UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES OBERGEFELL, et al.	:	**Civil Action No. 1:13-cv-501**
Plaintiffs,	:	
	:	**Judge Timothy S. Black**
v.	:	
	:	
THEODORE E. WYMYSLO, et. al.,	:	**EXPERT DECLARATION OF**
	:	**GEORGE CHAUNCEY IN SUPPORT**
Defendants.	:	**OF PLAINTIFFS' MOTION FOR**
	:	**DECLRATORY JUDGMENT AND**
	:	**PERMENANT INJUNCTION**

I, George Chauncey, hereby declare and state as follows:

Expert Background and Qualifications

1. I am the Samuel Knight Professor of History and American Studies and past Chair of the Department of History at Yale University, where I have taught since 2006. My testimony will relate to my opinions as an expert in the history of the United States in the twentieth century and gender, homosexuality, sexuality, and civil rights in the United States, with a particular focus on the history of discrimination experienced by gay men and lesbians in the United States. I have actual knowledge of the matters stated in this declaration, and could and would so testify if called as a witness.

2. My background, experience, and publications are summarized in my curriculum vitae, which is attached as Exhibit A to this declaration. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *Darby et al. v. Orr*, Nos. 12-CH-19718 and 12-CH-19719 (Cir. Ct. Cook County, Ill.); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *Gill v. Office of Pers. Mgmt.*, No. 09-10309 (D. Mass.), *Commonwealth of Mass. v. U.S. Dep't of Health and Human Servs.*, No. 09-11156 (D. Mass.), *Windsor v. U.S.*, 833 F.Supp.2d 394 (S.D.N.Y. 2011), *Pedersen v. Office of Personnel Management*, 2012 WL 3113883 (D. Conn.), *Golinski v. Office of Personnel Management*, 824 F.Supp.2d 968 (N.D. Cal. 2012), *Dragovich v. U.S. Dep't of the Treasury*, 2012 WL 1909603 (N.D. Cal. 2012), *Donaldson v. Montana*, No. 10-702 (Mont. 1st Jud. Dist. Ct.), *Jackson v. Abercrombie*, 2012 WL 3255201 (D. Haw. 2012); *Cooper-Harris v. United States*, No. CV 12 0887 (C.D. Cal.); and *Sevcik v. Sandoval*, No. 2:12-CV-00578-RCJ-PAL (D. Nev)—all of which involved testimony on topics similar to those discussed below. Although it is more than four years ago, I also testified in *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995) *cert. granted, judgment vacated*, 518 U.S. 1001 (1996).

3. From 1991 to 2006, I was a Professor of History at the University of Chicago. I am the author of *Gay New York: Gender, Urban Culture, and the Making of the Gay Male*

World, 1890-1940 (New York: Basic Books, 1994), which won the Organization of American Historians' Merle Curti Award for the best book in social history and Frederick Jackson Turner Award for the best first book in any field of history, the Los Angeles Times Book Prize in History, and Lambda Literary Award. I am also the author of *Why Marriage? The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2004); coeditor of three books and special journal issues, including *Hidden From History: Reclaiming the Gay and Lesbian Past* (NAL, 1989); and the author of numerous articles, which are listed in my curriculum vitae, attached to this declaration as Exhibit A.

4. In preparing this Declaration, I reviewed the Complaint in this case. I base my opinions on my own research, experience and publications, the work of other historians and scholars as listed in the attached bibliography (Exhibit B), and the general statutes of a number of states, including Illinois, New York, Connecticut, Vermont, and New Hampshire.

5. I have been retained by counsel for Plaintiffs in this litigation. I am being compensated at a rate of $400 per hour for preparation of reports or declarations; $450 per hour for time spent preparing for and giving deposition or trial testimony; and $4,500 per day spent preparing for or attending trial. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

Summary of Opinions

6. It is my professional opinion that the historical record, which is outlined below, demonstrates that gay and lesbian people have been subject to widespread and significant discrimination and hostility in the United States.

7. Through much of the twentieth century, in particular, gay men and lesbians suffered under the weight of medical theories that treated their desires as a disorder; penal laws that condemned their consensual adult sexual behavior as a crime; police practices that suppressed their ability to associate and socialize publicly; censorship codes that prohibited their depiction on the stage, in the movies, and on television; and federal policies and state regulations that discriminated against them on the basis of their homosexual status. These state policies and ideological messages worked together to create and reinforce the belief that gay and lesbian persons comprised an inferior class to be shunned by other Americans.

8. Despite social and legal progress in the past thirty years towards greater acceptance of homosexuality, gay and lesbian people continue to live with the legacy of the anti-gay measures enacted in the 1930s, 1940s, and 1950s and the attitudes that motivated those measures. That legacy is evident both in laws that remain on the books and in the many legal protections that have not been enacted.

9. Among the many products of the legacy of discrimination in the twentieth century, the most conspicuous today include Congress' repeated failure to enact or even seriously consider federal legislative protections for gay and lesbian people in housing, employment, and public accommodations; the numerous state statutes and constitutional amendments that brand gay men and lesbians as second-class citizens by denying them the right to marry the person they love; and the former federal Defense of Marriage Act, which until a few

months ago prohibited the federal government from recognizing such a marriage when it did occur. The legacy of discrimination is also evident in the demeaning stereotypes and inflammatory rhetoric used by anti-gay organizations and public officials as they campaign to enact further measures meant to erode gay people's civil rights and diminish their status as full citizens of the United States—campaigns that are, to this day, very often successful.

10. Today, the limited civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. Like other minority groups, gay men and lesbians often must rely on judicial decisions to secure equal rights.

History of Discrimination Against Gay and Lesbian People in the United States

I. Introduction

11. While there is ample evidence that same-sex attraction, love, and intimacy have persisted across the ages, most historians now agree that the concept of the homosexual and the heterosexual as distinct categories of people emerged only in the late nineteenth century. This concept had profound effects on the regulation of homosexuality. Early American legislators, drawing on their understanding of ancient Judeo-Christian prohibitions against sodomy and "unnatural acts," penalized a wide range of non-procreative behavior, including many forms of what would now be called homosexual conduct. While these laws prohibited conduct, it was in the twentieth century that governments began to classify and discriminate against certain of their own citizens on the basis of their status or identity as homosexuals.

12. Official, government-sanctioned hostility and discrimination has had a profound and enduring negative impact on lesbians and gay men in American society. In the 1920s, the State of New York prohibited theaters from staging plays with lesbian or gay characters. Beginning in the 1930s and 1940s, many states prohibited gay people from being served in bars and restaurants. In the 1950s, the federal government banned the employment of homosexuals and insisted that its private contractors ferret out and dismiss their gay employees. It also prohibited gay foreigners from entering the country or securing citizenship. Until the 1960s, all states penalized sexual intimacy between men. Throughout the twentieth century, many municipalities launched police campaigns to suppress gay meeting places, and sought to purge gay civil servants from government employment.

13. Private hostility and discrimination, often encouraged by government officials, has had a similarly profound and enduring negative effect on lesbians and gay men in American society. Until the 1970s, leading physicians and medical researchers claimed that homosexuality was a pathological condition or disease. In the 1930s, the Hollywood studios enacted a censorship code that for nearly thirty years prohibited the discussion of gay issues or the appearance of gay or lesbian characters in the era's most powerful communications medium. In the 1940s and 1950s, municipal police officials, state governmental leaders, local newspapers, and national magazines justified anti-gay discrimination and the suppression of gay meeting places by fostering frightening stereotypes of homosexuals as child molesters. These stereotypes have had enduring consequences, and continue to inspire public fears and hostility, especially concerning gay teachers and parents. In the 1980s, the early press coverage of AIDS reinforced

the view that homosexuals were diseased and threatened other Americans. In the 1990s, many clergy condemned (and still condemn) homosexuality as sinful. The Southern Baptist Convention, for example, called for a boycott of all Disney products because Disney offered domestic partnership benefits to its employees and Disneyland organized gay theme nights. Also, some anti-gay groups threatened to organize boycotts against the sponsors of network television shows which included gay characters.

