TECHNOLOGY USE AND THE GAY MOVEMENT FOR EQUALITY IN AMERICA

PHILIP C. AKA*

INTRODUCTION

Although the United States declared equality and freedom to be among the lodestar principles animating its birth and foundation,[1] the new republic, in its evolution, stressed freedom at the expense of equality. The Bill of Rights incorporated into the U.S. Constitution[2] left out equal protection under

---

* Professor of Political Science, Chicago State University; Vice Chair, American Bar Association Committee on International Human Rights; Member of the Illinois Bar. J.D., Temple University School of Law; LL.M. Candidate in International Human Rights Law, Indiana University School of Law, Indianapolis; Ph.D., Howard University. Dr. Aka has lectured and published extensively on issues relating to human rights and American constitutionalism. His recent publications in these fields include *Assessing the Constitutionality of President George W. Bush's Faith-Based Initiatives*, J.L. SOC'Y (forthcoming 2008); and *The Supreme Court and the Challenge of Protecting Minority Religions in the U.S.*, 9 SCHOLAR: ST. MARY'S L. REV. MINORITY ISSUES 343 (2007). This Article is a revision of a paper for a seminar course in law and technology, taught by Professor J. Bruce Shelkopf, that the author took in fall 2005, under the auspices of the program in International Human Rights Law at Indiana University School of Law. Dr. Aka gratefully acknowledges the editorial staff of the *Capital University Law Review* for their magnificent labor in editing this piece.

[1] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *reprinted in* MELVIN I. UROFSKY & PAUL FINKELMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 55 (2d ed. 2002) ("W[e] hold these [t]ruths to be self-evident, that all [m]en are created *equal*, that they are endowed by their Creator with certain *unalienable [r]ights*, that among these are [l]ife, [l]iberty, and the [p]ursuit of [h]appiness . . . ." (emphasis added)).

[2] The Bill of Rights consists of the first ten amendments to the U.S. Constitution. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 446 (2d ed. 2005). These amendments encompass a multiplicity of guarantees that include, inter alia, freedom of religion, speech, press, association, and assembly, U.S. CONST. amend. I; freedom from unreasonable searches and seizures, U.S. CONST. amend. IV; freedom from self-incrimination, double jeopardy, and due process, U.S. CONST. amend. V; rights of accused persons in criminal prosecutions, U.S. CONST. amend. VI; and right against cruel and unusual punishments, U.S. CONST. amend. VIII. Although integrated into the Constitution, the Bill of Rights was ratified in 1791, four years after the ratification of the main document in 1787. *See* David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1839 (1987).

the laws.[3] It took the ratification of the Fourteenth Amendment in 1868[4] to correct this anomaly.[5] The Fourteenth Amendment guaranteed multiple rights

---

[3] *See* STEFFEN W. SCHMIDT ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY 50 (2005–2006 ed.). In explaining this omission, Professor Schmidt speculated that the protection "was not commonly regarded as a basic right at that time." *Id.* But other commentators, as we would expect, provide alternative explanations. *See, e.g.*, CHEMERINSKY, *supra* note 2, at 446. According to Professor Janda and his colleagues, in the United States equality and freedom are conflicting, rather than complementary, political values. KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY 20 (8th ed. 2005). "When forced to choose between [freedom and equality] . . . Americans are far more likely to choose freedom over equality than are people in other countries." *Id.* A recurrent theme in the JANDA ET AL. text is that "[t]he conflicts among freedom, order, and equality explain a great deal of the political conflict in the United States." *See id.*

[4] *See* JANDA ET AL., *supra* note 3, at 514.

[5] This normalization process started in 1865 with ratification of the Thirteenth Amendment, *see id.* at 513, which forbids slavery and involuntary servitude. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."). Talk of equality for African Americans would have been premature or made little sense without the abolishment of slavery. So, even though a tension exists between freedom and equality, *see* JANDA ET AL., *supra* note 3, the Black experience in the United States bears out those two political values as complementary or at least interconnected. Along with the Fourteenth and Fifteenth Amendments, the Thirteenth Amendment makes up what is known as the Civil War Amendments. Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1055 (1993). The Fifteenth Amendment, ratified in 1870, stipulated, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. The Amendment effectively gave black males the right to vote. *See id.*; U.S. CONST. amend. XIX, § 1 (extending the right to vote to women). The Fifteenth Amendment started a process of progressive expansion of the U.S. electorate that two other amendments completed. *See* U.S. CONST. amend. XIX, § 1; U.S. CONST. amend. XXVI, § 1. The two amendments were the Nineteenth Amendment (1920) and the Twenty-Sixth Amendment (1971). The Nineteenth Amendment gave women nationally the right to vote. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). The Twenty-Sixth Amendment extended suffrage to eighteen-year-old citizens. U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

that include "equal protection of the laws,"[6] the guarantee of especial interest in this Article.[7]

Beginning with African Americans, minority groups in the United States have taken advantage of the equal protection clause to fight for equality.[8] Besides African Americans, minority groups that have struggled for equality include: women,[9] Native Americans,[10] Hispanic Americans,[11] persons with disabilities,[12] and elderly Americans.[13] One of the latest groups in the post-civil rights era to engage in its own struggle for equality are homosexual Americans.[14] It is not difficult to see why gays would put a high premium on

---

[6] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Supreme Court applied this guarantee to certain actions of the Federal government as well, but under the rubric of the Fifth Amendment stipulating that no person shall be "deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V; *see, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("Segregation in public education . . . imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.").

[7] The other guarantees embodied in the Fourteenth Amendment include: citizenship rights for "[a]ll persons born or naturalized in the United States," enjoinment of any laws that "abridge the privileges or immunities of citizens of the United States," and "due process of law." U.S. CONST. amend. XIV, § 1.

[8] *See* JANDA ET AL., *supra* note 3, at 513–25 (discussing the stages in the African-American struggle for equality from enactment of the Thirteenth Amendment to the period of the civil rights movement in the mid-1960s).

[9] *Id.* at 533–38 (analyzing the stages from "protectionism" to demand for an equal rights amendment that formed the women's movement in America). "Protectionism" refers to laws supposedly meant to protect women as the "weaker" gender but, in actuality, discriminated against them. *Id.* at 533.

[10] *Id.* at 526–27.

[11] *Id.* at 527–30.

[12] *Id.* at 530.

[13] *See* SCHMIDT ET AL., *supra* note 3, at 172–73 (discussing programs and legislation enacted to help senior citizens with problems unique to their group). The use of the past tense—*struggled*—in referring to these groups can be presumptuous given that the term implies a done deal when for some of these groups, such as Blacks, Native Americans, and women, the campaign for equality is still anything but mission accomplished. *See infra* note 104 and accompanying text (referring to the African-American experience); *see also* Philip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417, 458–62 (2006) (documenting ongoing violations of Native American human rights).

[14] *See* JANDA ET AL., *supra* note 3, at 530–33. Consistent with the practice in the literature, I define homosexual Americans to include gay men, lesbians, bisexuals, and transgendered persons (GLBT). *See, e.g.*, Charles W. Gossett, *Lesbians and Gay Men in the Public-Sector*

(*continued*)

equality. Like for other minority groups, equal protection under the law forms the basis for combating the discriminatory treatments homosexuals face in U.S. society.[15] In addition to the general problem of discrimination that all U.S. minorities share in common, the public perception of homosexuality as sinful or abnormal behavior is a problem unique to gays that they need equal protection to change.[16] In short, for gays—perhaps arguably more so than for any other single minority group—equality holds the key to better respectability and dignity of homosexual personhood which makes gay equality also a human rights issue.

Although, as indicated, this Article deals with the gay struggle for equality in America, its main focus is on gay application of technology in the struggle for that equality. If equality constitutes the highest value that gays crave and work for, it is only natural that they will deploy every arsenal within their means to achieve that purpose. Those tools will necessarily include modern or available technology.[17] Put somewhat differently, for

---

Workforce, *in* PUBLIC PERSONNEL MANAGEMENT: CURRENT CONCERNS, FUTURE CHALLENGES 70, 70 (Norma M. Riccucci ed., 4th ed. 2006). As Part II, *infra*, makes clear, this is a topic of many acronyms. I do my best to minimize their use. I also stay away from the constant reference in the literature to "gay men and lesbians" or "lesbians and gay men." Instead, for terminological convenience, I use the term "homosexuals" or "gays." Unless the passage suggests otherwise, each term should be understood to include all four categories or groups without exception. I admit that the terms do not sound value neutral, but perhaps no less so than the rest of the gamut of terms that have evolved to describe homosexual persons, including among others, "same gender loving," "two spirits," "queer," "men who have sex with men" (MSM), and "down low." *See* Gossett, *supra*, at 71. So not only do I adopt the terms for terminological convenience, I also use them only descriptively. Transgenders consist of (1) transsexuals (persons who have altered or are contemplating altering, through surgery or hormone therapies, their biological sex to match their gender identity); and (2) cross-dressers or transvestites (persons who choose to dress as a member of the opposite sex, either regularly or occasionally, but do not contemplate surgical alteration of their bodies). *Id.* at 71–72.

[15] *See* Tracy T. Kenton, Note, *Quasi-Suspect Status for Homosexuals in Equal Protection Analysis:* Equality Foundation of Greater Cincinnati v. City of Cincinnati, 12 GA. ST. U. L. REV. 873, 873–74 (1996) ("The Equal Protection Clause may be viewed as 'a tool for overturning those injurious legislative acts, judicial decisions, and executive or administrative choices that are motivated by racial or other unacceptable types of bias.'" (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, 1515 (2d ed. 1988))).

[16] *See* Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 287 (1992).

[17] Technology consists of scientific methods and materials or the application of science. THE AMERICAN HERITAGE DICTIONARY 830 (3d ed. 1992); *see also* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1872 (2d ed. 1979) (definition

(*continued*)

gays, the highest purpose technology could serve, if it serves any purpose at all, would lie in its utility for equality promotion.[18] If gays and interest groups who lobby for them seek not just equality but equality to its fullest scope, it is natural to expect that they will use every available means designed to achieve that end, including technology. But one does not get this sense poring over the scholarly literature relating to gay application of technology. Instead, the suggestion in that literature is that gays use modern technology, such as cyberspace, to shield their homosexuality from societal intolerance, taking advantage of the anonymity and other benefits or utilities that this technology affords.[19] This Article challenges the conventional wisdom

---

of technological). Technology can be an end in itself, as the Webster's Dictionary definition connotes. But in the sense I use it, "technology" is an application designed to further an activity or achieve a desired end, such as here, the goal of equality.

[18] Not only do homosexuals and interest groups advocating for gay rights crave equality, they also insist, as they should, on equality to the fullest scope. *See infra* text accompanying notes 292–95. Thus, Parents, Families, and Friends of Lesbians and Gays (PFLAG), one of many gay interest groups whose work is highlighted in this Article, *see* discussion *infra* Part II.F, phrased its agenda in terms of "*full* equal rights and protections," PFLAG, FAQs/Facts, http://www.pflag.org/FAQs_Facts.pflag_faq.0.html (last visited Aug. 21, 2007) [hereinafter PFLAG, FAQs] (emphasis added), and "*full* inclusion" for homosexuals, PFLAG, Vision, Mission and Strategic Goals, http://www.pflag.org/Vision__Mission_and_Strategic_Goals.mission.0.html (last visited Aug. 21, 2007) [hereinafter PFLAG, Vision] (emphasis added). Specifically, the organization disclosed that it seeks to create a society wherein all gay persons "may enjoy, in *every aspect* of their lives, *full* civil and legal equality and may participate *fully in all the rights, privileges and obligations of full citizenship* in this country." PFLAG, Vision, *supra* (emphasis added). It is the same insistence on full-scope rights that arguably drives the campaign for gay marriage. *See* Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 114–15 (1996). Human Rights Campaign, another group whose work is highlighted in this Article, *see* discussion *infra* Part II.B, still insists on marriage for gays, HRC, What We Do: The Human Rights Campaign and the Human Rights Campaign Foundation, http://www.hrc.org/Content/NavigationMenu/About_HRC/What_We_Do_HRC.htm (last visited Aug. 21, 2007) [hereinafter What We Do], even though it is fully cognizant that "'going for marriage is like shooting for the moon. It's our hardest issue . . . .'" John Cloud, *For Better or Worse*, TIME, Oct. 28, 1998, at 43, 43 (quoting Elizabeth Birch). Finally, it was the same insistence on nothing short of full-scope rights that Justice Scalia, in a different context, adverted to in his dissent in *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting); *see also infra* notes 200–01. Justice Scalia complained that homosexuals are committed "to achieving not merely a grudging social toleration, but *full social acceptance, of homosexuality*." *Romer*, 517 U.S. at 646 (emphasis added).

[19] *See* discussion *infra* Part III. For the definition of "cyberspace," see *infra* note 312.

regarding gay application of technology and presents an alternative interpretation that, although more complicated, is also more complete and realistic. Beginning with an update on the gay movement for equality, the Article goes beyond that limited focus to examine the relationship between equality and technology, or, put differently, the use of technology to promote equality. The Article's main import and basis of contribution, above all else, is interpretive. By questioning the completeness of the conventional wisdom and model, the Article contributes to improved understanding regarding the application of technology in the gay campaign for equality in America.

This Article has four main parts. Part I presents the latest update on the gay struggle for equality. Part II surveys the gay and non-gay interest groups that advocate for homosexuals, along with their methodologies and technology use. Part II is material in the "middle" between the update embodied in Part I and Part IV incorporating the argument of the Article. It complements the background discussion in Part I, but at the same time it goes beyond that account to anticipate the indictment of the conventional model finally presented in Part IV. The relevance of Part II is borne out in the fact that the conventional model, in its exclusive focus on individuals, omits to discuss the contributions of numerous interest groups who work tirelessly to promote equality for gays. Part III presents the conventional wisdom and model regarding the use of technology by gay persons, focusing illustratively on the work of Professor Stein and Judge Sporkin's opinion in *McVeigh v. Cohen*.[20] Part IV analyzes the trouble with that model in four components that include: an articulation of five factors that render that view inadequate and unacceptably incomprehensive; an analysis of the district court's decision in *McVeigh* as exemplification of the trouble with the conventional model and wisdom; and an examination of the question whether technology makes a decisive difference for gays in the pursuit for equality.

I. LATEST UPDATE ON THE GAY STRUGGLE FOR EQUALITY IN AMERICA

This Part presents a prelude and background history on the gay struggle for equality in America. The account is necessary both to start the story from the beginning as well as for proper understanding of the nature of the use gay persons and interest groups advocating for gays have made and still make of technology in the gay movement for equality. The discussion comprises three integral elements, namely, Stonewall and its aftermath; victories won in the course of the struggle; and what I denominate as unsteady progress in the

[20] 983 F. Supp. 215 (D.D.C. 1998).

struggle. As already indicated in the introduction, note that Part II, dealing with gay advocacy groups, continues and complements the survey started here. However, because Part II also goes beyond background history to anticipate the criticism of the conventional model that I present in Part IV, it is kept separate.

A. Stonewall and Its Immediate Aftermath

The movement for gay equality predated 1969.[21] However, by conventional wisdom, the event that signaled the birth of the modern gay movement[22] is a bout of protests known as the Stonewall riots.[23] The protests occurred at the Stonewall Inn, located in Greenwich Village in New York, which was a gay bar that police frequently raided.[24] On the night of June 27, 1969, when the New York police began their customary raid of the bar, the now-fed-up patrons resisted arrest, resulting in clashes with the police that

---

[21] *See, e.g.*, NEIL MILLER, OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT 112 (1995).

[22] The position of Professor Epstein is that there is no one unified homosexual movement in the U.S., but rather, numerous movements. *See* Steven Epstein, *Gay and Lesbian Movements in the United States*, *in* THE LANAHAN READINGS IN THE AMERICAN POLITY 560, 561 (Ann G. Serow & Everett C. Ladd eds., 2d ed. 2000). According to Epstein, "One of the most noteworthy aspects of gay and lesbian movements in the United States is the *proliferation* of political beliefs, practices, and organizations that often *compete* with one another to be perceived as legitimate and preferred." *Id.* Epstein referred to two core U.S. national institutions: the gay demand for inclusion in marriage and the military. *Id.* at 567–68. Beginning with marriage, some gays:

> saw "family" issues as the cutting edge of movement politics; for them, gay marriage was the single most important marker of progress. To others, however, the "aping" of heterosexual marital institutions was a betrayal of radical liberationist and feminist critiques of traditional models of gender, sexuality, and the family and reflected an unfortunate desire to assimilate into the mainstream.

Id. at 568. With respect to inclusion in the military service, some gay people saw that inclusion "as the pivotal step in the march for equality and genuine citizenship." *Id.* Others, however, "questioned gay support for a historically misogynistic, racist, and homophobic institution that acted in the interest of U.S. imperial ambition." *Id.*

[23] *See* SCHMIDT ET AL., *supra* note 3, at 175.

[24] *Id.*

lasted for two nights.[25] The event marked the "shot heard round the homosexual world."[26] "Gay power" graffiti sprouted in New York, and gay rights groups formed in other major U.S. cities following the Stonewall riots.[27] The riots also created a new assertiveness by homosexuals unable to maintain their identity inside the closet.[28] Before Stonewall, the stigma attached to homosexuality and the fear of exposure kept most homosexuals securely inside the closet,[29] but this was no longer the case after the riots.[30] Many of today's gay advocacy groups, surveyed in Part II below, came into existence following the Stonewall riots.[31] Subsequent events in the course of

---

[25] *Id.*; Columbia University Libraries, Stonewall and Beyond: Lesbian and Gay Culture, http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html (last visited Aug. 21, 2007).

[26] SCHMIDT ET AL., *supra* note 3, at 175; *see also* Columbia University Libraries, *supra* note 25.

[27] *See* SCHMIDT ET AL., *supra* note 3, at 175.

[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See* discussion *infra* Part II. This is not to suggest that there were no gay advocacy groups before 1969. To the contrary, opposition to gay-bashing is as ancient as discrimination directed against gays. For example, in 1957 the Ninth Circuit considered whether the magazine *One*, which is considered to be the first continually published gay and lesbian magazine in the U.S., was obscene. One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 371 (1958); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 411 (1997). In *One, Inc.*, later overturned by the Supreme Court in 1958, the Ninth Circuit applied the "corruption-of-morals" test to speech to hold that the magazine was obscene and that the Post Office could not deliver it. *One, Inc.*, 241 F.2d at 775. During the 1960s, Frank Kameny and others formed the Mattachine Society of Washington (MSW) to oppose the ban on homosexuals that then prevailed in the federal civil service. Gregory B. Lewis, *Lifting the Ban on Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees since the Cold War*, *in* INTRODUCTION TO PUBLIC ADMINISTRATION: A BOOK OF READINGS 455, 459 (J. Steven Ott & E.W. Russell eds., 2001). Kameny was an astronomer who held a Ph.D. from Harvard. *Id.* Kameny formed the MSW after losing a three-year court battle to keep his job with the U.S. Army Mapping Service. *Id.* The organization argued that exclusion of homosexuals from government service constituted discrimination against an oppressed minority. *Id.* In August of 1963, Kameny testified before a congressional committee. *Id.* The MSW picketed the White House repeatedly in the summer of 1965 and sought a meeting with top government officials to discuss the ban. *Id.* In the fall of 1965, that meeting occurred with a committee of the Civil Service Commission. *Id.* In the first full justification of the ban, the committee rejected the argument of the society that the exclusion constituted discrimination. *Id.* The Commission Chairman contended that

(*continued*)

gay struggle for equality, such as the Supreme Court decision in 1986 in *Bowers v. Hardwick*,[32] also commented upon below, further helped to galvanize activism for gay rights.[33]

B. Victories Won in the Course of the Struggle

Homosexuals today form a powerful factor in U.S. politics.[34] During the course of their struggle dating back to almost forty years since Stonewall, gays and the interest groups that advocate for them have scored important victories that have advanced the gay movement for equality. These victories revolve around certain "legal asymmetries" relative to heterosexuals[35] that, to a varying extent, have been overcome, as well as the lifting of negative social norms surrounding homosexuality. Better federal protection and more friendly Supreme Court jurisprudence complete these signs of victory. I will discuss these important developments in turn.

1. Victory Centered Around Removal or Minimization of Legal Asymmetries Between Homosexuals and Heterosexuals

One legal asymmetry removed or minimized, which constitutes a victory for homosexuals, is the dramatic decline in the number of jurisdictions that punish sodomy. Although sodomy laws are "morality" statutes that target "unnatural" sex practices, whether engaged in by different- or same-sex persons, many assess these laws as directed specifically at homosexuals, partly because many straight people view the type of sex same-sex persons

---

"employment of homosexuals impeded 'the efficiency of the service.'" *Id.* at 459–60 (quoting Chairman John W. Macy).

[32] 478 U.S. 186 (1986).

[33] *See* Jennifer Naeger, Note, *And Then There Were None: The Repeal of Sodomy Laws After* Lawrence v. Texas *and Its Effect on The Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN'S L. REV. 397, 402 (2004).

[34] Since the evolution of the gay movement, issues relating to homosexuals have shared the center stage in American politics. *See* John C. Green, *Culture Clash: Social Issues and the 2000 Presidential Vote*, *in* CONTEMPORARY READINGS IN AMERICAN GOVERNMENT 309–11 (Mark Rozell & John Kenneth White eds., 2002) (including gay rights among social issues that framed the debate in the 2000 presidential election); Epstein, *supra* note 22, at 562–70; *see also* Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) ("[T]hose who engage in homosexual conduct tend to . . . have high disposable income . . . and possess political power much greater than their numbers [that] . . . they devote . . . to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.").

