summarily affirmed by the Supreme Court, 425 U.S. 901 (1976). This summary affirmance was interpreted in several subsequent lower court decisions as having precluded the finding of any constitutional liberty or privacy right to engage in private consensual homosexual conduct. E.g. Berg. v. Clayton, 436 F. Supp. 76 (D.D.C. 1977); Matlovich v. Air Force, 45 U.S.L.W. 2074 (Aug. 17, 1976).

The Court later, however, in Carey v. Population Services, 431 U.S. 678, struck down certain restrictions on access to contraceptive materials and information contained in New York law. In reaching that result, the Court commented that it had "not definitely answered the difficult questions whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," "and we do not purport to answer that question now." Id. at 688 n. 5.

This statement by the Court prompted a vigorous dissent by Justice Rehnquist, id. at 717, who contended that the issue had been definitely answered by virtue of the summary affirmance in Doe. Justice Rehnquist's views did not sway the majority however, who reiterated in two separate locations their view that the issue was still open. Id. at 688 n. 5, 694 n. 17.

In the abortion cases, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), the Court further explicated the right of privacy, and made explicit the constitutional basis from which the majority thought the right derived:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. Roe, 410 U.S. at 153.

The Court thus finds the right of privacy to be an aspect of the concept of personal liberty or autonomy. It is clear too from Roe v. Wade that the right is not dependent on privacy in the sense of geographical isolation in order to be invoked, for the abortion procedure itself generally requires the presence of other persons.

It is not particularly easy to grasp the extent or scope of this right of personal autonomy. Its definition

of necessity proceeds by example. The Court is able to say, after examining prior cases, that "These decisions make it clear that only personal rights that can be deemed 'fundamental or implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy." 410 U.S. at 152.

The precise extent of the right of personal privacy is, because of the nature of our constitutional adjudication, unknown at any given time except to the extent that it has been held in decided cases to encompass particular activity. The court in Carey v. Population Services, stated that "This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.' . . . While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage . . . procreation . . . contraception . . . family relationships . . . child rearing and education.'" 431 U.S. 684-85.

All of the Court's decisions discussed above that impinge on sexual privacy have come virtually up to the edge of the question of the degree of constitutional protection to be provided for private consensual sexual activity itself, but the Court has carefully avoided an explicit consideration of that issue. Indeed, in Carey v. Population Services, the Court went to some pains to make clear that it did not believe it had definitively determined what it characterized as that "difficult question," and that it did not purport to do so there.

The Court almost appears to be waiting for a discernible consensus to develop on the issue before grappling with it itself. There are clear divisions of opinion on the Court over the issue which can be seen in the Court's decisions to date. In Carey, for example, which is the most recent general discussion of the right of privacy in sexual matters and the most explicit discussion of the precise issue of sexual conduct per se to have appeared in any of the privacy decisions so far, Justice White, in an opinion concurring in the decision in Carey in part and concurring in the result in part, states that "I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual relations." 431 U.S. 702.

Justice Powell, though concurring in the judgment, nevertheless expresses disagreement with what he sees as some of the implications of the Court's opinion.

> The Court apparently would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review . . . In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions. 431 U.S. 703.

Justice Rehnquist, as was noted above, dissented, not only from the reasoning and the judgment in Carey, but also from its statement that the question of consenting adult sexual conduct had not been previously decided. Chief Justice Burger simply dissented, without opinion.

It seems likely, however, that the Court, by necessary implication, will in time explicitly extend the concept of personal autonomy and liberty embodied in the right of privacy to its logical end-point in the area of sexual freedom, that is, to the protection from unwarranted governmental interference of private, consensual adult sexual conduct itself. If the right of procreation, the right of contraception, and the right to marry or not marry, are all contained within the right of sexual privacy, then so too should be private sexual activity around which these other activities necessarily center.

It has been asserted that extramarital sexual relations have not been part of our traditional "concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), and thus cannot be included in the guarantee of personal privacy. Indeed, Justice Goldberg, in his concurring opinion in Griswold v. Connecticut, adopted Justice Harlan's view expressed in his dissent in Poe v. Ullman, 367 U.S. 497 (1961), that "Adultery, homosexuality, and the like are sexual intimacies which the State forbids." Griswold, 381 U.S. at 499. This view was adopted and relied upon by the majority of the three-judge district court in Doe v. Commonwealth's Attorney, in upholding Virginia's "crime against nature" statute, 403 F. Supp. at 1201-1202.

To so formulate the issue, however, misconceives the right that is subject to the constitutional protection. It is not the specific activity itself which must fall within our concept of ordered liberty. Were that the case, then few of the previous privacy cases would have been decided as they were. The use (Griswold), distribution (Eisenstadt), and advertising (Carey) of contraceptive devices were not in themselves matters ingrained

in our traditions; nor were the concepts of a specific right to abort (Roe v. Wade), or of a specific right to view obscene materials in private (Stanley v. Georgia).

The right of privacy, rather, is the right to be free from unwarranted governmental intrusion into matters "fundamentally affecting a person," Eisenstadt, 405 U.S. at 453; it is the right to be free from intrusion into one's intimate private life, where there is no harmful impact on anyone else. As Justice Douglas described it in his concurring opinion in Roe v. Wade:

> This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." Olmstead v. United States, 277 U.S. 438, 478 . . . That right includes the privilege of an individual to plan his own affairs, for, "outside of areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." Kent v. Dulles, 357 U.S. 116.

410 U.S. at 213.

Under this rubric, the private consensual sexual conduct of adults, which does not harm others, should clearly be protected.

Several state courts have gone beyond the Supreme Court in their willingness to delineate the right of sexual privacy. In People v. Rice, 41 N.Y. 2d 1018 (1977), the New York Court of Appeals was presented with motions to dismiss criminal misdemeanor informations charging violation of the state's consensual sodomy law. N.Y. Penal Law § 130.38. The Court refused to rule on the constitutional issues of privacy and equal protection in the context of motions to dismiss, without full factual records before it, and sent the cases back for trial. The court commented, however, that "Intermeshed are questions of conduct traditionally treated as criminal and yet, when committed privately and circumspectly, suggestive of an unwarranted interference by the State with the lately recognized and inchoate 'penumbral' right of privacy (see, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-85; Stanley v. Georgia, 394 U.S. 557, 564-568)." 41 N.Y. 2d 1018.

In State v. Ciuffini, N.J. Super. Ct., App. Div. (No. A-1775-76, Dec. 6, 1978), a New Jersey appellate court held that consensual adult homosexual sodomy was protected by the right of privacy. The court relied upon the prior decision of the New Jersey Supreme Court

in State v. Saunders, 75 N.J. 200 (1977), which held that New Jersey's fornication statute (N.J.S.A. 2A 180-1) unconstitutionally criminalized heterosexual conduct between consenting adults in violation of their constitutional right of privacy.

These New Jersey cases based their decisions upon the New Jersey Constitution's analogue to the Fourteenth Amendment, N.J. Const. Art. I, Par. 1 (1947), rather than upon the Federal Constitution, in order to avoid having to follow the summary affirmance of Doe v. Commonwealth's Attorney. It may be that now, in light of the Supreme Court's statements in Carey v. Population Services, that it has not yet decided the extent to which the Constitution prohibits state statutes criminalizing private consensual adult sexual conduct, state courts will be less reluctant to base decisions invalidating such statutes on Federal Constitutional grounds.

Until the Supreme Court explicitly decides, however, that private adult consensual conduct is protected by the federal constitutional right of privacy, state courts are likely to continue to protect their decisions in this area by reliance on their own constitutions as well, since "the lack of constraints imposed by considerations of federalism permits this court to demand stronger and more persuasive showings of a public interest in allowing this State to prohibit sexual practices than would be required by the United States Supreme Court." State v. Saunders, 75 N.J. 200, 217.

As some of the concurring opinions in Carey v. Population Services, supra, would indicate, however, the Supreme Court may be on the threshold of explicitly requiring a compelling state interest for any attempted governmental intrusion into the privacies of adult consensual sexual conduct. Such a holding would be the logically and conceptually consistent conclusion to the evolution of the right of sexual privacy.

SECURING GAY RIGHTS THROUGH CONSTITUTIONAL LITIGATION*

Panelists: E. Carrington Boggan--Partner, Boggan & Thom, New York, New York; Chairperson-elect, Section on Individual Rights and Responsibilities, American Bar Association; Co-author, The Rights of Gay People (ACLU handbook)

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E. Carrington Boggan:

Prior to the Burger Court, most constitutional litigation in the civil liberties area was pursued in the federal courts. That was where favorable decisions were most likely to be obtained, especially during the Warren Court years. With the Burger Court's increasing limitation on civil liberties and its narrow interpretation of procedural safeguards in criminal matters, however, litigators began to re-evaluate the receptivity of the federal courts to civil liberties issues.

About two years ago, Justice Brennan made a speech to the New Jersey Bar Association in which he recited a list of twenty or more cases cited by various state supreme courts since the Burger Court had been on the bench. In every instance, those state supreme court cases explicitly discussed a particular criminal procedural ruling, or some similar ruling by the Burger Court, and rejected it on the grounds that they could go further under their own state constitutions in protecting individual rights, and were willing to do so. It is possible that the Burger Court actually wants to encourage this revitalization of the state court forum. Many of the things it does are perceived as an attempt to encourage a resurgence of federalism and to instill new life into the state judicial systems that, at least in the criminal procedure

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and civil liberties areas, had been overshadowed by the federal courts during the period of the Warren Court. And so, to a certain degree, the Burger Court's encouragement of state courts to start thinking about what they can do in the individual rights area is a constructive phenomenon. Whereas state courts have to a large extent simply taken whatever the United States Supreme Court had said on a particular issue arising under the federal bill of rights, looked at their own state constitutional analogue to the federal provision, and given the state provision virtually the same scope and effect as the Supreme Court had given the federal provision, the Burger Court altered the approach. As the Burger Court began to assign a narrower scope to the federal provisions, some of the state courts that had become more liberal in this area began to look for alternatives to the federal line.

At the oral argument for People v. Rice, 41 N.Y.2d 1018, 363 N.E.2d 1371, 395 N.Y.S.2d 626 (N.Y. 1977), a case that the New York Court of Appeals heard a year ago, one of the judges made the comment that it was fine to go uphill with the U.S. Supreme Court, but that didn't mean the state court had to go downhill with it as well. Fortunately, the state courts have several mechanisms by which they can avoid this downhill slide. Some of the state constitutional provisions do not have quite the same language as the federal constitution. For example, in a New Jersey case involving the state's fornication statute, State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977), the New Jersey Supreme Court relied on a provision in the New Jersey Constitution stating that all persons are by nature free and independent and have certain natural and inalienable rights among which are those of enjoying and defending life and liberty, and of obtaining safety and happiness. This provision is extremely broad; such a broad analogue cannot be found in the federal constitution. This is the kind of provision that the state courts can look to in their own state constitutions. Also, some state constitutions contain an explicit privacy right which either has been put there by amendment in recent years or has been implied by the state court. The Alaska Supreme Court a few years ago held that under its state constitutional right of privacy, one had the right to smoke marijuana in the privacy of one's own home. Ravin v. State, 537 P.2d 494 (Alaska 1975). Of course, no explicit privacy right exists in the federal constitution, so to the extent that a state constitution does contain an explicit right of privacy, a much stronger basis for a privacy argument can be established.

