

## HOW THE RIGHT TO BE SEXUAL SHAPED THE EMERGENCE OF LGBT RIGHTS

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### ABSTRACT

*The right to privacy, as applied to LGBT rights, is often described as a sort of tolerance: Sexuality is tolerated as long as it remains hidden in the bedroom. This tension between tolerance and open expression of sexuality has been at the center of numerous debates over LGBT legal strategy. Thus, this Article argues for a counter-intuitive result: The right to privacy has also been used to advance the seemingly more radical right to be sexual.*

*This Article excavates the early history of LGBT legal organizing in order to show how the tension between the right to privacy and the right to sexuality has played out within the LGBT legal movement, and how the right to privacy was shaped by and shared overlapping concerns with the right to be sexual. In order to support this claim, this Article takes a deep dive into the world of LGBT legal organizing in the 1960s and 1970s. This Article shows how contrasting visions over LGBT rights shaped the issues that became important and the claims that activists made in court.*

*After examining the organizational history of early LGBT rights, this Article turns specifically to discussions between LGBT lawyers regarding sodomy reform. By tracing the decisions leading up to *Bowers v. Hardwick*, this Article shows how claims to the right to privacy were in tension with but also ultimately shaped by ideas about the right to be sexual.*

*The payoff for this historical excavation is a richer understanding of the role of activist lawyers in pushing new constitutional meanings. This Article concludes with a discussion of how the right to be sexual helps us to understand the relationship between dignity and the identity-based logic of LGBT rights.*

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## INTRODUCTION

When the history of LGBT rights is told, it is often told as one of triumph, victory, or a dream fulfilled.<sup>1</sup> In this telling, LGBT rights is the story of going from a time when “homosexuals were virtually without constitutional rights” to “a twenty-first-century America in which gays can marry” throughout the country.<sup>2</sup> But while much of this history has been told before, this Article argues that the dominant understanding of it is incomplete.

Before LGBT rights emerged as a coherent category, the “right to be sexual” offered an alternate model for LGBT activists.<sup>3</sup> To oversimplify, claims of LGBT rights describe gay people as basically the same as everyone else and deserving of protection from discrimination on that basis.<sup>4</sup> Claims of the right to be sexual describe gay people as basically different from everyone else and deserving of dignity and respect for their sexual choices.<sup>5</sup> LGBT rights asks for the state to leave LGBT people alone. The right to be sexual demands state recognition and support.

This Article excavates the early history of LGBT legal organizing in order to show how the tension between the right to privacy and the right to be sexual has played out within the LGBT legal movement, and how the right to privacy was shaped by and shared overlapping concerns with the right to be sexual. In order to support this claim, the article takes a deep dive into the world of LGBT legal organizing in the 1960s and 1970s. This Article shows how contrasting visions of LGBT rights shaped the issues that became important and the claims that activists made in court.

This Article proceeds in four parts. Part I reviews historical writings on the right to be sexual before offering my own full definition of it. This Article argues for the normative desirability of the right to be sexual and compare it to LGBT rights. Part II tells a detailed history of LGBT legal organizing in the 1960s and 1970s. Rather than focus on specific cases or issues, this history proceeds by way of focusing on the organizations involved and how

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<sup>1</sup> See, e.g., DAVID BOIES & THEODORE B. OLSON, REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY 7 (2014); LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION, at xiii (2012).

<sup>2</sup> WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY 1 (2014).

<sup>3</sup> Mary C. Dunlap, *Toward Recognition of “A Right to be Sexual,”* 7 WOMEN’S RTS. L. REP. 245, 245 (1982). The “right to be sexual” was first declared by Mary Dunlap in 1982. Patricia A. Cain, “*The Right to Be Sexual*” (Revisited): Remembering Mary Dunlap, 19 BERKELEY WOMEN’S L.J. 19, 20 (2004).

<sup>4</sup> Cf. Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 93 SOCIALIST REV. 9, 40 (1987) (describing difference and sameness models of gay identity).

<sup>5</sup> See *infra* Part I (defining the right to be sexual).

the activists involved talked about their goals. The right to be sexual overlapped with and competed with LGBT rights as a legal category to describe their goals. This Article examines key litigation involving immigration, partner benefits, and prisons to show how the tension between LGBT rights and the right to be sexual played out doctrinally.