[35] *See* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L.L. REV. 159, 171–73 (2003).

engage in as "unnatural."[36] Professor Stein wrote that sodomy laws "are often used to support and justify other laws and social practices relating to homosexuality," as well as to "restrict sexual behaviors and enforce negative attitudes toward lesbians and gay men."[37] Whereas in 1960, every State outlawed sodomy,[38] as of June 2003, only about twenty-four states still retained sodomy laws, while about twenty-seven jurisdictions, including the District of Columbia, have repealed the laws.[39] At the time of the *Bowers* decision in 1986,[40] twenty-five states prohibited homosexual conduct in some fashion.[41] By 2003, when the case was overturned,[42] "only thirteen did so of which four, like Texas, only punished homosexual couples."[43] The protection against sodomy and related discrimination meant that "by the mid-1990s more than one-fifth of Americans lived in cities or counties providing legal protection" against discrimination based on sexual orientation.[44]

Another legal asymmetry that has been removed, thus making for victory, is in the area of hiring and housing discrimination. Twelve states and more than 230 municipalities (cities and counties) have enacted laws and

---

[36] *Id.* at 171–72.

[37] *Id.*

[38] Epstein, *supra* note 22, at 569.

[39] The repealing states, in order of repeal, are Illinois (1962), Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), Hawaii (1973), Ohio (1974), North Dakota (1975), New Hampshire (1975), New Mexico (1975), California (1976), Maine (1976), Washington (1976), West Virginia (1976), Indiana (1977), South Dakota (1977), Vermont (1977), Wyoming (1977), Iowa (1978), Nebraska (1978), New Jersey (1979), Alaska (1980), Wisconsin (1983), Nevada (1993), District of Columbia (1993), Rhode Island (1998), and Arizona (2001). Sodomy Laws, U.S. Laws, http://www.sodomylaws.org/usa/usa.htm (last visited Aug. 21, 2007). [hereinafter Sodomy Laws]. These already impressive numbers do not include numerous jurisdictions that have passed laws protecting homosexuals "from various forms of discrimination based on sexual orientation," or executive orders and mayoral proclamations officially banning discrimination. Epstein, *supra* note 22, at 569. Nor do these numbers consider jurisdictions, such as Arkansas, Georgia, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, and Tennessee, where courts have struck down sodomy laws because they found those laws to be in violation of the respective states' constitutions. Sodomy Laws, *supra*.

[40] Bowers v. Hardwick, 478 U.S. 186 (1986).

[41] HANES WALTON, JR. & ROBERT C. SMITH, AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM 36 (3d ed. 2006).

[42] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[43] WALTON & SMITH, *supra* note 41, at 36; *see also* Stein, *supra* note 35, at 171 (putting the number at thirteen states plus the military, which is a separate criminal jurisdiction).

[44] Epstein, *supra* note 22, at 569.

ordinances that protect homosexuals against discrimination in employment, housing, public accommodation, and access to credit.[45] A third legal asymmetry lifted or minimized, signifying victory, revolves around the benefits that come with marriage.[46] Vermont and Hawaii enacted legislation that afforded same-sex couples civil union protections.[47] The Vermont Civil Union Act accorded state recognition to same-sex relationships and extended to these relationships the various benefits and protections afforded married heterosexual couples under the state marriage laws.[48] The Hawaii Reciprocal Beneficiaries Act afforded same-sex couples the benefits and protections provided to opposite-sex married couples.[49] These do not include the numerous jurisdictions (states, cities, counties, and private-sector employers) that have enacted domestic partnership acts that have extended to same-sex couples economic, legal, and work-related benefits and protections, such as health insurance, standing for wrongful death suits, Medicaid benefits, and other family-based guarantees.[50] The good point about these domestic partnership benefits is that they came without the controversy relating to gay marriages or civil unions that were associated with the benefits introduced in Vermont and Hawaii. The net effect of these benefits is that while there is still

---

[45] SCHMIDT ET AL., *supra* note 3, at 175–76. The twelve States involved are California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.* at 175 n.34. Additionally, Maine had a law protecting gay and lesbian rights until the law was repealed in a referendum in February 1998. *Id.*

[46] Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, 90 A.B.A. J. 47, 48 (2004) ("By some counts, marriage carries with it 1,049 distinct rights, benefits and responsibilities under federal law alone."). Numerous aspects of the marital relationship addressed by federal and state laws in the U.S. include "Social Security survivor's benefits, preferential tax treatment, standing to sue for certain torts, access to health care insurance, support obligations for children, access to divorce courts, intestacy rights, decision-making authority for an incapacitated spouse[,] and parental rights." *Id.*

[47] VT. STAT. ANN. tit. 15, § 1204(a) (2002); HAW. REV. STAT. § 572C-1 (2005).

[48] *See* H.B. 847, 1999–2000 Legis. Sess. (Vt. 2000), *available at* http://www.leg.state.vt.us/DOCS/2000/ACTS/ACT091.HTM (creating "civil unions"). H.B. 847 became 2000 Vt. Acts & Resolves 91.

[49] *See* Reciprocal Beneficiaries Act, H.B. 118, 19th leg. (Haw. 1997); HAW. REV. STAT. § 572C-1 (2005).

[50] *See, e.g.*, HUMAN RIGHTS CAMPAIGN FOUNDATION, THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDERED AMERICANS 4 (2006), http://www.hrc.org/Content/ContentGroups/Publications1/State_of_the_Workplace/SOTW2005-2006.pdf.

> no legal recognition of same-sex couples under federal law, and only a few states extend coverage of their laws to same-sex couples[,] . . . there has been gradual acknowledgment of the contention that at least some of the legal rights enjoyed by married persons should be extended in effect, if not in name, to persons in committed same-sex partnerships.[51]

Last but not least, of these family-oriented benefits and protections are gains in child-adoptive practices. For example, in 2000, the New Jersey Supreme Court invoked the "psychological parent doctrine" and recognized the parental status of a nonbiological lesbian parent who helped care for the children her former partner conceived and gave birth to during the course of their relationship.[52] The decision recognized the rights of nonheterosexuals persons "to create families and to have those creations protected under the laws of New Jersey."[53]

2. *Victory Centered Around Lifting of Negative Social Norms Surrounding Homosexuality*

For many years now, the attitude of the American public toward homosexuality has been changing in the direction of increasing acceptance.[54] The changes are evident in the growing number of Americans in national surveys who opine that homosexuality is an acceptable alternative lifestyle,[55]

---

[51] Chanen, *supra* note 46, at 48.

[52] V.C. v. M.J.B., 748 A.2d 539, 541–44, 555 (N.J. 2000); *see generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19–20 (1973) (discussing the psychological parent doctrine in more detail).

[53] *See* Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 TUL. J.L. & SEXUALITY 119, 139 (2003); *see also V.C.*, 748 A.2d at 555.

[54] *See* Frank Newport, *Homosexuality*, GALLUP POLL NEWS SERVICE, Sept. 11, 2002, http://www.galluppoll.com/content/?ci=9916&pg=1 [hereinafter *Homosexuality*] (on file with author).

[55] *See* Frank Newport, *American Attitudes Toward Homosexuality Continue to Become More Tolerant*, GALLUP POLL NEWS SERVICE, June 4, 2001, http://www.galluppoll.com/content/?ci=4432&pg= [hereinafter *American Attitudes*] (on file with author). "[O]ver the nineteen-year period from 1982 to 2001, Americans moved from leaning against the acceptability of homosexuality to a slight majority acceptance on the issue." From a low of 34% in 1982, the number rose to 38% in 1992, 44% in 1996, and 52% in 2001. *Id.* Acceptance of homosexuality varies by ethnicity. BERNARD D. ROSTKER & SCOTT A. HARRIS, RAND NAT'L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 195 (1993) [hereinafter RAND REPORT].

the number who believe that homosexual relations between consenting adults should be legalized,[56] and the number who favor equal rights in job opportunities and related civil rights for gays.[57] In the U.S. and abroad, homosexuality used to be the "[l]ove that dare not speak its name."[58] And, arguably, at the risk of substantial exaggeration, there was also a time in this country when being "an alive and functioning queer" was a "rebellious act" and a "revolutionary" occurrence, given the few protections that "validate[d], protect[ed] or encourage[d]" homosexual existence.[59] Although problems still remain, that is no longer the case. Rather, today, "instead of thinking about the private activity of gay sex," society now "think[s] about the public

---

[56] *Homosexuality*, *supra* note 54 (showing that from a low of 43% in 1977, when this survey was first taken, the number of Americans who believe that homosexual relations should be legal increased to 44% in 1996 and 54% in 2001).

[57] *See* RAND REPORT, *supra* note 55, at 23 (stating that roughly 80% of Americans believe that homosexuals should not be discriminated against in the workplace, although much of this majority, intriguingly, would prefer not to work with a homosexual); *see also American Attitudes*, *supra* note 55 (showing that from a low of 56% in June 1977 when the survey was first taken, the number of Americans who believe that gay persons should have equal rights increased to 71% in 1989 and to 85% in June 2001); Darren K. Carlson, *Americans Divided on Cause of Homosexuality*, GALLUP POLL NEWS SERVICE, May 9, 2001, http://www.galluppoll.com/content/?ci=1741&pg=1 (on file with author) (reporting on a survey conducted in February 1999 that showed that 83% of respondents agreed that homosexuals should have equal rights in job opportunities, compared to 13% who believe they should not have equal rights in job opportunities, 2% who responded that it all depends on the situation, and the remaining 2% who expressed no opinion on the issue). Regarding gay participation in the armed forces, a 2001 survey shows that 72% of Americans agreed that homosexuals should be allowed to serve, compared to only 23% who disagreed. *American Attitudes*, *supra* note 55. Two percent indicated it all depends on the situation, and the remaining 3% expressed no opinion on the issue. *Id.* Previously, in 2000, 41% of Americans surveyed believed that homosexual service members should be allowed to serve openly in the military, compared to 17% who wanted them barred from military service altogether. *Homosexuality*, supra note 54. Of the remaining number, 38% preferred a limit on participation such as is represented by "Don't ask, Don't tell," and 4% of those surveyed expressed no opinion on the issue. *See id.*

[58] Lord Alfred Douglas, *Two Loves* (1896), *reprinted in* THE OXFORD DICTIONARY OF QUOTATIONS 255 (Angela Partington ed., 4th ed. 1992).

[59] Anonymous, *Queers Read This: I Hate Straights*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 773, 773 (Mark Blasius & Shane Phelan eds., 1997).

category of gay people."[60] Whereas the homosexual community was in the past relegated to "the fringe of American society," today it "maintains a significant presence in national politics."[61] About fourteen public officials, at various levels of U.S. governments, are openly gay. Of those public officials, three of them are members of the U.S. House of Representatives.[62] They are Democrats Barney Frank of Massachusetts and Tammy Baldwin of Wisconsin and Republican Jim Kolbe of Arizona.[63] The remaining eleven, some of them lesbians, are State-level officials.[64] Virginia Apuzzo, a former executive director of the National Gay and Lesbian Task Force (NGLTF) and a lesbian, became the highest-ranking openly homosexual person in government in U.S. history when, in fall of 1997, she was appointed assistant to the president for management and administration.[65] In addition, homosexuals now appear in roles that before were unthinkable, such as gay and lesbian ministers, gay and lesbian athletes, and gay and lesbian characters in popular television shows and films.[66] Issues relating to homosexuals are now routine topics of respectable print and electronic media coverage, and homosexuals are afforded the opportunity to tell their stories to a national audience where, in the not too distant past, those very issues were only

---

[60] Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES MAG., Jan. 1, 2006, at 30.

[61] JANDA ET AL., *supra* note 3, at 531.

[62] *Id.*

[63] *Id.* There are no openly gay members of the U.S. Senate. SCHMIDT ET AL., *supra* note 3, at 176. But Senate seats are statewide offices that are more difficult to win, compared to seats in the House of Representatives. Roger H. Davidson, *United States Senate*, MSN ENCARTA ENCYCLOPEDIA, http://encarta.msn.com/text_761586759_9/Senate.html (last visited Aug. 21, 2007). There is currently only one Black member of the Senate, Barack Obama, who is biracial, and the fifth Black representative in the chamber in the more than 200 years of U.S. history. *See* MILDRED L. AMER, CRS REPORT FOR CONGRESS, BLACK MEMBERS OF THE UNITED STATES CONGRESS: 1870–2005, 39 tbl.1 (2005), *available at* http://www.senate.gov/reference/resources/pdf/RL30378.pdf. Women are better represented in Congress with fourteen members in the 109th Congress. *See 109th Congress: Statistically Speaking*, CQ GUIDE TO THE NEW CONGRESS, Nov. 4, 2004, http://oncongress.cq.com/corp/flatfiles/editorialFiles/temporaryItems/mon20041103-3demographics.pdf. However, fourteen congresswomen do not come close to representing women's 51% share of the population. RENEE E. SPRAGGINS, U.S. CENSUS BUREAU, WE THE PEOPLE: WOMEN AND MEN IN THE UNITED STATES 2 (2005), *available at* http://www.census.gov/prod/2005pubs/censr-20.pdf.

[64] Epstein, *supra* note 22, at 569.

[65] *Id.* at 569–70.

[66] *Id.* at 570.

covered as "crime stor[ies] or . . . titillating social problem[s]."[67] The apt language of one sourcebook of gay and lesbian politics summarizes the current environment well: "[W]e [homosexuals] are everywhere."[68]

To appreciate the significance of the increased visibility homosexuals today are assuming in the U.S., one needs to understand the following characterization of the closet that I crave the indulgence of the reader to quote in considerable length because of the compelling nature of the story:

> The closet is a distinctive, pervasive, and . . . singular feature of lesbian and gay existence. Its effects are easily underestimated. People remain in the closet who are financially and professionally secure enough to survive the negative ramifications that might follow the disclosure of their homosexuality. They do so despite the energy and emotional stress involved in hiding an important part of their lives from family, friends, neighbors, and coworkers. Even when lesbians and gay men "come out," the closet continues to play a central role in their lives. Since in many contexts people are presumed to be heterosexual, the question of whom to tell about one's homosexuality or bisexuality continually arises. For example, a lesbian whose mail carrier mistakenly asks her about her "sister," who is in actuality her lover, will have to decide whether to "come out" to him. . . . [B]eing obliged by social conventions or the "unwritten rules" of the lesbian and gay community to keep someone else's homosexuality secret is an assault on one's dignity as a gay man or lesbian.[69]

Another measure of society's growing acceptance of homosexuals relates to the American Civil Liberties Union's (ACLU) support for excluding homosexuals from federal civil service during the 1950s when homosexuals were considered a national security risk worse than Communists.[70] Today, the ACLU is a group that advocates for homosexual equality[71] and is surveyed in Part II of this Article.

---

[67] *Id.*

[68] WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS (Mark Blasius & Shane Phelan eds., 1997); *see also supra* text accompanying note 34.

[69] Stein, *supra* note 35, at 177 (citations omitted).

[70] *See* Lewis, *supra* note 31, at 458.

[71] *See, e.g.*, American Civil Liberties Union, Lesbian Gay Bisexual Transgender Project, http://www.aclu.org/lgbt/index.html (last visited Aug. 21, 2007).

3. Victory Arising from Better Federal Protection for Gay Rights

Another legal asymmetry removed, and source of victory, is the increased protection for gay rights emanating from the national government. Federal protection is critical because it can strengthen or reinforce state protection and provide protection beyond points where state boundaries end.[72] The Federal Government passed a law, the Hates Crimes Statistics Act of 1990, that covers homosexuals.[73] The legislation mandates that the Attorney General establish guidelines and collect data on crimes motivated by bias, including crimes based on the perceived sexual orientation of the victim.[74] Although the law lacks enforcement mechanisms,[75] it signifies Congressional recognition of discrimination against homosexuals that has the potential to result in violence and leaves room for data compilation that can be used to promote equality for this group.[76] Building on this federal example, the overwhelming majority of states now have hate-crime laws, many of which target crimes based on sexual orientation.[77] Additionally, due to the initiatives of some gay office holders and employee unions,[78] numerous Federal government agencies now list sexual orientation in their nondiscrimination policies.[79] Some of these protections are coming from

---

[72] *See* McCulloch v. Maryland, 17 U.S. 316, 435–36 (1819).

[73] Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat.140 (codified as amended at 28 U.S.C. § 534nt).

[74] *Id.*; *see also* CRIMINAL JUSTICE INFO. SERVICES, U.S. DEPT. OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES: UNIFORM CRIME REPORTING 1 (1999).

[75] *See* Hate Crimes Statistics Act ("Nothing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation."). The Act also states, "Nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality." *Id.*

[76] *See* Yatar, *supra* note 53, at 140.

[77] *See* Margaret Carlson, *Laws of the Last Resort*, TIME, Oct. 26, 1998, at 40 (counting forty states with hate-crime laws as of 1998).

[78] *See infra* notes 221–22 and accompanying text.

[79] As of 1997, these include, inter alia, the White House, the Departments of State, Commerce, Interior, Justice, Agriculture, Housing and Urban Development, the General Services Administration, the National Academy of Sciences, the U.S. Information Agency, the international Trade Commission, the Small Business Administration, and the Merit Systems Protection Board. Lewis, *supra* note 31, at 465. Gregory Lewis traced federal policy toward homosexual employees since the Cold War and found that civil servants and unions representing them "are significantly more likely than the general public to support civil rights for gays and lesbians." *Id.* at 466–67.

quarters that in the past would be unthinkable.[80] Consider the Interfaith Alliance, a nationwide organization of more than fifty denominations which, in 1997, announced its support for a federal anti-discrimination law to protect gay men and lesbians in the workplace.[81]

Another asymmetry removed and thus a monument of victory, relates to the participation of homosexuals in the military.[82] Under the Federal Government's "Don't Ask, Don't Tell" policy, the prohibition against homosexual participation in the military has been lifted and gays may now serve in the military but not openly as homosexuals.[83] The policy was designed to create "a zone of privacy in the military for individuals" and prevent "witch hunts," without sacrificing "unit cohesion."[84] It allows gay service members "to serve their country honorably, so long as they are discreet in pursuing their personal lives."[85] Phrased in prohibitory terms, the

---

[80] *See, e.g.*, Epstein, *supra* note 22, at 570.

[81] *Id.*

[82] Repeated references to "the military," as in this Article, may leave the erroneous impression that the military in the U.S. is a monolithic institution; but no one should fall into that error, for it is not. Instead, the U.S. military is a gigantic organization with four distinct and distinguishable branches, namely, the Army, the Air Force, the Navy, and the Marine Corps. *See, e.g.,* U.S. Department of Defense, Military Homefront, http://www.militaryhomefront.dod.mil/portal/page/itc/MHF/MHF_SITE_MAP (last visited Aug. 21, 2007).

[83] White House Background Briefing Concerning the Issue of Gays in the Military 1 (July 16, 1993), http://dont.stanford.edu/regulations/briefing.pdf [hereinafter White House Background Briefing]; *see also* William J. Clinton, *Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1109, 1111 (Office of the Fed. Register Nat'l Achieves and Records Admin. 1994) [hereinafter Clinton, *Remarks Announcing New Policy*] (indicating that the policy was designed to promote national security, along with "a decent regard to the legitimate privacy and associational rights of all service members").

[84] White House Background Briefing, *supra* note 83. Reference to unit cohesion calls to mind the stated policy of the government before 1993 to the effect that homosexuality is incompatible with military service. *See generally* DEP'T OF DEF., DIRECTIVE 1332.14: ENLISTED ADMINISTRATIVE SEPARATIONS 26 (1993) [hereinafter DIRECTIVE 1332.14].

[85] McVeigh v. Cohen, 983 F. Supp. 215, 220 (D.D.C. 1998). Professor Stein believes that the policy is nothing but an extension of the "well-accepted social maxim that a gay man or lesbian who keeps quiet about his or her sexual orientation will face fewer problems." Stein, *supra* note 35, at 201–02. But Stein, who argues for courts to evaluate regulations that limit speech by homosexuals in cyberspace using heightened scrutiny, disagrees with this maxim, on the ground that "[t]hose who remain closeted are not immune from harm. Insofar as some people know one's sexual orientation, one is at risk" of having his or her sexual orientation

(*continued*)

policy "requires each of the parties to refrain from taking certain actions"—for the gay service member, a commitment to remain silent regarding the member's sexual orientation in return for the opportunity to serve, and for military authorities, a commitment not to ask questions regarding sexual orientation or "pursu[e] an inquiry into a member's sexual orientation without a reasonable basis in fact."[86] In the past, mere possession of a "homosexual

---

revealed. *Id.* at 202 n.223. Stein says society and the government "have created and sustained the closet[,]" and by so doing "created an obligation to protect people in the closet and their free speech rights." *Id.* at 202.

[86] *McVeigh*, 983 F. Supp. at 221–22. "Don't Ask, Don't Tell" is codified at 10 U.S.C. § 654 (2000). The policy stipulates that a member of the armed forces is subject to separation from the armed forces when

> the member engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts[;] . . . stated that he or she is a homosexual or bisexual, or words to that effect[; or] . . . has married or attempted to marry a person known to be of the same biological sex.

Id. § 654(b)(1)–(3). It defines a homosexual act to mean "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires," *id.* § 654(f)(3)(A), and "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in" a homosexual act as described in the preceding clause, *id.* § 654(f)(3)(B). The policy presumes that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." *Id.* § 654(a)(15). It authorizes the armed forces to "maintain personnel policies that exclude persons whose presence in the armed forces would" endanger these qualities that are supposedly at the heart of military capability. *Id.* § 654(a)(14). The policy claims that "[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service." *Id.* § 654(a)(13). In the aftermath of the codification of "Don't Ask, Don't Tell," the Department of Defense issued various regulations for implementing the policy. *See, e.g.*, DEP'T OF DEF., DIRECTIVE NO. 1304.26: QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (1994); DIRECTIVE 1332.14, *supra* note 84; DEP'T OF DEF., DIRECTIVE NO. 1332.30: SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (1997). According to these regulations, the military may not ordinarily inquire into or investigate a service member's sexual orientation unless there is "credible information that there is a basis for a discharge." DIRECTIVE 1332.14, *supra* note 84, at 67. But, if there is any indication of behavior indicating a propensity to engage in homosexual activity, the service member may be discharged. 10 U.S.C. § 654(b)(2). Other key features of the new policy include that

(*continued*)

personality," without sexual conduct or activity was enough to earn a person discharge from the armed forces.[87] This would no longer be the case under the new policy.[88] In response to concerns that the ban on disclosure of sexual orientation conflates speech and conduct,[89] the Justice Department released a statement that made it clear that the policy "is not directed at speech or expression itself."[90] Instead, any burdens relating to suppression of free speech arising from the policy are "incidental to the achievement of an important governmental interest."[91] The Federal Government has also voided a 1952 law that prohibited homosexuals from migrating to the United States.[92]

> an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service.

