

January 1994

Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of *Bowers v. Hardwick*

Mary C. Dunlap

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 Golden Gate U. L. Rev. (1994).

<http://digitalcommons.law.ggu.edu/ggulrev/vol24/iss1/1>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

GAY MEN AND LESBIANS DOWN BY LAW IN THE 1990'S USA: THE CONTINUING TOLL OF *BOWERS v. HARDWICK*

Mary C. Dunlap*

I. INTRODUCTION

In the summer of 1986, the U.S. Supreme Court dealt a body blow to efforts by civil rights advocates and activists to secure constitutional rights for persons without regard to sexual orientation. In *Bowers v. Hardwick*,¹ the Court rejected the

* B.A. 1968, J.D. 1971, University of California, Berkeley.

Ms. Dunlap is a nineteen-year veteran of civil rights litigation, who retired in 1991 from active practice to do more law teaching, writing and to study art. Between 1983 and 1993, Ms. Dunlap has taught law courses concerning gender and sexual orientation at Golden Gate University Law School, Hastings College of Law, Stanford Law School and the University of San Francisco Law School. In the first decade of her law career, Ms. Dunlap was a co-founder with other feminist attorneys of Equal Rights Advocates, Inc., in San Francisco, a public interest law firm that, between 1974 and 1978, operated an ambitious clinical law program, thanks to grants from foundations and the co-operative support of several Bay Area law schools, especially Golden Gate and Stanford. Ms. Dunlap has published a number of law review articles on civil rights issues, and she has litigated several celebrated gay/lesbian rights cases, including *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987) (upholding USOC's trademark claim as to the word "Olympic" against the claim of promoters of the would-have-been "Gay Olympics" that they had a First Amendment right to use the term, and that their prosecution by USOC for alleged trademark infringement represented anti-gay discrimination in violation of the equal protection guarantee); *Hill v. Immigration & Naturalization Serv.*, 714 F.2d 1470 (9th Cir. 1983) (striking down the exclusion of a gay man under the Immigration and Nationality Act as not properly based on a valid medical basis for exclusion); and *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd sub nom. Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (upholding the Navy's policy of discharging gay/lesbian service personnel as, *inter alia*, justified by the fact that there are persons in the U.S. military who "despise/detest homosexuality"), *cert. denied*, 454 U.S. 855 (1981).

1. 478 U.S. 186 (1986). In the by-now widely infamous *Hardwick* case, (not logically known as *Bowers*, any more than *Roe v. Wade*, 410 U.S. 113 (1973) is commonly identified by reference to the name of District Attorney Henry Wade of Texas, who was the

2 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:1

claim of a gay man that he had a federal constitutional right to privacy that included the right not to be criminally prosecuted for physically private and non-commercial sexual activity with another consenting adult (male). The Court's opinion does not resolve an array of additional constitutional questions raised by Michael Hardwick's situation, including whether all oral-genital and all anal-genital sexual activities between consenting adult heterosexuals in physical privacy can be criminalized, and, if so, what is left of constitutional privacy and of *Griswold v. Connecticut*.² Or, if constitutional privacy is to be afforded only for heterosexual private consenting adult sexual activities, it is uncertain how the Court's decision in *Hardwick* could be plausibly reconciled with the guarantees of equal protection and due pro-

legal representative of the entity that sought to uphold Texas' criminal prohibition of abortion), a 5-4 majority of the Court concluded that Georgia's so-called "sodomy" statute, which criminally prohibits any person from "perform[ing] or submit[ting] to any sexual act involving the sex organs of one person and the mouth or anus of another," GA. CODE ANN. § 16-6-2 (1984), did not violate Michael Hardwick's federal constitutional right to privacy (nor, presumably, that of any other person similarly situated), when he was arrested in the physical "privacy" of his bedroom while engaged in consenting oral-genital sexual contact with another adult and was placed in jail overnight. *Hardwick*, 478 U.S. at 188 n.1, 195-96. See Petition for Rehearing for Respondent at 3-8, *Hardwick* (No. 85-140). For a fuller account of the circumstances leading up to the arrest and incarceration of Michael Hardwick for his voluntary, non-commercial, adult and physically private sexual activity with another male, including his first-hand description of being severely beaten by three men whom he associated with the dogged, apparently obsessive, pursuit of himself by one Officer Torick (the individual who later arrested Michael Hardwick in Hardwick's bedroom), see Michael Hardwick, *What Are You Doing In My Bedroom?*, in PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 392-403 (1988). The Court in *Hardwick*, per now-retired Justice Byron White, characterized the issue presented as whether homosexuals have a fundamental constitutional right to engage in sodomy. In dissent, Justice Harry Blackmun responded that "[t]his case is no more about 'a fundamental right to engage in homosexual sodomy' . . . than *Stanley v. Georgia*, 394 U.S. 557 (1969) was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth." *Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting). In his petition for rehearing on behalf of Michael Hardwick, Harvard law professor Laurence Tribe asserted that "[t]he question before the Court is not what Respondent Michael Hardwick was doing in the privacy of his bedroom, but what the State of Georgia was doing there." Petition for Rehearing, *supra* at 10.

2. 381 U.S. 479 (1965). In *Griswold*, the Supreme Court established that at least married persons are entitled to freedom from unwarranted governmental intrusions into matters of contraception, and that marital bedrooms have some "sanctity" from state entry for purposes of enforcing some legislated version(s) of morality. *Griswold* is widely taken to have been extended in its definition of protected privacy to include a right of privacy in unmarried couples by *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where the Court held that a distributor of contraceptives and contraceptive information to unmarried persons could not be criminally prosecuted for so doing.

cess of the U.S. Constitution.

Whatever *Bowers v. Hardwick* may mean within its four constitutional corners, and within the greater body of law that encompasses it, the case has profound effects on the lives of gay, lesbian and other sexual minority people in the United States, and on those who seek to represent us in legal and other fora. This Article will take a look at these developments and will review the progress, stasis and backsliding of the movement for gay/lesbian civil rights, since (although not necessarily because of nor despite) the Supreme Court's decision of the *Hardwick* case.

A review of all gay/lesbian³ rights cases decided since *Hardwick* is not contemplated here,⁴ even were such an enterprise

3. The choice of the terms "gay/lesbian" to mean sexual minority persons generally, and to include gay, lesbian, bisexual and transgendered persons, admittedly is not free of controversy. "Sexual orientation minority" errs in vagueness; "queer" errs in its regrettably and unnecessarily polarizing quality; and, repetition throughout this article of the lengthy phrasing in the first sentence of this footnote about the author's intended comprehensive meaning of "gay/lesbian" is not serviceable due to space limitations and readers' needs for efficiency. However, the author is keenly aware that people are highly sensitive about how they are termed, labeled and referred to; it is the author's aim to include all who identify with the concept of "sexual orientation" minorities in defining their own sexualities, by use of the terms "gay/lesbian." Bisexual and transgendered persons, often as victimized by discrimination if not more so than gay and lesbian persons, are within the intended compass and focus of this Article. Perhaps it is also necessary to mention that the term "homosexuals" is unworkable for the greatest number and variety of reasons, not the least of which is its immediate and palpable connection to the long and agonizing world history of anti-gay reactionism.

4. Two outstanding casebooks recently have been published on the subject of sexual orientation and law. They are: ACLU National Office attorney WILLIAM RUBENSTEIN's artful and enriching *LESBIANS, GAY MEN AND THE LAW* (1993) and New York Law School professor ARTHUR LEONARD's carefully annotated *SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* (1993). These texts are long-awaited and promise to strengthen the teaching of gay and lesbian rights law courses in and beyond law schools. Also, general reference materials may be found in *SEXUAL ORIENTATION AND THE LAW* (3d ed. 1993), newly edited by National Lawyers Guild attorney Karen Moulding, co-chair of the Guild's Gay/Lesbian Rights Subcommittee, as well as in Ohio State University Law School professor Rhonda Rivera's "classics," *Queer Law: Sexual Orientation Law in the Mid-Eighties (Part I)*, 10 U. DAYTON L. REV. 459 (1985); *Queer Law: Sexual Orientation Law in the Mid-Eighties (Part II)*, 11 U. DAYTON L. REV. 75 (1986), and *Our Straight-Laced Judges: The Legal Position of Homosexual Persons In The United States*, 30 HAST. L. J. 799 (1979). For a lesbian-centered account of legal developments in the United States system, City University of New York law professor and writer Ruthann Robson provides a rich and detailed perspective in *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992).

practicable.⁵ Instead, this article attempts an exploration of some cases and situations in the layered social, psychological and political context in which these legal phenomena are occurring. The purpose is to determine what lessons we have learned in the years since *Hardwick*, and especially whether the legal system can be made more responsive to the cries of justice for sexual minority persons.⁶

II. *BOWERS V. HARDWICK* IN 1980'S TIME AND SPACE

“The Supreme Court can screw faggots, so why can't I?”

Within hours of the announcement of the United States Su-

5. There is a continuing problem of non-publication and de-publication of cases involving issues of gay/lesbian sexuality and rights, thus making any research in this area that seeks to be comprehensive a difficult prospect. The problem has existed for a long time. See Thomas Coleman, *To Publish Or Not To Publish - That Is The Question*, 2 SEX. L. RPTER. 18 (1976). It persists. For example, San Francisco attorney G. Michael German reported to a panel entitled “Privacy Isn't Everything,” presented by the Section On Gay and Lesbian Legal Issues of the American Association of Law Schools, at its annual conference on January 5, 1990, that he had recently won an important appeal in a case that concerned the right of a gay man to refuse to answer questions about his sexual history posed in the context of a tort action against him by the parents of his former lover. *Doe v. Humbert*, ___ Cal. App. 3d ___ (1989). Despite Mr. German's motion for publication, the opinion was ordered de-published and thus cannot serve as a precedent for citation in California by those seeking to avoid similarly improper, intrusive inquiries. For further information about this case in particular, and the de-publication problem in California, contact: G. Michael German, Attorney, 444 Market Street, San Francisco CA. 94105, Telephone: (415) 433-4500. The lack of accessibility to opinions by courts granting second-parent adoptions to gay and lesbian couples is another species of this same problem of non-recording and secrecy about legal decisions affecting sexual minorities. See RUBENSTEIN, *supra* note 4, at 536 n.1.

6. As in past legal writings addressing issues of gay/lesbian rights, I consider it a matter of scholarly ethics as well as of philosophical pertinence to note that I am a lesbian feminist, and that the life experiences that go with those designations necessarily and sometimes deeply affect my feelings and my viewpoints about the issues I address. See Mary Dunlap, *Law and Society: Foundering on the Seas of Hopelessness*, 87 MICH. L. REV. 1366, 1368 n.8, 1371 n.16 (1989) (reviewing RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* (1988)); Mary Dunlap, *Sexual Speech and The State: Putting Pornography In Its Place*, 17 GOLDEN GATE U. L. REV. 359, 363 n.10 (1987). Separation and removal of the personal from the legal seems to me not simply impossible, but actually undesirable in its dehumanizing potential; it is vital to admit how we are affected by legal matters, and to connect the various realms in which we live in our work. I reject the traditional pretense of objectivity of legal scholarship even as I strive to be open and fair about my viewpoints.

7. This is the first of a series of quotations that I have gathered for the subsection headings of this article from signs carried in the National March for Gay/Lesbian Rights in Washington D.C., on October 11, 1987, during which somewhere between 300,000 and 1,000,000 people marched to call federal and public attention to this cause.

preme Court's decision in *Bowers v. Hardwick*,⁸ on June 30, 1986, gay and lesbian people and supporters in many cities across the United States poured into the streets, gathering together to mourn, rage, and protest the decision. In San Francisco, at a rally in Harvey Milk Plaza in the Castro District, several dozen people gathered for speeches and an opportunity to vent feelings.⁹ This same scenario reiterated itself across the land, as non-heterosexual people and those associated with us came to recognize the gravity of the loss that *Hardwick* brought. Meetings, conferences, discussions and rallies carried the theme and message of loss in *Hardwick* far and wide.¹⁰ In the wake of the *Hardwick* decision, many commented that the litigation of *Hardwick* had been a mistake, and the case should never have been taken to the, or at least this, Supreme Court.¹¹ After all,

8. 478 U.S. 186 (1986); see *supra* note 1 and accompanying text.

9. My knowledge of this event is based on my having been there. I was among the speakers on this occasion. During the course of my remarks, I found myself tearing up a copy of the *Hardwick* opinions and throwing them up into the air like so much white rain. Afterward, I reported with some embarrassment to my colleague, Matt Coles, now a staff attorney with the ACLU of Northern California who has specialized in gay/lesbian rights law for many years, that I had mistakenly torn up the dissenting opinions of Justices Blackmun and Stevens (in which Justices Brennan and Marshall joined) as well. Matt replied that "only a lawyer would care." His comment returns in my memory here as I reckon with the dual perspectives of careful lawyer and angry lesbian that I personally maintain on these matters.