14. Historically, anti-gay measures often were enacted or strengthened in response to periods of relative growth in the visibility or tolerance of gay people. For example, the effervescence and visibility of gay life in the 1920s contributed to the backlash gay and lesbian people endured during the Great Depression. The increased visibility of gay men and lesbians during the Second World War helped precipitate a second wave of hostility in the late 1940s and 1950s. The dramatically increased visibility of gay people in the 1970s and 1980s, and their success in persuading some state and local governments to include sexual orientation in their anti-discrimination laws, resulted in a wave of referenda and initiatives between 1977 and the early 1990s that overturned such laws and/or prohibited the enactment of others.

15. In recent decades, and especially in the last twenty years, many (though not all) of these discriminatory measures were repealed, but considerable discrimination and animosity persisted. Given the long history of campaigns demonizing homosexuals as child molesters, it is unsurprising that in 1977—the year Anita Bryant launched her "Save Our Children" campaign—two-thirds of Americans told pollsters they objected to lesbians or gay men being hired as elementary school teachers. By 1992, after fifteen years of extensive public discussion of this and other gay issues, opinion had shifted, but half of those parents polled still rejected the idea of their child having a gay elementary school teacher. By 2002, about forty percent of Americans still were unwilling to have elementary schools employ gay teachers, and one-third of them found gay high school teachers unacceptable.

16. When marriage emerged as the new flashpoint in debates over civil rights for gay men and lesbians almost two decades ago, the debate was shaped by the legacy of anti-gay policies and attitudes. Many Americans initially responded to the idea that gay and lesbian couples should be allowed to marry with the same misgivings and even hostility with which they once greeted the idea of gay teachers or gay characters on television sitcoms. Opponents of marriage equality mobilized some of the most enduring anti-gay stereotypes to heighten public apprehension. For instance, during the 2008 campaign over Proposition 8—the California ballot initiative that revoked the marriage rights of gay men and lesbians that the California Supreme Court had recognized under the state constitution—several television commercials aired by the supporters of Proposition 8 warned that marriage equality might encourage children to become homosexuals themselves. The recent campaign to repeal marriage equality in Maine used the same tactics, including recycling commercials and scripts from the Proposition 8 campaign because they had been so effective in California. Likewise, material from the Nevada campaign to amend the state constitution to bar marriage for same-sex couples stated "Let's not experiment with Nevada's children." The approval of Proposition 8 in California, Question 1 in Maine, Question 2 in Nevada, and similar laws and constitutional amendments in a total of forty-one states, including Ohio's constitutional amendment, which was passed by the voters in 2004, indicates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships. The civil rights enjoyed by gay and lesbian

people throughout the United States continue to be subject to the vicissitudes of public opinion in an ever-changing social, political, and cultural landscape.

17. At several critical junctures, a handful of state and federal courts have been the only authorities willing to defend the rights of gay people against the antipathy of the majority. In the 1950s and 1960s, at a time when overwhelming public sentiment supported the criminalization of gay bars and other meeting places, state courts in California and New York ruled that gay people had the right to assemble. In 1954, the United States Supreme Court ruled that the United States Post Office could not ban a gay political magazine from the mails. In the 1990s, when voters in cities and states across the country were voting to ban states and local municipalities from enacting anti-discrimination protections for gay people, the Supreme Court, in *Romer v. Evans*, struck down a Colorado constitutional amendment that withdrew from gay men, lesbians, and bisexuals, but no others, specific legal protection from discrimination. Sometimes quickly and sometimes more slowly, these decisions played a critical role in shifts in public opinion.

II. The Roots of Anti-Gay Discrimination

18. The first American laws against homosexual conduct were rooted in the earliest English settlers' understanding of the religious and secular traditions that prohibited sodomy, and they reflected the ambiguity of those traditions. Although sodomy included some forms of what today would be called homosexual conduct, medieval theologians did not use sodomy to refer systematically and exclusively to such conduct; for example, they rarely understood sodomy to include oral sex or sex between women.

19. The English Reformation Parliament of 1533 turned the religious injunction against sodomy into the secular crime of buggery when it made "the detestable and abominable vice of buggery committed with mankind or beast" punishable by death. The English courts interpreted this to apply to sexual intercourse between a human and an animal and anal intercourse between a man and woman or between two men.

20. Colonial American statutes drew on these religious and secular traditions and shared their imprecision in the definition of the offense. Variously defining the crime as (the religious) sodomy or (the secular) buggery, they generally proscribed anal sex between men and men, men and women, and humans and animals, but their details and their rationales varied. The southern colonies generally adopted the English law against buggery, while the Puritan New England colonies usually drew on religious traditions to penalize many forms of "carnall knowledge," including adultery, fornication, sex with prepubescent girls, and "men lying with men." Puritan clergy in the New England colonies were especially vigorous in their denunciation of sodomitical sins as contrary to God's will, but their condemnation was motivated by the pressing need to increase the population and to secure the stability of the family, as well as their reading of scripture. In the Massachusetts Bay Colony, sodomy was prohibited in 1641 by a statute taken directly from Leviticus: "If any man lyeth with mankinde as he lyeth with a woeman, both of them have committed abhomination, they both shall surely be put to death." Although several men were executed for sodomy, the colonies rarely prosecuted men for this offense, for reasons that still are not entirely clear to historians.

III. Modern American History: 1890-1940

21. Prosecutions for sodomy and related offenses increased dramatically in the late nineteenth and early twentieth centuries as a result of the emergence of the idea of the homosexual as a distinct category of person, the expansion of laws penalizing homosexual conduct, and the growing influence of religiously-inspired moral reform societies that insisted on criminal prosecutions. In 1914, for example, the Supreme Court of Nevada held that the state's statute criminalizing "infamous crimes against nature" encompassed oral as well as anal intercourse, each being an "'abominable crime not fit to be named among Christians.'" *In re Benites*, 37 Nev. 145, 149 (1914).

22. These types of prosecutions continued to penalize people on the basis of their homosexual conduct rather than their identity as homosexuals. Current historical research suggests that the concept of the homosexual as a distinct category of person developed as recently as the late nineteenth century. The word "homosexual" appeared for the first time in a German pamphlet in 1868, and was introduced to the American lexicon only in 1892. Between the 1920s and 1950s, the government, drawing on long traditions of hostility to same-sex conduct and responding both to new conceptions of the homosexual as an individual and to the growing visibility of those individuals, began to classify and discriminate against certain of its citizens on the basis of their status or identity as homosexuals. This discrimination reached remarkable, and still largely unrecognized, proportions.

23. The dramatic growth of American cities in the late nineteenth century permitted lesbians and gay men to develop a more complex and extensive collective life than was possible in small towns and rural areas. While everyone was likely to know everyone else's business in small towns, the size, complexity, and relative anonymity of cities made it easier for gay people (and other nonconformists) to forge a collective life with people like themselves, away from the eyes of hostile outsiders. The early history of the migration of gay people to the relative freedom of the cities is little understood, but it seems to have increased in the early twentieth century, at about the same time as growing numbers of African Americans fled the small towns of the Jim Crow South for the relative freedom of northern cities. Like African Americans, gay people, both black and white, found that the relative freedom of city life was tempered by continuing hostility and discrimination.

24. The emergence of gay and lesbian communities described in this Declaration took place in varying degrees in every American city studied by historians. Because the field of lesbian and gay history remains relatively young in 2013 and has been hampered by the legacy of censorship described below, historians still know most about the history of such communities in major metropolitan centers such as New York, San Francisco, Los Angeles, and Chicago, and they will therefore loom large in the history that follows. However, recent studies of the gay history of smaller cities and communities, ranging from Buffalo, New York, and Portland, Oregon, to Jackson, Mississippi, and its surrounding rural areas, both confirm the broad outlines of the history described here and reveal regional variations in that history. Important recent historical studies of the development of federal and military policies concerning homosexuality and gay citizens have documented discriminatory laws and policies that had nationwide effects.

25. New York City provides one of the best documented examples of the emergence of a distinctive gay world in the early twentieth century. By the 1910s, New York's "gay world" included gay residential and commercial enclaves in several immigrant, African American, and bohemian neighborhoods; widely publicized dances and other social events; and a host of commercial establishments where gay people gathered, ranging from saloons, speakeasies, and bars to cheap cafeterias and elegant restaurants. In the 1920s and early 1930s, gay writers and performers produced a flurry of gay literature and theater. Some gay people were involved in long-term relationships they called marriages. Most remained very careful to conceal their homosexuality from non-gay associates, though, for fear of losing their jobs, homes, and respect.