Clinton, *Remarks Announcing New Policy*, *supra* note 83, at 1111. Finally, "all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner" with respect to both heterosexuals and homosexuals. *Id.*

[87] RAND REPORT, *supra* note 55, at 5–6. In 1921, the Army's "stigmata of degeneration" and "sexual psychopathy" could form the basis for exclusion. *Id.* at 4. These included "men who appeared overly feminine, with sloping shoulders, broad hips, and an absence of secondary sex characteristics, including facial and body hair . . . [as well as] sexual relations between men." *Id.*

[88] 10 U.S.C. § 654; *see also supra* note 86 and accompanying text.

[89] *See, e.g.*, JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 112–13 (1997).

> The statement . . . "I am a homosexual," is fabulously misconstrued . . . . A claim that is, in the first instance, reflexive, that attributes a status only to oneself, is taken to be solicitous . . . to hear the utterance is to 'contract' the sexuality to which it refers. . . . This is a statement construed as a solicitation; a constative taken as an interrogative; a self-ascription taken as an address.

Id. at 113.

[90] Memorandum from Janet Reno, Attorney General, to President William Clinton, on the Defensibility of the New Policy on Homosexual Conduct in the Armed Forces (July 19, 1993), *available at* http://dont.stanford.edu/regulations/RenoMemo.htm.

[91] *Id.*

[92] SCHMIDT ET AL., *supra* note 3, at 176.

4. Victory Arising from More Friendly Supreme Court Jurisprudence Relating to Homosexuality

The last asymmetry lifted that signifies victory in gay rights relates to the Supreme Court jurisprudence on homosexuality. That jurisprudence appears to radiate in a more friendly disposition. In 1965 in *Griswold v. Connecticut*,[93] the Court recognized a right to privacy that, in prior years, was applied to a diversity of privacy-related settings that included child rearing, education, family relationships, and procreation.[94] In years subsequent to *Griswold*, a right to privacy was applied to marriage and abortion[95] However, in *Bowers*, the Court drew the line when it came to homosexuals and held that the right to privacy does not extend to consensual sex among homosexual adults.[96] But, seventeen years later in *Lawrence v. Texas*,[97] the Court

---

[93] 381 U.S. 479, 485 (1965) (holding that the right to privacy encompasses the right of married couples to purchase contraceptives).

[94] Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

[95] *Id.*

[96] *Id.* Chief Justice Burger declared in his concurring opinion that "there is no such thing as a fundamental right to commit homosexual sodomy" and "[t]o hold that an act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 196–97 (Burger, J., concurring). The Court reasoned that the right of homosexuals to engage in sodomy "bears [no] resemblance" to any of the rights in case law that recognize a constitutionally protected right of privacy. *Id.* at 190–91 (majority opinion). To the contrary, the Court stated, "Proscriptions against [sodomy] have ancient roots" and sodomy "was a criminal offense at common law and was forbidden by the laws of the original 13 States." *Id.* at 192. Given this history of proscriptions, the Court said, "[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194. *But see* Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985) ("The activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation."). The Supreme Court rejected a similar position put forth by Harvard Law professor Laurence Tribe (the attorney for Michael Hardwick) during oral argument. *See* MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955, 365–66 (Peter Irons & Stephanie Guitton eds., 1993). In 1993, President Clinton, speaking about his policy to partially lift the ban on gay participation in the military services, stated, "[W]hen this matter is viewed as an issue of individual opportunity and responsibility rather than one of alleged group rights, this is not a call for cultural license but rather a reaffirmation of the American value of extending opportunity to responsible individuals and *of limiting the role of Government over citizens' private lives.*" Clinton, *Remarks Announcing New Policy*, *supra* note 83, at 1371 (emphasis added).

[97] 539 U.S. 558 (2003).

acknowledged its error and engaged in the extraordinary act of expressly overruling and setting aside its holding in *Bowers*.[98] In a judgment for the Court written by Justice Kennedy, the Court ruled six to three that the Texas sodomy statute under challenge in the case was unconstitutional.[99] In a rare public confession, the Court stated that it "fail[ed] to appreciate the extent of the liberty at stake"[100] and that it framed the issue presented in *Bowers* far too narrowly.[101] Homosexuals "may seek autonomy . . . just as heterosexual persons do."[102]

> [They] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'[103]

C. Unsteady Progress in the Gay Movement for Equality

Human progress is not unilinear and every struggle for equality has been marked by its moments of unsteadiness, reverses, or setbacks. This has been the case with the African American struggle for equality,[104] and perhaps even more so, it has been the fate of the gay movement for equality.[105] One analyst has lamented the wealth of "social and cultural stigma associated with

---

[98] *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. . . . [It] should be and now is overruled.").

[99] *Id.* at 558, 578.

[100] *Id.* at 567.

[101] *See id.* ("To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

[102] *Id.* at 574.

[103] *Id.* at 578.

[104] *See* Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, BYU EDUC. & L.J. 1, 16–34 (2006) (analyzing the "[z]ig-[z]ags" of the African American struggle for civil rights).

[105] *See* Yatar, *supra* note 53, at 141.

homosexuality that persists in modern American society."[106] I leave out stigma and talk instead about indicators of unsteady progress[107] and curvilinear victories signifying businesses unfinished in the gay movement for equality in the U.S.

1. Indicators of Unsteady Progress

I start with elimination or minimization of legal asymmetries between homosexuals and heterosexuals. Despite the repeal or unconstitutionalization of many state sodomy laws, some states in the country still maintain and actively enforce their sodomy laws against homosexuals.[108] Professor Epstein chillingly observed, "With the exception of Wisconsin and Minnesota . . . every state that has banned discrimination (including Hawaii) is on the Atlantic or Pacific Coast, *leaving the inhabitants of the vast interior without protection*."[109] Still on the topic of eliminating or minimizing legal asymmetries between homosexuals and heterosexuals, adoption rights for same-sex parents represent an area of unsteady progress.[110] Some jurisdictions in the United States do not consider homosexuality as grounds to

---

[106] *Id.* Yatar points out that changing social norms relating to homosexuality and liberalization of attitudes toward homosexuals by the American public, proceed apace with "[c]ontinuing [m]arginalization of and [d]iscrimination [a]gainst [h]omosexuals." *See id.* at 134–41 (discussing changing norms), 141–48 (discussing marginalization and discrimination).

[107] On the African American struggle for equality, Professor Kelly has looked at progress as a series of far-reaching "revolutions" that can also run their tide. *See* Alfred H. Kelly, *The School Desegregation Case*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 307, 310 (John A. Garraty ed., 1987). For example, he depicted *Brown v. Board of Education*, 347 U.S. 483 (1954), which required desegregation of American public education, as a "far from complete" event. *Id.* It is not clear what events in the gay struggle qualify as revolutions that have run or will run their tide. This is one more problem with analogizing the Black struggle for equality with that of gays. However, following Kelly's practice, I will talk in this Article about incomplete victories.

[108] Prior to the Supreme Court case, *Lawrence v. Texas*, 539 U.S. 558 (2003), the Commonwealth of Puerto Rico and many states had sodomy statutes that prohibited any form of sodomy, whether between same-sex or opposite-sex parties, with penalties that include time in prison. Sodomy Laws, *supra* note 39. These states are Alabama, Florida (60 days in prison and a $500 fine), Idaho (five years to life), Louisiana, Michigan, Mississippi, North Carolina, South Carolina, Utah, and Virginia. *Id.* Finally, three other states—Massachusetts, Michigan, and Missouri—have sodomy laws on their statute books whose validity has been rendered suspect by court rulings. *Id.*

[109] Epstein, *supra* note 22, at 569 (emphasis added).

[110] *See* Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1497–98 (1998).

deny same-sex parents adoption rights, and some states, like New Jersey, have actually used innovative doctrines, such as the psychological parent doctrine, to promote those rights.[111] However, other jurisdictions still maintain an express ban on child adoption by homosexual parents.[112] For example, in 2001 a federal district court in Florida ruled that a Florida law prohibiting adoptions by same-sex parents does not violate the Equal Protection Clause of the Fourteenth Amendment.[113] The court reasoned that Florida's asserted interests in continuing the ban on homosexual adoptions were sufficiently and rationally related.[114] Florida posited that the ban serves the purpose of reflecting the State's moral disapproval of homosexuality.[115] This purpose in itself was insufficient to justify the ban on homosexual adoption; however, it was a corollary to another State interest—promoting the child's best interest —which was adopted by the court.[116] Florida argued that it is in the child's best interest "to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father."[117] The court also accepted this argument.[118] Further yet on adoptive rights, homosexuality is viewed as a negative factor that may be taken into account when determining custodial rights over children in the event of divorce. For example, Louisiana considers the "moral fitness" of the parties in the event of divorce.[119] Jurisdictions that do not employ the "moral fitness" standard utilize a "nexus test" whereby the homosexuality of a parent can become a factor if it has had or is likely to have an adverse impact on the well-being of the child.[120]

Supposedly, the attitude of the American public toward homosexuality is changing. Although support for gay civil rights in America is solid,[121] an overwhelming majority of Americans in national surveys believe that

---

[111] *See supra* notes 52–53 and accompanying text.

[112] Starr, *supra* note 110, at 1511.

[113] *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1374, 1381–85 (S.D. Fla. 2001) (upholding FLA. STAT. § 63.042(3), which prohibits adoptions by homosexuals).

[114] *Id.* at 1380–85.

[115] *Id.* at 1382.

[116] *Id.* at 1382–83.

[117] *Id.* at 1383.

[118] *Id.*

[119] *See* LA. CIV. CODE ANN. art. 134(6) (1999) ("The court shall consider . . . [t]he moral fitness of each party, insofar as it effects the welfare of the child."); Lundin v. Lundin, 563 So. 2d 1273, 1274, 1277 (La. Ct. App. 1990) (assessing homosexuality of a mother, under the moral fitness prong, as a negative factor in decision awarding custody to father).

[120] *See* M.A.B. v. R.B., 510 N.Y.S.2d 960, 965 (N.Y. Sup. Ct. 1986).

[121] *See supra* text accompanying note 57.

homosexuality is "morally wrong."[122] These statistics lead one to question the steady growth in American public opinion regarding the acceptability of homosexuality as an alternative lifestyle.[123] And for all the victories in the

---

[122] RAND REPORT, *supra* note 55, at 23 (putting the proportion of the American public who believe that homosexuality is "wrong" at nearly three-quarters). In addition, a majority of the public disapprove of homosexuality or a homosexual lifestyle and "[a]n overwhelming proportion [of Americans] believe sexual relationships between two adults of the same sex are 'always wrong.'" *Id.* at 207; *see also* Yatar, *supra* note 53, at 142 & n.126 ("[A] majority (fifty-three percent) of Americans expressed the belief that homosexual behavior is 'morally wrong,' . . . only forty percent of Americans believe that homosexuality is 'morally acceptable,' three percent believe that it would depend on the situation, one percent believe that homosexuality is not a moral issue at all, and another three percent expressed no opinion on the issue whatsoever." (citing *Moral Issues*, GALLUP NEWS SERVICE, May 10–14, 2004, http://www.gallup.com/poll/indicators/ indmoral.asp)). On a parenthetical note, "[a] greater proportion of blacks (85 percent) characterize homosexuality as 'always wrong' than do whites (75 percent). . . . However, non-white ethnic groups also appear less willing than whites to label homosexuality as an unacceptable alternative lifestyle." RAND REPORT, *supra* note 55, at 195. Reinforcing the perception that homosexuality is wrong, are pronouncements by some U.S. government officials and celebrities who depict sexual orientation as environmentally induced rather than genetic. *See* Yatar, *supra* note 53, at 142. These include former-Senate Majority Leader Trent Lott who compared homosexuality to alcoholism, and kleptomania. *Id.* at 142 n.127; Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 32, 34. In June of 1998, Lott reportedly stated, "'You should try to show them a way to deal with homosexuality just like alcohol . . . or sex addiction . . . or kleptomaniacs.'" Lacayo, *supra*, at 34 (omission in original). Gay activists attribute anti-gay violence like the murder of Matthew Shepard, a Wyoming gay student beaten to death in 1998, to pronouncements of conservatives like Lott. *See id.* at 33–34. In contrast, Christian groups who insist homosexuality is curable, defend these conservative public officials. *Id.* at 34–35. One group wanting to ban a Republican gay group from the 1998 Texas G.O.P. Convention declared, "We are standing with the G.O.P. against the Sodomites." *Id.* at 34. The group bore a placard with "Sin" written over all four corners of the placard, and inside the square it stated, "Your Parents May Accept You, Your Religion May Tolerate You, Science May Excuse You, Society May Include You, Gov't May Protect You, But God Will Throw [remaining word indistinct]. . . ." *See id.* Of specific relevance to the focus on technology in this Article is the term "science" on the placard. *See id.*

[123] *See supra* text accompanying note 55. Regarding the measurement of attitudes on homosexuality, it may be necessary to keep in mind the cautionary advice from one RAND report. As the study pointed out, given the sensitivity of homosexuality and homosexual relations in the U.S., "[i]ndividuals may state opinions they believe to be socially acceptable even when their personal opinion is actually more accepting or less accepting. Measuring attitudes on homosexuality may be further complicated if respondents fear that by expressing

(*continued*)

gay struggle for equality, including the ones this Article has articulated, the closet has "continuing vitality" in gay culture.[124] On gay marriage, an issue of surpassing importance in the gay struggle for equality,[125] a majority of Americans in a 2003 opinion survey believed that such marriages "should not be recognized as valid,"[126] although an overwhelming majority believes that such marriages will be legal within the next hundred years.[127] Even the progress of gay visibility, signified by the presence of openly gay individuals in national office,[128] embodies elements of unsteady progress. Professor Epstein points out that gay movements "seem[] to have difficulty generating or sustaining leaders with the imagination and personal qualities needed to mobilize or redirect collective sentiments in powerful ways, to generate solidarity across the divisions within the movements, or to construct coalitions with movements of other kinds."[129]

---

support for homosexuality, others will conclude that the respondent is homosexual." RAND REPORT, *supra* note 55, at 194.

[124] Stein, *supra* note 35, at 179.

[125] *See infra* note 263 and accompanying text.

[126] Jeffrey Rosen, *How to Reignite the Culture War*, N.Y. TIMES MAG., Sept. 7, 2003, § 6, at 48, 50 (quoting a Gallup opinion poll). Professor Epstein ruminated that the debate over gay marriage was laced "with symbolic power for all concerned," Epstein, *supra* note 22, at 567, and that additional benefits for gays conferred by traditional marriage was bound to draw a backlash, *see id.* at 567–68. From the 1980s to the 1990s,

> lesbians and gay men won substantial victories in obtaining domestic partner benefits such as health insurance for the lovers of gay men and lesbians employed by many businesses, city governments, and universities around the Unites States—no small matter in a country without national health care. A number of cities, such as San Francisco, had formal provisions for couples to register at City Hall as domestic partners.

Id. at 567. "No one seemed quite prepared" for the ruling in 1993 from the Hawaii Supreme Court suggesting the possibility of gay marriage for same-sex people. *Id.* at 567–68. Many Americans in opinion polls disapproved of discrimination against homosexuals in the workplace, Epstein said, but few "conceive[d] of gay marriage as anything other than an oxymoron." *Id.* at 568.

[127] Rosen, *supra* note 126, at 50.

[128] *See* discussion *supra* Part I.B.2 and notes 61–63 and accompanying text.

[129] Epstein, *supra* note 22, at 566. Tracking the strategy and symbolism of the civil rights movement—and provoking comparability with that movement—the gay rights movements, during the 1990s, accomplished two national marches. One was the third National March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation, involving participants estimated at anywhere from 300,000 to one million people. *Id.* at 565–66. The other was

(*continued*)

A third indicator of unsteady progress is signified by the few protections the federal government affords to homosexual issues as compared to the protection afforded by states, cities, and counties. To begin, the Hate Crimes Statistics Act, as previously indicated, only mandates that the Attorney General collect data relating to hate crimes but it makes no provision for any Federal Bureau of Investigation (FBI) enforcement nor does it allow for causes of action brought by hate crime victims.[130] Although numerous states now have hate crime laws that cover sexual orientation,[131] a national law is necessary to strengthen or reinforce state protection. To date, no such law exists. Additionally, Title VII of the Civil Rights Act of 1964, which protects against employment discrimination, does not target discrimination based on sexual orientation.[132] Instead, the protection against discrimination afforded by the law with regard to compensation, terms, conditions, or privileges of employment, is limited to only race, color, religion, sex, and national origin.[133] Consistent with this federal attitude, many courts do not interpret Title VII to include protection against discrimination based on sexual orientation.[134] Although the blanket exclusion against gays that formally

---

Stonewall 25, commemorating the twenty-fifth anniversary of the Stonewall riots. *Id.* This latter march brought over one million demonstrators from the U.S. and all over the world who marched on the streets of Manhattan and to the United Nations building, demanding respect for the human rights of homosexuals around the world. *Id.* at 566. Although the marches were momentous occasions that attracted enormous media attention, these visible acts of solidarity and mobilization achieved "transient result[s]" and had little lasting impact. *See id.* at 565–66.

[130] *See supra* notes 74–75 and accompanying text. The FBI, created in 1924, along with the Central Intelligence Agency (CIA), are two of the sixteen or so agencies that make up the intelligence community of the U.S. government. LARRY BERMAN & BRUCE ALLEN MURPHY, APPROACHING DEMOCRACY 283 (2d ed. 1999); United States Intelligence Community, Who We Are, http://www.intelligence.gov/1-members.shtml (last visited Aug. 21, 2007). The first director of the bureau was J. Edgar Hoover who went on to lead the agency for several decades. BURMAN & MURPHY, *supra*. Under Hoover's leadership, the Bureau developed a reputation as a tough and competent crimefighter. *Id.* Using the FBI, Hoover relentlessly investigated communist "cells," and infiltrated or attacked black civil rights organizations and leaders, including the venerable Dr. Martin Luther King Jr., whose reputation Hoover worked hard to destroy. *Id.*

[131] *See supra* note 77 and accompanying text.

[132] *See* 42 U.S.C. § 2000e-2(a)(1) (2000).

[133] *Id.*

[134] *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals." (citing *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979))). *Cf.* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (holding that even though Title VII does not prohibit discrimination based

(*continued*)

existed in federal civil service employment is now lifted, equally troubling is the fact that, as Lewis points out, no court has ruled that homosexuality or homosexual conduct is necessarily irrelevant to employment decisions.[135] The same lack of federal protection found in the employment context exists in housing. The Fair Housing Act, as amended in 1988, protects against discrimination on grounds that do not include sexual orientation.[136] The law protects individuals against discrimination based on race, religion, color, sex, disability, familial status, and national origin in the sale and rental of housing; advertising for sale or rental of housing; and in residential real estate-related transactions.[137] The failure to include homosexuals as a class of persons protected under the Fair Housing Act would have been appropriate if gay persons do not suffer discrimination in housing. However, homosexuals are discriminated against in housing and other real estate-related services.[138] Another federal law that protects various classes of persons while excluding homosexuals is the Equal Credit Opportunity Act.[139]

A federal act of commission (rather than an omission like many of the ones recounted above) that has hurt the gay struggle for equality is the passage by the U.S. Congress of the Defense of Marriage Act (DOMA).[140] DOMA was designed to respond to developments relating to liberalization in gay rights arising from Vermont and Hawaii, particularly the judicial rulings in *Baker v. State*[141] and *Baehr v. Lewin*.[142] The law defines marriage as a

---

on sexual orientation, same-sex sexual harassment may in fact occur where the plaintiff can prove that the discrimination against the individual affected was based on "sex," although not based on sexual orientation).

[135] Lewis, *supra* note 31, at 465.

[136] *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. § 3604(a) (2000)).

[137] *See id.* § 3604(a)–(e).

[138] *See, e.g.*, Neithamer v. Brenneman Prop. Services, Inc., 81 F. Supp. 2d 1, 2–4 (D.D.C. 1999).

[139] *See* 15 U.S.C. § 1691(a) (2000) (protecting applicants in all aspects of a credit transaction from discrimination based on race, color, religion, national origin, sex, marital status, and age).

[140] Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2000)). The Act was signed into law by President Clinton on September 21, 1996. *See id.*

[141] 744 A.2d 864 (Vt. 1999). In *Baker*, three homosexual couples applied for and were denied marriage certificates by their respective town clerks in Vermont. *Id.* at 867. The couples brought suits contending that the denials violated the Vermont marriage statutes and the state Constitution. *Id.* at 868. The Vermont Supreme Court ruled in favor of the Plaintiffs, holding that the state's marriage statutes had been implemented to exclude same-sex couples, contrary to the Common Benefits Clause of the Vermont Constitution. *Id.* at 869–86. The

(*continued*)

union between one man and one woman,[143] and it makes states unobligated to confer full faith and credit under the U.S. Constitution to same-sex marriages performed in other states.[144] In the aftermath of DOMA, thirty-nine states have enacted similar laws that mirror the language and purposes of the statute.[145] One commentator complained, "While marriage and its incidents have, for the most part, always been a matter of state law, DOMA made a federal issue of the same-sex marriage debate that was being fought at the state level."[146] Regarding DOMA, an important act of symbolism that may be discouraging for many homosexuals is that the law was enacted during the presidency of William J. Clinton,[147] who worked harder than any recent occupant of the White House to cultivate the support of the gay community.[148] No less worrisome for gays and those who advocate for their equality have been calls made for an amendment to the U.S. Constitution, incorporating the language of DOMA, which would limit marriage to heterosexual couples.[149] As if all these are not enough, the public opposition to gay marriages also extends to same-sex civil unions.[150]

---

court advised the state's legislature to extend the benefits and protections traditionally accorded to heterosexual married couples under the state marriage statutes to same-sex couples. *Id.* at 886. The legislature complied with the advice by enacting the Vermont Civil Union Act. VT. STAT. ANN. tit. 15, § 1204(a) (2002).