Sodomy reform was a priority for all of the LGBT legal organizations when they were founded. But it was not *the* only priority. Part III turns to the history of sodomy reform, explaining how it became the defining goal of LGBT rights by the mid 1980s. This Article argues that sodomy reform became a vehicle for talking about the larger meaning of the right to be sexual and LGBT rights.<sup>6</sup> This part begins with a discussion of the sodomy roundtables. It then turns to key pre-*Hardwick* sodomy litigation. Part III concludes by reinterpreting some of the known history of *Bowers v. Hardwick* and adding in additional history that reveals more debate over legal strategies than is commonly recognized. This Article's theory of a right to be sexual sheds new light on the organizational disagreements over this case.

In addition to a richer historical understanding of LGBT rights, this Article contributes to how we understand LGBT rights today. Part IV argues that the right to be sexual remains a viable theory today. This Article analyzes Supreme Court opinions on LGBT rights through the lens of the right to be sexual. This analysis reveals how the Court has implicitly accepted central tenets of the right to be sexual. Moreover, this Article argues that LGBT rights has only succeeded because the Court has implicitly accepted the right to be sexual.

## I. DEFINING THE RIGHT TO BE SEXUAL

The idea of LGBT rights is that LGBT people, *as a group*, deserve constitutional protection under principles of privacy and equal protection. According to this view, LGBT people do not threaten the basic institutions of society. They are different from the majority only in a small and insignificant respect. As critics note, LGBT rights are won at the cost of hiding sexuality itself.<sup>7</sup> LGBT people are protected as a group, but on

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<sup>6</sup> Similarly, with reference to same-sex marriage today, Doug NeJaime refers to same-sex marriage's role in a broader movement as "talking around marriage." See Douglas NeJaime, *Introduction: Talking Around Marriage*, 45 LOY. L.A. L. REV. 675, 679 (2012) ("Marriage did not define and structure the dialogue around sexuality and gender. Rather, it provided a lens for analysis and often receded into the background.").

<sup>7</sup> See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS*, at xi (2006) (arguing that lesbians and gays need to "cover" their sexuality in order to win protection from

condition that they do not talk about their sexual conduct or fundamentally challenge the state in any way. In contrast, the right to be sexual foregrounds sexuality. It claims protection from state regulation based on the dignity of sexual choices and sexual identities. It deemphasizes individual identities, focusing on the claim that *all* sexual choices deserve the same dignity and respect. The state can regulate sexual violence and lack of consent, but its justifications cannot be about the dignity or morality of sexual conduct. The right to be sexual fundamentally challenges the state to recognize the dignity of all people.

Mary Dunlap, a respected lesbian feminist lawyer and legal scholar in the early LGBT movement, first defined the right to be sexual as “the idea that an individual’s sexual choices are basic.”<sup>8</sup> She set out to define “the right to be actively sexual for its own sake”<sup>9</sup> and “a positive concept of sexual relationships.”<sup>10</sup> For Dunlap, the right to be sexual was grounded in respect of the dignity of individual moral choices.<sup>11</sup> Dunlap argued that if LGBT activists limited themselves to the doctrinal categories of privacy and equality—the standard bases of LGBT rights—they would unnecessarily limit the right to be sexual.<sup>12</sup> To illustrate her concerns, she used examples of an elderly woman ejected from a nursing home for her “persistent association” with a male resident and a white girl expelled from a private

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discrimination); *see also* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 4 (1995) (arguing that gay and lesbian people have “virtual equality,” meaning they “possess some of the trappings of full equality but are denied all of its benefits”).

<sup>8</sup> Dunlap, *supra* note 3, at 247. Dunlap and many of her colleagues consciously drew on a sex-positive feminism that took challenging society’s sex-negativity as a core part of its goal. *Cf.* Patricia A. Cain, “*The Right to Be Sexual*” (Revisited): Remembering Mary Dunlap, 19 BERKELEY WOMEN’S L.J. 19 (2004).

<sup>9</sup> Annamay T. Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN’S RTS. L. REP. 229, 231 (1982) (citing Dunlap, *supra* note 3, at 245).