26. Many Americans responded to the growing visibility of gay life with fascination and sympathy, regarding it as simply one more sign of the growing complexity and freedom from tradition of a burgeoning metropolitan culture. Popular fascination with gay culture reached a crescendo during the Prohibition Era (or Jazz Age), when lesbians ran some of the most popular tearooms and cafes in bohemian neighborhoods such as New York's Greenwich Village and Chicago's Towertown. That said, the poor, immigrant, African American, and bohemian neighborhoods where gay life became most visible were regarded as the underside of city life by "respectable society."

A. Hostile Religious and Medical Views Prompted the Escalation of Anti-Gay Policing in the Early Twentieth Century

27. Other Americans regarded the growing visibility of lesbian and gay life with dread. Hostility to homosexuals sometimes was motivated by an underlying uneasiness about the dramatic changes underway in gender roles at the turn of the last century. In this era—indeed until 1973—homosexuality was classified as a disease, defect, or disorder. Conservative physicians initially argued that the homosexual (or "sexual invert") was characterized as much by his or her violation of conventional gender roles as by specifically sexual interests. At a time when many doctors argued that women should be barred from most jobs because employment would interfere with their ability to bear children, numerous doctors identified suffragists, women entering the professions, and other women challenging the limits placed on their sex as victims of a medical disorder. Thus, doctors explained that "the female possessed of masculine ideas of independence" was a "degenerate" and that "a decided taste and tolerance for cigars, * * * [the] dislike and incapacity for needlework * * * and some capacity for athletics" were all signs of female "sexual inversion." Similarly, another doctor thought it significant that a male "pervert" "never smoked and never married; [and] was entirely averse to outdoor games."

28. Such views about gender roles lost their credibility once public opinion had come to accept significant changes in women's roles in the workplace and political sphere, but doctors continued for several more decades to identify homosexuality per se as a "disease," "mental defect," "disorder," or "degeneration." For generations, such hostile medical pronouncements provided a powerful source of legitimation to anti-homosexual sentiment, just as medical science previously had legitimized widely held (and subsequently discarded) beliefs about male superiority and white racial superiority. The medical profession's classification of homosexuality as a defect or disorder also helped spur and legitimate anti-gay law enforcement activity throughout the country.

29. Religiously-inspired hostility to homosexuality also inspired an escalation in anti-gay policing. In the late nineteenth century, native-born Protestants organized numerous "anti-vice" societies to suppress what they regarded as the sexual immorality and social disorder of the nation's burgeoning Catholic and Jewish immigrant neighborhoods. Although these organizations focused on female prostitution and what they regarded as the weakening of moral strictures governing relations between men and women, they also opposed the growing visibility of homosexuality, which they regarded as a particularly egregious sign of the loosening of social controls on sexual expression under urban conditions. They encouraged the police to step up harassment of gay life as one more part of their campaigns to shut down dance halls and movie theaters, prohibit the consumption of alcohol and the use of contraceptives, dissuade restaurants from serving an interracial mix of customers, and otherwise impose their vision of the proper social order and sexual morality. In New York City in the 1910s and 1920s, for instance, the Society for the Suppression of Vice (also known as the Comstock Society) worked closely with the police to arrest several hundred men for homosexual conduct. In Massachusetts, the Watch and Ward Society, established as the New England Society for the Suppression of Vice, conducted surveillance on virtually all the popular gay bars and gathering places of the time. In Chicago, the 1910 Vice Commission investigated the city's homosexual "resorts."

30. As a result of the pressure from Protestant moral reform organizations, municipal police forces began using misdemeanor charges, such as disorderly conduct, vagrancy, lewdness, loitering, and so forth to harass homosexuals. These state misdemeanor or municipal offense laws, which carried fewer procedural protections than felony sodomy charges, allowed further harassment of individuals engaged in same-sex intimacy. In some cases, state officials tailored these laws to strengthen the legal regulation of homosexuals. For example, in 1923, the New York State legislature specified for the first time that a man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" was a form of disorderly conduct. Many more men were arrested and prosecuted under this misdemeanor charge than for sodomy. Between 1923 and 1966, when Mayor John Lindsay ordered the police to stop using entrapment to secure arrests of gay men, there were more than 50,000 arrests on this charge in New York City alone.

31. The social marginalization of gay men and lesbians gave both the police and the public even broader informal authority to harass them. The threat of violence and verbal harassment deterred many gay people from doing anything that might reveal their homosexuality in public. Gay people knew that anyone discovered to be homosexual risked the loss of livelihood and social respect, so most gay people were careful to lead a double life, hiding their homosexuality from their heterosexual employers and other associates.

B. Censorship

32. The growing visibility of lesbian and gay life in the early twentieth century precipitated censorship campaigns designed to curtail gay people's freedom of speech and the freedom of all Americans to discuss gay issues.

33. The earliest gay activists fell victim to such campaigns. In 1924, when the Chicago police learned that a postal worker had established the country's earliest known gay political group, the Society for Human Rights, they raided his home and seized his group's files.

After the raid, the group ceased publication of its short-lived magazine, *Friendship and Freedom*. In the 1910s and 1920s, a handful of plays included lesbian and gay characters or addressed gay themes. But in 1927, after "The Captive," a serious drama exploring lesbianism, opened on Broadway to critical acclaim, New York State passed a "padlock law" that threatened to shut down for a year any theater that staged a play with lesbian or gay characters. Given Broadway's national importance as a staging ground for new plays, this law effectively censored American theater for a generation.

34. Theater censorship occurred in other cities in addition to New York. In the early twentieth century, Boston had a particularly strict culture of "moral purity" censorship, and the phrase "Banned in Boston" was familiar to people throughout the country. In 1935, for instance, Boston Mayor Frederick W. Mansfield banned Lillian Hellman's "The Children's Hour," a play with lesbian themes. Mansfield explained his decision to the press by asserting that the play "showed moral perversion, the unnatural appetite of two women for each other."

35. Such censorship had even wider-reaching effects when it spread to the movies. A censorship movement led by religious leaders threatened the Hollywood studios with mass boycotts and restrictive federal legislation if they did not begin censoring their films. Seeking to avoid federal legislation, the studios established a production code (popularly known as "the Hays Code") that from 1934 on prohibited the inclusion of gay or lesbian characters, discussion of homosexual issues, or even the "inference" of "sex perversion" in Hollywood films. This censorship code remained in effect for some thirty years and effectively prohibited discussion of homosexuality in a powerful communications medium. This censorship stymied and delayed democratic debate about homosexuality for more than a generation.

C. The Great Depression and the Curtailment of Gay People's Freedom of Association

36. In the early years of the Great Depression, restrictions on gay life intensified. By depriving millions of men of their role as breadwinners, the Depression transformed already-existing anxiety over gender roles into a crisis in gender and family relations. Federal, state, and local governments responded to this perceived crisis with policies that directly affected women and gay people. New Deal public works projects, for instance, which offered jobs only to male heads of households, were designed in part to restore men's status in their families and larger society, even when this meant limiting women's economic opportunities.

37. The apparent fragility of the family and gender arrangements made the visibility of gay life seem more threatening to many people, especially given the long-standing representation of gay men and lesbians as gender deviants. After a generation in which gay life had been relatively visible and integrated into urban public life, restrictions on gay life increased. Gay people were forced into hiding by new laws that pushed gay people out of restaurants and bars, as well as off the stage and silver screen.

38. New regulations curtailed gay people's freedom of association. In New York State, for instance, the State Liquor Authority, established after the repeal of Prohibition in 1933, issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing or serving homosexuals or even allowing them to congregate on their

premises. The Authority's rationale was that the mere presence of homosexuals made an establishment "disorderly," and when the courts rejected that argument, the Authority began using evidence of unconventional gender behavior or homosexual solicitation gathered by plainclothes investigators to provide proof of a bar's disorderly character. Hundreds of bars were closed for this reason in the next thirty years in New York City alone.

39. Similar regulations were introduced around the country in subsequent years. In California in the 1950s, notes historian Nan Alamilla Boyd, the Alcoholic Beverage Control Board "collapsed the difference between homosexual status (a state of being) and conduct (behavior) and suggested that any behavior that signified homosexual status could be construed as an illegal act. Simple acts such as random touching, mannish attire (in the case of lesbians), limp wrists, high-pitched voices, and/or tight clothing (in the case of gay men) became evidence of a bar's dubious character" and grounds for closing it. In Chicago in 1934-35, Mayor Edward J. Kelly used laws against bawdiness and cross-dressing to shut down almost all the cabarets on the Near North side featuring lesbians, "pansies," or male or female impersonators, on stage or in the audience.

