Our Straight-Laced Judges: Twenty Years Later

Rhonda R. Rivera
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by
RHONDA R. RIVERA*

I am both surprised and thrilled to write the preface to the reprinting of my article "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States." This article was originally printed in 1979 and is now being reprinted for the 50th Anniversary of the Hastings Law Journal. I understand that my article was chosen for this issue because the article received the fifth-highest number of citations of all the articles that Hastings has ever printed. The very nice young man who first contacted me for this project told me that Hastings would like an "updating" of my article, due one month from his call. This request was so astounding that I summarily said "I can not do that!" and hung up. Later, upon

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*Visiting Professor, The University of Arizona, James E. Rogers Law College of the Law, Professor emeritus (The Ohio State University). Professor Rivera wishes to thank Elizabeth Townsend Gard, Ph.D., Law II, for her excellent research for this article. In addition, Professor Rivera thanks the University of Arizona for four and a half wonderful years of teaching. This article is dedicated to Kitty Lowe MacSorley Rieley, the author's mother, who died in 1998. Kitty always supported her daughter, even though she regarded being gay as "socially inconvenient!"

1. The oft-used rule of legal writing that one should NEVER use the word “I” creates a lot of passive sentences and is silly!


3. The article has 93 cites in Shepard's and 43 cites in the Social Sciences Citation Index.


5. The article is 156 pages in length and has 938 footnotes and covers a span of years from to 1905 to 1979. The article took me four years to research and a whole summer, seven days a week from 7 a.m. to 5 p.m., to draft.

[1179]
reflection, I decided that communications were crossed. I called the
editor-in-chief, who assured me that Hastings did not want me to
update the article in a one-month period. Rather, what Hastings
wanted was (1) the story of how the article came to be written, (2)
what the reaction was to the article that I knew of, and (3) what were
my observations and reflections on what has happened to gay and
lesbian law in those twenty years, 1979-1999. I agreed to do the
preface.

**How the Article Came to Be Or How Not to Get Tenure**

For a very short time in my life, I was the Assistant Dean at the
During that period, the Gay Academic Union (GAU) chose Ann
Arbor for its annual meeting. The committee members for the
meeting decided that a workshop should be created on "Gay
Employment Issues." I was told that the committee searched both
Ann Arbor and Detroit for a lawyer who would speak on gay
employment issues. The committee asked lawyers who, in particular,
were associated with the American Civil Liberties Union (ACLU),
the National Lawyer's Guild (NLG), or who were union lawyers. No
lawyer would do the workshop! All of these organizations are now
very committed to the rights of lesbians and gay men, but, in the 70's,
members of these organizations often reflected the same attitudes as
the rest of America. I had recently helped a number of students start
the Feminist Law Clinic (FLC) at University of Michigan. One of
those students knew someone in GAU and volunteered me to do the
workshop. When asked, I said I would try but that I knew nothing
about the subject. I asked the students, who were members of the
FLC, to help me with the research. What the students found both
astonished and angered me. Literally, the subject of the legal position

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6. The school may deny this statement. I was told when I left Michigan that, while I
had done a very good job as Dean, I was just too student-oriented. Many thought that
when I became a law professor I would lose this immature attitude. 'Fraid not: here at
Arizona, I remain as committed to students as ever. At Arizona, one is rewarded for such
an attitude.

7. I was honored in 1983 by the Gay Academic Union for the Hastings article with
the Evelyn Hooker Award. The Gay Academic Union, also known as the Lesbian and
Gay Academic Union, is a national and local activist organization which began in the
1970s and which still exists on some campuses.

8. Yes, feminists existed in those days. No, the law school did not pay me for this
endeavor. However, in 1975, Ann Arbor N.O.W. gave me my favorite award: "Uppity
Woman of the Year."
of gay men and lesbians was virtually unaddressed in legal literature except for a plethora of articles on sodomy and solicitation. The pervasive effect of the civil law on the lives of gay men and lesbians in America was almost totally ignored. In fact, the legal indices did not have a subject title for homosexuality except under criminal matters. Yet, I knew from my own knowledge, gained mostly from reading gay and lesbian newspapers, that the civil law affected gay men and lesbians in many ways. The law determined whether they could keep custody of their biological children. The law determined their fate in their employment if they were “out” or were “outed.” The law determined if their wills leaving property to a life-partner would be successfully contested. The law determined if a gay teacher could keep his or her credential, etc.

I prepared for the GAU workshop, as best I could, and it went remarkably well. However, I was still appalled that no one had addressed the broad issue of the effect of the civil law on the lives of gay men and lesbians. I was ranting about this subject to a lesbian friend, and she said, “well, if no one else is doing it, you must!”

9. One exception was a very prescient article by Irving Kovarsky entitled Fair Employment for the Homosexual, 1971 WASH. U. L.Q. 527 (1971). Later, when I actually did the research myself, I found a number of interesting articles written in the 60's. See, e.g., Comment, Government-Created Employment Disabilities of the Homosexual, 82 HARV. L. REV. 1738 (1969); Note, Homosexuals in the Military, 37 FORDHAM L. REV. 465 (1969); Ralph Slovenko, Sexual Deviation: Response to an Adaptational Crisis, 40 U. COLO. L. REV. 222 (1968). Moreover, if computer-assisted research had existed then, I suspect that I would have discovered more articles and more cases.

10. See Rivera, supra note 2, Part X, at 883-904; Rivera, Developments, supra note 4, Part III-C, at 327-36; Rivera, Queer Law II, Part III-C and Part III-D, supra note 4, at 327-98. See also Rivera, Legal Issues in Gay and Lesbian Parenting, in GAY AND LESBIAN PARENTS 199-227 (Frederick W. Bozett ed., 1987) [hereinafter Rivera, Legal Issues].

