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COUPLES AND COUPLING IN THE PUBLIC SPHERE: A COMMENT ON THE LEGAL HISTORY OF LITIGATING FOR LESBIAN AND GAY RIGHTS

*Mary Anne Case**

OF three possible focal points for gay identity—the individual, the community, and the couple—the couple is the least visible in litigation about the public sphere rights of gay men and lesbians. Using as my starting point the cases collected in Professor Patricia Cain's litigation history,¹ I shall explore in this Commentary the implications of the couple's absence from most public sphere cases and its uneasy, shadowy presence within others.

It should not be surprising that the couple is both a suppressed and a contested element in gay rights litigation. Coupling, in two senses of the word, is both defining and problematic for gay men and lesbians in this society. That is to say, "coupling" as in "forming a pair bond" and "coupling" as in "copulating" are exactly what gay men and lesbians may want to do and what troubles society when they try to do it. Same-sex coupling might therefore be what sodomy is not—"the behavior that defines the class"² of homosexuals.

* Associate Professor of Law, University of Virginia School of Law. I am grateful for the help of Ken Abraham, David Bauer, Mary Bonauto and Jennifer Wriggins, Pat Cain, Mary Case, Bill Eskridge, David Garrow, Pat Gill, Clay Gillette, Anne Goldstein, Janet Halley, John Harrison, John Hersey, Nan Hunter, Pam Karlan, Cliff Landesman, Bill La Piana, Sylvia Law, Debra Livingston, Cheryl and Edward Mendelson, Bill Miller, Dan Ortiz, Rick Pildes, Todd Preuss, George Rutherglen, Rick Scarola, Buffie Scott, Adina Schwartz, Paul Stephan, Peter Swire, Jonathan Vogel, Walter Wadlington, Julia Winter, Deborah Weiss, Susan White, Ted White; Bill Rubenstein of the ACLU, Dickson Osborne of the Campaign for Military Service, Joe Baker and Martin Manalansan of GMHC, Evan Wolfson of Lambda; participants in the Virginia Law Review Symposium on Sexual Orientation and the Law, the University of Michigan Legal Theory Workshop and GALLSA of UVA; and my research assistants Kate Cooper and Dionne Thompson.

¹ Patricia A. Cain, *Litigating for Gay and Lesbian Rights: A Legal History* 79 Va. L. Rev. 1551 (1993).

² See *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in *Bowers v. Hardwick*, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.").

Many of the traditional dichotomies that plague gay rights litigation meet and break down in the gay couple.³ The couple is a mediating term between status and conduct, private and public, sameness and difference, and the sexual and nonsexual aspects of gay identity. Just as "couple" is both a noun and a verb, in a gay couple conduct and status slip ineluctably into one another. Coupling behavior can range from the exchange of bodily fluids to the exchange of vows and rings. The couple can be simultaneously the situs for the most private of intimate relationships and the most public representation of it. And in a gay couple the signs of sameness and difference with respect to heterosexual pairs are both clearly visible.

In light of all this, it is to be expected that the reaction of the legal system to the gay couple will be complex, ambivalent, and at times apparently confused, contradictory, or inconsistent. Nevertheless, one can draw a few tentative conclusions: First, the couple as pair bond may be most absent from litigation where it might be most useful—in challenges to the sodomy statutes, challenges which might benefit if brought on behalf of persons whose relationship the courts could more readily assimilate to the marital relationship protected in *Griswold*.⁴ At the same time, the pair bond is most often present and most negatively weighted where it may seem least relevant—in public employment litigation provoked by an employer's objection to an employee's acknowledgement that s/he has a "spouse" of the same sex.

Most significantly, when pair bonding and copulating can be, as it were, decoupled, courts generally react favorably to the pair bond and negatively to copulation. Courts accord the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect has perforce been removed due to the death, illness, or imprisonment of one of the members of the couple. But when, as is typically the case, the two aspects of same-sex coupling are inextricably linked, pair bonding generally loses its positive valence and serves to intensify the courts' negative reaction to same-sex copulation; indeed, there is a tendency to collapse the two forms of coupling into one another, to see pair bonds as vehicles for

³ As I shall make clear *infra*, by "couple," I mean simply two gay men or lesbians together in any intimate or sexual capacity, not just those in a domestic partnership.

⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

regular sodomitical copulation. The reaction provoked by members of gay couples who attempt to claim the heterosexual privilege of marriage is perhaps the harshest. I shall try to suggest several possible explanations for these reactions.

Finally, in response to suggestions by both Professors Pat Cain and Janet Halley that gay rights advocates should focus more attention in the future on the specifics of one form of coupling—copulation—I shall set forth my reasons for doubting the effectiveness of such a strategy.

I. WHAT IS MISSING FROM PROFESSOR CAIN'S HISTORY

In her contribution to the Symposium, Professor Cain has done a splendid job organizing a great quantity of material in a useful, coherent, and clear fashion. Nevertheless, as a commentator, I am naturally inclined to focus on what has been left out. Cain makes clear at the beginning of her article how she has organized it—how she views what is left out and put in. She says, "I have chosen to focus on litigation that affects public sphere rights as opposed to litigation about private relationships and family issues, because *Hardwick*, as a practical matter, more directly affects public sphere rights such as employment and citizenship."⁵

Without endorsing her assumption about the effects of *Hardwick*, I would like to suggest two other ways of looking at what is included and excluded in her litigation history, and then to discuss one of them at length. First, even within the public sphere, Cain has mostly focused on cases in which the law has been the oppressive element. The gay and lesbian litigants featured in Cain's article are fighting aspects of the legal system that in some way make life difficult for them, whether sodomy laws that criminalize their sexual activity, regulations that deny them governmental employment, or statutory schemes that discriminate against them. Cain spends little time discussing litigation under the various affirmative gay rights ordinances. These ordinances provide an opportunity to use law in a positive way to remedy problems not directly of the law's own making.⁶

⁵ Cain, *supra* note 1, at 1553.

⁶ Of course, as gay legal theorists have observed, the oppressive effect of the law goes far beyond what it may explicitly require or forbid. See, e.g., Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1435 (1992) (arguing that the sodomy laws serve as a de facto authorization of gaybashing).

Cain's article, therefore, may underestimate the extent to which, as Professor William Eskridge has argued, "the government is potentially important as a support for bisexuals, gay men, and lesbians against social oppression."⁷ Eskridge has advocated that such an affirmative, egalitarian legal strategy "should dominate gay legal efforts in the 1990s."⁸ He advises those who fight for gay liberation to follow the lead of feminists and "call[] upon the government to fight social oppression against [gay men, lesbians, and bisexuals] through antidiscrimination statutes, hate crimes laws, and sex education programs."⁹ I am not, however, going to focus on either the history of such affirmative efforts or their future potential. To do justice to the subject, one would have to close the circle from oppressive to affirmative law by discussing the recent legal history of legislation such as the Colorado Constitution's Amendment 2,¹⁰ which creates an oppressive legal obstacle to affirmative legislation.¹¹ One would then have to address the next step—the Oregon legislature's attempt to prohibit local governments from passing similar antihomosexual ordinances.¹² The Oregon measure, in particular, blurs all distinctions between the

⁷ William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 Yale L.J. 333, 384 (1992).

⁸ *Id.* at 385.

⁹ *Id.* at 384.

¹⁰ As is now notorious, Amendment 2 provides:

Neither the State of Colorado . . . nor any of its . . . political subdivisions . . . shall enact . . . any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Colo. Const. art. II, § 30b. Similar legislation has recently been passed by communities within Oregon and is springing up on legislative agendas throughout the country. Oregon Lawmakers Ban Local Votes on Gay Bias, N.Y. Times, July 30, at A10. The Colorado Supreme Court has preliminarily enjoined the enforcement of Amendment 2 on the grounds that it violates the equal right to political participation of gay men, lesbians, bisexuals and their supporters. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (en banc).

¹¹ One would also have to consider the paradoxical ways in which affirmative and negative legislation coexist in many jurisdictions, with the state in essence reserving a monopoly on discrimination. For example, the District of Columbia made illegal both employment discrimination on the basis of sexual preference, D.C. Code Ann. § 1-2512 (1992 & Supp. 1993), and homosexual sodomy. D.C. Code Ann. § 22-3502 (1992) (repealed 1993) (making sodomy illegal). Massachusetts prohibits discrimination on the basis of sexual orientation in employment, housing, and the granting of credit but in the very same bill reserved unto itself the right to discriminate on the basis of sexual orientation in the placement of children in foster care. 1989 Mass. Acts 516.

¹² See Oregon Lawmakers, *supra* note 10, at A10.

affirmative and the negative. Although the legislature's intent seems to have been far more limited, it may have inadvertently passed a gay rights bill by providing that "no special rights' will be granted to any individual or group based on sexual orientation."¹³

Rather than pursuing these matters, I want instead to focus on another intriguing absence from Cain's history of defensive public sphere litigation, the absence of the gay couple. The vast majority of cases cited in Cain's paper are about either the gay community or the gay individual,¹⁴ with hardly any cases focusing on the gay couple.¹⁵ Although shadowy couples emerge in the background in many of these cases, such couples are rarely, if ever, the focal point of the liti-

¹³ Id. Heterosexuals are, of course, a "group" that has traditionally been given "special rights" based on their sexual orientation. Depriving them of these rights is tantamount to protecting the rights of non-heterosexuals.

¹⁴ Let me spell out briefly what I mean by individual and community cases. The bulk of the cases discussed by Cain pit one sole gay or lesbian individual, whether it be a criminal defendant, soldier, employee, or immigrant, against the system. These cases are what I would call the individual cases. The remainder, the community cases, include those concerning student organizations, gay bars, and gay rights organizations such as Lambda and the Mattachine Society. In addition, the community is represented in the employment arena by cases such as *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *National Gay Task Force v. Board of Educ. of Okla. City*, 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985) and *Society for Individual Rights v. Hampton*, 528 F.2d 905 (9th Cir. 1975). The community is also represented in the sodomy cases by *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) and *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992), two cases brought by groups of gays, not all having sex with one another in a wild orgy, but together as a community challenging the sodomy laws. Even the name of the Mattachine's magazine, "One," seems to highlight the gay individual and the community rather than the gay couple. Although it may suggest the isolation of the gay man in a hostile world, the name is derived from Thomas Carlyle's assertion that "[a] mystic band of brotherhood makes all men one." John D'Emilio, *Making Trouble* 34-35 (1992).

¹⁵ Of course, this is partly a function of Cain's exclusion of cases about private relationships and family issues, cases where gay couples are more in evidence. Even in family law cases, however, the gay couple is a problematic focal point, as courts have rarely awarded a litigation victory to a functioning gay couple. For example, in child custody disputes pitting two members of a gay couple against each other, courts often decline to give any legal significance to the couple; in those pitting a divorced person now in a homosexual relationship against her heterosexual former spouse, the courts often do give legal significance to the couple, but a negative one—they use its existence as a justification for restricting the custody or visitation rights of its members. See, e.g., *Lesbians, Gay Men, and the Law* 482-509, 554-560 (William B. Rubenstein ed., 1993) (collecting cases).

gation.¹⁶ This absence is perhaps most striking in the sodomy cases,¹⁷ all of which feature an individual or the community rather than a couple, even though it takes two, at least, to commit homosexual sodomy.¹⁸

I think the couple, the missing third term between the individual and the community, is an extremely suggestive absence from the litigation history.¹⁹ The individual, the couple, and the community are

¹⁶ Of the cases Cain cites, only one, *Doe v. Sparks*, 733 F. Supp. 227 (W.D.Pa. 1990), mentioned by Cain only in a footnote, directly implicates the couple (although, again, only one of its members appears in court). *Sparks* is a successful challenge to prison visitation regulations that discriminate between same-sex and different-sex couples. See *infra* text accompanying notes 73-74 for a further discussion of this case. There are, additionally, cases falling within Cain's rubric but not cited by her in which the gay couple is more directly put at issue. See, e.g., *Fricke v. Lynch*, 491 F. Supp. 381, 388-89 (D.R.I. 1980) (holding that high school student has a First Amendment right to attend prom with a date of the same sex). Finally, although further consideration of the area would be beyond the scope of this paper, the couple is central to some cases brought under antidiscrimination ordinances. See, e.g., *The Mixed Couple: Deborah L. Johnson and Dr. Zandra Z. Rolan in Eric Marcus, Making History: The Struggle for Gay and Lesbian Equal Rights 1945-1990*, at 439, 444-53 (1992) (detailing account of lesbian partners who successfully brought a challenge under Los Angeles city ordinance and California's Unruh Civil Rights Act after restaurant refused to seat them in booths reserved for "romantic dining" by couples).

¹⁷ By "sodomy cases," I mean all cases involving the criminalization of homosexual activity, whether or not the crime is technically that of sodomy.

¹⁸ Although it is difficult to be certain from the brief statement of facts, it appears that *People v. Peoples*, one of the companion cases of *People v. Onofre*, 415 N.E.2d 936 (N.Y.1980), cert. denied, 451 U.S. 987 (1981) involved two male defendants convicted of having oral sodomy with each other. *Id.* at 938. The *Onofre* court, which held the New York sodomy statute unconstitutional, includes the following in its summary of the various cases consolidated before it on appeal:

Defendants Peoples and Goss were convicted in Buffalo City Court of violating the consensual sodomy statute after a jury trial at which evidence was adduced that they had engaged in an act of oral sodomy in an automobile parked on a street in the City of Buffalo in the early morning hours.

Id. This passage is about all the opinion has to say about the couple.

As far as I can ascertain, the cameo appearance by *Peoples* and *Goss* is the only one by a couple of defendants in the sodomy cases cited by Professor Cain. All the other sodomy cases, notably including *Hardwick*, involve only an individual defendant fighting a charge or the gay community challenging a statute. The absence of couples from sodomy cases is not entirely mysterious. In some cases, like *Onofre* itself, the defendant's sex partner was a minor. *Id.* at 937-38. In many others, the partner or potential partner was a police officer. See, e.g., *People v. Masten*, 292 N.W.2d 171, 172 (Mich. Ct. App. 1980), rev'd, 322 N.W.2d 547 (Mich. 1982). In still other cases, notably *Hardwick*, one member of the sodomitical couple had more reason than the other to wish to avoid the publicity of a trial, and so sought to resolve the charges by plea bargain. See *infra* text accompanying notes 39-41.

¹⁹ At the risk of stating the obvious, let me stress that I am by no means criticizing Cain for excluding the couple or cases featuring it; I am fascinated by its scarcity in the legal history she

focal points for gay identity. Both queer theory and personal "coming out" narrative can begin at any one of these three points. For example, beginning with the individual, many gay men and lesbians recall that as young people they were tormented by feelings they feared were unique to them. Again and again they start by saying, "I thought I was the only one in the world," "the only person that felt the way that I felt, that was attracted to men" (or to women).²⁰ Beginning with the couple, some lesbians and gay men may say at first they "fell in love with this particular person who just happens to be" of the same sex.²¹ Beginning with the community,²² some lesbian separatists of the 1970s identified themselves as such initially and primarily for political reasons of community solidarity, rather than out of desire for a generalized or concrete other.²³ And some gay men and lesbians say they first discovered their gay identity in gay culture; before all else, they sought and found "a people," "their people."²⁴

quite comprehensively discusses. Moreover, I am not suggesting that the couple's absence generally is the result of a grand strategic decision, whether by gay rights litigants, their opponents or the judges deciding their cases; rather, various circumstances in the individual case account for the extent to which the couple is visible in it.