10. Michael Hardwick himself began a lengthy circuit in the U.S. media. IRONS, *supra* note 1, at 401-02; also reprinted in RUBENSTEIN, *supra* note 4, at 125-31. Discussions among gay/lesbian rights advocates, such as the institution of the Lambda Roundtable, originally founded in the early 1980's to advance sodomy law reform and growing over the years into a regular convocation of leading legal minds devoted to the full array of gay/lesbian rights law questions, became absorbed with the implications of *Hardwick* for the work of these advocates, their clients and causes. Workshops and panels at the 18th National Annual Conference on Women and The Law, held on March 19-22, 1987 in Washington, D.C., as well as those held at subsequent conferences of this group, frequently raised questions about whether test litigation was worthwhile, whether federal court litigation was particularly hazardous, and what the alternatives were in the business of seeking vindication of civil rights. See, e.g., *Why Litigate?* and *Courts, Confrontation and Coalition Building*, 18TH NATIONAL CONFERENCE ON WOMEN AND THE LAW SOURCEBOOK 57-59 (1987). The latter entitled panel, designated for lesbians, includes in its description of subject matter the question, "[g]iven the conservative tide in the courts, what other avenues are open to us which are effective in bringing about change?"

11. The members of the Court at the time *Hardwick* was decided were (now retired) Chief Justice Burger, and Justices Blackmun, O'Connor, Stevens, (now Chief Justice) Rehnquist, (now retired) Justices Brennan, Powell and White and (now deceased) Justice Marshall. Now on the Court with Blackmun, Rehnquist, Stevens and O'Connor of the *Hardwick* Court are (in order of appointment) Justices Scalia, Kennedy, Souter, Thomas and Ginsburg. It is debatable whether the current Court would have decided *Hardwick* as the 1987 Court did, and, indeed, that debate is crucial to the development of litigation strategies and approaches before the current Court, as the legal issues raised

goes this line of thought, wasn't *Hardwick* a "classic" test case, in which the parties initiating the action could have foregone it in favor of a "better" case in a friendlier era? This post-loss reaction is quite understandable, and presumably accompanies defeat in most cases, especially test cases that challenge existing assumptions about the content of law. The grief and anger that tend to accompany any such profound loss can affect our entire way of looking at the legal system, and the world that surrounds it.

At the same time, this reaction to *Hardwick* also represents an unrealistic, although deeply conditioned and common, need on the part of lawyers to think that we control and manipulate a human rights movement that is much grander and more complex than lawyers, or the law itself. In this respect, the perspective that *Hardwick* should not have been litigated is a highly elitist one.¹² The perspective disregards that there were real clients holding pressing interests who made the decision to proceed. The plaintiff/respondent Michael Hardwick was rightfully and passionately determined to challenge the law that allowed for his arrest and incarceration; he had been seriously injured by the intrusion of the law into his bedroom, his person and his life.¹³ The *post hoc* view that *Hardwick* was untimely, misguided

by (whether or not decided in) *Hardwick* will be revisited in new cases before the Court, such as the cases involving gay and lesbian military personnel. See *infra* section III C. It is also, and much more unusually, debatable whether the members of the 1987 Court that decided *Hardwick* would reach the same result today, as retired Justice Powell, the "swing" vote for upholding the sodomy statute has publicly disowned his own position in the *Hardwick* decision, stating, "I think I probably made a mistake in that one." See Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3. At least three current members of the Court who were present for *Hardwick* have expressly indicated in opinions that they support extension of equal protection to gay/lesbian persons, either in *Hardwick* (Blackmun and Stevens) or in the *Gay Olympics* case, 483 U.S. 522 (Blackmun and O'Connor).

12. For a more thorough commentary on the importance and necessity of litigating cases that have strong potential for making progress in our society, even where they are likely to be "lost" in narrow legal terms, see Mary Dunlap, *Introduction to Amicus Brief in Bowers v. Hardwick*, 14 N.Y.U. REV. L. & SOC. CHANGE 949, 952 (1986).

13. See IRONS, *supra* note 1, at 396 and RUBENSTEIN, *supra* note 4, at 128. See also *infra* note 18 and accompanying text. Michael Hardwick states in relevant part:

I asked [arresting Officer] Torick if he would leave the room so we could get dressed and he said, 'There's no reason for that, because I have already seen you in your most intimate aspect.' He stood there and watched us get dressed, and then he brought us over to a substation. We waited in the car for about twenty-five minutes, handcuffed to the back floor. Then

litigation also pays little heed to the way in which legal and social change interactively operate. When law does change, it is usually from bad to better or from good to worse; that is, it is highly rare in law to replace a vacuum in law with a sudden and clear-cut victory.

There is another defect in the reactive assertion about *Hardwick* that it was presented under the wrong facts at the wrong time and/or to the wrong Court. This defect stems from the understandable emotional content of the reaction — very often gay and lesbian people offer that *Hardwick* was somehow a mistake that gay and lesbian litigators and our allies made, because we want to have power over the wrongs that have been done to us. We criticize ourselves for litigating *Hardwick*, and other gay and lesbian rights cases we have lost, because we want most of all to avoid the losses by imagining that we have the power to avoid them. But to say that *Hardwick* should not have been litigated is more than a bit like saying that someone who got gaybashed in a hostile neighborhood should not have gone there, or should have been differently dressed, and so on and so on. As long as the courts are unsafe to us, just as the streets, we will not progress by hiding indoors.

The business of deciding when and where to “come out” is not simply a private exercise, burdening the average gay, lesbian or other sexual minority person daily but having no social and legal significance. It is an encompassing process, in which the Supreme Court of the United States is no more to be excluded than is a particular city, state, prison, school, family. It could be said, in this regard, that in *Bowers v. Hardwick*, we “came out” legally at a highly visible level, and we got bashed legally at a highly visible level. Nothing can take away the pain of the reaction; the wounds remain real. But it does not help us, ultimately or even immediately, to say that we would have avoided the bashing if we had stayed in the closet. In Michael Hardwick’s

he brought us downtown, brought us in and made sure everyone in the holding cells and guards and people who were processing us knew I was in there for ‘cocksucking’ and that I should be able to get what I was looking for. The guards were having a real good time with that. There was somebody there to get me out of jail within an hour, but it took them twelve hours to get me out.

IRONS, *supra* note 1, at 396.

case, the “closet” of his bedroom could not be made small enough to keep out the flashlight and intruding eyes of Officer Torick; in Michael Hardwick’s case, the “closet” also, painfully if briefly, turned into a jail cell.

Prior to *Hardwick*, the state of the law on the federal constitutional questions presented was extremely bad for gay and lesbian people overall, with a few scattered islands of hope.¹⁴ A decade earlier, the Supreme Court had ducked full review and had summarily (without argument) affirmed a three-judge federal panel’s upholding of a similar sodomy statute in *Doe v. Commonwealth’s Attorney of Richmond*.¹⁵ The *Doe* case, to a significant extent, had already done in a doctrinal way what *Hardwick* did more notoriously and in a way that galvanized public outrage and outcry far more effectively.

The notion that a case with “better” facts than *Hardwick* should have been sought likewise signifies a kind of retrospective panic, and a continuing desire for greater power than lawyers actually have. The operative facts in *Hardwick* were overwhelmingly strong, if traditional privacy interests had been the focus of the deciding Court. Here was a man who had been arrested, not in a public or quasi-public place, not in an even arguably commercial context,¹⁶ not with a minor, and not in a sexual act

14. As of Professor Rivera’s landmark summary of “the status of homosexual persons in the United States” in 1978 the federal constitutional picture for gay and lesbian people was bleak and dim, with the exceptions of bright spots in a few places, as where college students had won victories in several federal circuits in contests against would-be institutional banishment of their gay/lesbian organizations, and in the handful of important cases where federal civil servants in Washington D.C. had succeeded in establishing their right not to be terminated from employment unless the employer could show a “nexus” between their sexual orientation and their fitness to do their jobs. *See generally* Rivera, *supra* note 4. For the most part, as of the time that *Hardwick* reached the U.S. Supreme Court, there had been only a smattering of comparable victories, and most had been established on statutory or other non-constitutional grounds. *Id.*

15. 403 F. Supp. 1199 (E.D. Va. 1975), *aff’d*, 425 U.S. 901, *reh’g denied*, 425 U.S. 985 (1976). *See* discussion of *Doe v. Commonwealth’s Attorney of Richmond* in Rivera, *supra* note 4, at 944. It is notable that Justice White’s opinion in *Hardwick* is far from creative in its reasoning, relying heavily upon, although without extensive citation to, the highly similar U.S. District Court opinion in *Doe*.

16. Both the factors of public place and of arguably commercial context probably helped to weaken the case for Robert Uplinger. Uplinger, a gay man in Erie County, New York, was arrested for the crime of loitering for the purpose of soliciting deviate sexual intercourse, when Mr. Uplinger conversed with an undercover police officer in a “gay neighborhood” in Buffalo. At the end of the conversation Uplinger stated, “If you give me a ride home I’ll give you a blow job.” Respondent’s Brief, *State v. Uplinger*, 447

that could be characterized as other than consenting. Michael Hardwick was arrested in his bedroom, for engaging in mutually consensual oral sex with another adult (male).¹⁷ “Better” facts would be difficult to imagine. It could be said that heterosexuals in the same circumstances as Michael Hardwick would have won the case. This brings *Hardwick’s* real import home, especially in light of the terms of the Georgia statute, which prohibited any oral-genital and any anal-genital sexual contact, regardless of the genders of the partners. The points to be considered are that heterosexuals in the *Hardwick* circumstance would not have been arrested, would not have been jailed, would not have been charged and would have had a total *Griswold*-based privacy defense to any such criminalization. In terms of the idea that the

N.E.2d 62 (N.Y. 1983), cert. dismissed, 476 U.S. 246 (1984). At the state court level in New York, the case resulted in a judicial declaration of the invalidity of the state law, following logically and efficiently upon the striking down of New York’s “sodomy” law as applied to private, consenting, and non-commercial adult sexual contacts in *State v. Onofre*, 415 N.E.2d 936 (N.Y. 1980). The idea in *Uplinger* is that solicitation of acts, that are no longer unlawful because they have been held to be subject to protection by constitutional privacy, is not a type of solicitation which can be subject to criminal sanction. The United States Supreme Court granted certiorari in *Uplinger*, and then, after oral argument, dismissed the cert petition as improvidently granted. I am informed by Mr. Uplinger’s attorney and others that during oral argument, Justice White engaged Uplinger’s counsel in repeated questioning about whether, if Justice White were accosted by a man on the street making a lewd proposition to him, he could not rightfully call the police and expect state intervention in his behalf. Amicus curiae briefs in behalf of a variety of gay/lesbian rights and other public interest groups, inviting the Court to recognize Mr. Uplinger’s rights of privacy and equal protection in the circumstances, failed to persuade the Court to do so. See, e.g., Brief Amici Curiae of the American Association for Personal Privacy et al., and Brief Amicus Curiae of Lambda Legal Defense and Education Fund, Inc., on behalf of Respondent Robert Uplinger, in *Uplinger*, 447 N.E.2d 62 (N.Y. 1983). (I understand that Mr. Uplinger died of complications due to AIDS in the early 1990’s.)

17. IRONS, *supra* note 1, at 395-97; Petition for Rehearing at 2-4, *Hardwick*, 478 U.S. 186 (1986). I do credit some of my law students in recent semesters with the proposal that perhaps if Michael Hardwick had been clearly engaged in a long-term relationship with his sexual partner on the occasion of his arrest, the Court might have been confronted with a stronger case, in that Hardwick would then have been a married-like (although necessarily unmarried, but see *infra* note 60) intimate partner, claiming freedom from state intrusion into his private sexual activity, in a way more closely resembling the situation in *Griswold*, or at least that in *Eisenstadt*. While this idea certainly evokes interesting and important technical as well as policy questions about the connectedness of illegitimation and criminalization of gay/lesbian persons under law, I must respectfully suggest that the Justices who voted for the State of Georgia’s prerogatives in *Hardwick* showed not the slightest sign of regard for the nature or significance of the bond between Mr. Hardwick and his sexual partner. Rather, in the emphatic words of Justice White, the Court proclaimed that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . .” *Hardwick*, 478 U.S. at 191.