[142] 852 P.2d 44 (Haw. 1993). In *Baehr*, the Hawaii Supreme Court found that the restriction barring same-sex couples from state-sanctioned marriage was discrimination based on sexual orientation and held that the state's marriage statutes were unconstitutional under the Equal Protection Clause of the Hawaii Constitution, until so amended. *See id.* at 56–68. The case was remanded to a lower court to allow the state to present a compelling interest for its prohibition of same-sex marriage. *Id.* at 68. On remand, the court held that the state had not met its burden of proving any compelling interest in prohibiting same-sex marriage. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997) (table decision).

[143] *See* 28 U.S.C. § 1738C; *see also* 1 U.S.C. § 7 (2000) (defining marriage under federal law as the legal union between one man and one woman and stipulating that a spouse is a person of the opposite sex who is a husband or a wife).

[144] *See* 28 U.S.C. § 1738C (carving out an exception to the Full Faith and Credit Clause under U.S. CONST. art. IV, § 1).

[145] *Wedding Zinger: Marriage Amendment Faces Fight*, CHIC. TRIB., Feb. 19, 2004, at 11.

[146] Yatar, *supra* note 53, at 143.

[147] *See supra* note 140 and accompanying text.

[148] *See infra* note 152 and accompanying text.

[149] *See* Robert P. George, *The 28th Amendment*, 53 NAT'L REV. 32, 34 (2001) ("The only sure means of preserving the institution of marriage for future generations of Americans is a federal constitutional amendment protecting marriage as the union of a man and a woman.").

(*continued*)

A final indicator of unsteady progress, which is arguably linked to the few federal protections for gay rights, is the inhospitality or inconduciveness of the American party system to the promotion of the gay rights agenda.[151] Between the two major political parties, the Democratic Party is the one that has shown more sympathy for gay concerns.[152] The gay interest group Log Cabin Republicans revealingly, but probably discouragingly, states on its website: "The mere existence of our organization recognizes the fact that the Republican Party still has a long way to go on issues affecting gay and lesbian civil rights. . . . Too many people in the party remain hostile to gay and lesbian civil rights."[153] Money, they say, is the mother's milk of politics, but not even the capacity of the Log Cabin Republicans to raise money for the Republican Party has served to blunt the party's antipathy toward homosexuality.[154] Resistance to expanding the homosexual agenda is not something only Republicans do.[155] Even Democrats who considered themselves liberals opposed same-sex marriage.[156] That was the case with Ben Cayetano, the Hawaii governor, who during the showdown over gay marriage in his state in 1998, opined that "same-sex marriage shouldn't be legal for the same reason that 'marrying your sister' isn't legal."[157] It is evidently the American party system's inhospitality that Epstein refers to

---

National politicians, including President George W. Bush, also support a constitutional amendment limiting marriage to heterosexuals. *See infra* text accompanying note 177.

[150] *See* Chris Chambers, *Issue Referendum Reveals Mix of Liberal and Conservative Views in America Today*, GALLOP POLL MONTHLY, Nov. 1, 2000, at 30, 30–31 (reporting the result of a national survey conducted in 2000 that showed that 54% of Americans surveyed would vote against creation of such legal civil unions, compared to 42% who would vote for such civil unions).

[151] *See, e.g.*, Epstein, *supra* note 22, at 566 (noting the Republican Party's antigay position during the 1992 Republican National Convention).

[152] *See, e.g.*, *id.* at 66–67 (contrasting the 1992 platform of the Republican Party filled with "antigay hate mongering" with the more gay-friendly platform of the Democratic Party). Epstein stated that the position of William Clinton, as presidential candidate under the platform of the Democratic Party and subsequently as President, "seemed to hold open the prospect of a new political opportunity structure" for homosexuals. *Id.* However, when faced with strong opposition in his attempt to end exclusion of gay people in the U.S. military, Clinton backed down and proposed an unprogressive compromise. *Id.*

[153] Log Cabin Republicans, About Log Cabin, http://online.logcabin.org/about/?print-t (last visited Aug. 21, 2007); *see also* discussion *infra* Part II.D.

[154] *See, e.g.*, Epstein, *supra* note 22, at 564.

[155] *See, e.g.*, Cloud, *supra* note 18, at 44.

[156] *See id.*

[157] *Id.*

when he blames "the fragility of gay rights in the United States" on "the peculiarities of the United States and on the internal difficulties of U.S. gay and lesbian movements."[158] These factors help create a "repressive" cultural climate surrounding sexuality, with the result that strides toward equal citizenship are severely limited in comparison to other Western countries.[159]

2. Curvilinear Victories

In addition to the indicators of unsteady progress discussed above, some gay victories inhere doses of curvilinearity that brand or render those victories incomplete. I will discuss several events that illustrate the trend. The first is "Don't Ask, Don't Tell," the federal policy that conditionally allows gays to participate in the military services.[160] Many advocates of gay rights do not perceive the policy as a major advance.[161] These include the Servicemembers Legal Defense Network (SLDN), which documents countless instances of dismissal of homosexuals in the military that it blames on the policy.[162] Others who take this position include Professors Gossett, Epstein, and Stein. Gossett, in his study of employment of homosexuals in the public-sector workforce, stated that the argument of harm to military readiness if homosexuals are allowed to serve openly in the military "is strikingly similar to the arguments raised when President Truman ordered the integration of armed forces units rather than continuing to segregate different races in separate units."[163] However, in the case of homosexuals, "gay male and lesbian soldiers are already integrated into all units, which makes it not surprising that some opponents of homosexuals serving openly in the military

---

[158] Epstein, *supra* note 22, at 569.

[159] *Id.*

[160] *See supra* notes 83–92 and accompanying text.

[161] *See, e.g.*, SLDN, *Ten Years of "Don't Ask, Don't Tell" A Disservice to the Nation*, http://www.sldn.org/templates/dont/record.html?section=42&record=1453 (last visited Aug. 21, 2007) [hereinafter *Ten Years of "Don't Ask, Don't Tell"*] ("The decade under 'Don't Ask, Don't Tell' has been a disservice to our country and to the people who serve in our Armed Forces"); Human Rights Watch, *U.S. Military's "Don't Ask, Don't Tell" Policy Panders to Prejudice*, http://www.hrw.org/press/2003/01/us012303.htm (last visited Aug. 21, 2007) [hereinafter *Policy Panders to Prejudice*]; Human Rights Campaign, *Don't Ask, Don't Tell, Don't Pursue, Don't Harass*, http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Military2/Fact_Sheets_Dont_Ask_Dont_Tell/Dont_Ask,_Dont_Tell_Fact_Sheet.htm (last visited Aug. 21, 2007).

[162] *See, e.g.*, *Ten Years of "Don't Ask, Don't Tell"*, *supra* note 161; *Policy Panders to Prejudice*, *supra* note 161.

[163] Gossett, *supra* note 14, at 97.

proposed segregation of homosexuals and heterosexuals as a compromise solution."[164] He said that "from its founding," the United States has dismissed from the public service persons engaging in same-sex sexual activity, and that "[f]or the most part, such dismissals were focused on the acts allegedly committed and not because the accused was a particular 'type' of person."[165] This is essentially what "Don't Ask, Don't Tell" does.[166] Epstein, in his criticism, assesses the policy as a "regressive 'compromise'" with compromise instructively or revealingly secluded in quotes.[167] He argued, "Much like the targeting of homosexuals during the McCarthy era, the debate about gays in the military seemed wrapped up in concerns about the 'feminization' of the state, in a country whose whole national identity in the period since the Second World War has centered on its global military might."[168] Stein, for his part, opines that under "Don't Ask, Don't Tell," homosexuals "in the military live in a legally enforced closet,"[169] and he dismisses the policy as little more than an extension of the "well-accepted social maxim that a gay man or lesbian who keeps quiet about his or her sexual orientation will face fewer problems."[170]

Another curvilinear victory that indicates there is still unfinished business in the gay struggle is the Supreme Court decision in *Lawrence v. Texas*, discussed above.[171] In striking down the sodomy law under challenge, the majority bypassed the Equal Protection Clause,[172] and instead anchored its decision solely and exclusively on the Due Process Clause.[173] Legal scholars have written commentaries that analyze various senses in which *Lawrence* represents an incomplete victory for gays. Timothy Woznick assessed the decision as "[a] [b]ad [w]ay to [r]each a [g]ood [d]ecision[.]"[174] Woznick

---

[164] *Id.*

[165] *Id.* at 96.

[166] *Id.* at 96–97.

[167] Epstein, *supra* note 22, at 567.

[168] *Id.*

[169] Stein, *supra* note 35, at 181.

[170] *See id.* at 201–02.

[171] *See supra* Part I.B.4.

[172] *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[173] *Id.* at 564 ("[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

[174] Timothy Woznick, *Striking Down Anti-Sodomy Laws: A Bad Way to Reach a Good Decision?* Lawrence v. Texas, *123 S. Ct. 2472 (2003)*, 4 WYO. L. REV. 795, 795 (2004). Woznick believes that "the best way for homosexuals to gain equal rights is through the (*continued*)

opined, "Though the Court's determination to recognize the 'autonomy' of homosexual persons is admirable, it is possible that it will have the opposite effect on American culture."[175] He stated that the Court was not—but should have been—worried about "the potential for backlash" coming from its decision,[176] keeping in mind that "'[r]ecent advances in gay civil rights have invigorated pro-family efforts to preserve their particular vision of morality and family, and the result has been numerous legal efforts designed to hold the line against what the pro-family organizations would characterize as the ever encroaching homosexual agenda.'"[177] It is an assessment that the

---

democratic process." *Id.* at 822. Woznick's suggestion appears to echo Justice O'Connor's concurrence in the case. In Justice O'Connor's view, the Texas statute under challenge was unconstitutional under the Equal Protection Clause because the government did not have a legitimate interest in proscribing homosexual sodomy. *Lawrence*, 539 U.S. at 584–85 (O'Connor, J., concurring). A State may not impose on one class of citizens punishment that it does not apply to the rest of its citizens. *See id.* at 584. O'Connor admitted that this line of analysis might not render invalid an anti-sodomy law that applied equally to different sex and same-sex persons; but rather stated instructively, that such laws would probably "not long stand in our democratic society." *Id.* at 585. On a parenthetical note, notice that Justice O'Connor applied rational basis, a nonexacting judicial review standard usually reserved for noneconomic legislation in her concurrence. *Id.* at 579. To justify this application, O'Connor indicated that the Court's jurisprudence allows the use of the test in settings, where as here, "the challenged legislation inhibits personal relationships." *Id.* at 580.

[175] Woznick, *supra* note 174, at 821.

[176] *Id.*

[177] *Id.* at 821 n.201 (quoting Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1, 1 (2003)). Woznick stated, referring to President George W. Bush's comment during his State of the Union Address in January 2004, "If Congress amends the Constitution in response to this issue, courts will have severely damaged homosexuals' chances at equality rather than improving them." *Id.* at 822. During his State of the Union, President Bush took aim at "activist judges . . . [who] have begun redefining marriage by court order." George W. Bush, *State of the Union*, 40 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 94, 100 (Jan. 26, 2004), *available at* http://www.cnn.com/2004/ALLPOLITICS/ 01/20/sotu.transcript.6/index.html. He indicated he would support a constitutional amendment that would limit marriage to a union between a man and a woman. *See id.* He stated, "On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage." *Id.* The President appeared to be referring to the Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). There the court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." *Id.* at 969.

constitutional law scholar Jeffrey Rosen seems to share. Rosen posits that in *Lawrence*, the Supreme Court handed conservatives "on a silver platter," a tool they will use to "reinvigorate the culture wars."[178] He fears that "the fractious political sideshows that *Lawrence* has set in motion may lead not to greater equality and acceptance for gays and lesbians but to greater recriminations, suspicion[,] and strife."[179] Rosen additionally believes *Lawrence* was wrongly decided.[180]

---

[178] Rosen, *supra* note 126, at 50. One of the early prophesies of a culture war with respect to issues related to homosexuality was by Justice Scalia who employed the terminology in his dissent in the *Romer* case. *See* Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I think it no business of the courts . . . to take sides in this culture war."). *But see* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 8 (2d ed. 2006) (debunking the existence of a culture war in the U.S.). "Culture wars" are "new divisions" in society that are "based on sexuality, morality, and religion," "so deep as to justify fears of violence," and the use of the imagery of war in referring to these new divisions. *Id.* at 7. These new divisions are distinguishable from old disagreements built on economics. *Id.* Some view such a culture war as comparable in magnitude to the ideological cold war between the U.S. and the defunct Soviet Union in its criticality for the soul of America. *See id.* at 1.

[179] Rosen, *supra* note 126, at 50.

[180] *Id.* The basis for this belief, as he explained, is that

> Texas is one of only four states in America that banned sodomy only when committed by gays and lesbians, and the court could have struck down these four laws as a violation of the constitutional guarantee of equal protection, as Justice Sandra Day O'Connor recommended. This would have left states free to ban sodomy, as long as they did so in an evenhanded way, treating heterosexuals and homosexuals alike. Libertarian conservatives insist that they would not have objected had the [C]ourt simply struck down these four discriminatory state laws.

Id. "Taken to its logical conclusion," Rosen said, Justice Kennedy's argument for the Court in the case, "would seem to invalidate all moral restrictions on intimate associations that, it could be said, cause no harm to others—restrictions on polygamy, for example." *Id.* Justice O'Connor, a jurist during her years in the Rehnquist Court noted for her swing votes and praised as a voice of reason, held the same view but for a different reason—the issues presented in the *Bowers* and *Lawrence* are different. *See* C. Lincoln Combs, *A Curious Choice:* Hibbs v. Winn *as a Case Study of Justice Sandra Day O'Connor's Balancing Jurisprudence*, 37 ARIZ. ST. L.J. 183, 192, 197 (2005) (discussing Justice O'Connor's balanced and nonindeological approach to jurisprudence); Lawrence v. Texas, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring). O'Connor said she would not overrule *Bowers* because the decision presented an issue different from the one presented in *Lawrence*. *See id.* at 582. And as indicated before, she would decide the case based on the Equal Protection rather than the Due Process Clause, as the majority did. *See supra* text accompanying note 174.

In sum, *Lawrence* was driven not so much by a zeal for justice as by a concern on the part of the Supreme Court that its decision in *Bowers* lagged unacceptably behind social change with respect to homosexuality. This is evident in the commentary of the majority concerning "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[181] It is also arguably evident in the fact that the Court took special care to point out that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[182] Other significations of the limitedness or uncertainness of the victory that *Lawrence* symbolizes is the fact that, as one recent study finds, lower courts are avoiding the decision through narrow interpretations.[183] Also, despite the case, and the overruling of *Bowers*, several states, including Utah and Virginia, still have sodomy laws on their statute books.[184]

In retrospect, the incompleteness which mars *Lawrence* flows down to the Supreme Court's jurisprudence in supposedly progressive cases like *Romer v. Evans*,[185] which was decided purely on equal protection, rather than on due process, grounds.[186] The case loses some of its sparkle and momentousness when its full context is considered. Colorado adopted a constitutional amendment designed to preemptively invalidate all future state and local laws protecting homosexuals from discrimination.[187] National outrage by gay

---

[181] *Lawrence*, 539 U.S. at 572 (majority opinion).

[182] *Id.* at 578.

[183] *See* Stephanie Francis Ward, *Avoiding Lawrence*, A.B.A. J. 16, 17 (June 2004) [hereinafter *Avoiding Lawrence*]; *see also* Stephanie Francis Ward, *Polygamous Union Sparks Split: Divided Utah Supreme Court Holds* Lawrence *Doesn't Protect Plural Marriages*, 5 ABAJOURNAL EREPORT (May 26, 2006), http://www.abanet.org/journal/ereport/my26poly.html (citing Utah v. Holm, 137 P.3d 726, 742–43 (Utah 2006)). In *Holm*, the Utah Supreme Court ruled, "Despite its use of seemingly sweeping language, the holding in *Lawrence* is actually quite narrow. Specifically, the Court takes pains to limit the opinion's reach to decriminalizing private and intimate acts engaged by consenting adult gays and lesbians." *Holm*, 137 P.3d at 742–43 (citation omitted).

[184] *See Avoiding Lawrence*, *supra* note 183, at 18; *see also supra* text accompanying note 108.

[185] 517 U.S. 620 (1996).

[186] *Id.* at 635–36.

[187] COLO. CONST. art. II, § 30b. The amendment, in pertinent part, stipulates:

> Neither the State of Colorado . . . nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual,

(*continued*)

persons prompted an organized boycott of travel to Colorado,[188] as well as a court challenge that eventually wound its way through to the Supreme Court.[189] In *Romer*, a six to three majority of the Court invalidated the amendment, ruling that Colorado had no rational basis for preemptively banning gays and lesbians from attempting to pass legislation securing their rights.[190] The amendment violated the equal protection clause, the Court said, because it denied to homosexuals in Colorado—but to no other Colorado residents—"the right to seek specific protection from the law."[191] This utter brazenness of Colorado is why one commentator assessed that, although the ruling appeared as "a seemingly new supreme judicial view on the gay rights cause, it was actually decided because of the outrageousness of its animus; the amendment would have made it unreasonably more difficult for only one group of persons (i.e., homosexuals) to seek protection under the law."[192] In short, as the Court said therein, Colorado had no right to make homosexuals, as a class, less equal under the law than any other group.[193]

A final curvilinear moment worthy of attention that occurred after the initial wave marked by the decisions in Vermont and Hawaii,[194] concerns a new wave of court decisions and a rash of gay marriage moves across the country in 2004. Massachusetts became the first state to recognize same-sex marriage[195] when, on May 17, 2004, its Supreme Court interpreted marriage under its State law to be the "voluntary union of two persons as spouses."[196]

> lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id.

[188] *See* Andrea M. Kimball, Romer v. Evans *and Colorado's Amendment 2: The Gay Movement's Symbolic Victory in the Battle for Civil Rights*, 28 U. TOL. L. REV. 219, 227 (1996) (discussing the boycott organized by gay groups in response to Amendment 2).

[189] *Romer*, 517 U.S. at 625–26.

[190] *Id.* at 631–32.

[191] *Id.* at 633.

[192] Yatar, *supra* note 53, at 150.

[193] *Romer*, 517 U.S. at 631–32.

[194] *See supra* text accompanying notes 141–42.

[195] *E.g.*, Smelt v. County of Orange, 374 F. Supp. 2d 861, 878 (C.D. Cal. 2005).

[196] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). In an act of symbolism that links the gay campaign for same-sex marriage with the African American struggle for equality, an act again provoking comparability of the two movements, the Massachusetts high court chose May 17 as the effective date of its ruling. *See* WALTON & (*continued*)

Either animated by the development in Massachusetts or independent of it, early in 2004, the City of San Francisco issued approximately 4,000 marriage licenses to same-sex couples.[197] Oregon followed suit with the performance of 3,000 same-sex marriages the same year.[198]

Swift backlashes attended these rulings and putative marriages.[199] In Massachusetts, even as the marriages were being performed, the state legislature initiated a three-step process that recognized same-sex civil unions while putting a constitutional amendment banning gay marriages before the voters in 2006.[200] In California in March of 2004, within weeks after the issuance of the marriage licenses in San Francisco, the state Supreme Court put a stop to gay marriages in the city.[201] As one author noted, "[T]hat action left open the question of whether the marriages that already were performed [were] valid, even as the state legislature has adopted laws expanding rights for persons in domestic partnerships."[202] Finally, in Oregon, a trial judge, Frank L. Bearden, enjoined officials of Multnomah County (encompassing Portland, the state capital) "from issuing marriage licenses to gay couples, but ordered Oregon officials to recognize some 3,000 same-sex marriages performed already in the state" in 2004.[203] Judge Bearden gave "the legislature and supreme court an opportunity to fashion a more definitive decision on the issue."[204] To add to these backlash measures, the President and members of his political party continue to propose a marriage amendment to the U.S. Constitution that limits marriage to different-sex individuals to the exclusion of same-sex unions.[205] All of these occurrences point to the

---

SMITH, *supra* note 41, at 258. May 17 was the date of the landmark U.S. Supreme Court decision of *Brown v. Board of Education* in 1954 that desegregated American public education. *Id.*; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[197] WALTON & SMITH, *supra* note 41, at 258; *see also* Chanen, *supra* note 46, at 47.

[198] Chanen, *supra* note 46, at 48.

[199] *See* David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES MAG., May 9, 2004, § 6, at 52.

[200] Chanen, *supra* note 46, at 48.

[201] *Id.* at 47.

[202] *Id.*

[203] *Id.* at 48 (citing Li v. State, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004), *rev'd en banc*, 110 P.3d 91 (Or. 2005)).

[204] *Id.*

[205] *See* Carl Hulse, *Senate Rebuffs Same-Sex Marriage Ban*, N.Y. TIMES, June 8, 2006, at A20. Advocates of a marriage amendment argued that such a change was necessary because the Massachusetts Supreme Judicial Court's ruling might lead to the overturning of the Defense of Marriage Act (DOMA) enacted in 1996. Rick Klein, *President Rips SJC on Gay*

(*continued*)

unwillingness of the American public "to expand decisively the definition of marriage to include same-sex couples,"[206] whether or not they agree that a constitutional amendment is the means to achieve that limitation.[207]

In sum, as Eric Yatar contends, changing social norms relating to homosexuality in the U.S. proceed apace with continuing discrimination against homosexuals.[208] Gay victories "have met with tremendous resistance and continue to face enormous challenges as to their validity under the law,"[209] and there is no question that when it comes to attitudes toward homosexuality in the U.S., the "[t]he tides of change" themselves "are slow moving."[210] But it is understating matters to dismiss the changes that have occurred as "piecemeal changes."[211] Compared to other Western democracies, U.S. society, like the military institution that caters to its

---

Marriage, BOSTON GLOBE, June 6, 2006, at A1. Recall that DOMA defines marriage as a legal union between a man and a woman and provides that no state is required to recognize as valid a same-sex marriage sanctioned by another state. *See id.*; *supra* notes 143–44 and accompanying text. In the aftermath of the failure of Congress in 2004 to muster the two-thirds vote necessary to set in motion the process of a constitutional amendment that would restrict marriage to heterosexuals, *see* Carl Hulse & Sheryl Gay Stolberg, *Spending Bill in Hand, Congress Departs*, N.Y. TIMES, Nov. 21, 2004, at 26, in November 2004, eleven states approved referenda measures to ban gay marriages, Editorial, *Gay Marriage: Votes vs. Edicts*, CHI. TRIB., Sept. 16, 2005, § 1, at 24.