²⁰ Marcus, *supra* note 16, at 82, 188. The first quotation is from "outsider" Paul Philips, the second from drag queen Rey "Sylvia Lee" Rivera, but countless other gay men and lesbians use almost the same words. See Randy Shilts, *Conduct Unbecoming: Gays in the U.S. Military, Vietnam to the Persian Gulf passim* (1993). Although I shall, for the sake of convenience, use the oral histories in Marcus' *Making History*, *supra* note 16, as my chief source of examples of the part played by the individual, the couple, and the community in the shaping of the identities of gay men and lesbians, countless other sources, both anecdotal and theoretical, tell the same story.

²¹ The phrase comes from Dianne Richardson, *Lesbian Identities in The Theory and Practice of Homosexuality*, 111, 120 (John Hart & Diane Richardson eds., 1981). For an example of this pattern, see Kathleen Boatwright, *The Bridge Builder*, in Marcus, *supra* note 16, at 454-63.

²² I do not mean to suggest that there is a single, univocal "gay community." Rather, there are, of course, a series of sometimes overlapping, sometimes distant, sometimes counterpoised gay and lesbian communities or subcultures from the bars and bathhouses (community as a site for coupling), to gay rights organizations and gay pride marches, to the less tangible communities of high camp and the "friends of Dorothy."

²³ Although I take these terms from Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in *Feminism as Critique*, 77-95 (Seyla Benhabib & Drucilla Cornell eds., 1987), unlike Benhabib I use them to suggest the distinction between desire for a certain sort of person and for a particular person.

²⁴ For the notion of looking for one's people, see Barbara Gittings & Kay Lahusen, *The Rabble Rousers*, in Marcus, *supra* note 16, at 104-26. Gittings, who describes herself as "temperamentally a joiner," *id.* at 113, says "the first place I found [my people] was in books," the second was in gay bars, the third and perhaps most lasting was in organizations such as One, Inc. and the Daughters of Bilitis. *Id.* at 105-13.

From any one of these three starting points, the story can progress to either of the others.²⁵ For example, some individual gay men and lesbians say they first broke from their sense of isolation by discovering the gay community, others by entering into a relationship or having a sexual experience with another person.²⁶ Gay and lesbian theory has stressed the necessity of community in the formation of gay identity. As Simon Watney put it, there is "an acknowledgement that gay identity does not follow automatically from homosexual desire or practice. Something else is needed—the active presence of a confident, articulate lesbian and gay culture that clothes homosexual desire in a stable, collective *social* identity."²⁷ And, at least in today's climate, when identity is seen primarily as self-identification rather than as description or imposition by a (potentially hostile) other,²⁸ few have questioned the importance of the individual.²⁹

The couple is in many ways potentially the mediating term between the community and the individual. For wherever a gay narrative begins whatever its focus,³⁰ the couple remains a central and necessary element. At some point, it seems, almost definitionally, coupling or the desire to couple must figure in same-sex orientation. In the words of the adage, "It takes two women to make a lesbian." Now,

²⁵ It may be possible to imagine other starting points, but the only other one I can think of is, unlike those described above, externally driven: the outside world may well tell someone, usually a "genderbender," that he or she must be gay; effeminate young men and tomboys may be pushed into gay identity by a world only too ready to typecast.

²⁶ I found it an interesting exercise to try to chart the narratives in Marcus' *Making History*, supra note 16, in terms of the individual/couple/community schema. While many, including the narrators themselves, might disagree with my reading, I did find all three elements consistently present but great variety as to both the chronological order in which they appeared in the narrators' lives and the relative importance accorded each element.

²⁷ Simon Watney, *School's Out*, in *inside/out: Lesbian Theories, Gay Theories* 387, 392 (Diana Fuss ed., 1991).

²⁸ Hostile "others" can include the church, the psychiatric community, or the mainstream culture.

²⁹ Would even extreme biological determinism provide a gay identity to someone who neither acknowledged nor acted on same sex orientation? I doubt it. Yet I suspect the tendency today is to say that, at minimum, everyone is gay who says so.

³⁰ The story of coming to gay identity, it should be stressed, says nothing about the content of that identity, beyond its ability to fit in some way under rubrics such as "gay," "lesbian," or "queer." Regardless of the starting point or the progress of identity formation, it may be possible to have an affirmative or self-hating gay identity, to see gay men and lesbians as quite similar to or fundamentally different from non-gays. Cf. Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 Va. L. Rev. 1833 (1993) (disaggregating categories used in gay and lesbian theory).

some might suspect that I'm being too feminine or too straight in looking for the couple; the conventional wisdom, after all, has lesbians, but not gay men, settling down into couples with a vengeance.³¹ And one possible implication of gay liberation has been liberation from the prison of the couple rather than the mere substitution of a couple that is just shaped a bit differently from the conventional heterosexual pair.³² I think, however, such a suspicion of my focus is unjustified given that even the most anonymous bathhouse sex usually seems to consist of a series of couplings, the Marquis de Sade's geometric fantasies to the contrary notwithstanding.³³ I am by no means confining my search for couples in gay rights litigation to the oft sought after, and equally strenuously derided, bland and monogamous "Ozzie and Harriet"-type gay and lesbian couples who are the poster children for same-sex marriage.³⁴ Rather, by "couple," I mean two gay men or lesbians together in any intimate capacity, whether it be for a lifetime of domestic partnership or a "quickie." In the course of the discussion, however, I shall have occasion to note the distinc-

³¹ See Margaret Nichols, *Lesbian Sexuality: Issues and Developing Theory*, in *Lesbian Psychologies* 97-125 (Boston Lesbian Psychologies Collective ed., 1987). But see Larry Kramer's assertion that although gay men may both deny their desire for a relationship and rarely find a "sustaining, nurturing and admirable" one, "most people, at some level, wanted what I was looking for. . . . I wanted a lover. I wanted to be in love." Larry Kramer, *The Unwanted Messenger*, in Marcus, *supra* note 16, at 422. Kramer has insisted that:

The concept of making a virtue out of sexual freedom, i.e. promiscuity . . . came about because gay men had nothing to call their own *but* their sexuality. The heterosexual majority has for centuries denied us every possible right of human dignity The right to marry. The right to own property jointly without fear that the law will disinherit the surviving partner Indeed—the right to walk down the street holding hands, as you do when you are freely in love We are denied the right to love

. . . Had we been allowed to marry, we would not have felt the obligation to be promiscuous.

Larry Kramer, *Whose Constitution is it, Anyway?*, in *Reports from the Holocaust: The Making of an AIDS Activist* 177, 178-79 (1989).

³² See, e.g., Paula Ettelbrick, *Since When is Marriage a Path to Liberation*, in *Lesbians, Gay Men and the Law*, *supra* note 15, at 401, 403 (arguing against the "elevation of married relationships and of 'couples' in general" over "other relationships of choice").

³³ See, e.g., Donatien-Alphonse-François, Marquis de Sade, Juliette 573-74 (Austyn Wainhouse trans., 1968) (recounting orgy of a hundred nuns linked by dildoes into the shape of a rosary) and commentary thereon by Camille Paglia, *Sexual Personae* 240-42 (1991).

³⁴ See William N. Eskridge, Jr., *A History of Same Sex Marriage*, 79 Va. L. Rev. 1419, 1486 (1993); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage."*, 79 Va. L. Rev. 1535, 1546 (1993).

tions courts appear to make in the treatment they give to several different kinds of coupling: pair bonding and its subcategory of marriage, copulating, and the sort of displays of affection that can be the prelude to or the public expression of either.

I shall examine statutes and case law from a variety of jurisdictions and time periods, whose attitudes toward same-sex coupling in all its forms obviously vary. I have nevertheless chosen to discuss cases thematically rather than chronologically or geographically. In part this is because Professor Cain's article already provides a fine sense of the chronological development of the cases here discussed and because the sample of cases from most jurisdictions is not large enough to form reliable conclusions. More importantly, I find the sense of continuing ambivalence in the legal system's treatment of gay couples stronger than that of development over time. Where I see significant change over time, I shall note it. I must also note, unfortunately, that even the most regressive views are not entirely outdated.³⁵

II. DECOUPLED SODOMY

What does the absence of the couple mean in the sodomy cases? In *Bowers v. Hardwick*,³⁶ only one line in the entire majority opinion gives any indication that Hardwick was doing something other than masturbating alone in his bedroom. It says simply that "Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home."³⁷ That's it—just "committing that act with another adult male." This makes Hardwick's partner seem like a disembodied penis poking through the wall in a bathroom stall. And that makes it very easy for the majority to say, "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . by respondent."³⁸

³⁵ As Cain's chronological account makes clear, the history of gay rights litigation has not been one of steady progress, more of one step forward, two steps back. The very recent past provides no happier trend. Indeed, the most recent case cited herein, a September 1993 Virginia decision depriving a lesbian mother of custody, see *infra* note 179, is perhaps the most hostile to gay rights.

³⁶ 478 U.S. 186 (1986).

³⁷ *Id.* at 187-88 (footnote omitted).

³⁸ *Id.* at 191.

There are understandable reasons for the absence of Hardwick's partner from the litigation—he was a schoolteacher from North Carolina, a married man, and a one-night stand. "Please don't tell my wife . . . I'll lose my teaching job," he begged the officer who arrested them. It was not surprising that he "pleaded to lesser charges and split," leaving Hardwick alone to fight the case.³⁹ Hardwick, single and a bartender in a gay bar, had less to lose, but this absence of a pair bond to go along with the copulating is what makes *Hardwick*, otherwise so ideal,⁴⁰ an imperfect vehicle.⁴¹

Griswold,⁴² *Eisenstadt*,⁴³ and *Hardwick* may be seen as a progression of ever more problematic requests for the same legal right to couple, a point Nan Hunter emphasizes in her analysis of the underlying purpose of the sodomy laws.⁴⁴ Locating a historical justification for the prohibition of sodomy in the biblical injunction against the "spilling of seed," Hunter notes that "[t]his same aim of the law—discouragement of nonprocreative sex—underlay the statutes prohibiting the use of birth control devices which were stricken as unconstitutional by the Supreme Court in the 1960's."⁴⁵ Far from there being, as the court claimed in *Hardwick*, no connection between procreation and homosexual activity, "[i]n fact, the exact opposite was the case. Michael Hardwick, as a person engaged in sodomy, had the same relationship to procreation as persons using birth control during het-

³⁹ Art Harris, The Unintended Battle of Michael Hardwick, Wash. Post, Aug. 21, 1986, at C1, C4.

⁴⁰ In that it involved the actual arrest of someone for consensual oral sex in the privacy of his own bedroom, *Hardwick* was a dream come true for gay rights litigators usually plagued by less sympathetic facts or standing problems.

⁴¹ There was, of course, another couple involved in the *Hardwick* litigation, a married heterosexual one, that was also virtually erased from the case. Relegated to a footnote in Justice Byron R. White's opinion, John and Mary Doe joined Hardwick's challenge to the Georgia sodomy law, which on its face applied equally to heterosexual and homosexual sodomy. Though the Does claimed that they "were chilled and deterred" from fulfilling their desire to engage in proscribed sodomy in their home, they were dismissed for lack of standing because the district court found that, unlike Hardwick, who had been arrested and remained subject to prosecution, the Does were in no "immediate danger of sustaining any direct injury from the enforcement of the statute." *Hardwick*, 478 U.S. at 188 n.2.

⁴² *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down as a violation of the right to privacy a Connecticut statute that made it a criminal offense to provide contraceptives to married couples).

⁴³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down a Massachusetts law that made it a crime to provide contraceptives to unmarried people).

⁴⁴ Nan D. Hunter, Life After Hardwick, 27 Harv. C.R.-C.L. L. Rev. 530 (1992).

⁴⁵ Id. at 536.

erosexual intercourse: none, which was precisely the point. The issue in *Hardwick* should have been controlled by *Griswold* and *Eisenstadt*.⁴⁶

Yet, if one were to chart a progression from *Griswold* through *Eisenstadt*, with the first step being the married couple, followed by the unmarried heterosexual individual, what is the next logical term in this series?⁴⁷ For some, it might be the gay individual. This would not only fit well with the facts of *Hardwick*, but would also deploy *Stanley v. Georgia*⁴⁸ to some strategic advantage. Perhaps with the benefit of hindsight, however, we may now claim that the next term in the series is the gay couple. The right of privacy articulated by the majority in *Griswold* was, after all, first and foremost a relational right, not one centered in the autonomy of the individual.⁴⁹ For the *Griswold* majority, that "case . . . concerns a *relationship* lying within the zone of privacy And it concerns a law which . . . ha[s] a maximum destructive impact upon that *relationship*."⁵⁰

For gay men and lesbians to have their right of "intimate *association*" recognized, it may be necessary to go back to *Griswold*, i.e., to a strong pair bond.⁵¹ However leery courts may be of a homosexual

⁴⁶ Id. The law actually struck down in *Eisenstadt* provides support for Hunter's argument in that it prohibited alike the distribution of any "article intended to be used for self-abuse, . . . the prevention of conception or for causing unlawful abortion." *Eisenstadt*, 405 U.S. at 441 n.2 (citing Mass. Gen. Laws Ann. ch.272, § 21). The Massachusetts legislature here demonstrated that it viewed masturbation, contraception, and abortion as equivalent evils.

⁴⁷ As my colleague Pam Karlan helped me see, the series may begin even earlier, not with *Griswold* and the couple, but with the community and *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), protecting the liberty interest in educating children in, respectively, foreign languages and private schools.

⁴⁸ 394 U.S. 557 (1957) (protecting an individual's right to use obscene material in the privacy of his home).

⁴⁹ The distinction between relational approaches and those stressing autonomy is common among feminist legal theorists, building on the work of Carol Gilligan. For a discussion of the relational and autonomy strands in the rhetoric of Supreme Court abortion decisions, see Pamela Karlan & Daniel Ortiz, In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda, 87 Nw. U. L. Rev. 858, 876-85 (1993).

⁵⁰ *Griswold*, 381 U.S. at 485 (emphasis added).

⁵¹ Acknowledging that syllabi form no part of an opinion, I nevertheless find it curious that the syllabus of the successful *Griswold* action prominently mentions "married persons" and "marital privacy" although the only plaintiffs were a physician and the director of Planned Parenthood. By contrast, the syllabus to *Poe v. Ullman*, 367 U.S. 497 (1961), *Griswold*'s unsuccessful predecessor, speaks only of the "two plaintiffs who were married women," erasing the couple although Mr. Poe was in fact a co-plaintiff with his wife. Is this some

pair bond, they have seen their enterprise with respect to heterosexuals in earlier cases as promoting pair bonding, not mere copulation.⁵²

The distinction between the coupling the Court may protect and that which it has said it will not may be captured in the perhaps overfine distinction between "intimate sexual relationships" and "sexually intimate . . . relationships." The latter phrase occurs in Judge Kenneth Starr's response to his colleagues' criticism of Judge Robert Bork's sweeping refusal to extend privacy rights so as to protect a gay serviceman from discharge on the grounds of homosexuality. According to Judge Starr, writing two years before *Hardwick*:

It simply cannot seriously be maintained under existing case law that the right of privacy extends beyond . . . traditional relationships—the relationship of husband and wife, or parents to children, or other close relationships . . . — or that the analytical doctrines enunciated by the Court lead to the conclusion that government may not regulate sexually intimate consensual relationships.⁵³

The phrase "intimate sexual relationships" comes from Justice Harry A. Blackmun's *Hardwick* dissent. According to Justice Blackmun:

"Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.⁵⁴

evidence that the ability to focus on the couple helped make some of the difference in the outcome of the two cases?

⁵² But see Richard A. Posner, Sex and Reason 349 (1992):

Consensual sex in whatever form is . . . a method of cementing a relationship. . . . But the Supreme Court has made clear that it shares the dominant American preference for heterosexual relationships. . . . The Court does not want to facilitate the cementing of homosexual relationships, so it cannot be expected to view with sympathy the claim that anal intercourse is more important to homosexual relationships than to heterosexual ones because male homosexuals cannot have vaginal intercourse with each other.