Another advantage to the state court aside from the reliance of the state court on its own constitution is its ability to decide both federal and state questions. In other words, one can litigate the federal constitutional issue in

the state court as well as the state constitutional issue. If the court decides both the federal and the state claims favorably, the losing party might contemplate an appeal of the federal issue in federal court. Because no appeal of the determination of the state issue in federal court is possible, however, the likelihood of an appeal is slight, for the result of the case could not be changed.

These are some of the considerations that led litigators to start looking at the state court system again. Of course, one of the disadvantages in states with crowded dockets is the difficulty of getting into court in the first place and obtaining a hearing in an expeditious manner. One might spend several years trying to get an appellate posture in some areas under the present New York state court system, whereas the federal system is more efficient and prompt. Nonetheless, the state court system is becoming an increasingly attractive alternative to the federal courts in gay rights litigation.

David A.J. Richards:*

I will begin my discussion by making a few background remarks on the nature of the setback in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), aff'g without opinion 403 F. Supp. 1199 (E.D. Va. 1975) [three-judge court], putting this case in the larger perspective of the constitutional right to privacy and the general perspective of the agenda of political reforms that have been associated since the Enlightenment [D. DIDEROT, D'Alembert's Dream & Sequel to the Conversation, in RAMEAU'S NEPHEW AND OTHER WORKS 166-75 (J. Barzun & R.H. Bowen trans. 1956)] with liberalism. See generally, J.S. MILL, ON LIBERTY (1871); Richards, Human Rights and Moral Ideals: An Essay in the Moral Theory of Liberalism, SOC. THEORY AND PRAC. (forthcoming).

Litigation centering on the unconstitutionality of sodomy and unnatural acts statutes has focused on a number of alternative arguments, [See generally, W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION (1973); Note, The Constitutionality of Sodomy Statutes, 45 FORDHAM L. REV. 553 (1976)] including (1) the establishment of religion clause of the first

*The themes of this presentation have been developed by the panelist at greater length in Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 FORDHAM L. REV. 1281 (1977) and Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957 (1979). See also Richards, THE MORAL CRITICISM OF LAW ch. III (1977); Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. PA. L. REV. 1195 (1979).

amendment, (2) the cruel and unusual punishment prohibition of the eighth amendment, (3) due process vagueness under the fifth and fourteenth amendments and *ex post facto* clauses of the U.S. Constitution, and (4) the constitutional right to privacy. On the merits, the strongest of these constitutional arguments appears to be the establishment of religion argument and the constitutional right to privacy. I say this not because I regard the cruel and unusual punishment and vagueness arguments as frivolous, but because they do not appear to afford the strongest possible constitutional arguments against the criminalization of homosexual relations between or among consenting adults. As regards cruel and unusual punishment, the suggestion was early made that, on the authority of *Robinson* v. *California*, 370 U.S. 660 (1962), and *Powell* v. *Texas*, 392 U.S. 514 (1968), the criminalization of homosexuality was unconstitutional for the same reason that criminalizing having a common cold would be unconstitutional, namely, on the ground that people are not morally culpable for involuntary states, including diseases, which they happen to suffer. This argument has understandably not been pursued because it makes a false analogy between homosexuality and disease which is indefensible in principle and which, if accepted, opens homosexuals to alternative forms of civil commitment (as for insanity, or having a contagious disease) which may be more deplorably violative of due process rights than criminal penalties which, at least, are subject to due process guarantees of proof and proportionality limits as to level of punishment. Other cruel and unusual punishment arguments may have validity to the extent, by comparison of levels of punishment with other forms of crime, they show levels of punishment for homosexuality to be constitutionally disproportionate, but these arguments would still allow some level of punishment for homosexuality, which is objectionable. Finally, vagueness arguments may be usefully employed against some forms of "unnatural acts" statutes which do not have any clear background case law defining the scope of the vague concept of unnatural acts, but they may not be employed against statutes, like that which we have in New York State, which quite precisely define the forbidden forms of sexual conduct, indeed describe the conduct in quite lascivious detail. *See* N.Y. PENAL LAW §§ 130.00(2), 130.38 (McKinney 1975).

The arguments which appear strong and convincing on the merits against the constitutionality of anti-homosexuality laws are establishment of religion and privacy. The argument, premised on the first amendment prohibition of the establishment of religion, argues that historically the prohibitions on homosexuality rest on purely religious

premises which cannot be justified by secular arguments about empirical effects on substantive human interests for there are no such effects. Indeed, to the contrary, the criminal prohibitions of homosexuality frustrate deep and substantial human interests for no good secular reason. Louis Henkin of Columbia Law School, for example, who is himself a devout and scholarly Jew and student of Jewish law, has argued that, whatever one's religious views about homosexuality, one is, as a civil libertarian committed to the values of the first amendment, debarred from allowing religious views alone to be the basis for criminal penalties against homosexuals, [Henkin, Morals and the Constitution: The Sin of Obscenity, 63 COLUM. L. REV. 391 (1963)], for the same reason that in Epperson v. Arkansas, 393 U.S. 97 (1968) the Supreme Court forbade Bible Belt Baptists from forbidding the teaching of Darwin in Tennessee schools, viz., that the Baptist theory of Creation and rejection of Darwinism was a solely religious view which could not constitutionally be enforced on citizens at large. I believe the anti-establishment argument to be quite powerful, but it has not been generally accepted either because people argue that it is not clear that the moral prohibition of homosexuality is completely religiously based [For example, Plato's arguments about the unnaturalness of homosexuality are not specifically religions. See Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 FORDHAM L. REV. 1281, 1293-94 (1977)], or because they refuse to accept that religious groups are constitutionally debarred from urging their moral views through the democratic political process. See L. Tribe, AMERICAN CONSTITUTIONAL LAW 928 (1978). In order to rebut these views, we need a sounder and more profound historical analysis of the origins of hostility to homosexuality and a deeper moral theory of the values that may permissibly be enforced through the criminal law compatibly with due process requirements of rationality. See Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957 (1979); Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. PA. L. REV. 1195 (1979). See also, Richards, Human Rights and the Moral Foundations of the Substantive Criminal Law, 13 GA. L. REV. 1395 (1979).

The center of litigation relating to the constitutionality of anti-sodomy statutes has been the constitutional right to privacy. The right to privacy, as an independent constitutional right, was inferred in 1965 in Griswold v. Connecticut, 381 U.S. 479 (1965), in which Justice Douglas, speaking for the Court, inferred a constitutional right to privacy of a married couple to use contraceptives from the "penumbra" of the first, third, fourth, fifth, and ninth

amendments to the Constitution. In later cases, the constitutional right to privacy was invoked to invalidate the prohibition of the sale and use of contraceptives by unmarried couples, Eisenstadt v. Baird, 405 U.S. 438 (1972), the use of pornography in the privacy of one's home, Stanley v. Georgia, 364 U.S. 557 (1969), and, most recently, the right of women to have an abortion during the first and second trimesters of pregnancy. Roe v. Wade, 410 U.S. 113 (1973). These cases rest, I believe, on a general repudiation, as a defensible model of natural or proper sexual function, of the procreational model of sexual conduct, according to which sexual conduct must be conducted with the intention and probability of procreation. Since this model of sexual conduct is no longer defensible, the associated requirements that sex be conducted procreationally were regarded as indefensible since they rested on no good moral argument based on the legitimate interests of the person or any sound paternalistic argument to the effect that so conducting one's sexual life was necessarily in the agent's interests. Once such moral and paternalistic arguments were regarded as suspect, new areas of personal autonomy and life choice were opened to persons, including the right to determine whether or to what extent procreation and children will play a role in one's life plan. The right to an abortion, for example, secures to women the unqualified right to determine the basic choice of identity and orientation, including the right to undertake procreation and child rearing as a free and rational choice - unencumbered by the oppressive stereotypes of women's proper role and nature which distort and disfigure women's conception of the autonomous capacities to determine with dignity the nature of their own life in accord with independent, informed, and free judgment.

In Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), aff'g without opinion 403 F. Supp. 1199 (E.D. Va. 1975) [three-judge court], the Supreme Court indefensibly and incoherently refused to extend the arguments for the constitutional right to privacy to consensual adult homosexuality. In that case, the Supreme Court summarily affirmed a lower court opinion which excluded homosexuality from the right to privacy on a false reading of the right to privacy cases as extending only to married couples, when both the contraception and abortion decisions extended the right to unmarried people, and erroneously allowed the state to enforce avowedly Biblical prohibitions against acts not clearly immoral in themselves on the basis of possible immoral consequences, invoking, in a remarkable non sequitur, a case of heterosexual sodomy involving a married couple, a third party, and the couple's children. See Louisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), cert. denied sub nom. Louisi v. Zahradnick, 429 U.S. 977 (1976).

The shabby reasoning of the lower court, affirmed in Doe, illustrates the irrational and unprincipled extremes to which courts are driven in order to defend what is, in fact, indefensible - the failure to extend the constitutional right to privacy to consensual adult homosexual relations.

There is no principled way to defend the earlier right to privacy cases and not extend the right to homosexuality, other than the circular and question-begging assumption that homosexuality, as such, is intrinsically immoral and unnatural, when, in fact, it is a form of non-procreational sexual conduct, not in principle different from other forms of non-procreational sex, which must be liberated from the indefensible procreational model of sexual conduct. The difference between homosexuality and contraception, pornography in the home, and abortion is not constitutional or moral principle, but popularity: namely, that the non-procreational model in the other areas is supported by substantial popular sentiment, whereas homosexuality is still the settled object of widespread social hostility and opprobrium. It is the supreme paradox that the constitutional right to privacy has been applied to areas where there is either majoritarian consensus (contraception) or at least substantial popular support (abortion) and not applied to the protection of an oppressed minority, the settled object of unjustified social hate, that is paramountly entitled to the protection of the countermajoritarian rights of the constitutional design.

If a decision like Doe cannot be justified, it must be fought tooth and nail. It must be limited, to the extent possible, to its facts. It must not be allowed to affect other federal constitutional arguments (for example, arguments against employment and housing discrimination). And, of course, it must not be allowed to stop litigators from law that may be available. Movements in the state courts can, in time, influence the direction of Supreme Court adjudication [see, for example, the period from Wolf v. Colorado, 338 U.S. 25 (1949), to Mapp v. Ohio, 367 U.S. 25 (1961)], and we should press these litigations accordingly, as well as legislative lobbying.

We should, however, keep our general perspective on a set-back like Doe, a perspective which may take two desirable forms. First, let us remind ourselves that the fight for gay rights is, historically, part of the larger political objective and agenda of liberalism since the Enlightenment: the view that persons, as such, are entitled to define their own systems of ends as free and rational beings, and that legitimate state power must be exercised

in conformity with principles that respect the fundamental right of persons to equal concern and respect for their dignity and personhood. This political theory, expressed in Rousseau [See J. ROUSSEAU, THE SOCIAL CONTRACT, in THE SOCIAL CONTRACT AND DISCOURSE (G. Cole trans. 1930)] and Kant, [See I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959); I. KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE (J. Ellington trans. 1964)] and brilliantly defended in John Stuart Mill's On Liberty [See J.S. MILL, ON LIBERTY (1871)], seeks to so guarantee human rights that people develop the dignified self-respect to choose their own lives on terms fair to all. The constitutional right to privacy rests upon and expresses this point of view, which is fundamental to the whole idea of liberalism and constitutional democracy, and which has, accordingly, been developed by the Supreme Court as part of its moral task to explicate the political theory of constitutionalism. The argument to extend this right to consensual adult homosexuality, accordingly, must be seen as part of the implementation of the deepest values of our Constitution. In so doing, we must as lawyers be prepared to bring to bear the best contemporary knowledge of anthropology, sexology, psychoanalysis, sociology, etc., which disclose the nature of homosexuality as one natural expression of sexual propensities which may be pursued in a life of decency, self-respect, personal integrity, and social service. Our task, accordingly, is made difficult by the need to explain and do moral archaeology in analyzing the fallacies in the traditional condemnation of homosexuality and the reasons why, accordingly, the liberal right to equal concern and respect must be extended to homosexuality.