[206] Sailagh Murray, *Same-Sex Marriage Ban Is Defeated*, WASH. POST, June 8, 2006, at A1 (quoting Senator John McCain, a Republican from Arizona, who opposes a constitutional amendment). Of the fifty states, "[f]orty-five have acted to define traditional marriage in ways that would ban same-sex marriage." David Hammer, *Debate on Gays Is a Test for Ohio*, CINCINNATI POST, June 6, 2006, at A1. The five that have not acted are New Jersey, New Mexico, New York, Rhode Island, and Massachusetts. *Id.* Nineteen of the forty-five did so through constitutional amendments. *Id.* These states are Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah. *Id.* The remaining twenty-six states have enacted statutes but not constitutional amendments. *Id.* These states are Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

[207] *See* Murray, *supra* note 206.

[208] Yatar, *supra* note 53, at 141.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 140–41.

national defense,[212] is essentially conservative. *Bowers v. Hardwick*, much criticized,[213] was released in 1986[214]—the heyday of the conservative "revolution" pervading the Reagan presidency.[215] *Lawrence v. Texas*, overturning *Bowers*,[216] signaled the dawn of a new day and era just less conservative than the 1980s. Yatar himself admits that the effects of the changes that have taken place in this area are visible "at many different levels."[217] The ubiquity contradicts his assessment of piecemeal changes.

II. GAY ADVOCACY GROUPS AND THEIR RESPECTIVE METHODOLOGIES, INCLUDING TECHNOLOGY USE

The U.S. has an earned reputation, for good or bad, as an "interest group society."[218] Consistent with this image, every articulable interest in this society has its own lobby. The same is true of homosexuals. Numerous interest groups work to promote equal treatment under the law for homosexuals.[219] Analyzing interest groups who advocate for gay rights can be a difficult and unenviable task given the numerosity of these groups. For

---

[212] *See* Clinton, *Remarks Announcing New Policy*, *supra* note 83, at 1112. According to Clinton, "Our military is a conservative institution. . . . Because it is a conservative institution, it is right for the military to be wary of sudden changes." *Id.* He said the military "is an institution that embodies the best of America and must reflect the society in which it operates," but that it should also "make changes when the time for change is at hand." *Id.* Added to this conservatism, and reinforcing it, is the fact that homosexuality is a sensitive issue in the U.S. that, like race and abortion, can be highly charged. RAND REPORT, *supra* note 55, at 194 (citing John F. Dovidio & Russell H. Fazio, *New Technologies for the Direct and Indirect Assessment of Attitudes*, *in* QUESTIONS ABOUT QUESTIONS 187, 209–10 (Judith M. Tanur ed., 1992)).

[213] *E.g.*, Yatar, *supra* note 53, at 157 ("[T]he Supreme Court's ruling in Hardwick was a crushing setback for the movement for equality. . . . [It] constitutionaliz[ed] the criminalization of sodomy . . . .").

[214] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[215] *See, e.g.*, Mark Vilaboy, Comment, *Playing the* Apprendi *Card: Revisiting Judicial Fact-Finding in Arizona's Death Penalty Scheme*, 33 AZ. ST. L.J 363, 370 (2001).

[216] *Lawrence*, 539 U.S. at 578.

[217] *See* Yatar, *supra* note 53, at 141.

[218] *See generally* JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY (3d ed. 1997).

[219] *See, e.g.*, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 173–74 (2005) (noting that the Lambda Legal Defense and Education Fund and the Human Rights Campaign organizations work to promote equality in marriage rights and rights in general for homosexuals).

example, according to a news report, more than ninety gay-rights groups marked the Eighteenth Annual National Coming Out Day of gay-persons on October 11, 2004.[220] This is not counting gay individuals who contribute their personal efforts toward the pursuit of gay rights,[221] nor employee unions that negotiate contracts that include non-discrimination concessions and other benefits for gays.[222] It also does not include religious organizations, such as the Metropolitan Community Church, which promote issues beneficial to gays.[223] Because the complete list of groups advocating for equal rights for homosexuals is probably unascertainable, the several groups surveyed here are illustrative rather than by any means comprehensive. This caveat entered, the illustrative groups analyzed here are: (a) the Gay & Lesbian Alliance Against Defamation (GLAAD), (b) Human Rights Campaign (HRC), (c) Lambda Legal Defense and Education Fund (LDEF or Lambda Legal), (d) Log Cabin Republicans, (e) the National Gay and Lesbian Task Force (NGLTF), (f) the Parents, Families & Friends of Lesbians and Gay (PFLAG), and (g) Servicemembers Legal Defense Network (SLDN). The survey also includes key non-gay advocacy groups that contribute their time, money, and other vital resources to the promotion of gay equality. On a note of organization, this portion of the Article, as earlier indicated, both

---

[220] Tracy Schmidt, *Changing Sides; Groups Mark Coming Out Day*, CHIC. TRIB., Oct. 12, 2004, at 9. These Coming Out occasions may include "coming out" stories by gay persons. *See, e.g.*, Human Rights Campaign, National Coming Out Day, http://www.hrc.org/Content/NavigationMenu/Coming_Out/Get_Involved3/National_Coming_Out_Day/Index.htm (last visited Aug. 21, 2007).

[221] One such individual who comes to mind here is the openly gay congressman Barney Frank who, in November 1993, "wrote to the OPM [Office of Personnel Management] Director James King requesting both clarification on 'federal laws and personnel procedures regarding discrimination based on sexual orientation,' and a formal notification to all federal agencies about 'the state of these rules and procedures.'" Lewis, *supra* note 31, at 464.

[222] These unions and the different federal agencies against whom the concessions have been won include: the National Treasury Employees Union (NTEU) that, in 1988, negotiated with the Department of Health and Human Services to allow union members to bring grievances charging discrimination based on sexual orientation; and similar negotiations in 1990 by the American Federation of Government Employees (AFGE) with the Department of Housing and Urban Development. *See id.* at 465. Unions have also extended some protections to homosexual employees in the Internal Revenue Service; the Bureau of Alcohol, Tobacco, and Firearms; the U.S. Custom Service; and the Pension Benefit Guarantee Corporation. *Id.* Partly due to these union pressures, many federal and even state agencies now list or are negotiating to list sexual orientation in their nondiscrimination policies. *See id.*

[223] *See* Lacayo, *supra* note 122, at 34 (stating that "the richest gay group in the nation isn't a political group but a religious denomination, the Metropolitan Community Church").

complements the background history presented in Part I and simultaneously lays the ground for the argument of the Article in Part IV. It is left free standing on its own as a separate treatment, rather than attached to any of these complementing parts, simply because it is distinct enough to come under each of these portions.

A. Gay and Lesbian Alliance Against Defamation (GLAAD)

GLAAD originated in 1985 in New York in protest response to the *New York Post*'s coverage of the AIDS epidemic;[224] the founders of the organization assessed the coverage as "grossly defamatory and sensationalized."[225] Ever since, the organization has been "on the ground working with local activists to promote awareness and combat invisibility."[226] GLAAD holds out and avows its mission as "promoting and ensuring fair, accurate[,] and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation."[227] "[T]hrough an effective, forceful mix of advocacy, education[,] and visibility," GLAAD provides "timely, inclusive[,] and authoritative resources," that help "expand[] the representation of [the gay] community one story at a time[,]" "[i]n step with today's always-changing media landscape."[228] Building on its conviction that "[w]ords and [i]mages [m]atter," GLAAD maintains that it is

> in the business of changing people's hearts and minds through what they see in the media. We know that what people watch on TV or read in their newspaper shapes how they view and treat the LGBT [lesbian, gay, bisexual, and transgender] people around them. And we have a responsibility to make sure those images foster awareness, understanding[,] and respect.[229]

---

[224] GLAAD, Our History, http://www.glaad.org/about/history.php (last visited Aug. 21, 2007) [hereinafter GLAAD, Our History].

[225] *Id.*

[226] *See* GLAAD, Current Campaigns, http://www.glaad.org/action/campaigns.php (last visited Aug. 21, 2007) [hereinafter GLAAD, Current Campaigns] (referring to its campaign directed at hate crimes).

[227] GLAAD, Our Mission, http://www.glaad.org/about/mission.php (last visited Aug. 21, 2007).

[228] GLAAD, Our History, *supra* note 224.

[229] GLAAD, Images in the Media, http://www.glaad.org/PSA2006/media.php (last visited Aug. 21, 2007).

The organization boasts many "far-reaching" impacts flowing from its work that has promoted the "visibility" of homosexuals.[230] These include "chang[ing] the way lesbians and gay men are portrayed on the screen and in the news."[231] GLAAD has also, it said, "become a major source of resources and information for entertainment and news media decision makers."[232] The organization's exertion on behalf of homosexuals has won it accolades[233] from media outlets, such as the *Los Angeles Times*, which praised GLAAD as "'possibly the most successful organizations [sic] lobbying the media for inclusion.'"[234] Its other accomplishments include getting the *New York Times* to adopt the practice of using the term "gay" to refer to homosexuals in its editorial policy.[235] Due to its campaign efforts, over 140 newspapers across the country, including the *New York Times*, now include same-sex union announcements alongside other wedding listings,[236] among other achievements.[237] GLAAD touts among its current campaigns the "Announcing Equality Project," which teases viewers to check out whether their local newspapers publish gay and lesbian wedding announcements.[238] Finally, as part of its promotion for another project, titled the "'I Do' Campaign," GLAAD is sponsoring a nationwide contest, urging members of the lesbian, gay, bisexual, transgender, and allied community to create their own thirty-second commercials in support of marriage equality.[239]

B. Human Rights Campaign (HRC)

HRC boasts a membership of about 600,000 members and self-describes itself as "America's largest civil rights organization working to achieve gay,

---

[230] GLAAD, Our History, *supra* note 224.

[231] *Id.*

[232] *Id.*

[233] *See id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *See id.* ("GLAAD has not only reached media insiders, but has also impacted millions through newspapers, magazines, motion pictures, television and visibility campaigns."); *see also* GLAAD, Accomplishments, http://www.glaad.org/about/accomp.php (last visited Aug. 21, 2007) (listing a full compilation of the organization's accomplishments in its twenty-one years of existence from 1985 until 2006).

[238] GLAAD, Current Campaigns, *supra* note 226.

[239] *Id.*

lesbian, bisexual[,] and transgender equality."[240] It was founded in 1980 by Steve Endean to raise money for gay-supportive congressional candidates.[241] Its first executive director was Vic Basile, a leading gay activist in Washington D.C., who was elected in 1983.[242] Basile held the position until his departure in January 1989.[243] The organization "envisions an America where GLBT [gay, lesbian, bisexual, transgender] people are ensured of their basic equal rights, and can be open, honest[,] and safe at home, at work[,] and in the community."[244] To achieve its mission, the HRC lobbies Congress, extends campaign support to "fair-minded candidates, and works to educate the public on a wide array of topics" affecting Americans, including recognition of relationship, workplace, family, and health issues.[245] Through its website, HRC assists its members by identifying state and local lawmakers sympathetic to homosexual causes; researching state and local laws regarding issues central to homosexuals; reviewing scorecards of how lawmakers rate on homosexual issues; and drafting and sending letters to lawmakers.[246] One *Time* magazine report praised the foundation of the HRC as the emergence of a "a new kind of gay lobbying group . . . [one] that corresponds to mainstreaming impulses within the gay community."[247] The *Time* article further added that HRC is "[s]edate and pragmatic, with a name so innocuous it could be transferred intact to a group devoted to fair labor practices, [the] H.R.C was established to speak to the middle class in middle-class terms."[248] Moreover, the HRC has an annual black-tie fund-raising dinner which is a significant event for the gay political season and has been attended by guest speakers such as President Clinton in 1997 and Vice President Al Gore in 1998.[249] In 1995, after Elizabeth Birth, a corporate lawyer from Silicon Valley, took over the leadership of the group as Executive director, the HRC

---

[240] HRC, About HRC, http://www.hrc.org/Template.cfm?Section=About_HRC (last visited Aug. 21, 2007).

[241] HRC, HRC History/Timeline: 1980–1989, http://www.hrc.org/Content/NavigationMenu/About_HRC/HRC_History_Timeline_1980-1989.htm (last visited Aug. 21, 2007) [hereinafter HRC History I].

[242] *Id.*

[243] *Id.*

[244] What We Do, *supra* note 18.

[245] *Id.*

[246] *See id.*

[247] Lacayo, *supra* note 122, at 35.

[248] *Id.*

[249] *See id.* at 35–36.

changed its symbol to a yellow equal sign on a blue background.[250] Now "[c]ool as a computer-keyboard button, it has no visible connection to the pink triangle or rainbow flag, two more freighted symbols of the ragged glories of gay history."[251]

HRC has an affiliate, the Human Rights Foundation, formed in 1986,[252] that is tasked with research and public education and programming.[253] In its attempt to further promote its mission, and of importance here, given the technology accent of this Article, the HRC has an Online Action Center through which supporters and other persons who follow events relating to homosexuals receive timely updates and stay informed about upcoming votes in Congress and in state legislatures across the country.[254] The HRC disclosed that "[p]articipants have used the Action Center to send more than 1 million e-mails and faxes to their state and federal elected officials to hold them accountable and demonstrate constituent support for [homosexual] equality."[255]

HRC also boasts an array of publications, several of which are of especial interest here. The first is the organization's website, www.hrc.org. The organization touts the website as:

> [T]he most comprehensive source on the Internet for information about [homosexual] issues, politics and people and the work of HRC and the HRC Foundation. Named by *National Journal* as one of the top five civil rights sites in America, hrc.org attracts millions of users who visit it daily for news and information about [homosexual] America, [its] allies and [its] families.[256]

Another HRC publication is *Equality Magazine*, a quarterly, reputed as "[t]he flagship publication of the [HRC] . . . [and] arguably the largest-circulation [homosexual] magazine in America."[257] The magazine "publishes news about [homosexual] politics and the work of HRC on Capitol Hill and in the

---

[250] *Id.* at 36.

[251] *Id.*

[252] HRC History I, *supra* note 241.

[253] *See* What We Do, *supra* note 18. The HRC Foundation maintains a Board separate and independent from the HRC Board of Directors. Human Rights Campaign Foundation, http://hrc.org/Foundation/Foundation.htm (last visited Aug. 21, 2007).

[254] *See* What We Do, *supra* note 18.

[255] *Id.*

[256] *Id.*

[257] *Id.*

community."[258] There is also *LAWbriefs*, a quarterly, which summarizes "major developments in [homosexual] legal issues."[259] The quarterly "covers case law as well as legislation and includes information ranging from family law to discrimination protections to international legal developments."[260] Finally, indicative of an issue of overriding interest to homosexuals, HRC also publishes *State of the Family*.[261] According to the HRC website, the publication "ranks states on a variety of indicators, including laws covering marriage, civil unions and domestic partnership; adoption and second-parent adoption; safe schools; discrimination; and hate crimes."[262] HRC sponsors Coming Out Day, which came into being on October 11, 1987, and is celebrated now every year on October 11.[263]

---

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.* Notice the resonating words of Elizabeth Birch in 1998, commenting on the showdown over homosexual marriage in Hawaii that year. *See* Cloud, *supra* note 155, at 43. She reportedly said, "'Going for marriage is like shooting for the moon . . . It's our hardest issue, but success would bring the greatest rewards.'" *Id.* (quoting Elizabeth Birch). Birch was Executive Director of the HRC from 1995 to 2004. *See* HRC, HRC History/Timeline: 1990–2000, http://www.hrc.org/Content/NavigationMenu/About_HRC/HRC_History_Timeline_ 1990-2000.htm (last visited Aug. 21, 2007); Hrc.org, News Release, http://www.hrc.org/Content/ContentGroups/News_Releases/20021/Elizabeth_Birch_to_Lead_HRC_Through_Next_Year.htm (last visited Aug. 21, 2007).

[263] *See* HRC, About the HRC Coming Out Project, http://www.hrc.org/Template.cfm?Section=About_Coming_Out (last visited Aug. 21, 2007).

C. Lambda Legal Defense and Education Fund (LLDEF or Lambda Legal)[264]

Lambda Legal portrays itself as "a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education[,] and public policy work."[265] Beginning with "a couple of volunteers in someone's apartment," the organization has grown to "a staff of roughly 100 employees"[266] spread out into one national headquarters based in New York and four regional offices in Atlanta, Chicago, Dallas, and Los Angeles.[267] Lambda Legal strives to help "fashion a society that is truly diverse and tolerant[,]" and it claims that its mission "to combat discrimination based on sexual orientation, gender identity and HIV status in this country has become

---

[264] Lambda Legal is distinguishable from Lambda Gay, Lesbian, Bisexual, and Transgender individuals (Lambda GLBT). *See* Lambda GLBT Community Services, http://www.qrd.org/qrd/ www/orgs/avproject/main.htm (last visited Aug. 21, 2007). The latter identifies itself as "a non-profit gay/lesbian/bisexual/transgender agency dedicated to reducing homophobia, inequality, hate crimes, and discrimination by encouraging self-acceptance, cooperation, and non-violence." *Id.* Its mission is "to create social change and achieve full civil rights, dignity, and self-respect for gay, lesbian, bisexual, and transgendered individuals through education, youth advocacy, anti-violence efforts, and fighting discrimination of all forms, to achieve full participation in society of persons belonging to a sexual minority." *Id.* And its philosophy is to inform, create change, and support. Lambda GLBT, History, http://www.lambda.org/history_org.htm (last visited Aug. 21, 2007). The organization seeks to inform by "organiz[ing] the lesbian, gay, bisexual and transgender community to provide a source for accurate information about and within our community" in an attempt "[t]o improve the public's awareness and understanding of the [homosexual] community by providing technical assistance, seminars, workshops, and public education campaigns." *Id.* It creates change by various means, including working with groups and individuals "[t]o empower, reduce homophobia, and expand understanding of sexual orientation," in an attempt "[t]o create coalitions and collaborative efforts to maximize resources and efforts at creating change." *Id.* And it extends support by "recogniz[ing], reduc[ing], and respond[ing] to the effects of homophobia, prejudice, and ignorance by designing and implementing educational, advocacy, outreach, and other supportive programs." *Id.*

[265] Lambdalegal.org, About Lambda Legal, http://www.lambdalegal.org/about-us/ (last visited Aug. 21, 2007) [hereinafter About Lambda Legal]. As the organization indicates in its website, "At Lambda Legal, we imagine a different world—a world of full equality for lesbians, gay men, bisexuals, transgender people and people with HIV—and we work to create that world every day." *Id.*

[266] Lambdalegal.org, Lambda Legal History, http://www.lambdalegal.org/about-us/history.html (last visited Aug. 21, 2007) [hereinafter Lambda Legal History].

[267] About Lambda Legal, *supra* note 265.

an intrinsic part of the struggle for civil rights."[268] It selects cases and issues that will most protect and advance the rights of LGBT people and those with HIV,[269] including litigations dealing with discrimination in employment, housing, public accommodations and the military; HIV-related discrimination; parenting and relationships; equal marriage rights; equal employment and domestic partnership benefits; sodomy law challenges; immigration; anti-gay initiatives; and free speech and equal protection rights.[270]

D. Log Cabin Republicans

Log Cabin Republicans takes its name from a reference to the first Republican President of the United States, Abraham Lincoln, who was born in a Log Cabin.[271] The organization claims that it "courageously stand[s] on the front lines of today's most important battleground for gay and lesbian civil rights," and it touts itself as "the nation's leading voice for fairness, inclusion, and tolerance in the GOP."[272] Its mission is "to work within the Republican Party to advocate equal rights for all Americans, including gays and lesbians."[273] Log Cabin "stand[s] for the proposition that all of us are created equal—worthy of the same rights to freedom, liberty, and equality"[274] and for "the principles of limited government, individual liberty, individual responsibility, free markets[,] and a strong national defense," which drive the agenda and moral values of the Republican Party.[275] Log Cabin Republicans further articulate that these principles "are consistent with the pursuit of equal treatment under the law for gay and lesbian Americans."[276] Not only does it "work[] within the [Republican] party for change, Log Cabin continues

---

[268] *Id.*

[269] *Id.*

[270] Lambda Legal History, *supra* note 266.

[271] *See* Log Cabin Republicans, A Proud History, http://online.logcabin.org/about/history.html (last visited Aug. 21, 2007) (discussing the "proud history" of the organization from Abraham Lincoln to Ronald Reagan to George W. Bush).

[272] Log Cabin Republicans, About Log Cabin, http://online.logcabin.org/about/ (last visited Aug. 21, 2007) [hereinafter About Log Cabin]. The GOP or Grand Old Party, in full, is another name for the Republican Party. GOP.com, The Republican Party – GOP History, http://www.gop.com/About/AboutRead.aspx?AboutType=3 (last visited Aug. 21, 2007).

[273] Log Cabin Republicans, Mission Statement, http://online.logcabin.org/about/mission.html (last visited Aug. 21, 2007).