⁵³ *Dronenberg v. Zech*, 746 F.2d 1579, 1584 (D.C. Cir. 1984).

⁵⁴ *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting) (quoting *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 63 (1973)). As this excerpt makes clear, Justice Blackmun's opinion maintains throughout a delicate balance of emphasis between the protection of individuals and

I may be reading far too much into the mere difference in word order between Justice Blackmun and Judge Starr, but I believe Justice Blackmun is seeking to distinguish *intimate* sexual relationships from those which, although every bit as sexual, are less intimate, i.e., between pair bonding and copulating. Although the court should perhaps protect both, the former are more easily analogized to the "other close relationships" that even Judge Starr admits may be encompassed within a right to privacy.⁵⁵

Although the absence of the couple may be a problem in gay rights litigation, I am not suggesting that its presence would be a solution. As I thought about the problem the gay couple poses for gay rights litigation I had in the back of my mind an analogy from that most resolutely heterosexual of Broadway musicals, "Fiddler on the Roof."⁵⁶ The plot of "Fiddler" centers on Tevye, the patriarch of a Jewish family in the shtetl faced with three increasingly less suitable suitors for the hands of three of his daughters. The first suitor is just poor and young, but a member of the community in all senses of the word; the second suitor is a Jewish revolutionary; the third is a Gentile. The father has problems with each of these suitors, problems which he weighs in an interior monologue of competing considerations. On the one hand is always "Tradition," warning him against any departure from the way things have always been done. On the other is his daughter. For each of the first two suitors, the father overcomes his reservations and blesses his daughter's marriage when she appears before him arm in arm with her intended, asking for his approval. The scales tip and the voice of tradition falls silent when the father is able to say, "But look at my daughter's eyes. She loves

that of relationships. Consider, for example, the A:B:B:A structure ("individuals . . . relationships, . . . relationship . . . individual") of the final quoted sentence. His highlighting of the individual elsewhere in the opinion conforms both to the facts of *Hardwick* and to the *Eisenstadt* holding that "the marital couple is not an independent entity . . . but an association of two individuals If the right of privacy means anything, it is the right of the individual" *Eisenstadt*, 405 U.S. at 453. According to Justice Blackmun: "We protect the decision whether to have a child because parenthood alters so dramatically an *individual's* self-definition [W]e protect the family because it contributes so powerfully to the happiness of *individuals*." *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting) (emphasis added).

⁵⁵ See *infra* text accompanying notes 67-72, 86-93 for a comparable discussion of *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989).

⁵⁶ Joseph Stein, *Fiddler on the Roof* (1964) [hereinafter *Fiddler*].

him.”⁵⁷ And that causes the father to bless the union. The third daughter comes alone before her father and fails to get his blessing.⁵⁸

There is an interesting chicken and egg problem with the third daughter’s coming alone: Does she come alone because she has to, or, if she came with someone, could she have been recognized?⁵⁹ I think that gay men and lesbians are in the position of the third daughter, that is to say, they will not be recognized until they stand together with the ones they love, and they cannot stand together until they are recognized.

To push the analogy to “Fiddler” even further, let me argue that *Griswold*, *Eisenstadt*, and *Hardwick* may be seen as the three daughters. Like the request of the poor, young tailor of the community for permission to marry the eldest daughter, *Griswold* accepts most of the traditional social framework. Far from calling into question the institution of marriage, the result in *Griswold* is seen to strengthen and confirm it. But, as Tevye muses when finally giving his permission to his eldest and her intended, despite their failure to go through a

⁵⁷ Id. at 86.

⁵⁸ The third daughter, Chava: “The world is changing, Papa.”

The Father, Tevye: “No. Some things do not change for us. Some things will never change.”

Chava: “We don’t feel that way . . . we want to be married.”

Tevye: “Are you out of your mind? Don’t you know what this means, marrying outside of the faith?”

Chava: “But Papa . . .”

Tevye: “I said no! Never talk about this again! Never mention his name again! Never see him again! Never! Do you understand me?”

Chava: “Yes, Papa, I understand you.” Despite her father’s objections, Chava marries, a fact which her mother, Golda, is the first to communicate to her father. Tevye tells Golda their daughter is now dead to them and reminisces about the sweet, happy child she once was. Chava then approaches again to ask for her father’s approval. Again, she is alone:

Chava: “Papa, I beg you to accept us.”

Tevye: “Accept them? How can I accept them. Can I deny everything I believe in? On the other hand, can I deny my own child? On the other hand, how can I turn my back on my faith, my people? If I try to bend that far, I will break. On the other hand . . . there is no other hand. No, no, no!”

Chava: “Papa. Papa.”

Villagers behind transparent curtain: “Tradition.”

Fiddler, supra note 56, at 100-03.

⁵⁹ Chava’s intended, the Christian Fyedka, had lobbied her vigorously for a chance to talk to her father about their plans, but she stopped him, saying, “that would be the worst thing, I’m sure of it.” Id. at 98.

matchmaker, as is traditional, "One little time you pull out a prop, and where does it stop. Where does it stop?"⁶⁰

For traditionalists on the Court and in Tevye's village, it does not stop soon enough. Tevye's second daughter, Hodel, and her intended, Perchik, resemble the image of an unmarried heterosexual couple that I suspect was current in the early 1970s, at the time of the *Eisenstadt* decision. Both individualists and full of new ideas, Hodel and Perchik are eager to put them into practice together in old settings. They stretch the bounds of tradition, but not quite to the breaking point. Because they begin within the community and hope to change it rather than reject it, they have some hope of acceptance within it.

But the majority on the Court sees Hardwick's claim, just as Tevye sees that of his third daughter, as falling wholly outside both the tradition and the community. Because the couple is the visible sign of this affront to tradition, its members provoke the strongest hostility when they appear together. If they insist on remaining together, they must be entirely banned from acceptance by the community.

III. THE DOUBLE BIND OF THE COUPLE

The presence of the couple is at least as great a problem for gay and lesbian litigants as is its absence. Like the patrons at gay bars, gay people seeking government employment often seem worse off when they are visibly coupled, even, indeed especially, when they form long-term, close, and openly acknowledged pair bonds.⁶¹

Why are visible gay couples so problematic for the legal system? One likely reason may be because such coupling is seen as indicative of a homosexual orientation both more firmly established and more public than either an occasional furtive, anonymous encounter or an admission of orientation unaccompanied by demonstrable homosexual acts. Not only is there less doubt as to orientation, less chance that this is just a passing phase, the coupling usually is described as undesirable "flaunting." As Richard Mohr puts it, "acting as a couple tends, as much as anything short of saying one is gay, to pro-

⁶⁰ Fiddler, *supra* note 56, at 50.

⁶¹ This may at first seem somewhat counterintuitive. One might expect even opponents of gay sexuality to prefer it to be domesticated. After all, someone peacefully at home with a partner is less likely to be out preying upon other's children or spouses or being preyed upon by foreign agents.

ject one's affectional preferences into the public realm."⁶² This is clearly one of the reasons why the Army, much more concerned with public declarations than with anything else, penalizes gay marriage even in the absence of other homosexual activity or declarations.⁶³ An attempt to marry may be the most threatening form of gay coupling because it is viewed as an attempt to invade and/or to parody the very bastions of heterosexual privilege.⁶⁴ Marriage is a demand on the part of a gay couple that the society do even more than tolerate them, that it affirmatively give recognition to their coupled status.

Moreover, anti-gay persons in authority seem ready to conflate one kind of coupling with another, to make the leap of imagination from pair bonding to sodomitical copulation. Thus, for Attorney General Bowers, the marriage ceremony Robin Shahar underwent with another woman seems to have been tantamount to committing an act of sodomy in public: although there was no evidence that Shahar had violated Georgia law, Bowers withdrew her offer of employment as an attorney in the Criminal Division "to ensure public perception (and the reality) that his [d]epartment is enforcing and will continue to enforce the laws of the State."⁶⁵ Bowers testified in a deposition that "the natural consequence of a marriage is some sort of sexual conduct, I would think to most people, and if it's homosexual it would have to be sodomy."⁶⁶

Hence, the couple may present a double bind for gay and lesbian litigants because it focuses courts on what couples do, that is to say, have sex. In this connection, it is most interesting that two of the most prominent victories in gay rights litigation, *Braschi*⁶⁷ and

⁶² Richard Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* 236 (1988).

⁶³ See *infra* text accompanying notes 75-80.

⁶⁴ See *infra* text accompanying notes 84-88, 113-33.

⁶⁵ *Shahar v. Bowers*, 58 Fair Empl. Prac. Cas. (BNA) 668, 671 (N.D. Ga. March 9, 1992); cf. *National Gay Task Force v. Board of Educ. of Okla. City*, 729 F.2d 1270, 1273, (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985) ("Surely a school may fire a teacher for engaging in an indiscreet public act of oral or anal intercourse.").

⁶⁶ Memorandum in Support of Defendant's Motion for Summary Judgment at 32, *Shahar v. Bowers*, No. 1:91-CV-2397-RCF (N.D. Ga. filed Oct. 5, 1991) (quoting Bowers Deposition at 80-81). See *infra* text accompanying notes 115-18 for further discussion.

⁶⁷ *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (holding that, where rent control laws prevent dispossession by a landlord of family members of a deceased tenant who lived in a controlled apartment with the tenant, "a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment

*Kowalski*⁶⁸ are cases in which the court can bless a couple without blessing their sexual activities.⁶⁹ In neither case is the couple functioning as a couple—Braschi's lover is dead, Kowalski has emerged from a coma severely impaired⁷⁰—so the court can focus on all the wonderful pair bonding⁷¹ without being threatened by the sexual implications of that pair bonding.⁷² The same is also true of *Doe v.*

and interdependence" so that Braschi was entitled to succession rights in the apartment he had shared with his lover for ten years before the latter's death).

⁶⁸ In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991). After Sharon Kowalski was severely injured in an auto accident in 1983, Karen Thompson, the lover with whom she had been "living together as a couple for four years," id. at 791, waged a protracted court battle for guardianship against Kowalski's parents, who were unaware of their daughter's lesbian relationship before the accident and sought to bar Thompson from contact with their daughter. The parents won the first several rounds of litigation, in opinions that described the two women as "roommates" and their relationship as "uncertain." In Re Guardianship of Kowalski, 382 N.W.2d 861, 863 (Minn. Ct. App. 1986). In the final decision, the court awarded guardianship of Kowalski to Thompson, whom it described as "her lesbian partner," 478 N.W.2d at 791, finding such guardianship consistent with Kowalski's wishes and in her best interests. The decision paved the way for Thompson to bring Kowalski home from the hospital into a "fully handicap-accessible [sic] home [she had built] in the hope that Sharon will be able to live there." Id. at 794. See also Karen Thompson & Julie Andrzejewski, *Why Can't Sharon Kowalski Come Home?* (1988) (telling Thompson's side of the story).

⁶⁹ Neither of these cases is cited by Cain because neither falls within her rubric—both concern private relationships and family issues rather than the public sphere.

⁷⁰ *Kowalski*, 478 N.W.2d at 791. Nevertheless, Kowalski's father raised the specter of copulation, claiming "he and his wife are worried that Thompson will sexually abuse their daughter if Thompson is allowed to continue visiting her." Thompson & Andrzejewski, *supra* note 68, at 81; see also id. at 176-77 (discussing how parent's family doctor opined that a risk of sexual abuse existed). And Thompson herself makes clear that her relationship with Kowalski continued to be physically intimate after the accident. Id. at 31, 51. But the only sexual relationships apparently considered by the court that ruled in Thompson's favor are those Thompson had with other people since Kowalski's accident, which it found raised "no reason to question Thompson's commitment to Sharon's best interests." *Kowalski*, 478 N.W.2d at 795-96.

⁷¹ See, e.g., *Kowalski*, 478 N.W.2d at 794 (describing the couple as a "family of affinity"); *Braschi*, 543 N.E.2d at 51 (describing the "long-term interdependent nature of the 10-year relationship").

⁷² After I first delivered this paper, I ran across a similar argument in Richard D. Mohr, *Gay Ideas: Outing and Other Controversies* 82 (1992). Discussing *Braschi* in the context of another, later New York Court of Appeals case, *Alison D. v. Virginia M.*, 569 N.Y.S.2d 586 (N.Y. 1991), in which the court resolved a child custody dispute between lesbian former partners by denying all rights to the one partner they identify as "a biological stranger to the child," id. at 587, and hence a "nonparent," id. at 588, Mohr observes:

Conveniently for the equanimity of the New York court's mind in the gay rental case, the plaintiff was not, after all, in a living gay relation—owing to the death of his life-partner. . . . The courts may give rights to gays by ones, but they will not give rights to gays by twos. They will not give rights to gays *in relations*, which is after all what it is to be gay—to have relations of a certain sort. So when the courts do on occasion give

Sparks,⁷³ one of the few couple-centered cases cited by Professor Cain. *Sparks* authorizes noncontact visits by the boyfriends or girlfriends of gay and lesbian prisoners, once again blessing the pair bond without needing to confront the copulation.⁷⁴

The sense that pair bonding and copulating may each be a sufficient marker for the evil that is homosexuality, even when separated from one another, is clearest in the military's approach to homosexuality. Military regulations list three bases for separation from the service on grounds of homosexuality: copulating,⁷⁵ "acknowledgement of homosexual status,"⁷⁶ and pair bonding.⁷⁷ The military considers

rights to gays—by ones—they do so in spite of rather than because of their gayness. And in giving rights to gays by ones *only*, the courts, even as they hand out a right, destroy the very basis and idea of gayness, that it is a relation between people.

Mohr, *supra*.

⁷³ 733 F. Supp. 227 (W.D. Pa. 1990).

⁷⁴ For further evidence of this phenomenon, see Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 Temple L. Rev. 511, 519 n.61 (1990) (collecting cases in which judges in "conservative jurisdictions," faced with "nonexistent or imperfect testamentary documents" made by deceased gay men, "noted the homosexual nature of the relationship between the men and decided in favor of the surviving lover"). The ability of the judging observer to separate the pair bond from any sexual taint similarly explains 19th- and early 20th-century society's acceptance of female couples such as those in so-called "Boston marriages" (same-sex households of two college alumnae linked, *inter alia*, by close, loving friendship). Although debate rages today about the sexual component of such relationships, contemporary observers clearly saw them as unthreateningly non-sexual. See Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* 15, 18, 21 (1991).

⁷⁵ It is a ground for separation if "the soldier has engaged in, attempted to engage in, or solicited another to engage in a homosexual act." Army Reg. 635-200, ch. 15-3(a) (1990). A "homosexual act" is defined as "any bodily contact . . . between soldiers of the same sex for sexual satisfaction." Army Reg. 635-200, ch. 15-2(c). See *infra* text accompanying notes 214-16.

⁷⁶ It is a ground for separation if "[t]he soldier has stated that he or she is a homosexual or bisexual." Army Reg. 635-200, ch. 15-3(b).