Second, we in the United States should remind ourselves of the course of decriminalization of homosexuality in other comparable countries, in particular, Great Britain, which shares our legal heritage. In Great Britian, the contemporary battle to decriminalize homosexuality and prostitution took the form of a debate over the decriminalization recommendations of the Wolfenden Report. These recommendations were argued in England in terms of the political theory of liberalism. H.L.A. Hart, England's best legal philosopher, defended that theory, in terms reminiscent of Mill [See H.L.A. Hart, Immorality and Treason, 62 LISTENER 162-63 (July 30, 1959); H.L.A. HART, LAW, LIBERTY AND MORALITY (1962)] against Lord Devlin [P. DEVLIN, THE ENFORCEMENT OF MORALS (1962)] who was roughly the equivalent in England, both in judicial power and conservatism, of our Chief Justice Burger. We in the United States must, I believe, be prepared to fight the battle at a similar level of intellectual depth combined with political wisdom and the intransigence of rights.

At bottom, the argument against the anti-sodomy laws is an argument for our rights. The only way that such argument can succeed, as it did in England with the 1967 repeal [Sexual Offences Act, ch. 60 (1967)] is by a coalition of articulate assertions of rights by the people who suffer the injustice, with others (for example, heterosexuals like Hart) who share a common political theory which they come to see as crucially implicating the rights in question. The great enemy of homosexual rights is, I believe, the idea of homosexuality as crimen innominandum [the unspeakable crime, in St. Thomas Aquinas (SUMMA THEOLOGICA II-II, Q CLIV, I, II and XII) and in Blackstone (4 W. BLACKSTONE, COMMENTARIES 215)] - the idea that homosexuality is so satanic that we cannot speak of it. The conspiracy of silence about homosexuality, current even among decent and humane people, reflects this underlying tradition, which disables homosexuals and heterosexuals from speaking or thinking articulately and without stereotypes about the continuities and convergences between these disparate styles of sexuality. We must learn to speak and think about these matters with precision, with respect for evidence, with a sense of the reality of feeling which mark both homosexuality and heterosexuality as basic variants on the great theme of human love. But, we must speak of these things forthrightly and publicly, not in order to display in public the recesses of our private selves which should remain always the stuff of our private lives, but in order to make decently possible for homosexuals what heterosexuals have always had and of which they have difficulty in imagining the absence, namely, the realistic possibility of a personal life of dignity and self-respect without fear of irrational prejudice. Part of the organon of such self-respect for homosexuals is, I believe, the honest and courageous assertion of one's rights, for only by taking such risks do we achieve a secure sense of what rights mean: the capacity to become independent, to be oneself, and to realize one's dignity in making a life of work and love that one can call one's own. Accordingly, the battle for rights, as always, must paramountly be fought by the oppressed, whose liberation is the growth of personhood which the assertion of rights facilitates. With this will come gains as well for heterosexuals. The battle for gay rights must enable us to come to question self-critically the degree to which in our culture love is illegitimately defined as a necessary truth of gender difference. If we can free ourselves from this dogma, we may unlock the prisons of gender which shackle people of the same gender to competition and hostility, and parties of opposite gender to love. Both responses are, I believe, impoverishments of the range and complexity of human emotional response and need, which are functions not of gender but of the person. The battle for gay rights, accordingly, is not only the battle of liberalism but the battle of all persons, men and women, heterosexual and homosexual, to be treated as persons, to be guaranteed the dignified con-

ditions of personal integrity which, as one claims one's rights, one extends on fair terms to all.

EDITOR'S NOTE: As this article went to press, the New York Supreme Court, Appellate Division, in State v. Onofre, N.Y.L.J. Jan. 29, 1980, at 4, col. 1 (App. Div. 4th Dep't. 1980), reversed the conviction of a man charged with consensual sodomy under N.Y. PENAL LAW § 130.38 (McKinney 1975). Citing Professor Richards, a unanimous five-judge panel declared the section unconstitutional "insofar as it prohibits voluntary sexual conduct between consenting adults in private."

Thomas F. Coleman:

This morning we heard Cary Boggan, chairperson of the A.B.A. Section of Individual Rights and Responsibilities, discuss the right to privacy as a matter of substantive constitutional law. Again this afternoon, Professor David Richards spoke about the right to privacy as a matter of substantive law. I too will speak about constitutional law, but from a different perspective.

I will focus on some practical aspects involving constitutional litigation - strategy and procedure. I would like to do this by analyzing the way in which two important sodomy cases have been handled within the past few years. Each of those cases involved an attempt to have the federal courts recognize the principle that private sexual conduct between consenting adults is constitutionally protected. Although each case was handled differently, each ultimately was rejected by the United States Supreme Court. These cases had the same objective - a recognition of constitutional right to privacy for consenting adult behavior. The different procedural tactics and strategy used in these cases, however, is worthy of our closest attention and analysis.

In the first case, Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971), the defendant was prosecuted under the Texas sodomy law. Rather than exhausting his remedies in the state courts by facing trial and then appealing to the state court of appeals after conviction, the defense filed a lawsuit in federal district court. The federal court was requested to issue an injunction against the pending state prosecution and to declare the Texas sodomy law unconstitutional. The then Texas sodomy law prohibited all forms of sodomy, even if the sexual acts were performed in private between consenting adults. The law also prohibited both homosexual and heterosexual sodomy even if performed between husband and wife. Consequently, Mr. Buchanan was not the sole plaintiff in his federal lawsuit.

Others were granted permission to intervene as plaintiffs. These intervenors included a heterosexual married couple, a heterosexual unmarried couple, and a homosexual couple. These couples claimed that this law infringed on their right to privacy and they too requested injunctive and declaratory relief. In this case, Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), a three-judge district court declared the Texas sodomy law unconstitutional and granted the requested injunctive relief. The State of Texas then took a direct appeal to the United States Supreme Court in Wade v. Buchanan, 401 U.S. 989 (1971). The Supreme Court vacated the judgment and remanded the case to the district court, with directions to reconsider its injunction against this pending state prosecution in light of a recent pronouncement by the Supreme Court regarding federal abstention, in Younger v. Harris, 401 U.S. 37 (1971). The Younger case basically held that, except in the rarest of circumstances, the federal courts should not interfere with pending state prosecutions. The defendant must first exhaust his state remedies of trial and appeal before seeking federal relief. Accordingly, the injunction was lifted, the state prosecution resulted in a conviction, and the Texas Court of Criminal Appeals affirmed the conviction. Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971). The defendant petitioned the United States Supreme Court for a writ of certiorari, and on February 22, 1972, the petition was denied. Buchanan v. Texas, 405 U.S. 930 (1972).

In the second case, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), an entirely different strategy and procedure was used by the plaintiffs. The plaintiffs were residents of Virginia. Rather than disclosing their identity, they used fictitious names for this litigation. They claimed that they were practicing homosexuals and that they engaged in sexual acts in private with other consenting adults. They said they feared possible prosecution under the Virginia sodomy law, which they argued was an unconstitutional violation of their right to privacy. The plaintiffs asked a three-judge federal district court for injunctive and declaratory relief. The majority opinion of that court upheld the statute and recognized the right of the state to regulate private homosexual activity. It should be noted that heterosexual intervenors were not used in this case, and only one expert witness, a gay activist, testified before the district court.

Rather than petitioning the Supreme Court for a writ of certiorari, the plaintiffs appealed to that Court from the adverse judgment of the district court. The Supreme Court refused to grant plenary consideration to the appeal, summarily affirming the judgment of the district court. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) .

At this point, we should consider the significant difference between petitioning the Supreme Court for a writ of certiorari, and appealing to that Court. In Hicks v. Miranda, 422 U.S. 332 (1975), the Supreme Court discussed the difference between a denial of certiorari and a summary disposition of an appeal. The Court held that if a federal constitutional question is properly presented and if it is within the Court's appellate jurisdiction under 28 U.S.C. § 1257(2), the Court may not avoid adjudicating the case on the merits, as would be true had the case been brought to the Court under its certiorari jurisdiction. Although the Court need not grant plenary consideration to every appeal, the Court must deal with every such appeal on the merits. In Hicks, the Supreme Court stated that lower courts are bound by summary decision of the Supreme Court until such time as the Court informs them that they are not.

So what does the summary affirmance by the Supreme Court in Doe v. Commonwealth's Attorney actually mean? First, it means that the United States Supreme Court was not ready to give plenary consideration to the issues presented in the appeal. Second, it means that the Supreme Court agreed with the result, although not necessarily the reasoning of the district court. Third, it seems that, under the doctrine of Hicks v. Miranda, lower courts are bound by that summary affirmance, at least with respect to the issues which were actually decided by the district court. Doe would not be binding as to issues that were neither raised nor discussed by the district court in its opinion. The Supreme Court has stated, despite the existence of the Doe affirmance, that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults." Carey v. Population Services Int'l, 431 U.S. 678, 694 n. 17 (1977). But see id. at 718 n. 2 (Rehnquist, J., dissenting). The Court could have dismissed the appeal for want of a substantial question, thereby branding the constitutional issue presented to it as insubstantial, but it did not. Apparently, the Court was not yet ready to tackle these controversial questions by granting plenary review, and so it took the least drastic measure that it could - summary affirmance.

It seems that several lessons can be learned about securing gay rights through constitutional litigation by analyzing the strategy and procedures used in the Buchanan case and in the Doe case. I would like to offer some suggestions regarding the handling of future cases based upon my analysis of these two cases. But, first, I would

like to give you some additional information about the track record of the United States Supreme Court in cases involving sexual civil liberties issues, such as private sexual behavior, employment rights of persons with unconventional sexual lifestyles, and the rights of gay activists.

I have reviewed nineteen cases involving such issues which have eventually found their way to the United States Supreme Court during the past twelve years. In only three cases did the Court grant plenary consideration and write an opinion. Rose v. Locke, 423 U.S. 48 (1975); Wainwright v. Stone, 414 U.S. 21 (1973); Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967) . In the remaining cases, the Court either denied certiorari, or summarily disposed of an appeal. Reviewing the votes of the justices may give us a hint as to the current position of members of the Court, and the prospects of a favorable ruling in the near future. Although this may be an oversimplification, I have attempted to categorize any particular vote as being either positive or negative with respect to sexual civil liberties.

Here is what I have found. Justices Brennan and Marshall each have cast seven positive votes. Justices Stevens and Stewart each have cast two positive votes. Justice Powell has cast a positive vote only once, and that was at the request of the Solicitor General. Justices Rehnquist, White, and Burger have never cast a positive vote; in fact, they have joined in at least two rather vigorous dissents, and have even opposed a request by the Solicitor General to summarily reverse an anti-gay lower court ruling. Justice Blackmun voted favorably only once, and that too was at the request of the Solicitor General. He also voted negatively once, along with Rehnquist and Burger, in what may have been an attempt by the conservative members of the Court to put a halt to the growing body of federal case law which has been favorable to gay student organizations.