[274] *Id.*

[275] *Id.*

[276] *Id.*

building new alliances in the gay and lesbian community."[277] The organization instructively and revealingly disclosed:

> The mere existence of our organization recognizes the fact that the Republican Party still has a long way to go on issues affecting gay and lesbian civil rights. . . . Too many people in the party remain hostile to gay and lesbian civil rights. Log Cabin will confront the radical right's bigotry head-on as we join the majority of Republicans who believe inclusion wins.[278]

The organization states it intends to create change, and it portrays itself as a grassroots organization whose numerous members across the country "work tirelessly to change minds and hearts. One person at a time, we are building a stronger Republican party and a better America."[279] Log Cabin boasts itself as a "'home for mainstream gay and lesbian Americans who . . . care deeply about equality [and] hold Republican views on crime, fiscal responsibility and foreign policy.'"[280] Log Cabin helped draw more than a million votes for George W. Bush in the 2000 election, a number that is estimated to represent about one-quarter of all gay and lesbian votes nationwide.[281] None of these efforts appeared to faze conservative resistance to Log Cabin and homosexuals: "Though the organization proved capable of raising more than $100,000 per election cycle, it found itself in the embarrassing position of not being able to find many Republican candidates willing to accept [its] donations."[282]

E. National Gay and Lesbian Task Force (NGLTF) and the Task Force Foundation

Founded in 1973, NGLTF works to "build the grassroots political power of the LGBT [lesbian, gay, bisexual and transgender] community to win

---

[277] About Log Cabin, *supra* note 272.

[278] *Id.*

[279] *Id.*

[280] Epstein, *supra* note 22, at 564 (omission and alteration in original).

[281] Press Release, Log Cabin Republicans, With Election Not Yet Determined, Bush-Cheney Captures 25 % of Gay Vote Despite Gay Press Predictions of Single-Digit Support (Nov. 8, 2000) (on file with author); *see also* CNN.com, Election 2000 – Results, http://www.cnn.com/ ELECTION/2000/results/index.epolls.html (last visited Aug. 21, 2007).

[282] Epstein, *supra* note 22, at 564.

complete equality."[283] Founded in 1988, the Task Force Foundation was "the first national LGBT civil rights and advocacy organization and remains the movement's leading voice for freedom, justice and equality."[284] One of the means by which the organization seeks to achieve its goal of equality for homosexuals is through "partner[ing] with leaders, organizations, and campaigns to build the political power of the lesbian, gay, bisexual and transgender (LGBT) community in measurable ways at the state and local level."[285] The NGLTF successfully lobbied the U.S. Civil Service Commission in 1973 to employ gay people in the public sector.[286] NGLTF founded the Legislative Lawyering Program in 1999 to promote progressive legislation for homosexuals at both the national and state level.[287] Unlike Human Rights Campaign, which arguably "pursue[s] centrist strategies and relie[s] heavily on wealthy, white male donors for their electoral fund-raising[,]" NGLTF is more left-leaning and "populist" in its orientation.[288]

F. Parents, Families & Friends of Lesbians and Gays (PFLAG)

PFLAG consists of parents, families, and friends of lesbians and gay men who band together to form "a national support, education and advocacy organization for gay, lesbian, bisexual and transgendered (GLBT) people, their families, friends and allies."[289] It is a nonprofit, independent organization that is headquartered in Washington, D.C., and it is not affiliated with any political or religious institution.[290] PFLAG was founded in 1973, but was not incorporated as a national organization until 1982, almost ten years later.[291] Its members and leaders are people of all ages, races, and economic backgrounds united in a "commitment to grow beyond false and harmful perceptions of GLBT people, to educate our communities, and to stand up for full equal rights and protections for GLBT people."[292] PFLAG has 200,000 members and supporters as well as local affiliates "in more than

---

[283] National Gay and Lesbian Task Force, About Us, http://www.thetaskforce.org/aboutus/whatwedo.cfm (last visited Aug. 21, 2007).

[284] *Id.*

[285] National Gay and Lesbian Task Force, Organization and Training, http://www.thetaskforce.org/our_work/organizing_and_training (last visited Aug. 21, 2007).

[286] JANDA ET AL., *supra* note 3, at 531.

[287] *Id.*

[288] Epstein, *supra* note 22, at 564.

[289] PFLAG, FAQs, *supra* note 18.

[290] *Id.*

[291] *Id.*

[292] *Id.*

500 communities across the U.S. and abroad."[293] PFLAG touts itself as "the largest grassroots-based family organization of its kind."[294]

The organization seeks to "[c]reate a society in which all gay, lesbian, bisexual[,] and transgender persons may enjoy, in every aspect of their lives, full civil and legal equality and may participate fully in all the rights, privileges[,] and obligations of full citizenship in this country" and to "[w]ork toward full inclusion of gay, lesbian, bisexual and transgender persons within their chosen communities of faith."[295] Through support, education, and advocacy, the organization seeks to "promote[] the health and well-being of gay, lesbian, bisexual and transgender persons, their families and friends."[296] PFLAG has developed policy statements on a multiplicity of issues, including equality in the workplace, same-sex marriage, and reparative therapy, among others.[297]

G. Servicemembers Legal Defense Network (SLDN)

SLDN depicts itself as "a national, non-profit legal services, watchdog[,] and policy organization dedicated to ending discrimination against and harassment of military personnel affected by 'Don't Ask, Don't Tell' and related forms of intolerance."[298] Its online resources consist of a law library on the U.S. government's military policy relating to homosexuals, including statutes, court cases, and law review articles touching on the topic.[299] SLDN claims it has documented thousands of violations of "Don't Ask, Don't Tell" since the policy's inauguration in 1993.[300]

---

[293] *Id.*

[294] *Id.*

[295] PFLAG, Vision, *supra* note 18.

[296] *Id.*

[297] PFLAG, Policy Statements, http://www.pflag.org/index.php?id=104 (last visited Aug. 21, 2007). Reparative therapy is an effort designed "to change or repair a person's sexual orientation." *Id.* PFLAG disagrees with such therapy because, according to PFLAG, reparative therapy is "futile and damaging" and the proper thing to do is to "work toward changing cultural biases." *Id.*

[298] SLDN, About SLDN, http://www.sldn.org/templates/about/record.html?section=10&record=15 (last visited Aug. 21, 2007).

[299] *See* SLDN, Law Library, http://www.sldn.org/templates/law/index.html (last visited Aug. 21, 2007).

[300] SLDN, *Conduct Unbecoming: The Seventh Annual Report on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"*, Mar. 15, 2001, http://www.sldn.org/templates/law/record.html?section=22&record=256.

H. Key Non-Gay Civil Rights Organizations Advocating for Gay Rights

There are multiplicities of other liberal civil rights organizations that have commitment to homosexual issues as part of their mission, two of which deserve special mention here. The first is the American Civil Liberties Union (ACLU). Formed in 1920, the ACLU is a nonprofit, nonpartisan organization that has "grown from a roomful of civil liberties activists to an organization of more than 500,000 members and supporters."[301] The organization claims that it handles about 6,000 court cases annually from its offices scattered all over the United States.[302] It portrays its mission to include solicitude for "segments of our population that have traditionally been denied their rights" in a list that includes homosexuals, among others.[303] In fact, the organization maintains a lesbian and gay rights project benefiting homosexuals.[304] The ACLU's embrace of gay issues is consistent with its mission not only to defend existing understandings of the Bill of Rights, but also to expand its interpretation of that charter to cover citizens hitherto excluded.[305] The organization justifies the solicitude for traditionally vulnerable groups on the ground that "[i]f the rights of society's most vulnerable members are denied, everybody's rights are imperiled."[306] The ACLU has not always been consistent in its advocacy for gay rights. Rather, for example, as indicated before, during the Red Communist scare of the 1950s, the organization supported excluding homosexuals from federal civil service.[307]

Another key non-gay group that devotes its energies to homosexual issues is the Stanford Law School in California, which maintains a website relating to "Don't Ask, Don't Tell."[308] The database embodies primary materials on the U.S. military's policy on sexual orientation going back to World War I, including legislation; regulations; internal directives of service branches;

---

[301] American Civil Liberties Union, About Us, http://www.aclu.org/about/index.html (last visited Aug. 21, 2007) [hereinafter ACLU, About Us].

[302] *Id.*

[303] *Id.*

[304] *See* American Civil Liberties Union, Lesbian and Gay Rights, http://www.aclu.org/lgbt/index.html (last visited Aug. 21, 2007) (counting "lesbian and gay rights" among a multiplicity of issues for which the organization advocates).

[305] *See generally Guardian of Liberty: American Civil Liberties Union*, LECTRIC LAW LIBRARY, http://www.lectlaw.com/files/org01.htm (last visited Aug. 21, 2007).

[306] *See* ACLU, About Us, *supra* note 301. The organization also "maintain[s] the position that civil liberties must be respected, even in times of national emergency." *Id.*

[307] *See* Lewis, *supra* note 31, at 458.

[308] *See* Stanford Law School, *Don't Ask, Don't Tell, Don't Pursue*, http://dont.stanford.edu/doclist.html (last visited Aug. 21, 2007).

hearing transcripts, litigations papers, and court decisions on particular service members' proceedings; policy documents generated by the military, Congress, the Department of Defense, and other offices of the Executive branch; and advocacy documents submitted to government entities.[309]

I. Summation

Advocacy groups working for gay rights lobby lawmakers for favorable legislation on behalf of homosexuals and they use the media and related advocacy tools alongside with technology like cyberspace. To various degrees, all of the above-referenced organizations maintain a strong online presence. One analyst assessed, not incorrectly, that these and other gay advocacy groups have managed "to make serious in-roads into both the legal and legislative arenas to advance the twin causes of gay rights and equality,"[310] and because of their efforts, he said, "the social, legal, and political developments in the area of gay rights have been profoundly and positively impacted," with the result that "homosexuals in American society today arguably experience much greater social tolerance and acceptance than was the case just over a decade ago."[311] But how different is the work of these interest groups from interest groups who advocated for other minority groups? Part IV attempts to answer these and other questions.

III. UNDERSTANDING GAY APPLICATION OF TECHNOLOGY: THE CONVENTIONAL MODEL OR ACCOUNT

The conventional account in the literature regarding homosexual application of technology posits that gay persons use technology, particularly cyberspace,[312] to hide their sexual orientation and identity as well as to protect

---

[309] *Id.* (including a table of contents organized into Statutes and Regulations, Executive Materials, Congressional Materials, Military Branch, and Miscellaneous Materials).

[310] Yatar, *supra* note 53, at 135.

[311] *Id.*

[312] The term "cyberspace" encompasses "communication on and through the Internet, the World Wide Web, electronic mail, Usenet discussion groups, chat rooms, the exchange of digitized images, video, and sounds, as well as other modes of communication." Stein, *supra* note 35, at 164. As Stein stated, the term is "a catchall phrase for computer-mediated communication" or even, more simply, "the 'location' of various electronic interactions." *Id.* Though the Internet maintains some distinctive properties, much like cyberspace, it is a vast, congealment of *previous* technologies that include the telegraph, telephone, radio, and the computer. *See* Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOC'Y, http://www.isoc.org/internet/history/ brief.shtml (last visited Aug. 21, 2007) (stating that the invention of the telegraph, telephone, radio, and computer created an "unprecedented

(*continued*)

their privacy. Recent works typifying this worldview include an article by Professor Stein[313] and Judge Sporkin's opinion in the *McVeigh* case.[314] In justifying his ruling against the government in *McVeigh*, Judge Sporkin stated, "Particularly in the context of cyberspace, a medium of 'virtual reality' that invites fantasy and affords anonymity, the comments attributed to McVeigh do not by definition amount to a declaration of homosexuality."[315] The rest of Judge Sporkin's views, including the portion of interest to this Article, are saved for Part IV.B below analyzing the *McVeigh* case as exemplification of the trouble with the conventional model. The remainder of this discussion will therefore revolve around the views of Professor Stein as embodied in his article. First, I summarize the main arguments of the piece. This is fair to Professor Stein whose position goes beyond the confines of my focus in this Article, gay application of technology. Articulating his main arguments first is also consistent with scholastic canons and the ethos of intellectual honesty forbidding willful or deliberate misrepresentation of a person's work. Next, I focus on the portion of Stein's piece of interest to this Article, his discussion related to gay use of cyberspace.

A. Stein's Arguments

Stein's article, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, analyzes the intersections among free speech, freedom of association, privacy, and cyberspace (or technology).[316] Specifically, the

---

integration of capabilities" that gave rise to the Internet). It is also, at the same time, inextricably connected to *existing* technologies like the World Wide Web and cyberspace generally, all the while affording the canvass of a "general infrastructure on which new applications could be conceived." *Id.* The Internet has also "revolutionized the computer and communications world like nothing before" and has, in turn, been positively affected by these technologies. *See id.* ("A key to the rapid growth of the Internet has been the free and open access to the basic documents . . . ."). In short, in addition to being a "collection of technologies," the Internet is also a "collection of communities" whose very success "is largely attributable to both satisfying basic community needs as well as utilizing the community in an effective way to push the infrastructure forward." *Id.*

[313] *See* Stein, *supra* note 35.

[314] *See* McVeigh v. Cohen, 983 F. Supp. 215 (D.D.C. 1998).

[315] *Id.* at 219.

[316] *See* Stein, *supra* note 35, at 163, 199–205 (discussing "closetspeech" and the First Amendment). Stein uses closetspeech as shorthand "for the speech of lesbians and gay men, when they speak as lesbians and gay men but do so anonymously." *Id.* at 199 (citation omitted). Stein also tied protections for anonymous speech conducted through the technology of cyberspace to privacy. *See id.* at 192.

piece deals with the crucialness of anonymity (and pseudonymity) in gay life and the necessity of constitutional protection for anonymous gay speech.[317] "[G]ay men and lesbians cannot enjoy free speech unless, when they speak as gay men or lesbians, they are allowed to speak anonymously, either by using a pseudonym or by hiding their identities in some other fashion."[318] Stein said homosexuals are "unpopular minorities" within the meaning of the Supreme Court's First Amendment jurisprudence.[319] To ensure the speech of unpopular minorities is not suppressed by an intolerant majority or met with repercussions for expressing unpopular views, the Supreme Court has afforded "especially strong protection" to such speech.[320] The same strength of protection "should be extended to the speech of lesbians and gay men in cyberspace."[321] "[T]he right to conceal one's sexual orientation in order to fully participate in public discourse is central to lesbians and gay men's ability to fully exercise their right to free speech."[322] "Protecting 'persecuted groups . . . [who] criticize oppressive practices and laws' is at the very core of the First Amendment."[323] Laws restricting anonymous speech especially burden the viewpoints of advocates of unpopular causes such as homosexuals.[324] Government regulation of cyberspace has "pervasive effects . . . on the lesbian and gay community."[325] Affording gay anonymity (achieved through cyberspace) constitutional protection is critical because without the possibility of speaking anonymously or pseudonymously, the unpopular viewpoints of homosexuals, just like the views of other unpopular minorities, may be silenced.[326] Without some form of constitutional "right to speak anonymously" afforded to homosexual speech,[327] homosexuals might face "'threats, harassment or reprisals'" for coming out or being open about

---

[317] *Id.* at 199.

[318] *Id.*

[319] *See id.*

[320] *See id.* at 196–97, 200–01, 211.

[321] *Id.* at 211.

[322] *Id.* at 199.

[323] *Id.* at 212 (quoting Talley v. California, 362 U.S. 60, 64 (1960) (omission and alteration in original)).

[324] *Id.* at 197.

[325] *Id.* at 161.

[326] *See id.* at 197.

[327] *Id.* at 200.

their sexual orientation, advocating gay rights, or engaging in provocative political speech.[328]

Not only are homosexuals unpopular minorities whose anonymous speech needs strong constitutional protection to insulate them against suppression by the majority, "[l]aws that restrict the expression of lesbians and gay men in cyberspace disrupt one of the central functions of the First Amendment."[329] "Given the relative anonymity of speech in cyberspace and the role that such speech plays for gay men and lesbians, laws that restrict speech in cyberspace should be carefully examined for their effect on the speech of sexual minorities."[330] Stein maintains that although attempts to regulate cyberspace affect "all non-dominant groups, including women and racial minorities," homosexuals are "uniquely" affected by restrictions on anonymity.[331] "Neither speaking as a gay man or lesbian nor speaking about homosexuality is without negative ramifications, especially in comparison to speaking about heterosexual relationships, heterosexual lifestyles, and heterosexual sex."[332] He said, "Cyberspace provides opportunities for which lesbians and gay men as a group, more than heterosexuals as a group, have a particular need."[333] What is more, gay persons quite early and strongly embraced the Internet, and many believe that they maintain a presence on the medium disproportionate to their numbers.[334] Given his belief that "attempts to regulate cyberspace by preventing anonymity will have a differential impact" on homosexuals,[335] Stein views with alarm the increase in attempts by governments "to regulate speech in cyberspace through various means."[336] He ruefully observed that "despite the discrimination faced by lesbians and gay men . . . current Supreme Court case law does not afford sexual orientation heightened

---

[328] *See id.* at 200–01, 212 (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982)). Stein also referred to the Supreme Court decisions in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); and *Talley v. California*, 362 U.S. 60 (1960), which focused on protection of anonymous speech. Stein, *supra* note 35, at 200–01, 212.

[329] *See* Stein, *supra* note 35, at 163.

[330] *Id.* at 199; *see also id.* at 205 ("In light of the role cyberspace plays for lesbians and gay men[,] . . . laws that restrict the closetspeech of lesbians and gay men in cyberspace warrant careful and critical judicial evaluation.").

[331] *Id.* at 163.

[332] *Id.* at 191.

[333] *Id.* at 162–63.

[334] *See id.* at 184–85.

[335] *Id.* at 212.

[336] *See id.* at 159.

scrutiny under the Fourteenth Amendment's Equal Protection Clause, as it does for classifications based on race, ethnicity, national origin, sex, alienage, and legitimacy."[337] Society and the government created and maintained "the legal institution of the closet."[338] And, "[b]ecause of the closet and other features of their social situation, lesbians and gay men have special needs for the sort of anonymity that cyberspace provides."[339] Given this occurrence, "[w]hen governments regulate cyberspace, they must consider the impact of potential legislation on lesbians and gay men and safeguard against the suppression of unpopular groups and ideas; when courts evaluate these regulations, they should subject efforts to limit the speech of lesbians and gay men to close judicial scrutiny."[340]

B. Stein's Views Relating to Gay Use of Cyberspace

Compared to Stein's contention for constitutional protection on the anonymous speech of homosexuals, his views on gay use of cyberspace is much more limited. The Internet and cyberspace afford "opportunities for which lesbians and gay men as a group, more than heterosexuals as a group, have a particular need."[341] For homosexuals across all age groups, these media and technology afford "new avenues for anonymous and pseudonymous communication"[342] plus the opportunity to "interact without the traditional constraints of time, place, and manner of communication."[343] "Deeply personal issues of sexual identity could, for the first time, be explored in almost total anonymity without threat of rejection or violence."[344] Whether they are gay teenagers living in the closet or gay adults living in isolated contexts like rural areas or the military, and regardless of where they are in their station as gay, "cyberspace is an important and perhaps vital context in which to express themselves anonymously."[345] Individuals who have reservations about speaking openly can participate in many of the

---

[337] *Id.* at 173. Stein disclosed that "most lower courts that have considered the question" have held that sexual orientation classifications do *not* deserve heightened scrutiny, but that the Supreme Court has yet to directly rule on the question. *Id.* at 173–74.

[338] *Id.* at 202, 205. Stein portrayed the closet as a "social creation" that is "enforced in various ways by laws and judicial decisions." *Id.* at 177.

[339] *Id.* at 212.

[340] *Id.* at 163.

[341] *Id.* at 162–63.

[342] *Id.* at 159.

[343] *Id.*

[344] *Id.* at 184.

[345] *Id.* at 201.

activities in cyberspace anonymously or pseudonymously without any obligation to attach any information that can identify them, such as name, hometown, race, or sexual interests.[346] "The relative anonymity of cyberspace is ideal for lesbians and gay men who are not open about their sexual orientation and for people who are exploring their sexuality."[347] This is particularly the case with gay teenagers with access to computers.[348] For these teenagers, "the Internet has, quite simply, revolutionized the experience of growing up gay";[349] cyberspace offers "a teeming online gay world, replete with resource centers, articles, advice columns, personals, chat rooms, message boards, porn sites and—most crucially—thousands of closeted and anxious kids."[350] "Gay teenagers surfing the Net can find Web sites packed with information about homosexuality and about local gay support groups and counseling services, along with coming-out testimonials from young people around the world" among other resources.[351]

Additional to its important property of anonymity, cyberspace also serves the useful function of affording "a means of escape from the emotional and social isolation that for so many people is part of being gay."[352] For gay persons, it "provides a virtual community that constitutes an emotional lifeline."[353] Given the legal and social challenges homosexuals face and the "pervasive institution of the closet,"[354] cyberspace affords a source of "important refuge"[355] and a "virtual lifeline" for homosexuals.[356] With specific reference to the military, the organization's "intolerance of homosexuality" leaves homosexuals little choice but to turn "to cyberspace as a way to express and explore their sexual orientations."[357] Legislators "need to take special cognizance" of this virtual lifeline when they "craft statutes designed to regulate cyberspace, [and] they need to consider the unique role

---

[346] *Id.* at 164.

[347] *Id.* at 162.

[348] *See id.* at 185.

[349] *Id.* (quoting Jennifer Egan, *Lonely Gay Teen Seeking Same*, N.Y. TIMES MAG., Dec. 10, 2000, § 6, at 110).

[350] *Id.* at 183 (quoting Egan, *supra* note 349, at 113).

[351] *Id.* at 185 (quoting Egan, *supra* note 349, at 113).

[352] *See id.* at 184.

[353] *Id.* at 162.

[354] *Id.* at 185.

[355] *Id.*

[356] *Id.* at 182.

[357] *Id.* at 185.

that cyberspace plays in the lives of many lesbians and gay men."[358] In short, in Stein's depiction, gays use cyberspace as a tool designed to help shield their homosexuality and identity against the hostility of an intolerant majority.

