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NOTES

DOING THE NASTY: AN ARGUMENT FOR BRINGING SAME-SEX EROTIC CONDUCT BACK INTO THE COURTROOM

If you have a mind that can think about something that is inextricably connected with something else, without thinking about the something else, then you have The Legal Mind.

Thomas Reed Powell

INTRODUCTION

On the morning of August 3, 1982, Officer K.R. Torick arrived at the home of Michael Hardwick with an invalid arrest warrant for failure to appear in court. A house guest answered the door and waved him into the home. Once inside, Torick either observed or heard—through a partially-open bedroom door—Hardwick and another man engaged in mutual fellatio. He entered the bedroom and arrested both men, refusing to leave the room or turn his back while they dressed. Hardwick's companion, a married schoolteacher from North Carolina on a weekend search for government employment in Atlanta, feared the repercussions of his arrest: "Please don't tell my wife," he begged the arresting officer, "I'll lose my teaching job." After handcuffing the men, Torick drove them to the Central Police Station in Atlanta where he had them photographed, fingerprinted, and charged with committing the crime of sodomy, defined by a Geor-

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3 Cain, supra note 2, at 1612. According to Michael Hardwick, Officer Torick entered the house through an open door and was allowed into the interior by a half-asleep houseguest on the couch who did not realize that Hardwick and his companion were together in Hardwick's bedroom. Irons, supra note 2, at 395.

4 The schoolteacher pled to a lesser charge, Case, supra note 2, at 1653, and decided that, because of the risk to his job, he could not go on with the case, see Irons, supra note 2, at 396.
gia statute as "any sexual act involving the sex organs of one person and the mouth or anus of another."\textsuperscript{5} If convicted, they faced from one to twenty years in prison.\textsuperscript{6}

Hardwick was incarcerated for twelve hours even though he was legally entitled to bail one hour after his arrival at the station.\textsuperscript{7} And Torick made certain that the guards and other inmates knew that he had been arrested for "cocksucking."\textsuperscript{8} Upon placing the men in the holding cell, the officers said, "Wait until we put [them] into the bullpen... fags shouldn't mind—not after all, that's why they are here."\textsuperscript{9}

Hardwick challenged Georgia’s prohibition on sodomy as an unconstitutional violation of his right to privacy. In a now infamous 1986 decision, the United States Supreme Court disagreed, holding that the Constitution does not protect consensual adult homosexual sodomy as defined by the Georgia statute.\textsuperscript{10} In so doing, the Court spawned a new generation of gay-rights litigation that focuses on the distinction between homosexual status and homosexual conduct. According to Professor Patricia Cain, the \textit{Hardwick} decision "has changed the course of gay rights litigation" by making the status/conduct distinction the "driving force in shaping new constitutional challenges to discrimination against gays and lesbians."\textsuperscript{11} This litigation strategy—dissecting lesbian, gay, and bisexual people into a sexual and an asexual component—is sculpting the contours of constitutional jurisprudence in regards to sexual orientation.

Part I of this Note discusses the origins of the status/conduct distinction; Part II describes its evolution; Part III explores its ramifications; and Part IV concludes that the present effort to divorce status from conduct, although necessary in the short term, might ultimately

\textsuperscript{5} \textsc{Ga. Code Ann.} \textsection 16-6-2(a) (1996).
\textsuperscript{6} "A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years." \textit{Id.} \textsection 16-6-2(b).
\textsuperscript{7} \textsc{Irons, supra} note 2, at 396.
\textsuperscript{8} \textit{Id.}
\textsuperscript{9} \textsc{Tribe, supra} note 2, \textsection 15-21, at 1424-25 n.32.
\textsuperscript{10} \textsc{Bowers v. Hardwick}, 478 U.S. 186 (1986) (5-4 decision). Michael Hardwick describes the day he learned of the Supreme Court's decision as follows:

A friend of mine had been watching cable news and had seen [a report of the Court's decision] and knew where to find me and came over. When I opened the door he was crying and saying that he was sorry, and I didn't know what the hell he was talking about. Finally I calmed him down and he told me what had happened: that I had lost by a five-to-four vote.

I was totally stunned. ... I just cried—not so much because I had failed but because to me it was frightening to think that in the year of 1986 our Supreme Court... could make a decision that was more suitable to the mentality of the Spanish Inquisition.

\textsc{Irons, supra} note 2, at 400. \textsc{Newsweek} magazine printed a poll that said 57% of the population opposed the decision. \textit{Id.} at 401.
\textsuperscript{11} \textsc{Cain, supra} note 2, at 1617.
harm lesbian, gay, and bisexual people, \(^{12}\) psychologically, socially, legally, and morally.

I

Origins of the Status/Conduct Distinction

Although the *Hardwick* decision laid the foundation for a dependence on the status/conduct distinction in gay-rights litigation, \(^{13}\) two canons of constitutional law also favor its usage. First, a long-standing precept of criminal law—that the state cannot punish status unless accompanied by proof of criminal conduct—makes legal disabilities placed on persons merely because of their sexual orientation appear improper even outside the criminal law context. Second, the separation in First Amendment jurisprudence between speech and conduct, such that the former receives protection more readily than the latter, implies that an admission of homosexuality, by, for instance, a lesbian

\(^{12}\) Although the word "gay" in this Note usually refers to gay men, terms such as "pro-gay" and "gay rights" are meant to include lesbians and bisexuals. Additionally, I use the term "homosexual" to refer to lesbians and bisexuals as well as to gay men. Some people object to the clinical overtones of the word "homosexual," observing that clinicians introduced the term in association with their descriptions of homosexuality as a pathology. See *id.* at 1626. Furthermore, many lesbians believe that the word "homosexual" conjures up images of gay men and thus excludes women. *Margaret Cruikshank, The Gay and Lesbian Liberation Movement* 91 (Roger S. Gottlieb ser. ed., Radical thought/Radical movements 1992). One could also object to including bisexuals under a heading that implies strict same-sex attractions. Although I agree with these criticisms, I can find no suitable substitute for the word "homosexual," and so I continue to use it. Some writers prefer the term "gay," because it lacks the clinical overtones of "homosexual" and because it was "chosen by [gays themselves], as a sign of [their] refusal to be named by, judged by, or controlled by the dominant majority." *Id.* But "gay," like "homosexual," excludes lesbians and bisexuals.

The word "queer" may eventually prove superior to any of these alternatives in that it does not distinguish between lesbian, gay, and bisexual people and even leaves open the possible inclusion of other groups, like transvestites. I suspect that much of the problem with terminology in pro-gay literature stems from the fact that the homosexual-heterosexual dichotomy constructed by theorists does not accurately reflect human sexual behavior. Human sexuality, according to Alfred Kinsey, is a continuum:

> The world is not to be divided into sheep and goats. . . . Only the human mind invents categories and tries to force facts into separated pigeon-holes.
>
> The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.


Additionally, although I identify myself as a bisexual woman, I use the third person objective when referring to lesbian, gay, and bisexual people as a group. I choose to write in that voice not in order to distance myself from the gay community, but because I cannot include myself in many of the struggles that I discuss in this Note. For example, I feel uncomfortable saying that the military's exclusion of homosexuals deprives "us" of the opportunity to work for one of America's largest employers. I am deprived of such an opportunity, of course, but because I have never had any interest in working for the armed forces, it is difficult to identify myself as having suffered such a deprivation.

\(^{13}\) See *supra* note 11 and accompanying text.
servicemember, would receive greater First Amendment protection than would any conduct expressive of her sexual orientation. Focusing on her speech and status as distinct from her sexual conduct, consequently, seems wise, especially when the government can constitutionally criminalize the latter.\textsuperscript{14} \textit{Hardwick} comports with these existing legal canons, and encourages what appears to be a promising litigation strategy that divides status from conduct.

A. \textit{Robinson v. California}\textsuperscript{15}

The criminal law permits punishment only after the state or federal government has proven that a particular defendant has engaged in proscribed conduct. "Bad thoughts alone cannot constitute a crime; there must be an act . . . . Thus the common law crimes are defined in terms of act . . . and statutory crimes are unconstitutional unless so defined."\textsuperscript{16}

In 1962, the Supreme Court held in \textit{Robinson v. California} that a statute criminalizing "addict[ion] to the use of narcotics" violated the Eighth Amendment's prohibition against cruel and unusual punishment.\textsuperscript{17} A police officer had arrested Robinson after examining his arms and observing "scar tissue and discoloration" on the inside of his right arm and "what appeared to be numerous needle marks" on the inside of his left arm.\textsuperscript{18} He testified at trial that Robinson had admitted to the occasional use of narcotics.\textsuperscript{19} Another officer, who had examined Robinson in the Central Jail in Los Angeles the day after his arrest, testified that the scabs were several days old and that Robinson was neither under the influence of narcotics nor suffering withdrawal symptoms at that time.\textsuperscript{20} Robinson denied that he had ever used or been addicted to narcotics.\textsuperscript{21} He attributed the marks on his arms to an allergic condition.

In striking down the California law, the Court noted that the statute punished status without proof of any related antisocial behavior:

This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for anti-social or

\begin{itemize}
  \item \textsuperscript{14} Assuming, for the moment, that the conduct is, in this instance, same-sex erotic contact of the type prohibited by the Georgia statute at issue in \textit{Hardwick}.
  \item \textsuperscript{15} 370 U.S. 660 (1962).
  \item \textsuperscript{16} WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW \textsection{3.2}, at 195 (2d ed. 1986).
  \item \textsuperscript{17} The statute read in part: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the state to prescribe and administer narcotics." CAL. HEALTH \& SAFETY CODE \textsection{11721} (West 1962) (repealed 1972).
  \item \textsuperscript{18} 370 U.S. at 661.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. at 661-62.
  \item \textsuperscript{21} Id. at 662.
\end{itemize}
disorderly behavior resulting from their administration. . . . [W]e deal with a statute which makes the “status” of narcotic addiction a criminal offense . . . . California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.22

But the level of generality at which the Court examined the California statute muddied the clarity of its rationale. Justice Stewart, writing for the majority, analogized the situation to one in which a law criminalized mental illness or the contraction of a venereal disease. “[I]n the light of contemporary human knowledge,” he wrote, “a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . . . [N]arcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily.”23

In emphasizing the specific status targeted by the statute, and in characterizing that status as a sickness, the Court left the legal community unsure of the scope of its holding. Did Robinson stand only for a prohibition on the creation of a crime of status, or did it reach even further to prohibit the government from punishing any antisocial act attributable to a condition over which an individual has no control? Some commentators interpreted Robinson to mean the latter.24 But the Supreme Court put that broad reading to rest six years later in Powell v. Texas25 when it held that the state could constitutionally punish a chronic alcoholic for public drunkenness. Consequently, commentators now understand Robinson to stand for the proposition that crimes of status and personal condition must require proof of corresponding antisocial behavior in order to satisfy the Eighth Amendment’s prohibition on cruel and unusual punishment.26 This narrower reading of Robinson means that the government may punish.

22 Id. at 666.
23 Id. at 666-67. He cited various medical authorities for this proposition, pointing out that addiction may result from the use of medically prescribed narcotics or from the use of narcotics by one’s mother during pregnancy.
24 “[I]t might be argued that the ‘illness’ rationale of Robinson bars conviction for that conduct which is an inevitable consequence of the addiction.” LAFAVE & SCOTT, supra note 16, § 2.14, at 189 (footnote omitted); see also Powell v. Texas, 392 U.S. 514, 568 (1968) (Fortas, J., dissenting) (arguing that the defendant, a chronic alcoholic, could not prevent himself from appearing publicly after having become intoxicated).
26 Courts examining challenges to crimes of status have produced identical results under substantive due process analyses. See, e.g., LAFAVE & SCOTT, supra note 16, § 2.12, at 157 nn.73 & 76. “With mere guilty intention, divorced from an overt act or outward manifestation thereof, the law does not concern itself.” Id. § 2.12, at 157 n.73 (quoting People v. Belcastro, 190 N.E. 301 (Ill. 1934)). The author also cites Proctor v. State, 176 P.771 (Okla. Crim. 1918) (“holding unconstitutional the statutory crime of owning a building with intent to sell liquor therein”). Id. § 2.12, at 157 n.76.
status so long as status is accompanied by some proven antisocial conduct. Thus, although the Robinson holding suggests that pro-gay litigators might utilize the status/conduct distinction to their clients’ advantage when no proof of criminal conduct exists, courts can easily circumvent Robinson by using a person’s homosexuality as evidence of criminal conduct. Any legal disability an individual faces, then, only incidentally penalizes her for her sexual orientation.