IV. Modern American History: World War II

40. Changes in the policies of the Armed Forces of the United States during the Second World War both reflected and expanded the government's growing campaign of classifying and discriminating against gay citizens. The military had long made sodomy a criminal offense (and, indeed, it continues to do so). But the Second World War marked the first time the military moved beyond criminalizing homosexual conduct to develop policies that systematically endeavored to exclude personnel on the basis of their identity as homosexuals. All of the branches of the armed forces put in place screening mechanisms designed to ferret out homosexuals during the induction process. Thousands of men and women were kept from serving their country, and often faced public opprobrium as a result. Notwithstanding the new prohibition, many gay men and lesbians served in the armed forces in the Second World War, but they had to be careful to whom they disclosed their sexual orientation.

41. Across the country, notwithstanding legal restrictions, the number of lesbian and gay bars and other meeting places increased during the war years. Military authorities responded to the growth in the number of gay meeting places by collaborating with civil authorities to close them or at least keep servicemen from visiting them. The Army and the Navy created a joint Disciplinary Control Board that worked together with state liquor control agents and municipal police forces to identify and police bars and night clubs, including almost one hundred in San Francisco alone, with the intent of harassing and suspending the licenses of those that served a gay clientele. Military and civilian police also cooperated in anti-vice raids against gay bars and other meeting places. Servicemen who were caught in these raids risked being discharged, and several thousand patriotic Americans who honorably served to defend their country were not honorably discharged solely because of their gay or lesbian identity.

42. Following the war, the Veterans Administration denied GI Bill benefits to soldiers who had received undesirable discharges. Eventually, most other groups of soldiers with such discharges had their benefits restored, but the Veterans Administration steadfastly refused to restore them to homosexuals. This meant that gay veterans who were members of the "Greatest

Generation" and who had risked their lives for their country before being discharged were denied the educational, housing, and readjustment allowances provided to millions of their peers.

V. Modern American History: Post-WWII Period

A. Government Policies in the McCarthy Era

43. Even the stepped-up policing of gay life in the 1930s and 1940s did not equal the scale of discrimination faced by gay men and lesbians in the generation following the Second World War. The persecution of gay men and lesbians dramatically increased at every level of government after the war.

44. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay persons in the State Department, the Senate conducted a special investigation into "the employment of homosexuals and other sex perverts in government." The Senate committee recommended excluding gay men and lesbians from all government service, civilian as well as military. To support this recommendation, the committee argued that homosexual acts violated the law, and it gave its imprimatur to the prejudice that "those who engage in overt acts of perversion lack the emotional stability of normal persons" and that homosexuals "constitute security risks."

45. The committee also portrayed homosexuals as predators: "[T]he presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. . . . One homosexual can pollute a Government office."

46. The Senate investigation and report were only one part of a massive anti-homosexual campaign launched by the federal government after the war. The Senate committee reported that "between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion." In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian. At the height of the McCarthy era, the U.S. State Department discharged more homosexuals than communists. The government's purge of its gay employees prompted the founding of some of the earliest gay rights organizations. Frank Kameny, for one, founded the first gay rights group in Washington, D.C. after he was dismissed from his job as a government astronomer for being homosexual in 1957.

47. President Eisenhower's executive order prohibiting federal employment for homosexuals also required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees. Many other private employers without federal contracts adopted the federal government's policy by refusing to hire gay people. Furthermore, the FBI initiated a widespread system of surveillance to enforce the executive

order. As the historian John D'Emilio has noted, "The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued. Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press articles that provided information about the gay world. . . . Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected."

48. Two years after the Senate committee recommended that homosexuals be purged from government employment, Congress signaled its conviction that homosexuals had no place in American society in the most palpable way possible: by denying them entry into the country. In 1952, Congress prohibited homosexuals (whom it called "psychopaths") from entering the country, much as it previously had prohibited immigration from Asia and curtailed the immigration of Jews and Catholics from eastern and southern Europe. In the case of homosexuals, the prohibition extended beyond people seeking long-term residency or citizenship; a generation of foreign visitors applying for mere tourist visas had to sign statements swearing they were not homosexual before they could make even the briefest trip to the United States.

49. Many state and local governments followed the federal government's lead in seeking to ferret out and discharge their homosexual employees. As a result of these official policies, countless state employees, teachers, hospital workers, and others lost their jobs. Beginning in 1958, for instance, the Florida Legislative Investigation Committee, which had been established by the legislature in 1956 to investigate and discredit civil rights activists, turned its attention to homosexuals working in the state's universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and lesbians. It "pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities." Its 1959 report to the legislature called the extent of homosexual activity in the state's school system "absolutely appalling." In addition, in a well-publicized 1949 case in Massachusetts, Dr. Miriam Van Waters, long-time superintendent of the Women's Reformatory at Framingham, was dismissed by the Commissioner of Corrections because she had either not known or had known and had not prevented "an unwholesome relationship" that "existed between inmates of the Reformatory," which had "resulted in 'crushes', 'courtships', and homosexual practises [sic] among the inmates." She was then forced to defend her policies in public hearings held by a Massachusetts house committee over several months.

50. During this period, both federal and local agencies sought to curtail gay people's freedom of speech and the freedom of all people to discuss homosexuality. In 1954, postal officials in Los Angeles banned an issue of the first gay political magazine, *ONE*, from the mails, a ban overturned by the Supreme Court in 1958. In some cities the police continued to shut down newsstands that dared to carry it. In 1957, San Francisco officials arrested Lawrence Ferlinghetti and Shig Murao for publishing and selling "Howl," a poem by Allen Ginsberg that openly proclaimed his homosexuality.

51. Censorship, government-sanctioned discrimination, and the fear of both made it difficult for gay people to organize and speak out on their own behalf. Given the severity of

anti-gay policing, for instance, the Mattachine Society, the most significant gay rights organization in the 1950s, repeatedly had to reassure its anxious members that the police would not seize its membership list. In Denver in 1959, a few weeks after Mattachine held its first press conference during a national convention, the police raided the homes of three of its Denver organizers; one lost his job and spent sixty days in jail.

B. The Demonization of Homosexuals

52. The official harassment of homosexuals received further legitimization from a series of press and police campaigns in the 1940s and 1950s that fomented demonic stereotypes of homosexuals as child molesters out to "recruit" the young into their way of life. In response to a series of local panics over sex crimes against women and children, in which homosexuals were almost never identified as the culprits, numerous local newspapers and national magazines claimed that children faced a growing threat from homosexuals. The press warned that, in breaking with social convention to the extent necessary to engage in homosexual behavior, a man had demonstrated the refusal to adjust to social norms that was the hallmark of the psychopath. In 1950, *Coronet*, a popular national magazine, asserted: "Once a man assumes the role of homosexual, he often throws off all moral restraints. . . . Some male sex deviants do not stop with infecting their often-innocent partners: they descend through perversions to other forms of depravity, such as drug addiction, burglary, sadism, and even murder."

53. The demonization of homosexuals by the press was reinforced by the statements of public officials. A Special Assistant Attorney General of California claimed in 1949 that "[t]he sex pervert, in his more innocuous form, is too frequently regarded as merely a queer individual who never hurts anyone but himself. All too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both sexes, and is ever seeking for younger victims." Detroit's prosecuting attorney demanded the authority to arrest, examine, and possibly confine indefinitely "anyone who exhibited abnormal sexual behavior, whether or not dangerous." In 1957, the *Hartford Courant* reported on comments by a Connecticut judge at a criminal sentencing. The judge endorsed jail terms for homosexuals because his "observation" was that homosexuality "ha[d] spread much too far."

54. Such press campaigns and official statements created fearsome new stereotypes of homosexuals as child molesters, which continue to incite public fears about gay teachers and parents as well as other gay people who come into contact with children. Between the late 1930s and late 1950s, public hysteria incited by such press campaigns prompted more than half the state legislatures to enact laws allowing the police to force persons convicted of certain sexual offenses—or, in some states, merely suspected of being "sexual deviants"—to undergo psychiatric examinations. These examinations could result in indeterminate civil confinements for individuals deemed in need of a "cure" for their homosexual "pathology."