Hardwick litigators should have awaited a case with better facts, even if the arrest of heterosexuals under the *Hardwick* facts were conceivable, then it is obvious that litigation of the right of gay/lesbian persons to sexual privacy would not have been accomplished. The only better facts that could be adduced would be in a situation presenting a heterosexual litigant; the slant of the Georgia law, and of the U.S. Supreme Court upholding it, predictably would have made "better facts" into an irony of heterosexual privilege. The inescapable conclusion is that the result in *Hardwick* is about homophobia, and, given that cause of the result, playing with the facts will not change the outcome; only a frontal address of the homophobia will do so.

In deciding whether it was a good strategic decision to litigate *Hardwick*, Michael Hardwick's own perspective on the worth of litigating his case bears consideration. Michael Hardwick has observed:

When I started this case, people had never heard of AIDS, and that all developed as my case developed. And all the negative impressions that society and the media have been producing for the last three years had just about reached a high point when the decision came down and they asked me to come out nationally. [Until the Court rendered its decision, Hardwick retained a low profile and avoided media, on advice of his attorneys.] That affected me a lot. When I first started speaking I thought that some crazy fundamentalist was going to blow my head off. Once I overcame that fear and a month or two went by, people would stop me and say, I'm not a homosexual but I definitely agree with what you're doing. This is America and we have the right to privacy, and the Constitution should protect us. They were supportive once they understood the issue and how it affected them. . . . Speaking and coming out nationally was a very healthy experience for me, because it made me develop a confidence I never would have had if I had gone along with my individual life. It also gave me a sense of importance, because right now there is a very strong need for the gay community to pull together, and also for the heterosexual community to pull together, against something that's affect-

ing both of us. I feel that no matter what happens, I gave it my best shot. I will continue to give it my best shot.¹⁸

The view that *Hardwick* should not have been litigated when and as it was also inaccurately idealizes the functioning of non-judicial branches of government, projecting relatively higher degrees of capacity for affirmative change upon, for example, the legislative and executive branches of the federal government, or state or local government, or upon institutions outside the judicial system. This idea, that legal change is to be made simply by picking the institutions in which we will win and then winning outright there, or by not going in at all, seriously distorts the nature and process of progressive work in law. The truer panorama seems to be one that shows the slow, tedious progress made from losing and building up years and sometimes decades (perhaps even centuries) of conceptual exposure and issue-based familiarity: this is how the topsoil of socio-legal change actually accretes.¹⁹

Regardless of one's view of whether *Hardwick* should have been litigated, or even whether it should have been litigated with the emphasis on the physical privacy of Michael Hardwick's bedroom that his counsel elected to use,²⁰ one fact is inescapable: *Hardwick* was itself a grievous loss. *Hardwick* set in motion other grievous losses, including other anti-gay judicial decisions, as well as a pervasive sense of impatient anger, frus-

18. IRONS, *supra* note 1, at 402-03.

19. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* (1976) (depicting the decades of litigation, organizing and consciousness-raising that preceded *Brown v. Board of Educ.* (I), 347 U.S. 483 (1954)).

20. On this point, I sharply disagree with Michael Hardwick's Supreme Court lead counsel, Professor Laurence Tribe, as I have stated elsewhere. I believe the apologetic tone of Professor Tribe's address to the Court, claiming the lack of impact of this case on the question of the legitimacy of gay/lesbian people and our relationships, and Tribe's corresponding choice to de-emphasize personhood arguments in favor of locational privacy arguments, cost us much, especially in terms of the Court majority's real lack of understanding of what was at stake, and of the predictably broad stigmatizing consequence of its decision upon the millions of gay, lesbian and bisexual persons in the nation. See Dunlap, *supra* note 12, at 950. However, I recognize that this criticism on my part derives in unfortunate part from the same utopian, fanciful place that causes others to say that *Hardwick* should have been foregone in favor of better facts, a better Court, a happier era. Thus, my criticism is offered with caution; Monday-morning quarterbacking as to Supreme Court litigation strategies, as with other activities, has the advantage that one already is aware of the outcome of the contest.

tration and cynical defeatism among many of those who sought a pro-gay/pro-lesbian outcome in *Hardwick*. In some respects, it is logical to look at every legal development since *Hardwick* that affects gay, lesbian, bisexual and/or transgendered persons as having been affected by *Hardwick*. The cold depths into which *Hardwick* plunged us have not yet been fully sounded, much less bridged.

III. THE AFTERMATH OF *HARDWICK*: *HARDWICK* AS BOOSTER ROCKET FOR NEW HEIGHTS OF ANTI-GAY/LESBIAN BIGOTRY AND VIOLENCE

In the weeks and months following announcement of the *Hardwick* decision, two clusters of reactions emerged. For opponents of the gay/lesbian rights movement, *Hardwick* was perceived as a victory and openly interpreted as a license to (continue to) discriminate. To those in the community of gay and lesbian persons and our allies, *Hardwick* was a stunning blow that drew a variety of responses. We had been bashed, and we spent some time simply assessing the damages. Clearly, *Hardwick*'s influence had far-reaching effects.

A. NATIONWIDE GAY/LESBIAN-BASHING: "THE SECOND EPIDEMIC"²¹

Every year since the *Hardwick* decision, homophobia has motivated thousands of acts of violence across the United States, from predominantly verbal assaults to homicides.²² This

21. "An alarming increase in the number of verbal and physical assaults on lesbians and gay men has led to a heightened awareness of 'Gay-bashing' . . . activists are mobilizing to address [this] 'second epidemic' in the gay community." Anne Lewis, *Gay-Bashing on the Airwaves often goes Unnoticed - and Unchallenged*, WASH. BLADE, Aug. 31, 1990, at 1. This description of the waves of anti-gay/lesbian bashing that have broken across the U.S.A. since *Hardwick* appears to have first been used by the National Gay and Lesbian Task Force (NGLTF) in its annual white paper on gay-bashing published in 1990. The number of anti-gay/lesbian bias incidents in Chicago, San Francisco, New York, Boston and Minneapolis/St. Paul taken together rose 161% between the years 1988 and 1991. NGLTF POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION AND DEFAMATION IN 1991 (1992).

22. See NGLTF POLICY INSTITUTE, *supra* note 21. In 1989, NGLTF reported 7,248 incidents, including 70 anti-gay/lesbian homicides. Lou Chibbaro Jr., *NGLTF Report: Anti-Gay Violence Keeps Going Up*, WASH. BLADE, June 9, 1989, at 3. The rate of violence has increased since 1987, and under-reporting of anti-gay/lesbian crimes continues as well. Lou Chibbaro Jr., *Survey Finds Little Change in Violence Reports*, WASH. BLADE, June 8, 1990, at 1. Cf. NGLTF POLICY INSTITUTE, *supra* note 21.

wave of hate-based crime, sometimes called "bias crime," is not chiefly the result of organized action by skinheads, KKK members, or others acting in some politically organized fashion. According to Kevin Berrill, long-time director of the Anti-Violence Project of the National Gay and Lesbian Task Force, "Most of the perpetrators are the guys next door."²³

The up-close individual stories of people suffering from this epidemic of violence are tragic and unforgettable. Claudia Brenner saw her lover murdered by a deer-hunting "survivalist" who pursued and threatened the couple while they were camping, and killed her lover with a shotgun. The murderer later claimed that he had mistaken the couple for deer, despite evidence of his verbalizing anti-lesbian sentiments to the women.²⁴ A San Francisco lesbian couple was physically attacked and verbally abused by a member of the San Francisco Police Department, who stuck a pool cue into one of the women's crotches and yanked up on it, telling his partners in uniform, "[t]his bitch is a bulldagger."²⁵

In the beating of a gay man in the Polk Street area in San Francisco that resulted in his immediate death from a crushed skull, the defendants admittedly went into the city from neighboring Vallejo to bash some queers.²⁶ In October, 1992, U.S. Navy Seaman Allen Schindler was brutally beaten to death by Airman Apprentice Terry Helvey and others; the anti-gay nature of the crime continues to unfold and deepen.²⁷ Before the November 1992 election in Oregon, in which a statewide initiative that would have amended the state's constitution to make discrimination against gay, lesbian and bisexual persons legally acceptable was defeated, a lesbian and a gay man who shared a

23. Chibbaro, *supra* note 22, at 14. Not only the "guys next door," but the families of gay and lesbian youths are responsible for much anti-gay/lesbian violence. Christopher Knorr, *Half of Violence Against Gay Youth Is From Family*, WASH. BLADE, Aug. 27, 1993, at 1, 17.

24. Chibbaro, *supra* note 22, at 3.

25. COMING UP (now, BAY TIMES), Mar. 9, 1989, at 9.

26. *People v. Clanton*, 216 Cal. Rptr. 748 (Ct. App. 1989). The Court of Appeal threw out the defendants' murder convictions, concluding that they lacked the requisite intent to commit murder, and essentially ignoring the significance of the evidence that they came to San Francisco to gay-bash. *Id.*

27. Eloise Salholz, *A Grisly Murder Mystery*, NEWSWEEK, Feb. 1, 1993, at 57; James Sterngold, *Death of a Gay Soldier: A Lethal Beating Brings Questions and Fear*, N.Y. TIMES, Jan. 31, 1993, at 22.

home in Salem, Oregon, were killed when their house was firebombed by four youths with whom the lesbian had argued earlier in the day about gay and lesbian rights.²⁸

While it is not terribly difficult to imagine these types of acts occurring without *Hardwick*, there can be little real dispute that the attitude and posture of the Supreme Court majority in *Hardwick* condones and even encourages such actions. The opinions against *Hardwick*'s position from the Justices themselves sound similar to anti-gay epithets, albeit framed in legalisms. Justice White's labeling of the privacy argument made in behalf of *Hardwick* as "facetious," as well as White's slurring conflation of consensual, private, non-commercial adult gay/lesbian sexual activity with "adultery, incest, and other sexual crimes . . . committed in the home,"²⁹ constitute an act of verbal gay-bashing to which the entire Nation, howsoever unconsciously, is witness. Likewise, Chief Justice Burger's quotation in *Hardwick* of Blackstone to the effect that "'the infamous crime against nature'" is "an offense of 'deeper malignity' than rape"³⁰ cannot be accurately translated as other than a call to view all gay men (and lesbians, by statutory inclusion, if not by Burger's personal projections about who "commits sodomy") as worse than rapists. To defame and defile gay, lesbian and bisexual human beings as these members of the Court willingly did cannot be easily or cleanly separated from the anti-gay epithets, curses, and blows that form parts of the life experiences of thousands of anti-gay/lesbian bias crime victims in this nation.

28. Lisa Keen, *Firebombing Kills Two Gays in Oregon Town*, WASH. BLADE, Oct. 9, 1992, at 25. In response to a flyer circulated in Oregon in the summer of 1993, calling for identification, castration and execution of gay/lesbian people, the United States Department of Justice concluded that the request by Parents and Friends of Lesbians and Gays ("PFLAG") for investigation and prosecution of the advocates of this violence could not be granted, because "neither the dissemination of the flyer nor the violence it advocates constitutes a violation of any federal criminal civil rights statute." Lisa Keen, *Justice Department Sides Against Gays*, WASH. BLADE, Aug. 6, 1993, at 1, 23. Apparently, the possibility of criminal prosecution of the parties for conspiracy to deprive gay and lesbian persons of civil rights pursuant to 42 U.S.C. §§ 1983 and 1985(3), and the Fourteenth Amendment's guarantee of equal protection of the laws, has not yet occurred to Department of Justice attorneys. The presence of a potential Supreme Court majority in support of gay/lesbian equal protection would surely strengthen any such law enforcement bid. See *supra* note 11 and accompanying text. The blatant malice of the Oregon facts would seem to make such a law enforcement bid both timely and potentially life-saving.

29. *Hardwick*, 478 U.S. at 196.

30. *Hardwick*, 478 U.S. at 197.

Indeed, the era that has followed *Hardwick* has been full of hate-based speech and verbal assaults on gay, lesbian and other sexual minority persons. Radio programs are “spiced up” with homophobic references, in and beyond the broadcasts of Rush Limbaugh, and virulently anti-gay disc jockeys are the subject of media “wars” (and, presumably, of ratings “wars”).³¹ Some rap musicians, such as Audio Two, have celebrated the Zeitgeist of permission to abuse gay/lesbian people with lyrics like:

I can't understand why ya lookin' dis way
 Wassa matter wit ya, boy? Are ya gay?
 Yo, I hope dis ain't da case.
 'Cause gay muthas git punched in the face.
 Word to kids: I hate faggots.
 Dey livin' in the Village like meat on some
 maggots . . .
 Ya think I'm rude and I'm unfair?
 Well, check it out, baby, I don't care.³²

31. Lewis, *supra* note 21, at 1.

32. Gizmo, *News of the Outrageous, the Amusing, the Pathetic and the Unexpected*, BLK, 1990, at 3. In his column, Gizmo, who is half of the rap team, Audio Two, offers that “[b]eing an entertainer, you have a strong influence on younger people. Kids listen to us. We have a power that a lot of parents don't have, and you have to use that power to influence them positively.” *Id.* The editorial in this issue of BLK, a news magazine oriented toward gay and lesbian African American persons, puts this sort of anti-gay ejaculate in the form of a question:

The black rap group, 2 Live Crew, is near the top of the radical right's shut down agenda. So far their lyrics have been declared obscene and retailers in Florida who dared to sell the independently-produced records have been arrested. But with singles like ‘Get the Fuck Out of My House’ and ‘The Bitch That I Hate’, the besieged group are scarcely friends of ours. They trash women and bash gays. But they are black folk being prosecuted for ‘crimes’ white groups on major labels commit all the time. What's a person to do? Do we support our homeboys or diss' em for being homophobic?