11. In those days, persons were often outed by inference or accident; few gay persons engaged in personal self-disclosure for obvious reasons. The first case where I knew of a person who voluntarily disclosed their sexual orientation was in the case of Leonard Matlovich, the member of the U.S. Air Force who wrote to the Secretary of the Air Force and “outed” himself to test the law then applicable. See Matlovich v. Secretary of the Air Force, 414 F. Supp. 690 (D.D.C. 1976), vacated, 591 F. 2d 852 (D.C. Cir. 1978). I must admit that living in the mid-west, I was less aware of these issues than someone who lived on either coast. For a discussion on employment discrimination, see “Employment and Related Occupational Discrimination” in Rivera, supra note 2, at 805-74. See also Rivera, Developments, supra note 4, Part II, at 312-24 (covering 1979-1981); “Employment and Related Occupational Discrimination” in Rivera, Queer Law I, supra note 4, at 464-536.

12. See Rivera, supra note 2, Part XI, at 904-08.

13. For teaching in public schools, see id. at 860-74. See also Rivera, Developments, supra note 4, at 319 (covering the years 1979-1981, in which Rivera reported “[n]o published decisions affecting state employees or teachers have occurred in the two-year period under consideration. . .”); Rivera, Queer Law I, supra note 4, at 514-35 (discussing issues in teaching).
first, I was taken aback; I was not a legal scholar. However, I decided that I should at least try. I started gathering materials from many sources.

In 1976, I became an Assistant Professor at The Ohio State University Law School (OSU). I taught Contracts and the Uniform Commercial Code (UCC), both of which I loved. However, I continued gathering materials about gay men and lesbians and the civil law. As a new law professor, I knew that I had to write. Professor Douglass Whaley, my mentor at OSU, told me to pick a narrow topic in the UCC and write about it for my first piece, then go on and do something more ambitious. At his suggestion, I chose UCC section 2-105, mainly because no one else had ever addressed it. I began desultory work on the UCC article, but, truthfully, the subject never engaged me. I kept doing research on gay and lesbian issues. Sometime in the fall of 1978, someone from the Hastings Law Journal called me and asked if I would do the lead article in a symposium on homosexuality and the law. To this day, I do not know who gave Hastings my name. I said "yes." I finished the research in early 1979 (the research was never really finished; I just stopped for a while). I spent the summer of 1979 drafting and editing the article. Until I started writing, I did not realize what I had promised to do. I labored through the summer, every day, and wrote the article and all the 938 footnotes personally. When the draft was ready at the end of the summer, I sent it off to Hastings.

Suddenly, I realized that the only article I had for my promotion to Associate Professor and my application for tenure was the Hastings article. The UCC article was not done. Since then, I have been told how brave I was to submit the Hastings article for my tenure piece. I must admit of no courage; I had no other choice.

14. James W. Shocknessy Professor of Law, Ohio State University of Law. Professor Whaley was a wonderful mentor. I later co-authored a textbook with him, entitled PROBLEMS AND MATERIALS IN SALES, published by Little Brown in 1983.
15. UCC section 2-105 is the section in the Uniform Commercial Code that defines "goods."
16. With good reason. The section and its consequences were incredibly boring, and the substance would not fill many pages.
18. For the problems involved in researching gay and lesbian legal issues, see Rivera, supra note 2, at 807 and Rivera, Queer Law I, supra note 4, at 461 n.7.
19. Thank goodness the Hastings folks blue-booked for me, or I might still be writing.
20. In addition, I was incredibly naive about law schools and law school politics.
Shortly after I submitted the article, my assigned Hastings editor called me. After various pleasantries, the editor told me that I had to revise the article substantially. He said that I had to cut out all the facts about the gay litigants; nobody was interested in their lives prior to the case at hand. Secondly, he told me that I had to cut out all the quotes from judges, which admittedly were many. "Just make the article like Prosser," he said. I had spent a lot of time and energy getting the facts behind the cases; I was very discouraged. I told the editor that the reason for all the personal facts about the litigants was to illustrate the injustice perpetrated on them. All the judicial quotes were to illustrate the prejudice of the judges. This editor was unconvinced. I thought about this demand over the weekend and decided I could not do what was demanded. I called on Monday and told the editor that I would not make those kinds of changes; if Hastings insisted, I would withdraw the article. (Was I nuts? What would my tenure be based on?) The editor was shaken. (After all, my article was the lead article of the symposium.) Shortly thereafter, the Editor-in-Chief called. I explained my reasons to him. Luckily for me, he understood my reasons. He gave me a new editor who did the hard edit that the article certainly needed. Publication was just around the corner when another editor called me about the title. This editor wanted to change the title of the article. He wanted to strike "Our Straight-Laced Judges" and leave only "The Legal Position of Homosexual Persons in the United States." By then, I was bold. "No," I said. He acquiesced graciously but said that a spelling mistake existed in the title, namely, that "Straight" should be "Strait." I refused the well-meant, but innocent, suggestion.

21. I do not like the word "homophobia." Webster's dictionary does not have a definition for homophobia. See WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, (2d ed. 1979)[hereinafter WEBSTER'S NEW TWENTIETH]; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, (2d ed. 1993) [hereinafter WEBSTER'S THIRD]. However, the American Heritage dictionary defines homophobia as "a fear of homosexuals." AMERICAN HERITAGE DICTIONARY 619 (2d ed. 1991). The reasons for prejudice against gay men and lesbians seems to me to be more complex than just fear.

22. That editor, Lynn Loacker, graduated from Hastings in 1979 and is now in private practice in Seattle, Washington. I have always been grateful to Ms. Loacker for her fine job.