⁷⁷ It is a ground for separation if "[t]he soldier has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved)." Army Reg. 635-200, ch. 15-3(c). Although the Clinton Administration's proposed revision of the military policy governing homosexuality in the armed forces has aptly been nicknamed "Don't ask, don't tell, don't understand," it appears to work no substantial change in this framework. Secretary of Defense Les Aspin's July 19, 1993, Memorandum to the Joint Chiefs provides that "[s]ervicemembers will be separated for homosexual conduct. . . . Homosexual conduct is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." Memorandum from Les Aspin, Secretary of Defense, to the Joint Chiefs of Staff, Policy on Homosexual Conduct in the Armed Forces, July 19, 1993, at 1-2. Aspin retains the prior definition of "homosexual act." *Id.* at 2. The Policy Guidelines further

each basis adequate standing alone, but allows soldiers guilty of either form of same-sex coupling to remain in the service if there is evidence breaking the chain of inference from coupling to homosexual status.⁷⁸ From the military perspective, the problem seems therefore not that homosexuality leads to coupling, but that coupling is evidence of homosexuality.⁷⁹ The Army, for example, attempted to dismiss Dusty Pruitt from its reserves for homosexuality after a published interview revealed she "had twice gone through ceremonies of inarriage to other women."⁸⁰

The Freudian notion of the "narcissism of minor differences" may help to explain why both gay sex and gay marriage provoke such hostile reactions.⁸¹ Freud describes this phenomenon as occurring on both the individual and group levels. In the individual, "this self-love behaves as though the occurrence of any divergence from [one's] own particular lines of development involved a criticism of them and a

provide that "[b]odily contact between servicemembers of the same sex that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts (e.g., handholding or kissing in most circumstances) will be sufficient to initiate separation" although "association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications, or marching in a gay rights rally in civilian clothes will not, in and of themselves, constitute . . . a basis for initiating an investigation." Department of Defense, Policy Guidelines on Homosexual Conduct in the Armed Forces 1-2 (1993). Nor will the mere listing "of someone of the same gender . . . as an insurance beneficiary or in a similar context" provide a basis for investigation. *Id.* at 2.

⁷⁸ Thus, with respect to a soldier involved in a same-sex marriage, there may be "further findings that the member is not a homosexual or bisexual." Army Reg. 635-200, ch. 15-3(c). And there is no ban on the retention of "[p]ersons who have been involved in homosexual acts in an apparently isolated episode . . . and in the absence of other evidence that the person is a homosexual."

⁷⁹ As Judge Norris put it in the *Watkins* case:

If a straight soldier and a gay soldier of the same sex engage in homosexual acts because they are drunk, immature or curious, the straight soldier may remain in the Army while the gay soldier is automatically terminated. In short, the regulations do not penalize soldiers for engaging in homosexual acts; they penalize soldiers who have engaged in homosexual acts only when the Army decides that those soldiers are actually gay.

Watkins v. U.S. Army, 875 F.2d 699, 715 (9th Cir. 1989) (en banc) (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990).

⁸⁰ *Pruitt v. Cheney*, 963 F.2d 1160, 1161 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). Although the Ninth Circuit found that "there is no evidence in this case that she engaged in homosexual acts," *id.* at 1162, it nevertheless permitted Pruitt, an acknowledged lesbian, to pursue an equal protection challenge to the Army regulations concerning separation for homosexual status.

⁸¹ See, e.g., *infra* note 188 (noting that behavior seen as "parodic" of heterosexuality is perhaps therefore harshly condemned).

demand for their alteration.”⁸² At the group level, he notes “the advantage which a comparatively small cultural group offers of allowing . . . a convenient and relatively harmless satisfaction of the inclination to aggression, by means of which cohesion between members of the community is made easier.”⁸³ Both gay sex and gay marriage most sharply throw into relief the similarities and differences between couples of the same and of different sexes; they force heterosexuals to give some consideration to their own way of doing things.

Sylvia Law has suggested that a gay or lesbian pair bond is perceived as more threatening to society than mere same-sex copulation because the former more sharply calls into question traditional gender roles and gender hierarchy.⁸⁴ According to Law:

Gay people and feminists violate conservative ideology of family in many ways. . . . [W]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender. For this reason lesbian and gay couples who create stable loving relationships are far more threatening to conservative values than individuals who simply violate the ban against non-marital or non-procreative sex.⁸⁵

⁸² Sigmund Freud, *Group Psychology in The Works of Sigmund Freud* (standard ed. 1921), at 7, 101. Freud acknowledges an inability to determine why “just these details of differentiation” are so disturbing. *Id.* I am grateful to Adina Schwartz for drawing this concept to my attention.

⁸³ Sigmund Freud, *Civilization and its Discontents* 61 (James Strachey trans., Norton 1961) (1930). Freud uses this concept chiefly to account for the antipathy felt by closely related peoples such as the English and the Scotch and to account for the role played by groups such as the Jews of medieval Europe. Cf. Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 *Va. L. Rev.* 1859, 1868-70 (1993) (arguing that the status of sexual outlaw plays an important role in gay identity formation as well).

⁸⁴ Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 *Wis. L. Rev.* 187, 196, 218-21, 232.

⁸⁵ *Id.* at 218. The Final Report of the Task Force on Family Diversity for the City of Los Angeles put a similar point somewhat more tendentiously: “The perceived danger posed by homosexual relationships is that they present an opposing and threatening metaphor of equality, mutuality and respect that, if adopted as a model for heterosexual relationships, would seriously endanger male prerogatives of freedom, excess and authority which men have been taught to expect and hold dear.” *Id.* at Supp. Part I, S-206-07 (quoted in David Link, *The Tie that Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 *Loy. of L.A. L. Rev.* 1055, 1141 (1990)).

How does Law's thesis accord with a case like *Braschi*? Somewhat paradoxically, the result in that case may support rather than undermine her theory. Although *Braschi* did give legal status to a "stable, loving" gay couple, it did so precisely because the behavior of the couple, rather than radically calling into question the "'nuclear'/'normal'/'genuine' family,"⁸⁶ closely resembled it, without squarely challenging its preeminence. Using categories common in gay theory, one might argue that the *Braschi* couple is an example of "passing," not "drag,"⁸⁷ let alone some non-parodic alternative. The *Braschi* couple can therefore be more reassuring than destabilizing to a conservative model of pair bonding.⁸⁸ This may be one reason why, if Law is correct about the nature of the threat posed by same-sex couples, the court may have felt less threatened by this couple—they were blending in, behaving "just like everybody else." Nevertheless, unlike a gay couple who seeks to marry, they were more modest in their claim to be treated like everyone else.⁸⁹

While this may help explain the New York Court of Appeals' willingness to recognize the couple, it should cast a shadow over the unbounded enthusiasm with which gay and lesbian advocates greeted the decision.⁹⁰ In *Braschi*, the court held, in effect, that if you behave

⁸⁶ *Braschi*, 543 N.E.2d at 56 (Bellacosa, J., concurring).

⁸⁷ "Passing" and "drag" are both varieties of cross-dressing; the distinction between them is broadly analogous to that between a copy and a parody. A "passing" woman dons male attire for the purpose, inter alia, of being taken for a man by observers; she may live her life as a man. A "drag queen" will rarely be mistaken for a woman nor does he generally seek to be. Although men can pass and women be in drag (e.g., Marlene Dietrich), history seems to have given us far more passing women, in part because they could use male attire as an entree to male privileges. See Marjorie Garber, *Vested Interests: Cross-Dressing & Cultural Anxiety* 151, 152, 234 (1992) (discussing "drag" and "passing"). As many writers of gay and lesbian theory have pointed out, drag, in particular, can serve as a destabilizing commentary on heterosexual gender norms. See Judith Butler, *Imitation and Gender Insubordination*, in *The Lesbian and Gay Studies Reader* 307 (Henry Abelove et al. eds. 1993). "Passing" walks an even finer line, at times reaffirming the value of traditional roles even while undermining their essentialism.

⁸⁸ They are reassuring to the extent the couple is perceived to be saying to the traditional family, in effect, "we want to be just like you," destabilizing to the extent they necessarily add, "and we don't need the male/female polarity to accomplish this." Of course, the fact that this otherwise traditional couple was composed of two men retains in and of itself some of the dangers and the possibilities perceived by Law.

⁸⁹ If *Braschi*-like domestic partnership is perceived as "passing," gay marriage is "drag," threatening in part because perceived as parodic.

⁹⁰ I can readily understand that, for advocates of gay and lesbian rights, half a loaf is better than none. In the absence of same-sex marriage or even of meaningful domestic partnership

like Ozzie and Harriet, or alternatively like Baron and Feme,⁹¹ then you are a couple and can receive the succession rights of family members under the New York rent control laws. The Court of Appeals, in determining whether the household Braschi had shared with his deceased lover, Blanchard, had "all of the normal familial characteristics,"⁹² focused on things like sexual fidelity, sharing a domicile, and commingling finances as the evidence of commitment it required before recognizing the couple.

Married couples in this society are not required to do the rather conservative things the Court of Appeals required of Braschi and his lover.⁹³ A marriage certificate now allows heterosexual couples to have an open marriage,⁹⁴ to live in different cities or in different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged. I agree with Nancy Polikoff that, from a feminist perspective, the history of marriage, whether of the same or different sexes, is unhelpful precedent.⁹⁵ But, assuming that marriage is a social construction, we need to look at how it is being constructed in our present society. I would argue that in our society marriage can be

legislation, gay couples understandably might rejoice at whatever legal recognition they can get.

⁹¹ See 1 William Blackstone, *Commentaries on the Laws of England* 429-33 (photo. reprint 1979) (1765).

⁹² *Braschi*, 543 N.E.2d at 54.

⁹³ I by no means intend to suggest that fidelity or the sharing of space and material goods are per se outmoded, sexist, or oppressive. Of course committed couples may find themselves eager to share everything in an egalitarian, loving way rather than one rife with slavish conformity to gender role stereotypes. But I think it is important to remember the particular ways the *Braschi* court's criteria played out in traditional legal and cultural definitions of the couple. Sexual fidelity was expected of a married woman in essence to protect her husband's property interest in her and in the children she would bear him; her infidelity typically received far harsher penalties under the law than his. The requirement of shared domicile meant simply that "when a woman marries, her husband's domicile automatically supersedes her own." See Herma Hill Kay, Text, Cases and Materials on Sex-Based Discrimination 203 (3d ed. 1988); id. at 203-08 and sources therein cited. Finally, finances were commingled under the husband's sole control and often in his name; until passage of Married Women's Property Acts, he alone could dispose of the couple's assets. Braschi's success may be attributable in part to the court's ability to assimilate him conceptually into the traditional class of widows. Like those proverbial favorites of the court, he has forsaken his own home for that of his spouse, on whom he depends financially, whom he cares for in his final illness, and whom he survives. His claim to the apartment resembles a claim for dower rights.

⁹⁴ At least in those jurisdictions that do not prosecute adultery.

⁹⁵ See Polikoff, *supra* note 34, at 1538-41.

liberating rather more than it need be oppressive from the perspective of gender. Although some alternatives to same-sex marriage, such as domestic partnership laws, may also have a liberating potential, all are not equally promising. I find it puzzling that any proponent of gay or lesbian rights who affirmatively opposes same-sex marriage⁹⁶ could enthusiastically support *Braschi*. It seems to me that to the extent a case like *Braschi* can be read to discourage experimentation with all less traditional ways for couples to organize their lives and manifest their commitment to one another, it may be more oppressive for feminists, whatever their sexual preference, than gay marriage would be for anyone.

IV. THE PROS AND CONS OF COUPLING

Whether a gay litigant is seen as part of a couple may spell the difference between victory and defeat for him or her. Unfortunately, sometimes being coupled seems to spell victory, at other times defeat. It is almost always a double-edged sword. Some examples may prove the point. In each of the following two cases the gay plaintiff ultimately prevails. In each there is also a difference of perspective among judges both as to whether the gay litigant is part of a couple and as to whether he should prevail. Interestingly, in the first case the majority stresses the absence of a couple in ruling for the plaintiff; in the second, by contrast, the appellate court stresses the presence of a couple in overturning an unfavorable lower court ruling.

In *Morrison v. State Board of Education*,⁹⁷ the petitioner, a teacher, was at risk of losing his license because, during a week in which a fellow teacher and friend, one Schneringer, was experiencing severe marital stress, the "two men engaged in a limited, non-criminal⁹⁸ physical relationship which petitioner described as being of a homosexual nature."⁹⁹ The dissent, which wished to uphold the school board's decision to bar Morrison from teaching, repeatedly refers to the occurrence as "a homosexual relationship."¹⁰⁰ Judge Mathew O.

⁹⁶ That is to say one who views it not merely as unattainable, but as undesirable.

⁹⁷ 461 P.2d 375 (Cal. 1969).

⁹⁸ As the majority is careful to explain "neither sodomy, oral copulation [nor public sex] were [sic] involved." *Id.* at 377 n.4 (citations omitted).

⁹⁹ *Id.* at 377-78 (citations omitted).

¹⁰⁰ See, e.g., *id.* at 395 (containing three separate such references); *id.* at 396 (containing two references); *id.* at 401.

Tobriner, writing for the majority, just as insistently refers to it as "the Schneringer incident"¹⁰¹ and stresses that it is "a single, isolated, and limited homosexual contact."¹⁰²

The immigration case of Horst Nemetz shows even more clearly how being seen as part of a gay couple may work both for and against a litigant. A lower court denied Nemetz's petition for naturalization solely because he had been involved in a long-term monogamous relationship with another male; the relationship and the sexual activity were held to constitute evidence of bad moral character sufficient to mandate exclusion.¹⁰³ The decision was reversed on appeal, and it is possible that the appellate court reversed precisely because it was a long-term monogamous relationship—it does not look like moral turpitude of the most horrifying kind. A comparison of the language of the two *Nemetz* opinions may support this analysis. The district court focuses almost obsessively on the couple's copulating, saying, "The petitioner concedes having actively engaged in sexual relations with his male roommate, more or less continuously, since 1967."¹⁰⁴ The subliminal image this sentence conjures up is of over ten years of near non-stop copulation. The district court opinion is short and full of abstract references to "bad moral character," "moral delinquency," "licentious living," and "the rising tide of this type of moral decay."¹⁰⁵

The appeals court opinion, by contrast, focuses on the pair bonding of Nemetz and his roommate. This opinion quotes extensively from Nemetz's deposition detailing the nature of his relationship:

Q: Mr. Nemetz, are you now or have you ever been a homosexual?

A: I'm now.

....

¹⁰¹ Id. at 392.

¹⁰² Id. at 391; see also id. at 378 ("[T]he Schneringer incident 'was the only time that [petitioner] engaged in a homosexual act with anyone.'").

¹⁰³ *Nemetz v. INS*, 485 F. Supp. 470, 471 (E.D. Va. 1980), rev'd, 647 F.2d 432 (4th Cir. 1981).

¹⁰⁴ Id. at 470.

¹⁰⁵ Id. at 471. Not all these fine phrases are used to describe the conduct of Nemetz and his roommate. Some are directed to examples of homo- and heterosexual sodomitical behavior set forth in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976), in which the Nemetz district judge participated and which he commends, in another unfortunate choice of words, for its "penetrating analysis" of the evils of sodomy. *Nemetz*, 485 F. Supp. at 471.

Q: Do you have sexual relations with your roommate . . . ?

A: Well, we have a relationship. I like him.

Q: Have you ever had sexual relationships with him?

A: What do you mean sexual relationships?

Q: Intimate relationships. Getting into the sexual aspects.

Q: Either yes or no.

A: Yes.

. . . .

Q: So what you're saying is that your relationship in the United States has been with one individual. Is that correct?

A: Yes.

Q: And no others?

A: That's right. Yeah.

Q: And in your lifetime that is the only individual you've had a relationship of this type with?

Q: Yes.¹⁰⁶

The circuit court additionally uses extensive quotes from the deposition to emphasize the completely private nature of Nemetz's sexual activities. It then concludes that "Nemetz in all respects sustained his burden of proving good moral character."¹⁰⁷ The case is unusual in ruling in favor of a gay plaintiff who is still part of a sexually-active couple. The excerpts quoted by the circuit court, however, somewhat downplay the sexual aspects of the relationship and stress the affectional ones. Additionally, they show how discreet Nemetz has been—he is not flaunting. Moreover, in contrast to the members of gay couples who claim to be married, Nemetz is not arrogating heterosexual privilege.¹⁰⁸

Having suggested both the ambivalence with which courts view visible gay couples and some reasons that may account for this, I shall consider specific examples from each of three of Cain's categories of litigants—public employees, gay bars, and student organizations—for evidence of the treatment accorded the couples visible in them.