C. Another Escalation of Anti-gay Policing

55. During the postwar era, bars became an especially important meeting place for lesbians and gay men because they were often the only public spaces in which people dared to be openly gay. Given their growing importance to gay people as a social center and the growing pressure on the police to enforce regulations prohibiting bars from serving homosexuals, gay

bars became an important battleground in the postwar years. Despite the prevailing popular animosity toward homosexuals, state courts in New York and California issued rulings that curtailed the right of state liquor authorities and the police to discriminate against gay bar patrons. Official antipathy to homosexuals was so strong, however, that police officials circumvented or simply disregarded these judicial decisions.

56. This sharp escalation in the policing of gay life after the Second World War occurred throughout the country. In 1955, for example, the government of Boise, Idaho launched a fifteen-month investigation of gay men in town, interrogating fourteen hundred persons and pressuring men known to be gay to reveal the names of other gay men. Police departments from Seattle and Dallas to New Orleans and Baltimore stepped up their raids on bars and private parties attended by gay and lesbian persons, and made thousands of arrests for "disorderly conduct." By 1950, Philadelphia had a six-man "morals squad" arresting more gay men than the courts knew how to handle, some 200 a month. In the District of Columbia, there were more than a thousand arrests every year. In 1965, the Boston City Council's Committee on Urban Renewal debated whether to bulldoze several downtown gay bars. A proponent of the effort, City Councilor Frederick Langone, gave a speech at the meeting calling for the destruction of "these incubators of homosexuality and indecency and a Bohemian way of life," and insisting that "[w]e must uproot these joints so innocent kids won't be contaminated." Many gay bars were razed in the "revitalization" that followed. In 1969, a Councilman in Rocky Hill, Connecticut called for a nightclub frequented by homosexuals (Alice's Joker Club) to be closed as a "public nuisance" because it was a "threat to the morals" of the town's citizens. From 1933 until the mid 1960s, hundreds of bars that tolerated gay customers were closed in New York City alone. Some bars in New York and Los Angeles posted signs telling potential gay customers: "If You Are Gay, Please Stay Away" or, more directly, "We Do Not Serve Homosexuals." According to the historian John D'Emilio, raids on gay bars in Chicago in this period were "a fact of life, a danger every patron risked by walking through the door."

VI. The Gay Rights Movement and Its Opponents in the 1970s and 1980s

A. Early Successes of the Gay and Lesbian Rights Movement

57. The dramatic escalation in policing and suppression in the post-war years failed to eradicate gay life. In larger cities, lesbians and gay men covertly patronized bars and restaurants, which they turned into informal meeting places, took over remote sections of public beaches, and held dances and parties. In many smaller towns, gay life took shape unnoticed in church choirs, amateur theaters, and women's softball leagues, and was sustained by closely knit social circles.

58. Nonetheless, most gay men and lesbians responded to the escalation in policing after the Second World War by keeping their homosexuality carefully hidden from non-gay people. They developed elaborate verbal codes that allowed them to communicate with one another while remaining invisible to hostile outsiders. The word "gay" is a good example of this: before the 1970s few heterosexuals realized gay people had given it a distinctly homosexual meaning. But the very success of such subterfuges in concealing gay life made it difficult for gay people to find one another in the 1950s, and it severely limited the capacity of gay people to organize on their own behalf.

59. The earliest gay rights organizations, the Mattachine Society, *ONE*, and the Daughters of Bilitis, were founded in the early 1950s at the height of the demonization of homosexuals as dangerous, irrational, and unstable pariahs who threatened the nation's children as well as national security. This initial generation of activists worked to meet and educate potential allies among sociologists, psychologists, criminologists, and other professionals who had the credibility to speak on homosexuality that was denied to homosexuals themselves.

60. Gay rights organizations began to influence public policy in the mid-1960s, although the pace of change varied enormously across the country. The New York Mattachine Society's success in 1966 in persuading Mayor John Lindsay to end the widespread police use of entrapment had a profound effect on gay male New Yorkers, who for the first time in decades did not have to worry that the men who approached them in bars and elsewhere were undercover policemen. New York and California state court rulings finally curtailed the policing of gay bars and other meeting places in those states in the 1960s, but in some other parts of the country the police continued to raid gay bars well into the 1970s and 1980s. The growing divergence in the treatment of gay people in different parts of the country prompted a growing number of gay people to migrate from hostile areas to New York, Boston, San Francisco, Los Angeles, Chicago, and other more tolerant cities and regions. This mass migration, in turn, affected the political and cultural climate of those cities and regions, making them more likely to enact gay rights legislation and similar policies.

61. Major institutions that once helped legitimize anti-gay attitudes also began to change their positions. Medical writers and mental health professionals whose stigmatization of homosexuality as a disease or disorder had been used to justify discrimination for decades were among the first to change their views. In 1973, the American Psychiatric Association voted to remove homosexuality from its list of mental disorders. The American Psychological Association soon followed suit. However, the American Psychiatric Association's decision was fiercely opposed by prominent members of the association such as Charles Socarides and Irving Bieber. They and other medical professionals who claimed homosexuality was a treatable psychological disorder continued to receive considerable attention.

62. Censorship of gay images and speech declined. By the early 1960s, competition from television led the Hollywood studios to reorganize their nearly thirty-year-old censorship code, enabling the studios to make films for adult viewers which addressed "serious themes" such as homosexuality. These themes remained off-limits for television. The studios initially still included very few gay characters in their features, and the television networks included virtually none, but ending formal censorship opened a door that resulted in significant cultural changes in later years.

63. A small but growing number of municipalities enacted legislation protecting people from certain forms of discrimination on the basis of their sexual orientation. In 1972, East Lansing, Michigan, home to Michigan State University, became the first town to do so. Within five years, another twenty-seven communities passed such legislation, more than half of them university towns such as Ann Arbor, Austin, Berkeley, and Madison. They were joined by a handful of larger cities such as San Francisco, Minneapolis, Seattle, and Detroit. During this same period, however, a number of states enacted new legislation that criminalized homosexual sodomy, even as they decriminalized heterosexual sodomy.

64. Attitudes toward homosexuals and homosexuality in some religious denominations also began to change. Since the 1970s, many mainline Protestant denominations have issued official statements condemning legal discrimination against homosexuals and affirming that homosexuals ought to enjoy equal protection under criminal and civil law. Several of these groups descended from the historically influential denominations whose religious authority had been invoked to justify colonial statutes against sodomy. The Lutheran Church in America, the Unitarian Universalist Association, the United Methodist Church, the United Church of Christ, the Protestant Episcopal Church, the Disciples of Christ, and the United Presbyterian Church in the U.S.A. all issued statements in support of civil rights for gay men and lesbians by 1980.

65. Those seven denominations, however, account for only 10.3 percent of the American population. Many more Americans belong to faith traditions that remain strongly opposed to gay civil rights, including 26.3 percent affiliated with historically white evangelical Protestant churches and 23.9 percent who are Catholics. Leading clergy and laypeople from those churches have played a major role in opposing gay rights measures across the country.

B. Anti-Gay Discrimination in the 1970s and 1980s

66. Gay men and lesbians continued to suffer discrimination at the hands of government officials in the 1970s and 1980s. For example, police continued to raid gay bars in some cities. In 1970, the Connecticut State Motor Vehicle Department refused to renew the drivers license of a man on the grounds that he was "an admitted homosexual and that his homosexuality makes him an improper person to hold an operator's license."

67. Beginning in the late 1970s, the initial success of the gay movement in securing local gay rights legislation, as well as the increasing visibility of gay people in the media, provoked a vigorous, negative reaction. Anti-gay rights advocates drew on pernicious stereotypes developed in previous decades to argue that enacting gay rights laws, permitting gay people to teach, and even simply allowing gay characters to appear on television sitcoms threatened the security of children and the stability of the family.