Id.

A powerful and important exchange among critical race legal scholars on these issues is ongoing. See Kimberle Crenshaw et al., *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (1993), as discussed in Maia Ettinger, et al., *Heady Stuff*, CALIFORNIA LAWYER, Sept. 1993, at 45.

Whatever one's answer to this question (including the possibility that criticizing rap groups and other artists for hate speech is not in any real way inconsistent with speaking out against censorship and suppression of dissent), one fact remains clear: today's music includes violently heterosexist and homophobic messages. See also the lyrics of TUPAC SHAKUR, *Last Words*, on STRICTLY 4 MY N.I.G.G.A.Z. (1992) in his latest album: “The .44 mag got you running like a fag”; Shakur is a witness to the shooting death of a 6-year old African-American child at a celebration of the 50th anniversary of African-American

Amidst governmental attacks upon these selfsame musical and artistic personalities and others,³³ homophobic messages continue to be conveyed. Insults to gay men, lesbians, bisexual and transgendered persons on the street and in our culture after *Hardwick* carry an especially nasty and ironic tinge; for now, and until such time as the decision (and the rhetoric) in *Hardwick* is overturned, they are officially sanctioned by at least one branch of the federal government.³⁴

community Marin City, California, and, through his attorneys, Shakur "refuses comment." Craig Marine, *No Poetic Justice in Unsolved Marine Killing*, S.F. CHRON./EXAMINER, Aug. 22, 1993, at D-1, D-7. *But cf.* Donna DiPrima, *Beat the Rap*, MOTHER JONES, Sept./Oct. 1990, at 32-33, where Queen Latifah states:

Don't get me wrong, there is definitely sexism in rap; you've seen the evidence, and I'm not in denial. I think it is important to realize, however, that this problem is not found in all male rap lyrics, and that sexism itself, as well as violence against women, is a major problem in almost all North American pop culture, not confined to the young black man or the rap world. To assume so is just plain racist. What most people don't realize is that the positive side of rap music far outweighs the negative. It is a forum for many largely unheard voices, and has a fierce political consciousness unparalleled in any other pop form today. Rap lyrics deal with racism, violence, apartheid, nationalism — a huge range of issues. People are thinking and being made to think. And there is a burgeoning of women in rap.

Id.

33. *See supra* note 32 and accompanying text. In June 1989, the Corcoran Gallery in Washington D.C. canceled a planned exhibition of the photographs of the late Robert Mapplethorpe. Jeff Donahoe, *Corcoran Cans 'Controversial' Mapplethorpe Retrospective*, WASH. BLADE, June 16, 1989, at 1. Calling United States Senator Jesse Helms (the leader of the campaign to cut off National Endowment of the Arts funding for, *inter alia*, homoerotic art) "the most flaming bigot on Capitol Hill," local gay/lesbian artists and others marched around the Capitol grounds carrying signs such as "Promote Homoeroticism." Doug Hinckle, *OUT! For Art on Capitol Hill*, WASH. BLADE, July 20, 1990, at 1. In San Francisco, the community of artists planned ways to deal with the NEA funding cutoffs, claiming that "Jesse Helms and his cohorts on the far right just can't leave art alone." *See* S.F. WEEKLY, Mar. 14, 1990, at 1. The clause that Senator Helms succeeded in having the United States Senate adopt as a restriction on NEA funding specifies that art considered "'obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts'" must have "serious literary, artistic, political or scientific value" to receive funding. *Id.*

34. Those who would tend to disagree that the opinions of Justice White and Chief Justice Burger and the outcome in *Hardwick* itself do not represent any sort of official imprimatur on anti-gay/lesbian hate speech ignore not just the contents of their opinions deciding the case, but the fact that the members of the Court knew that their treatment of the case could feed a monster wave of anti-gay violence that had begun to rise before the decision. In amicus curiae briefs to the Court in *Hardwick*, the Court was informed that to permit criminalization of private, consenting, non-commercial adult sexual activities by gay/lesbian persons would "translate . . . readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian

**B. DISCRIMINATION AGAINST GAY AND LESBIAN PERSONS AFTER
HARDWICK: A BLANKET PERMISSION FOR BIAS?**

One common judicial approach to gay/lesbian claims of discrimination after *Hardwick* is to invoke *Hardwick* as categorically precluding such claims. Two cases epitomize this permission-to-discriminate reading of *Hardwick* and of the extreme harm that it has done and can do.

In *High Tech Gays v. Defense Industry Security Clearance Office*,³⁵ the Court of Appeals for the Ninth Circuit reviewed a lower court decision that had concluded that DISCO's policy of delaying grants of security clearances to applicants who declare that they are other than heterosexual, and of subjecting such applicants to more extensive investigations and to an in-built inference of unreliability, violated the applicants' constitutional rights of privacy and equal protection.³⁶ Reasoning that, after *Hardwick*, "there is no fundamental right to engage in homosexual sodomy [as a matter of due process liberty]," the Court of Appeals concluded that "it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct."³⁷

In *High Tech Gays*, the Court of Appeals ignored the District Court's carefully crafted distinctions of *Hardwick* as not having been based on equal protection, which *Hardwick* explicitly was not, as having not addressed the lawful (non-criminal) sexual practices of gay and lesbian persons (non-"sodomy", under the Georgia law, could include manual sexual stimulation, sex with vibrators and dildoes, and an array of other sexual practices presumably engaged in by some gay as well as non-gay persons), and as having not contemplated nor addressed the right of the affected group not to be discriminated against in areas other than the criminal prosecution circumstance

persons in this culture, society and legal system," including "anti-gay violence;" the Court was told that one of five gay men and one of ten lesbians in eight U.S. cities reports having been kicked, hit or beaten because of sexual orientation-based hostility. Dunlap, *supra* note 12, at 953.

35. *High Tech Gays v. Defense Industry Security Clearance Offense*, 895 F.2d 563 (9th Cir. 1990), *reh'g. denied*, 909 F.2d 375 (9th Cir. 1990).

36. *High Tech Gays*, 668 F. Supp. 1361 (N.D. Cal. 1987).

37. *High Tech Gays*, 895 F.2d at 571.

presented in *Hardwick*.³⁸ Instead, the Court of Appeals essentially read *Hardwick* as having decided all of these questions adversely to gay/lesbian persons, and, in dictum, went on to volunteer that gay people should not constitute a suspect category for equal protection purposes,³⁹ aside from *Hardwick*'s direction or implication, because our sexual practices are mutable and because we "are not without political power."⁴⁰ This dictum ignores a number of other groups that have received (varying degrees of) constitutional protection from discrimination, especially where it has been irrationally motivated discrimination, and who have mutable group-identifying behavior (e.g., religious minorities and members of politically controversial groups such as the Communist Party) and who arguably possess some political power (e.g., immigrants, women and people of color). Nor did the decision-makers in *High Tech Gays* pay the slightest heed to the dubiousness of requiring immutability in order to protect a minority group from discrimination.⁴¹

Prior to *High Tech Gays*, the first high-level federal appellate decision to provide this sort of blanket pro-discrimination invocation of *Hardwick* was *Padula v. Webster*.⁴² In *Padula*, the FBI refused a lesbian employment as a special agent because of her sexual orientation.⁴³ The Court of Appeals for the District of Columbia upheld the lower court's dismissal of Ms. Padula's constitutionally grounded employment discrimination case, concluding that *Hardwick* constituted an insurmountable barrier to her claim.

38. *High Tech Gays*, 668 F. Supp. at 1369-77.

39. *High Tech Gays*, 895 F.2d at 571.

40. *High Tech Gays*, 895 F.2d at 573-74. This line of reasoning was resoundingly criticized and debunked in *Jantz v. Muci*, 759 F. Supp. 1543 (D.Kan. 1991), as requiring that women and people of color would thereby no longer merit suspect category treatment under the equal protection guarantee if the anti-discrimination laws addressing race and gender were to be similarly considered; the District Court's opinion in *Jantz*, regrettably, was reversed by the Tenth Circuit Court of Appeals, 976 F.2d 623 (10th Cir. 1992), *cert. denied* (1993).

41. See Janet Halley, *The Politics Of The Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. Rev. 915 (1989).

42. *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); the FBI has announced a change in its policy that calls for non-discrimination against gay men and lesbians, since settlement of the action in *Buttino v. Federal Bureau of Investigation*, (N.D. Cal. 1993) (unpublished). See LESBIAN/GAY LAW NOTES, Jan. 1994, at 7.

43. *Id.* at 98-99.

The Court of Appeals in *Padula* side-stepped the significant fact that *Hardwick* was not an equal protection decision, nor an employment law case, by citing *Dronenberg v. Zech*,⁴⁴ a military exclusion case. Looking at the linkage of *Hardwick* with *Dronenberg* in the *Padula* decision, it becomes evident that the military exclusion cases and *Hardwick* itself have become the two hugest bricks in the constitutional wall against gay/lesbian rights. In decisions styled upon *Padula v. Webster*, such as *High Tech Gays*, the *Hardwick* case has come to stand for the proposition that gay, lesbian and bisexual people are without constitutional rights whatsoever.

C. MILITARY DISCRIMINATION AGAINST NON-HETEROSEXUALS:
THE PROTOTYPE FOR INSTITUTIONAL BASHING OF GAY/LESBIAN
PERSONS

“Heterosexuals are a proven security risk.”⁴⁵

Few institutions in our system and culture so openly practice anti-gay/lesbian discrimination and so repeatedly and recalcitrantly are upheld in the practice by hate-based justifications⁴⁶

44. *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

45. This sign, carried by a man in full-dress Air Force uniform at the Washington D.C. march in 1987, *supra* note 7, invited the federal government to avoid the problem of undermining heterosexual security forces' effectiveness, by proclaiming, on its reverse side, that the U.S. should, in effect, send in the gay marines. The problem as to heterosexuals in military security positions had materialized rather graphically during that year in the form of bribery of two male U.S. soldiers assigned to guard the U.S. embassy in Moscow by offering them sex with women.

46. *See, e.g., Middendorf*, 632 F.2d at 811-12, where the Court of Appeals, per then-Judge Anthony Kennedy, cites an affidavit from the Assistant Chief of Naval Personnel that states, *inter alia*, that “[t]he Navy is concerned about tensions between known homosexuals and other members who ‘despise/detest homosexuality,’” as a sufficient justification for upholding the Navy’s policy of exclusion of gay and lesbian service members, and of discharge of those found to be gay or lesbian while in the service. The Court of Appeals in *Middendorf* rejected the constitutional claims of one admitted bisexual female and two denying but allegedly gay male sailors that their rights to privacy and due process should prevent them, respectively, from being denied re-enlistment and from being discharged from active duty, stating in its opinion in pertinent part that “a substantial number of naval personnel have feelings regarding homosexuality . . . which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties.” It seems apropos to contrast the record in *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *aff’d on non-constitutional grounds*, 875 F.2d 699, *cert. denied*, 498 U.S. 957 (1990), in which it was established that Perry Watkins’ “homosexuality was well-known but caused no problems and generated no complaints from other soldiers.” *Wat-*

than the United States military establishment. It must be accepted that the U.S. military has fought harder in the past couple of decades to keep its purported "ban" on gay and lesbian service personnel in place than perhaps any other institution has fought. Tens of thousands of gay and lesbian persons have been investigated, disciplined, discharged, court-martialed and otherwise punished in the past couple of decades.⁴⁷ Military brass have commissioned studies about the performance of gay and lesbian service members, and then suppressed the findings when they underscore the absence of a basis for the military's discrimination.⁴⁸ In 1993, in reaction to the announcement of President Clinton that he intended to put an end to the anti-gay/lesbian "ban," the military engaged in a wholesale, tireless and so far substantially successful effort to defend the ban.⁴⁹

kins, 847 F.2d at 1331.