¹⁰⁶ *Nemetz*, 647 F.2d 432, 433-34.

¹⁰⁷ *Id.* at 437.

¹⁰⁸ The reaction might have been different if, for example, Nemetz had claimed that his relationship with an American citizen entitled him to the immigration status of a spouse. But Nemetz is making no claim at all for his relationship, except perhaps that it should be ignored.

V. VISIBLE PAIR BONDS IN PUBLIC EMPLOYMENT DISCRIMINATION

Although in one sense all of the public employment discrimination cases other than class actions brought by gay rights organizations may be classified as "individual" rather than "couple" or "community" litigation, the employment cases can be further subdivided based on the nature of the gay or lesbian activity the employer puts at issue. For some, it is the purely individual assertion of sexual preference, apart from any pair bonding, copulating, or gay community activities.¹⁰⁹ For others it is chiefly participation in the gay community to which the employer claims to object.¹¹⁰ Finally, coupling is put at issue in several different ways.

My discussion of the shadowy couples moving through the employment litigation will focus on cases, like *Shahar v. Bowers*,¹¹¹ in which the presence or potential of a pair bond is deemed important to the employer or the court. Other forms of coupling do surface in the employment arena, including reliance on specifically identified acts of copulation as grounds for termination.¹¹² An absence of coupling is also used as evidence that homosexual inclinations are transient, that the person is not a real homosexual.

Of the employment cases I shall discuss in detail, most concern persons whose employer sought to terminate them after learning of their

¹⁰⁹ See, e.g., *BenShalom v. Secretary of the Army*, 807 F.2d 982 (Fed. Cir. 1986) (involving an action for reinstatement of reserve officer "discharged from the Army because she had stated on several occasions that she was a homosexual, although there was no evidence that she had actually ever engaged in a homosexual act").

¹¹⁰ See, e.g., *Acanfora v. Board of Educ.*, 491 F.2d 498, 500 (4th Cir.) (upholding firing of teacher not for giving press and television interviews "about the difficulties homosexuals encounter" but for failure to include on his job application his college membership in the Homophiles of Peun State), cert. denied, 419 U.S. 836 (1974).

¹¹¹ *Shahar v. Bowers*, No. 1:91-CV-RCF (N.D. Ga. filed Oct. 5, 1991); see also *Shahar v. Bowers*, 58 Fair Empl. Prac. Cas. (BNA) 668 (N.D. Ga. March 9, 1992) (denying motion to dismiss).

¹¹² See, e.g., *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969) (holding that alleged homosexual advance by NASA employee toward man he picked up in his car was not sufficient to justify dismissal); *Schlegel v. United States*, 416 F.2d 1372, 1373-74 (Ct. Cl. 1969) (upholding discharge of employee for four specific sex acts with military personnel), cert. denied, 397 U.S. 1039 (1970); *Moser v. State Bd. of Educ.*, 101 Cal. Rptr. 86, 87 (Cal. Ct. App. 1972) (revoking teacher's credentials after conviction for sex act in public restroom, described in detail); cf. *Woodward v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989) (upholding military's action in asking officer to resign his commission after he visited Officers' Club in company of gay enlisted man), cert. denied, 494 U.S. 1003 (1990).

attempt to enter into a same-sex marriage. As noted above, such a marriage is both a particularly visible and a particularly threatening declaration of one's same-sex preference. Opponents view gay marriage as a most unsettling parody of opposite-sex behavior—it is like going in drag. Indeed, although the courts' reasoning is never quite made explicit, the most reliable predictor of failure for a gay litigant in a public employment case has in the past¹¹³ been that, to his employer's knowledge, he views himself as having a spouse of the same sex.¹¹⁴ The reaction of nonmilitary government employers to their gay employees' attempts to marry approaches the vehemence of the military. Such employers seek to characterize the attempt to marry not merely as flaunting but as evidence of activism on behalf of homosexual causes, regardless of the amount of publicity generated by the marriage itself or the role, if any, the employee played in generating such publicity. Robin Shahar, for example, was fired solely for having participated with another woman in a Jewish marriage ceremony. Her employer learned of this only when she informed him she would be changing her last name from Brown to Shahar after getting married over the summer before commencing employment.¹¹⁵ In response, she received a letter "withdrawing her offer of permanent employment because of information received concerning 'a purported marriage between [Shahar] and another woman.'" ¹¹⁶ In seeking to justify his actions to the court, Attorney General Bowers insisted, *inter alia*,

"that Shahar 'pursued an activist role regarding the societal status of homosexuals' is a proper inference drawn from the facts that [p]laintiff purported to 'marry' another female, that she changed her name to have the same name as her partner, and that she made the fact of this 'marriage' public knowledge."¹¹⁷

¹¹³ The courts in more recent cases are less hostile, but those cases, like *Shahar*, have yet to result in a final decision. For speculation as to the reasons for change, see *infra* text accompanying notes 220-23.

¹¹⁴ For attempts by various courts to find different, less convincing ways of distinguishing successful from unsuccessful public employment litigants, see *infra* text accompanying notes 131-33. See also *Childers v. Dallas Police Dept.*, 513 F. Supp. 134, 141 n.10 (1981) (claiming, inaccurately, that the distinction is one of participation in demonstrations on behalf of homosexual causes), *aff'd*, 669 F.2d 732 (5th Cir. 1982).

¹¹⁵ Her partner also adopted the name Shahar, Hebrew for the "act of seeking God." See Mark Curriden, A.G. Refuses to Hire Lesbian, A.B.A. J., Dec. 1991, at 32.

¹¹⁶ *Shahar*, 58 Fair Empl. Cas. (BNA) at 668.

¹¹⁷ *Id.* at 669 n.4 (quoting Defendant's Reply, at 4).

To its credit, the court chastized Bowers for this and other unwarranted inferences in his summary judgment papers, saying:

At this time, the court is not convinced that telling one person of a pending marriage makes it "public knowledge." Moreover, the court does not agree that plaintiff's disclosure to her administrative supervisor of her pending plans logically implies that she "pursued an activist role regarding the societal status of homosexuals" any more than another employee's similar announcement of marriage to a person of the opposite gender implies that she "pursued an activist role" regarding the societal status of heterosexuals.¹¹⁸

Other courts have been far more willing to conflate same-sex marriage, flaunting, and activism, and to hold all three against a visibly coupled gay employee. Like Shahar, would-be university librarian J. Michael McConnell had informed his prospective employer of his intention to enter into a same-sex marriage before commencing employment. He was warned that this "might well jeopardize favorable consideration of [his] employment application," but proceeded nevertheless to apply for a marriage license, attracting the attention of the local news media.¹¹⁹ Although McConnell "specifically denied arranging for the presence of the press at this event," the court found what it described as "this antic" sufficient cause for denying McConnell employment.¹²⁰ Noting disapprovingly that McConnell was not merely someone with homosexual tendencies or "a desire clandestinely to pursue homosexual conduct" the court accused him of "seek[ing] employment on his own terms."¹²¹ It concluded:

¹¹⁸ *Id.*

¹¹⁹ *McConnell v. Anderson*, 451 F.2d 193, 195 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972). The attempt to marry resulted in two reported decisions, *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (holding that marriage under Minnesota law required two persons of opposite sex), appeal dismissed, 409 U.S. 810 (1972), and *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (denying increased veteran's benefits notwithstanding claim that McConnell was the dependent spouse of Baker). Evidence external to the reported cases supports the charge of activism, at least on the part of the man McConnell tried to marry. Jack Baker acknowledged that "right from the start [he] tried to provoke a heterosexual backlash by rhetorical and psychological confrontation," but that earlier efforts had failed in the face of Minnesota tolerance. See Kay Tobin & Randy Wicker, *The Gay Crusaders* 14-46, 140-52 (1972). For example, his effort to shock his law school prom by dancing with his lover met not with the anticipated resistance, but with acceptance. See *id.* at 141. Not until his wedding was Baker able to stir up a reaction. See *id.* at 143-52.

¹²⁰ *McConnell*, 451 F.2d at 195 n.4.

¹²¹ *Id.* at 196.

[T]he prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands.¹²²

As Marc Fajer and others have pointed out, what is seen as extravagant flaunting on the part of gay men and lesbians is routine, even expected, behavior for heterosexuals in this society. Heterosexuals are free to reveal their status and preferences through public displays of affection as diverse as holding hands and sending out wedding announcements. Conversations among heterosexuals about "the process of forming couples" and one's life with one's partner are "expected and appropriate . . . in social and work settings."¹²³ Indeed, a heterosexual employee who did what the court expected of McConnell—who either declined to marry his partner or to tell his employer he was doing so, who carried on a clandestine relationship—would be viewed by many as bizarre.

John Singer, a clerk typist who had informed his employer, the EEOC, of his homosexuality at the time he was hired, was nevertheless subsequently fired for having "flaunted" it through both kinds of coupling.¹²⁴ The EEOC faulted him both for "kissing and embracing a male in front of the elevator in the building where he [had previously been] employed and kissing a male in [his former employer's] company cafeteria"¹²⁵ and for applying with another man for a mar-

¹²² *Id.*

¹²³ Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 604 (1992). Fajer concludes that "to be full participants in American social life, people must be able to publicly discuss their partners and their search for partners." *Id.* at 605. While I personally would prefer a world in which my sex life was not the business of the state, my employer, my co-workers, nor of any one else with whom I was not on intimate terms (i.e., a world in which discretion was a fashionable option for people of all sexual preferences), I take Fajer's point that gay men and lesbians will not have achieved true equality until they are free to publicize their coupling to the same extent heterosexuals now are expected to.

¹²⁴ *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 249 (9th Cir. 1876), vacated, 429 U.S. 1034 (1977).

¹²⁵ *Id.* It is important to note that neither of these incidents took place on EEOC premises, or, indeed, while Singer was employed by the EEOC.

riage license.¹²⁶ In a newspaper article, which identified his employer as the EEOC, Singer was quoted "as saying, in part, that he and the man he sought to marry were 'two human beings who happen to be in love and want to get married for various reasons.'"¹²⁷ A close reading of the opinion suggests that those who opposed Singer were most troubled by his public coupling.¹²⁸ The Civil Service Commission, which, like the court, ruled against him, stressed not only his "flaunt[ing]" and advocacy, but the possible revulsion of his co-workers, "their apprehension of homosexual advances and solicitations," and the danger that Singer might use his position "to foster homosexual activity, particularly among youth."¹²⁹ His conduct is repeatedly described as "immoral" and "notoriously disgraceful."¹³⁰ The court, somewhat puzzlingly, distinguishes his case from that of Acanfora,¹³¹ who also gave interviews that mentioned both his homosexuality and his government job, and from the student organization case of *Bonner*¹³² on the grounds that "[n]either [of those cases] involved the open and public flaunting or advocacy of homosexual conduct."¹³³

Employees who are open about their homosexuality but not about any aspect of their coupling seem to fare better in court. Approvingly contrasting the apparently unattached gay plaintiff before it with Singer and McCounell, the court in *Aumiller v. University of Delaware*¹³⁴ noted that "Aumiller, by contrast, never engaged in comparable public conduct such as applying for a marriage license, kissing a man in public, or participating in homosexual demonstrations."¹³⁵ Aumiller, a college drama teacher, is distinguished instead by various refusals to couple: "Aumiller concluded . . . he would not have a sexual relationship with anyone connected with the University, either a

¹²⁶ Id.

¹²⁷ Id. Their attempt to compel issuance of a marriage license was denied in *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

¹²⁸ The charges against him also included complaints of his organizing on behalf of the gay community, granting interviews in connection with the marriage license application and other gay issues, and "indicat[ing] by his dress and demeanor at work that he intended to continue homosexual activity as a 'way of life.'" *Singer*, 530 F.2d at 249.

¹²⁹ Id. at 250 n.3.

¹³⁰ Id. at 249, 250.

¹³¹ See *supra* note 110.

¹³² See *infra* text accompanying notes 158-67.

¹³³ *Singer*, 530 F.2d at 256.

¹³⁴ 434 F. Supp. 1273 (D. Del. 1977).

¹³⁵ Id. at 1293.

student or an employee."¹³⁶ He did not have a sexual relationship with his gay housemate.¹³⁷ Although quoted in a local paper as saying, "We want to provide these gay people with a healthy, normal way of meeting other homosexuals. Who would find their sex in a bathroom if they could do it another way?"¹³⁸ he insisted to the court that he

in no way . . . intended to suggest that one of the purposes of the Gay Community [a student organization with which he was affiliated] was to help members find sex partners. Indeed, Aumiller emphatically contends that the purpose is just the opposite: to provide homosexuals with the opportunity to meet other homosexuals in a completely *non-sexual* environment.¹³⁹

Aumiller's rhetoric enthusiastically supports long-term, monogamous same-sex pair bonding: "Many of our members are involved in long-term relationships," he told a reporter. "Most gay people would stay with one person, I think, if they were given the chance to meet lots of homosexuals and find a compatible partner."¹⁴⁰ But the court deciding his case was never forced to confront a real, live gay couple.

For a gay couple to seem threatening to an employer, it is not necessary that they formally seek to marry. When applying for a job with the Dallas Police Department,

[plaintiff Steven] Childers said he wanted to be honest and told [his interviewer] he was gay. Childers assured [the interviewer] that he would not have to worry about him, however, because he (Childers) was "married[.]" His "spouse" was outside in the car. [The interviewer] claims . . . that at that point he determined that Childers was disqualified from the job. . . . [because] Childers was telling him that he was an habitual lawbreaker.¹⁴¹

Like the Dallas Police Department, the district court was prepared to hold against Childers both his pair bonding and his copulating, repeatedly noting with disapproval that Childers

¹³⁶ Id. at 1283-84.

¹³⁷ Id. at 1303.

¹³⁸ Id. at 1317 (quoted from Jan de Blein, Gays: "There's No Need to Deny Fact," Says a Homosexual Activist at U.D., Wilmington Sunday News-J., Nov. 2, 1975 (reprinted in full in *Aumiller*)).

¹³⁹ Id. at 1298 (citations omitted).

¹⁴⁰ Id. at 1317 (quoted from de Blein, *supra* note 138).

¹⁴¹ Id. at 138.

admitted freely that he cohabited in a sexual relationship with another man . . . Donald Armstrong, to whom plaintiff referred as his "spouse[,"] prior to, during and following his [police department] interviews . . . Plaintiff lived with Donald Armstrong from 1973 to 1975, and he engaged in sexual relations with Armstrong several times a week for the entire two and a half years.¹⁴²

While, as the court indicates, the copulating likely violated the Texas sodomy laws,¹⁴³ the pair bonding additionally "was in flagrant violation of police regulations."¹⁴⁴

On the other hand, the discriminatory Defense Department security clearance review procedure approved by the court in *High Tech Gays v. Defense Industry Security Clearance Office*¹⁴⁵ seems to favor pair bonding over promiscuity. The Defense Department manual directed investigators to learn not only the "'nature and full extent of deviant acts engaged in [so as to] determine if the SUBJECT's activities involve actual violation of criminal statutes'"¹⁴⁶ but also "'the types of individuals with whom the SUBJECT participates in deviant activity.'"¹⁴⁷ The investigators are directed to "'[d]etermine if the SUBJECT maintains a single or a small number of lasting relationships or effects numerous transient and temporary liaisons with a vari-

¹⁴² Id. at 141, 144, 147 n.21.