23. Dear reader, if you cannot figure out the pun, try a dictionary. The 1979 Webster's dictionary defined "strait" as narrow, close, not broad, tight, confined, close, intimate, strict, rigorous, exacting. See WEBSTER'S NEW TWENTIETH, supra note 21, at 1798. In contrast, "straight" was defined as "having the same direction throughout its length; having no curvature or angularity; not crooked, bent bowed, wavy, curly, etc." Id. at 1797. Note: the 1993 Webster's definition of "straight" has changed slightly to "without deviation, delay or other interruption." WEBSTER'S THIRD, supra note 21, at 2254.
The article was published. I received tenure.\textsuperscript{24} I was then relatively safe in my position, an openly gay tenured law professor.\textsuperscript{25} In 1980-1981, I wrote a short update of the article in the \textit{Drake Law Review}, entitled "Recent Developments in Sexual Preference Law."\textsuperscript{26} In 1985 and 1986, I wrote more comprehensive updates for the \textit{Dayton Law Review}, entitled "Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I and Part II."\textsuperscript{27}

\textbf{Reactions to the Article Or How I Became the "Mother" of Sexual Orientation Law}\textsuperscript{28}

Although the article was supposed to be so ground-breaking, I personally received very little direct comment on it for many, many years. I think that, in the early 1980's, most people were terrified to talk about the issue. My colleague, Professor Larry Herman,\textsuperscript{29} did remark that I should have published each section separately, and then I would have had ten lines in the \textit{Legal Index of Periodicals}, not just one. Other people, much more scholarly than I, began to write in the field, and most, but not all, cited to my article as the foundation from which they proceeded. My two favorite citations are found in (1) Bill Rubenstei\textsuperscript{n’s} preface to his casebook where he describes how he educated himself about gay law: "In the succeeding semesters, I slowly pieced together a self-education, relying primarily on Rhonda Rivera’s remarkable series of queer law articles,"\textsuperscript{30} and in (2) the index to Richard Mohr’s book on gay philosophy: "General trends in gay law are best tracked through the field-establishing works of Rhonda R. Rivera . . . ."\textsuperscript{31}

\textsuperscript{24} An altogether different war story!

\textsuperscript{25} I tried to make the most of this bully pulpit for the next 20 years. Yet another story!

\textsuperscript{26} See generally Rivera, Developments, supra note 4.

\textsuperscript{27} See generally Rivera, Queer Law I, supra note 4; Rivera, Queer Law II, supra note 4.

\textsuperscript{28} Art Leonard, of course, is the father. The conception, obviously, was asexual! Professor Arthur Leonard is one of the very first and very finest scholars in the field of Sexual Orientation Law. He and I founded the Gay and Lesbian Legal Issues Section (GLLIS) of the American Association of Law Schools (AALS). Professor Leonard is well known for his \textit{Gay and Lesbian Law Notes}, a monthly publication that discusses current cases and other legal events with regard to gay and lesbian persons. Professor Leonard is at New York Law School.

\textsuperscript{29} President’s Club Professor of Law at Ohio State, now Professor emeritus.

\textsuperscript{30} \textsc{William B. Rubenstein, Cases and Materials on Sexual Orientation and the Law} (2d ed. 1997).

\textsuperscript{31} \textsc{Richard D. Mohr, Gays/Justice: A Study of Ethics, Society, and Law} 339 (1988).
Today, the articles about gay men and lesbians and the civil law are numerous and on subjects that I would never have conceived in my wildest imagination in 1979.32

I did receive, starting in 1979, some requests to speak at various conferences, such as Women and the Law. I was not invited to speak at an AALS meeting on this subject until the late 80's.33

The commentary that I have held most dear are the remarks that have come from former law students, both lawyers and law professors, all younger than I. Many of them have come to me and thanked me for writing the article and saving their sanity. They said that, when they were in law school, they were not “out” and were terrified. They said that they knew nothing of the law about lesbians and gay men and that their teachers certainly never included such material in their courses. These folks looked up “homosexuality” secretly and spent many a night reading the article with the Hastings cover hidden behind some hornbook cover (perhaps, even Prosser!). From the article, they knew they were not alone, and they knew that other persons such as themselves had succeeded.

These accolades were all I ever needed, and I treasure them today. I look at the article now and can see its mistakes and rough spots. Once, I went back to a section that dealt with “due process” and thought I had mistakenly failed to include the three levels of due process analysis. Then I realized that those levels had not yet come into common usage.

While I did do three updates of the article, I did not complete the last update. AIDS hit our community, and I wrote in that area for quite some time.34 By the time that I had the time to update the article, many other articles had been published in the area, and frankly, I could add nothing different or new, in my estimation. I was also older and more tired. I think that by now I am the “grandmother” of sexual orientation law.

The parts of the articles of which I am most proud are the

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32. Most of these articles have in their titles the words “paradigm,” “deconstruction,” “alterity,” “otherness,” “queering,” or “essentialism.”

33. As I remember, I was asked by the section on Property Law to be on a panel about wills to discuss the issues facing gay men and lesbians in this area.

sections on the use of language. I have waged a never-ending battle to have the word "homosexual," a pseudo-medical term, used only as an adjective and never as a noun. ("He is a homosexual soldier," not "he is a homosexual.") The use of “homosexual” as a noun eroticizes and, in a sense, trivializes a gay person’s life. In fact, I try not to use the word at all and now use “same-sex” in its place. I realized that “sexual preference” was misleading as a term and changed to “sexual orientation.” I tried to push “life-partner” rather than “lover,” but I think that “domestic partner” is more common and probably just as accurate. I find using “gay men and lesbians” in my articles refreshing and pleasing. In my last two updates for Dayton, I insisted on calling the area “Queer Law,” hardly original or radical now.

Another favorite of mine is to refer to persons who identify as heterosexual as “non-gays.” Non-gay people should not be made one-dimensional any more than gay people. Interestingly, when I used this phrase in a speech, one person said that the term was demeaning to persons who identify as heterosexuals. Moreover, the term, she said, was so negative! I said, “yes?”