47. Several excellent books document this history of active gay/lesbian identifications, sanctions and banishments in the U.S. armed forces. These include the work of KATE DYER, aide to Congressman Gerry Studds and Hastings law student, in *GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS* (1990) (documenting the high numbers of gay and lesbian persons discharged annually in the 1970's through 1980's by the U.S. military establishment); and three broader histories, RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* (1993); ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990); and MARY HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT* (1990). Historian Allan Berube estimated the total number of gay, lesbian and bisexual persons discharged from the U.S. Armed Forces in the 20th Century to have been approximately 75,000, as of mid-1991. Allan Berube, Address at Outlook Foundation Meeting, *HomoSocial Debate: Our Right to Serve?* (June 13, 1991).

48. Interview with Congressman Gerry Studds, *BAY AREA REPORTER*, Sept. 13, 1990, at 1. See also, DYER, *supra* note 47; UNITED STATES GENERAL ACCOUNTING OFFICE, *REPORT TO CONGRESSIONAL REQUESTERS: DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY* (1992) (concluding that the Department of Defense's policy of exclusion and discharge of gay/lesbian persons is a costly waste). A report commissioned by the Department of Defense from the Rand Corporation was made public in August 1993; the report concluded that there is no reason for the "ban" on gay/lesbian personnel. Bill Behrens, *\$1.3 Million Rand Report Released: No Reason for Ban*, *BAY AREA REPORTER*, Sept. 1, 1993, at 1, 24.

49. Then President-elect Clinton was closely questioned by media shortly after his election concerning his commitment to end the ban; his comments about the legitimacy of military concerns about "conduct" and "privacy" worried some. Thomas L. Friedman, *Clinton and Top Legislators Pledge Amity on Economy*, *N.Y. TIMES*, Nov. 17, 1992, at A18. Clinton stated then that "[t]he issue ought to be conduct. Has anyone done anything which would disqualify them, whether it's Tailhook scandal or something else." *Id.* No one pointed out at the time that Tailhook was an overwhelmingly heterosexual male scandal. Over the period from that first post-election comment to the occasion of President Clinton's announcement on July 19, 1993, of his acceptance of the "don't ask, don't tell, don't pursue" approach favored by Senator Sam Nunn, former Secretary of Defense Les Aspin and many military leaders, and almost universally opposed by gay and lesbian

On July 19, 1993, President Clinton announced, in a speech to the Joint Chiefs of Staff delivered in the militaristic environment of the National Defense University at Ft. McNair in Washington D.C., what he called an “‘honorable compromise’,” on the issue of gays/lesbians in the military. Under the compromise the President presented, recruiters would not ask about sexual orientation, but investigating officers could do so; the “‘compromise” also removed existing language about the incompatibility of gay/lesbian sexual orientation with military service, but allowed the military to investigate and to exclude any person who admitted or was found to have engaged in same-gender contact. Finally, the “‘compromise” required gay and lesbian military service personnel not to tell anyone of their sexual orientation.⁵⁰

Since President Clinton’s announcement of acceptance of the “‘don’t ask, don’t tell” policy as to gay/lesbian service personnel, as of late 1993, both House and Senate have moved to adopt a bill that would codify the contents of Clinton’s policy, minus the provisions as to equal enforcement of sexual conduct regulations without regard to sexual orientation, and restoring

leaders (except for Congressman Barney Frank, who may be said to have helped the cave-in along with his uninformed and unilateral encouragement of this “‘compromise”), President Clinton waffled, wavered, and showed a limited understanding of the seriousness of the harm that the “‘don’t ask, don’t tell” approach would do. See Lou Chibbaro Jr., *Tug Of War In Clinton Camp On How To End Military Ban*, WASH. BLADE, Jan. 15, 1993, at 1; *Clinton Warned On Gays Ban: Congress And Military Brass Will Fight Efforts To End Proscription, Aspin Memo Says*, S.F. CHRON., Jan. 25, 1993, at A-1; Cliff O’Neill, *Fundies And Bigots Lobby Hard For Military Ban*, BAY AREA REPORTER, Jan. 28, 1993, at 1; *Clinton Acts To End Military’s Gay Ban*, S.F. EXAMINER, Jan. 29, 1993, at A-1; Gwen Ifill, *The Gay Troop Issue: Clinton Accepts Delay In Lifting Military Gay Ban*, N.Y. TIMES, Jan. 30, 1993, at A-1; Michael Wines, *The Gay Troop Issue: This Time, Nunn Tests A Democrat*, N.Y. TIMES, Jan. 30, 1993, at A-1; Senator Dan Coats, *Clinton’s Big Mistake*, N.Y. TIMES, Jan. 30, 1993, at A-11; *Excerpts From The News Conferences by Clinton and Nunn*, N.Y. TIMES, Jan. 30, 1993, at A-6; *Agreement Is Setback For Republican Amendment*, N.Y. TIMES, Jan. 31, 1993, at A-14; *Pentagon Aides To Study Option Of the Segregation of Gay Troops*, N.Y. TIMES, Jan. 31, 1993, at A-1; *Clinton Buys Time*, S.F. EXAMINER, Jan. 31, 1993, at A-16; Adam Clymer, *Hearings Could Sway the Debate on Gay Troops*, N.Y. TIMES, Feb. 2, 1993, at A-8; Peter Applebome, *Homosexual Issue Galvanizes Conservative Foes Of Clinton*, N.Y. TIMES, Feb. 1, 1993, at A-1; Carrie Woford, *Frank’s ‘Compromise’ Denounced*, WASH. BLADE, May 21, 1993, at 1, 14-15; Eric Schmitt, *Clinton At Impasse With Joint Chiefs In Gay Troop Talks: Issue is ‘Incompatibility,’* N.Y. TIMES, July 2, 1993, at A1, A8; *President Adopts ‘Don’t Ask, Don’t Tell’: Clinton to Gays: Shhh!*, S.F. EXAMINER, July 19, 1993, at A-1.

50. See *supra* note 50; *President Adopts ‘Don’t Ask, Don’t Tell’: Clinton To Gays: Shhh!*, S.F. EXAMINER, July 19, 1993, at A-1, A-12.

the ability of the military to investigate a member based on rumors or gossip.⁵¹ President Clinton has signified that he supports this newest version of the "honorable compromise."⁵²

The development of "don't ask, don't tell" as a purported alternative to ridding the military of anti-gay/lesbian discrimination is worthy of close study, as it is a bellwether of national sentiment about sexual minorities. Surely those of us who are gay and lesbian would be wealthy beyond measure if we were paid a cent every time someone advised us that our problems as gay and lesbian people would disappear if only we would learn to shut our mouths about who we are. The "don't ask, don't tell" approach will no more prove effective in overcoming discrimination against us in the military than it will overcome some military members' prejudiced objections to our existence among them. This is because "don't ask, don't tell" is nothing more than a newly phrased urging/warning of gay and lesbian people to hide, sneak and disguise our identities, and, in short, to return to the closet. "Don't ask, don't tell" is a declaration of the factual reality that some of us have been forced to try to hide our sexual identities, and a denial of the constitutional and moral reality that forcing us to hide is wrong.

There is a striking and useful analogy, in legal historical terms, between the "honorable compromise" of "don't ask, don't tell" and the adoption of a strangely similar policy by the United States Immigration and Naturalization Service in the early 1980's. Before the INS adopted its "new" policy allowing for exclusion of gay and lesbian foreigners only when they identified themselves or were so identified by third parties, INS had actively engaged in anti-gay/lesbian exclusions. When the Assistant Surgeon General criticized this form of discrimination, and acted to prevent Public Health Service physicians and nurses from going along with INS' anti-gay/lesbian exclusions, the new "don't ask, don't tell" policy of INS was instituted in 1980. By

51. Bill Behrens, *Congressional Homophobes' New, Improved, 'Ban Plus'*, BAY AREA REPORTER, Aug. 19, 1993, at 16; Lou Chibbaro Jr., *House Votes to Legalize the Military's Ban on Gays*, WASH. BLADE, Oct. 1, 1993, at A-1; Donna Cassata, *Stricter Gay Policy Backed by Senate: Homosexuality Called Incompatible with Military Service*, S.F. EXAMINER, Sept. 9, 1993, at A-1.

52. Cassata, *supra* note 51, at A-1. See also Lisa Keen, *Clinton Endorses Nunn Plan*, WASH. BLADE, July 30, 1993, at 1, 5.

1983, the INS' "new" policy had been held invalid as it was inconsistent with federal law (and putatively unconstitutional, according to at least one federal district court, if it had been enforceable); by 1990, the Immigration and Nationality Act was amended to eliminate the statutory predicate to gay/lesbian exclusions; and, presently gay and lesbian immigrants are succeeding on claims to United States amnesty based on persecution in their homelands.⁵³

There are a number of ways that the situations of immigrants and military personnel are analogous, under United States law and policy. Both groups are supposed to receive constitutional protections, but those protections historically have been limited by the degree of deference that our legal institutions habitually tend to show to immigration and military authorities. Both groups have sought change in Congress and in the federal courts to end discrimination against them. Ultimately, discrimination based on sexual orientation against United States immigrants has been halted, by a combination of successful litigation and legislative action.

If this legal historical analogy to the gay/lesbian immigration law experience portends the fate of "don't ask, don't tell" in the comparable constitutional situation of the military's anti-gay/lesbian position, then it can be predicted that the tenure of "don't ask, don't tell" as a legally acceptable military policy will be short-lived as of the present. Legal challenges to the Clinton "honorable compromise" as well as to the Congressional version

53. Lesbian/Gay Freedom Day Committee, Inc. v. United States Immigration and Naturalization Serv., 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd in part, vacated in part sub nom.* Hill v. Immigration and Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983); see also discussion of this case in LEONARD, *supra* note 4, at 653-56. The work of Congressman Barney Frank was vital to the eventual statutory omission of language in the Immigration and Nationality Act of 1991 that had allowed for the exclusion and deportation of gay/lesbian immigrants from the United States. Asylum cases include that of Serkan Altan, who was beaten, harassed and gang-raped because Turkish high school classmates in Istanbul believed he was a "fag," and who was beaten and raped by an Istanbul police officer who called him "sick" and "queer". Lou Chibbaro Jr., *Gay Man from Turkey Seeks Asylum in U.S.*, WASH. BLADE, Nov. 26, 1993, at 17; see also, *Fighting For Freedom From Persecution*, in LAMBDA UPDATE 16 (Summer 1993), where it is reported by Lambda Legal Defense and Educational Fund, Inc., in New York, that three petitions have been filed with the INS in California and New York, seeking asylum for gay and lesbian immigrants from Russia, Iran and Nicaragua. The INS granted asylum to a gay Mexican, under the pseudonym "Jose Garcia," in April, 1994. Sidney Brinkley, *Gay Mexican Man: 'Life was made intolerable.'*, WASH. BLADE, Apr. 1, 1994, at 14.

of that compromise are progressing inexorably toward the Supreme Court, and pre-existing litigation against the "ban" continues apace.⁵⁴ Cases brought by servicemembers such as Keith Meinhold, Joseph Steffan and numerous others seem almost certain to bring the military issues to resolution in the United States Supreme Court in the near future.⁵⁵ The one precious and sought-after object that the Clinton administration's "honorable compromise" clearly cannot buy is peace in the legal department as to gay and lesbian service personnel. Far too much is at stake for the Clinton administration's weak, back-pedaling "resolution" to succeed, and the pending litigation already strongly suggests that it will fail.

Surely any legal advancement of our rights as sexual minor-

54. Erica Lebherz, *New Policy On Gays In The Military Could Spur Litigation*, DAILY JOURNAL, July 12, 1993, at 1; Katrina M. Dewey, *Is the Ban Legal? A California case - not Clinton, not Congress - May Resolve The Fight Over Gays In The Military*, CALIFORNIA LAWYER, July 11, 1993, at 36-40, 84. The litigation in behalf of military service members that preceded the Clinton administration's announcements also continues unabated, and has been essentially unaltered by those announcements (if not strengthened by them) in the admission that homosexuality is not incompatible with military service, in the failure of the sham Senatorial hearings to establish a factual foundation for the ban, see Letters to the Editor, *Hearings on Gays in the Military are a Sham*, N.Y. TIMES, May 26, 1993, at A-16, and in the emergence of a nationally exposed cadre of gay and lesbian military personnel who are dedicated to ending the "ban" in the courts, or wherever the legal struggle takes them. See, e.g., *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) (reversing a trial court's summary judgment of constitutionality of the discharge of a lesbian service member), cert. denied, 113 S.Ct. 655 (1992); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991) (finding dismissal of Annapolis cadet on eve of graduation, due to his admission of homosexuality, was rationally based on policy of gay exclusion designed to prevent transmission of HIV disease), rev'd, 8 F.3d 57 (1993) (holding that military exclusion policy in case of gay Naval officer violated equal protection of the laws); *Meinhold v. United States Department of Defense*, 808 F. Supp. 1453 (C.D. Cal. 1993) (granting permanent injunction against military's enforcement of anti-gay ban against Naval Petty Officer Keith Meinhold); Thomas L. Friedman, *Judge Rules Military's Ban On Homosexuals Unconstitutional*, N.Y. TIMES, Jan. 29, 1993, at A-8; *White House Plans To Fight For Discharge Of Gay Sailor*, N.Y. TIMES, July 31, 1993, at A-10; William Rubenstein, *Face Off: Should Gays Be In The Service?*, S.F. EXAMINER, July 19, 1993, at A-1, A-12. Gay, lesbian and bisexual servicemembers' decades of litigation against discriminatory policies of the Armed Forces were honored, as ten famous litigants were presented with the Liberty Award of Lambda Legal Defense and Education Fund, Inc., at Carnegie Hall, New York City, New York, on May 24, 1993. *Lambda Celebrates 20th Anniversary at Carnegie Hall*, LAMBDA UPDATE 1, 8-9 (Spring 1993).