¹⁴³ The Texas sodomy law prohibits homosexual oral and anal sex, but no other activities. See *infra* text accompanying notes 217-20. While the court finds that Childers "admitted to engaging regularly in homosexual sexual activity which is prohibited by" the sodomy statute, 513 F. Supp. at 144, and while he may have made this admission explicitly in a portion of the record not cited in the opinion, the text of the opinion details only admissions of gay sexual activity, without specifying anything that would constitute criminal sodomy in Texas. Is the judge simply assuming not only that all sexually active gay men violate the sodomy laws, but that any gay sex is such a violation? A strict grammatical reading of the judge's language quoted above would suggest that he is making this assumption. Specifically, the reference is to "homosexual sexual activity *which* is prohibited," not to "activity *that* is prohibited"; this use of a nonrestrictive rather than a restrictive clause either makes all "homosexual sexual activity" criminal sodomy or makes the judge guilty of a grammatical error at least as common and as rarely prosecuted as violations of the sodomy laws. For an explication of the rhetorical move that elides the difference between sodomy and homosexuality, see Janet E. Halley, *Reasoning About Sodomy*, 79 Va. L. Rev. 1721, 1737 (1993) (describing sodomy as the metonym for homosexuals.).

¹⁴⁴ *Childers*, 513 F. Supp. at 146. Specifically, the couple allegedly violated "[s]ection 15(G) of the Code of Conduct which prohibits cohabitation with a sex pervert of the same sex." Id. at 144.

¹⁴⁵ 895 F.2d 563 (9th Cir. 1990).

¹⁴⁶ Id. at 568.

¹⁴⁷ Id.

ety of individuals through chance meetings in bars or other public places.’”¹⁴⁸ The Defense Department’s emphasis on lasting relationships may reflect the changing times—society in the 1990s may be more willing to accept both heterosexual and homosexual pair bonding outside of marriage and to judge promiscuity more harshly.¹⁴⁹

VI. SHADOWY COUPLING IN THE GAY COMMUNITY LITIGATION

One way of interpreting the gay bar and student organization cases is that these sites for the formation of the gay community trouble the legal system chiefly to the extent that they are also sites for the formation of gay couples. In these cases, the “pairing off” which draws censure may lead to pair bonding, copulation, both, or neither. Opponents of the gay community, however, assume that it is the prelude to sodomy and react accordingly.

As Professor Cain’s discussion of the factors considered by courts in the gay bar cases makes clear, the more coupling that was going on, the more people were getting together in pairs, the more troubled courts were by the gay bars.¹⁵⁰ Although the police and liquor licensing authorities seem bothered enough by any bar that attracts the gay community, most courts find the mere presence of gay patrons, even in large numbers, unproblematic. A bar can be “a meeting place” or “hangout” for the gay community without thereby jeopardizing its license.¹⁵¹ But the moment the patrons start coupling, the courts begin to take more notice.

¹⁴⁸ Id. Although the district court criticized it for its negative inference, *DISCO* faulted one applicant for his “visits to gay bathhouses” and “homosexual activity with casual acquaintances,” *High Tech Gays v. Defense Indus. Sec. Office*, 668 F. Supp. 1361, 1378 (N.D. Cal. 1987), rev’d, 595 F.2d 563 (9th Cir. 1990).

¹⁴⁹ The threat of AIDS, for example, has been credited with promoting the ideal of monogamy among both gays and straights.

¹⁵⁰ See Cain, *supra* note 1, at 1567-72; see also M.J. Greene, Annotation, Sale of Liquor to Homosexuals or Permitting Their Congregation at Licensed Premises As Ground For Suspension or Revocation of Liquor License, 27 A.L.R.3d 1254, 1266-67 (1969) (summarizing what activities courts will and will not accept at licensed premises).

¹⁵¹ *Stoumen v. Reilly*, 234 P.2d 969, 971 (Cal. 1951); accord *Kerma Restaurant Corp. v. State Liquor Auth.*, 233 N.E.2d 833, 834 (N.Y. 1967). But see *Inman v. City of Miami*, 197 So.2d 50, 51-52 (Fla. Dist. Ct. App.) (upholding an ordinance that prohibited a liquor licensee, *inter alia*, “to knowingly allow two or more homosexual persons to congregate or remain in his place of business” because “[t]he object of the ordinance as a whole is to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal by the Legislature of the State), cert. denied, 201 So.2d 895 (Fla. 1967), and cert. denied, 389 U.S. 1048 (1968).

Several California cases underline this distinction. In *Kershaw v. Department of Alcoholic Beverage Control*,¹⁵² a license revocation was sustained "where there was conduct on the premises by homosexuals who openly sought and obtained sexual satisfaction by aberrant methods."¹⁵³ The conduct enumerated at considerable length is an indiscriminate mix of copulation (e.g., fondling of a partner's genitals), pair bonding ("one male couple declared that they had been married some three months and displayed their wedding rings"), and the sort of public displays of affection that can be a prelude to either (e.g., "[s]ome of the male couples danced cheek to cheek in close embrace"); the court makes no apparent distinction between these various sorts of activities.¹⁵⁴

And in *Vallerga v. Department of Alcoholic Beverage Control*,¹⁵⁵ the California Supreme Court went on to say:

Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals . . . may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. But any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society.¹⁵⁶

¹⁵² 318 P.2d 494 (Cal. Dist. Ct. App. 1957).

¹⁵³ *Vallerga v. Department of Alcoholic Beverage Control*, 347 P.2d 909, 911 (Cal. 1959) (discussing the holding in *Kershaw*). For the *Kershaw* court, "[s]eeking and obtaining sexual satisfaction with a person of the same sex is considered an aberrant method by the great majority of people. The methods of copulation available to two persons of the same sex would certainly be so regarded." 318 P.2d at 497.

¹⁵⁴ *Kershaw*, 318 P.2d at 496. The *Vallerga* court also noted that "[i]n the *Nickola* case, the court held generally that seeking sexual gratification in a public tavern with another of the same sex would offend the moral sense of the general public." *Vallerga*, 347 P.2d at 912 (discussing the holding in *Nickola v. Munro*, 328 P.2d 271, 276 (Cal. Dist. Ct. App. 1958)). *Nickola* also includes a lengthy and indiscriminate catalogue of coupling behavior, from relatively mild ("men dancing with each other in close and affectionate embrace"), 328 P.2d at 272, to questionable ("Some of the male dancers, while dancing, wrapped their arms around the buttocks of their companions and vigorously rotated their pelvic areas, to the evident enjoyment of other patrons."), id., to indisputably lewd ("Another agent saw a male patron fondle the private parts of a Negro patron for a period of several seconds."). Id. at 273. The court seems to take a particular interest in the interracial aspects of the coupling, which it sets forth in detail as the culmination of a list of acts of apparently increasing perversity.

¹⁵⁵ 347 P.2d 909 (Cal. 1959).

¹⁵⁶ Id. at 912. The court noted that:

When the *Vallerga* court details the evidence of coupling in an Oakland bar, however, it becomes clear that homosexuals *are* being held to a higher standard, faulted for much conduct that is routine and acceptable among heterosexual couples in bars. But, because the trier of fact had not relied on this evidence of coupling, but instead on the mere fact that the premises were "a resort for sexual perverts, to wit, homosexuals"¹⁵⁷ (that is to say for the gay community and gay individuals rather than gay couples), the court felt compelled to reverse the license revocation.

Although most of the gay bar cases date from the 1950s and reflect then-current attitudes, a similar fear of couples and coupling seems to drive the university administrators who have more recently sought to ban or restrict gay and lesbian student organizations on campus. For example, the University of New Hampshire gave limited recognition to its Gay Students Organization, but banned it from holding social functions after Governor Meldrim Thompson, Jr., expressed outrage over a dance sponsored by the group.¹⁵⁸ First on Virginia Commonwealth University's list of reasons for denying registration to the Gay Alliance of Students, an organization that "[t]ogether with providing educational activities . . . conducts social activities, including dances"¹⁵⁹ was that recognition "would increase the opportunity for homosexual contacts."¹⁶⁰ The University of Missouri refused to rec-

[P]atrons usually paired off, men with men, and women with women. During the period of surveillance police officers testified that they observed women dancing with other women, and women kissing other women. A policewoman testified that as she and a companion policewoman sat at a table a female patron dressed in mannish attire sat down and said to her companion, "You're a cute little butch." Later in the evening this patron kissed the policewoman, and a waitress came by and warned the participants that if they wanted to continue such activity they should go into the restroom. . . . A police officer testified that he observed a male patron and a grey-haired man approach, embrace each other at the bar, put their foreheads together while they carried on a whispered conversation, and that the grey-haired man then kissed the other and stated to the bartender: "Arley and I are going steady."

Id. at 913. In addition, the court includes evidence of crossdressing by bar patrons, evidence that further confirms its anti-homosexual bias and the disingenuousness of its claim to equal treatment of gays and straights. Id. According to the California Supreme Court: "The foregoing is sufficient evidence of a display of sexual desires and urges which, when made in a public place as a continuing course of conduct, could reasonably be found by the trier of fact to be 'contrary to public welfare and morals.'" Id.

¹⁵⁷ Id. (quoting the lower court).

¹⁵⁸ Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 654 (1st Cir. 1974).

¹⁵⁹ Gay Alliance of Students v. Matthews, 544 F.2d 162, 163 (4th Cir. 1976).

¹⁶⁰ Id. at 164.

ognize the organization Gay Lib "on the ground that recognition . . . would probably result in the commission of felonious acts of sodomy in violation of Missouri law."¹⁶¹

Perhaps to counter these concerns, gay and lesbian student organizations involved in litigation almost always state their purposes as including dialogue with nongays on campus and rarely stress a desire to bring gay students together for any purpose whatsoever, let alone one that moves beyond community building to coupling.¹⁶² Appellate courts have consistently ruled in favor of the student organizations on First Amendment grounds.¹⁶³ Yet dissenting judges continue to echo the fears of the universities that gay student organizations, however restrained their aims or activities, will inevitably lead to more homosexual coupling. Like Justice William H. Rehnquist, dissenting from the denial of certiorari in the University of Missouri case, these dissenters see no constitutional obstacle to denying "recognition to an organization the activities of which expert psychologists testify will in and of themselves lead directly to violations of a concededly valid

¹⁶¹ *Gay Lib v. University of Mo.*, 558 F.2d 848, 850 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); see also *Gay Activists Alliance v. Board of Regents of the Univ. of Okla.*, 638 P.2d 1116, 1121 (Okla. 1981) (same); *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 363 (8th Cir. 1988) (quoting one student senator arguing, "We cannot use state money to support a homosexual group. What if a group of students/arsonists wanted to start an arsonists club and start fires. Would you fund them? . . . It's the same thing as funding homosexuals."). The controversy continues to the present day. See, e.g., *Leaping into the Fray Over Gay Group At Auburn*, N.Y. Times, Mar. 22, 1992 (detailing efforts by legislators, students and university administrators to restrict gay student group).

¹⁶² See *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984), cert. denied, 471 U.S. 1001 (1985). To rebut the testimony of a university witness who claimed, "It would be a shock really, if there were not homosexual acts engaged in at or immediately after a meeting of a homosexual student organization," a witness for Gay Student Services tried to show that "GSS was a typical student service group . . . rather than a substitute for a gay singles bar." *Id.* at 1323; see also *Bonner*, 509 F.2d at 654 n.1 (noting that gay group listed four purposes for organization; the first three involved outreach to the broader community and only the last, "not least important . . . [was] to give bisexual and homosexual members of the college community a place to communicate with each other and form discussion groups so that a healthy gay consciousness can evolve among students."); *Gay Lib*, 558 F.2d at 850 (listing five purposes, four of which involved outreach to the broader community); *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1298 (D. Del. 1977) (involving the faculty supervisor of a gay student group whose job is on the line and who denies that the group aims to help members find sex partners).

¹⁶³ *Gohn*, 850 F.2d 361; *Texas A & M*, 737 F.2d 1317; *Gay Lib*, 558 F.2d 848; *Gay Alliance*, 544 F.2d 162; *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Student Servs. for Lesbians/Gays and Friends v. Texas Tech*, 635 F. Supp. 776 (N.D. Texas 1986).

state criminal law.”¹⁶⁴ Rehnquist coyly notes that, while Gay Lib “disavow[s] any intent to advocate present violations of state law, the organization intends to engage in far more than political discussion.”¹⁶⁵ He then lists three of the organization’s purposes: to provide information on homosexuality, without “proselytiz[ing or] . . . recruit[ing, to enable] people who have already established a pattern of homosexuality when they enter college [to] adjust to this fact” and to “help the gay community to rid itself of . . . guilt.”¹⁶⁶ For him these purposes were sufficiently pernicious to justify university exclusion. Endorsing the notion of homosexuality as contagious, he agreed with the University that “the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.”¹⁶⁷

VII. THE PROBLEM WITH MAKING COPULATION MORE VISIBLE

Having examined some of the strengths and weaknesses of one form of coupling, the pair bond, as a focus for gay rights litigation, I want briefly to consider the other form, copulating. Two of the participants in this symposium, albeit in very different ways and for different reasons,¹⁶⁸ have suggested, if I understand them correctly, that in a post-*Hardwick* world advocates for gay men and lesbians might do well to focus more than they have previously on specific forms of copulation. Both Janet Halley and Pat Cain urge a renewed attention to the details of the sodomy statutes, the former to remind us of the specific conduct they prohibit, the latter to distinguish the myriad forms of gay and lesbian sexuality that the statutes do not traditionally encompass.

¹⁶⁴ *Ratchford v. Gay Lib*, 434 U.S. 1080, 1084 (1977) (Rehnquist, J., dissenting), denying cert. to *Gay Lib*, 558 F.2d 848; see also *Gay Activists Alliance*, 638 P.2d at 1126 (Barnes, J., dissenting) (quoting Rehnquist’s opinion on this point).

¹⁶⁵ *Ratchford*, 434 U.S. at 1083.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1084.

¹⁶⁸ Among other differences, Cain’s is chiefly a litigation strategy, while it seems that Halley’s is focused on political and legislative activity.

Professor Halley wishes to explore the political possibility of "alliances along a register of acts"¹⁶⁹ by working both to dissolve the illusory identity between sodomy and the homosexual and to "exploit[] and . . . undermine[heterosexual identity] from within."¹⁷⁰ She extends a word of caution both to those whose oral and anal sex is exclusively heterosexual (and is, as such, still proscribed by sodomy laws in over a dozen states)¹⁷¹ and to those who see any same-sex erotic contact as "evict[ing its participants] from the class of heterosexuals" and defining them "necessarily and unproblematically [as] homosexuals."¹⁷² Her goal is an "alliance of sodomites" focused on acts, not identities.¹⁷³

While Professor Halley wishes to stress the similarities between homosexual and other forms of sodomy, Professor Cain wishes to stress the differences between the homosexual sodomy whose criminalization was authorized in *Hardwick* and all other homosexual conduct, sexual and nonsexual.¹⁷⁴ She wishes, in effect, to limit the *Hardwick* holding to its particular facts.¹⁷⁵ Cain urges those who litigate on behalf of gay men and lesbians to focus the court's attention on the details of the conduct their clients have engaged in. First, she claims, a focus on "proven rather than presumed conduct" would help prevent courts from inferring "conduct . . . from the mere fact of

¹⁶⁹ Halley, *supra* note 143, at 1722. Or, as Michael Hardwick put it, "All you gotta do . . . is make 'em realize it affects them, too. Then most heterosexuals are 100 percent behind you. Most people don't understand what sodomy is. They think it's some crazy, unnatural act." By explaining to his married heterosexual business associate in graphic terms what sodomy is, Hardwick gets the man to realize that sodomy is what he does with his wife. Art Harris, *supra* note 39, at C1.

¹⁷⁰ Halley, *supra* note 143, at 1722.

¹⁷¹ For a useful overview in the form of a map of the United States with symbols indicating the activities each one proscribes, see *The Geography of Desire, Details*, June 1993, at 26-27. For a more scholarly, although somewhat dated rendition of some of this information, complete with statutory citations, see *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1519-21 (1989).