Every author wants to be cited by the Supreme Court. The Supreme Court did cite to the whole symposium once but not to my article specifically. However, the information cited did, in likelihood, come from my section of the symposium. The case in question, Rowland v. Mad River Local School District, Montgomery County, Ohio, involved a denial of certiorari with a strong dissent by Brennan and Marshall. So while the case turned out badly from a gay rights point of view, the symposium did get cited in the Brennan and Marshall dissent. Personally, I consider the citation an honor!

**Reflections on the Legal Position of Gay Men and Lesbians in the United States in 1999**

Both persons from Hastings asked me to describe the “progress” that gay men and lesbians have made in the United States in terms of their legal status. Both times, I said that I was not sure exactly what “progress” had occurred. Both were taken aback, as if the “progress”

35. See Rivera, supra note 2, at 800-04. See also Rivera, Queer Law I, supra note 4, at 463-64.
36. I absolutely REFUSE to enter the fray between the essentialists and the social constructionists.
37. I was pleased when I read the flyleaf of Betty DeGeneres’ book about her daughter to see that she used the word “non-gay.”
38. 470 U.S. 1009, 1015 n.9 (1985) (concluding that the free speech rights of the teacher were not violated when the teacher was fired for disclosing her orientation).
were self-evident. I am not so sure. I think the glass may be half empty, rather than half full. You decide.\textsuperscript{39}

Let's start with criminal law. Although my articles did not deal, at length, with criminal law, most of the areas of the law that I discussed were seriously affected by the sodomy laws. While, in the past, gay men probably have been affected by the criminal law more often than have lesbians,\textsuperscript{40} the criminalization of gay and lesbian behavior\textsuperscript{41} affects all gay people, even today. Lesbians and gay men still lose custody of their children because they are considered immoral because the law makes their behavior criminal. One of the rationales for the current military policy, besides the "morale" issue, is that gay men and lesbians might be considered potential criminals in some states and overseas.

In 1979, the only Supreme Court case on the books dealing with the constitutionality of sodomy laws was \textit{Doe v. the Commonwealth of Virginia}.\textsuperscript{42} In \textit{Doe}, a three-judge federal panel upheld the Virginia sodomy law against a constitutional attack based on the right to privacy. The Supreme Court denied certiorari. However, even after \textit{Doe}, legal analysts could legitimately state that, for various reasons, the final answer on sodomy was not in. However, in 1986, the Supreme Court decided \textit{Bowers v. Hardwick},\textsuperscript{43} and the final answer was in. The Court held that "homosexuals" had no right to privacy under the Constitution and that states could legitimately make sodomy criminal.\textsuperscript{44} \textit{Bowers} is still good law. In 1979, 29 states made sodomy a crime,\textsuperscript{45} but today only 17 states still do.\textsuperscript{46} Five of those

\textsuperscript{39.} I will discuss only in a cursory and summary manner the following areas: Criminal Law, Employment, Military, and Custody. I am going to provide one broad footnote for each area and only provide individual case names when absolutely necessary. Otherwise, I might get to 938 footnotes again!

\textsuperscript{40.} For an example of lesbians caught by the snares of the criminal law, see \textit{People v. Livermore}, 155 N. W. 2d 711 (Mich. App. 1967)(police officers received a complaint about the activity of two women in a tent in a campground. The officers listened outside the tent and decided that unlawful activity was occurring. The women were arrested and convicted of a felony—gross indecency between women.).

\textsuperscript{41.} One of my favorite cases is a Georgia case where the court held that women can not commit sodomy. \textit{See Thompson v. Aldredge}, 200 S.E. 799 (Ga. 1939). Subsequently, Georgia changed the definitions under its sodomy laws to make sure women could commit sodomy. The Georgia law that covered both same-sex and different-sex sodomy was upheld as to same sex couples in \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986).


\textsuperscript{44.} \textit{Id.} at 196.

\textsuperscript{45.} \textit{See} Rivera, \textit{supra} note 2, at 951 n.a.
seventeen states intentionally criminalize solely same-sex sodomy. However, under Bowers, every state could re-criminalize same-sex sodomy without violating the Constitution. Thus, gay men and lesbians live at the whim of state legislators!

Some legal analysts argue that Romer v. Evans portends a change with regard to the sodomy laws; however, others say Evans will not inevitably lead to such a result. In 1992, Colorado citizens passed an amendment to the Colorado Constitution banning any state action to prohibit discrimination against gay men and lesbians. Four

46. The twelve states that criminalize both different-sex and same-sex sodomy are Alabama, Arizona, Florida, Idaho, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, South Carolina, Utah and Virginia. See Lambda Legal Defense and Education Fund Inc., February 19, 1999 Pamphlet, Sodomy Law State-by-State Status Report [hereinafter Lambda Pamphlet]. The Lambda pamphlet did not include Georgia. O.C.G. Section 16-6-2 (1999) still criminalizes sodomy in Georgia. However, in Powell v. Georgia, the Georgia Supreme Court held that 16-6-2, “insofar as it criminalizes the performance of private, un-forced, noncommercial acts of sexual intimacy between persons legally able to consent,” violates the right of privacy found in the Georgia Constitution. 510 S.E. 2d 18, 26 (Ga. 1998).

47. The five states that criminalize only same-sex sodomy are Arkansas, Kansas, Missouri, Oklahoma, and Texas. See Lambda Pamphlet, supra note 46. Not to be outdone, the Missouri State House of Representatives proposed bill 850/851 to expand the definitions of sexual offenses, making same-sex sexual activity a crime. The bill allows a person to be convicted of “forcible sodomy, statutory sodomy, deviate sexual misconduct, and sexual misconduct in the first degree if there is a sexual act involving the genitals of a person and the hand of another person.” H.B. 850 & 851, 90th Gen. Ass’y., 1st Reg. Sess. (Mo. 1999)(emphasis added). Currently, persons can only be convicted of these crimes if the sexual act involves the genitals of one person and the mouth, tongue, or anus of another person. This proposed addition to the Missouri statue, making mutual masturbation a crime, appears to make sure that no same-sex sexual behavior escapes the clutches of the law.