<sup>10</sup> Cain, *supra* note 8, at 21–23 (explaining that since “the Court never developed a positive concept of sexual relationships,” and has instead focused on the right to privacy, Dunlap “argue[d] that the privacy decisions imply there is a constitutionally protected ‘right to be sexual.’”).

<sup>11</sup> *See* Mary C. Dunlap, *In the Supreme Court of the United States, October Term, 1985, Michael J. Bowers, Petitioner, v. Michael Hardwick, et al., Respondents. Brief Amicus Curiae For the Lesbian Rights Project, Women’s Legal Defense Fund, Equal Rights Advocates, Inc. and the National Women’s Law Center.*, 14 N.Y.U. REV. L. & SOC. CHANGE 949, 950 (1986) (explaining that the amicus brief filed with the Supreme Court in *Bowers v. Hardwick* written on behalf of the Lesbian Rights Project and other women’s rights organizations deliberately argued for the dignity of lesbian and gay sex); *see also* Brief for Lesbian Rights Project et al. as Amici Curiae Supporting Respondents at 21, *Bowers v. Hardwick*, 478 U.S. 168 (1986) (No. 85-140) (emphasizing “the citizens’ capacities for responsible individual judgment in the area of consenting adult sexual behavior”).

<sup>12</sup> *See* Dunlap, *supra* note 3, at 247 (describing the right to be sexual as crabbed and inconsistent if advanced under the doctrine of privacy).

school for holding hands with a black male friend.<sup>13</sup> Dunlap argued that, rather than shoehorn these examples into standard doctrinal categories of due process and equal protection, LGBT lawyers should develop the right to be sexual as a more persuasive basis for addressing the state's fear of the open expression of sexuality.

Other lawyers and activists writing at the same time and in the same circles as Dunlap also rejected the exclusive focus on LGBT people as the group affected by a right to be sexual. They offered various criteria, including “the multiplicity of situations in which a person’s sexual orientation interfaces with the law[.]”<sup>14</sup> the male/female dichotomy,<sup>15</sup> and laws targeting “reproductive biology.”<sup>16</sup> From these various starting points, they argued that “a strong affirmative interest in sexual expression and relationships” can be found in “our constitutional visions of liberty and equality.”<sup>17</sup> Many of these scholars and activists were forthright in acknowledging that they were experimenting with new legal theories and claims. While they discussed equality, they argued that it had to move beyond tests of formal classifications to recognize concerns with how the state regulated self-determination.<sup>18</sup> Any form of LGBT rights that required sexual minorities to pretend to be just like heterosexuals in order to win legal protections could not constitute a real affirmation of the right to be sexual.<sup>19</sup>

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<sup>13</sup> *Id.* at 245 (citing *Wagner v. Sheltz*, 471 F. Supp. 903, 906, 908 (D. Conn. 1979) and *Fiedler v. MarumSCO Baptist Church*, 486 F. Supp. 960 (E.D. Va. 1979), *rev'd sub nom. Fiedler v. MarumSCO Christian School*, 631 F.2d 1141 (4th Cir. 1980)). Dunlap similarly stressed this intersectionality in her earlier work. See Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1147 (1979) (“An essential commonality exists among the distinct groups—women, homosexuals, mothers of illegitimate children, sexually reassigned persons, and others—who have suffered from the power of the law to prescribe sex identity . . .”).

<sup>14</sup> Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 799 (1979). For further analysis on legal discrimination on the basis of sexual orientation, see Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part I*, 10 U. DAYTON L. REV. 459 (1985); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part II*, 1 U. DAYTON L. REV. 275 (1986); Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980–1981).

<sup>15</sup> See Dunlap, *supra* note 3, at 247 (explaining that the right to be sexual may inhibit the sexual freedom of females if it is derived from a stereotypical dichotomous model of sexuality).

<sup>16</sup> See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1008–9 (1984) (proposing a particular level of scrutiny for laws that govern reproductive biology).

<sup>17</sup> Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187, 225, 228 (1988).

<sup>18</sup> See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 806 (1990) (“[F]eminist theory will be better served if we refocus our energy from the debate about equality to a more direct debate about the meaning of self-definition.”).