¹⁷² Halley, *supra* note 143, at 1738.

¹⁷³ *Id.* at 1771. The T-shirt marketed by the University of Virginia Gay and Lesbian Law Students Association might be a good symbol of this alliance. The shirt bears the legend "FELON" in bold black letters on the front and on the back the text of the Virginia sodomy law, which criminalizes both homosexual and heterosexual oral and anal sex. The shirt is in great demand among heterosexuals of my acquaintance, including two who requested it as a wedding present.

¹⁷⁴ See Cain, *supra* note 1, at 1624-27, 1633-36.

¹⁷⁵ *Id.* at 1635.

status.”¹⁷⁶ Second, she insists that “[w]hen sexual conduct is at issue, gay rights litigators need to be explicit about what the conduct is” so as to distinguish it from the sodomy at issue in *Hardwick*.¹⁷⁷ To the extent that Cain is urging a focus on acts that are not, by any stretch of the imagination, sex acts, I have no quarrel with her project.¹⁷⁸

The objection I do have to both Halley’s and Cain’s suggestion that gay rights advocates focus on the details of sexual activity is a practical one—I simply do not think either proposal will work to achieve the desired ends.¹⁷⁹ It seems from an examination of the litigation history that the closer the issue gets to the gay couple copulating, the more problematic it is for courts and legislators. Opening the door,

¹⁷⁶ Id. at 1627.

¹⁷⁷ Id. at 1633-34.

¹⁷⁸ I agree, for example, that Shahar should stress that she is not being penalized for sexual conduct, but for “her religious celebration of a personal relationship.” Id. at 1638. I also endorse Cain’s general emphasis on continuing to make substantive due process as well as equal protection arguments. My concern is that, whatever the constitutional rubric under which it is introduced, detailed discussion of sexual practices will not advance the cause of gays and lesbians in the courts. Whatever its limits as a slogan for the military, “Don’t ask, don’t tell” may remain a sensible approach to the discussion of sex acts in litigation.

¹⁷⁹ Both proposals may have limited usefulness in appropriate cases, however. Consider, for example, the recent, widely publicized Virginia decision transferring custody of a young boy from his lesbian mother, Sharon Bottoms, to his maternal grandmother. Of the numerous reasons reported for depriving the mother of custody, one is vulnerable to a one-two punch from Cain and Halley. Judge Buford M. Parsons, Jr., apparently ruled that, because the mother and her lover had admitted engaging in oral sex, they were acknowledged felons under the laws of Virginia. See B. Drmmmond Ayres, Jr., “Judge’s Decision in Custody Case Raises Concerns,” N.Y. Times, Sept. 9, 1993, at A9. Virginia does make oral sex a felony, but regardless of the gender or even the marital status of the participants. See VA. Code Ann. § 18.2-361 (Michie Supp. 1993). On its face, Virginia law condemns oral sex between married couples equally with same-sex activity. *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.) (upholding sodomy prosecution for consensual oral sex between husband and wife, albeit in presence of third party and recorded in photographs that fell into the hands of the wife’s minor children), cert. denied, 429 U.S. 977 (1976). Moreover, Virginia law requires penetration for oral sex to be a crime; in the case of cunnilingus this has been held to mean penetration of the vagina by the tongue. See *Ryan v. Commonwealth*, 247 S.E.2d 698 (1978). In line with Cain’s suggestion, an even more detailed examination of Bottoms’s sexual practices might well have revealed that they were not felonious after all—not all oral sex is sodomy. Furthermore, as Halley would remind us, the judge’s holding, by its terms, endangers the parental rights of most Virginians: if violation of the sodomy law makes one an unfit parent, few heterosexuals are immune. Nevertheless, these combined strategies would not have changed the result for Sharon Bottoms. Judge Parsons additionally listed a number of independent grounds for his decision, among them that homosexuality is “immoral” and that the child would suffer from gender confusion. Drmmmond, *supra*, at A9.

not merely of the closet but also of the bedroom, does not dissipate but rather intensifies the problem.

To focus, as Cain would wish, on the details of sexual conduct for the purpose of showing that none of a particular litigant's sexual conduct violates the relevant sodomy law seems to me to miss the point.¹⁸⁰ Such a focus would address neither what the proponents of gay rights want nor what their opponents fear.¹⁸¹ Both proponents and opponents are generally concerned with a broad spectrum of same-sex eroticism. Opponents rarely limit their discomfort or their objections to the four corners of a sodomy statute and it is unlikely that they would be satiated by a pledge on the part of all homosexuals to abide by the laws now on the books. And although some gay men or lesbians might be prepared to take such a pledge in order to keep their jobs,¹⁸² I doubt that any would find this a satisfactory solution. What proponents wish to claim on behalf of gay men and lesbians is exactly what would make opponents uncomfortable—the freedom to express same-sex desires. So, while Cain's technical dodge may save one or two individuals from losing their jobs, it may do more harm than good to her cause in the long term.

The best way I can think of to prove this point will require some fairly graphic discussion of sexual practices. I propose to provide a taxonomy of sexual practices centered on the sodomy laws and to examine both Cain's and Halley's proposal in light of this taxonomy. I will then test their suggestions against some of the recent history of the regulation of same-sex copulation. If some readers find parts of this discussion offensive, I may, unfortunately, have doubly proven my point—it is simply not a good strategy for advocates of gay and

¹⁸⁰ Unless, of course, the litigant is only in court on a charge of sodomy.

¹⁸¹ It is, in this respect, analogous to proposing the following solution to the abortion problem: If abortion is intolerable because it kills the fetus, and if our law imposes only a duty not to kill rather than a duty to rescue, then let us outlaw only methods of abortion, such as D & C, that necessarily destroy the fetus; mandate instead that the fetus be removed very carefully and made available to a right-to-life advocate, who may take whatever steps possible to keep it alive. If the fetus, because it is not yet viable, nevertheless dies, it will no longer be a murder victim, but rather one of countless who die for want of adequate nutrition and medical attention. This is a technical dodge that provides little meaningful recognition to either the right to life or reproductive freedom. Like Cain's proposal with respect to gay sex, it is likely to satisfy no one. Cf. Polikoff, *supra* note 34, at 1541-43 (noting how abortion rights advocates can be imprisoned by the limits of their rhetoric).

¹⁸² This is apparently the premise on which the Clinton Administration military policy on gays, if taken at face value, is based.

lesbian rights to push the legal discourse about sexual orientation far in the direction of explicit consideration of the details of copulation. What shocks the legal academy is unlikely to find favor with courts and legislatures.¹⁸³

Taking the sodomy laws as our organizing principle, we can divide the universe of same-sex copulation into three categories. The first is conduct specifically proscribed by such statutes, today typically¹⁸⁴ contact (often requiring penetration) between the sex organs of one person and the mouth or anus of another (i.e., oral and anal intercourse). The second is conduct that, although not generally proscribed by such statutes, would probably be looked upon by anyone favoring the criminalization of homosexual acts as at least as troubling, revolting, or worthy of condemnation as traditional sodomy.¹⁸⁵ Included in this category might be, for example, fisting,¹⁸⁶ penetration with other objects, anilingus, and sadomasochism. The failure of some states with sodomy statutes to criminalize these sorts of activities seems to reflect lack of legislative imagination¹⁸⁷ more than lack of legislative will or a perceived limitation on legislative power.¹⁸⁸

¹⁸³ When I delivered this paper at the symposium, it seemed that some in the audience heard only one word in the entire discussion—"fistfucking." Others were made uncomfortable even by the use of such words as "penis." One can scarcely expect greater broadmindedness from the average judge, juror, or legislator than from those who choose to attend a symposium on "Sexual Orientation and the Law."

¹⁸⁴ While sodomy is "an utterly confused category," delving into that confusion is well beyond the scope of this paper. Suffice it to say that, while I am aware of the diversity of ways sodomy has been and continues to be defined, it seems unnecessary to rehearse them here. For insight into the problem of defining sodomy, see Halley, *supra* note 143, at 1760-67.

¹⁸⁵ Cf. Gayle S. Rubin, *Thinking Sex*, in *The Lesbian and Gay Studies Reader*, 3, 19 ("Some of the most detested erotic behaviors . . . are not as closely or completely regulated by the criminal justice system as somewhat less stigmatized practices Areas of sexual behavior come under the purview of the law when they become objects of social concern and political uproar.").

¹⁸⁶ The insertion of the hand of one person into the anus or vagina of another.

¹⁸⁷ Thus, for example, legend has it that Queen Victoria insisted that prohibitions on lesbian sex be stricken from a draft statute because she could not imagine that women could do such things. An alternate explanation for the failure of some jurisdictions to criminalize is an unwillingness to stimulate the imagination of those regulated; the argument appears to be that describing what is to be prohibited will only give people ideas about sexual practices they might never have dreamed up on their own. Other jurisdictions, have, however, criminalized some of the practices listed here. See, e.g., the discussion of the Texas statute, which, for example, criminalized penetration with objects, *infra* text accompanying notes 217-18.

¹⁸⁸ There are many possible explanations as to why certain sex acts, but not others, have been criminalized. For example, it may be that the more closely same-sex behavior is seen to "parody" behaviors at the core of conventional heterosexuality, the more readily it will be

The third category comprises conduct that, while perhaps disturbing to opponents of homosexuality, would generally be considered, even by them, to be "milder" than sodomy. This category includes everything from mutual masturbation to kissing and handholding; there is greater room in this category for uncertainty as to both the will and the power to regulate.¹⁸⁹

Using this rubric, what must the litigational and sexual situation of litigants be for them to benefit from Cain's suggestion that they focus on proven sexual conduct and seek to distinguish it from sodomy? The details of the sodomy statutes have varying potential relevance to different sorts of litigants.¹⁹⁰ Consider three prototypical government employees: a back office clerk, a high school teacher, and an assistant attorney general. The clerk can most readily argue that there is no nexus between the job and private consensual sex acts, whatever they may be and whatever relation they may have to proscribed sodomy;¹⁹¹ s/he does not need Cain's strategy. The precise contours of the law are similarly of minor importance in the school teacher's case: because the employer will likely be able to claim that the moral standards required of a role model for youth go beyond those set by the criminal law, Cain's strategy will not suffice. Only with law enforcement personnel is it plausible for the issue to be, not the relevance of homosexual conduct generally, but the relationship of that conduct to criminal sodomy.

If there is a paradigm case for Cain's strategy, it would thus seem to be that of someone in Robin Shaliar's litigational posture. Shaliar is a

punished. This approach would help account for both the strong hostile reaction to gay marriage and the widespread criminalization of anal intercourse.

¹⁸⁹ Some practices are somewhat more difficult to classify under this schema. What of tribadism (technically, the rubbing of one set of female genitals against another), condemned for centuries, but now legal almost everywhere in the United States? Consider cunnilingus—over time, some jurisdictions have classified all contact between the mouth and the female sex organs as sodomy, others have required the penetration of the vagina by the tongue. Still others, by requiring the participation of a penis for sodomy, have excluded all lesbian sex from the category. For a discussion of the legal treatment of specific lesbian sex acts, see generally Ruthann Robson, *Crimes of Lesbian Sex*, in *Lesbian (Out)Law* 47-59 (1992).

¹⁹⁰ A particular sexual orientation might be dangerous in one profession and irrelevant to another. Necrophilism . . . might be objectionable in a funeral director or embalmer, urolagnia in a laboratory technician, . . . or dendrophilia in an arborist, yet none of these unusual tastes would seem to warrant disciplinary action against a geologist or a shorthand reporter.

Morrison v. State Bd. of Educ., 461 P.2d 375, 385 n.21 (Cal. 1969).

¹⁹¹ See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

litigant in a civil case, not a criminal prosecution for same-sex copulation. She resides in a state with a sodomy statute,¹⁹² indeed the very statute upheld in *Hardwick*. Although there is no direct evidence that her sexual activities fell afoul of this statute, they were directly put at issue when her prospective employer conflated her same-sex marriage with sodomitical sex. Expert testimony on sexual practices might cure Bowers of his misconception that all lesbian sex is sodomy.¹⁹³ In addition, it might be of some advantage to Shahar if she could show, not only that she did not violate the sodomy law, but that all of her sexual conduct was appreciably "milder" than sodomy: perhaps Bowers would be mollified if Shahar and her partner confined themselves to hugging and kissing.¹⁹⁴ The couple could then seek to assimilate themselves to the previously respectable and desexualized category of female romantic friendships represented by "Boston marriage."¹⁹⁵

But what if the sexual activities of a litigant like Shahar fell instead on what Dan Ortiz has called "the far side of sodomy"?¹⁹⁶ Would either an employer or a court be favorably impressed by the explanation that she had never violated the sodomy laws because she confined herself to acts generally deemed kinkier still than sodomy?¹⁹⁷ What difference would it make whether her avoidance of illegal acts was the coincidental result of her personal sexual tastes or stemmed instead from a scrupulous desire to abide by the law?

Limiting *Hardwick* to its particular facts works only if one can articulate a reason why the particular sex act at issue should be accorded different treatment from that given acts covered by the Georgia sodomy law.¹⁹⁸ I see no reason to think that this can be done

¹⁹² Those in states that do not criminalize homosexual sodomy need, at most, only discuss the specifics of their sexual conduct to the extent necessary to show that it violates no other laws, e.g., those concerning sex performed in public. They can argue about the implications that should be drawn from the decision not to criminalize any private consensual same-sex behavior without bringing in the specifics of their own conduct.

¹⁹³ See *supra* text accompanying notes 65-66 for his assumption that the two are identical.

¹⁹⁴ Of course, Bowers could still argue "bad tendency," as he did with respect to Shahar's nonsexual coupling activity (i.e., her marriage).

¹⁹⁵ See *supra* note 74 and accompanying text.

¹⁹⁶ University of Virginia Law Professor Dan Ortiz has used this phrase in discussions.

¹⁹⁷ In other words, those acts listed *supra* in category two.

¹⁹⁸ Note that the Supreme Court in *Hardwick* already ignores the distinction between sodomy as most traditionally defined (i.e., anal intercourse) and the oral sex with which *Hardwick* was charged. As critics have noted, the long historical record of criminalization on which Justice White relied applied only to anal sex. See Anne B. Goldstein, History,

effectively with respect to those acts on the "far side of sodomy" in category two.¹⁹⁹

Even with respect to same-sex acts considered "milder" than traditional sodomy, Cain's strategy of limiting *Hardwick* has so far failed to carry the day in court. Shortly after *Hardwick*, the Missouri Supreme Court heard a challenge to that portion of its sodomy statute criminalizing "any sexual act involving the genitals of one person and the . . . hand . . . of another."²⁰⁰ The defendant had been charged with attempting to violate this statute because he "touched Det. Steven Zielinski's genitalia *through his clothing* and such conduct was a substantial step toward the commission of the crime of sexual misconduct with Det. Zielinski."²⁰¹ This would seem an excellent test case for Cain's theory, involving as it does the sort of conduct not traditionally encompassed by sodomy and clearly not construed as unimaginable or worse.²⁰² Her approach, however, was accepted by only one dissenter.²⁰³ The majority disposes of this argument as well as a wide variety of other arguments made by the ACLU as, for example, "ludicrous" and "without merit."²⁰⁴ The court reads as *Hardwick*'s holding that the Constitution does not confer upon consenting

Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*, 97 Yale L.J. 1073, 1085-86 (1988).

¹⁹⁹ An unstated assumption of Cain's proposal may therefore be that she sees only the first and third of my categories of same-sex acts: sodomy in her conceptual scheme may mark the outer boundary of the proscribable. Anything worse is unimaginable; anything not proscribed is more defensible in the eyes of the legal system.