From this tally, I feel that, at this time, we can count on two solid votes on the Court - Justices Brennan and Marshall. Justice Stevens might rule favorably given the right factual situation. Justices Stewart and Blackmun seem to be borderline. At this time, I do not think we can put much hope in Justice Powell, and I think that Justices Burger, White, and Rehnquist are against gay rights or sexual civil liberties.

From this information about the Supreme Court and from an analysis of the Buchanan and Doe cases, along with my experiences over the past several years in handling sexual civil liberties litigation (in large measure at the appellate level) and publishing the Sexual Law Reporter, I would like to offer some suggestions.

Certiorari v. Appeal:

In sexually-oriented cases, there appears to be no good reason at this time to appeal to the Supreme Court from an adverse ruling of a lower court. If the Court wants to take a case, it may do so by granting a hearing on a petition for a writ of certiorari. We are not going to force the Supreme Court to give plenary consideration to a case simply because an appeal was filed instead of a petition for certiorari. Since a summary disposition of an appeal is a decision on the merits, but a denial of certiorari is not, it seems that litigants should use the Court's certiorari jurisdiction whenever possible. This will avoid foreclosing lower courts from developing constitutional issues because of a plethora of summary dispositions of appeals to the United States Supreme Court. We already have enough summary dispositions by that Court on sexual civil liberties issues without adding to this problem any further.

Anonymous Plaintiffs:

Although there may be instances where the use of anonymous plaintiffs would be appropriate, litigants should be cautious about using this approach. Many judges do not seem to be very sympathetic to a case when it seems to be an attempt to secure an advisory opinion from a court. An anonymous plaintiff seeking declaratory relief against potential future prosecution may not receive the same treatment by a judge as a person who has actually been prosecuted, or has actually suffered some demonstrable damage. Judges avoid serious consideration of hypothetical cases or controversies. The use of an anonymous plaintiff, however, may be appropriate where a person has suffered actual harm, but further harm would result from being named as a plaintiff as a matter of public record. For example, a teacher who wants to challenge a statute restricting the rights of gay teachers may win a lawsuit at the expense of irreparable social and economic harm if he were to be named as a plaintiff. A court could well understand the need to use a fictitious name under such circumstances.

Using Heterosexual Cases:

One goal of gay activists is to have the courts recognize that private homosexual acts between consenting adults are constitutionally protected. Reaching that goal without major setbacks and without undue delay is certainly desirable. However, we must also consider the present state of the law with respect to heterosexual conduct when we develop our strategy in securing gay rights. The United States

Supreme Court has not yet declared that private heterosexual conduct is constitutionally protected. Is it likely that the Supreme Court would rule favorably in a gay case before it acknowledged such a constitutional right for heterosexual conduct? This question is even more sobering when we consider the current make-up of the Supreme Court.

No state supreme court has yet declared that private homosexual conduct is constitutionally protected. The highest courts of two states, however, have recognized sexual privacy rights in the context of heterosexual cases. State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977); State v. Pilcher, 242 N.W.2d 348 (S. Ct. Iowa 1976). One of the cases, State v. Saunders, a New Jersey Supreme Court decision, became the basis some two years later for the recognition of the sexual privacy rights of homosexuals by an intermediate New Jersey appellate court. State v. Ciuffini, 164 N.J. Super. 145, 395 A.2d 904 (Super. Ct. App. Div. 1978). In short, it is often easier for judges to create precedent in a heterosexual case, and then for gay rights to be recognized shortly thereafter.

Often, a lawyer may not choose a heterosexual case to pave the way because a homosexual case presents itself first, and the client needs representation. The client simply cannot wait for the rights of heterosexuals to be decided first. In such a situation, I would suggest using heterosexual intervenors or amici such as was done in the Buchanan case. This affords a judge an opportunity to decide the rights of both heterosexual and homosexual persons at the same time.

Creating a Record for Appeal:

When it comes to litigation involving gay rights, we must recognize that judges are human beings and have their own prejudices and attitudes concerning homosexuality. They may adhere to many of the myths concerning homosexuals; e.g., gays are child molesters, gays are oversexed, gays are mentally ill, homosexuality is unnatural.

Expert witnesses should be used, whenever possible, to educate trial judges. Simply presenting legal arguments, no matter how eloquent, usually will not be enough. The time to create a record for a possible appeal is at the trial court level. Appellate courts do not hear testimony from expert witnesses for the first time on appeal. Furthermore, appellate courts are usually bound by the factual record created in the trial court. Having expert witnesses testify in the trial court enables one to argue from that testimony in an appellate brief. A transcript of such expert testimony may then be considered by the reviewing court as a part of the record on appeal.

Further duplication of the Doe v. Commonwealth's Attorney approach should be avoided. The testimony of one gay activist, no matter how well intended, is just not the same as testimony from a battery of experts from a variety of disciplines. We should remember that the record created in a trial court may very well be the record that is presented to the United States Supreme Court when it is requested to give plenary consideration to a gay case. Do we want that record to be devoid of expert testimony?

State Courts and State Grounds:

With decisions of the United States Supreme Court in cases such as Younger v. Harris, limiting intervention by federal courts in pending state prosecutions, and Stone v. Powell, 428 U.S. 465 (1976), restricting collateral attacks on convictions in state courts, litigants are being forced to pay more attention to the state courts as a forum for raising federal constitutional issues. Also, with the current make-up of the Supreme Court, it is likely that substantive federal constitutional protections will be very slow to expand beyond their current scope. As a result of these procedural and substantive considerations, litigants should consider using state constitutional provisions for attacking unfair statutes which regulate sexual behavior or speech. The United States Supreme Court has acknowledged that states are free to confer more freedoms on their citizens under their state constitutions than are currently afforded under the federal constitution. A decision concerning sexual privacy rights which is decided by a state court under both state and federal constitutions, as was done by the New Jersey Supreme Court in State v. Saunders, 75 N.J.200, 381 A.2d 333 (1977), insulates that decision from reversal by the United States Supreme Court. The doctrine of "adequate and independent state grounds" was expounded by Mr. Justice Brennan in Henry v. Mississippi, 379 U.S. 443 (1965), when he stated, "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds even where these judgments also decide federal questions." Id. at 446.

It is suggested that attorneys analyze state constitutions very closely to see what additional protections may be available under them. Furthermore, attorneys should avoid raising only federal constitutional provisions if there may be a corresponding state protection which applies. This will give a state court the option of deciding the case strictly on the state constitutional provision or on both state and federal grounds.

Priorities and Test Cases:

Appealing to the United States Supreme Court from a judgment of a state supreme court that refused to recognize a constitutional right for same-sex marriages seems to be putting the cart before the horse. See Baker v. Nelson, 409 U.S. 810 (1972), dismissing appeal from 291 Minn. 310, 191 N.W.2d 185 (1971). When it comes to cases involving marriage or child custody, the Supreme Court is very unlikely to recognize the rights of gay persons, at least at this time. When it comes to this area of the law, the Supreme Court will probably follow the popular trend rather than take a leadership role. An officer of the Supreme Court told my law associate recently that the Court was more interested in what state legislatures were doing in this area than what state courts were doing.

After the Supreme Court has recognized sexual privacy rights or first amendment rights of gays, it is more probable that other rights will be recognized. We should provide the Court with opportunities to grant plenary consideration in cases involving private sexual behavior or freedom of speech and association before seeking plenary review of more sensitive areas.

I suggest that one of our best chances for a favorable decision by the Supreme Court would be in a gay student organization case. The federal courts have developed a significant body of progressive decisions in cases involving the right of gay student groups on state university campuses to organize and receive university recognition. Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977), cert. denied 435 U.S. 981 (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Students Organization of Univ. of N.H. v. Bonner, 367 F. Supp. 1088 (D.N.H. 1974), aff'd, 509 F.2d 672 (1st Cir. 1974); Wood v. Davidson, 351 F. Supp. 543 (N.D. Ga. 1972). If the Supreme Court were to take such a case for full review, our chances of obtaining a favorable ruling from that Court would be significantly greater than if the Court reviewed a gay case involving military or tax law. Even the conservative members of the Court are likely to vote for a full review of such a student case. See Ratchford v. Gay Lib, 435 U.S. 981 (1978) (Rehnquist, J., dissenting) denying cert. to Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977) .

What I have attempted to do today is to demonstrate that securing gay rights through constitutional litigation involves much more than merely having a grasp on substantive constitutional principles. The procedures and strategy

used in each case are as important as the legal principles raised in briefs. Gay people have received little recognition of their constitutional rights. If we are going to secure that recognition in the near future, we must be more selective in our test cases, prepare our cases more thoroughly, use expert witnesses more often, and place more emphasis on state courts and constitutions.

Eventually, we will succeed in having the United States Supreme Court take a gay case, allow oral argument, and write an opinion. Whether that opinion is favorable or not to gay rights may depend, in large part, upon what cases we present to that Court and how thoroughly those cases have been prepared.

IMMIGRATION AND NATURALIZATION OF GAYS

Panelists: Robert DiPierro--Attorney, New York, New York

David Carlinger--Partner, Carlinger and Gordon, Washington, D.C.; General Counsel, American Civil Liberties Union

Robert DiPierro:

An alien attempting to enter the United States must overcome certain standards of excludability under § 212(a)of the Immigration and Nationality Act of 1952(8 U.S.C. § 1182(a)). Three of these standards are relevant to homosexuals: (1) exclusion on the basis of affliction with "psychopathic personality" or "sexual deviance" (subsection (4)); (2) exclusion because of a prior conviction of a crime involving "moral turpitude" (subsection (9)); and (3) exclusion due to conviction for two or more offenses with an aggregate sentence of five years or more, regardless of whether moral turpitude was involved (subsection (10)). Because homosexual activity is a crime in many nations, the question of excludability based on that criminal record is a prime concern of gays attempting to immigrate.

Another issue of concern to immigration authorities and relevant to homosexuals is the fact that people often marry solely to increase their chances of admissibility. Immigration benefits are bestowed upon immediate relatives, such as spouses, or on those with job offers for certain professions. This issue is relevant to gay women and men in that many of them are unmarried and would be free to marry an American citizen for the purpose of gaining admission. "Marriage" is not defined for immigration purposes; its definition is left to case law. Sixty percent of all aliens who are married to Americans and are attempting to enter the United States are suspected of having married solely for admissibility.

A third issue concerning gays is that, in order to be naturalized, an alien must prove "good moral character." The question of good moral character also arises when an alien's business visa expires and she or he becomes subject to deportation proceedings. The alien has the burden of proving good moral character. However, the term "good moral character" is not statutorily defined.

The current situation with regard to the excludability of alien homosexuals under § 212(a)(4) (the "sexual deviance" and "psychopathic personality" provision) of the Immigration

and Nationalization Act is unclear. This provision has been carried over from the 1950's, before the growth of modern psychological thought about sexual behavior. However, in 1967 the Supreme Court held in Boutilier v. Immigration & Naturalization Service, 387 U.S. 118 (1967), that homosexuals were persons afflicted with psychopathic personality within the meaning of the statute. This decision has been relied upon by the immigration authorities in excluding aliens suspected at the time of entry of being homosexual. Examples of evidence of homosexuality that have tipped off immigration officials are letters from lovers or gay synagogues. Interrogations frequently are made in these situations with little regard for the alien's Miranda rights.

Nevertheless, an alien accused of being lesbian or gay at the time of entry can request an exclusion hearing on the matter. If a hearing is requested, the Immigration and Naturalization Service (INS) must refer the matter of sexual deviance to the Public Health Service (PHS). The PHS disagrees with the INS' position that homosexuality is a form of sexual deviance and feels that this question should be left to current medical thinking. In a situation where an exclusion hearing has been requested, the PHS advises the alien to go ahead with his or her activities and the case is never brought before a judge. This practice of the PHS reflects an unwritten policy that is contrary to the INS's continuing policy of detaining aliens suspected of being homosexual. The tension between these two positions has not yet been resolved.