<sup>19</sup> See, e.g., Nancy Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907, 908 (1986) (“[The client] is forced to deny any pride in her

Like Dunlap, I define the right to be sexual as broader than just the right to be left alone. It is different in its justification and in the demands it places on the state. While the justification for the right to be left alone might be described as tolerance, the right to be sexual is justified by respect for the dignity of sexual identities and sexual choices.<sup>20</sup> This is a dignity that inheres in the person, not one that is conferred by the State.<sup>21</sup> It is a dignity that the state can recognize but not one that the state can create.

The right to privacy demands just that the state not interfere with what people do in their bedrooms. It prevents government imposition of harm. The right to be sexual prevents the government from using sexuality to define a class for disability or stigma. It demands positive state action to integrate sexual minorities into society. This demand might include nondiscrimination and affirmative action laws and policies; healthcare benefits and medical research; support services for LGBT youth; and changed immigration policies.

By arguing that the right to be sexual was a viable alternative to LGBT rights, I do not mean to argue that LGBT activists chose freely between these theories. Because minority rights in the United States developed to protect blacks, other minority groups—including lesbians and gays—fared better when they seemed analogous to blacks.<sup>22</sup> Thus, gays and lesbians could claim to be an oppressed minority group—defined by their sexuality rather than their race—who were seeking access to the same rights that everyone else enjoyed.<sup>23</sup> The right to be sexual did not match this identity-based model of minority rights. By arguing that the right to be sexual was a viable alternative to LGBT rights, I mean to broaden the discussion of what constitutes LGBT law. LGBT legal organizations did not only think in terms of the narrow

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lesbianism, any solidarity with other lesbians; she may even be compelled to deny or alter her sexual relationship.”).

<sup>20</sup> See Cain, *supra* note 8, at 20 (explaining that Dunlap’s amicus brief in *Hardwick* argued that love is a moral choice, rejecting the traditional arguments that focused on geographical privacy).

<sup>21</sup> In *United States v. Windsor*, Justice Kennedy describes marriage laws as a mechanism in which the state confers dignity on a couple. 570 U.S. 744, 768 (2013). Noa Ben-Asher has described the Supreme Court’s reasoning in *Windsor* as a “weak dignity” because it assumes that the state confers dignity rather than seeing dignity as inherent in all people. Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 243–44 (2014). However, the broader discussion of dignity in *Windsor* suggests that Justice Kennedy would be sympathetic to the argument that the dignity of sexual choice and identity is inherent in the person.

<sup>22</sup> See JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 314–15 (2002) (arguing that LGBT rights faced a challenge insofar as lesbians and gays were not seen as similar to racial minorities).

<sup>23</sup> See Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 340–41 (2009) (discussing how gay activists introduced a race-sexuality analogy in the courts).

identity-based claims of minority rights. They also actively pursued the right to be sexual. Even as LGBT rights became the dominant model, the right to be sexual continued to inform the strategic debates within the LGBT legal organizations. Recovering this history of how the right to be sexual overlapped with and competed with LGBT rights as a basis for articulating arguments of liberty and equality is important to analyzing persistent questions of whether we protect sexual minorities because they are just like everyone else or because we respect some sphere of dignity around sexual choices.<sup>24</sup>

## II. TRACING THE RIGHT TO BE SEXUAL IN EARLY LGBT LEGAL ORGANIZING

Historical scholarship on LGBT rights addresses three overlapping themes: Judicial treatment of LGBT rights, civil rights as a model for LGBT rights, and social movement histories of LGBT rights. This scholarship is dominated by court-focused histories. The identity-based logic of LGBT rights is obvious in the titles of key historical scholarship: *Gaylaw*,<sup>25</sup> *Litigating for Lesbian and Gay Rights*,<sup>26</sup> *Rainbow Rights*,<sup>27</sup> *Queers in Court*,<sup>28</sup> *Gay Rights and American Law*,<sup>29</sup> *Courting Justice: Gay Men and Lesbians v. The Supreme Court*,<sup>30</sup> *From the Closet to the Courtroom: Five LGBT Rights Lawsuits that Have Changed Our Nation*.<sup>31</sup> This scholarship traces the history of LGBT rights from early procedural challenges to police harassment, through constitutional challenges to sodomy laws, and to more robust claims for equal protection under the law. LGBT rights is defined by the demand to be left alone by the state and by the claim that LGBT people are just like everyone else. These studies provide several different explanations for the changing meaning of LGBT rights. These explanations include cultural attitudes towards LGBT

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<sup>24</sup> Cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1474–75 (2004) (outlining similar persistent tensions in the justification for protection of racial minorities).