B. Bowers v. Hardwick

1. Disposition

When the State of Georgia chose not to prosecute him, Michael Hardwick sued in federal district court for a declaratory judgment on the constitutionality of Georgia’s prohibition on sodomy. John and Mary Doe, a married heterosexual couple, joined in the suit, claiming that their desire to engage in sodomy had been “chilled and deterred” by the statute. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

On appeal, the Eleventh Circuit dismissed only the Does’ portion of the complaint, agreeing with the district court that the couple lacked standing. In order to have had standing to facially challenge the statute, the Does needed to show (1) that they were likely to break the law and (2) that the authorities were likely to prosecute them for

27 “[I]f this is all that Robinson means, then the scope of that decision is quite limited; it might be held, for example, that narcotics addiction is still punishable when proof of acts is required.” LaFave & Scott, supra note 16, § 2.14, at 182 (footnote omitted). The authors cite at least one court that has so held: State ex rel Bloin v. Walker, 154 So. 2d 368 (La. 1963) (holding narcotics addiction to be punishable when proof of act is also required), cert. denied, 375 U.S. 988 (1964). LaFave & Scott, supra note 16, § 2.14, at 182 n.133.

28 See infra parts II.B.3.a, III.B.1 for a discussion on the use of status as evidence of conduct in the military context.

29 Hardwick v. Bowers, No. C83-273A (N.D. Ga. Apr. 15, 1983), rev’d, 760 F.2d 1202 (11th Cir. 1985), rev’d, 478 U.S. 186 (1986), cited in Cain, supra note 2, at 1612, 1613 n.338. The American Civil Liberties Union and Lambda Legal Defense and Education Fund were planning strategies to challenge the constitutionality of state sodomy laws and approached Hardwick after his arrest. Hardwick’s case seemed promising because he was out to his family and friends about his sexual orientation and because he worked as a bartender in a gay bar and so did not have to fear the loss of his employment due to his involvement in the case. Also, because the officer had actually walked into Hardwick’s bedroom, the case clearly presented a privacy issue; most sodomy charges were issued for public or semi-public sexual activity. “The behavior for which Michael Hardwick was arrested and temporarily jailed took place in his home, a sanctuary to which . . . the fourth amendment accords special protection.” Tribe, supra note 2, § 15-21, at 1424-25 (footnotes omitted).


31 Id. at 188.

32 The district court found that because the Does “had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action.” Id. (citing Hardwick, No. C83-273A, slip op. at 8).
their transgression. By claiming only that they wanted to engage in sodomy and that the statute had deterred them from so doing, the Does failed to meet the first criterion. Hardwick, on the other hand, claimed that he regularly engaged in sodomy and that he planned to do so in the future, thus satisfying the first criterion. The Does failed to meet the second criterion as well because Georgia police traditionally did not enforce sodomy prohibitions against heterosexuals. Hardwick, of course, had actually been arrested and charged with the commission of a crime and hence easily satisfied the second criterion.\(^3\) The Eleventh Circuit therefore reversed the lower court's dismissal of Hardwick's claim and ultimately invalidated the Georgia statute as an unconstitutional invasion of privacy.\(^4\) Writing for the majority in language reminiscent of the Supreme Court's privacy decisions, Judge Frank M. Johnson stated that "[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage."\(^5\) The State of Georgia appealed, and, in the words of Professor Laurence Tribe, who argued Michael Hardwick's case before the Supreme Court, the question properly before the justices was whether "private, consensual, adult sexual acts partake of [the] traditionally revered liberties of intimate association and individual autonomy" recognized by the Constitution.\(^6\) The Court, however, narrowed the inquiry such that it focused only on sexual intimacy between same-sex couples and found that the penumbral right to privacy elucidated in prior case law did not extend to homosexual sodomy.\(^7\) Most of the briefs filed on behalf of Hardwick contended that intimate sexual con-

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\(^3\) The Court could have limited its ruling on standing to these two factors, but it instead characterized Hardwick's desire to engage in "the proscribed activity" as more "genuine" than the Does'. This language, in the words of Professor Nan Hunter, suggests that "only a homosexual could be genuinely interested in engaging in oral sex" and "conf[lat]es...homosexuality with sodomy," or status with conduct. Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REv. 531, 540-41 (1992).


\(^5\) Id. at 1212.

\(^6\) Tribe, supra note 2, § 15-21, at 1428.

\(^7\) The central privacy decisions are: Zablocki v. Redhail, 434 U.S. 374 (1978) (establishing the right to marry); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (establishing the right to choose which relatives with which to live); Roe v. Wade, 410 U.S. 113 (1975) (establishing the right to terminate a pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to use contraceptives to unmarried couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right of married couples to use contraceptives); Skinner v. Oklahoma, 315 U.S. 535 (1942) (establishing the right to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing the right of parents to direct the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing the right to teach one's child a foreign language). The issue in *Hardwick* should have been controlled by *Griswold* and *Eisenstadt* on the theory that a heterosexual person using birth control has no more connection to procreation than did Michael Hardwick and his companion.
duct between consenting adults was a fundamental right and that the justices should therefore subject the Georgia law to heightened scrutiny. The Court, however, rejected this argument, determining that the Due Process Clause required only a rational basis review of the challenged statute. Instead of remanding the case to the court of appeals, the Supreme Court conducted the rational basis determination itself, on a partial record and without the benefit of full briefing on the issue, concluding that the statute passed constitutional muster.

In conducting its review of the Georgia statute, the Court followed a two-step process beginning with the identification of the legitimate state interest promoted by Georgia's sodomy prohibition. Next, the Court determined whether the prohibition was rationally related to that interest. In addition to identifying Georgia's interest as the protection of public morality, the Court embarked on a lengthy historical analysis of the treatment of homosexuality in Europe and the United States. Commentators have roundly criticized this analysis as "bad scholarship," both for its overreliance on a single law review article, and for its substantive inaccuracy. The majority claimed correctly, for example, that sodomy "was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," but it failed to acknowledge, or perhaps to even recognize, that fellatio—the activity for which police arrested Michael Hardwick—was not included in the definition of sodomy in 1791. Geor-

38 Cain, supra note 2, at 1615 n.351.
40 Cain, supra note 2, at 1615.
41 Hardwick, 478 U.S. at 196.
42 Id.
43 Id.
44 Id.
45 Id. at 192-94.
47 The article relied on was: Yao Apasu-Gbotsu et al., Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521 (1986).
49 Hardwick, 478 U.S. at 192.
50 One would never know from reading the opinion exactly what Hardwick and his companion were doing; their activity is referred to only as "homosexual conduct," id. at 195, "homosexual sodomy," id. at 190, "that conduct," id. at 192, "such conduct," id. at 190 and "that act," id. at 188. Use of such language creates an image of male-male or female-female sexual activity as a monolithic, uniform, sameness.
51 See Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 YALE L.J. 1073, 1084-85 (1988) ("Courts in at least seven of the thirty-two states Justice White found to have 'criminal sodomy statutes in effect in 1868,' explicitly held that these statutes did not apply to oral-genital contact.") (footnote omitted) (quoting Hardwick, 478 U.S. at 193 n.6). For a discussion of the indeterminacy inherent in our definition of "sodomy," see infra part II.B.1.
Georgia did not explicitly ban sodomy until about 1816, and even then state courts diverged sharply on the question of whether that ban extended to oral sex. In fact, the Georgia Supreme Court did not put the question to rest until 1904 when it held that the prohibition on sodomy included that “infamous act . . . committed . . . not per anum, but in even a more disgusting way.” Against the historical background presented by the majority, Justice White may have accurately characterized a claimed “right to engage in [oral sex] . . . ‘deeply rooted in this Nation’s history and tradition’” as, “at best, facetious.” But a different adjective may have applied had the Justices more thoroughly researched their history. As for the second step in its rational basis review, the Court held that Georgia’s enactment of a virtually unenforceable statute regulating private conduct did indeed rationally relate to the protection of public morality.

2. Tone

The majority’s focus on “homosexual sodomy” in the Hardwick decision is, in the words of Justice Blackmun, “obsessive.” Justices White, Burger, and Powell used the terms “homosexual conduct” or “homosexual sodomy” a total of thirteen times in the space of eleven pages. Quoting William Blackstone, Justice Burger describes homosexuality as “an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature.’” The majority’s fascination with the homosexual nature of Hardwick’s act is further evidenced by its analysis of the statute only as applied to homosexual activity. The statute nowhere mentions the word “homosexual,” and briefs for Hardwick argued in terms of a fundamental right to privacy in intimate associations, not in terms of “a fundamental right . . . [for] homosexuals to engage in sodomy.” By narrowing its inquiry, the majority could ignore information contained in briefs prepared by the American Psychological Association and the American Public Health Association indicating that eighty percent of married couples practiced oral and/or anal sex; that ninety-five percent of American men had engaged in oral sex; and that homosexuals were no more likely than heterosexuals to violate sodomy laws.

52 See IRONS, supra note 2, at 383.
53 Halley, supra note 46, at 1769 (footnote omitted) (quoting the court in Herring v. State, 46 S.E. 876, 881 (Ga. 1904)). For a historical analysis of sodomy laws as they relate to the Georgia statute at issue in Hardwick, see Halley, supra note 46, at 1750-67.
55 Id. at 196.
56 Id. at 200 (Blackmun, J., dissenting).
57 Id. at 197 (Burger, C.J., concurring).
58 Id. at 190 (White, J., writing for the majority).
59 IRONS, supra note 2, at 387.
more, in its historical defense of the Georgia statute, the majority engaged in an inquiry that, according to Professor Tribe, was "beside the point." Justice Blackmun echoed this sentiment when, in challenging the majority's emphasis on pedigree, he quoted Justice Holmes in saying:

[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

The majority's intense and unnecessary focus on "homosexual sodomy," its refusal to express an opinion as to the constitutionality of the Georgia statue as applied to heterosexual sodomy, and its myopic vision of history contradict the veneer of neutrality created by Justice White's insistence that the decision presented no judgment as to "whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable." Rather, the social disapproval of homosexuality that pervades our culture, to which the justices aptly gave voice, enabled the Hardwick majority to "cut off constitutional protection 'at the first convenient, if arbitrary boundary.'"

3. Repercussions

Bowers v. Hardwick forces pro-gay litigators to evade any focus in the courtroom on their lesbian, gay, and bisexual clients' sexual activity. It forecloses the application of strict scrutiny in the substantive due process arena, forces gay-rights advocates to avoid privacy claims in their challenges to laws that discriminate against homosexuals, and all but necessitates the use of the status/conduct distinction in equal protection cases. Justice Blackmun closed his dissenting opinion in Hardwick with the following words:

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60 Tribe, supra note 2, § 15-21 at 1427.
61 478 U.S. at 199 (Blackmun, J., dissenting) (quoting O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897)).
62 Id. at 190.
63 Tribe, supra note 2, § 15-21, at 1422 (quoting from Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).
64 If litigators do not distinguish status from conduct, courts might refuse to examine laws that discriminate against lesbian, gay, and bisexual people with anything more than a rational basis review, reasoning that homosexuals as a class are defined by conduct that states can constitutionally criminalize. See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) (claiming that the application of strict scrutiny in an equal protection challenge by a lesbian servicemember would produce an "indefensible inconsistency" in light of Hardwick), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."); cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as
I can only hope that... the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.65

Ten years later, the convenient boundary at which the Hardwick majority truncated the Constitution's protection of privacy continues to shape its jurisprudence in the area of sexual orientation.66 And it continues to threaten this nation's commitment to equality, liberty, and justice.

C. The Speech/Conduct Dichotomy

Robinson and Hardwick set the stage for the use of the status/conduct distinction in gay-rights litigation. But a First Amendment doctrine that separates speech from conduct also plays an important role. This Part, and those that follow, will show that First Amendment jurisprudence can combine with the status/conduct distinction in such a way as to make the coming-out speech67 of lesbian, gay, and bisexual people vulnerable to government regulation.

The First Amendment provides that "Congress shall make no law... abridging the freedom of speech."68 Conduct receives no such protection. Thus the Supreme Court, in a line of cases beginning

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65 478 U.S. at 214 (Blackmun, J., dissenting).
67 The phrase "coming out" describes the "complex emotional, psychological, and sexual experience of naming oneself lesbian or gay." CRUIKSHANK, supra note 12, at 46. It includes both the process by which lesbian, gay, and bisexual people come to understand their emotional and physical affinity toward people of the same sex and the act of their communicating that realization to others. The terms "coming-out speech" and "identity speech" are used interchangeably in this Note.
68 U.S. CONST. amend. I.
with *International Brotherhood of Teamsters, Local 695 v. Vogt*,\(^6\) has refused to extend First Amendment protections to certain kinds of conduct. But because “[e]xpression and conduct, message and medium, are . . . inextricably tied together in all communicative behavior,”\(^7\) distinguishing one from the other often proves problematic. In fact, according to Professor Tribe, the Supreme Court’s attempts to differentiate speech and conduct has led to such “incongruency” that “any particular course of conduct may be hung almost randomly on the ‘speech’ peg or the ‘conduct’ peg as one sees fit.”\(^7\) In *Edwards v. South Carolina*,\(^7\) for example, the Court held that 187 demonstrators were unconstitutionally punished for having paraded peaceably through the grounds of the State House to protest segregation, calling their conduct “an exercise of [First Amendment] rights in their most pristine and classic form.”\(^7\) But two years later, in *Cox v. Louisiana*,\(^7\) the Court found, on almost identical facts, that a peaceful demonstration by 2,000 students was “expression mixed with particular conduct,”\(^7\) which government could constitutionally regulate. Although the Court has recognized the value and existence of expressive conduct in circumstances ranging from silent political protests to flag desecration, the speech/conduct dichotomy nonetheless persists.\(^7\)

\(^6\) 354 U.S. 284 (1957) (upholding a state law prohibiting labor demonstrations aimed at creating a union shop). Justice Frankfurter called picketing “speech plus” and said that states could permissibly regulate the “plus.” *Id.* at 289-90, 292. The Court began to uphold prohibitions on such demonstrations in a series of cases, the first of which was decided about seventeen years prior to *Teamsters Local 695*. See generally Tribe, *supra* note 2, § 12-7, at 825-32 (discussing the speech/conduct dichotomy).