68. The anti-gay rights campaign of this era was effectively launched in 1977, when Anita Bryant, a prominent Baptist singer and the spokeswoman for the Florida citrus growers, led a campaign to "Save Our Children" from newly enacted civil rights protections for gay men and lesbians in Dade County, Florida. Her success in persuading a decisive majority of Miami voters to vote against the ordinance depended heavily on her use of the still powerful postwar images of homosexuals as child molesters. Her organization published a full-page advertisement the day before the vote warning that the "other side of the homosexual coin is a hair-raising pattern of recruitment and outright seductions and molestation." Her victory in Miami prompted groups in other cities to take up the cause, and in the next three years, laws extending civil rights protections to gay men and lesbians were repealed in more than a half-dozen bitterly fought referenda stretching from St. Paul, Minnesota to Eugene, Oregon. Gay rights advocates managed to defeat such referenda only in two elections, in November 1978, when Seattle voted to preserve its antidiscrimination ordinance and when California rejected the Briggs Initiative. The Briggs Initiative was a proposal so onerous it would have prohibited public school teachers, gay or straight, from saying anything that could be construed as "advocating homosexuality."

69. The Save Our Children campaign had other far-reaching effects. The day after the Dade County gay rights ordinance was repealed, the governor of Florida signed into law a ban on adoption by lesbians and gay men, the first such statewide prohibition. Thousands of children who might otherwise have had loving parents were thus denied the stability of family life. Similarly, in 1985, the Massachusetts Department of Social Services removed two boys from their foster care placement with a gay male couple and implemented a policy of preferred placement in "traditional family settings." While Massachusetts' ban was reversed in 1990 as a result of litigation, the Florida ban remained in effect until 2010.

70. Across the country, the unfounded fear that homosexuals posed a threat to children itself threatened some children: those already being raised by lesbians and gay men. In the 1970s, most children being raised by lesbian or gay parents had been born before their parents came out as gay. When a parent came out, any dispute over child custody that had to be resolved in court was likely to be heavily influenced by stereotypes and prejudices. A growing number of such cases reached the courts in the 1970s and 1980s, and in case after case the courts took the custody of children away from a mother or father whose estranged husband or wife used their former spouse's lesbian or gay identity against them. Some courts confronting early disputes of this nature articulated a "per se" rule against custody and visitation claims made by gay and lesbian parents, holding that homosexuality was inherently inconsistent with parenthood as a matter of law.

71. The long-standing association of homosexuals with disease was reinforced in the 1980s by the media's initial sensationalist coverage of AIDS, which frequently depicted homosexuals as bearers of a deadly disease threatening others. Fear of contagion prompted a new wave of discrimination against gay people in medical care, housing, and employment. Media coverage and the government's slow response to the disease also reflected and reinforced the enduring conviction that homosexuals stood outside the moral boundaries of the nation. Even after the name AIDS (Acquired Immune Deficiency Syndrome) replaced the moniker GRID (Gay-Related Immune Deficiency), media reports initially minimized the crisis by reassuring Americans that the "general public" was not at risk, since the disease only affected homosexuals and a handful of other groups, as if gay people were not part of the "general public."

72. The media coverage of AIDS and the numerous campaigns against local gay rights laws had a dramatic effect on public opinion. In 1987, six years after the AIDS crisis unleashed a new wave of fear of homosexuals, public disapproval of homosexuality reached its peak. Polling data showed virtually no change through the 1970s, but the number of people who declared that homosexual relations were always wrong climbed from 73 percent in 1980 to 78 percent in 1987. In the 1980s, gay rights activists secured the enactment of gay rights ordinances in an additional forty cities, counties, and suburbs, including Chicago, Boston, New York, and Atlanta, bringing the national total to eighty. But these victories often were more difficult to achieve than they had been in the 1970s. In New York City, for example, the law passed the city council only after more than a decade. In Chicago, it took fifteen years of dogged struggle, led primarily by 20th ward Alderman Clifford P. Kelley.

73. National religiously-inspired organizations formed in the 1970s and 1980s, such as the Moral Majority, Focus on the Family, Family Research Council, and Traditional Values

Coalition, provided national leadership and coordination to the movement against gay rights and disseminated campaign materials, political strategies, and financial resources to local groups fighting gay rights ordinances.

VII. The Persistence of Anti-Gay Discrimination from the 1990s to the Present

A. Legal Inequality in State Law

74. The spread of AIDS and the escalation of debate over gay rights at the local level fueled a growing polarization of the nation over homosexuality in the 1980s and especially the 1990s. By the end of the 1980s, even cities and states that had managed to pass gay rights laws found those laws under attack from an increasingly well-organized and well-funded opposition. Beginning in 1988, and reaching a crescendo from 1992 to 1994, groups in Colorado, Oregon, Maine, and six other states used anti-gay referenda and initiatives to challenge gay rights laws, and built local anti-gay rights organizations. In the twenty-five years after Anita Bryant's campaign in Florida, anti-gay activists introduced and campaigned for more than sixty anti-gay rights referenda around the country. Nationwide, gay rights supporters lost almost three-quarters of these contests. In Oregon alone, there were sixteen local anti-gay initiatives in 1993 and another eleven in 1994. Oregon's gay rights supporters lost all but one. In 1993, Cincinnati voters passed Issue 3, which amended the city charter to prohibit the city from extending civil rights protections based on sexual orientation. After five years of litigation the courts let the amendment stand. It was not until 2004 that the Cincinnati votes repealed the amendment.

75. Following Anita Bryant's lead, anti-gay rights activists frequently fomented voter fear of gay people by reviving demonic stereotypes of homosexuals as perverts who threatened the nation's children and moral character. Two videos that repeatedly were screened in churches and on cable television, "The Gay Agenda" and "Gay Rights, Special Rights," juxtaposed discussions of pedophilia with images of gay teachers and gay parents marching with their children in Gay Pride parades. With little subterfuge, the videos depicted homosexuals as child molesters. This message was reinforced by mass mailings and door-to-door distribution of anti-gay pamphlets, which fostered a climate of hostility and fear during the referenda.

76. In 1992, voters in Colorado passed Amendment Two, which amended the state constitution to prohibit any municipality or unit of the government from enacting anti-gay discrimination ordinances or policies. This amendment repealed the ordinances already enacted by Denver, Boulder, and Aspen. Moreover, it removed from the political arena any future effort to secure anti-discrimination legislation for gay people. In the face of public antipathy to gay people, represented by the success of this and other referenda overturning non-discrimination laws, several legal groups filed a lawsuit, *Romer v. Evans*, challenging the constitutionality of such constitutional amendments. Once again, the courts protected the rights of the minority against the prejudice of the majority. In 1996, the Supreme Court overturned this state constitutional amendment because it withdrew legal protection against discrimination for gay men, lesbians, and bisexuals, but no others.

77. Although a number of states now have extended basic anti-discrimination protections to gay men and lesbians, in twenty-nine states, including Ohio, there is no statutory barrier to firing, refusing to hire, or demoting a person in private sector employment solely on

the basis of their identity as a gay man or lesbian. In approximately twenty states there is no statutory or administrative barrier to such discrimination even in state government employment. Similarly, gay men and lesbians remain without statutory protection from discrimination in housing in thirty states, including Ohio. And, despite the critical role played by harassment of gay and lesbian meeting places in enforcing discrimination toward them throughout the twentieth century, gay and lesbian people in Ohio and twenty-eight other states have no statutory protection from discrimination in public accommodations.

B. Legal Inequality in Federal Law

78. At the national level, employment discrimination against gay men and lesbians by federal agencies remained permissible until the late 1990s. Although the outright ban on hiring gay federal employees was lifted in 1975, federal agencies were free to discriminate against gay men and lesbians in hiring and employment decisions until former President Clinton issued a first-of-its-kind executive order forbidding such hiring discrimination in 1998.

79. In 1992, President Bill Clinton's proposal to end the armed forces' policy banning lesbians and gay men from serving in the military sparked a firestorm in the first months of his presidency and revealed how deeply divided the nation remained. The public outcry against his plan (calls to Congress ran a hundred to one against lifting the ban) had been stoked by years of local anti-gay organizing. Opposition to the new policy by both the Pentagon leadership and the public led Congress and President Clinton to enact a new law known as "Don't Ask, Don't Tell," which allowed for the discharge of gay and lesbian soldiers if they acknowledged their sexual orientation under any circumstances, even in private counseling. Discharge of gay men and lesbians from the military continued after "Don't Ask, Don't Tell" became law in 1993. According to the Servicemembers Legal Defense Network, an organization dedicated to assisting military personnel affected by "Don't Ask, Don't Tell," more than 14,000 service members were fired under the law.