David Carlinger:

It is not necessarily true from the language of § 212(a) of the Immigration and Nationality Act that the terms "psychopathic personality" and "sexual deviation" refer to homosexuals. However, the legislative history of that statute provides a clearer answer. In an exchange of memoranda between the PHS and the Congressional Committee that took up the Act, the PHS made specific references that homosexuals were persons afflicted with psychopathic personality. However, the Ninth Circuit has held that the term "psychopathic personality" is void for vagueness. In Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), vac. and remanded on other grounds, 374 U.S. 449, (1963), a plaintiff resident alien, brought an action against the INS District Director to review an order that he be deported. Fleuti was charged with having engaged in homosexual conduct and thus being afflicted with psychopathic personality. The Circuit Court found for plaintiff.

Subsequent to the _Fleuti_ decision, the statute was amended to include the term "sexual deviation." The current controversy over the excludability of homosexuals rests on differing interpretations of this term, with the INS taking the position that homosexuals are included in the term. Because the legislative history refers to both homosexuals and "sex perverts," it is unclear whether homosexuals are legally distinguishable from perverts.

The procedure in a specific case is basically as follows. Before coming to the United States from a country other than Canada, an alien needs a visa. An alien applying for a visa goes to the American Consul's office to fill out a form. In that form, the alien is asked whether he is afflicted with sexual deviation; thus, the alien's initial problem is how to answer that question.

A citizen of Canada or an individual with the right to live there permanently does not require a visa. In meeting the Canadian at the border the immigration official raises questions such as the purpose of the Canadian's visit, but usually does not ask about sexual deviation. However, a Canadian can be subjected to a "physical inspection." The immigration official has no limitations on his power to inspect; apparently he may even read diaries or letters, although the alien or his attorney should challenge such an inspection. If matter is discovered suggesting homosexuality, the immigration official can raise the issue of sexual deviation.

A Canadian confronted with the issue of homosexuality has a dilemma. He can either ask for a hearing, or withdraw his request to be admitted to the United States. If a hearing is held and the Canadian is ordered excluded from the United States, the order of exclusion is put into the Canadian's record and he cannot re-enter for one year. Re-entry may even be difficult after a year, because the INS retains the Canadian's registration number. If the Canadian withdraws his request for a hearing, he usually is left with no record and is free to try to enter at a later time.

A celebrated case in Hawaii involved a well-known individual who was excluded for being homosexual on the basis of some correspondence. After the individual's detention received publicity, the INS decided that he was not homosexual and allowed him to be admitted. This case raises the question of how to treat an individual who has a homosexual preference but has not engaged in homosexual conduct. Arguably, such a person is not homosexual under the Act; however, this argument is troublesome for people who assert the right to be homosexual.

Efforts to challenge the constitutionality of the grounds for exclusion and deportation have been unsuccessful. For example, the Supreme Court recently held that it was not a denial of equal protection for the illegitimate children of fathers not to get immigration benefits while the illegitimate children of mothers do get such benefits. In addition, the Court has not permitted excluded communists to assert first amendment rights of speech and association. The Court repeatedly has said that Congress has absolute authority to decide who can be admitted. Thus, a constitutional challenge to the exclusion of homosexuals is unlikely to succeed.

However, a challenge to the exclusion of homosexuals might succeed on the basis of an attack on the statutory term "sexual deviant." The American Psychiatric Association (APA) has determined that homosexuality in and of itself is not an illness, but that one with conflicts about his sexuality could indicate the existence of "mental disorder." Nevertheless, "mental disorder" is not a ground for exclusion, because the PHS has excluded from the statutory term "insane" such common disorders as anxiety neurosis.

Many grounds for exclusion are subject to decision by the INS only--first by an inspector, then by the Immigration Board, then by the Board of Appeal, and finally by the courts. However, as to individuals subject to exclusion on medical grounds, including mental defects, their determination is made conclusively by the PHS. Such a decision is referred to a panel of physicians. Yet, despite this referral, a physician or psychiatrist has no way of knowing if an individual is homosexual unless the person says so.

Because of the conflict between the APA and the INS over homosexuality, psychiatrists in the PHS have mixed views on the issue. Many psychiatrists seek to remove homosexuality from the regulation but retain other types of sexual conduct, even though the term "sexual deviant" is not a psychological term. At present, the psychiatrists are awaiting a ruling from the General Counsel of the PHS as to whether they have the authority to make this change. At the same time, the INS continues to refer individuals to the PHS who simply are believed to be homosexual. The two agencies thus are at an impasse.*

*Since this panel discussion, the PHS has decided not to certify homosexuals as psychopaths or sexual deviants solely on the basis of their sexual orientation. However, the Office of Legal Counsel, Department of Justice, has instructed the INS to make the determination of homosexuality on its own and to exclude as psychopaths or sexual deviants those it identifies as homosexuals. But under the Carter Administration, INS procedures have been changed and immigration officials no longer inquire into the sexual orientation of aliens. The INS excludes only those aliens who make a voluntary declaration of their homosexuality. <u>See</u> <u>New York Times</u>, 9/10/80, p.A20.

ENFORCING GAY RIGHTS LEGISLATION

Panelists: Mathew Coles--Attorney, San Francisco, California; Adjunct Professor, Hastings College of Law; Member, Gay Rights Advocates, San Francisco

David Donaldson--Representative, Pennsylvania Department of Justice, Pennsylvania Council for Sexual Minorities

Joseph V. Stewart--Attorney, Washington, D.C.; Member, Anti-Sexism Committee, National Lawyers Guild

Mathew Coles: Drafting a Gay Rights Ordinance.

Many problems of enforcing a gay rights ordinance are best solved beforehand by proper drafting. The three main areas of concern in drafting are the coverage of the ordinance, its enforcement, and litigation based on the ordinance.

Whose actions can be covered? The municipality's actions are easily covered, and it is best to cover, in addition, private parties' actions, although this is not always possible. The problem is, powers of municipalities are set by statutes. In California, for instance, municipalities may only make laws as to the relation between citizens and the municipality as a whole. Some state statutes may preempt municipal gay rights laws altogether. Other state statutes may restrict the remedies a municipality can include in its ordinance. In general the ordinance must be tied specifically to a power granted to the municipality; there must be an extensive findings section to establish the relation of the municipality's power to the problem the ordinance seeks to cure.

What transactions should be covered? Be sure to include more than the obvious. In employment, cover discrimination by employers, but also by employment agencies and labor unions. Where there are closed shop contracts, if the ordinance doesn't bind the union's actions, it will be ineffectual. In real estate, cover rental and leasing, but also sales, improvements, occupancy, financing (women have had particular trouble getting financing), credit, and insurance. In business, covering businesses without specification may be construed as meaning only public accomodation (see Katzenbach v. McClung); include all businesses. In city services, include not just direct city services but those services or facilities indirectly supported by the city.

What kind of discrimination should be covered? First, discrimination on the basis of actual or supposed sexual preference. Be sure to include supposed so the victim is not in the position of having to prove that the discriminator knew the victim's sexual preference. Second, discrimination on the basis of outward manifestations of sexual preference: include this so a person cannot be fired merely for being swish or tough. Characteristics not tied solely to being gay (as black skin is tied to being black) may not be inherently covered in an ordinance which only names sexual preference. Also include something on causality, indicating how much the victim does have to prove.

Criminal enforcement means making discrimination a misdemeanor. Thus it will be enforced by the D.A., and the victims won't have to bring suit individually. The drawback is that D.A.'s don't always like gay people and may not consider this a priority item.

One civil remedy is administrative: set up a human rights commission with power to investigate, mediate and take cases to court. The advantages are that it may get results [as a government institution faster and more directly than an individual bringing suit], and it's less public than a trial. The disadvantages are that like any bureaucracy, the commission may become slow, inefficient and callous, and such a commission is expensive for the city to run. Another civil remedy is a civil cause of action. The advantages are that enforcement by the victim means no hassle with uncooperative prosecutors and no cost to the city. On the other hand it becomes slow and expensive for the victim, and damages may be so speculative as to discourage litigation. There are some possible cures to the above drawbacks. First, set a statutory penalty, such as a fine payable to the victim; make it small or variable so the victim can bring it in small claims court. Second, grant attorney's fees (but beware that authority for this is dubious). Third, grant standing for an action for injunctive relief to anyone, so that a gay rights group can file for an injunction on behalf of the victim.

There are other problems, too. A municipality may be empowered only to set up criminal enforcement, unable to grant private remedies. However, there may be a "private attorney general" function--this seems to be the case in Massachusetts. Although you may want to put in various enforcement methods and allow an election of remedies to the victim, be careful about putting in an invalid remedy, as this is an excuse for not passing the ordinance at all.

Practical litigation problems stem from the fact that anti-gay discrimination is different from discrimination based on race or gender, and thus Federal and state civil rights cases are not very adaptable to gay rights ordinances. When there is clear discrimination, such as a stated policy of discrimination on the basis of sexual orientation, it may be an easy case. But the employer may argue for a BFOQ, (bona fide occupational qualification) and judges listen to ridiculous arguments. For instance, an employer may argue that gay people are too irresponsible. To combat this argument (and the judge's bias) you must understand the job and prepare to show that there is no evidence that gay people are not qualified; the scarcity of studies makes positive showings difficult. Use non-law sources, such as sociological studies.

Subtle discrimination is harder to deal with and exists when a discriminatory employer gives a neutral reason for firing. Attack the neutral reason--this is like other discrimination cases. One possible argument is that the reason given has disproportionate impact on gays, thus violating the law even without intent. See Griggs v. Duke Power, 401 U.S. 424 (1971). Find out if there is disproportionate impact on gays; for example having to be married to get promoted or to get an apartment, or a ban on same-sex dancing. Then decide whether the unintended discrimination is prohibited; it is prohibited under employment statutes modeled on Title VII, but it is not clear whether it is prohibited under public accommodation statutes modeled on Title II. Be careful not to draft intent into the ordinance: prohibit discrimation "as a result of," not "because of," or "on the grounds of." The problem remains that disproportionate impact cases are proved by statistics which are often unavailable on gays. A ban on same-sex dancing is a good case, however. You can prove (and should be prepared to prove, however obvious it seems) that: 1) dancing is primarily a couples activity; 2) heterosexuals mostly dance with the opposite sex; and 3) homosexuals mostly dance with the same sex, Q.E.D.

In sum, don't be bound by old ways. Use creative litigation and careful drafting.

David Donaldson:

Having anti-discrimination legislation passed is, of course, very helpful, but since legislatures are often hostile, progress can be achieved much more quickly, at times, through the executive. A single person can have a major impact in this branch of government. While proposed legislation may never be implemented, or if it is, it may be applied only case by case, the executive order immediately affects all state employees, and possibly even parties contracting with the state.

In Shapp's second administration, he set up the Governor's Council for Sexual Minorities. (Credit should also be given to Mrs. Shapp, who took this as a pet project.) "Sexual minority" includes gays, transvestites and transsexuals. Some of the activities of the Council and the effects of the executive order have been--

*telling police how to work with the gay community. This helped end harrassment of gays by police at highway rest stops, and the police even started protecting gays from criminal activities;

*giving state employée units contracts with non-discrimination clauses, thereby providing regular grievance procedures;

*allowing gays working for state agencies to be less afraid of coming out at work;

*educating the public by, for example, printing pamphlets;

*reviewing state licensing requirements to be sure they conform to the non-discrimination order.