\(^7\) Tribe, *supra* note 2, § 12-7, at 827 n.12 (quoting Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1493-96 (1975)).
II
EVOLUTION OF THE STATUS/CONDUCT DISTINCTION

This Part explores the evolution of the status/conduct distinction from its sporadic appearance in the gay-rights cases that pre-date *Hardwick* to its current centrality in pro-gay litigation. It will describe the way in which First Amendment jurisprudence interacts with the status/conduct distinction in order to restrict the speech of lesbian, gay, and bisexual people, especially in challenges to military expulsions of homosexual servicemembers.77

A. Pre-*Hardwick* Litigation Strategies

Although early legal battles for gay-rights did not invariably distinguish status from conduct, they did, at least in the First Amendment arena,78 set the stage for the status/conduct distinction that currently pervades gay-rights litigation. In *Stoumen v. Reilly*,79 for example, the California Supreme Court distinguished status from conduct and in so doing created what was probably the first favorable gay-rights ruling in the United States. In holding that the California Board of Equalization could not suspend an owner’s liquor license just because his place of business catered to known homosexuals, the justices wrote:

The fact that the Black Cat was reputed to be a “hangout” for homosexuals indicates merely that it was a meeting place for such persons. . . . Unlike evidence that an establishment is reputed to be a house of prostitution, which means a place where prostitution is practiced and thus necessarily implies the doing of illegal or immoral acts on the premises, testimony that a restaurant and bar is reputed to be a meeting place for a certain class of persons contains no such implication. Even habitual or regular meetings may be for purely social and harmless purposes, such as the consumption of food and drink, and it is to be presumed that a person is innocent of crime or wrong and that the law has been obeyed.80

The court reiterated this proposition in *Vallega v. Department of Alcoholic Beverage Control*,81 stating that it would require the government to show “something more” than the homosexual status of patrons in order to lawfully deprive a commercial owner of her property

77 See infra parts II.B.3.a, III.B.1.
78 The gay bar cases used here to exemplify “the First Amendment arena” were not First Amendment challenges per se, but rather challenges based on procedural due process. They certainly touched on the Free Association Clause of the First Amendment, though, and the courts in these cases focused on the right of homosexuals to associate for social purposes. Similar treatment appears in the lesbian and gay student organization cases of the 1970s. See Cain, supra note 2, at 1608-13.
79 234 P.2d 969 (Cal. 1951).
80 Id. at 971.
81 347 P.2d 909 (Cal. 1959).
interest in a liquor license. 82 A similar bifurcation of status and conduct appears in decisions by courts in every state in which the government tried to suspend or revoke the liquor licenses of gay bars. 83 By 1967, the highest courts in both New York 84 and New Jersey 85 had issued rulings that substantially duplicated the California Supreme Court's holding in Stoumen. Although these decisions meant that the government could not punish homosexual status itself, they left it free to punish homosexual conduct either standing alone or in combination with status, and they endorsed, implicitly and explicitly, an evidentiary sleight-of-hand in which the government used status as evidence of conduct. 86

In contrast to the gay bar cases, pre-Hardwick challenges to civilian and military dismissals of homosexual employees did not focus on the distinction between status and conduct. During the 1950s and 1960s, when many litigators believed that the Constitution protected private, consensual, adult sexual conduct, homosexual plaintiffs freely admitted that they engaged in same-sex erotic activity. 87 In emphasizing the private and consensual nature of this activity, they eventually persuaded courts to require that civilian employers establish a causal connection, or "nexus," between homosexual conduct and job performance. 88 Thus, private homosexual conduct no longer justified job terminations in the civilian context. 89 But the courts' refusal to extend the nexus requirement to military employers left the armed services free to discriminate against homosexual servicemembers.

Pre-Hardwick employment discrimination cases, then, in contrast to the gay bar cases of the same period, did not distinguish status from conduct. Before 1986, litigators could pick and choose from a variety of legal strategies. Their volitional use of the status/conduct distinction in the gay bar cases laid the groundwork for what has become the major theme in the post-Hardwick world. Bifurcating status and con-

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82 Id. at 912. Under the California Constitution, the Department of Alcohol Beverage Control had to show good cause to deprive a person of a property interest in a liquor license. Id. at 913.
83 See Cain, supra note 2, at 1571.
86 Cain, supra note 2, at 1571-72.
87 Id. at 1599-1600.
88 The "rational nexus test," which applied to all dismissals of government employees terminated for off-duty immoral conduct, was introduced by the D.C. Circuit in Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). Prior to that case, homosexual status served as evidence of unfitness for the civil service.
89 Congress codified this requirement in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 907, 92 Stat. 1111, 1227. Although secret homosexual conduct might not lead to job termination, public conduct might: the more public the conduct, the greater the probability that a court would find an employee's termination justified.
duct is now practically compulsory; virtually every successful gay-rights litigation depends on it.

B. Post-Hardwick Litigation Strategies

1. Defining Sodomy

In Hardwick, the Supreme Court placed an official stamp of approval on criminal sodomy statutes targeted at homosexuals. It thus set into motion a jurisprudence of sexual orientation that centers on the concept of sodomy. Sodomy statutes threaten lesbian, gay and bisexual people with surveillance, arrest, indictment, conviction, and imprisonment. According to attorney Abby Rubenfeld, they "are the bedrock of legal discrimination against gay men and lesbians."90 Equating homosexuality with sodomy and sodomy with criminal activity figures at the core of governmental discrimination against homosexuals.91 Police justified their raids on gay bars in the 1950s and 1960s, for example, on the ground that criminal activity might result from homosexual association.

But the word "sodomy," for most people, "reliably signals little more than serious wrongdoing."92 It recalls the site of a mass extermination: the Biblical city of Sodom which, according to Christian theology, was destroyed by God after he was unable to find within its borders a mere ten good men.93 Samuel Pepys might be speaking for the average American when he writes, in his seventeenth century diary: "I do not... know what is the meaning of this sin, nor which is the agent nor which the patient."94 A word historically mired in such indeterminacy does not, unfortunately, easily rise above its begin-

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90 Cain, supra note 2, at 1587 (quoting Lambda Update (Lambda Legal Defense & Education Fund, New York, N.Y.), Feb. 1984, at 3). Rubenfeld directed the Lambda Legal Defense and Education Fund from 1983-1988 and was a co-convenor of their sodomy task force. Id. at 1587 n.209.
91 Outside the military context, Georgia State Attorney General Bowers, for example, justified his dismissal of a new lawyer in his office on the ground that she had entered into a marriage ceremony with another woman and thus would, during her tenure with the Prosecutor's Office, be breaking the laws of Georgia. He said, "the natural consequence of a marriage is some sort of sexual conduct... and if it's homosexual, it would have to be sodomy." Memorandum in Support of Defendant's Motion for Summary Judgment at 32, Shahar v. Bowers, 886 F. Supp. 859 (N.D. Ga. 1993) (No. 1:91-CV-2397- RGF) (quoting Bowers's dep. at 80-81), vacated, 78 F.3d 499 (1996) (en banc), cited in Cain, supra note 2, at 1637 n.450.
93 Genesis 18:32; see JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 93 n.2 (1980).
nings. And confusion over the meaning of "sodomy" aggravates the problems caused by its centrality in the jurisprudence of sexual orientation. According to Professor Janet Halley, "[n]ot knowing what sodomy is, not naming it at all, not describing it accurately, [and] not acknowledging its presence, are all important parts of [the word's] historical profile. Obscurity is part of what sodomy is, a means by which it attains its social effects." 

Even official definitions of the word "sodomy" struggle with its meaning. The *American Heritage Dictionary* contains a tripartite definition of the term: "[a]nal copulation of one male with another . . . [a]nal or oral copulation with a member of the opposite sex [and] . . . [c]opulation with an animal." A survey of criminal statutes from around the country shows that legal definitions of sodomy also vary widely. Some states include oral sex in their definition of the proscribed activity, while others do not. At least one state even includes the manual manipulation of genitalia within its definition of sodomy.

This indeterminacy allows those who oppose gay rights to equate homosexuality with a vaguely repulsive act and to simultaneously remove heterosexuals entirely from the definition of that act. The Court of Appeals for the District of Columbia, for example, called sodomy the "behavior that defines the class" of homosexuals, and a member of the Ninth Circuit described sodomy as "fundamental to [homosexuals'] very nature." The Supreme Court, furthermore, by entirely eliminating heterosexuals from its *Hardwick* decision, reinforced the notion that homosexuals define, and are defined by, sodomy. The corollary to this position, expressed concisely by Senator

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95 Halley, *supra* note 46, at 1757.
96 *The American Heritage Dictionary of the English Language* 1712 (3d ed. 1992). Note that, under this definition, lesbian erotic activity does not constitute sodomy.
97 The volatility of sodomy wheels with particular rapidity around the question whether sodomy includes oral sex." Halley, *supra* note 46, at 1761.
98 See Goldstein, *supra* note 92, at 1783-84 nn.10-20 (discussing different sodomy statutes by state). Some sodomy statutes define the prohibited conduct euphemistically, e.g., the "infamous crime against nature." *Id.* at 1784 n.13 (listing Arizona, Idaho, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, Rhode Island, and Virginia).
100 Watkins v. United States Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting).
NOTE—DOING THE NASTY

Strom Thurmond, is that “[h]eterosexuals don’t practice sodomy.”

In reality, of course, most heterosexuals do engage in sodomy, and some homosexuals do not. Yet courts seem to view heterosexuals as incapable of engaging in criminal conduct of this type and homosexuals as inevitably engaging in it.

Post-Hardwick litigators have avoided the indeterminacy inherent in the definition of sodomy by utilizing the status/conduct distinction to avoid focusing on any erotic activity in which their lesbian, gay, and bisexual clients have participated. This strategy has resulted in some success, particularly in the equal protection arena, where two courts have recently applied strict scrutiny to anti-gay plebiscites that discriminated against homosexuals. The following Part discusses one of those cases.

2. Anti-Gay Plebiscites

In the last two decades, advocates of gay rights have secured the passage of laws or policies that forbid discrimination on the basis of

102 See supra text accompanying note 59.
103 “[M]any resolute homosexuals never do any acts that could be called sodomy, while many resolute heterosexuals are, where sodomy is concerned, avid recidivists.” Halley, supra note 46, at 1722.
104 See, e.g., Halley, supra note 46, at 1734-36; Hunter, supra note 33, at 543.
105 The important gay-rights cases in contemporary litigation seem to be those in which no evidence or admission of homosexual erotic activity exists. See, e.g., infra parts II.B.3.a and III.B.1 (discussing the military cases).
107 The word “plebiscite” refers to an “initiative,” in which citizens place a measure on the ballot “by securing a specified number of signatures,” or a “referendum,” in which a measure is ratified or disapproved by the electorate after its adoption by the legislature. See Robin Charlow, Judicial Review, Equal Protection and the Problem With Plebiscites, 79 CORNELL L. REV. 527, 551 (1994).
sexual orientation in 119 localities and in at least twenty states, including the District of Columbia. During that same period, religious and political conservatives have fought against extending civil rights protection to homosexuals. They have successfully placed plebiscites on the ballot in approximately thirty-eight of the communities that had adopted gay-protective laws. And they have experienced victory in thirty-four of those communities. In 1994, voters approved anti-gay initiatives or referendum in Colorado, Ohio, Maine, and Oregon.