80. The repeal of "Don't Ask, Don't Tell" became effective in 2011. Although the repeal was an important advance for gay men and lesbians, it did not restore the careers of the thousands of service members who had been discharged under the policy. Nor does it protect gay men and lesbians from the significant discrimination that they continue to face in other domains. After years of effort, gay and lesbian advocates and their allies still have not been able to enact any federal legislation that specifically prohibits discrimination in schools, employment, housing, and public accommodations on the basis of sexual orientation. The Employment Non-Discrimination Act, which would extend express employment protections on the basis of sexual orientation, has been introduced regularly since 1994 (and earlier versions as far back as the 1970s) and has never passed both houses of Congress.

C. Discrimination in Adoption, Custody, and Parenting

81. In the 1990s, lesbian mothers and gay fathers continued to risk their parenting rights when their former different-sex spouses used their sexual orientation to try to deny them custody or visitation rights in divorces. By the mid-1990s, courts in most states followed rules that required individualized assessment of a parent's fitness. But as Julie Shapiro's 1996 study of custody cases around the country demonstrated, many courts continued to infuse those

individualized assessments with their own prejudice against lesbians and gay men. As she discovered, courts were especially disapproving of lesbians and gay men who were honest about their sexual orientation with their children. In a widely publicized case, a Virginia trial court in 1993 granted a grandmother's petition to take Sharon Bottoms' two-year-old son away from her because, as the trial court judge explained, her lesbian "conduct is illegal . . . a Class 6 felony in the Commonwealth of Virginia." He went on to declare "that it is the opinion of this Court that her conduct is immoral" and "renders her an unfit parent." Virginia's Supreme Court upheld the trial court's decision terminating Sharon's parental rights despite the presumption favoring her as a natural parent. In doing so, it relied on a wider range of evidence, including the finding that Bottoms' lesbianism would subject her child to social condemnation and thus disturb the child's relationships with peers and the community at large. Some courts had used similar reasoning to remove children from the homes of divorced white mothers who had married or lived with black men, a practice ruled unconstitutional by the Supreme Court in 1984. In that case, *Palmore v. Sidoti*, Chief Justice Warren Burger ruled that "private biases may be outside the reach of the law, but the law cannot directly, or indirectly, give them effect." 466 U.S. 429, 433 (1984). But courts in many states continued to give legal effect to the private bias they assumed existed against lesbian and gay parents by preferring heterosexual parents over gay parents, without regard to other factors bearing on the child's best interests.

82. Gay and lesbian parents continue to be forced by some courts to choose between hiding their gay identities and losing parental rights. As one Texas attorney commented in 1988, "unless [a mother] ended her open lesbian relationship I would have little chance of winning a custody trial." According to Clifford J. Rosky, in 2004, after ordering a gay father not to expose his child to his "gay lover(s) and/or gay lifestyle," a Tennessee trial court sentenced the father to two days in jail for coming out to the child.

83. State and popular efforts that began in the 1970s to ban lesbians and gay men from adopting or serving as foster parents continued throughout the 1990s and 2000s. For example, in 2000, Mississippi's legislature passed a ban on adoption by same-sex couples that was subsequently signed by the governor. As recently as 2008, Arkansas enacted by popular referendum a ban on foster care and adoption by gay people.

84. Some states enacted laws that bar recognition of out-of-state adoptions by same-sex couples. For example, in 2004, Oklahoma passed the "Adoption Invalidation Law," which stated that Oklahoma "shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."

85. Some states refuse to allow a biological parent's same-sex partner to adopt the children they raise together. For example, as recently as December 2010, the North Carolina Supreme Court invalidated a second parent adoption by a woman's same-sex partner, holding that a non-biological same-sex partner could not be recognized as a legal parent.

86. During the 1980s and 1990s, gay and lesbian parents continued to face significant obstacles in custody and visitation disputes. Courts continued to demonstrate harsh judgments toward gay and lesbian parents even when a child was conceived with two gay or two lesbian parents intending to raise the child jointly. This was especially evident when the courts had to decide where to place a child when the child's biological mother died and one of her relatives

contested the right of her surviving partner, the child's second mother, to continue to raise the child. In a number of cases, courts granted custody to those relatives despite clear evidence that the child wished to remain with her surviving mother.

D. Depiction of Gay Men and Lesbians in the Media

87. With the decline in movie and television censorship and the growing interest in gay people and issues, there was a significant increase in the coverage of gay issues in the media and in the number of gay characters in movies and on television in the 1990s. By the time the immensely popular "Will & Grace" premiered on NBC in 1998, gay and lesbian characters were a more regular part of the television landscape. This exposure changed the dominant representation of homosexuals. Gay people usually appeared in the media in the 1950s as shadowy and dangerous figures, but they now appeared as a diverse and familiar group whose all-too-human struggles and pleasures drew the interest of large viewing audiences.

88. It was not only in the media that heterosexuals began to see gay and lesbian people. Dramatically increasing numbers of lesbians and gay men revealed their homosexuality to their families, friends, neighbors, and co-workers in the 1990s. Polling data suggest the magnitude of the shift. In 1985, only a quarter of Americans reported that a friend, relative, or co-worker had personally told them that they were gay, and more than half believed they did not know anyone gay. Fifteen years later, in 2000, the number of people who knew someone openly gay had tripled to three-quarters of the population. Acceptance of gay men and lesbians and support for civil rights protections increased as growing numbers of heterosexuals realized that some of the people they most loved and respected were gay.

89. It is important not to overstate the results of this nationwide "coming out" experience, however. In 2000, a significant majority of Americans still expressed moral disapproval of homosexuality. Moreover, support for lesbian and gay civil rights and equality continued to show significant regional differences. Polls showed that public opinion in Massachusetts, Connecticut, and Hawaii was the most tolerant. Support for civil rights also was strong in most other states in New England, in New Jersey and New York, and in other regional clusters: Maryland in the mid-Atlantic, Wisconsin, Minnesota, and Illinois in the upper Midwest, and California, Oregon, and Washington on the West Coast. Anti-gay sentiment was strongest in southern states and in the lower Midwest and plains states. The effects of these regional differences could be seen in regional variations in congressional votes on key gay rights issues, in the treatment of gay couples and individuals by state laws, regulations, and court rulings concerning adoption and foster parenting, parental rights, and in the passage of gay rights laws. Only two states—Wisconsin in 1982 and Massachusetts in 1989—enacted legislation banning anti-gay discrimination before 1990. The number rose to eleven by 2000, but eight of the states were in the Northeast or on the Pacific Coast. The rights of gay people continue to vary enormously across the nation.

E. Continued Official, Religious, and Private Condemnation of Homosexuality in the 1990s-2000s

90. Gay people also continue to face discrimination and opprobrium from highly regarded institutions and officials. The Boy Scouts of America, a federally-chartered

organization, long insisted that "homosexual conduct is not morally straight," and refused to allow gay people into the organization. *Boy Scouts of America v. Dale*, 530 U.S. 640, 651 (2000). Earlier this year, when the Boy Scouts announced that it would consider changing its national exclusionary membership policy to allow local leaders to decide whether to allow openly gay participants, the proposal faced a firestorm of opposition. Dozens of conservative and religious groups lobbied against the proposed change as a "grave mistake" and petitioned the Boy Scouts to "show courage" and "stand firm for timeless values"; they succeeded in persuading the Boy Scouts to delay a vote on the issue. Although the national organization ultimately voted to allow gay boys to join the organization, it continues to exclude gay men over the age of 18. Less than a decade ago, the Chief Justice of the Alabama Supreme Court referred, in a judicial opinion, to homosexual conduct as "abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated." *Ex Parte H.H.*, 830 So. 2d 21, 26 (2002) (Moore, C.J., concurring).

91. Although the American Psychiatric Association (APA) removed homosexuality from its list of mental disorders in 1973, dissident psychiatrists and psychologists led by Charles Socarides and Joseph Nicolosi established the National Association for Research and Therapy of Homosexuality (NARTH) in 1992. Disagreeing with both the APA and prevailing professional opinion, NARTH continues to disseminate materials claiming a scientific basis for believing that homosexuality is a psychological disorder and a "potentially deadly lifestyle," and that homosexuals can be "healed." NARTH also lectures, partners with religious organizations, supports conversion therapy activities, and files amicus briefs in court cases.