A council such as the one in Pennsylvania might also be able to influence the Attorney General by, for example, pressuring him or helping him to oppose sodomy laws in the legislature. If the A.G. is an elected official, gay rights can be made a bi-partisan political issue. The A.G. cannot declare a statute unconstitutional, but he can order the state law enforcers under his control not to prosecute or enforce the deviate sexual intercourse law on the grounds that he believes it to be unconstitutional.

Joe Stewart: The Washington, D.C. ordinance.

D.C. has had a human rights law since 1974, which includes sexual preference. The present law (1977 statute) covers discrimination in housing, employment, commercial space, public accommodation and educational institutions.

Under the D.C. law, a person who has been discriminated against goes first before an agency. If the agency finds there has been discrimination, the person goes before the human rights commission which may award damages, or before a court.

A study conducted by law students has shown that the law is very poorly enforced by the Office of Human Rights--in all areas, not just gay discrimination. Gay lawyers and law students have helped publish the results and organize groups to protest the neglect.

Questions:

Q. Are there any ideal statutes in force?

A. (Stewart). The D.C. law is good, just not enforced.

A. (Coles). The Berkeley law is good; if anyone wants a model draft, write to Coles at 540 Castro Street in San Francisco.

Q. Is "sexual status" a viable term to use in statute? Would it protect gay rights activists?

A. (Coles). It may speak only to the fact of sexual orientation, not to any action; it would not protect activists (e.g. at work). In general if the wording of a proposed statute seems inadequate, try to get some legislative history made covering the needed areas, so courts have something to interpret - it's better than nothing.

Q. What can be done in court about repealing ordinances?

A. (Coles). Try getting the court to consider an argument of discriminatory state action, with something more than the rational basis test.

Q. How prevalent are state preemption laws?

A. (Coles). States are rarely held to have dormant preemption, so a statute is necessary; however, criminal sodomy statutes do indicate legislative intent, so it would be far preferable to have them off the books before attempting, for instance, constitutional litigation.

Q. Is an executive order covering contracts legal?

A. (Donaldson). Yes, as far as state contracts, but it cannot cover a contractor's own private actions.

SECURING CHILD CUSTODY FOR GAY PARENTS

Panelists: Margot Karle--President, Lambda Legal Defense and Education Fund, Inc., New York, New York

Donna Hitchens--Director, Lesbian Rights Project, San Francisco, California

Bernice Goodman--Lesbian-feminist Psychotherapist, New York, New York; Co-chair, National Task Force on Gay Issues, National Association of Social Workers

Shephard Raimi--Attorney, New York, New York

Nancy Shilepsky--Counselor, Dykes and Tykes-Lesbian Mothers' Custody Center, New York, New York

Margot Karle:

Lesbian mothers seeking custody must be encouraged to provide the lawyer with extensive personal information. The lawyer must learn about the client's previous lovers (same or opposite sex) as well as the client's feelings about her sexuality and living arrangements. The client's reactions during the interview must be evaluated in order to decide how she will perform as a witness.

The lawyer will want detailed historical and medical information about the child, as well as detailed information about the client's income, education, family and social background. Similar information about the client's lover is essential; the lover may become the only issue in the case. In some cases, ex-lovers of the client's present lover have appeared and offered damaging testimony in support of the father.

Remedies: There are indications that out of court settlements are less frequent in cases involving lesbian mothers, but settlement is almost always preferable to trial. The client should compare sole custody with joint custody or a compensated time-sharing arrangement. The lawyer should distinguish between clients who really want sole custody and those who are ambivalent, but who feel guilty and are subject to pressures from relatives and friends. The client must make the decision as to what custody arrangement will be sought early because it will influence the rest of the litigation.

The lawyer should evaluate the client's resources, especially parental and community support. The client should develop emotional resources with the view that strong ties to the straight community may be important at trial. Clergy and school administrators make good character witnesses.

Pre-Trial Strategy: If the client has temporary custody, the lawyer should try to prolong the controversy because it is harder for courts to intervene in ongoing family relationships. Motions are especially useful for causing delay. A motion for support puts the father on the defensive. Since 42% of fathers default on support payments, the father may appear to be unfit as a parent. A motion to appoint a guardian ad litem will delay proceedings and, if a good guardian is appointed, may create another advocate for the client. A recent lesbian custody case in Massachusetts held a refusal to appoint a guardian to be a denial of due process. A motion for protective orders may require supervised or restricted visitation which will diminish the chances for the father to develop a relationship with the child. A motion to refer to a mental hygiene service is useful where a good one is available and the client will do well with a straight mental health professional. Similarly, the lawyer can move that the court appoint psychiatrists to examine all parties. Such delay tactics not only improve chances for winning custody battles, but also encourage the opponent to agree to a joint custody arrangement.

Also, the lawyer should keep in mind that a letter indicating the father's knowledge of the mother's preference may be a valuable addition to the separation agreement, because it will bar him from later arguing a change of circumstance.

Donna Hitchens:

Case law is of little use in custody cases because most states give the judge discretion to determine what is "in the best interests of the child." The determinative factor in cases involving gay parents is usually the presentation of the facts. Lawyers must keep the middle-class sexistbias of the courts in mind: A mother who works is seen as a bad mother; a father who does not work is seen as a bad father.

A lawyer must be prepared to educate the judge at trial. Some judges may have questions about the sexual behavior of lesbians. The lawyer must clear up misconceptions about child molesting, exhibitionism, etc. Judges

are often afraid that children may grow up with "confused" sex roles. Expert witnesses must be ready to testify about the "effects" of homosexual parenting. Judges fearing social stigma to the child often fail to consider the stigma which might result from the parent's religious choice. The lawyer must rebut such prejudices.

Two kinds of expert testimony should always be presented. The first involves personal interviews with the client and child by a mental health professional who will testify that they are happy and well-adjusted. The second involves more general expert testimony on homosexuality and the effects of gay parenting.

One extremely useful tactic is to challenge the qualifications of "experts" testifying for the opposition. They probably haven't read much about gay parenting, and are therefore less qualified to address the specific issues in the controversy than the witnesses testifying on behalf of the gay parent.

Beware that gay expert witnesses may be challenged as biased. Such witnesses should be warned prior to trial. The credibility of straight witnesses for the opposition may be similarly attacked.

Bernice Goodman:

The basic problem is bias. Bias is rooted in the historical importance assumed by the family for economic reasons. The advent of birth control and the population explosion give us new perspectives on non-reproductive sexuality.

We must provide needed social support systems for gay parents and their children. Gay households may be an attractive alternative to the traditional family, although the courts will not be easily convinced.

The courts must be convinced that homophobia is the social illness, not the lesbian lifestyle. Depriving the lesbian mother of custody is the real "crime." A recent Philadelphia decision which allows the mother visitation rights for one hour per month in the court nursery is, unfortunately, still the norm.

Perhaps other lesbian mothers should be called as witnesses to testify as to the results of lesbian motherhood. Nobody is more expert at raising children in a lesbian household than a lesbian mother and her children.

Shepherd Raimi:

Gay fathers are usually more concerned with visitation rights than with custody. Most cases in which fathers are denied all parental rights involve criminal convictions, alcoholism or drug abuse, or fathers who have been absent for long periods of time. Fathers wishing to retain visitation rights should be advised to maintain contact with their children and to take legal action, if necessary, as early as possible.

Custody disputes are often not fights for the children, but fights between angry parents. Clients should be counseled to abandon such motives and decide whether they really want the children.

Gay fathers have some community support groups, especially in New York. Clients should be encouraged to join such a group, which often plans group activities or outings to coincide with visitation days. None of the men in the New York group have full custody of their children.

The court's fear of gay sexuality may make the gender of the child an issue. Courts are more likely to allow gay fathers to spend time with their daughters than with their sons. Some courts have restricted visitation, allowing the father to see his children only while no other adults are present. "No other adults" is a euphemism for the father's lover.

Children, especially older ones, are being given more of a choice in custody contests. Their cooperation should be solicited.

Nancy Shilepsky:

There are an estimated 1.5 to 2 million lesbian mothers in the United States. As many as three out of ten lesbians are mothers. The Lesbian Mothers' Custody Center was established to address their needs. The Center provides counseling, legal referrals, and publicity, if needed. Straight lawyers may come to the Center for education on the issues surrounding lesbian custody. Counselors try to help clients decide how much they want to "come out" and how it will affect their futures. Many mothers are just coming out as lesbians when the marital problems leading to the custody dispute begin.

Some recent cases (Schuster v. Schuster and Miller) have been won on appeal by lesbian mothers in Seattle and Michigan. But few custody cases are appealed and they have little precedential value. The National Gay Task Force is also compiling cases on the issue.

PROPERTY DISTRIBUTION BY GAYS:

Problems of Trusts and Estates

Panelists: Helen Leeds--Attorney, New York, New York

Henry Weiss--Attorney, New York, New York

John Peschel--Professor, New York University School of Law

Helen Leeds:

Attorneys may be confronted with a variety of situations in which gay lovers have made no property arrangements. To take a real situation as an example, Jean and Jane are lovers in a small town who did not want others to know of their relationship. They contributed equally towards the purchase of land and construction of a house, but, instead of taking title jointly, they took title in Jane's name only. Such individual title is surprisingly common. When the relationship disintegrated, Jane rested on her title, and Jean was left in a poor bargaining position. This situation might have been ameliorated by alternate house-visiting arrangements; in practice, however, this remedy is unworkable. The best solution would have been a joint tenancy or tenancy in common. Generally, no one really cares if two people of the same sex jointly own property. The lawyer, when confronted with two gays who wish to buy property, should consider how best to protect each in the event that the unthinkable break-up occurs. Needless to say, this sort of advance planning is very awkward to effect.

A second actual situation involves two lovers, Bill and Bob, who bought two houses. Bill had more cash, while Bob had a greater income. Bob persuaded Bill to let him retain title in his name ostensibly to garner tax advantages. The lawyer representing both had suggested that they at least sign a paper indicating a joint interest, but he did no more to safeguard Bill. After Bill left Bob, Bob retaliated by insisting on his titular rights. Currently, Bob is wearing Bill down by approaching the brink of settlement and then reneging. The best remedy would have been a joint interest, or, alternatively, a contract marked by consideration and preferably containing an arbitration clause.

In a third situation, Jenny and Alice bought two houses and entered a partnership for the purpose of managing the second one. This was a mistake, since, in breaking up the partnership, the partners could not reach the assets until settling the partnership affairs. Furthermore, a very costly

and detailed cause of action in accounting was pursued. On the bright side, the judgment in the accounting action was a lever with which to gain a "separation agreement".

Henry Weiss:

Those buying a cooperative apartment should not place the ownership of the co-op in one name only because in New York City most co-op proprietary leases limit occupancy to persons specifically named or referred to therein. Since the leases refer to children and spouses but not lovers, a gay lover who is not named has no entitlement to occupancy.

Another problem encountered by gay persons is the anti-gay bias of laws relating to inheritance. "State-made" wills (intestate succession laws) provide for the spouse, but deprive the gay lover of any intestate inheritance. Therefore, a gay person should provide for his lover in a will, or else the lover will be totally cut off in favor of relatives of the deceased. A simple will is not, however, a failsafe. While making sure that tax advantages are utilized, that the parties understand and approve of the will, and that the will is stored safely, the lawyer must make special provisions for the contingency of a lover's incompetence. If this is not done, a court will appoint a conservator of the incompetent's assets, and this appointee is not likely to be the lover. Instead it will be the next of kin.