The _Hardwick_ decision, by foreclosing the application of strict scrutiny in the substantive due process arena, forces advocates of gay rights to avoid privacy claims in challenges to anti-gay laws and to focus instead on equal protection. By grounding their arguments against discriminatory laws on the Equal Protection Clause, pro-gay litigators hope to carve out a constitutional niche in which courts will apply strict scrutiny to laws that unfairly burden homosexuals. According to Professor Nan Hunter,

Since _Hardwick_ was decided, the threshold question in the litigation of lesbian and gay rights cases has become whether _Hardwick_ only extinguishes the claim to a substantive due process privacy right, or whether it also predetermines challenges under the Equal Protec-

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109 Their fight began in 1977 when evangelist singer and former starlet Anita Bryant successfully led a grassroots campaign to repeal a six-month-old pro-gay ordinance in Dade County, Florida. Tom Mathews, _Battle Over Gay Rights_, Newsweek, June 6, 1977, at 16. Although voters defeated anti-gay initiatives in California and Washington in the late 1970s, see _The Times of Harvey Milk_ (Cinecom International Films 1986) (discussing the defeat of Proposition Six, an anti-gay plebiscite aimed at lesbian and gay schoolteachers in California); Barry D. Adam, _The Rise of a Gay and Lesbian Movement_ 111, 113 (rev. ed. 1995) (discussing the defeat of a similar initiative in the state of Washington), the political rise of the religious right beginning in 1980 invigorated anti-gay activists. See id. at 109-27; Note, _Constitutional Limits on Anti-Gay-Rights Initiatives_, supranote 108, at 1908 (the “second wave of anti-gay-rights activity arrived with the political rise of the New Right in 1980.”). These activists continue to have a strong presence today. Some commentators believe that religious right organizations have a sophisticated organizational scheme and that they operate under a specific anti-gay agenda. Such organizations do appear to be involved in an on-going campaign designed to prevent states and municipalities from enacting gay-protective legislation. See id. at 1909; Lori J. Rankin, Comment, _Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right’s Campaign Against Lesbians and Gay Men_, 62 U. Cin. L. Rev. 1055, 1055-57 (1994).


111 Id. In 1994, voters approved plebiscites in Colorado; Cincinnati, Ohio; Lewiston, Maine; Oregon City, Oregon; and Keizer, Oregon. Pamela Coukos, Recent Development Note, _Civil Rights and Special Wrongs—The Amendment 2 Litigation_, 29 Harv. C.R.-C.L. L. Rev. 581, 581 n.6 (1994).

tion Clause. The courts must still decide whether the decision in Hardwick was a ruling on conduct or a ruling on a class of people.\textsuperscript{113}

Several federal courts have held that Hardwick bars heightened scrutiny, even in the equal protection context. Because states may constitutionally criminalize sodomy, these courts reason that “[i]t would be quite anomalous [sic], on its face, to declare status defined by [that] conduct . . . as deserving of strict scrutiny under the equal protection clause.”\textsuperscript{114} Other courts, and numerous commentators, have, however, concluded otherwise. According to these sources, courts may apply strict scrutiny to anti-gay laws challenged under the Equal Protection Clause without running afoul of the Hardwick mandate because (1) Hardwick involved only a substantive due process claim; and (2) Hardwick addressed conduct, not status.\textsuperscript{115}

The Colorado Supreme Court adopted this reasoning when on October 11, 1994, it permanently enjoined an amendment to the state constitution approved almost two years earlier by fifty-three percent of the voters.\textsuperscript{116} Colorado’s Amendment Two typified the anti-gay initiatives that until recently marred the political landscape. It read:


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 persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.\textsuperscript{117}

If Amendment Two had become law, lesbian, gay, and bisexual Coloradans would have had no legal recourse from discrimination in housing or employment. Furthermore, they could have secured the passage of gay-protective legislation only by first amending their state constitution. That would have required either a supermajority of

\textsuperscript{113} Hunter, supra note 33, at 531-32.
\textsuperscript{114} Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).
\textsuperscript{116} Evans, 882 P.2d at 1338.
\textsuperscript{117} Id.
votes in their state legislature, or an appeal to the same democratic body that had gutted their rights in the first place.

According to the Colorado Supreme Court, this "fencing-out" of lesbian, gay, and bisexual citizens violated their fundamental interest in participation in the political process. The court applied strict scrutiny to Amendment Two—stating that "[t]he government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right," and found that "[n]one of the [five] interests identified by the state is a necessary, compelling governmental interest which Amendment 2 is narrowly tailored to advance." The status/conduct distinction played a crucial role in the court's ability to apply strict scrutiny to the proposed amendment. Without it, Hardwick would have mandated the application of a rational basis review.

The Supreme Court, however, declined to adopt the reasoning of Colorado's highest court. Although it affirmed the lower court's judgment, it did so on different grounds. Justice Kennedy did not mention the status/conduct distinction in his majority opinion and the Court applied a rational basis review, concluding that Amendment Two "fail[ed], indeed defie[ld], even this conventional inquiry." Because most laws survive rational basis reviews, this disposition represents a strong statement about constitutional limits on government-sanctioned prejudice.

Such a statement is welcome in the context of a gay rights case, given the Court's previous record of hostility toward the interests of the queer community. Moreover, the Court avoided entering the fundamental rights quagmire by declining to utilize the Colorado Supreme Court's rationale. It therefore escaped the inevitable criticism that would have followed such action. In addition, it avoided fueling the anti-gay argument that lesbian, gay, and bisexual citizens

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118 Id. at 1350.
119 Id. at 1349. The first interest identified by the government was "protecting the sanctity of religious, familial, and personal privacy." Id. at 1342. The second interest concerned the conservation of limited government resources. Protecting the rights of lesbian, gay, and bisexual people, the government argued, would "have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes." Id. at 1345. The third interest was "allowing the people themselves to establish public social and moral norms." Id. at 1346. The fourth interest was "prevent[ing] government from supporting the political objectives of a special interest group." Id. at 1348. The fifth interest was "deter[ing] factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government." Id.
121 Id. at 1627.
122 Stone, supra note 64, at 541; Tribe, supra note 2, § 16-2, at 1442-43 (1988).
123 See Cain, supra note 2, at 1171 (discussing criticisms of fundamental rights analyses).
wanted to receive "special" rights via the Amendment Two litigation.\textsuperscript{124}

But the Supreme Court did not create a safe haven for the queer community in \textit{Romer}, for it failed to even mention \textit{Bowers v. Hardwick}. Thus, the status/conduct distinction may still appeal to pro-gay litigators, in both state and federal courts, who doubt that low-level, rational basis reviews will adequately protect their clients and who fear the pernicious influence of \textit{Bowers v. Hardwick}. By employing the status/conduct distinction, these litigators may experience success in a post-\textit{Romer} environment, just as they did prior to the appearance of that decision. On the other hand, they may discover limitations on the status/conduct distinction's ability to encourage pro-gay holdings. The \textit{Romer} Court, for instance, did not distinguish status from conduct (perhaps because the justices wanted for political reasons to avoid the application of heightened scrutiny and were satisfied that a rational basis review would result in a just outcome). The striking absence of the status/conduct distinction from the \textit{Romer} decision at least arguably calls into question its continued vitality. There are other signs of its limitations, as well. For example, as the next section demonstrates, the status/conduct distinction has not advanced the cause of gay rights in the military context.

3. \textit{Military Discharges}

[The] riddle [of whether] ... homosexuality [is] status or conduct ... was purely an artifact of ... legal doctrine and [of] the outcome of a single case. Yet it was picked up, replicated and amplified in the arguments over the military ban. ... [The] entire framework grew out of \textit{Hardwick}.\textsuperscript{125}

The military's express exclusion of homosexuals creates the backdrop against which the status/conduct distinction most sharply emerges. This Part analyzes that exclusion by first describing its history and mechanics; by next discussing the deference with which such military decisions are judicially reviewed; and by finally exploring the impact of the military ban on the civilian community.

\textsuperscript{124} See, e.g., \textit{Romer}, 116 S. Ct. at 1629-30 (Scalia, J., dissenting).

Prior to World War II, the military routinely punished homosexuality in its ranks by court martial and imprisonment.\(^\text{126}\) During that war, however, psychiatric theories defining homosexuality as a mental disorder convinced military leaders that court martials of homosexual servicemen were inappropriate.\(^\text{127}\) They instituted regulations that replaced court martials with administrative proceedings that culminated in dishonorable discharges.\(^\text{128}\) "By the end of World War II, only those who actually committed homosexual acts were subject" to those regulations.\(^\text{129}\) But in 1958, the military began to dismiss servicemen based on sexual orientation.\(^\text{130}\) For the next twelve years, military personnel identified as lesbian, gay, or bisexual automatically received dishonorable discharges unless they were diagnosed as mentally ill.\(^\text{131}\)

In 1973, homosexual servicemen began to challenge the constitutionality of their dismissals in civilian courts.\(^\text{132}\) They claimed that the military should be required to show a nexus between homosexuality and job performance.\(^\text{133}\) Their appeals met with little success until, in 1981, the D.C. Circuit held in *Matlovich v. Secretary of the...*\(^\text{134}\)

\(^\text{126}\) The military claims that the presence of homosexual servicemen adversely affects the ability of the Military Services [i] to maintain discipline, good order, and morale; [ii] to foster mutual trust and confidence among servicemen; [iii] to ensure the integrity of the system of rank and command; [iv] to facilitate assignment and worldwide deployment of servicemen who frequently must live and work under close conditions affording minimal privacy; [v] to recruit and retain members of the Military Services; [vi] to maintain the public acceptability of military service; and [vii] to prevent breaches of security.

32 C.F.R. § 41, app. A, pt. I(H) (1996). Ironically, the one interest served by excluding those lesbians, gays, and bisexuals who refuse to remain in the closet is a symbolic, expressive purpose: "To promote an image for the services that accords with the ideology of masculinity," Karst, supra note 1, at 563. This interest is, however, illegitimate because it is justified only by prejudice. *Id.; cf. infra* part III.B.1.


\(^\text{128}\) *Id.* at 2, 13, 33.

\(^\text{129}\) *Id.* at 136-37, 143-44.


\(^\text{131}\) See *id.*


\(^\text{133}\) *Id.* (citing Rivera, supra note 132, at 288 n.88).

that the Air Force could not discharge a gay airman unless
it clearly articulated standards for applying a regulation that permit-
ted the retention of homosexual servicemembers under certain un-
specified conditions. Instead of eliminating its exclusionary policy on
lesbian, gay, and bisexual soldiers, however, the Department of De-
fense (DOD) eliminated commanders' authority to make exceptions
to that policy and expressly allowed dismissals based on homosexual
orientation alone. From 1980 to 1990, an average of 1500 ser-
vicemembers were dismissed each year because of their sexual
orientation.

The Uniform Code of Military Justice (UCMJ), enacted in 1951,characterizes sodomy as a criminal act punishable by court-martial. Article 125 of the UCMJ states that "[a]ny person subject to this chap-
ter who engages in unnatural carnal copulation with another person of
the same or opposite sex or with an animal is guilty of sodomy." In promulgating the UCMJ, Congress thus singled out conduct, di-
recting commanders to punish servicemembers who engaged in sod-
omy whether or not they were homosexual. The DOD, however,
explicitly endorsed dismissals based solely on homosexual orientation
in 1981 when it issued the following regulation:

Homosexuality is incompatible with military service. The presence
in the military environment of persons who engage in homosexual
conduct or who, by their statements, demonstrate a propensity to
engage in homosexual conduct, seriously impairs the accomplish-
ment of the military mission.

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136 See infra note 140 and accompanying text. The DOD changed its policy after
Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), and Berg v. Claytor,
591 F.2d 849 (D.C. Cir. 1978). Courts in both cases required the service to specify stan-
dards for the application of the exception to the general rule requiring the discharge of
lesbian, gay, and bisexual servicemembers.
137 See, e.g., NATIONAL SEC. & INT'L AFFAIRS Div., U.S. GEN. ACCOUNTING OFFICE, PUB.
No. 92-98, DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY 4 (1992)
("During fiscal years 1980 through 1990, approximately 17,000 servicemen and women (an
average of about 1,500 per year) were separated from the services under the category of
'homosexuality.'); Kurt D. Hermansen, Note, Analyzing the Military's Justifications for its Ex-
clusionary Policy: Fifty Years Without a Rational Basis, 26 Loy. L.A. L. Rev. 151, 152 (citing
KATE DYER, Foreword to GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS xv-xv (Kate
Dyer ed., 1990)).
138 Spoeri, supra note 130, at 198 & n.134.
carnal copulation" has been construed to include cunnilingus and fellatio. United States v.
Harris, 8 M.J. 52, 58 (C.M.A. 1979) (cunnilingus); United States v. Scoby, 5 M.J. 160, 166
(C.M.A. 1978) (fellatio). But again note the indeterminacy in the definition: sodomy is
described euphemistically and without reference to the sexual orientation of those in-
volved; the term is nevertheless construed to encompass both homosexual and heterosexu-
al activity, as well as bestiality.
tions designed to implement DOD directives. These directives differ, but each substan-
The DOD defined a homosexual as one "who engages in, desires to engage in, or intends to engage in homosexual acts" and defined "homosexual acts" as "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Thus a naked desire to engage in same-sex erotic activity, unaccompanied by any such conduct, constituted grounds for dismissal under the new regulation. And even if the military acquired evidence of proscribed conduct, its regulation did not require that such conduct resemble sodomy as defined by the statute at issue in *Hardwick*. Not only did this regulation penalize status independently from conduct, it expanded the definition of homosexual sodomy to encompass sexual acts that the Constitution may in fact protect.