F. Anti-Gay Policing and Private Anti-Gay Violence

92. Although police harassment of gay men and lesbians and their meeting places is not as common as it was some years ago, it continues to be a problem. In 2009, for example, there were highly publicized police raids of gay bars in Atlanta, Georgia, and in Ft. Worth, Texas, where one patron was critically injured.

93. Gay people also continue to face violence motivated by anti-gay bias. A handful of horrific incidents have drawn widespread media attention. In 1984, in Bangor, Maine, 23-year-old Charlie Howard was targeted by three teens due to his sexual orientation. They attacked him and, although he protested that he could not swim, threw him off a bridge into the Kenduskeag Stream, where he drowned. Then, in 1998, Matthew Shepard, a college student in Laramie, Wyoming, was bound, tied to a fence, beaten with a pistol, and left to die because he was gay. Ten years later, Lawrence "Larry" Fobes King, a 15-year-old student at E.O. Green Junior High School in Oxnard, California, was shot and killed in school by a fellow student because of his sexual orientation. But the problem reaches far beyond these three incidents. The FBI reported 1,260 hate crime incidents based on perceived sexual orientation in 1998 and 1,293 in 2011. In 2008, the year of Lawrence King's murder, a national coalition of anti-violence social service agencies identified twenty-nine murders motivated by the assailants' hatred of lesbian, gay, bisexual, or transgender people. The threat of violence continues to lead many gay people to hide their identities or to avoid such commonplace expressions of affection as holding hands with their partners in public.

94. The most vulnerable victims of discrimination are youth. A national study published in December 2010 found that gay and lesbian teenagers are nearly 40 percent more likely than heterosexual teenagers to be punished by schools, police, and the courts. According to the Gay, Lesbian and Straight Education Network's 2009 National School Climate Survey published in 2010, 61.1 percent of lesbian, gay, bisexual, and transgender (LGBT) students surveyed felt unsafe at school because of their sexual orientation; 84.6 percent were verbally harassed because of their sexual orientation; 40.1 percent were physically harassed in the past year because of their sexual orientation; and 18.8 percent were physically assaulted because of their sexual orientation. A recent study sponsored by the New York City Council noted the over-representation of LGBT youth among the city's homeless population. And the recent spate of suicides among LGBT youth has highlighted the personal consequences of the ostracism and demonization of gay men and lesbians in American society.

95. One example of the harassment that LGBT youth may face was recounted by Derek Henkle, a high school student in Washoe County School District, Nevada, who sued the District for failing to protect him from anti-gay harassment. *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001). His suit contended that, on one occasion, students lassoed a rope around his neck in the school parking lot and threatened to kill him by dragging him from their truck. On another occasion, Henkle explained he was punched by another student while two school security guards stood by. Henkle also reported that one of his principals told him to "stop acting like a fag." The case resulted in the largest pre-trial settlement of its kind in the nation at the time.

G. Marriage

96. Gay men and lesbians are still prohibited from marrying in the vast majority of states in this country, and the question of marriage rights for same-sex couples remains hotly contested across-the-board. Some of the arguments made in the debate over the right of gay couples to marry have echoed those made in earlier debates over the rights of disfavored minority groups. Fifty years ago, for instance, segregationists often claimed that segregation and statutes banning interracial marriage reflected God's plan for humankind. In the 1960s, a Virginia judge who upheld that state's law against interracial marriage in the lower-court proceeding in *Loving v. Virginia* claimed that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

97. Opponents of the right of gay people to marry or adopt children also have drawn on their reading of scripture to justify their positions. As recently as 2002, when the Supreme Court of Alabama reversed the Alabama Court of Civil Appeals' decision to grant a lesbian mother custody of her children, the Chief Justice of the Supreme Court of Alabama used language as strong as that used by the trial judge in *Loving v. Virginia* in his concurring opinion: "Homosexuality is strongly condemned in the common law because it violates both natural and revealed law. The law of the Old Testament enforced this distinction between the genders by stating that '[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination.' Leviticus 20:13 (King James) . . . the common law designates homosexuality as

an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent." *Ex parte H.H.*, 830 So. 2d 21, 33, 35 (Ala. 2002).

98. The vigorous opposition to ending discrimination against lesbian and gay couples in marriage law is the latest example of this pattern. The marriage issue first reached the national stage in 1993, when Hawaii's Supreme Court ruled that the state's ban on marriages between same-sex couples presumptively violated the state's equal rights amendment and remanded the lawsuit challenging that ban to a lower court for review. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). By 1996, when a second trial began in the lower court, the prospect of gay couples winning the right to marry had galvanized considerable opposition. Ultimately, while the litigation was pending, Hawaii amended its constitution to give the legislature the authority to limit marriage to different-sex couples, *see* Haw. Const. art. I, § 23, which it did. The Hawaii Supreme Court then dismissed the case as moot. *Baehr v. Miike*, Civ. No. 20371 slip op. at 5-8 (Dec. 9, 1999) (taking notice of constitutional amendment). In addition, under pressure from organizations proclaiming support for "traditional family values," the United States Senate passed the Defense of Marriage Act (DOMA) on the day the Hawaii trial began. The Act provided a federal definition of marriage as the union of one man and one woman and declared that no state needed to give "full faith and credit" to "same-sex marriages" licensed in another state. It also denied federal benefits to such married couples. Fourteen states passed state-level DOMA statutes that year, and another eleven passed such statutes the following year. In 2004, when Massachusetts became the first state to permit gay couples to marry, a full thirteen states passed constitutional amendments banning such marriages even though twelve of those states already had enacted statutory state DOMAs.

99. Indeed, in each state where gay men and lesbians have achieved the right to marry —either through judicial decision or legislative action—there has been significant and organized action by those opposed to marriage rights for same-sex couples to take that right away. California provides a good—and especially contentious—example. In February 2004, San Francisco Mayor Gavin Newsom instructed city officials to issue marriage licenses to same-sex couples. The California Supreme Court ordered the city to stop doing so the following month, and it later nullified the marriages which had been performed. In 2005, and again in 2007, California's legislature approved bills that would legalize marriage for same-sex couples, but both bills were vetoed by then-Governor Schwarzenegger. In May 2008, the California Supreme Court decided in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) that the privacy and due process provisions of the California Constitution guaranteed the basic civil right of marriage to all individuals and couples, without regard to their sexual orientation. Six months later, on November 4, 2008, California voters approved Proposition 8, adding to the California Constitution the provision "Only marriage between a man and a woman is valid or recognized in California." Same-sex couples immediately sued to prevent the enforcement of Proposition 8, but their efforts were rebuffed by the California Supreme Court in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). The court held that the amendment was lawfully enacted, but that it did not invalidate marriages of same-sex couples performed in California prior to its effective date. The right of same-sex couples to marry in California was only restored in 2013 after a federal trial court found Proposition 8 unconstitutional, and the U.S. Supreme Court subsequently declined to review the decision on the merits because no appellant had standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)

100. Opponents of marriage equality who supported Proposition 8 mobilized some of the most enduring anti-gay stereotypes to heighten public apprehension. Several television commercials aired by the supporters of Proposition 8, for instance, warned that marriage equality might encourage children to become gay themselves. The approval of California's Proposition 8 along with similar laws and constitutional amendments in forty other states indicates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships.

101. Iowa provides another example. In April 2009, a unanimous Iowa Supreme Court struck down the exclusion of qualified same-sex couples from civil marriage. In response, national organizations opposed to marriage for same-sex couples, such as the National Organization for Marriage and the American Family Association, initiated a campaign for the removal of three of the judges involved in that decision who were subject to retention elections. The campaign was successful, and all three judges were ousted from their position on the bench.

Conclusion

Today the civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. Like other minority groups, they often must rely on judicial decisions to secure equal rights. The role of the courts in this dispute is reminiscent of earlier disputes in which courts had to confront public opposition to minority rights. In 1948, when the California Supreme Court became the first state supreme court in the nation to overturn a state law banning interracial marriage, it bucked the tide of white public opposition to such marriages. While the United States Supreme Court overturned the remaining state bans on interracial marriage in 1967 in *Loving v. Virginia*, it was not until 2001 that more Americans approved of interracial marriage than disapproved of it. History has vindicated the judges who had the courage and foresight to uphold the constitutional rights of disfavored minorities in the face of majoritarian hostility.

Signed under penalty of perjury under the laws of the United States this 10th day of Oct., 2013.

George Chauncey

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