Stein also wrote, "Many lesbians and gay men find cyberspace to be an important source of information, a useful way of community and political organizing, a congenial and entertaining way of spending time, and a potential medium for meeting friends, lovers, and sexual partners."[359] However, it is obvious that his emphasis is on the use of technology designed to hide their sexual orientation and identity, and to protect the privacy of that sexual orientation and identity.[360] The singular sentence incorporates a fleeting mention of "community and political organizing" that is quickly followed by commentary on "a congenial . . . way of spending time, and a . . . medium for meeting friends, lovers, and sexual partners" which commentary reinforces the emphasis on anonymity and shield.[361] To support his argument, Stein utilized several case studies of homosexuals who used the Internet and cyberspace to protect their homosexuality and identity.[362]

IV. UNDERSTANDING GAY APPLICATION OF TECHNOLOGY: THE TROUBLE WITH THE CONVENTIONAL MODEL

The conventional account and model posits essentially that gays and lesbians use technology, particularly cyberspace, to shield or hide their sexual orientation or identity—taking advantage of the anonymity and pseudonymness this technology affords.[363] In this view, homosexuals, like everyone else in society, have a need and craving for the rights of privacy and association.[364] But these are values instrumental to the primary value of the integrity of their sexual orientation and or identity. The trouble with this view is *not* that it is incorrect. Incorrectness is beside the point. The trouble is that it is incomplete or inadequate. It is also unrealistic. There are four segments to the discussion in this part of the Article. First, I identify and discuss five factors that, in my view, account for the incompleteness or inadequacy of the traditional model. Next, I use the *McVeigh* decision to illustrate what is wrong with the traditional model. In the remaining two sections, I address the

---

[358] *Id.* at 213.
[359] *Id.* at 162.
[360] *See id.* at 164.
[361] *Id.* at 162.
[362] *See id.* at 182–86.
[363] *See supra* Part III.
[364] *See* Stein, *supra* note 35, at 162–63.

question of whether technology makes a difference and respond to conceivable objections relating to my position in this Article.

A. Factors that Render the Conventional Model Incomplete or Inadequate

Five conceivable factors which render the conventional account incomplete or inadequate are that the model: (1) takes a narrow view of technology that is confined to the Internet and cyberspace; (2) ignores or accords little recognition to activities and contributions in the gay struggle for equality that go beyond the Internet and cyberspace; (3) ignores or accords little recognition to the labor and contributions of gay and non-gay advocacy groups working for gay equality, (4) is apolitical, and (5) is static rather than dynamic. I discuss these factors in turn.

1. Inadequacy Built on a Narrow View of Technology

The first factor responsible for the incompleteness or inadequacy of the traditional account is that it takes a narrow view of technology that is confined to the Internet and cyberspace. Nobody minimizes the importance of the Internet and cyberspace or the vast reaches of these tools of technology. However, gay application of technology has never been something limited to these media. Instead, in their struggle for equality, gays have used a range of technology that goes beyond the Internet and cyberspace to include, for example, scientific investigations into the biological origin for homosexuality.[365] The American Psychiatric Association, in 1973, voted to remove homosexuality from its list of psychological disorders,[366] after many years of regarding homosexuality as a mental or psychological disorder and inducing the U.S. government, especially the military, to do the same.[367] The result of the occurrence, as Professor Gossett points out, is that "the common use of the term 'sexual orientation' has not included behavior still classified as mental or psychological disorders" by psychologists and others.[368] Additionally, studies have been carried out inquiring into the possible biological origin for homosexuality in an attempt to ascertain whether sexual

---

[365] *See* Gossett, *supra* note 14, at 72.

[366] *Id. See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987).

[367] *See* RAND REPORT, *supra* note 55, at 5 (pointing out that during World War II, military authorities consulted with and accepted the recommendations of medical and psychiatric personnel regarding homosexuals, and that the American Psychiatric Association's Military Mobilization Committee helped develop the procedures used to evaluate more than 18 million men examined for induction during the course of the war).

[368] Gossett, *supra* note 14, at 71.

attractiveness is less a matter of choice than of biological predisposition.[369] Or, as Gossett put it, "whether or not sexual orientation is a personal characteristic more appropriately compared to race, ethnicity, or gender or whether comparison to some voluntary behaviors like religious choice is more suitable."[370] Indeed, that "sexual orientation" has replaced "sexual preference" or "affectional preference" in discussions relating to gays, suggests, again as Professor Gossett contended, "that the arguments in favor of at least a partial biological explanation have gained fairly wide acceptance."[371] Society and the state have used science as a tool of discrimination and exclusion against homosexuals.[372] But, turning the table against their excluders and tormentors, homosexuals and the interest groups that advocate for them have also, as indicated, shrewdly and successfully, used science in their pursuit of equality. With its definition of technology focused exclusively on cyberspace, the traditional model discounts or minimizes this more expansive application of technology in the gay struggle for equality.

2. Inadequacy Built on Ignorance or Little Recognition of Activities and Contributions Beyond the Comparatively Narrow Confines of the Internet and Cyberspace

A second factor, (cor)related to the first, accounting for the inadequacy of the conventional model, is that it ignores or gives little recognition to activities and contributions in the gay struggle for equality that go beyond the Internet and cyberspace. To accomplish their purpose of "in-roads into both the legal and legislative arenas" designed "to advance the twin causes of gay rights and equality,"[373] interest groups advocating for gays rights, such as the organizations surveyed in Part II of this Article, lobby lawmakers for legislation on behalf of homosexuals, and use the media and cutting-edge technology, along with the infrastructure or architecture of existing technology like the Internet and cyberspace.[374] A few examples illustrate this point. GLAAD "reache[s] media insiders" and "impact[s] millions through newspapers, magazines, motion pictures, television[,] and visibility

---

[369] *See, e.g.*, Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47.

[370] Gossett, *supra* note 14, at 96.

[371] *Id.*

[372] *See supra* note 367 and accompanying text.

[373] Yatar, *supra* note 53, at 135.

[374] *See supra* Part II; *see also* Yatar, *supra* note 53, at 135.

campaigns."[375] PFLAG "promotes the health and well-being of gay, lesbian, bisexual[,] and transgender persons, their families and friends" via "support, . . . education, . . . and advocacy."[376] Lambda Legal pursues its mission for gays "through impact litigation, education[,] and public policy work,"[377] and conducts its legal work through test cases "that will have the greatest impact in protecting and advancing the rights of LGBT people and those with HIV."[378] Lambda GLBT seeks to achieve its own mission through a variety of means, including "education, youth advocacy, anti-violence efforts, and fighting discrimination of all forms."[379] Last, but not least, HRC has lobbied Congress, extended campaign support to "fair-minded candidates," and worked to educate the public on a variety of issues affecting homosexual Americans.[380] Using its website, HRC has assisted its members in identifying state and local lawmakers sympathetic to homosexual causes, in researching state and local laws regarding issues central to homosexuals, in reviewing scorecards of how lawmakers rate on homosexual issues, and in drafting and sending letters to lawmakers.[381] The organization also has an Online Action Center through which supporters and persons who follow its work have received timely updates and have stayed informed about upcoming votes in Congress and in state legislatures across the country.[382] Using this online resource, participants have sent "more than 1 million e-mails and faxes to their state and federal elected officials to hold them accountable and demonstrate constituent support for [homosexual] equality."[383] Yet still, the organization runs a variety of publications that carry news about homosexual politics and HRC's work on Capitol Hill and in local communities.[384] Human Rights Foundation, an affiliate of HRC, does research, public education, and programming.[385] These examples are a complicated and entangled mixture of technologies that include the Internet and cyberspace—for example, HRC's award-winning website, hrc.org, is praised as "the most comprehensive source on the Internet for information about [homosexual] issues, politics and people

---

375 GLAAD, Our History, *supra* note 224.

376 PFLAG, Vision, *supra* note 18.

377 About Lambda Legal, *supra* note 265.

378 Id.

379 Lambda GLBT Community Services, *supra* note 264.

380 What We Do, *supra* note 18.

381 *Id.*

382 *Id.*

383 *Id.*

384 *See id.* (referring to the quarterlies *Equality Magazine* and *LAWbriefs*).

385 *Id.*

and the work of HRC and the HRC Foundation"[386]—yet at the same time also go beyond these media that the conventional model, focused as it is exclusively on the Internet and cyberspace, discounts or minimizes. This factor is a major problem identified in the *McVeigh* case analyzed below.

3. Inadequacy Built on Ignorance or Little Recognition of the Labor and Contributions of Gay and Non-Gay Advocacy Groups in the Gay Struggle for Equality

A third factor, related to and reinforcing the factor just discussed above, which accounts for the incompleteness or inadequacy of the conventional model is that it ignores or gives short shrift to the labor and contributions of gay and non-gay advocacy groups working for homosexual equality. The conventional model puts too much emphasis on gay individuals said to use the anonymity and pseudonymity afforded by computers, the Internet, and cyberspace to shield their sexual orientation and identity from societal intolerance. But the work of gay equality is not something only individuals do; nonindividual entities, such as the groups surveyed in this Article,[387] in their own right, equally participate in the struggle for gay rights. Not only do they participate, their contributions are substantial and many of the victories that gays have won in their campaign for equality would not have been possible without these groups.[388] However, one never gets a sense of that participation listening to the narratives of the conventional model centered around individuals who use technology only to shield their homosexuality from majority intolerance—much less the substantiality of those contributions.

4. Inadequacy Built on Ignorance or Failure to Recognize the Critical Role and Influence of Politics in the Gay Struggle for Equality

A fourth factor of indictment, making for the incompleteness or inadequacy of the conventional model, is that it is apolitical; the model ignores or fails to recognize the critical role and influence of politics in the gay struggle for equality. However, as earlier indicated, homosexuals are a major factor in U.S. politics.[389] Many, if not all interest groups working for gay rights, including the ones surveyed in Part II of this Article, work to change the views of the American public using a diversity of means that

---

[386] *Id.*

[387] *See supra* Part II.

[388] *See supra* Part II.

[389] *See supra* notes 34, 61–65 and accompanying text.

include influence of the President, Executive branch agencies, and Congress, subsumed correctly or incorrectly under the broad rubric of lobbying. The *McVeigh* case, analyzed below, illustrates this factor of political dynamics and underscores the weakness of the conventional account. Legal analysts who have commented on the topic have summarized McVeigh's response to his administrative discharge from the Navy for violating "Don't Ask, Don't Tell" as "cyber-activism."[390] However, McVeigh's campaign of protest against America Online's (AOL) mistreatment in disclosing his identity—which is supposedly centered around cyberspace as evidenced by the term "cyber" preceding "activism"—actually involves a medley of activities that not only go beyond cyberspace (for example, his protest received media attention for which McVeigh might have worked to achieve), but also incorporates political dynamics.[391] The counter-argument here is that it was people who sympathized with the mistreatment of McVeigh who made these movements, rather than McVeigh himself. But there is another political aspect, further explored below[392] that the *McVeigh* court's decision illustrates. Although typically associated with the influence of Congress, Executive branch agencies, and President, politics is not confined to these organs, but rather can also include institutions such as the federal judiciary. As further discussed below,[393] judges engage in politics, just like officials in the other branches of the government, although they do so differently than those other officials.

5. Inadequacy Built on the Staticness of the Conventional Model

A final factor of indictment, also accounting for the inadequacy of the conventional model, is that it is static rather than dynamic. Saying that homosexuals use technology conducted over cyberspace as a device meant to shield their sexual orientation and identity from majority intolerance betrays a passive view of technology application. For one thing, it belies the increasing assertiveness by some segments of the gay population designed to promote equality for gays.[394] This notion of technology is so minimalist it affords even inadequate treatment to fulsome or energetic activity in cyberspace of the kind Professor Stein and others refer to as "cyber-activism"[395]—although,

---

[390] *See, e.g.*, Stein, *supra* note 35, at 211.

[391] *See* discussion *infra* Part IV.B.

[392] *See* discussion *infra* Part IV.B.

[393] *See* discussion *infra* Part IV.B.

[394] *See supra* note 22 and accompanying text (discussing the existence of more than one movement for homosexual equality in the U.S.).

[395] *See, e.g.*, Stein, *supra* note 35, at 211.

as shown above and in the *McVeigh* case, those activities actually go well beyond the Internet and cyberspace.[396] But there is an even more fundamental point about this passiveness that supports the argument of staticness: where is the contribution to the struggle for equality if, for the wealth of activities homosexuals conduct over the Internet and cyberspace,[397] the purpose is to shield sexual orientation or identity? For almost four decades, counting from Stonewall, homosexuals have foresworn the closet in favor of openness about their sexual orientation.[398] The traditional model contradicts this trend and notion toward openness, which is more consistent with the goal of equality, especially given the severely constraining effects of the closet that Professor Stein compellingly highlights.[399] Unsurprisingly, this is the approach many interest groups working for gay rights follow. Among its many activities, GLAAD conducts a campaign designed to "combat invisibility" and promote the visibility of homosexuals.[400] And, as indicated before, HRC sponsors Coming Out Day.[401] Celebrated every year on October 11, the event is an occasion when homosexuals "are encouraged to identify themselves in some way to their families, friends, and co-workers."[402] Other gay events similar to Coming Out Day that are directed against the closet are gay pride celebrations.[403] Yet another in the planning stage is a "Gay, Lesbian, and Bisexual History Month," also, like Coming Out, scheduled for the month of October.[404] In a nutshell, the conventional model embeds such a limited view of technology application that, for homosexuals, equality and use of technology begin to look like oxymoronic terms.

Professor Stein conveys that all the gay individuals who formed the case studies in his piece, including McVeigh, used cyberspace to express and explore or embrace their sexual orientations.[405] In an arguably similar vein, Lambda GLBT states that it works to help homosexuals achieve "self-acceptance."[406] But there is still wonderment regarding the impact, if any,

---

[396] *See* discussion *supra* Part IV.A.1–4 and discussion *infra* Part IV.B.

[397] *See* discussion *supra* Part II.

[398] *See* David Link, Editorial, *He Dares Not Speak Its Name*, L.A. TIMES, June 7, 2006, at B13.

[399] Stein, *supra* note 35, at 177.

[400] *See* GLAAD, Current Campaigns, *supra* note 226.

[401] HRC, About the HRC Coming Out Project, *supra* note 263.

[402] Gossett, *supra* note 14, at 108.

[403] *Id.*

[404] *Id.*

[405] *See* Stein, *supra* note 35, at 182–86.

[406] *See* Lambda GLBT Community Services, *supra* note 264.

these goals have on the corporate concern or objective of gay pursuit for equality. Arguing for the conference of heightened scrutiny to gay anonymous speech conducted through cyberspace, Professor Stein maintained that "the right to conceal one's sexual orientation in order to fully participate in public discourse is central to lesbians [sic] and gay men's ability to fully exercise their right to free speech."[407] But where is the "participation" of any plenitude and where is the "public discourse" embedded in passive speech of the type we highlight here? In a statement that appears to link the use of technology to the gay movement for equality, Professor Stein praised, "McVeigh's cyber-activism is a vivid example of the role cyberspace can play in the organization of political and social change in the lesbian and gay community."[408] Again, it is not clear how McVeigh's tangle with the Naval establishment, designed to save his job, contributed to the gay movement for equality.

B. The McVeigh Case as Exemplification of the Trouble with the Traditional Model

1. Facts of McVeigh v. Cohen

Chief Justice Earl Warren[409] once admonished that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[410] In spite of this counsel, various federal courts that have entertained claims against the federal government's "Don't Ask, Don't Tell" policy have upheld it as constitutional.[411] Courts cite Warren's admonition, but still defer to the government.[412] One challenge known so far

---

[407] Stein, *supra* note 35, at 199.

[408] *Id.* at 211.

[409] Warren (1891–1974), a Republican from California, Earl Warren College, University of California San Diego, Earl Warren Biography, http://warren.ucsd.edu/aboutwarren/college_overview/earl_warren.php (last visited Aug. 21, 2007), was U.S. Chief Justice from 1953–1969, Supremecourtus.gov, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Aug. 21, 2007).

[410] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

[411] *See, e.g.*, Able v. United States, 88 F.3d 1280, 1283–84 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996); Richenberg v. Perry, 97 F.3d 256, 258 (8th Cir. 1996); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1127–28 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420, 1421 (9th Cir. 1997).

[412] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting); Greer v. Spock, 424 U.S. 828, 853 n.4 (1976) (Brennan, J., dissenting); *Able*, 155 F.3d at 634. In *Goldman*, the Court held that the Air Force may prevent a service member from wearing a

(*continued*)

to have departed from that predictable path, in the sense that the challenge against the government was successful, is *McVeigh v. Cohen*.[413]

In *McVeigh*, Helen Hajne, a civilian Navy volunteer, organized a toy drive for the children of members of the crew of the ship wherein her husband, a naval officer, was posted.[414] Using her AOL account, she had been in contact by e-mail with various individuals, including Timothy McVeigh. McVeigh was a highly decorated seventeen-year veteran of the United States Navy and the senior-most enlisted man aboard the United States nuclear submarine U.S.S. Chicago.[415] On September 2, 1997, Hajne received an e-mail message through her AOL account concerning the toy drive.[416] The message box indicated the source of the communication used the alias "boysrch" (translatable as "boy search"), and the text of the e-mail itself was signed by a "Tim."[417] The message piqued the curiosity of Hajne, who then sought to unravel the identity of its sender.[418] Through an option available to AOL subscribers, she searched the "member profile directory."[419] The directory tied boysrch to an AOL subscriber named Tim who lived in Honolulu, Hawaii, served in the military, and identified his marital status as "gay."[420] The same directory also revealed the sender's hobbies to include "'collecting pics [pictures] of other young studs,'" and "'boy watching.'"[421]

Hajne passed the e-mail message and the profile on to her husband.[422] The information passed through the ship's captain and McVeigh's commanding officer and finally to the ship's principal legal advisor, a member of the Judge Advocate Generals' Corps, the military's in-house legal team, who initiated an investigation.[423] A Navy investigator contacted AOL

---

yarmulke while on duty. *Goldman*, 475 U.S. at 504 (majority opinion). In *Greer*, the majority held that the Army may prohibit political speeches and demonstrations on a military base. *Greer*, 424 U.S. at 840 (majority opinion). The Court held in *Able* that the military's policy on homosexuality is justified because it is closely related to a strong governmental interest. *Able*, 155 F.3d at 636.

[413] 983 F. Supp. 215, 222 (D.D.C. 1998).

[414] *McVeigh*, 983 F. Supp. at 217.

[415] *Id.* at 216–17.

[416] *Id.* at 217.

[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] *Id.*

[423] *Id.*

through its technical services department and inquired whether the boysrch account in fact belonged to Timothy McVeigh.[424] The customer service representative confirmed that it did.[425] In verifying the ownership of the boysrch account with AOL, the Navy investigator never identified himself or indicated that he was getting the information as part of an investigation of McVeigh.[426]

Following its determination of the ownership of the boysrch account, the Navy notified McVeigh that it had obtained "'some indication[] that he made a statement of homosexuality in violation of § 654(b)(2) of "Don't Ask, Don't Tell."'"[427] On September 22, 1997, twenty days after Hajne received the e-mail message from Tim, the Navy began an "administrative separation" against McVeigh for "'homosexual conduct, as evidenced by [his] statement that [he is] a homosexual.'"[428] The discharge proceedings included an administrative discharge hearing before a three-member board, at which McVeigh presented evidence of a prior engagement to a woman and several other heterosexual relationships to rebut the presumption of homosexuality, consistent with section 654(b)(2) of "Don't Ask, Don't Tell."[429] The board did not accept the defense of McVeigh; instead, it found for the government, ruling that McVeigh had engaged in "homosexual conduct," a dischargeable offense under "Don't Ask, Don't Tell."[430]

McVeigh's separation from the Navy had not taken effect when, on January 15, 1998, he filed suit before the U.S. District Court in the District of Columbia to enjoin the Navy from discharging him under "Don't Ask, Don't Tell."[431] He contended generally that he never intended to declare his homosexuality, in contravention of the policy.[432] Specifically, he did his part by not "telling" as the policy mandated, but the Navy failed to do its part by impermissibly "asking" when it was obligated to refrain from asking pursuant to the policy.[433] Not only that, McVeigh said, in investigating his sexual orientation, the Navy violated his rights under the Constitution and statutory

---

[424] *Id.*

[425] *Id.*

[426] *Id.*

[427] *Id.* (quoting Administrative Record (AR) at 27–28). For the language of this provision, see *supra* note 86.

[428] *McVeigh*, 983 F. Supp. at 217 (quoting AR at 107).

[429] *Id.* at 217–18.

[430] *Id.* at 218.

[431] *Id.*

[432] *Id.*

[433] *Id.*

laws, including the Fourth and Fifth Amendments,[434] the Electronic Communications Privacy Act (ECPA),[435] and the agency's own regulations relating to "Don't Ask, Don't Tell."[436] With respect to the ECPA, although the law requires that government officials secure a warrant or a court order when they ascertain the identity of an individual whose electronic communication has been intercepted, the Navy, contrary to the law, obtained the information from AOL resulting in the ascertainment of his identity without a warrant or a court order.[437] The Navy defended that since McVeigh willingly gave this information to a third party, this was indeed a public declaration, warranting his separation from the Navy.[438]

2. Judge Sporkin's Ruling

Judge Stanley Sporkin of the District of Columbia federal district court accepted McVeigh's arguments and ordered the Navy to reinstate him.[439] Sporkin declared that "Don't Ask, Don't Tell" was designed "to allow members of the military to live private lives as gay men and women, so long as their sexual orientation remained unspoken."[440] Specifically, "Suggestions of sexual orientation in a private, anonymous email account did not give the Navy a sufficient reason to investigate to determine whether to commence

---

[434] *Id.* at 216. The provisions here involved were the Fourth Amendment's mandate against "unreasonable searches and seizures" and general warrants, U.S. CONST. amend. IV, as well as the Fifth Amendment's guarantee against self-incrimination and requirement for due process meant to guard against arbitrary laws and governmental action, U.S. CONST. amend. V.