The DOD's current policy, popularly known as "Don't Ask, Don't Tell, Don't Pursue," which became effective on October 1, 1993, directs the military to refrain from inquiring into the sexual orientation of servicemembers it recruits and curtails military investigations into the sexual habits of enlisted servicemembers. Couching itself in the language of the status/conduct distinction, the policy proclaims that "[s]exual orientation will not be a bar to service unless manifested by homosexual conduct." But because the policy then proceeds to obliterate the line between sexual orientation and same-sex erotic activity, it eviscerates any protection it might have offered to homosexual servicemembers. After assuring readers that "[t]he military will [continue to] discharge members who engage in homosexual..."
conduct,"147 the new policy goes on to define such conduct to include "a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts"148 and "a statement that the member is homosexual or bisexual."149 Additionally, the policy specifies that "a statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so."150 This evidentiary sleight-of-hand allows the military to bypass the Robinson prohibition on penalizing pure status.151 In addition, the DOD avoids running afoul of the First Amendment by simply hanging coming-out speech on the "conduct peg,"152 transforming the act of speaking of the words "I am gay" into "conduct" and utilizing the speech/conduct distinction as a sub rosa tool for legitimating the military's discriminatory policy.153

Furthermore, the new DOD policy expands the definition of "homosexual conduct" to include "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts"154 as well as a "marriage or attempted marriage to someone of the same gender."155 This definition of "homosexual conduct," in addition to implicating First Amendment protection of religious expression, encompasses sexual acts that the government probably cannot constitutionally criminalize, such as hand holding and kissing.156 But even if the government could criminally punish the conduct described above, no other military regulations penalize the sheer desire to engage in illegal acts, whether expressed or unexpressed, that occur either "preservice, prior [to] service, or [during] current service."157 Only homosexuality and same-sex erotic conduct receive such treatment.

Since 1981, then, the DOD has converted the congressional prohibition on sodomy contained in the UCMJ—written to apply equally to homosexual and heterosexual behavior—into a policy that singles

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147 Policy Guidelines, supra note 146, at 1.
149 Policy Guidelines, supra note 146, at 1.
150 Aspin Memo, supra note 145, at 2.
151 See supra notes 22-28 and accompanying text.
152 See supra text accompanying note 71.
153 See Tribe, supra note 2, § 12-7, at 826 n.7 (discussing the manipulation of the speech/conduct distinction by courts).
154 Aspin Memo, supra note 145, at 2. This language is in addition to the language regarding same-sex bodily contact engaged in to satisfy sexual desires. See supra text accompanying note 142.
155 Policy Guidelines, supra note 146, at 1.
out homosexuals. The current regulations primarily penalize status; in fact, "homosexual conduct" does not necessarily lead to expulsion from the service because the military's anti-gay policy still contains an exception designed to prevent the intentional avoidance of military service by heterosexuals. A commander does not have to dismiss a servicemember who has engaged in homosexual sodomy if that servicemember is heterosexual.

b. Judicial Deference

No clearly articulated standard determines the scope of judicial deference to the political branches with respect to military decisions. But in a 1953 Supreme Court decision, upholding an Army requirement that a military physician declare whether or not he belonged to any "subversive" organizations, Justice Robert Jackson called the military a "specialized community" and indicated that constitutional protection must yield somewhat to its peculiar needs. Chief Justice William H. Rehnquist, one of Justice Jackson's clerks that year, has begun to resurrect that language. In advocating judicial deference to military authority, the Chief Justice has described the armed services as a "separate community.

1. Watkins v. United States Army, 875 F.2d 699, 714 (9th Cir. 1989) ("Under the Army's regulations, 'homosexuality,' not sexual conduct, is clearly the operative trait for disqualification.") (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990). Some commentators suggest that the exception allows the military to retain soldiers in times of need, e.g., during the Iraq war dismissals based on homosexuality were suspended. See, e.g., Karst, supra note 1, at 579. "Homosexual conduct" will not result in discharge if the military finds that

1) Such conduct is a departure from the soldier's usual and customary behavior; and
2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and
3) Such conduct was not accomplished by use of force, coercion, or intimidation by the soldier during a period of military service; and
4) Under the particular circumstances of the case, the soldier's continued presence in the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and
5) The soldier does not desire to engage in or intend to engage in homosexual acts.

Watkins, 875 F.2d at 713 n.5 (Norris, J., concurring) (quoting A.R. 635-200, § 15-3(a)(1)-(5)).


3. According to Professor Karst, there are three main justifications for this deference: (1) emergencies; (2) respect for the special needs of a "separate community;" and (3) "the judiciary's relative incompetence to understand military matters." Karst, supra note 1, at 568. With regard to the first justification, "we need to be careful to keep the claim of emergency temporally confined, to reject the argument that because Armageddon may come out of the blue, some constitutional guarantees should be indefinitely suspended." Id. With regard to the second justification, the attenuation of constitutional rights in the military setting does not mean that generals should interpret the Constitution. Id. at 569-74. In challenging the third justification Professor Karst asks: What makes generals ex-
questions relating to military discipline and military operations," the Chief Justice has written, "[i]t properly defer[s] to the judgment of those who must lead our Armed Forces in battle." Thus the DOD's current policy will presumably benefit from the same level of judicial deference as that traditionally afforded military decisions. The judiciary has already turned a blind eye to the military's evasion of Robinson's prohibition on crimes of status. And it has already allowed the military to manipulate the speech/conduct distinction in order to punish coming-out speech.

c. Effects of the Military Ban

The failure of pro-gay arguments centering on the status/conduct distinction to undermine the military's exclusion of lesbian, gay, and bisexual servicemembers will have an effect on civilian litigation. Even though the judiciary defers substantially to the political branches in the military context, holdings and rationales from cases challenging the military ban will probably creep into cases involving the larger community, far removed from the peculiar needs of the armed services. Thus, the status/conduct distinction may fail advocates of gay rights even outside of the military. In short, the exclusion of homosexual servicemembers may provide a prototype for discrimination elsewhere.

Official sanctions of prejudice can escape their military confines and influence the larger community in even more subtle ways. In 1953, for example, President Dwight D. Eisenhower revived a World War II policy that excluded lesbian and gay Americans from the

161 North Dakota v. United States, 495 U.S. 423, 443 (1990). But, according to Professor Karst, judicial deference to the judgment of those more familiar with military matters "comes close to creating a 'military exception' to the Bill of Rights." Karst, supra note 1, at 565. It "turns out to be deference to a political policy to maintain the traditional gender line, and the systems of dominance expressed by that line: men over women, straights over gays." Id. at 579. According to Professor Karst, judges should not defer to regulations that deeply offend the Constitution. Id. at 572. As Justice Brennan observed, "it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment." Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting). The majority held that military officials could bar a soldier from circulating a petition on a military base without prior approval if the material posed a "clear danger to military loyalty, discipline, or morale." Id. at 355.

162 Although the current military regulations do not impose criminal sanctions on homosexuals, and thus avoid an outright Robinson bar, they stigmatize and penalize lesbian, gay, and bisexual people by depriving them of employment and by burdening their prospects of future employment (they lose the preferential treatment for veterans to which they would otherwise be entitled).

163 See infra part III.B.1.
armed services, extending it to the entire federal civil service. Pro-

It is no exaggeration to say that the exclusion of gay men and lesbi-

Because personnel flow continuously into and out of the armed

The government’s argument to the contrary—that the discharge

164 Karst, supra note 1, at 567 n.254 (citing BÉRUBE, supra note 127, at 265-70 (1990)).

165 Karst, supra note 1, at 558-59 (footnotes omitted).
would courts consequently find that the military's dismissal implied no stigma?  

The government's exclusion of homosexuals from the armed forces severely penalizes lesbian, gay, and bisexual people. In addition to depriving them of the opportunity to work for one of the largest employers in the country, it further restricts their personal liberty by providing a prototype for discrimination in the civilian community. The status/conduct distinction has failed, so far, to protect homosexual servicemembers from such discrimination. Courts have upheld the military ban even though it primarily penalizes status, and even though it implicates important First Amendment rights. Although pro-gay litigators used a variety of legal strategies prior to the Supreme Court's *Hardwick* decision, they have, since *Hardwick*, felt compelled to employ the status/conduct distinction as their central tool in challenging anti-gay laws. This strategy has, however, met with limited success. Although it has convinced two courts that an application of heightened scrutiny in the equal protection context does not undermine the *Hardwick* holding, the previous subsection demonstrates that it has not similarly advanced the cause of gay rights in the military context. Moreover, because the failure in the military context may spill over into the civilian community, pro-gay litigators should face the weaknesses inherent in the status/conduct distinction and explore alternative litigation strategies.

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168 I base this hypothetical on one by Professor Karst. *See* Karst, *supra* note 1, at 559.
169 *See*, e.g., Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *cert.* denied, 1996 WL 396112 (Oct. 21, 1996).
170 *See* *supra* part II.A.
171 *See* *supra* part I.B.2 (discussing *Evans v. Romer* and *Equality Found. of Greater Cincinnati v. City of Cincinnati*).
172 The recent *Romer v. Evans* decision also argues for a re-evaluation of the status/conduct distinction. In *Romer*, the Court invalidated an anti-gay initiative to Colorado's constitution by applying a mere rational basis review. *Romer*, 116 S. Ct. 1620, 1627, 1629 (1996). It found that the challenged law violated the Equal Protection Clause of the United States Constitution. *Id.* at 1629. Because the Court utilized a rational basis review, it did not need to avoid the holding of *Bowers v. Hardwick*, which forbids the application of strict or heightened scrutiny to anti-gay laws challenged on substantive due process grounds, like privacy. *See* *Bowers v. Hardwick*, 478 U.S. 186 (1986); *supra* part I.B.3. It did not, in other words, need to employ the status/conduct distinction in order to justify the use of a level of scrutiny higher than rational basis.

In fact, the majority nowhere mentioned the status/conduct distinction. Its analysis therefore left open the central question in gay rights litigation: does *Hardwick* foreclose the application of strict or intermediate scrutiny in the equal protection arena, as it does in the substantive due process arena? Does the status/conduct distinction provide courts with a legitimate argument by which to circumvent the *Hardwick* holding in cases grounded on equal protection claims?

The conspicuous absence of the status/conduct distinction is open to at least three interpretations. First, the majority's failure to distinguish status from conduct may signal its disapproval of the status/conduct distinction. After all, the distinction was available to the Court: the Colorado Supreme Court utilized it, *Evans v. Romer*, 882 P.2d 1335, 1350
III
RAMIFICATIONS OF THE STATUS/CONDUCT DISTINCTION

This Part analyzes two possible weaknesses in a legal strategy centered on the status/conduct distinction. It discusses the advantages of the status/conduct distinction, and then proceeds to examine its potentially negative effects on both the legal and social discourses surrounding sexual orientation. It concludes that the status/conduct distinction may ultimately fail to protect the rights of lesbian, gay, and bisexual people, and suggests some alternative litigation strategies.

A. Defenses of the Distinction

Two important benefits derive from a legal strategy that separates status from conduct. First, the status/conduct distinction makes clear that homosexual conduct—exemplified by sodomy, for most courts—does not define homosexual orientation. Lesbians, for example, retain a sexual attraction toward women regardless of whether or not they have sexual relationships with women. In fact, sexual orientation remains static even when an actor chooses celibacy. "[T]he reality for many gay men and lesbians is that sexual identity (status) is something much broader than sexual conduct, and in some cases . . . may even exclude sexual conduct." Thus, by recognizing a distinc-

(Colo. 1994), and briefs filed on behalf of the respondents argued in its terms. Brief of the Human Rights Campaign Fund et al., as Amici Curiae in Support of Respondents at 28-30, Romer v. Evans, 116 S. Ct. 1620 (1996); Brief for Respondents at 46 n.32, Romer v. Evans, 116 S. Ct. 1620 (1996). Second, the majority's failure to distinguish status from conduct may indicate that the Court is not willing to apply anything more than a rational basis review to anti-gay laws, even in the equal protection context. On the other hand, the third interpretation of the majority's failure to distinguish status from conduct is that the Court did not want to use heightened scrutiny in this particular equal protection case. The justices may share, or at least understand, the antipathy some sectors of the legal community feel for the fundamental rights doctrine and thus may have wanted to avoid that doctrine. Or they may themselves feel animosity toward the queer community, or doubt that community's claim of disadvantage, and as a result may have wanted to avoid bestowing suspect class status upon homosexuals. Or they may simply have evidenced, in Romer, a prudent desire to avoid fueling the flames of an anti-gay argument based on the notion of "special" rights. See supra text accompanying notes 123-24 (discussing the Romer decision and the "special rights" argument).

173 Many homosexuals identify themselves as homosexuals without ever having engaged in sexual conduct with a person of the same sex. Cain, supra note 2, at 1625 n.395; see also Gary J. McDonald, Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models, 8 J. HOMOSEXUALITY 47 (1982) (citing an article and study in which approximately 18% of 199 men who identified themselves as gay said that they had not had any sexual experiences with men).