55. See *supra* note 54; see also *Elzie v. Secretary of Defense*, 1993 U.S. Dist LEXIS 15481 (D.D.C. Nov. 2, 1993) (enjoining the military from discharging Marine Sergeant Justin Elzie); *Selland v. Aspin*, 832 F.Supp. 12 (D.D.C. 1993) (enjoining separation of Navy Lieutenant pending litigation); *Dahl v. Secretary of the Navy*, 830 F.Supp. 1319 (E.D. Cal. 1993) (granting summary judgment against government's military exclusion policy on equal protection grounds).

ity persons must depend, in deep measure, upon our ability to change the direction of this symbolic referendum on the acceptability of anti-gay/lesbian treatment that the military controversy has provided. It is hard not to be discouraged by the message that the military is an enclave, a "specialized society,"⁵⁶ and the implication that our courts will somehow continue to permit this "specialized society" to discriminate openly against us, evading basic constitutional responsibilities in the process. Because the military serves as a model for permissible conduct for people both in and out of uniform in this country, and beyond, and because the military is probably instrumental in setting the public tone as to approval or disapproval of interpersonal violence among distinct subgroups in America,⁵⁷ the harms of military homophobia cannot be confined to its ranks.

IV. THE TEMPTATION TO ISOLATE AND SEPARATE ONESELF FROM THE REACH OF THE HARMS OF *HARDWICK*

"L -esbians
A -gainst
B -oys
I -nvading
A -nything"⁵⁸

Among the forms of fallout from *Hardwick* is the common, perhaps wishful and perhaps even tactical misunderstanding of its limited scope. Because of the willingness of some courts to use *Hardwick* as a fixed premise for the validity of anti-gay/les-

56. *Middendorf*, 632 F.2d at 811; see also *Greer v. Spock*, 424 U.S. 828, 839 (1976) (upholding right of military to prevent candidate for U.S. presidency, who was vocal critic of U.S. participation in Vietnam War and was opposed generally to U.S. militarism, from giving political speech at Fort Dix military reservation, even on nearby civilian property); see also Dan Freedman, *U.S. Courts Loath To Force Military Change: GOP-Appointed Judges Issue Few Pro-Gay Rulings*, S.F. EXAMINER, Jan. 31, 1993, at A-14.

57. See, e.g., discussion by U.S. District Judge William W. Schwarzer of the significance of military racial integration to the acceptance of the goal of integration outside the military. *Middendorf*, 427 F.Supp. at 203, *rev'd sub nom Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

58. See *supra* note 7. This quotation is not meant to infer that the sign necessarily symbolizes the kind of self-differentiation and removal from the sexual fray in which gay and lesbian persons find ourselves, after *Hardwick*, that is discussed in this section. The sign easily could have been focussed primarily upon male aggression, militarism and violence; the intent of the person carrying it is subject to motley interpretations.

bian discrimination,⁵⁹ there is actually no area of law affecting sexual minorities into which the effects of *Hardwick* do not reach. Even if one's sexual practices do not transgress the Georgia "sodomy" law,⁶⁰ or even if one is lucky enough never to be targeted by a police officer's homophobic obsession, as it appears Michael Hardwick was,⁶¹ such that one avoids arrest for one's criminalized sexual practices, *Hardwick* nonetheless menaces expectations of privacy and equal treatment.

Illustrative of this seemingly boundless reach of *Hardwick* is its successful invocation in child custody/visitation litigation concerning gay and lesbian litigants.⁶² For example, one state appellate tribunal used *Hardwick* as the basis for taking custody of two minor children of an entirely fit female parent, because she lived in a small, rural town with her lesbian lover and there would be stigma upon her children if they were to continue to be raised by her.⁶³ Such chilling applications of *Hardwick* must give pause to even the most upscale, socially accepted, and geograph-

59. See *supra* section III B of this article.

60. See *supra* notes 1-2. There is not a terrific likelihood that many adult persons will fit within a group immune from the theoretical reach of Georgia-type "sodomy" laws, if Dr. Alfred Kinsey and his research successors are to be trusted. Or, as San Francisco Human Rights Commission attorney Norm Nickens once vividly put the matter, while teaching a sexual orientation law class with me at New College Law School in San Francisco, "[i]f your lips leave their lips . . .," you are on your way to a violation.

61. See *supra* note 1 and accompanying text.

62. See *infra* note 63, and accompanying text. Also, on September 7, 1993, a trial judge in Virginia ordered a minor child taken from the custody of his natural mother because she lives with a lesbian partner; the court cited the illegality of gay/lesbian sexual contact in Virginia among its reasons for finding Sharon Bottoms an unfit mother. *In re Dostou; Bottoms v. Bottoms* (unpublished order) (CH93JA0517-00) (Henrico County Cir. Ct. 1993). For a more comprehensive discussion of the effects of *Hardwick* on gay/lesbian family law, see Mary Dunlap, *The Gay/Lesbian Marriage Debate: A Microcosm Of Our Hopes And Troubles In The Nineties*, 1 TUL. L. & SEXUALITY REV. 63 (1991); see also William Eskridge, *A History of Same-Sex Marriage* 79 VA. L. REV. 1419 (1993). Despite the "acid rain" effect of *Hardwick*, progress in gay/lesbian family law since the decision includes at least one favorable decision advancing the possibility of legalization of same-gender marriage within at least some of our lifetimes. See discussion of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) in Evan Wolfson, *Hawaii Paves Way For Same-Sex Marriage*, LAMBDA UPDATE 1 (Summer 1993); see also *Legislative Battle Begins*, ISLAND LIFESTYLE, Feb. 1994, at 12. Progress as to gay/lesbian adoptions of children also has been marked. See Stephanie Landay, *The Rights of Gays To Adopt Children: Fortifying the Defenses Against Societal Prejudice*, 1 CARDOZO WOMEN'S L.J. 183 (1993). However, as long as these developments are not constitutionally underpinned, they also are vulnerable to reversals. See, e.g., Lou Chibbaro, Jr., *D.C. Court May Bar Gay Adoptions*, WASH. BLADE, Nov. 26, 1993, at 5.

63. S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987).

ically well-situated gay and lesbian parents and would-be parents.⁶⁴

One of the greatest dangers of *Hardwick* in the family law context is its utter sex-negativity, as well as its open prurience, upholding the idea that gay and lesbian relationships, and thus the families that grow effortfully and by choice from them, are per se "immoral and illicit."⁶⁵ Thus, one of the directions of *Hardwick* about which lesbian and gay rights activists must be especially wary is its tacit invitation to exempt those who are somehow free of the taint of gay/lesbian sexuality.

In this regard, the alleged distinction between gay/lesbian status and conduct must be carefully examined. While this distinction has been offered as a logically persuasive means of putting *Hardwick* aside,⁶⁶ it contains several fairly evident dangers. First and most blatantly, it accepts *Hardwick* and adapts to it, rather than refusing to comply, thus incorporating *Hardwick's* condemnatory outlook upon gay/lesbian sexuality (and, by closest implication, upon those who are defined as gay/lesbian, whether by reference to conduct, appearance, declaration, stereotype or implication). Assuming *arguendo* that any distinction of *Hardwick* must necessarily accept *Hardwick* in some part, the status/conduct distinction also provides an opportunity for gov-

64. The existence of gay fathers and lesbian mothers, long a social reality and never a contradiction in terms, except in law, has been recently documented by mainstream media. In *Lesbian Partners Finding The Means To Be Parents*, N.Y. TIMES, Jan. 30, 1989, at A-13, the message was conveyed that children of gay/lesbian parents more likely than not would be (1) gay and lesbian themselves, (2) stigmatized, and (3) that children of lesbian parents in particular would learn special hostility toward men. Soon after this article was published, the newspaper published an "Editor's Note," proposing to correct these misimpressions. *Editor's Note*, N.Y. TIMES, Feb. 3, 1989, at A-3. A well-written and moving account of the plight of the lesbian mother, in the specific context of a second parent adoption, debunks these bogeymyths in a personal way, in PHYLLIS BURKE'S FAMILY VALUES: TWO MOMS AND THEIR SON (1993).

65. *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985). In *Roe*, which preceded *Hardwick* and anticipated its morally condemnatory tone as to all gay and lesbian sex, the Supreme Court of Virginia declared that a gay father could be denied custody or visitation with his child, because "the immoral and illicit relationship [with his gay lover] renders [him] an unfit and improper custodian as a matter of law." *Id.* at 727.

66. See, e.g., *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), in which Judges Norris and Canby articulated the distinction between status and conduct in order to set aside the implication that *Hardwick* forecloses inquiry into the impropriety of a governmental line drawn against homosexuals *per se*. *Watkins* was affirmed on narrower grounds by the Court of Appeals en banc. See *supra* note 46. See also *High Tech Gays*, 895 F.2d 563 (1990), *supra* notes 35-37 and accompanying text.

ernment to divide and conquer sexually active gay/lesbian persons whose practices include oral-genital and/or anal-genital activities (which can include use of safe sex guidelines, it is noted), by simply requiring people to answer questions about specific sexual conduct.⁶⁷ These dangers are intensified in a climate and culture that are all too widely prepared to blame gay and bisexual men, along with IV drug users and Haitian immigrants, for the AIDS pandemic; there, the status/conduct distinction too often and quite harmfully is elided in favor of condemnation of both the groups of people involved and their sexual behaviors.⁶⁸ In sum, the status/conduct distinction may invite further and worse invasions of privacy and more severe breaches of equal treatment than did *Hardwick* itself.⁶⁹

The Clinton administration's "honorable compromise" of "don't ask, don't tell" represents a not-very-subtle and not-very-progressive variation on the status/conduct distinction, with the earlier condemnations by the military of gay and lesbian people translated into the "new" version, consisting of condemnations of gay and lesbian sexual activity. It is as dangerous as any other version of government doublespeak, in that respect. Any development of gay/lesbian rights that depends for its force upon the avoidance of certain consenting, physically private and non-commercial sexual behavior between adults may be predicted to foment sex-negative rules and policies, and to invite and worsen divisions, not only among gay, lesbian and bisexual persons, but between us and those who would judge us not by the content of

67. Of course, *Hardwick* did not decide the lawfulness, for constitutional or other purposes, of governmental inquiries about sexual conduct, and there is a very important argument that such inquiries would violate rights to privacy, equal protection, and freedom from self-incrimination. *But cf. High Tech Gays*, 895 F.2d 563 (1990); *see also supra* notes 35-37 and accompanying text.

68. See discussion of recriminatory and fault-finding attitudes toward gay and bisexual men with AIDS on the part of the American public in Mary Dunlap, *AIDS and Discrimination in The United States: Reflections On The Nature Of Prejudice In A Virus*, 334 VILL. L. REV. 909 (1989); DENNIS ALTMAN, *AIDS IN THE MIND OF AMERICA* (1987); HARLON DALTON & SCOTT BURRIS, *AIDS AND THE LAW* 233-90 (1987).