[435] *McVeigh*, 983 F. Supp. at 216; *see also* 18 U.S.C. § 2703(b)(1)(A)–(B), (c)(1)(A)–(D) (2000). The statute, in pertinent part, stipulates:

> A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service . . . to a governmental entity only when the governmental entity (i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; (ii) obtains a court order for such disclosure . . . ; (iii) has the consent of the subscriber or customer to such disclosure; or (iv) submits a formal written request relevant to a law enforcement investigation . . . .

Id. § 2703(c)(1)(B).

[436] *McVeigh*, 983 F. Supp. at 216, 218.

[437] *Id.* at 217; *see also* 18 U.S.C. § 2703(c)(1)(B).

[438] *See McVeigh*, 983 F. Supp. at 217–18.

[439] *Id.* at 222.

[440] *Id.* at 219.

discharge proceedings."[441] He said that in proceeding as it did against McVeigh, the Navy violated its own regulations, under which

> [a]n investigation into sexual orientation may be initiated 'only when [a commander] has received credible information that there is a basis for discharge,' such as when an officer 'has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts.'[442]

Judge Sporkin further stated that "[u]nder the Guidelines, 'credible information' requires more than 'just a belief or suspicion' that a Service member has engaged in homosexual conduct."[443] Such credible information exists, for example,

> if 'a reliable person' stated that he or she directly observed or heard a Service member make an oral or written statement that 'a reasonable person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts.'[444]

Here, however, Sporkin said, no such credible information exists that McVeigh had made such a statement.[445] "All that the Navy had was an email message and user profile that it suspected was authored by [McVeigh]."[446] This information alone, under the pertinent military regulations, should not have triggered an investigation.[447]

> When the Navy affirmatively took steps to confirm the identity of the email respondent, it violated the very essence of "Don't Ask, Don't Pursue" by launching a search and destroy mission. Even if the Navy had a factual basis to believe that the email message and profile were written by [McVeigh], it was unreasonable to infer that they were

---

[441] *Id.*

[442] *Id.* (quoting DIRECTIVE 1332.14, *supra* note 84) (second alteration in original).

[443] *Id.* (quoting DIRECTIVE 1332.14, *supra* note 84).

[444] *Id.* (quoting DIRECTIVE 1332.14, *supra* note 84).

[445] *Id.*

[446] *Id.*

[447] *Id.*

> necessarily intended to convey a propensity or intent to engage in homosexual conduct.[448]

Judge Sporkin reasoned, "Particularly in the context of cyberspace, a medium of 'virtual reality' that invites fantasy and affords anonymity, the comments attributed to McVeigh do not by definition amount to a declaration of homosexuality."[449] Whereas "the regulations specify that a statement professing homosexuality so as to warrant investigation must declare 'more than an abstract preference or desire'; they must indicate a likelihood actually to carry out homosexual acts."[450] In this instance, however, "[a]t most, [McVeigh's comments] express 'an abstract preference or desire to engage in homosexual acts.'"[451] In short, based on the record developed in the case, "while [McVeigh] complied with the requirements imposed upon him under [the policy]," by remaining silent about his sexual orientation and not publicly announcing that orientation, "the [Navy and the government] went further than the policy permits" by "impermissibly embark[ing] on a search and 'outing' mission" revolving around the conduct of an inquiry into his sexual orientation without a reasonable basis in fact.[452] Besides violating its own policy permitting gay participation in the military, the government also failed to comply with a federal statute, the ECPA, enacted to address privacy concerns on the Internet.[453] The law predicated government officials' obtainment of information from an online service provider relating to a subscriber upon the prior securement of a search warrant *or* a court order authorizing disclosure backed by prior notice to a subscriber, neither of which conditions occurred in this instance.[454]

3. McVeigh as an Illustration of the Trouble with the Conventional Model

As earlier indicated, Judge Sporkin's view, embodied in his opinion in the *McVeigh* case, belongs among the conventional account regarding gay application of technology.[455] The opinion shares in the factors highlighted above that render the traditional model incomplete or inadequate. There is no

---

[448] *Id.*

[449] *Id.*

[450] *Id.* (quoting DIRECTIVE 1332.14, *supra* note 84).

[451] *Id.* (quoting DIRECTIVE 1332.14, *supra* note 84).

[452] *Id.* at 222.

[453] *Id.* at 219.

[454] *Id.* (citing 18 U.S.C. § 2703(b)(1)(A)–(B), (c)(1)(B)).

[455] *See supra* notes 315–27 and 449 and accompanying text.

intention here to go over grounds covered before, so not all the factors analyzed above are discussed. The first flaw associated with the traditional model discernable here is the exclusive focus on cyberspace in a campaign that may be more properly described or denoted as "cyberspace-plus," given the interplay of cyberspace, lobbying, and media (and cutting edge technology) that the campaign involves. In a useful update that sheds light on the behind-the-scene, out-of-the-courtroom occurrences in the dispute between McVeigh and the Navy, Professor Stein wrote,

> After he discovered that AOL had illegally released his name to the Navy, McVeigh sent e-mail messages to every AOL user with the word "gay" in his or her member profile. In his e-mail message, McVeigh told the story of how AOL mistreated him. As news of what happened to McVeigh spread, many AOL users and others wrote to AOL, the White House, the Pentagon, and Congress. The dramatic response to McVeigh's 'mass' e-mail encouraged him to sue the Navy and ensured that his case would receive widespread media attention. It also forced AOL to clarify its policy with respect to the privacy of its customers.[456]

Stein and others labeled McVeigh's response "cyber-activism."[457] Not only that, Stein went further to praise "McVeigh's cyber-activism [as] a vivid example of the role cyberspace can play in the organization of political and social change in the lesbian and gay community."[458]

However, the activities here labeled cyber-activism were actually an intersection of the Internet, a campaign of public relations or lobbying, and media work. As Stein himself indicated, "many AOL users and others," resentful of the mistreatment embodied in AOL's mishandling of McVeigh's privacy, "wrote to AOL, the White House, the Pentagon, and Congress."[459] Also, again, as Stein himself acknowledged, McVeigh benefited from the "widespread media attention" that his case received.[460] The mixture—and synergy—in this instance of a wealth of techniques that goes beyond cyberspace indicts the traditional model focused singularly and exclusively on cyberspace. Another problem, highlighting the matter I described before as

---

[456] Stein, *supra* note 35, at 211 (citation omitted).

[457] *Id.*; *see also* Steve Friess, *Cyber Activism*, THE ADVOCATE, Mar. 2, 1999, at 35.

[458] Stein, *supra* note 35, at 211.

[459] *Id.*

[460] *Id.*

the staticness of the traditional model, is the goal of activism here. In praising "McVeigh's cyber-activism [as] a vivid example of the role cyberspace can play in the organization of political and social change in the lesbian and gay community,"[461] Professor Stein seems to perceive a positive relationship between that activism and the gay struggle for equality. Unquestionably, McVeigh's activism over cyberspace goes beyond exertion designed to shield his identity and sexual orientation. Sheer identity shielding would have been beside the point given that his sexual orientation has already been unveiled.[462] But, it is a long shot to argue that the activism by McVeigh, designed to arrest his impending discharge from the Navy and save his job, amounted to any contribution to the gay pursuit for equal treatment in America.

Another flaw with the conventional account, that the McVeigh story well highlights, relates to political dynamics. Politics is the struggle in society over who gets what benefits or privileges, when, and how.[463] I have argued that there are political considerations embedded in the intervention of AOL users and others who, in sympathy with McVeigh regarding the unwarranted violation of his privacy, contacted "the White House, the Pentagon, and Congress."[464] Assuming that is not obvious, Judge Sporkin's behavior in the case was. It is a supposition now too well known that through choices, rooted in judicial review and interpretation of the law, judges make law and policies.[465] Specifically, in the apt explanation of Professor Janda and his colleagues, they "are politicians in the sense that they exercise political power, but the black robes that distinguish judges from other politicians signal constraints on their exercise of power."[466] Judges are divided between judicial restrainers and judicial activists.[467] Judicial activists use their power of interpretation and judicial review to checkmate the political branches in an attempt to correct problems, such as here, the scourge of inequality, in the political system.[468] Judicial restrainers, for their part, defer to the political branches and are much less likely to interject their political values into their decisions.[469] Judge Sporkin's action in ruling against the government on

---

[461] *Id.*

[462] *See* McVeigh v. Cohen, 938 F. Supp. 215, 217 (D.D.C. 1998).

[463] SCHMIDT ET AL., *supra* note 3, at 3 (citing HAROLD LASSWELL, POLITICS: WHO GETS WHAT, WHEN AND HOW (1936)).

[464] Stein, *supra* note 35, at 211.

[465] *See* JANDA ET AL., *supra* note 3, at 445, 447.

[466] *Id.* at 447–48.

[467] *See* SCHMIDT ET AL., *supra* note 3, at 471–72.

[468] *See id.* at 471.

[469] *See id.*

"Don't Ask, Don't Tell," departing from the line of cases that found the policy constitutional,[470] and the general tone of the opinion place him squarely in the column of judicial activists. At least that could have been the assessment of a group like the Concerned Women for America[471]—a group opposed to gay participation in the military and, like some gay advocacy groups, though, as we see, for a different reason, views "Don't Ask, Don't Tell" as unworkable.[472] In a commentary it released on the *McVeigh* case, the organization stated that the ruling "proves that the 'don't ask, don't tell' policy is highly ineffective in dealing with gays in the military."[473] Even more important here, Concerned Women for America commented on how the decision "highlights the problem of *activist judges* determining military policy."[474] Among the trouble with the conventional model is that it ignores or discounts these important political dynamics. There is another element of politics less obviously connected with the *McVeigh* case that needs to be pointed out: in the aftermath of the *McVeigh* decision, there has been a campaign, facilitated through the use of technology, designed to show that "Don't Ask, Don't Tell" does not work.[475] Some of the gay advocacy groups whose activities this Article spotlights, like the Servicemembers Legal Defense Network, base a large portion of their labor and campaign for gay equality on the unworkability of the policy.[476] Some of those efforts may have contributed to the Supreme Court's overruling of its precedent in *Bowers* where it refused to extend the right to privacy it recognized in heterosexual settings to consensual intercourse by same-sex couples.[477] This is also another angle the conventional model, steeped in apoliticalness, ignores or minimizes.

---

[470] *See supra* notes 411 and 413.

[471] Concerned Women for America, *McVeigh, Navy Policy*, Feb. 5, 1998, http://www.cwfa.org/printerfriendly.asp?id=1848&department=cwa&categoryid=nation.

[472] *Id.*

[473] *Id.*

[474] *Id.* (emphasis added). On an unrelated issue, responding to the Massachusetts Supreme Court decision in Goodridge v. Dep't of Public Health, which interpreted marriage under state law as the "voluntary union of two persons as spouses," 798 N.E.2d 941, 969 (Mass. 2003), President Bush not only criticized "activist judges . . . [for] redefining marriage by court order," but also for "forcing their arbitrary will upon the people." Bush, *supra* note 177, at 100.

[475] *E.g.*, SLDN, SLDN's Strategic Plan to Lift the Ban, http://www.sldn.org/templates/about/record.html?section=87&record=722 (last visited Aug. 21, 2007).

[476] *See id.*; *see also* discussion *supra* Part II.G.

[477] *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003).

C. Question as to Whether Technology Makes a Difference for Gays

Having identified and analyzed the trouble with the traditional view, the next logical question is whether, for homosexuals, technology makes a difference. The question is important because, like gays and interest groups promoting their concerns, groups opposed to homosexual rights also use technology.[478] For gays and heterosexuals alike, in the apt language of one staffer of the library of Congress, "'The Internet has become for many the public commons, a place where they can come together and talk.'"[479] The real possibility that individuals and groups opposed to the "expanding gay agenda" can also deploy technology in their opposition to gay rights makes technology a double-edged sword. The plain answer to whether technology use for gays make a difference, given that their opponents also have access to the same mix and quantity of technology gays use in their own campaign, is that technology certainly matters. Both as individuals and as a group, homosexuals have been ready and willing to utilize technology to promote equality and disabuse public perception of homosexuality as sinful.[480] Professor Fiorina wrote, "[T]he movement toward increased acceptance of gays and lesbians in the past decade has been so strong that we believe the present divisions are largely a transitional state."[481] Fiorina posits that although "a majority of Americans continues to oppose gay marriage[,]" there is "considerable evidence of growing toleration of homosexual relations and growing support for equal rights for homosexuals."[482] Effective use of technology undoubtedly contributed to the growing toleration of homosexuality that Fiorina and others comment on.[483] Homosexuals and interest groups who advocate for them have no more access to technology than their detractors, but they also have no less, and homosexuals may be even more willing and ready to utilize technology to advance their cause than their opponents, as I show next below.

---

[478] *See, e.g.*, Concerned Women for America, *supra* note 471.

[479] Mari Jo Buhle & Daniel Czitrom, *Community and Memory: The World Trade Center and Ways of Remembering*, *in* SEPTEMBER 11 AND BEYOND: PRENTICE HALL AUTHORS SPEAK OUT 15, 18 (2002) (discussing the Library of Congress's online efforts in the aftermath of the terrorist attacks of 9/11).

[480] *See* discussion *supra* Part II.

[481] FIORINA ET AL., *supra* note 178, at 9.

[482] *Id.* at 120.

[483] *See* discussion *supra* Part II.

D. Conceivable Objections and Rebuttals

There are two conceivable objections to the position advanced in this piece and two rebuttals to those objections. The first is that gays are no more different from other groups in their use of technology. This objection relates to the position discussed already above as to whether, for gays, technology makes a difference. Gossett wrote that gay activists "make[] remarkably similar use of the strategies and rhetoric of the supporters and enemies of the civil rights movement of African Americans and the women's movement."[484] There are some elements of truth in the assertion. There are also elements, arguably, that set gays apart from these previous movements. In their struggle occurring in the canvass of the post-civil rights era, gays possess a property political scientists and public opinion analysts call "intensity."[485] Intensity means the force of strength with which a group is "willing to express [its] private opinions" and "is often critical in generating public action" in that "an intense minority can often win on an issue of public policy over a less intense majority."[486] For gays, the zeal to win is dictated by an attitude of "we can also do it" signified in the belief, for example, that "'[a]s our case is new, so we must think anew and act anew.'"[487] The zeal to think anew and act anew is probably one reason why, for all the antipathy of the Republican Party toward gay issues, interest groups advocating for gay rights refuse to dump the party in its strategy for inclusiveness.[488] Instead, for example, Log Cabin Republicans chose to "confront the radical right's bigotry head-on," and "work tirelessly to change minds and hearts," to "build[] a stronger Republican party and a better America" "[o]ne person at a time."[489] Touting

---

[484] Gossett, *supra* note 14, at 95.

[485] *See* STEFFEN W. SCHMIDT ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY 222 (2001–2002).

[486] *Id.*

[487] *See* DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 171 (2004) (quoting Abraham Lincoln). The book has a chapter on "Think Anew," *id.* at 147, and also a chapter on "Act Anew," *id.* at 181. The work is a story on the battle for gay marriage in Vermont by a veteran journalist and commentator on matters relating to homosexuals, who assessed, "In my view, the Vermont story ranks, not just with the Stonewall riots and the murder of Harvey Milk as landmarks of gay history, but with Birmingham and Selma as landmarks of our growth toward a more complete democracy." *Id.* at xiv. Milk, the first avowedly gay member of the San Francisco Board of Supervisors, elected in 1977, was assassinated one year after his election by a disgruntled former city supervisor. *See* Carl Nolte, *City Hall Slayings: 25 Years Later*, SAN FRANCISCO CHRONICLE, Nov. 26, 2003, at A1.

[488] *See* Epstein, *supra* note 22, at 564.

[489] About Log Cabin, *supra* note 272.

itself as "the nation's leading voice for fairness, inclusion, and tolerance in the GOP,"[490] Log Cabin chose "to work within the Republican Party to advocate equal rights for *all Americans, including gays and lesbians*,"[491] rather than take the comparatively easier route of ditching the party.

A second conceivable objection centers around the notion that the progress won in the gay struggle for equality may be a case of Americans becoming more tolerant over time on issues relating to gays rather than the result of any savvy application of technology in the campaign for equal rights under the law. In explaining a liberalized attitude toward homosexuality "[i]n much of Europe and North America," despite the continued opposition of major religious groups and a "persist[ent] undercurrent of social disapproval[,]" Princeton professor Kwame Appiah stated that, as in anything else ranging from mathematics to morals, people get used to what they do not understand.[492] Professor Fiorina arguably makes the point somewhat differently when he wrote, "[T]he movement toward increased acceptance of gays and lesbians in the past decade has been so strong that we believe the present divisions are largely a transitional state."[493] Of particular importance here, Fiorina contended that although "a majority of Americans continues to oppose gay marriage[,]" "considerable evidence of growing toleration of homosexual relations and growing support for equal rights for homosexuals" exists.[494] These positions bear notice. However, it is also the case, as the African American freedom fighter Frederick Douglass said, that progress in human affairs is always preceded by activism and scarcely achievable without the agency of human action.[495] For example, the American Psychiatric Association's removing homosexuality from its list of psychological disorders[496] could have occurred because of relentless pressure to do so from homosexuals and interest groups advocating for gays in the wake of Stonewall in 1969, not because, as Professor Appiah would say, the association acted out of charity based on the organization's (or the American public's) getting used to what it did not understand.[497] Instead, it is, therefore,

---

[490] *Id.*

[491] Log Cabin Republicans, Mission Statement, *supra* note 273 (emphasis added).

[492] *See* KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 77–78 (2006).

[493] FIORINA, *supra* note 178, at 9.

[494] *Id.* at 120.

[495] *See* Fredrick Douglass, West India Emancipation (August 3, 1857), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 367 (Philip S. Foner ed., 1999).

[496] Gossett, *supra* note 14, at 72.

[497] *See* APPIAH, *supra* note 492, at 178.

more likely than not that the increased toleration of homosexuality Fiorina and others observed and commented upon is the result of activism by gay individuals and groups, facilitated by savvy application of technology.

CONCLUSION

This Article analyzed the gay struggle for equality in the U.S., specifically the use of technology to advance that equality. The conventional model relating to technology application by homosexuals posits that homosexuals use technology, especially the Internet and cyberspace, to shield their homosexuality from majority intolerance, taking advantage of the anonymity and related benefits these media afford. This Article challenges that understanding and presents an alternative interpretation that outlines various factors that render the conventional model incomplete or inadequate—and unrealistic.

First, gays and interest groups who advocate for gay rights use technology in a more expansive way than the traditional model allows. Second, and related to this first point, many activities and contributions take place outside the narrow confines of the Internet and cyberspace that the conventional model, focused exclusively on the Internet and cyberspace, ignores or minimizes. This factor was evident in the *McVeigh* case used to illustrate the trouble with the conventional model. McVeigh's campaign designed to forestall his discharge from the Navy—a campaign that some legal commentators have characterized as "cyber-activism"—was actually a medley of activities that, while unquestionably including the Internet and cyberspace, also, at the same time went beyond the limitations of these media. The same is also true of the many interest groups working for gay rights. These groups build their modus operandi on the infrastructure afforded by the Internet and cyberspace but, at the same time, utilize a medley of lobby, media work, and cutting edge technology that goes beyond the architecture of the Internet and cyberspace.

Third, as Part II of this Article made evident, interest groups make immense contributions to the gay struggle for equality that the conventional model, due to its exclusive emphasis on individuals, discounts or minimizes. Fourth, the gay movement for equality embraces more political dynamics than the conventional model acknowledges. Much politics goes into the work of the campaign of interest groups working for gay rights that the conventional model, because of its exclusive focus on individuals, misses. Even at the individual, noncorporate level, a lot of politics is involved in the gay struggle for equality that the conventional model misses. As already indicated, there are important political dynamics subsumed in McVeigh's response to his impending discharge from the Navy, which legal commentators over-ascribed

to cyberspace, as is evident in their coinage of "cyber-activism." This political element goes beyond the branches of the government (Congress, the presidency, and administrative agencies) typically viewed as "political" to include the judiciary. As indicated before, Judge Sporkin's role in the case marked him out as a judicial activist who has no qualms interjecting his political values into his decision. Fifth and finally, the conventional model is static, when a credible model with reckonable explanatory power should be dynamic. It casts a passive model of technology application and it does not show how gays' shielding their sexual orientation via cyberspace promotes equality, especially given the known campaign by gay interest groups designed to promote outing and combat the invisibility of the closet. The Article has also shown, responding to the question whether technology makes a difference, that while gays, as a class, have no more access to technology than their opponents and detractors, they appear to possess more readiness and willingness to harness and utilize technology in their drive for equality than previous movements at this stage of the struggle.

By demonstrating the incompleteness and unrealism of the conventional model and presenting an alternative interpretation, this Article contributes to improved understanding regarding the application of technology by homosexuals in the gay movement for equality. Concededly, the interpretation provided here represents only one view on the application of technology by gays in their struggle for equality. I use the term "interpretation" deliberately or advisedly because the term leaves open, as it should, the possibility of the existence of other interpretations out there that may also be equally valid.[498] The point to keep in mind is that the

---

[498] For example, the analysis in this Article is based largely on the equal protection guarantee afforded by the Fourteenth Amendment to the U.S. Constitution. *See* U.S. CONST. amend. XIV, § 1. But that is not the only portion of the Constitution mistreatment of homosexuals possibly violates. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). Rather, in addition, discrimination against gays might also violate the provision under the First Amendment that forbids the national and state governments from establishing a religion. *Id.* Professor Perry has construed this guarantee to mean that "government may rely on a religious argument in making a political choice about the morality of human conduct only if a plausible secular rationale supports the choice." Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407, 445 (1996); *see also* ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 86 (2000) ("[O]ne has a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, and is willing to offer, adequate secular reason for this advocacy or support . . . ."). Much opposition by public officials to homosexuality is based on religious

(*continued*)

conventional view is sorely inadequate. There is need for a more balanced and dynamic view of a kind that this Article presents.

---

argument, including condemnation of homosexuality in the book of Leviticus in the Bible. Perry, *supra*, at 443. Perry does not think such opposition plausibly secular. *Id.* at 443–44.