174 Cain, supra note 2, at 1625. One study of 199 gay men showed that 18% identified themselves as gay before they had ever experienced a sexual act with a man. Ten percent recognized that they were gay at the time of their first homosexual encounter; 22% identified themselves as gay while involved in a long-term homosexual relationship and twenty-three percent so defined themselves only after such a relationship had ended. McDonald, supra note 173, at 52-53.
tion between status and conduct, courts avoid a definition of homosexuality based solely on erotic activity, and thereby acknowledge the fullness and complexity of lesbian, gay and bisexual lives. Removing homosexuality from a purely sexual context serves additionally to undermine the stereotype that lesbian, gay, and bisexual people are dangerously promiscuous sexual predators.175

Second, the status/conduct distinction refutes the idea that lesbian, gay, and bisexual people invariably engage in sodomy.176 When judges view status as having an existence independent of conduct, they can no longer use homosexuality as reliable evidence of certain behaviors. They cannot, for instance, assume that just because a plaintiff is gay, he engages in the type of constitutionally unprotected sexual activity at issue in Bowers v. Hardwick.177

The status/conduct distinction thus allows judges to maneuver around the Hardwick holding, by restricting it to fact patterns involving sodomy as defined by the Georgia statute, and to call into question judicial decisions that refuse protections to homosexuals because they belong to a class defined by criminal conduct. By demonstrating that lesbian, gay, and bisexual people lead full and complex lives that in-

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175 According to one Florida minister, gay men want pro-gay laws passed so that they can "walk down the streets j[ack]ing off." Mike Thomas, Are Gay Rights A Civil Right? David Caton Says No, and He Wants Florida Voters to Close the Debate Forever, ORLANDO SENTINEL, July 18, 1993, at 8, 10 (quoting Rev. James Sykes). The Reverend Jerry Falwell contends that "[s]o-called gay folks [would] just as soon kill you as look at you." Mathews, supra note 109, at 16, 22. One anti-gay video claims that homosexuals are "disproportionately homicidal" and have killed a majority of mass murder victims in the last two decades. Brian T. Meehan, Scholars Cast Doubt on Accuracy of Anti Gay Video, OREGONIAN, Oct. 8, 1992, at A1. During a 1977 campaign to repeal a Florida pro-gay ordinance, Anita Bryant claimed that homosexuals were committed to "recruitment and outright seductions and molestation" of minors. Mathews, supra note 109, at 20. An anti-gay Christian group in Oregon distributed fliers claiming that "[p]edophilia may be publicly denounced by many homosexuals but it is definitely represented as a "sexual orientation" under the gay rights umbrella." Brian T. Meehan & Bill Graves, OCA Stirs Emotions With Its Second Flier, OREGONIAN, Sept. 25, 1992, at D1, D4. Colorado for Family Values, an anti-gay Christian group, dispersed a pamphlet claiming that "gays commit up to half of all child molestations;" that "twenty-nine percent of lesbians intentionally spread sexual disease;" and that "of mass murders in the U.S. over the past seventeen years, homosexuals killed at least sixty-eight percent of the victims." Colin Crawford, Gay Rights Wins in Oregon and Portland, Maine; Losses in Colorado and Tampa, Florida, LESBIAN/GAY L. NOTES, Dec. 1992, at 83. Actually, 90% of reported sexual molestations of children are committed by heterosexual men on minor females. Betty Berzon, Developing a Positive Gay and Lesbian Identity, in Positively Gay 3, 9 (Betty Berzon ed., 1992) (citing U.S. DEP'T OF HEALTH EDUC. & WELFARE, NAT'L CTR. ON CHILD ABUSE & NEGLECT, CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT, PUB. NO. (OHD) 75-30073).

176 This function is, however, limited by the fact that the status/conduct distinction, by attempting to minimize the focus on gay sexuality, avoids a direct confrontation of the indeterminacy inherent in the definition of sodomy.

177 To give due consideration to the rights of homosexuals, judges must recognize this fact and restrict Hardwick to its facts. For example, a gay plaintiff and his partner might, instead of engaging in sodomy, practice mutual masturbation.
volve much more than sexual activity, and by refuting the idea that homosexuals invariably engage in sodomy, the status/conduct distinction adds an important and valuable element to the judicial understanding of sexual orientation.

B. Criticisms of the Distinction

Notwithstanding those benefits, however, a gay-rights jurisprudence that depends for its vigor on an excision of erotic conduct from sexual orientation may have harmful long-term effects. As long as post-Hardwick litigators feel compelled to remove a crucial element from gay identity—specifically, the love, intimacy, and affection that lesbian, gay, and bisexual people share with their same-sex partners—they reinforce rather than challenge the Hardwick holding, making homosexuals, for the time being, something less than whole people. Furthermore, the use of the status/conduct distinction might encourage anti-gay forces to develop laws and policies that repress homosexuality more than ever before.

1. Effects on the Legal Discourse: Equating Speech with Conduct

In the military context, where the status/conduct distinction is most tenacious, it has failed to undermine the military’s exclusionary policy toward homosexuals. Defenders of the policy have simply expanded the definition of “conduct” to include speech and other expressive behavior. In Ben-Shalom v. Marsh, for example, the Seventh Circuit upheld an army regulation that required the dismissal of any

178 Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir.), rev’g Ben-Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989), cert. denied, 494 U.S. 1004 (1990). Miriam Ben-Shalom “was the first self-identified homosexual litigant to challenge the military’s policy of excluding” lesbian, gay, and bisexual people solely on the basis of their sexual orientation. Caldwell, supra note 132, at 429. In 1974, she enlisted in the Army Reserves. 703 F. Supp. at 1373. Two years later, after she had disclosed her lesbianism, the Army discharged her. Id. She sued in the district court for wrongful discharge, claiming that the Army had violated her free speech, privacy, and substantive due process rights. Ben-Shalom v. Secretary of Army, 489 F.Supp. 964 (E.D. Wis. 1980). The privacy claim derived from the Ninth Amendment and related to autonomous control over personality; the First Amendment claim related to the protection of manifestations of personality. The district court ruled in Ben-Shalom’s favor and ordered the Army to reinstate her. Id. Nevertheless, the Army refused to reinstate Ben-Shalom and thus precipitated a procedural battle that ended when the Federal Circuit concluded that it lacked jurisdiction over the case and transferred the litigation to the Seventh Circuit. Ben-Shalom v. Secretary of the Army, 807 F.2d 982, 988 (Fed. Cir. 1986). The Seventh Circuit ultimately ruled in Ben-Shalom’s favor. Ben-Shalom v. Secretary of the Army, 826 F.2d 722, 724 (7th Cir. 1987). So, in 1987, the Army belatedly complied with the district court’s 1980 order to reinstate Ben-Shalom. Eleven years had passed since her discharge. But when her enlistment period expired only eleven months later and Ben-Shalom requested reenlistment, the Army refused and a second round of litigation began. Ben-Shalom won this second litigation at the district court level, but lost on appeal to the Seventh Circuit. 708 F. Supp. 1972, 1980-81 (E.D. Wis. 1989), rev’d, 881 F.2d 454, 466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).
"individual who is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service." In so doing, the court dangerously expanded the concept of conduct. It characterized Ben-Shalom's identification of herself as a lesbian as an "admission" of culpability.

What Ben-Shalom cannot do, and remain in the Army, is to declare herself to be a homosexual. Although that is, in some sense speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud. Thus, if the Army's regulation affects speech, it does so only incidentally, in the course of pursuing other legitimate goals. "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The court did not assert that speech indicates status and that status provides evidence of conduct. It skipped the intermediate step, arguing that Ben-Shalom's speech itself constituted conduct. This conflation of speech and conduct would seem absurd if it were not for the alarming fact that it came from a federal court of appeals in a case that upheld the Army's dismissal of a lesbian servicemember without any evidence of homosexual erotic conduct. It recalls the ancient English concept of constructive treason in which a defendant's speech provided evidence of his treasonous act of imagining the sovereign's death. A similar concept, existing under the early common law in the United States and codified in the Sedition Act of 1798, was repudiated when, in 1804, President Jefferson pardoned those punished under the Act, and Congress repaid the fines collected under it.

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179 A.R. 140-111, tbl. 4-2, Rule E, quoted in Ben-Shalom, 881 F.2d at 457 n.3.

180 The Seventh Circuit applied the United States v. O'Brien, 391 U.S. 367 (1968), conduct test, treating Ben-Shalom's speech like conduct. O'Brien provides that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. ... [A] governmental regulation is sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

181 Id. at 376-77.

182 Id. Alternatively, the court seems to equate Ben-Shalom's coming-out speech with "identity," or status, and it characterizes the military's penalization of pure status as "legitimate." Id. But see Robinson v. California, 370 U.S. 660 (1962), discussed supra part I.A.


184 The Sedition Act, 1 Stat. 596, ch. 74 (1798) (expired by its terms in 1801).

Although the Supreme Court never ruled on the constitutionality of the Sedition Act, it did comment that there existed "a broad consensus that the Act... was inconsistent with the First Amendment."\textsuperscript{186} In \textit{Ben-Shalom}, the Seventh Circuit adopted an analysis that denies First Amendment protection to pure speech. Even though the court employed this analysis in the military context and therefore deferred considerably to military judgment, it still endorsed a dangerous and potentially unconstitutional restriction on expressive freedom, a restriction that may well have repercussions in the civilian community.\textsuperscript{187}

A judiciary that can boldly assert that pure speech is the same thing as conduct should have little trouble extending that treatment to symbolic speech. By wrongly characterizing expressive manifestations of personality or belief as conduct, courts can ignore the protection guaranteed by the First Amendment to thoughts, emotions, and personality.\textsuperscript{188} In \textit{Pruitt v. Cheney},\textsuperscript{189} for example, the Ninth Circuit expressed an impoverished view of the scope of First Amendment protection for expressive conduct and religious freedom when it upheld an Army regulation mandating the discharge of any soldier who "enters into a homosexual marriage ceremony."\textsuperscript{190} The court accepted the government's argument that Captain Dusty Pruitt had, by completing a marriage ceremony with another woman, admitted (1) to having previously participated in lesbian erotic activities and (2) to having a continuing desire to participate in such activities in the fu-

\textsuperscript{186} \textit{Id.}
\textsuperscript{187} One might argue that the patent absurdity of calling speech "conduct" will undermine judicial acceptance of the status/conduct distinction. This may be true: an absurd legal argument is more vulnerable to attack than a solid one. But how long will the doctrine last before an attack is successful? The patently absurd doctrine announced in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), survived for some 60 years before being supplanted.
\textsuperscript{189} 963 F.2d 1160 (9th Cir. 1991), \textit{cert. denied}, 506 U.S. 1020 (1992). Dusty Pruitt served actively in the Army for over four years, attaining the title of Captain. \textit{Id.} at 1161. The Army would have promoted her to Major, but two weeks before her promotion became official, a reporter for the \textit{Los Angeles Times} interviewed Pruitt about her lesbianism, her position as minister of a lesbian and gay church, the fact that she had participated in marriage ceremonies with two women, and the problems she encountered as a lesbian in the armed forces. \textit{Id.} The Army withdrew her promotion after \textit{The Times} published the article. \textit{Id.}
\textsuperscript{190} Karst, \textit{supra} note 1, at 549. This section focuses on Army regulations that single out expressive conduct in the form of marriage. The \textit{Pruitt} litigation did not revolve only around Pruitt's marriages (she freely admitted her lesbianism to the military after publication of the \textit{Los Angeles Times} article); the outcome of the litigation would have likely been the same whether or not the military had any evidence of "homosexual conduct" beyond those ceremonies.
The symbolic expression contained in a religious ceremony, in other words, constituted prohibited conduct. In manipulating the speech/conduct dichotomy in order to produce an outcome favorable to the military, the Ninth Circuit abdicated its responsibility to protect First Amendment rights from unnecessary restrictions. Moreover, the court turned its back on a constitutional principle that has been described by a Wisconsin federal district court as follows: "One's personality develops and is made manifest by speech [and] expression. . . . It is only when one's personality, no matter how bizarre or potentially dangerous, actually manifests itself in the form of unlawful conduct, that the government may intercede in an effort to control the personality or restrict its manifestation." Hardwick does not direct courts to abandon their responsibility to protect the Constitution; contrary to what one may gather from the Ninth Circuit's holding in Pruitt, there exists neither a military nor a homosexual exception to the Bill of Rights.

In Ben-Shalom and Pruitt, the Seventh and Ninth Circuits, respectively, refused to protect expression that some commentators and at least one court have viewed as political speech implicating core First Amendment principles. Professor Karst, for example, believes that when Reverend Pruitt was Captain Pruitt, her straight Army colleagues and superiors knew her as an outstanding officer. Now that she has made her gay identity public, those people are challenged to reconsider their understanding of what it is to be homosexual—to reshape their abstract and threatening idea of "a homosexual" in a way that will make room for this real person whom they know and respect. The likelihood of such a reconsideration, I suggest, is exactly what the political leadership of the Defense Department fears in cases like this one.