<sup>25</sup> WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

<sup>26</sup> Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

<sup>27</sup> PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (2000).

<sup>28</sup> SUSAN GLUCK MEZEY, *QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY* (2007).

<sup>29</sup> DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* (2003).

<sup>30</sup> JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001).

<sup>31</sup> CARLOS A. BALL, *FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION* (2010). But see MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE 57–93* (2010) (analyzing *Boutilier v. INS* through lens of Supreme Court cases dealing with sexual freedom and equality).

people,<sup>32</sup> judicial politics,<sup>33</sup> the roles of individual lawyers and plaintiffs,<sup>34</sup> and broader changes in legal doctrine on privacy and equal protection.<sup>35</sup>

Along the way, these court-focused studies discuss some disagreements over the meaning of LGBT rights. In particular, they highlight the recurring argument raised by some LGBT rights lawyers that it is important to talk about real LGBT people in court.<sup>36</sup> These lawyers were concerned that when legal arguments were just about the abstract categories of privacy and equal protection, the dignity of actual LGBT people disappeared.<sup>37</sup> These dignitary concerns are related to the issues that I raise in this Article. However, in current historical scholarship, they are treated as discrete strategic debates: Should LGBT lawyers talk just about privacy or talk also about the people impacted by privacy laws?<sup>38</sup> This Article shows that these disagreements were more than strategic issues. These disagreements are related to the unresolved tensions between protecting people based on the right to be sexual and LGBT rights.

Several key studies also focus on individual cases, revealing the particular historical context leading up to the case and influencing its outcome. Dale Carpenter finds that *Lawrence v. Texas* depended upon an almost unbelievable cast of characters, including local police in Texas and a politically-sensitive bartender, to transform what could have been routine police harassment of gay men into a major constitutional challenge.<sup>39</sup> Carpenter shows how the constitutional case was shaped by local and national politics. Similarly, Lisa Keen and Suzanne Goldberg discuss how local lawyers in Colorado thought about the challenge in *Romer v. Evans* in different terms from national lawyers

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<sup>32</sup> See ESKRIDGE, *supra* note 25, at 2–4 (describing cultural construction of homosexuality as underlying legal regulation of lesbians and gays).

<sup>33</sup> See PINELLO, *supra* note 29, at 72–105 (explaining court decisions based on judicial attitudes model).

<sup>34</sup> For detailed studies of individual cases and the roles of individual actors in those cases, see BALL, *supra* note 31; MURDOCH & PRICE, *supra* note 30.

<sup>35</sup> See Konnoth, *supra* note 23, at 352–57 (discussing changes in the doctrinal approach to analyzing minority groups).

<sup>36</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003 138 (2008) (describing how Frank Kameny utilized politics of recognition to advocate for the decriminalization of sodomy laws).

<sup>37</sup> See Cain, *supra* note 26, at 1591–1611 (illustrating how early sodomy cases led LGBT litigators to argue that gay identity/status was distinct from sodomy); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1639–44 (1997) (comparing LGBT rights litigation that directly challenged the regulation of conduct with litigation that implicitly accepted regulation of conduct in order to argue for discrimination based on identity).

<sup>38</sup> See ESKRIDGE, *supra* note 36, at 154–55 (discussing first federal challenge to sodomy laws under privacy theory).

<sup>39</sup> See generally DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012) (describing the legal strategy used by Lambda Legal attorneys).

from the LGBT legal organizations.<sup>40</sup> These studies are presented as adding more nuance to specific chapters of LGBT rights. They do not change the overall focus of the story from LGBT rights.