48. Given the quality of most state legislators, the thought is terrifying!


50. Amendment 2 repealed by state-wide referendum the anti-discrimination ordinances that prohibited discrimination on the basis of sexual orientation. Various municipalities in Colorado had enacted such ordinances. Justice Kennedy, writing for the court in Romer v. Evans, explained:

[Y]et Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the state of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce 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
years later, in *Evans*, the U.S. Supreme Court found the amendment unconstitutional. The basis for the decision was the due process clause, rather than the right to privacy. The Court said that it was applying "rational basis" scrutiny rather than "strict scrutiny," the highest test used only for cases involving fundamental rights or suspect classes. In effect, the Court found that the Colorado Amendment was irrational because the only reason for its enactment was "animus" against a disfavored class of persons. Many criticized the Court for insufficient analysis to justify its conclusion. I would argue that in its collective (majority) gut, the Court knew such an amendment was wrong in our democracy and that if the Court allowed the amendment to be upheld, two classes of citizens would automatically be created under the Constitution.

However, *Evans* was undercut by what the Supreme Court did shortly thereafter. The citizens of the City of Cincinnati passed an Amendment to the City Charter very similar to Colorado's Amendment 2, popularly referred to as Issue 3. The federal district
court found the amendment constitutionally insufficient.\textsuperscript{54} The Sixth Circuit, however, upheld the amendment.\textsuperscript{55} This case was also granted certiorari by the Supreme Court.\textsuperscript{56} After Evans, the Supreme Court sent the case back to the Sixth Circuit for reconsideration in light of that decision. The Sixth Circuit framed the issue anew with Evans in mind and, using dubious logic, came to the same conclusion, namely, the Amendment was constitutional.\textsuperscript{57} When this decision was appealed, the Supreme Court denied certiorari.\textsuperscript{58}

What was this denial supposed to mean? States cannot pass laws solely based on animus,\textsuperscript{59} but cities can? Was the Supreme Court resorting to its former days of not taking gay cases unless absolutely forced to? Who knows? In a sense, we are back where we were when the Court denied certiorari in Doe.\textsuperscript{60} For many years after Doe, legal experts argued the effect of the denial of certiorari on the status of sodomy. Now, the effect of the Cincinnati case on Evans is unclear and subject to various interpretations. Is the constitutional glass half empty or half full?

One of the most precious rights any person can have is the right to employment based on merit and not based on immutable personal characteristics. Employment puts food on the table and a roof over one’s head. “Coming out” as a political act fades into insignificance when one can not find a home or a job. The right to employment has

relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. \ldots

\textit{Id.} at 422 (providing a full text of Issue 3).

\textsuperscript{54} See Equality Found. v. City of Cincinnati, 860 F. Supp. 1235 (S.D. Ohio 1994). The trial court held Issue 3 violated plaintiff’s First Amendment rights to free speech and association as well as plaintiff’s right to petition the government for redress of grievances. Moreover, the trial court found Issue 3 unconstitutionally vague. See \textit{id.} at 449.

\textsuperscript{55} Judgment reversed and vacated by \textit{Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati}, 54 F.3d 261 (6th Cir. 1995).


\textsuperscript{57} Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).


\textsuperscript{59} \textit{Trust me, this charter amendment was based on “animus.”} I participated in the fight at the polls and had a very minor role in the litigation that followed the passage of Issue 3. The proponents of Issue 3 used the exact same language that was used in Colorado, calling protection from discrimination for gay men and lesbians, “special rights.” See Rhonda R. Rivera, \textit{Where are We? Anti-Gay-Lesbian-Bisexual Ballot Attacks Today}, 55 OHIO ST. L.J. 555 (1994). My article was again the introductory article to a symposium.

\textsuperscript{60} Doe v. Commonwealth’s Attorney, 425 U.S. 985 (1976).
important national economic implications. If people are chosen for jobs based on factors other than merit, then the best-suited persons are not doing the job, and the result would be damage to our free enterprise system. Congress has protected the jobs of black persons and other racial minorities, women, the handicapped, the aged, and persons of various ethnic heritages against invidious discrimination in private sector employment on the basis of this economic reasoning. Sexual orientation is not among the protected classes. Since Title VII was enacted, gay men and lesbians have sought protection under the law on the basis that the prohibition against "sex" discrimination included a prohibition against discrimination on the basis of sexual orientation. However, courts routinely deny such protection and state that Title VII does not extend its protections to gay men and lesbians. Nationally, the private sector can legitimately discriminate against persons on the basis of their sexual orientation. Therefore, gay employees live at the whim of their private employers.