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191 Pruitt, 963 F.2d at 1163. Pruitt actually participated in two marriage ceremonies; however, her participation in a single ceremony would have sufficed.

192 The military is creating a new generation of legal fictions that equate speech and other expressive behavior with conduct.

193 Ben-Shalom v. Secretary of Army, 489 F. Supp. 964, 976 (E.D. Wis. 1980); cf. supra part I.A.

194 See, e.g., Karst, supra note 1, at 561; Hunter, supra note 125, at 1703 ("[T]o come out is to implicitly, or often explicitly, affirm the value of homosexuality."). Homosexuality is not merely status or conduct; it is an idea that threatens the status quo. Prohibitions on identity speech also implicate the right not to speak. See Wooley v. Maynard, 430 U.S. 705 (1977) (holding that a state statute forcing people to display messages to which they were ideologically opposed on their private property invaded their First Amendment rights). Staying silent about one's sexual orientation implies, by default, that one is heterosexual. Prohibiting identity speech thus compels a message about oneself to which one might be ideologically opposed.

195 Karst, supra note 1, at 562.
The California Supreme Court has likewise described coming-out speech as an “aspect of the struggle for equal rights,” finding that statements of homosexual identity constitute political speech protected by that state’s labor code. To openly identify oneself as a lesbian contradicts prevailing social mores by affirming the value of homosexuality in a cultural climate that constantly denigrates it. The judiciary, by silencing that affirmation, allows the government to “prescribe what shall be orthodox in politics, nationalism, religion, [and] other matters of opinion” and thus loses sight of one of the “fixed stars in our constitutional constellation.” Identity speech is not only “in some sense speech,” as the Seventh Circuit claimed in *Ben Shalom*, it is speech itself. The court cannot cover the emperor’s nakedness by simply admiring his new clothes.

The status/conduct distinction has failed to protect lesbian, gay, and bisexual identity, and may have even encouraged a line of decisions (including *Ben-Shalom* and *Pruitt*) that seriously threaten gay rights. Not only have courts continued to accept the proposition that status implies conduct, they have broadened the definition of conduct to include behaviors that the First Amendment seems to clearly protect. The argument that status exists entirely separately from conduct has apparently forced judges, to whom the status/conduct distinction may appear disingenuous, to nevertheless couch their decisions in terms of that distinction. These judges have expanded the concept of “conduct” to the point where they allow the government to jeopardize core First Amendment principles. But one can understand their disdain for the status/conduct distinction if one forgets, momentarily, about the Supreme Court’s *Hardwick* holding. The love, intimacy, and affection that lesbian, gay, and bisexual people share with their same-sex partners is indeed a crucial element in sexual orientation, and insofar as the status/conduct distinction denies that reality,

197 *Id.* at 610-11. It is thus rather ironic that the *Pruitt* decision came out of the Ninth Circuit.
199 *Id.*
201 The courts have manipulated the speech/conduct dichotomy to deny constitutional protection to lesbian, gay, and bisexual people. The fact that this conflation of speech and conduct is constitutionally unsound does not mean that a pro-gay litigation strategy grounded in the distinction between status and conduct is solid.
202 [I]f homosexual status is accorded constitutional protection by the courts, there is every reason to believe that government actors will become more intent on justifying their discriminatory actions in terms of conduct rather than status. We are seeing such a move now as the new military policy broadly defines prohibited conduct to include acts of self-identification. Cain, supra note 2, at 1627.
it pollutes the theoretical discourse on homosexuality. It may also cripple the development of civil rights doctrines that would benefit lesbian, gay, and bisexual people.

2. Effects on Social Discourse

a. Throwing the Baby Out With the Bathwater

According to Professor Hunter,

`Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity. Identity cannot exist without it. That is even more true when the distinguishing group characteristics are not visible, as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component of the very identity itself. This is a paradox that current law cannot resolve.\textsuperscript{203}`

If the status/conduct distinction successfully protected identity speech, it might make sense for lesbian, gay, and bisexual people to accept it as a temporary and pragmatic, albeit unsavory, legal strategy. But, as the previous section demonstrates, it fails to do so. And yet it continues to drive the contemporary dialogue. Advocates of gay rights seem to have forgotten that the status/conduct distinction owes its vitality to one adverse Supreme Court holding and that the distinction is, after all, only a legal construct.\textsuperscript{204} Real people are whole people. We do not have a sexual component that is completely distinct from an otherwise asexual self.

Commentators forget that fact when they claim (as Professor Marc Fajer did) that Miriam Ben-Shalom's acknowledgment of her lesbianism "[was] certainly not compelling evidence she [would] engage in [same-sex erotic activity] while under the jurisdiction of the army, unless you believe that, as a lesbian, she is simply incapable of self-control."\textsuperscript{205} Granted, Ben-Shalom might have abstained from sexual relations with the woman to whom she had ceremonially declared her commitment while under the military's jurisdiction. But in reality, she probably would not have remained celibate. She would have instead done what thousands of homosexual servicemembers have

\textsuperscript{203} Hunter, supra note 125, at 1718. Justice Brennan has also noted that "it is realistically impossible to separate [a lesbian's] spoken statements from her status." Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1016 n.11 (1985) (Brennan, J., dissenting) (upholding the dismissal of a public school teacher who confidentially identified herself as bisexual to a colleague).

\textsuperscript{204} Romer is silent on the status/conduct distinction, leaving the vitality of this litigation strategy an open question.

\textsuperscript{205} Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. MIAm L. Rev. 511, 545-50 (1992) (arguing that discrimination against lesbians and gay men is a form of sex discrimination).
done throughout the history of the armed forces' anti-gay policy; she would have made love with her partner privately, hidden from the military view. Georgia State Attorney General Bowers's contention that, to most people, "the natural consequence of a marriage is some sort of sexual conduct" rings true. And declaring oneself a lesbian, barring a religious oath of celibacy, does seem to imply that one will engage in sexual activity with women; at the very least it implies a desire to engage in such activity. To claim otherwise is intellectually and emotionally dishonest.

That dishonesty has already taken a toll on the gay community. The status/conduct distinction seems to have convinced some people that homosexual erotic conduct is literally, as opposed to legally, distinct from homosexual orientation. Pro-gay litigators call upon psychologists to testify that "sexual orientation is distinct from, and exists wholly independently of, sexual behavior or conduct," and convince courts to find that "a distinction between homosexual orientation and homosexual conduct is well grounded in fact." In so doing, they betray the celebration of sexuality for which the gay rights movement once stood, and they reinforce a tradition of secrecy that deprives lesbian, gay, and bisexual people of deserved dignity. Secrecy about homosexuality sends the message to the heterosexual majority that lesbian, gay, and bisexual people are ashamed of their sexual orientation, and it erodes the self-esteem of individual members of the gay community.

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206 As much as I hate to, I must agree with Bowers on this point.


209 Lesbian, gay, and bisexual people have historically hidden their sexual orientation from heterosexuals. The status/conduct distinction continues that tradition, and in so doing, affronts the dignity of queer people. It might also encourage the tradition of clandestine sexual activity in the gay male community, a tradition that might have encouraged the spread of AIDS.

210 When lesbian, gay, and bisexual people remain closeted about their sexual orientation, they sustain significant emotional and psychological harm. Immersion in a culture that constantly denigrates homosexuality causes them to internalize homophobia, just as women and people of color sometimes internalize sexism and racism. The closet reinforces this self-hatred and prevents queer people from forming positive images of themselves.

[T]he closet exacts a high price in self-esteem, emotional health, and access to the community. It is not only the constant stress of maintaining a wall of secrecy around life's most intimate associations that makes the closet so onerous, but also the way in which it can powerfully sustain the kind of "internalized homophobia" that makes difficult the "emergence of positive identity in a context of external oppression."
The status/conduct distinction also opens the door for anti-gay arguments that focus on homosexual erotic activity as volitional and therefore amenable to change. One pro-gay court found, for example, that "sexual conduct may be a matter of volition, [but that] sexual orientation is not," and that sexual orientation "is a characteristic . . . beyond the control of the individual . . . [and] existing independently of any conduct that the individual . . . may choose to engage in."\textsuperscript{211} The court's argument powerfully advocates the status/conduct distinction, but by describing sexual orientation as unamenable to change and same-sex erotic conduct as volitional, the court unwittingly invites arguments that homosexuals can choose heterosexual lifestyles. Minimizing the importance of erotic activity to sexual orientation provides an opportunity for anti-gay activists to claim that lesbian, gay, and bisexual people can rise above their weaknesses and, in the words of one Christian leader, fight their inclination toward "unnatural sex behavior."\textsuperscript{212}

The status/conduct distinction endangers the health and well-being of individual members of the gay community by dismissing as insignificant the erotic relationships that they share with one another, by abdicating the celebration of sexuality for which the gay-rights movement originally stood, by feeding the tradition of secrecy that surrounds homosexuality, and by providing a foundation upon which anti-gay activists can attack same-sex erotic conduct. In escaping Hardwick, pro-gay litigators have symbolically neutered their constituency, convincing sympathetic courts that the status/conduct distinction accurately reflects reality.\textsuperscript{213} But by divorcing status from conduct, they may be throwing the baby out with the bathwater.\textsuperscript{214} If the Supreme Court had held in Powell \textit{v.} Texas that the government could not con-
institutionally punish a chronic alcoholic for behavior attributable to his condition, \(^2\) would pro-gay litigators have argued in *Hardwick* that the Constitution prohibited states from punishing homosexual sodomy because it resulted from the disease of homosexuality?

b. Reinforcing Heterosexism

*Hardwick* ushered in the present period in gay-rights litigation in which the status/conduct distinction figures at the center of the dialogue on sexual orientation. But deferring to *Hardwick* in this way allows an obscure definition of sodomy to exist unchallenged, and by extension allows the heterosexual majority to remain ignorant of the actual content of same-sex erotic conduct. Present litigation strategies respond to stereotypes of homosexuals as oversexed sodomites\(^2\) by dismissing same-sex erotic conduct as insignificant to homosexual identity. This tactic, in turn, chills speech about sexuality within the gay community itself. For example, a professor of political science, who recently appeared as a witness in a challenge to an anti-gay initiative, testified that "those who organized the 'March on Washington' did not represent the mainstream homosexual population."\(^2\)

He apparently feared that including leather boys and drag queens within the larger gay community would focus unwanted attention on same-sex erotic conduct.\(^2\) But removing a minority population from the larger gay community merely caters to heterosexual predilections and allows the straight community to control homosexual behavior. A litigation strategy that encourages lesbian, gay, and bisexual people to disown portions of their own community transforms its constituency into an agent of its own oppression.\(^2\)

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\(^2\) See supra note 2, at 1641.

\(^2\) See supra part I.A.

\(^2\) See supra text accompanying notes 99-101.


\(^2\) The participants in the March on Washington represented the mainstream homosexual population—drag queens and all. Although most of the participants were not leather boys or drag queens, these minority populations are certainly a part of the larger gay community.

\(^2\) Additionally, in chilling speech about same-sex erotic activity both within and outside of the gay community, the status/conduct distinction does nothing to counter the lack of information in the straight community about what it is, exactly, that lesbian, gay, and bisexual people do in bed. It thus allows ignorance about the scope and content of sodomy prohibitions to continue unchallenged. It also fails to challenge misunderstandings about heterosexuality. Part of the difficulty in the military cases is that they make obvious the fact that sexuality is a continuum and that the categories "homosexual," "heterosexual," and "bisexual" are limiting.
The current gay-rights litigation strategy negatively affects the social discourse on homosexuality by dismissing the significance of same-sex erotic conduct to lesbian, gay, and bisexual identity and by allowing the straight community to continue to equate same-sex erotic conduct with sodomy, thereby reinforcing heterosexist stereotypes of homosexuals.

C. Suggested Alternatives

In order to circumvent the status/conduct distinction's weaknesses, pro-gay litigators should restrict its reach by emphasizing its legal, as opposed to its literal, veracity; by using it to bifurcate sodomy from homosexual status; and by demonstrating its relationship to the speech/conduct dichotomy of First Amendment jurisprudence. At the same time, they should seek out alternative strategies for asserting gay rights, four of which appear below.