A second theme in this historical scholarship is the role of the civil rights movement as a model for LGBT rights. In most studies, this is more of an assumption than a major part of the analysis.<sup>41</sup> Studies mention the civil rights movement as a model but do not develop the alleged links.<sup>42</sup> The civil rights movement is assumed to provide organizational models for LGBT organizations, public recognition of the idea of the public interest lawyer, and direct precedents that LGBT rights lawyers could use.<sup>43</sup> When told through *Hardwick*, *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, and their analogies to *Plessy*, *Cleburne*, *Reed*, *Brown*, *Griswold*, and *Loving*, LGBT rights becomes an obvious extension of earlier civil rights. The earlier civil rights and women's rights cases offered a model of formal legal equality for LGBT lawyers. The work of LGBT rights lawyers was to expand the established categories of civil rights. This scholarship pays insufficient attention to how the arguments put forth by LGBT rights lawyers did not simply parallel the civil rights cases that they sometimes relied upon.<sup>44</sup>

A third theme in the historical literature on LGBT rights is social movement studies. Because these studies focus on street politics and direct action, they typically devote little attention to litigation.<sup>45</sup> To the extent that social movement studies do discuss LGBT rights litigation, most assume that the development of LGBT legal organizations was an obvious response to

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<sup>40</sup> See LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 17–42 (1998) (discussing tensions between local and national lawyers).

<sup>41</sup> But see Konnoth, *supra* note 23, at 340–69 (providing an in-depth analysis of how lesbian and gay rights used civil rights precedents in the 1950s through 1970s).

<sup>42</sup> See, e.g., MEZEY, *supra* note 28, at 2 (suggesting that lesbian and gay rights “[hewed] most closely to the civil rights model”).

<sup>43</sup> See CAIN, *supra* note 27, at 49–53 (considering the tension and division that existed in civil rights movements prior to gay and lesbian civil rights and arguing those tensions and divisions were parallel to the ones faced by gay and lesbian civil rights); Konnoth, *supra* note 23, at 352–57 (considering past precedent that influenced LGBT rights); Thomas Miguel Hilbink, *Constructing Cause Lawyering: Professionalism, Politics, and Social Change in 1960’s America* 346–53 (May 2006) (unpublished Ph.D. dissertation, New York University) (on file with author) (arguing that the civil rights movement produced an idea of the public interest lawyer as devoted to fair procedure and process).

<sup>44</sup> See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 5 (2011) (“And reasoning from race did not only involve simple parallels or assertions of equivalence. When advocates reasoned from race, they often engaged in more sophisticated uses of comparative analysis.”).

<sup>45</sup> But see Katherine Turk, “Our Militancy is in Our Openness”: *Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law*, 31 L. & HIST. REV. 423, 427 (2013) (finding that the same organizations engaged in direct action also sponsored key litigation in the 1960s).

the growth of an LGBT social movement. One author claims that “the history of the Lambda Legal Defense and Education Fund is in no short measure the history of gay rights litigation in the United States.”<sup>46</sup> Another author describes Lambda as the “legal arm” of the gay movement, engaged in a conventional civil rights approach to LGBT rights modeled after other civil rights organizations.<sup>47</sup> Social movement studies also commonly describe the turn to LGBT rights litigation as an assimilationist strategy.<sup>48</sup> Like the other historical scholarship, social movement studies fail to address the diversity of early approaches to litigation by LGBT activists and lawyers.

Turning to the contemporary organizational records, a different picture emerges.<sup>49</sup> Beginning in the 1950s, LGBT organizations turned to litigation with a variety of different goals. Some might be described as mainstream and assimilationist, but others were radical and liberationist.<sup>50</sup> They did not all fit neatly under the rubric of LGBT rights as we know them today. Even as they slowly moved towards the identity-based claims that would become the category of LGBT rights that we know today, their identity-based claims were heavily infused with demands for the dignity and autonomy of sexual conduct. The right to be sexual was as important as LGBT rights in these early organizational goals. Ultimately, I argue that the category of LGBT rights emerged as these organizations struggled to define what they do.

The organizational approach that I use in this Article provides a new model for studying legal history. A growing scholarship that has been called a “new civil rights history” deemphasizes the centrality of the Supreme Court.<sup>51</sup> In her groundbreaking study of civil rights history, Tomiko Brown-Nagin asks what civil rights would look like if we did not put the NAACP and

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<sup>46</sup> ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 27 (2005).