One solution is for lovers to exchange powers of attorney. Such powers can be created without an attorney's help. However, the attorney-in-fact must be trustworthy and fully knowledgeable of the incompetent's assets. The best solution is a revocable inter vivos trust ("housekeeping trust") in which the grantor names himself and his lover as the only trustees. If the grantor becomes incompetent, the lover can control the assets since hs is the other trustee. However, the grantor can control abuse of power by the trustee since he can revoke the trust and/or replace the trustee. Additionally, probate of the assets in the trust is avoided.

Other problems arise from the gay lovers' lack of protected legal status. Gay lovers cannot recover for wrongful death or loss of consortium. They are denied entrance into emergency rooms and intensive care wards as they are not next of kin. The gay couple must make known to their doctor that each is to be allowed into those areas.

Attorneys should not recommend adoption of a lover as a means of providing for the lover and of making certain

he receives the inheritance. If the relationship ends, the adoptee cannot be "disadopted". Furthermore, there is the danger of prosecution for incest.

Turning to tax savings, under the 1976 Tax Reform Act, a $175,000 estate passes tax free. However, gay lovers, unlike spouses, cannot take advantage of the $250,000 marital estate tax deduction. Gay lovers can transfer life insurance to the lover, and, as long as the lover pays the premium, the policy is not taxed as part of the estate of the insured decedent. Otherwise, the best tactic for avoiding the estate tax is to spend any wealth in excess of $175,000.

John Peschel:

In the area of trusts and estates, one problem involves contests of wills whose bequests have favored gay lovers over disapproving and perhaps greedy relatives.

The primary weapon employed by will contestants has been allegation and proof of undue influence. If lovers jointly make and execute their wills, the relatives can use this fact as ammunition for their allegations that the survivor unduly influenced decedent's dispositions. Courts exacerbate this problem for gays since they are hostile to "unnatural" dispositions.

To overcome these pitfalls and negate inferences of undue influence, it is best to create a "paper trail". If the question arises, disclosure of the gay relationship may well be helpful, as otherwise the witness might lose credibility. Fortunately, an "immoral" gay relationship does not per se establish that the participants in it were unduly influenced by each other. In fact, a disclosure should negate the inference of undue influence by showing that the bequest was motivated by love, not by fear or domination.

Questions and Answers:

Weiss and Leeds suggested that when one lover is a lawyer, undue influence problems should be avoided by selecting a neutral lawyer. Peschel pointed out that a will drafted by an unrelated attorney-legatee is highly vulnerable to attack on grounds of undue influence since often in such a situation undue influence is presumed. A gay lawyer, therefore, should not draft his lover's will.

Regarding joint tenancy, Weiss commented that this arrangement was a solution for joint purchases of real property, but not for infirmity and incompetence. Moreover, joint tenancy has a tax disadvantage: the entire joint property is taxed to the estate of the first to die unless the survivor can prove his own contribution. Peschel added that a joint tenancy in many states can be unilaterally terminated by one party through alienation of the property.

In addition, Peschel noted that one method of deterring will contestants is the inclusion of a clause providing that any person who challenges the will receives nothing from the estate. He cautioned that some states do not enforce such clauses. Weiss recommended the housekeeping trust. Leeds suggested that a series of similar wills can be a deterrent. If the latest will is successfully challenged, the next most recent will governs.

In response to a question concerning housekeeping trusts, Peschel warned that the grantor must make it clear that there is to be no successor, or at least no court appointment of the successor, if a trustee dies. Otherwise, upon the death of the grantor, the grantor's family can stymie the surviving lover. Peschel also suggested that gifts are preferable to bequests, since gifts remain at the lover's disposal if any dispute arises, while bequests are unavailable to the lover for some period even if no will contest arises, and if a contest does arise, they may be unavailable for several years.

LOBBYING STRATEGIES FOR GAY RIGHTS LEGISLATION

Panelists: Steven Endean--Executive Director, Gay Rights National Lobby, Washington, D.C.

David Thorstad--Spokesperson, Coalition for Lesbian and Gay Rights, New York

Hon. Jane Trichter--Member, City Council of New York

Steven Endean:

There are four categories of strategy: law and litigation, "embarassing the competition," information, and influence and pressure. This discussion will focus on the last two categories.

Of major importance is the subject of research and the dissemination of research results. Two major studies currently under way are particularly interesting. The first, "Operation Documentation," cites specific cases of discrimination against gay people. The second is directed at elected officials, and documents the fact that elected officials can enforce the rights of gay people and still be reelected. A major obstacle on Capitol Hill results from the widespread assumption that supporting gay rights is like committing political suicide. Elected officials do read these reports, and they can influence public opinion as well.

Personal lobbying has severe limitations but is vitally important. It is naive to suppose that one-to-one contact will necessarily change a legislator's mind without the constituent work behind you, but it can make a significant difference. One tactic is lobbying friends, though that may seem strange. But it is vital to get friendly members to support you.

Another tactic is the use of committee hearings. There is much debate concerning their value, but they are essential to the legislative process. They have a legitimizing effect, but they do not necessarily effect the outcome in the legislature.

Constituent influence and pressure is a most effective strategy. The movement, in its lobbying efforts, has largely ignored this. For one piece of state legislation a statewide effort was mounted, with mailings to 25,000 people

asking for their support. Supporters were identified by district; their influence was instrumental in getting the bill out of committee. The bill was narrowly defeated only because the opposition had a stronger constituent effort. A grass-roots movement needs to be developed over the coming years.

One way to do it is to enlist leaders of the communities. Another is through campaign contributions, an area where our movement cannot realistically get involved at this point. Contributions are beginning, and they're going to be very important. Educating the community is the most crucial thing, and a movement that proceeds without doing it is doomed to failure.

David Thorstad:

We must keep our goals in mind, and ask ourselves how lobbying may help us to achieve our goals. We hear much of short-term goals: being left alone; creating a sense of the gay community; getting a bill passed. We do not hear much talk about our long-range goals: to end heterosexism and restrictions on sexuality; to achieve sexual freedom for everybody. We must therefore build a broad-based movement with support from other oppressed groups; we need a multiplicity of ideas and tactics. Lobbying is only one tactic, and must never be relied on to the exclusion of militant public actions.

Politicians are the representatives of the status quo. They respond to power, not to reason. Lobbying is not a bad thing; in fact it is necessary. But it is in the realm of logistics only. Politics is dirty, whereas sex, or a rowdy demonstration, make you feel good. Politics is exasperating, but it probably cannot do any harm, and it can provide some insights, if it is subordinated to the needs of a mobilized community, it is not a vehicle for making secret deals, and lobbyists are accountable to those whom they are supposed to represent.

Lobbying becomes dangerous when elevated to the level of principal strategy. It diverts energy from useful organizing activity; it tends to shift focus onto the terrain of the enemy; and it fosters elitism, the kiss of death of a mass movement.

It's humiliating to appeal to politicians. Last year at City Hall the Mayor reneged on his promise to work for the gay rights bill. We should have responded to him with an obscenity, but that just is not done at City Hall. In

suits and ties we're not our real selves. We play by rules that are artificial, that hamstring effective action. People who refuse to play by the rules find themselves being denounced on TV as a lunatic or worse, a communist.

Nothing really important is ever changed by lobbying. It was the principal strategy in Dade County and it failed miserably. The Briggs initiative was defeated by a mass mobilization strategy.

Lobbying fosters elitism because it requires the selection of representatives, and despite the sincerity of the people involved, the rank and file begins to lose control. Efforts to build a movement are stifled. The media want "approved representatives": middle-class, well-dressed, well-spoken representatives. In this way the power-holders tame the movement.

This movement began with riots. Through mobilization, we are showing oppressed groups how to fight back against their oppressors.

Jane Trichter:

We want to change not only the words in legal books, but attitudes and the nature of society. The political process is one way to secure certain kinds of change, the kind that can change the environment in which other kinds are possible. Which comes first, changes in law or in attitudes? They are simultaneous.

Unlike most issues, this one has a very high emotional charge. It touches upon the personal fears and concerns of the people being lobbied. Legislators often don't try to make a reasonable decision; they just don't want to talk. They would prefer it if you were not there.

There must be a working relationship between the gay community and those legislators supporting the bill. Last year in New York, every decision was made by this kind of working group. Despite the defeat of the bill, this was a very successful, creative process.

All of the tactics must be employed: lobbying, information, media, and letter-writing.

There are three groups of legislators: those who are supportive because they think it's right or that their constituents do; those that oppose because of their beliefs or out of fear of political danger; and those who do not care and do not want to think about it. For this last group, it is not a moral decision, but a purely political one. This

requires organizing, not merely around the legislator but in the community. Too many legislators say, "There aren't any gay people in my district." They need to see hundreds mobilized in their district, ready to work for or against them in the next election. Most legislators believe in reelection above all else.

Important influences include money, support, volunteer troops, and threats backed up by real power. It is not enough to argue against discrimination on the basis of its injustice - though that should be enough. The most effective lobbying occurs when you can say, "Support our bill or we're going to throw you out of office."

Additional comments.

Endean:

It's true we don't rely on the good will of politicians, but it's not dirty if it helps them to understand us. Mass demonstrations - though they vent justifiable anger - are the politics of self-indulgence. Organizing and constituent effort is dull and boring, but it works.

Trichter:

One more essential ingredient is the election at every level of government of lesbians and gay men. Legislatures are like fraternities. A kind of dialogue that is otherwise impossible occurs among colleagues who sit and work together every day.

Questions from the floor.

Q. How devastating is it when a gay politician runs and loses?

A. (Trichter). You mobilize, you raise issues. Losing is no fun, but it's necessary to the process. Many in office now lost once first, or even twice. You win supporters, people vote for you.

Q. Demonstrations and lobbying accomplish nothing unless they deal with specific political problems: the ill-formed, unconscious attitudes of people. And, in the Marxist view, everything in bourgeois society is for sale, rights and privileges not less. You can buy these with campaign contributions.

A. (Trichter). This is a consumer-oriented society. Buying power is a tactic. There are concentrations of wealth within the gay and lesbian community. As to attitudes, you don't have to re-educate everybody; often just get the legislator to support you, for whatever motive.

Q. How can you organize constituencies besides supporting a candidate?

A. (Trichter). Run your own candidate. Raise the issue in public settings where the candidate will appear. Confront the candidate when there is no other way to get his attention.

Q. In Connecticut, the chairperson of the House Judiciary Committee was convinced when his cousin, who was gay, called him up. It's important to remember that tactic.

A. (Thorstad). Not everyone who opposes us at first is necessarily the enemy; they may simply not have the information.

A. (Trichter). Information is so important. The legislators need it to take out to their communities.

PROVIDING LEGAL SERVICES TO THE GAY COMMUNITY

Panelists: William Thom--Founding Member, Lambda Legal Defense and Education Fund, Inc., New York, New York; Partner, Boggan and Thom, New York, New York

George Terzian--Legal Counselor, Gay and Lesbian Community Services Legal Clinic; Private Practice in New York, New York

Judith Holmes--Partner, Feminist Law Collective, Washington, D.C.