²⁰⁰ Mo. Ann. Stat. § 566.010 (Vernon 1993).

²⁰¹ State v. Walsh, 713 S.W.2d 508, 509 (Mo. 1986) (emphasis added).

²⁰² Missouri is quite unusual in criminalizing this sort of contact when consensual. Unfortunately for Halley's alliance of sodomites, it only does so when the hand and the genitals belong to two persons of the same sex. See also Robson, *supra* note 189, at 53 ("Among the broadest of these statutes are ones that clearly target same-sex activities. For example, Montana's criminalization of 'deviate sexual intercourse' includes 'any touching of the sexual or other intimate parts of another [of the same sex] for the purposes of arousing or gratifying the sexual desire of either party.'").

²⁰³ Walsh, 713 S.W.2d at 514 (Blackmar, J., dissenting). Like Cain, Judge Blackmar argued that the statute went

beyond the limits of state power in defining "deviate sexual intercourse" as involving the hand. This is not the offense of sodomy as discussed in [*Hardwick*] and it has no long history of legal sanction such as seemed very important to Justice White in that case. [*Hardwick*] . . . holds that [the] right of privacy does not extend to offenses traditionally punished as sodomy. Its rationale is absent here.

Id. (citations omitted) (Blackmar, J., dissenting).

²⁰⁴ *Id.* at 511.

homosexuals a fundamental right to engage in *sodomy*.²⁰⁵ It readily concludes from this "that there is no fundamental right under the United States Constitution to engage in private consensual *homosexual activity*."²⁰⁶ Both Cain and Halley may well criticize this leap of logic, but it seems their criticisms will have little success as a litigation strategy. Aside from the lone dissenter in Missouri, the only other judge Cain cites in support of her approach is the reversed district court judge in *High Tech Gays*.²⁰⁷

Ordinarily, the fact that a new strategy has not yet worked is no particularly good reason to stop trying it. But the limited likelihood of success must be weighed together with the substantial costs and risks of Cain's proposal. The first cost is political—the proposal may fracture the gay community into "sodomites" and "nonsodomites." Gay and lesbian advocates have vehemently resisted other opportunities to divide the community into more and less acceptable subgroups so as to benefit the more mainstream while further excluding the rest.²⁰⁸ These advocates should find this potential division just as troubling, particularly given the comparatively limited number of people unequivocally in the "nonsodomite" category.

The second cost is more personal, to be borne by the individual litigants—the details of whose sex lives will now be paraded before the courts and their employers. Try as she might, Cain cannot limit her proposal to carefully chosen plaintiffs, with mild sexual tastes and the willingness to talk about them. Nor can an individual litigant easily control the contours of the discussion. If "[p]laintiffs like Padula . . . testify in detail about what it means to be a 'practicing homosexual' "

²⁰⁵ *Hardwick*, 478 U.S. at 192.

²⁰⁶ *Walsh*, 713 S.W.2d at 511 (emphasis added). Moreover, the majority opinion in *Hardwick* itself says that "homosexual activity" generally, rather than just sodomy in particular, has no connection to the values protected in earlier privacy cases. *Hardwick*, 478 U.S. at 191.

²⁰⁷ *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp 1366, 1370-72 (N.D. Cal. 1987), rev'd, 895 F.2d 563 (9th cir. 1990); see Cain, *supra* note 1, at 1635. The *High Tech Gays* appeals court used reasoning similar to that of the Missouri Supreme Court in *Walsh*. See 895 F.2d at 571.

²⁰⁸ See, e.g., Ettelbrick, *supra* note 32, at 403 (opposing gay marriage because, *inter alia*, it would divide the community into married insiders and unmarried outsiders who "would clearly face increased sexual oppression.").

and no longer avoid a “focus on sex”²⁰⁹ they may open the door²¹⁰ to explicit questioning as to what they do in bed. Either the specifics of sexual practices are relevant or they are not, both within a case and within a line of cases. I do not want to give employers in the future any excuse to pry further into the sexual practices of applicants and employees. And, whether courts respond with prurient fascination or revulsion to the sexual practices litigants testify about, I rarely see such testimony benefitting a litigant.

This brings me to the third category of risk, which is that the legal system’s “negative judgment against all things homosexual”²¹¹ will only be intensified the more it is forced to confront the details of gay sex—the system is squeamish enough about sex and homosexuality taken separately. Combined and made more vivid, the two will likely provoke a worse reaction than they already do separated and sanitized.

Halley’s proposal presents fewer risks than Cain’s, but its usefulness may have similar limitations. As with Cain’s proposal, the potential for Halley’s alliance seems strongest the “milder” the sex acts in question are by conventional standards. Moreover, it, too, would divide the gay community, this time along an even more controversial axis—the alliance would benefit those whose sexual activity most closely resembles that of the majority of heterosexuals and exclude those most different from heterosexuals in their practices.²¹² Even a limited alliance, however, depends on a perception on the part of heterosexuals that there is a fundamental identity or similarity between acts they perform and those performed by homosexuals. From a purely physical standpoint, there can be no dispute about this—mouths and penises, for example, fit together in exactly the

²⁰⁹ Cain, *supra* note 1, at 1639.

²¹⁰ I use this phrase as a litigator would, to refer to the opening up of a subject area by a line of questioning.

²¹¹ Cain, *supra* note 1, at 1592.

²¹² The alliance seems limited to the first category of activity, proscribed sodomy, which for Halley’s purposes should probably be further divided into oral and anal sodomy because it seems that such an alliance is likely to coalesce only around practices that a critical mass of heterosexuals engages in. Survey data on sexual practices may well be unreliable, especially tending to understate the frequency with which respondents engage in practices they have reason to believe carry social stigma, but they generally indicate that although the vast majority of practicing heterosexuals engage in oral sex, only a minority practice anal sex. It therefore seems the only potentially effective “alliance of sodomites” Halley can hope to put together is one of practitioners of oral sex.

same way regardless of the sex of the person whose mouth is involved; so do mouths and clitorises, vulva or vaginas. There seems nothing gender-specific about a mouth. Although the drafters of the original sodomy laws—which generally criminalized acts irrespective of the gender of the participants—may well have believed in an identity of acts, this view is far from prevalent today. The sex of a person into whose mouth a penis is inserted makes all the difference, not only in the laws of several states, but, from all indications, in the minds of the inhabitants.²¹³ Consider the hostile reaction to much milder displays of same-sex affection—for example, kissing and hand holding—neither of which differs physically depending on the sexes of the participants. There can be little question that in much of our society such public displays of affection are tolerated if performed by heterosexual couples but remain taboo for those of the same sex.

Perhaps the broadest definition of proscribed homosexual activity is, not surprisingly, that set forth in Army regulations governing discharge for homosexuality. According to the Army, “A homosexual act means bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.”²¹⁴ As Judge William A. Norris points out in his *Watkins*²¹⁵ concurrence:

[T]he regulations . . . cover any form of bodily contact between persons of the same sex that gives sexual satisfaction—from oral and anal intercourse to holding hands, kissing, caressing and any number of

²¹³ Given this hostility, it is unclear of what strategic benefit an alliance of sodomites would be to practioners of heterosexual sodomy. As a matter of principle they may agree that all sodomites should be treated equally; as a matter of strategy, however, it seems clear that they are more likely to succeed with their own decriminalizing agenda when not saddled with the baggage of same-sex sodomy. See *infra* text accompanying note 218 for a discussion of legislation in Texas.

²¹⁴ Army Reg. 635-200, ch.15-3 (1990). In 1989, at the time *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990) was decided, the Army regulations further provided that any soldier who “engages in, desires to engage in, or intends to engage in” such an act is defined as “a homosexual” and anyone who “has stated he or she is a homosexual” shall be separated from the service, as shall anyone who “has engaged in, attempted to engage in, or solicited another to engage in a homosexual act” who cannot demonstrate that such behavior is aberrational. Army Reg. 635-200 ch. 15-2 to 15-3 (1981).

Much has been made of the aspects of these regulations that penalize homosexual status rather than homosexual conduct. For present purposes, however, I am chiefly interested in how the Army has chosen to define the homosexual conduct it is prepared to penalize.

²¹⁵ 875 F.2d 699.

other sexual acts. Indeed, in this case the Army tried to prove at Watkins' discharge proceedings that he had committed a homosexual act described as squeezing the knee of a male soldier, but failed to prove it was Watkins who did the alleged knee-squeezing.²¹⁶

If statutes prohibiting simply "the abominable and detestable crime against nature" withstood a vagueness challenge, what hope would there be for striking down on such grounds a criminal law patterned on the Army's regulations?

The history of state sodomy regulation provides little hope to Halley or Cain. Consider, for example, the recent history of the Texas sodomy law, as set forth by the district court in *Baker v. Wade*.²¹⁷ The statute originally prohibited both homo- and heterosexual acts; it was then amended to prohibit only homosexual acts and then further amended to prohibit an even broader variety of homosexual acts.²¹⁸ Two things are significant about the pattern of the Texas legislation. First, it appears that the legislature is prepared to broaden the statutory prohibition as it becomes aware of sexual practices not previously covered. Hence, the failure to criminalize certain acts may indicate not legislative tolerance for these acts but rather the absence of legislative imagination. This would, it seems, further, limit the usefulness of Cain's proposal.

Second, and most damningly for Halley's proposed "alliance of sodomites," liberalization of laws concerning heterosexual sodomy not only does not correspond to a more liberal attitude toward homosexual sodomy, it may not even be the first step in that direction. For it was in 1981, seven years after heterosexual sodomy was legalized, that the legislature expanded the definition of homosexual sodomy.²¹⁹

²¹⁶ Id. at 714-15 (Norris, J., concurring).

²¹⁷ 553 F. Supp. 1121 (N.D.Tex. 1982), rev'd, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986).

²¹⁸ See generally id. at 1148-53 (giving a history of the evolution of the Texas sodomy statute). By a 1974 amendment, "Article 524 (Sodomy) was replaced with § 21.06 (Homosexual Conduct), which condemned only oral or anal sex between consenting adults of the same sex." Id. at 1150. The scanty legislative history indicates that a subcommittee "did seriously consider the decriminalization of the private homosexual acts of consenting adults, but . . . fear[ed] a backlash effect against the entire Penal Code should such acts be decriminalized." Id. at 1151.

²¹⁹ Those who see gay identity as determined by the breaking of heterosexual law rather than same sex desire, see Calhoun, *supra* note 83, actually see some advantages in this further criminalization of the homosexual "other." Of course, such persons must generally find themselves in some tension with advocates for gay and lesbian civil rights, because, in a sense,

From the perspective of gay rights litigators, this pattern may have a happy ending, however. The legislative move sharply to divide heterosexual and homosexual sex, fully accepting the former while further criminalizing the latter, may have been the direct cause of the demise of the Texas sodomy law. In a recent decision currently on appeal in the Supreme Court of Texas, an intermediate appellate court struck down the law on state constitutional grounds.²²⁰ Its analysis is an intriguing combination of substantive due process and equal protection; while it strikes the law down on privacy grounds alone,²²¹ the court is clearly influenced by the discriminatory treatment given homosexual sex acts.²²² It concludes:

If consenting adults have a privacy right to engage in sexual behavior, then it cannot be constitutional, absent a compelling state objective, to prohibit lesbians and gay men from engaging in the same conduct in which heterosexuals may legally engage. In short, the State cannot make the same conduct criminal when done by one, and innocent when done by the other.²²³

In striking down its state's sodomy law a year ago, the Kentucky Supreme Court made its reliance on state equal protection as well as privacy guarantees more explicit. Consistent with my analysis of the privacy decisions, it faulted the statute, *inter alia*, for failing to take into account that the act was "private and involves a caring relationship, rather than a commercial one."²²⁴ The court held:

Certainly, the practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized The issue here is not whether

a successful campaign for legal and social acceptance of gays and lesbians, an end to their outsider/lawbreaker status, would mean, for models such as Calhoun's, an apocalyptic end to gay identity.

²²⁰ *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992) (involving a declaratory judgment challenge brought by three lesbians and two gay men).

²²¹ "[W]e can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." *Id.* at 204.

²²² The Texas House responded by introducing legislation recriminalizing both heterosexual and homosexual acts and the Senate sought to repeal the homosexual sodomy provisions, but, in the end, the legislature opted to maintain the status quo. Ross Ramsey, Committee Compromises on State Sodomy Law, *Hous. Chron.*, May 25, 1993, at A1.

²²³ *Morales*, 826 S.W.2d at 204. The court notes that one of the compelling interests the state might have advanced, prevention of sexually transmitted diseases, would apply just as well to heterosexual sex acts. *Id.* at 205.

²²⁴ *Commonwealth v. Wasson*, 842 S.W.2d 487, 488 (Ky. 1992).

sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference. . . . The question is whether a society that no longer criminalizes adultery, fornication or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexuals for different treatment. . . . If there is a rational basis for different treatment, it has yet to be demonstrated in this case. We need not sympathize, agree with, or even understand the sexual preferences of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.²²⁵

Somewhat paradoxically, therefore, one successful strategy against the sodomy laws may not be an alliance of sodomites in the political arena, but something close to its opposite—a disaggregation of same-sex and heterosexual acts in the legislative mind followed by a court challenge to this discriminatory treatment. It is judges, rather than the mass of heterosexual sodomites,²²⁶ who may be most effectively convinced that the gender of the participants should not affect the legal treatment of sex acts.²²⁷

CONCLUSION

Having begun by noting the comparative absence of the gay couple from public sphere litigation about the rights of gays and lesbians, I might be expected to end by recommending a greater presence for it in these sorts of cases. For several reasons, I will not do this. First, couples and coupling should not, in my view, be deemed relevant to many public sphere questions—the strongest case most gay public employees can make, for example, is simply that their coupling has nothing to do with their job performance. Second, as I have discussed extensively above, coupling presents a double bind for gay and lesbian

²²⁵ Id. at 499-501.

²²⁶ As Halley points out, however, where legislative repeal has occurred recently, it has been of gender-neutral sodomy laws. See Halley, *supra* note 143, at 1775.

²²⁷ Consistent with the notion that same-sex pair bonding is viewed as more threatening than same-sex copulation, the courts' willingness to find a legal equivalence between heterosexual and homosexual activity has been far stronger with respect to gay sex than gay marriage. Equal protection challenges to marriage statutes have generally fared less well than those to sodomy statutes. Whether this trend will continue depends on the outcome of the *Morales* sodomy appeal and the Hawaii marriage remand. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding for determination if compelling state interest supports ban on same-sex marriage).

litigants. Because couples tend to be sexualized and because consideration of sex, as I have argued, troubles courts, it may only be in sodomy cases, where sex is necessarily already an issue, that a greater focus on pair-bonding clearly has benefits that outweigh the risks. Most importantly, the recommendation of a litigation strategy in particular cases or in the broad spectrum of gay rights litigation is way beyond the scope of this paper. My objective was instead simply to see what insights might result if one approached the public sphere litigation history using the rubric of the couple.

One of these insights may be a new appreciation of the military regulations on homosexuality, which may help explain their continued vigor. These much criticized regulations may have this much to be said for them—more explicitly and completely than any other statute, policy, or judicial opinion, they spell out exactly what it is that gays and lesbians do that has most troubled society and the legal system. The military identifies as troubling all recurring forms of same-sex sexual gratification, public statements of homosexual identity²²⁸ and attempts to claim the privilege of marriage. An examination of history shows that, in legal opposition to gay and lesbian rights generally, just as in the military regulations, what are traditionally the highest and lowest forms of coupling—discrete acts of copulation and marriage—are singled out for sanction.

As our society struggles with the treatment it is prepared to accord gay men and lesbians, it must come to terms with precisely those elements of homosexual behavior identified by the military regulations, in particular with the gay couple in all its forms.

²²⁸ See Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695 (1993).