69. *See, e.g., Padula v. Webster*, 822 F.2d at 102, *supra* Section II B of this article. In *Padula*, the Court of Appeals accepted defendant FBI's use of the status/conduct distinction to explain that it is not discriminating against homosexuals, but only against homosexual conduct. In so doing, the Court rejected Padula's argument that "homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status." An excellent discussion of the status/conduct distinction's attendant problems may be found in Nan Hunter, *Life After Hardwick*, 27 HARV. C.R. C. L. L. REV. 531 (1992).

our characters but by the particular sexual practices in which we elect to engage.⁷⁰

V. THE OPPOSITE EXTREME OF ISOLATION: UNDERSTANDING THE PHENOMENON OF "OUTING"

Most every lesbian and gay man I know has wondered who, among the rich and famous, may be lesbian or gay. Sometimes it's just pure lust and fantasy; other times it's based on information someone we know found out from someone who knew someone who swears it's fact. But the 'code of silence' that has surrounded this community in the past seems to be breaking down via an act called 'outing.' This past spring [of 1990] lesbian and gay media, and the mainstream as well, has spent many hours discussing the topic. Geraldo and Jane Wallace have devoted hours to the subject; NEWSWEEK, THE NEW YORK TIMES, SAN FRANCISCO CHRONICLE, even THE RECORDER, a legal newspaper, has [sic] devoted space to the question. The question: Should famous and/or powerful lesbians and gays be forced out of the closet?⁷¹

Both *de jure* and *de facto* discrimination, hate-based violence, and the unapologetic and unreasoned deprivation of basic legal rights, including rights to jobs, relationships and families, continue against sexual minority persons and groups in this society. These damaging anti-gay/lesbian phenomena have intensified after, and in some instances at least, obviously because of, the *Hardwick* decision. Accordingly, it is sane to expect that at least some of the people suffering these manifest injuries and

70. This modest borrowing from the quotation by the late Dr. Martin Luther King, Jr., concerning a day in the future when his children and all African American children will be judged not upon the color of their skins but upon the content of their character, is made with appreciation for Dr. King's crucial insight into the basic shape of discrimination, and the basic hope of freedom. It is noted that, in the struggle to end U.S. military mistreatment of gay and lesbian members, Dr. King's surviving partner, Coretta Scott King, has spoken out powerfully and emphatically about the importance of ending the ban, which "makes a mockery of civil and human rights in our country." Coretta Scott King, *Together We Shall Overcome*, WASH. BLADE, July 2, 1993, at 35.

71. Suzanne Chasin, *Opinion: The End Of The Code Of Silence?* VISIBILITIES, Sept./Oct. 1990, at 5.

losses will engage in public reactions of various kinds. The phenomenon of "outing" appears related, both conceptually and emotionally, to bitter and outraged reactions to our palpable loss of privacy in and because of the *Hardwick* decision. "Outing" certainly has not been caused solely by *Hardwick*, but the case is a definite factor in the momentum of this anti-privacy phenomenon.

The rationales for "outing" are as diverse as those who propose or advocate it.⁷² Some media representatives, as well as individuals, objecting on emotional and ethical grounds to the existence of famous closeted gay and lesbian persons as contributing to the stigmatization and secretiveness of minority sexual identities, claim that "outing" constitutes a legitimate response to the right of the public to know relevant facts about people, in and out of the news.⁷³ Some argue for "defensive out-

72. I personally remain strongly opposed to "outing," as the Stanford law students who were in my "Sexual Orientation and Law" seminar in spring 1990 know perhaps too well. I honor these students for their discussions and explorations of this difficult terrain with me, and I retain respect for those who believe that "outing" is, ultimately, justifiable (or better). However, as I have written elsewhere, see Mary Dunlap, *The Pro's and Con's Of 'Outing': One Lesbian Advocate's Views*, VISIBILITIES, Sept./Oct. 1990, at 18, I remain opposed to "outing" because it is premised on the nature of a gossipy smear, because it interferes with the right of the individual (no matter how loathsome) to do his/her own coming out process or not, in a lifetime, and because I believe that even "defensive outing" of gay-bashing political homophobes (those possessed of what some might call "Hoover-Dolan-Cohn syndrome") see NICHOLAS VON HOFFMAN, CITIZEN COHN 215, 222, 322, 362-78 (1988) (documenting not only Roy Cohn's homosexuality but the desperate and extreme homophobia that surrounded him from his vicious days in the Joe McCarthy era to his closeted death due to AIDS complications) is homophobic and reactive at its roots and because "outing" represents and signifies an abandonment of the right of privacy, which I seek personally and for all humans, even as privacy is double-edged, thorny and difficult to define, confine and enforce.

73. For example, editor Gabriel Rotello of OUTWEEK, a periodical that "outed" the late Malcolm Forbes in an obituary, supports "outing" as a media responsibility, and adds that it has become a price for staying in the closet in a society that mainly punishes people for coming out of that closet. Nick Bartolomeo, *ACT UP Sponsors Debate on the Pros and Cons of Outing*, WASH. BLADE July 20, 1990, at 4-5. But see Chasin, *supra* note 71:

My right to privacy means that everyone has that right. Yes, I want everyone who is lesbian and gay to be out. I wait eagerly for that day. . . . But even when it is absolutely safe for all lesbians to be out, I would still respect anyone's right to be private about her sexual orientation. It is an individual decision that we each make, some of us each day.

Ironically, one of the first cases about "outing" to reach the courts resulted from the publication by the San Francisco Chronicle of the fact that Oliver "Billy" Sipple, who had just saved then-President Gerald Ford's life by deflecting the gun that a would-be

ing,"⁷⁴ as a limited tactic aimed at those who profit from or gain power by bashing a group of which they are, or are purported to be, members. An illustration of the logic, or at least the comprehensible reflex, of "defensive outing" recently was offered when Republican Party tacticians sought to link House Speaker Thomas Foley (D-WA) with gay causes, and to imply that he himself is gay. In response, Representative Barney Frank (D-Mass.) threatened to expose "hypocritical Gay Republicans in the Bush administration and in the U.S. Congress," declaring that "[t]he right to privacy and the right to hypocrisy do not co-exist."⁷⁵ No such exposures by Congressman Frank have occurred to date. Meanwhile, Frank himself has been reprimanded, but not censured or expelled as the vehemently anti-gay/lesbian Congressman William Dannemeyer sought, for Frank's relationship with a gay male prostitute, Steve Gobie.⁷⁶

There can be little doubt that there is a higher standard in this system, approaching a double one, for gay men, lesbians, bisexual and transgendered persons who publicly identify our sexualities. Because of the permission to discriminate, this severity is not usually checked by the forces of law. Given this environ-

assassin had aimed at him, was gay; Sipple sued for invasion of privacy, and the California courts upheld the newspaper's claim that, because Sipple was a close friend of Harvey Milk and had been seen in gay bars and neighborhoods, the fact of his sexual orientation had not been treated as private by him. Mr. Sipple, who has died of complications due to AIDS, claimed to have suffered severely from the public revelation of his sexual orientation. His attorney, John Wahl, averred that "[a]ll [Sipple's] . . . primary relationships with his family were ruptured" when Sipple's relatives learned, from a newspaper article, that Sipple was gay. Sipple claimed, "[M]y sexuality . . . is a part of my private life and has no bearing on my response to the act of a person seeking to take the life of another." Ray O'Loughlin, *Billy Sipple*, WASH. BLADE, Feb. 10, 1989, at 11. The newspapers that carried the story about Sipple's sexual orientation claimed, inter alia, that his sexual orientation was relevant because President Ford had not thanked him for his action, which some interpreted as a homophobic act on Ford's part. *Id.*

74. See discussion *supra* note 72. It is difficult to discern where so-called "defensive outing" ends and "outing" of actual or potential allies begins. For an illustration, while some gay and lesbian persons sought to "out" New York's newly appointed schools chief, Ramon C. Cortines, others such as openly lesbian champion of gay/lesbian rights and Assistant Secretary of Housing and Urban Development Roberta Achtenberg, posited that Mr. Cortines was conservative but not anti-gay. Kristina Campbell, *Around the Nation: NYC Schools Chief Hired*, WASH. BLADE, Sept. 3, 1993, at 34.

75. Christopher Matthews, *GOP Tries To Link Gay With Foley*, S.F. EXAMINER, June 7, 1989, at A-13; Lou Chibbaro Jr., *Barney Frank Heads Off a Smear Effort Against Foley*, WASH. BLADE, June 9, 1989, at 1.

76. Lou Chibbaro Jr., *House Brings Frank Saga to a Close*, WASH. BLADE, July 27, 1990, at 1.

ment, then, it is hardly surprising that some who seek justice for sexual minorities are disabused of respect for values such as privacy, individual autonomy where the matter of "coming out" is concerned, and fairness in dealings with other people, especially (actual or perceived) adversaries and enemies. These values certainly do lose meaning when we are deprived of enjoying the extension of them to us by others, including by the highest Court of this land.

Even so, "outing" represents outright denigration, if not condemnation, of the values of personal autonomy and privacy that some of us have dedicated our lives to securing and strengthening. "Outing" assumes in its very mechanism that the putatively gay or lesbian person is not entitled to make the choice to share or not to share the fact of her/his sexual orientation in the arena in which (s)he is to be "outed." "Outing" also erroneously assumes that the business of coming out is an all-or-nothing, once-done-all-done proposition. "Outing" mistakes the personal experience of many of us, that "coming out" is a painstaking, sometimes highly uncomfortable and definitely continuing process of talking with the various people and groups that cross our paths, significantly and otherwise, over lifetimes.⁷⁷ In the combat zone of sexual freedom, "outing" symbolizes a hardening of boundaries, an imposition of inhibitions because of the need to define friends and enemies by reference to sexual orientation, even a refusal to recognize that sexual identity can change. "Outing" is a war-time reaction born of potent emotions; as a war-time tactic, it is profoundly divisive.

"Outing" gives an indelible quality to the sexual labeling that has been and is the means for many of us to personal liberation, group empowerment, and societal consciousness-raising. Finally, "outing" is at least sometimes premised on guesswork,

77. See Dunlap, *supra* note 72. The decision of a gay, lesbian, bisexual or transgendered person about whether to "come out" at work is usually a painstaking, ongoing matter. See Carol Ness, *The Corporate Closet: Gay Professionals More Open But Still Fearful*, S.F. EXAMINER, Oct. 10, 1993, at A-1. The decision of an HIV-positive person to identify in that status at work likewise tends to involve a tense and tearing process. See Dennis deLeon, *Act of Courage*, STANFORD LAWYER, Fall 1993, at 25, in which Mr. deLeon identifies as an HIV-positive person, and observes that "fear of employment discrimination, fear of the politics of AIDS . . . [and] fear of becoming a pariah . . ." all have stood in the way of HIV-positive people telling others of their statuses.

speculation, stereotyping,⁷⁸ and scent-based impressions of people's sexual orientations, thus contributing to the discrimination that its practitioners profess to oppose. As one supporter of "outing" has conceded, "outing" "contain[s] . . . the seeds of things our movement would rather not be associated with."⁷⁹ On balance, "outing" seems ill-advised, inconsistent, and dangerous, even as its emotional predicates of outrage, grief, and frustration constitute decent, human, and understandable reactions to the plethora of people and institutions that lie systematically about human, and especially about variant human, sexuality.⁸⁰

VI. GAY/LESBIAN CIVIL DISOBEDIENCE AFTER *HARDWICK*

"We're here, we're queer, and we're not shopping."⁸¹

78. Surely a vivid and absurd example of this mechanism occurred when U.S. Supreme Court nominee David Souter was widely speculated about in terms of his sexual orientation because he was unmarried, lived alone, and apparently did not "date." Whatever Justice Souter's sexual orientation, this genre of speculation is rife with the self-same stereotyped and prejudiced inferences that sexual equality advocates have been seeking to overcome, among other places, in the courts. The notion that because a person does not marry or associate intimately with persons of a particular gender, (s)he must be gay/lesbian, is rather primitive and certainly presumptuous. Yet this is the "stuff" upon which at least some "outing" has been based.

79. See Rotello, *supra* note 73, at 4.

80. By "lying," I refer not simply to the hypocrisy of those seized by "Hoover-Dolan-Cohn syndrome," *see supra* note 72, but also more broadly to the concept of heterosexual lying as presented by poet and philosopher ADRIENNE RICH'S *WOMEN & HONOR: SOME NOTES ON LYING* (5th ed. 1979), who there observed that "[h]eterosexuality as an institution has also drowned in silence the erotic feelings between women. . . . That silence makes us all, to some degree, into liars. . . ." quoted in Brief Amici Curiae of Lesbian Rights Project, et al., on behalf of Respondent Michael Hardwick 19, *see supra* note 12. "Lying" about sexual minority people can also consist of omitting mention of our existence from public school texts and curricula. *See, e.g.*, discussion of the resistance to the New York City Board of Education's adoption of a curriculum guide for first graders called "Children of the Rainbow" that includes stories of gay and lesbian parents. *Teaching About Gays and Tolerance*, N.Y. TIMES, Sept. 27, 1992, at A-18. Parallel struggles continue in other educational milieus; it appears that the breaking of silence about the existence of gay and lesbian people is itself still widely controversial. "Don't ask, don't tell" is not a paradigm confined to a relatively narrow controversy about U.S. military policies toward sexual minorities; it shows its forms throughout our lives and culture.