However, since I wrote in 1979, eleven states and numerous cities, counties, and other political bodies have enacted prohibitions against sexual orientation discrimination. Technically, gay men and


62. See Smith v. Liberty Mutual Insurance Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975) (holding Title VII did not forbid discrimination based on "affectional or sexual preference, of the applicant, despite the fact that the plaintiff was not characterized as a homosexual person but as "effeminate"); Voyales v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 456 (N.D. Cal. 1975) (holding Title VII does not protect the employment rights of transsexuals, and, in dicta, broadening that lack of protection to cover homosexuals and bisexuals as well). See DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) (holding that Title VII applied only to discrimination on basis of gender and not sexual preference); Macauley v. Massachusetts Commission Against Discrimination, 397 N.E.2d 670, 671-71 (Mass. 1979)(refusing to extend term "sex" in Title VII to cover sexual preferences). See also Rivera, Queer Laws I, supra note 4, at 465 for more discussion on gay men and lesbians' unsuccessful attempts to bring sexual orientation under the ambit of Title VII, including discussion of Valdes v. Lumbermen's Mutual Casualty Co., 507 F. Supp. 10, 13 (S.D. Fla. 1980) (holding that a female employee would be entitled to Title VII relief if she could show that an employer's policy against employing gay persons was not applied uniformly); and Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (holding that the discharge of a male employee for rejecting advances allegedly made by his male supervisor constituted a violation of Title VII). Wright was essentially a same-sex sexual harassment case, a bit before its time. The Supreme Court has just ruled on this issue in Oncale v. Sundowner Offshore Services, Incorporated, 118 S. Ct. 998, 1001 (1998). In an opinion by Justice Scalia (of all people!), expressing the unanimous view of the court, the court held that workplace sexual harassment is actionable as sex discrimination under Title VII, even where the harasser and the harassed employee are of the same sex.

63. According to the Human Rights Campaign, as of December 2, 1998, eleven states,
lesbians are protected in these jurisdictions. Unfortunately, many of these laws, particularly in cities and other local jurisdictions, do not have significant penalties attached to them and thus are, I suspect, violated with impunity. In addition, the enforcement mechanisms of local governments, as opposed to state governments, are usually weak.

However, in some respects, much has changed in the corporate sector. Corporations have learned that gay persons make good employees, and numerous corporations have policies that prohibit discrimination on the basis of sexual orientation. However, when gay litigants have taken these same corporations to court for failure to follow their own policies, the courts have found, for various reasons, that the policies can not be legally enforced. In that sense, the policies in the private sector are public relations pieces rather than legal protections. Except in eleven states, gay employees still work at the whim of their employers.

What of the public sector? The federal government was one of the biggest offenders in the area of discrimination on the basis of sexual orientation. Until the early 60's, few dismissed employees even challenged these actions. In 1969, in the case of Norton v. Macy, the D.C. Circuit finally recognized the due process rights of gay men and lesbians who were federal employees. The court held such persons could not be fired without (1) a hearing and (2) a rational basis for the action; this latter requirement is called a "rational nexus" test. Supplying a rational basis for firing gay employees proved very difficult in most civilian government jobs, and the amount of discrimination declined. The Carter Administration in 1979 changed the civil service rules to give gay men and lesbians more protection. Not until the current Clinton Administration has any administration openly hired gay men and lesbians.


64. See Joachim v. AT&T Information Systems, 793 F.2d 113, 114 (5th Cir. 1986) (per curiam)(holding employee handbook did not create any contractual relation, even when company handbook prohibited discrimination based on sexual preference).

65. See Rivera, supra note 2, at 813-25; Rivera, Developments, supra note 4, at 317-19; Rivera, Queer Laws I, supra note 4, at 483-86.

66. 417 F.2d 1161, 163-64 (D.C. Cir. 1969).

67. For example, in 1993, the Clinton White House nominated my old friend Roberta Achtenberg to be Assistant Secretary for Fair Housing and Equal Opportunity at the Department of Housing and Urban Development. She became the highest-ranking openly gay public official in the country. See Clinton Names SF Lesbian as Fair Housing
Now, every department of the federal government has issued an executive order prohibiting employment discrimination based on sexual orientation. Finally, in 1998, the President issued an executive order covering the entire federal government, except the military, of course. Executive orders are not laws. The general understanding is that an executive order can be rescinded by the next executive. So, while welcome, the actions of the current administration are not as protective as would be a law enacted by Congress. So is the glass

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69. On December 30, 1983, Governor Richard Celeste, a liberal Democrat, signed Executive Order No. 83-64. This Order prohibited discrimination in state employment against certain enumerated classes, including gay men and lesbians. This Executive Order had no “sunset” provision. Governor Celeste signed this Order to fulfill a campaign pledge made to this author and other Ohio gay rights leaders. Governor Celeste was succeeded by Governor George Voinovich, a Republican. On December 31, 1998, at the end of his term, Governor Voinovich issued Executive Order No. 98-42v that sunset all the executive orders of previous governors, with the exception of sixteen orders. Among the orders “sunset” was Celeste’s order prohibiting discrimination on the basis of sexual orientation. In addition, this action meant that Ohio had no Equal Employment Opportunity Executive Order at all. Governor Voinovich was succeeded by Governor Taft, another Republican. On June 22, 1999, in answer to a request of the Ohio Department of Administrative Services, Taft issued Executive Order 99-18T. This Order prohibited discrimination in state employment in vague and general terms. No protected classes were enumerated. On August 16, 1999, Governor Taft, in response to criticism, issued Order 99-25T to supplant No. 99-18T. This Order again prohibited discrimination in state employment; however, it made reference only to federal and state protected classifications. Thus, the prohibition against discriminating on the basis of sexual orientation was gone! Letter from Elliot T. Fishman, Esq., former Counsel to the Ohio Department of Administrative Services under Governor Celeste (September 17, 1999) (on file with author).

70. Steven A. Holmes, The Nation; Civil Rights Dance Lesson: The Tiny Step Forward, N.Y. TIMES, September 15, 1996, § 4, at 5, Col. 1. After the approval by the Senate of the United States of the Defense of Marriage Act, a bill was introduced that would prohibit discrimination in employment on the basis of sexual orientation. That bill was defeated by one vote.