1. **Restricting the Reach of the Status/Conduct Distinction**

In order to restrict the reach of the status/conduct distinction, advocates of gay rights must recognize that it represents, in terms of sexual orientation, a legal, and not a literal, truth, and they must communicate this fact to others. Just because a corporation is a “person” for equal protection purposes, for example, does not mean that it comports with the dictionary definition of a “person” as “[a] living human being.”\footnote{220 The American Heritage Dictionary of the English Language 1351 (3d ed. 1992).} Distinguishing same-sex erotic conduct from homosexual identity may be useful for certain legal purposes, but overreliance on that distinction distorts the reality of many lesbian, gay, and bisexual lives. In addition, reliance on the status/conduct distinction may fuel arguments by anti-gay activists that same-sex erotic activity is volitional and that homosexuals can refrain from such behavior. Also, if the status/conduct distinction appears disingenuous, it may generate a negative response from the judiciary and from the public.\footnote{221 By appearing to be a clever but dishonest legal argument, the status/conduct distinction may, in fact, fuel the argument that lesbian, gay, and bisexual people are asking for “special rights.” If, however, pro-gay litigators make it clear that the status/conduct distinction is a legitimate, albeit abstracted, legal concept, perhaps at least legal actors will understand that there is no disingenuity in making the argument.}

Furthermore, pro-gay litigators should narrow the status/conduct distinction to focus on the conduct at issue in *Hardwick* instead of extricating all erotic conduct from homosexual status. Pro-gay litigators should use *Robinson* to confront, rather than to avoid, the indeterminacy inherent in the word “sodomy.” And they should continue to insist that the government refrain from punishing actors based solely on their predispositions. Moreover, they should undercut presum-
tions of conduct that emanate from the mere fact of status\textsuperscript{222} "by argu-
ing that the step from valid criminalization of actual conduct . . . to valid discrimination on the basis of presumed conduct is a big one."\textsuperscript{223} In so doing, pro-gay litigators can challenge the idea that homosexuals define and are defined by the act of sodomy, and they can thus acknowledge the fullness and complexity of lesbian, gay, and bisexual lives.

Finally, pro-gay litigators should, in the process of restricting their use of the status/conduct distinction, utilize the speech/conduct dichotomy to directly attack restrictions on free speech. They should not, for example, characterize the military as having penalized status in a case like Ben-Shalom; rather, they should characterize it as having penalized political speech.

2. Four Alternative Methodologies\textsuperscript{224}

Pro-gay litigators, should, in their attempts to create legal strategies that avoid the weaknesses of the status/conduct distinction, first try to more accurately represent their clients' lives. Lesbian, gay, and bisexual litigants should speak explicitly about the role of sex in their lives in order to more accurately demonstrate its contribution to self-identity and to dispel the myth that all homosexuals engage in sodomy.\textsuperscript{225}

Second, pro-gay litigators should attempt to limit Hardwick strictly to its facts. The Supreme Court held in that case only that the right to privacy does not extend to homosexual sodomy as defined by the Georgia statute at issue in the case. Other types of erotic conduct between homosexuals may or may not merit constitutional protection. District Judge Thelton Henderson recognized this fact when, in ruling in favor of the plaintiffs in a substantive due process gay-rights case, he wrote:

The Supreme Court in Hardwick simply did not address the issue of all homosexual activity. . . . Hardwick does not hold, for example, that two gay people have no right to touch each other in a way that expresses their affection and love for each other. Nor does Hard-

\textsuperscript{222} Several of the lesbian and gay bar and student association cases discuss the impropriety in presuming conduct from status. For a discussion of these cases, see generally Cain, supra note 2, at 1608-11.

\textsuperscript{223} Id. at 1626-27.

\textsuperscript{224} Much of this discussion is taken from Pat Cain's very useful survey of lesbian and gay legal history. See id. passim.

\textsuperscript{225} Of course, many lesbian, gay, and bisexual people do engage in sodomy, depending on how one defines that term. But not all homosexuals engage in any given activity that might be called "sodomy." Lesbian, gay, and bisexual people, like heterosexual people, vary their sexual practices such that, although two people might sometimes engage in sodomy, they might engage in other types of erotic activity as well. These distinctions are important in light of Hardwick.
NOTE—DOING THE NASTY

Peck address such issues as whether lesbians and gay men have a fundamental right to engage in homosexual activity such as kissing, holding hands, caressing, or any number of other sexual acts that do not constitute sodomy under the Georgia statute.\footnote{226}{High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987), rev’d in part, vacated in part, 895 F.2d 563 (9th Cir. 1990).}

Decisions like the one in \textit{State v. Walsh},\footnote{227}{713 S.W.2d 508 (Mo. 1986) (en banc).} in contrast, should not occur. In that case, a Missouri court used \textit{Hardwick} to uphold the information\footnote{228}{An “information” is an accusation against an individual for allegedly committing a criminal offense. It differs from an indictment only in that it is presented upon the oath of a public official rather than on the oath of a grand jury. \textbf{BLACK’S LAW DICTIONARY} 779 (6th ed. 1990).} of a man who had touched the penis of another, fully-clothed man with his hand.\footnote{229}{\textit{Walsh}, 713 S.W.2d at 509, 511. The Missouri statute criminalized sexual contact involving the hand of one person and the sexual organ of another. \textit{Id.} at 509 (quoting the Missouri statute as condemning any “sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person”).} Judge Blackmar pointed out in his dissent that the majority had egregiously broadened the \textit{Hardwick} holding:

\begin{quote}
I am ... inclined to believe that [the Missouri statute] goes beyond the limits of state power in defining “deviate sexual intercourse” as involving the hand. This is not the offense of sodomy as discussed in ... \textit{Bowers v. Hardwick}, and it has no long history of legal sanction such as seemed very important to Justice White in that case. \textit{Bowers} recognizes a right of privacy under the Constitution of the United States, but holds that this right of privacy does not extend of offenses traditionally punished as sodomy. Its rationale is absent here.\footnote{230}{\textit{Id.} at 514 (Blackmar, J., dissenting) (citation omitted).}
\end{quote}

Pro-gay litigators can further undermine \textit{Hardwick}’s rationale by presenting detailed historical analyses of homosexuality in cases that involve proscribed conduct. They can use the results of historical studies that show, for example, that in the late eighteenth century, English people viewed lesbian relationships as positive so long as they did not interfere with heterosexual marriage.\footnote{231}{See Cain, supra note 2, at 1632-33 nn.424-26.} Furthermore, in addition to limiting \textit{Hardwick} to the specific conduct prohibited by the Georgia statute, pro-gay litigators should limit it to the substantive due process arena. They should continue to argue, for instance, that \textit{Hardwick} does not foreclose the application of strict scrutiny under the \textit{Equal Protection} Clause.\footnote{232}{According to Professor Cain, “\textit{Hardwick} ... leaves litigators free to make substantive due process claims regarding other forms of conduct, both sexual and nonsexual.” \textit{Id.} at 1631. \textit{Romer v. Evans} leaves open the question of whether courts can apply strict scrutiny to anti-gay laws in the future. See supra note 172.}
Third, pro-gay litigators seeking to avoid the pitfalls of the status/conduct distinction should insist that courts hearing civilian gay-rights cases strictly limit the holdings of cases involving the military to their facts. They should remind judges that those decisions represent a deference to the political branches of government and an appreciation of the peculiar needs of the armed forces. In this way, litigators can curtail the effects on the civilian community of decisions adverse to the rights of lesbian, gay, and bisexual servicemembers. They can attack the following three themes that appear in the military cases as inappropriate to the civilian context: (1) severe restrictions on speech and symbolic expression; (2) evidentiary presumptions of illegal conduct when no real evidence of such conduct exists; and (3) broad definitions of constitutionally unprotected sexual conduct.

Finally, pro-gay litigators should not dismiss the utility of a rational basis review. In Romer v. Evans, for example, the Supreme Court handed down a decision favorable to the queer community without applying heightened scrutiny. In so doing, it used what might be called a rational basis review with "bite." This type of rational basis review gives rise to an invalidation of a challenged law for any of three reasons. A court might strike down a law in this manner by characterizing the government’s purported interest as "illegitimate," by finding irrational the means chosen to achieve an admittedly legitimate state interest, or by finding that a given law has as its foundation an improper purpose. In Romer, the Court most fully embraced the last of these concepts. It cited United States Dep’t of Agriculture v. Moreno and observed that Amendment Two "raise[d] the inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected."

In a post-Romer environment, attacks on the reasonableness of anti-gay laws might hold more promise than they did prior to that decision. Pro-gay litigators should therefore continue to argue against

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238 413 U.S. 528 (1973). In Moreno, the Court struck down a portion of the Food Stamp Act of 1964 designed to "exclude[] from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household." Id. at 529; accord City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985). In Moreno, the Court found improper the possible desire on the part of Congress to exclude "hippie communes" from the federal food stamp program. Moreno, 413 U.S. at 543.
the rationality of laws that unfairly burden lesbian, gay, and bisexual people. For instance, when a court sits in a state that does not criminalize homosexual sodomy, "pro-gay litigators should "argue that [discrimination] against lesbians and gay men can hardly be justified on grounds of public morality."240 Or, when a case concerns employment discrimination, pro-gay litigators should continue to ask courts to require the government to show a nexus between homosexuality and job performance. They should demand that the government support its justifications for discrimination with factual material. This strategy worked in California when a district court there refused to accept the argument that the military ban is rationally related to a legitimate governmental purpose.241 The DOD’s own studies, introduced into evidence in the case, concluded that “no empirical proof exists . . ‘[to support the Navy’s contention that] homosexuality has an adverse effect upon the completion of the [military] mission.”242 This type of analysis is useful outside the employment context as well: courts need not uphold discriminatory policies when the government’s justifications for those policies are devoid of factual support.243

CONCLUSION

The status/conduct distinction has failed to protect the rights of lesbian, gay, and bisexual people.244 Although some lower courts have used the distinction to bypass the Supreme Court’s Hardwick holding and to apply strict scrutiny under the Equal Protection Clause,245 the status/conduct distinction has not, in the military context, advanced the rights of lesbian, gay, and bisexual people. In re-

240 Cain, supra note 2, at 1629.
242 Goldstein, supra note 92, at 1803-04 n.114 (quoting the Chief of Naval Personnel).
243 The military’s justifications for its discriminatory policy are, for example, contradicted by its own internal documents. See, e.g., Goldstein, supra note 92, at 1803 n.114; Karst, supra note 1, at 548 n.194.
244 "To date, the status/conduct distinction has met with minimal success in the courts.” Cain, supra note 2, at 1627.
245 See, e.g., Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994), aff’d, 116 S. Ct. 1620 (1996); Equality Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 497 (S.D. Ohio 1994), aff’d in part, vacated in part, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996) (remanding in light of Romer, 116 S. Ct. 1620 (1996)). Although the Supreme Court’s Romer decision forecloses the application of strict or intermediate scrutiny in cases challenging anti-gay initiatives like the ones struck down in Evans and Equality Foundation (because the Romer Court used a rational basis review), pro-gay litigators may yet find uses for the status/conduct distinction. Laws discriminating against lesbian, gay and bisexual people will probably continue to appear, and they are sure to differ from Colorado’s Amendment Two and Cincinnati’s Issue Three. Because the Supreme Court neither condemned nor approved the status/conduct in Romer, litigators may continue to separate status from conduct in order to enable courts to bypass the Hardwick holding and apply heightened scrutiny to anti-gay laws that differ from those at issue in Evans and Equality Foundation.
viewing the military's ban on homosexual servicemembers, courts have simply recast status in terms of conduct, and they have thus refused to extend constitutional protection to expression that would have otherwise clearly implicated the First Amendment.

Moreover, the status/conduct distinction lacks long-term utility because it reinforces, rather than challenges, a holding that gay-rights litigators would like to see reversed. According to Professor Cain, “[l]itigation strategies for the advancement of lesbian and gay rights should be planned with an eye to the eventual reversal of Hardwick.” But litigators have used the status/conduct distinction to avoid, rather than to confront Hardwick, and in so doing, they have encouraged the tradition of secrecy surrounding homosexuality in our culture; they have facilitated heterosexual ignorance about homosexual identity and behavior; and they have presented an inaccurate picture of lesbian, gay, and bisexual lives by dismissing as insignificant the love and affection that same-sex couples share.

In order to avoid these weaknesses, advocates of gay rights should abandon the status/conduct distinction as the central tool in pro-gay litigation and, like litigators in the pre-Hardwick period, should utilize a variety of legal strategies, including those that focus attention on same-sex erotic conduct. Although Hardwick to a large degree necessitates the use of the status/conduct distinction, it leaves room for several alternative strategies for asserting gay rights: litigators should (1) more accurately represent their clients' lives by allowing them to talk about the role of sex in their identity; (2) explore the possibility that erotic conduct between homosexuals that differs from that proscribed by the Georgia sodomy statute may merit constitutional protection; (3) insist that courts hearing civilian gay-rights cases strictly limit the holdings of military cases to their facts; and (4) demand that courts overturn laws that are not rationally related to a legitimate government purpose. In addition, advocates of gay rights should, when using the status/conduct distinction, restrict its reach as much as possible by (1) emphasizing, to courts and to the public, that the status/conduct distinction represents a legal, as opposed to a literal, truth; (2) concentrating on distinguishing sodomy, rather than all erotic conduct, from homosexual status; and (3) directly challenging restrictions on First Amendment rights via the speech/conduct dichotomy instead of through an attenuation of the status/conduct distinction.

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