81. This slogan appeared on a banner unfurled by activists over the balcony of Nordstrom, during a demonstration at this opulent shopping ghetto staged by ACT UP and other groups in protest of discrimination against gay and lesbian and HIV-positive people, in the period of the International Conference on AIDS in San Francisco; people also chanted this phrase during the demonstration. *See S.F. EXAMINER*, June 24, 1990, at A-1. Signs carried by anti-AIDS demonstrators during a march on that same date also

Media accounts of the gay/lesbian civil rights movement over the years since *Hardwick* are peppered with reports of civil disobedience actions. Perhaps the best-known of these publicly noted occasions was the October 13, 1987, arrests of 635 demonstrators, including Michael Hardwick himself, on the steps of the U.S. Supreme Court. Demonstrators there were protesting the Supreme Court's decisions in *Hardwick*, the *Gay Olympics* case,⁸² and other anti-gay decisions of the Court.⁸³ More recent instances of gay/lesbian civil disobedience occurred in San Francisco, during the blocking of the Golden Gate Bridge for forty minutes in the morning rush-time traffic by a group called "Stop AIDS Now Or Else," in January 1989,⁸⁴ and by protests during the week of the International Conference on AIDS in San Francisco by more than ten thousand marchers during June 1990.⁸⁵ While a widespread boycott of the Conference kept thousands of invitees away, in protest of the United States' continuing policies banning HIV-infected persons (as well as the then-current policy of exclusion of self-identified gay and lesbian immigrants⁸⁶) and while one famous New York activist purportedly had put out a call to "riot" at the Conference in San Francisco, no such event occurred, and cooler (as in, more non-violent)

stated: "Discrimination Kills" and "AIDS Treatment Now." *Id.* at A-13.

82. *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987).

83. Karlyn Barker & Linda Wheeler, *Gay Activists Arrested at High Court*, WASH. POST, Oct. 14, 1987, at A-1; Lena Williams, *600 in Gay Demonstration Arrested at Supreme Court*, N.Y. TIMES, Oct. 14, 1987, at B-8. One affinity group whose members were arrested on this occasion wore black t-shirts emblazoned with the logo, "Queer and Present Danger" over a graphic of the pillars on the Supreme Court steps, with "CD in DC: Oct. 13, 1987" (civil disobedience in the District of Columbia) down the length of one sleeve. Protesters chanted a number of interesting statements and slogans, of which perhaps the most witty, a word play on the stereotype of gay men as unduly fashion-conscious, was, in response to the wearing of AIDS-phobic rubber gloves by some D.C. police, "Your gloves don't match your shoes." A more recent civil disobedience action on the Capitol, consisting of a "kiss-in" staged by gay/lesbian activists in the offices of Senator Jesse Helms (R-NC), resulted in arrests of the demonstrators when they refused to disperse. Lisa Keen, *Six Activists Hold Kiss-in in Helms' Office*, WASH. BLADE, July 20, 1990, at 1.

84. S.F. SENTINEL, Feb. 23, 1989, at 4. One of those arrested, the late Terry Sutton, who was an AIDS activist and a founder of the ARC/AIDS Vigil, an encampment of people protesting the government's lack of responsiveness and lack of funding to fight the HIV pandemic that has stood in front of the local branch of the Department of Health and Human Services for several years in San Francisco's Civic Center Plaza, when asked what the group SANOE would do next, responded in part, "[w]hen the dying stops, we'll stop." *Id.*

85. See *supra* note 81; S.F. EXAMINER, June 24, 1990, at A-13.

86. As to this policy, now defunct, see *supra* note 53 and accompanying text.

heads generally prevailed.⁸⁷

However, during the final address at the Conference, delivered by U.S. Secretary of Health and Human Services Louis Sullivan, a demonstration did occur inside the Conference headquarters at Moscone Center. "While Sullivan delivered a major address before the Conference [on June 24, 1990] . . . protesters led by ACT UP chapters from New York, San Francisco and other cities pelted the podium with balled up pieces of paper, pennies, ice, and other objects, including at least one apple that sailed over Sullivan's shoulder. Sullivan is reported not to have flinched. Afterward, he said, "I personally resent it, and I will not work in any way with these individuals. . . . They have shown they are not worthy of trying to form a coalition. . . ." ⁸⁸

The International Conference on AIDS was no stranger to the phenomenon of gay/lesbian and AIDS activists' civil disobedience. In June, 1989, at the International Conference on AIDS held in Montreal, Canada, "more than 200 AIDS activists pushed past security guards and made their way into the hall and onto the stage, chanting 'open the borders now' [in protest of the detention of a delegate to the Conference who was HIV-positive, by U.S. immigration authorities.]" ⁸⁹ Accordingly, Dr. John Ziegler, the Chair of the International Conference on AIDS in 1990, himself an AIDS researcher at the University of California at San Francisco, concluded that "[the advocacy groups] . . . are going to have to strike a delicate balance between calling attention to their cause and disrupting the flow of the information . . . the delegates have come a long way to hear what they want

87. Lisa Keen, *Protests And Politics Prevail As Conference Opens In S.F.*, WASH. BLADE, June 22, 1990, at 1. Then-Director of the Mobilization Against AIDS in San Francisco, Paul Boneberg, responded to the call by New York playwright and AIDS activist Larry Kramer for a riot in San Francisco, that Kramer's idea was "not merely wrong, [but also] defeatist." Said Boneberg, who had himself been arrested in Washington, D.C. in a protest outside the White House to oppose the Reagan Administration's continuing silence on AIDS: "Disease is not conquered with the instruments of death. No amount of violence will advance the cause of ending AIDS." Paul Boneberg, *A Reply to Larry Kramer & AIDS Terrorism*, S.F. SENTINEL, June 21, 1990, at 15.

88. Lisa Keen, *ACT UP Demo May Have Hurt Relationship with Sullivan*, WASH. BLADE, June 29, 1990, at 1, 8. Six months previously, this same gay/lesbian newspaper had reported that AIDS activists felt that they hoped to find a "friend" in appointee Louis Sullivan. WASH. BLADE, Jan. 16, 1990, at 1.

89. WASH. BLADE, June 19, 1989, at 1.

to hear.”⁹⁰

Civil disobedience of the sort practiced in these situations can and should raise fundamental questions about the directions, principles, and motivations of people engaged in this movement for justice. Among the questions that are, or should be, raised concerning at least some of the “CD” practiced in this cause are:

(1) How dedicated to principles of non-violence are the leaders of the gay/lesbian and AIDS activist groups who engage in civil disobedience that interfere with the rights of others and that endanger or menace the safety and security of those around whom, or at whom, the protests are directed?

(2) Can civil disobedience actions that involve interference with people’s ability to move, travel, their bodily security or other physical needs be harmonized with claims to legal protection, necessity or immunity by protesters?

(3) Philosophically and spiritually, as well as legally, how can the tactics of those willing to “riot” be reconciled, if at all, with criticisms from these same persons of anti-gay/lesbian violence, or, for that matter, with dissent from the violent, destructive and physically aggressive tactics of right wing groups, such as the anti-abortion choice group, Operation Rescue?⁹¹

These questions are likely to be unpopular in at least some

90. S.F. BAY GUARDIAN, June 20, 1990, at 15.

91. Operation Rescue engages in acts of physical aggression upon the persons of those seeking to procure or administer abortions; comparison of those tactics with the behavior of civil rights protesters led by the late Reverend Dr. Martin Luther King Jr. cannot be valid, given the severe contrasts of these groups’ attitudes, philosophies and actions concerning violence toward their adversaries. Compare LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 171-72, 239-40 (1991) with HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950’S THROUGH THE 1980’S (1988). Persons considering the question of civil disobedience would do well, it seems, to carefully study and contemplate these contrasting climates and philosophies of civil disobedience.

of the circles that support civil disobedience as a means of gay/lesbian and HIV-positive persons' securing of our rights. However, these questions must be energetically and searchingly pursued, in those groups and elsewhere, unless we are prepared to abandon the struggle to win constitutional and legal justice for sexual minority persons by non-violent means.

VII. CONCLUSION

In and after the *Hardwick* decision, not only the physical and psychological privacy of gay, lesbian, bisexual and transgendered persons, but our wider and deeper claims to integration, non-discrimination, freedom from violence and our contributions to the vital cause of diversity have been bashed. Along with steady efforts to continue to press for these rights in the legal system (of which system the courts are only, if integrally, one part), feelings of abiding frustration, righteous outrage and keen disappointment lead some of us to adopt postures and methods that call the use of law for making change, or even for seeking narrow measures of relief for victims/survivors of discrimination and violence, into serious question. Some have called for retreat from the courts, and from federal test litigation in particular. Some have isolated from the fray, claiming that the question of a right to "commit sodomy," and the privacy sought and claimed by Michael Hardwick and others, are chauvinistic, male-dominated, or elitist values that are not of use, for example, to those whose sexual practices do not draw law enforcement attention, or to those who will be harassed by police in any event. Some threaten to practice or have actually practiced "outing," using the allegation of a person's gayness, lesbianism or bisexuality as a means to draw confrontational reaction against that person's closeted identity. Some have elected to engage in civil disobedience, and in at least some instances have been willing to endanger the lives, safety and well-being of others to make their points. Since *Hardwick*, our gay/lesbian civil rights movement has become scattered, reactive, and understandably but hazardously faithless about making changes lawfully and non-violently, by persuasion instead of coercion. It could be said that we are still, and severely, shell-shocked. *Hardwick*, the devastation of AIDS, and society's bounces between outright gay/lesbian bashing and the "don't ask, don't tell" mentality are taking a huge toll in the momentum, and per-

haps in the dedication to principles, of our movement.

These sore post-*Hardwick* developments must be heeded by those who care to see the cause of inclusion of gay, lesbian and other sexual minority persons in the actual enjoyment of the promises of our federal constitution, and particularly the Bill of Rights, most strongly and effectively advanced. We must focus on directly and actively working to overturn *Hardwick* by planned legal actions (including but by no means limited to direct "sodomy" law challenges in courts and legislatures,⁹²) as well as by indirect challenges seeking to limit *Hardwick's* harmful seepage into non-criminal law areas, and, perhaps most affirmatively and hopefully, by commencing and sustaining a national drive to adopt "privacy" as an explicit guarantee of the U.S. Constitution.⁹³

More important and ground-breaking is the social change activism that will raise public consciousness sufficiently to require the demise of this precedential anathema to human rights called *Hardwick*. Convincing our friends, families and neighbors of the righteous deservingness of gay and lesbian people in our cause may be more vital, ultimately, than even convincing those in power in our government. The proposition that courts generally do not take the lead in social change, and instead tend to defer to societal shifts, is as true in this domain as in the rest of socio-legal activism.

If, instead of these pro-active and aggressive steps, we get caught up in adapting to *Hardwick* and in shifting and recon-

92. A model example of such a direct challenge in state court was *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992) (striking down Texas' sodomy law as unconstitutionally invasive of state privacy and equal protection). The Texas Supreme Court, on a 5-4 vote, just reversed this precedent on essentially procedural grounds. *States v. Morales*, No. 1388-92 (Jan. 26 1994); as cited in *Cowardly Texas Court Blows Off Sodomy Challenge*, LESBIEN/GAY LAW NOTES, Feb. 1994, at 13. See also discussion of other states' judicial treatment of "sodomy" laws since *Hardwick*, both pro and con, in RUBENSTEIN, *supra* note 2, at 152-53; Paula Brantner, *Removing Bricks From A Wall Of Discrimination: State Constitutional Challenges To Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992).

93. I have advocated elsewhere for this drive to amend the U.S. Constitution in order to expressly include "privacy." Mary Dunlap, *Mediating The Abortion Controversy: A Call For Moderation, Or For One-Sided Etiquette While The Bombs Keep Flying?* 30 WASHBURN L. J. 41 (1990) (reviewing LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1991)).

structing and settling for trying to find ways around it, then surely for as long as *Hardwick* remains "citeable law,"⁹⁴ we will continue to see our frustration, rage and grief rise. *Hardwick* imperils our ability and willingness to try to keep making change through the law, in a severely homophobic world. *Hardwick* has encouraged the tactics of "outing" and civil disobedience by its tremendous contribution to the cynicism of those victimized by this decision and its consequences. As long as *Hardwick* remains, with its open permission to government and citizens alike to mistreat gay, lesbian and other sexual minority people, not only our privacy but our peace, safety, equality of opportunity and of human compassion and co-operation are jeopardized. If we are to make progress within law in this phase and quarter of the human rights movement, the monument of *Bowers v. Hardwick* must fall promptly, absolutely and irreversibly.

94. I am ever grateful to my former Stanford Law student, San Francisco attorney Paul Schmidtberger, for this ingenious and tenable alternative phrasing to the expression, "good law," which I think all serious constitutionalists should vow never in our lifetimes to call the *Hardwick* decision.