The Defense of Marriage Act (DOMA) “was approved by a lopsided 85-14 vote amid strident calls for lawmakers to defend the sanctity of heterosexual marriage.” Id. President Clinton signed DOMA into law on September 21, 1996. In H.R. Rep. No. 104-664, at 2, the purposes of DOMA were said to be two in number: “First to defend the institution of traditional heterosexual marriage. The second is to protect the rights of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses. See id. at 2. “To achieve these purposes” section two provides that no State shall be required to accord full faith and credit to a marriage license issued by another state if it relates to a relationship between persons of the same sex.” Id. Section three “defines the terms
half empty or half full?

A third major area of legal importance for gay men and lesbians is child-rearing. Gay people want the right to keep their biological children when they divorce, want the right to adopt, and want the right to be foster parents. Gay young men even want to be Boy Scouts and Boy Scout leaders. All these rights are problematic and hardly secure.

Some of the first cases where the issue of "homosexuality" was raised were the custody cases. Gay men or lesbians married people of the opposite sex and, subsequently, recognized their sexual orientation. A divorce soon followed. In the days of these early cases, the 70's and early 80's, a general presumption existed in favor of the mother as custodian and in favor of fathers receiving liberal visitation rights. These presumptions did not hold when one of the parents was gay. In the early days, most, if not all courts, considered homosexuality per se a reason to deny custody and, in some cases, even to deny visitation. Usually, mothers and fathers were denied ordinary parental rights for a variety of stated reasons: (1) contact with the gay parent would turn the child gay; (2) all gay persons were "child molesters" and would abuse their own children; (3) gay persons were per se immoral and, therefore, custody or visitation was not in the "best interest of the child"; and (4) the child or children would

'marriage' and 'spouse' for the purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex. See id. Section two certainly confronts the full faith and credit section of the Constitution and will most likely encounter a constitutional challenge. Section three is less benign because by defining "spouse" for the first time by federal law, the section has serious, adverse consequences for federal employees seeking partnership benefits. For a more flexible view of same-sex marriage, see David Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Male Couples, 95 Mich L. Rev. 447 (1996).

71. See footnote 10 for citations on Rivera's articles on "custody."

72. See Dale v. Boy Scouts of America, 706 A.2d 270, 289 (N. J. Super. Ct. App. Div. 1998) (declaring BSA a public accommodation that did not fall within exception in Law Against Discrimination. The court concluded: "[t]here is absolutely no evidence before us, empirical or otherwise, supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or to impart BSA humanitarian ideals to the young boys in his charge. Nothing before us even suggests that a male, simply because he is gay, will somehow undermine BSA's fundamental beliefs and teachings. Plaintiff's exemplary journey through the BSA ranks is testament enough that these stereotypical notions about homosexuals must be rejected."). But see, Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218, 220 (Cal. 1998) (holding that the Boy Scouts were not a business establishment subject to the anti-discrimination requirements of the Unruh Civil Rights Act and, therefore, the Boy Scouts can deny membership to gay male scouts).
suffer in society because of the stigma of having a gay parent. These cases illustrate my main premise about the law and gay persons: mention the word "queer," and all legal bets are off! 

Slowly, the courts on either coast began to change as they understood that these reasons were either erroneous or irrelevant. The standard came to be that the "homosexuality" of the parent was a relevant factor, as were numerous other factors; however, "homosexuality" per se did not automatically bar the parent from custody or visitation. Evidence had to show that the sexual orientation of the parent had a direct adverse effect on the child or children. However, while some courts became more rational about such cases, limitations were still imposed in gay cases that were never imposed in non-gay cases. For example, the lesbian mother received custody of her child if, and only if, she would make her life-partner move out of the house. Gay fathers could only visit without their life-partners and, if the visitation involved an "overnight," the gay father had to ask his life-partner to leave their home. Thus, "you can have your child if you give up your relationship." Such a result, arguably, was not conducive to a stable home life, nor in the best interests of the child. If the parent then dated, he or she was likely to be accused of "promiscuity." Of course, since gay folks could not marry their life-partners, many courts justified their actions on the basis that the parent was involved in a meretricious relationship, resulting in a classic "Catch 22" situation. Now, courts on both coasts seldom impose such limitations.

However, the courts in the middle of the country, except in highly urban areas, have been loath to follow such changes. In many central states, gay custody issues are still problematic; moreover, the states are highly idiosyncratic in their approaches. Missouri, in particular, has been singularly homophobic and just plain mean-spirited. Within the last year, the first, but small, victory for a gay

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73. For a discussion of these four factors, see Rivera, Legal Issues, supra note 10, at 199-227.
74. Previously rational people lose it!
76. I have always liked the following definition of promiscuity: a person is promiscuous if he or she is getting more than the speaker.
77. See, e.g., J.P. v. P.W., 772 S.W.2d 786 (Mo. App. S.D., 1989). This was a custody case where the court wrote:
[a]ctually, given its concern for perpetuating the values associated with
parent occurred in Missouri when an appellate court overruled a restriction on visitation.\textsuperscript{78} This case is, unfortunately, still the exception that proves the rule.

In many states, gay men and lesbians still are not treated fairly in the domestic relations courts. Even if the state has “good” appellate law on the issue, few people have the money, time, or energy to appeal. Moreover, in trial courts, judges who discriminate against gay parents and who do not wish to be overruled have learned to claim that the “homosexuality” of the parent was not the real reason for the denial of custody or visitation; the real reason was the gay parent was not, in some way, an adequate parent. I remember one Ohio case where the kids were seen outside during cold weather without their coats, and this fact was said to illustrate the inadequacy of the lesbian mother.\textsuperscript{79}

Looking at custody nationally, gay parents, at least in the “heartland,” are still fighting old incorrect stereotypes and losing their children through the actions of prejudiced judges. In addition, gay attempts to adopt children, either singly or jointly, are still anathema to many judges. One of the current big issues is whether the non-biological parent (i.e., the parent’s life partner) can, in essence, do a step-parent adoption.\textsuperscript{80} In a sense, gay people are back

\begin{quote}
conventional marriage and the family as the basic unit of society, the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles.
\end{quote}

\textit{Id.} at 792 (quoting \textit{Roberts v. Roberts}, 489 N.E.2d 1067, 1070 (1985)). Note the reference to the \textit{Roberts} case from Ohio. The result in \textit{Roberts} shows what happens when the gay parent hires a lawyer, unfamiliar with sexual orientation law, who introduces absolutely no favorable evidence.