William Thom:

Lambda was founded in October of 1973 after the founding members won a one and a half year court battle over whether such a gay rights organization could be given permission to incorporate as a charitable not-for-profit organization. (Matter of Thom, 33 N.Y.2d 609, 301 N.E.2d 542, 347 N.Y.S.2d 571 (1973), rev'g. 40 A.D.2d 787, 337 N.Y.S.2d 588 (App. Div. 1972).) The board of directors has representatives from many different states including California, Illinois, Virginia and New York. Lambda was created to provide free legal services in those cases where gay rights are involved and where the outcome is likely to have an impact on gays as a group. As such Lambda is not a legal aid society for gays and is very selective in its choice of cases. Although the educational functions of Lambda have not yet fully ripened, the organization has printed pamphlets and held seminars on gay legal issues.

Lambda has taken on a broad range of cases. Several have involved child custody and visitation rights, and Lambda has won all of these. Other cases have involved immigration law. In one immigration case the Immigration and Naturalization Service tried to deport a homosexual alien who had applied for citizenship. The case is still at the administrative stage and Lambda appears to have successfully stalled the deportation attempt. (Matter of Morales.) Lambda has also challenged sodomy statutes. It represented a North Carolina man who had been entrapped by police into having consensual sex with a 17 year old Marine. (Enslin v. North Carolina.) Despite the outrageous conditions of the arrest, the federal courts were unwilling to entertain a challenge to the state sodomy statute because of the Supreme Court's summary affirmance in Doe v. Commonwealth of Virginia, 425 U.S. 901 (1976), aff'g.

403 F. Supp. 1199 (E.D. Va. 1975).

Lambda is currently involved in its most burdensome and costly lawsuit--a challenge of the federal prison policies which exclude gay publications from the federal prisons. (National Gay Task Force, et al. v. Carlson.) The policy has been applied arbitrarily and is very vague. It is not clear whether it is meant to apply to all literature by gays, about gays, or simply that which includes gay sex advertisements. The government has been totally uncooperative (it delivers cartons of documents in response to discovery requests), but Lambda believes the Government will eventually settle with an agreeable stipulation.

Lambda was also involved in an important students rights case where the court practically said that same sex dancing is covered by the first amendment. (Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir.), aff'g. and modifying 367 F. Supp. 1088 (D.N.H. 1974). Lambda has, in addition, been representing former Ensign Vernon E. Berg III in his challenge to his discharge from the Navy for homosexual conduct. (Berg v. Claytor.)

In taking these and other cases Lambda depends on cooperating attorneys. Cooperating attorneys are not reimbursed for their services, but Lambda pays all litigation costs so that the client does not bear the financial burden. All lawyers who are available to act as cooperating attorneys should contact Lambda.

George Terzian:

The Gay and Lesbian Community Services ("GLCS") Legal Clinic was founded one and a half years ago and was an offshoot of the Mattachine Society's legal clinic which had ceased functioning about half a year before. The GLCS legal clinic was established because there were no free legal walk-in services available to the gay and lesbian community.

In February of 1978 the I.R.S. granted the clinic tax-exempt status, making it the first nonreligious tax-exempt organization with the word "gay" in its name. Contributions to the clinic are tax-deductible and are its sole source of funding.

Clients are charged nothing for the services and the attorneys attempt to handle all legal problems on the spot. The attorneys operate mostly on the level of crisis intervention, referring those who need ongoing representation to outside attorneys. Referrals are made to

attorneys who are gay or sympathetic to gay issues and who are competent yet inexpensive. If some of the client's difficulties relate to psychological or employment problems, the attorneys can recommend the psychological counseling or job counseling clinics that GLCS also offers. The clinic attorneys do not accept any of the clients for ongoing representation and do not receive referral fees.

The clinic deals with a wide variety of cases, but most involve criminal offences and most of those criminal cases concern arrests in subway men's rooms on charges ranging from loitering to consensual sodomy. The attorneys advise the clients arrested for loitering that the charge is less serious than it might seem since it is only a "violation" in New York. Those who plead guilty generally receive no more than a $25.00 fine, and no fingerprints are kept. For more serious charges such as consensual sodomy (a class B misdemeanor in New York) clients are told they may be able to get an adjournment in contemplation of dismissal (an "ACD") as long as they have not been arrested before, are currently employed, and have roots in the community.

The clinic attorneys also advise clients on declaring bankruptcy, informing them, for example, that bankruptcy does not necessarily expunge all debts and that bankruptcy may be declared only once every six years. Other common cases involve landlord-tenant problems, matrimonial problems, job discrimination, partnership agreements, the rights of alienated lovers, social security and unemployment benefits, and the filing of tax returns. The clinic is virtually a legal supermarket.

The attorneys strive for a casual, nonintimidating atmosphere that allows clients to feel as though they are talking with peers. The clinic is open one night a week and averages eight to ten clients each time. Many clients use the clinic more than once.

Judith Holmes:

The Feminist Law Collective is a law firm that was founded in 1976. On the surface the collective is similar to a traditional law firm because it is not funded and runs entirely on its own fees. The comparison ends there, however. The collective is nonhierarchical and salaries are based on need. Legal fees are calculated on the basis of a sliding scale. The political content of the cases is very important to the members of the collective, and we hold regular meetings outside the

office to discuss this facet of our work.

The collective is not specifically a "gay" law firm, although the five of us who work there now are lesbians. The principal prerequisite is simply that each member be a committed feminist. At the same time the collective does have a "gay" practice in that many of the clients are gay and many of their problems involve gay issues. The cases the collective accepts involve issues such as child custody, job and housing discrimination, real estate, and relationship problems. The collective represents most of the feminist businesses in Washington, D.C.

Besides the ordinary legal problems we work on, we also take a number of political cases, some of which are related to gay issues. The fees for political cases are set lower than the lowest ordinary fees and are based on the collective decision of the members. One of these political cases is a suit we are working on with Lambda Legal Defense and Education Fund challenging the federal prison policy of excluding gay publications. We have also been providing support work in women prison cases, military discharge cases, and union organizing. In addition we are working with women's study groups and the local chapter of the National Organization for Women.

The basic concept behind the collective is that of being able to do one's own political work from one's own economic base. Political work that is independent of foundations and the government for funding can have potentially the greatest impact on the legal system. Those thinking of starting a collective practice should consider two pieces of advice: First, you should find other people with whom you want to work and with whom you are politically compatible. Second, in forming a collective you should discuss all possible problems and differences that could come up between the members of the collective and lay out ways of dealing with them.

In closing, it is important for law students to remember that law in inherently reform oriented and that lawyers will not cause a revolution. The crucial work of lawyers often consists of holding the line against rightist pressures. This sort of work can often be frustrating, and it is important to work with people who can provide significant support.

For more information on the Feminist Collective, send to 509 C. St. N.E. Washington, D.C., 20002, for the "Statement of Purposes," a document written for the collective before it opened in 1976.

CONCLUDING ADDRESS: The Role of Lesbian and Gay Lawyers

Donna Hitchens--Attorney, San Francisco, California; Director, Lesbian Rights Project, San Francisco

One of the purposes of our system of laws and government is to protect oppressed people. However, contrary to the view expressed by Attorney General Robert Abrams in his opening address, the system has not always functioned that way in practice. American law and government are closely tied to our economic structure. The powerful are those who have money, and money influences our government. The economic structure requires that certain groups be oppressed, and to be oppressed they must be disenfranchised from the power structure of law and government. This is not to say that it is terrible to be a lawyer merely because lawyers work within the system. We are needed as lawyers, but we must be sure not to perpetuate the myth that the legal system will solve the problems of all oppressed people.

The underlying obligation of lesbian and gay attorneys is to serve the lesbian and gay community. Just ten years ago lesbians and gays gave up easily when their jobs were threatened, their children were taken, or they were evicted by their landlords. Things have changed dramatically since then, and we no longer quietly step aside in the face of adversity. Many lesbians and gay men have taken great risks. Some have suffered and some, occasionally, have won. The rest of us have reaped the benefits of their struggles and indeed, this very conference was possible only because of their victories. We owe something to those who made it possible for us to meet here today.

Our obligation to serve the lesbian and gay community can be fulfilled in a number of ways. On one end of the spectrum, those of us who are economically able can donate money to public interest law work. At the other extreme we can dedicate our entire practice to serving the lesbian and gay community. There are, of course, many options in between. In all of these roles we, as lawyers, must recognize the interrelationships between the oppression of gay people and the oppression of other groups. We must build coalitions with these groups because we have a common enemy that survives by pitting us against each other. But to build these coalitions we have to recognize the racism, sexism, ageism, classism and discrimination against disabled

people that exists in our movement as well as in society. Eliminating prejudice and bigotry is a process that does not end, and our movement cannot afford to stop working on these issues. We must recognize what our struggle has in common with the struggles of other groups as well as the ways in which it is different. It is annoying, for example, to hear people say our movement is just like the civil rights movement. Similarities exist, but there are also major differences. One of these differences is that there are many choices available to us that are not available to black people. We can all grow from these differences, but only if we recognize them.

The oppression of women and the oppression of lesbians and gay men have several bases in common. One example is the professed aim of protecting the American family and of preventing children from being molested. The claim that gays are dangerous because they are child molesters is sexist. The fact is that 25% of all women are sexually abused before they reach 18, and most child molesters are straight men. Yet the anti-gay forces seem only concerned with boys who are molested by gay men. John Briggs, for example, the sponsor of the anti-gay teachers amendment in California, admitted in an interview with the Los Angeles Times that most child molesters are heterosexual adults. But he maintained that child molesting by homosexuals is especially evil because "it is not only a crime of rape, it is a crime against nature. If a man rapes a woman it is an act of passion." Conceding that heterosexual rape is not good, he went on to say, "But that is an act that in my opinion is deemed to be within the biological function of a man and a woman." The prominence of this view leaves no doubt that in this society it is considered normal and natural to abuse women and female children sexually. People do not get worried about sexual abuse unless the victims are boys or men.

As lawyers, lesbians and gays have four unique roles. First, we have a special capacity for understanding and representing lesbian and gay clients. In deciding on the appropriate strategy for these cases, a balance often must be struck between the interests of the individual client and the interests of the gay rights movement. The danger of setting bad precedent, for example, must be taken into account. At the same time, it is important for us to question our own motivations and to be sure that we are not accepting cases or appealing decisions for the sake of satisfying our egos. Too many lesbian and gay lawyers have appealed decisions simply for the publicity and without regard for the possible negative consequences. In representing lesbians and gays we also must take into account the need for communication and solidarity between

ourselves as attorneys. Creative strategies are frequently needed, and by sharing ideas and information we have the best chance of developing strong cases.

The second important role we have as attorneys is that of sharing our knowledge and skills with the lesbian and gay community generally so as to help demystify the law. We have an obligation to explain clearly to our clients what their rights are and what risks they will be taking and then to allow them to make their own decisions.

Our third role is that of educating lawyers and judges. They have the same biases as the rest of the people in our society and we need to educate them in ways other than through trials. We need to make our views known in bar association meetings, and we should supply speakers and set up panel discussions on lesbian and gay issues.

Our fourth role is that of lobbying and helping to draft and establish favorable legislation. This is a role we share with many nonlawyers, but still it is one in which our assistance is particularly helpful. In all of these roles it is important for us to know the enemy and for us to understand what sorts of arguments will be acceptable to the audience we are addressing. We cannot, for example, expect to successfully combat emotional arguments with rationality.

A song by Meg Christian and Holly Near suggests the power of persistence in efforts to bring about social change:

Can we be like drops of water
Falling on the stone,
Splashing, breaking, dispersing in air,
Weaker than the stone by far. But be aware
That as time goes by,
the rock will wear away.

And the water comes again.