\textsuperscript{78} J.A.D. v. F.I.D. III, and Guardian Ad Litem, 978 S.W. 2d 336, 339 (MO. 1998). In this case, the court made this statement: “A homosexual parent is not \textit{ipso facto} unfit for custody of his or her child, and no reported Missouri case has held otherwise. It is not error, however, to consider the impact of homosexual or heterosexual misconduct upon the children in making a custody determination.” Notice the word “misconduct.” What is heterosexual misconduct? Is all homosexual conduct “misconduct?” Missouri does criminalize sodomy. The results of the case are hardly dramatic; the non-gay father kept the custody awarded by the trial court, and the mother’s visitation limits were remanded. The appellate court said that only persons whose presence and conduct may (emphasis added) be contrary to the best interests of the children could be forbidden to see the children.

\textsuperscript{79} If every parent whose children ran outside without their coats were denied custody . . . ! \textit{See} Towend v. Towend, No. 635 (Ohio Ct. App. September 30, 1976) (unpublished opinion).

\textsuperscript{80} \textit{See, e.g.}, Matter of Adoption of: T. K. J. and K.A.K., 931 P.2d 488, 490-91(Colo. App., 1996) (rehearing and certiorari denied) (affirming lower court’s denial of lesbian
to square one on this issue, with only two states apparently permitting such an adoption. Thus, in many states, the battle has shifted dramatically from the right to keep one's own children to the right to so-called step-parent adoptions. So, is the custody glass half empty or half full?

Many other legal issues exist that affect gay men and lesbians. I will, however, in this preface, only touch on one more subject area: gay folks in the military. The military has always discriminated de facto against gay persons. The biggest purge began at the end of WWII when the war was won and when gays could be safely expended. The military used certain newly-written regulations, turning the discrimination into a de jure action. These regulations were challenged, starting with Leonard Matlovich. When the military realized that the regulations contained loopholes, the regulations were tightened under Reagan to make sure that all gay people were excluded. Such a policy not only got gay folks out of the army but also attacked military women, who were often considered lesbians because they would not sleep with their male colleagues. Some of the discharges were especially ludicrous. A high-ranking naval officer directed that all lesbians in his area be discovered and discharged. He instructed the other officers on how to find the “lesbians”: look for women who are “career-oriented, willing to put in long hours on the job and among the command’s top professionals.”

In 1994, President Clinton ineptly tried to keep his political promise to the gay community. He had promised that he was going to permit gay folks in the military. A firestorm arose; he backed down, presaging his handling of many issues to follow. The result was that

partners’ petitions to adopt each other’s natural children); In Interest of Angel Lace M., 516 N.W.2d 678, 686-87 (Wis., Jun 08, 1994) (denying adoption by biological mother’s partner).

81. See, e.g., Matter of Adoption of Two Children by H. N. R., 666 A.2d 535 (N.J. Sup. Ct. 1995) (reversing, remanding to the trial court, and holding that the children could be adopted by their biological mother's partner without terminating their mother's parental rights because the partner’s adoption of the children was in the children’s best interest).

82. For more on the military see Rivera, supra note 2, at 837-55; Rivera, supra note 4, at 319-24, and Rivera, Queer Law II, supra note 2, at 287-324.


prior regulations were now changed and, for the first time, the policy was enacted by Congress. The new policy called “Don’t Ask: Don’t Tell” was established. The policy was painted by the White House as a protection for gay persons in the military. The result has been the opposite. A new and more efficient purge has been undertaken, and, under the new policy, more gay people have been discharged than under prior policies. The new policy is based on the presumption that non-gay soldiers and sailors are prejudiced against gay persons and that the non-gay people, therefore, will have a “morale” decline and “unit cohesion” would be lost if openly gay persons are allowed to join the military. So gay men and women must lie to be in the military. In other words, the policy enacts discrimination. Of course, under the Evans case, “mere animus” can not be a reason for governmental action. However, the Constitution apparently has two standards: one for citizens who are civilians and one for citizens who are in the military. The Court has essentially held that the military is a “separate society” and, as such, is entitled to special deference. This glass is definitely still empty!

I portray what may seem to some a discouraging situation. Actually, I think that is the wrong conclusion. The “right” solution is not to be complacent or naive. Many gay men and lesbians are unconcerned about their legal status until the law directly affects them. However, as illustrated, much is left for the members of the gay community to achieve. Remember, “when you wake up in bed with a person of the same sex, you are now in politics.”

87. Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (1994). So far, this policy has been upheld by the federal appellate courts. See Able v. United States, 155 F.3d 628, 636 (2nd Cir. 1998), where the court wrote: “We conclude that under rational basis review section 654 does not violate the Equal Protection Clause of the Constitution.”

88. See Steven Lee Myers, Gay Group’s Study Finds Military Harassment Rising, N. Y. TIMES, March 15, 1999, at A14 (“In January, the Pentagon reported that the Army, Navy, Air Force and Marine Corps discharged 1,145 gay men and lesbians in the 1998 fiscal year, a 13 percent increase from the year before and nearly double the number in 1993, the year before the policy took effect.”). See also Steven Lee Myers, Despite ‘Don’t Ask’ Policy, Gay Ousters Rose in ’98, January 13, 1999, N. Y. TIMES, at A15.


90. See Romer v. Evans, 517 U.S. at 632.


92. For a great article on litigation strategy, see Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45, 45 (1996).