<sup>47</sup> HIRSHMAN, *supra* note 1, at 148.

<sup>48</sup> *See, e.g.*, CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES* 49 (2002) (describing the “assimilationist, legal-rights framework”).

<sup>49</sup> For a full organizational history, see Jeffrey Kosbie, *Contested Identities: A History of LGBT Legal Mobilization and the Ethics of Impact* (June 2015) (unpublished Ph.D. dissertation, Northwestern University) (on file with author).

<sup>50</sup> *Cf.* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 *YALE J.L. & HUMAN.* 1, 4–5 (arguing that the earliest same-sex marriage litigation was embedded in a politics of gay liberation and not gay rights).

<sup>51</sup> *See* Kenneth W. Mack, *Civil Rights History: The Old and the New*, 126 *HARV. L. REV. FORUM* 258, 258 (2013) (footnote omitted) (defining the new civil rights history as a paradigm in which “civil rights historians meld a traditional approach to the legal history of the subject . . . with that of traditional social history” to “show that civil rights law and lawyers were a mediating force . . . between the formal legal system and outsider communities”).

Thurgood Marshall at the center of the story.<sup>52</sup> She argues that we need to include the more radical and more “pragmatic” civil rights strategies of lawyers in Atlanta to fully explain the spread of civil rights across the country.<sup>53</sup> Risa Goluboff recovers a history of debates within the early NAACP over labor rights.<sup>54</sup> Christopher Schmidt turns to the question of how lawyers and activists define the idea of law and its relation to society.<sup>55</sup> And “[putting] aside the segregation-to-integration narrative” of civil rights, Kenneth Mack focuses on the dilemmas of professional identity faced by black lawyers.<sup>56</sup>

The new civil rights history challenges traditional legal history’s overreliance on legal doctrine. Drawing on new sources of data, this scholarship analyzes how the meaning of rights varies across communities, racial and class boundaries, organizations, and time periods. What emerges is a more complicated picture of how legal change happens. The micro-organizational perspective that I use in this Article contributes to the methodological tools of the new civil rights history. This Article relies on internal records of the LGBT legal organizations, personal papers of lawyers, and interviews with the lawyers involved to reconstruct the debates over the right to be sexual.<sup>57</sup> Paying attention to these organizational histories offers fresh insights into the different ways legal meanings are constructed and contested.

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<sup>52</sup> See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 2 (2012) (“When civil rights litigation was undertaken, pragmatism sometimes dictated different targets from those chosen by the NAACP and its legal arm, the NAACP LDF.”).

<sup>53</sup> *Id.*

<sup>54</sup> See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 217–37 (2007) (tracing debates leading to NAACP decision to drop labor issues).

<sup>55</sup> Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641, 643 (2011); see also Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 94 (2015) (explaining how the social protest movement influenced civil rights litigation).

<sup>56</sup> KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* 8 (2012). Mack tells “a multiple biography of a group of African American lawyers . . . [ranging] from famous figures . . . [to those] who have been largely lost to history.” *Id.* at 3–9.

<sup>57</sup> Organizational records include Lambda Legal, the ACLU, Gay and Lesbian Advocates and Defenders, National Gay Rights Advocates, the National Center for Lesbian Rights, and other organizations. Records were accessed from 10 universities and archival repositories, the organizations themselves, and private papers of individual lawyers. Over seventy interviews were completed with founders and key leaders of all the organizations. For more details on the research, see Kosbie, *supra* note 49.

### A. *Homophile Organizations*

Before the “modern” era of LGBT activism, lesbians and gays organized “homophile” organizations in the 1950s and 1960s. Because their litigation was typically defensive—following a sodomy arrest or police raid—it was often characterized as cautious and conservative.<sup>58</sup> But the turn to litigation in the homophile movement was about more than a demand to be left alone by the state. It was also a demand for recognition of deviant sexualities. Even when homophile activists moved closer to identity-based legal theories in the late 1960s, the dignity of sexual choices remained central to their legal theories.

Shortly after it was founded in 1951, the Mattachine Society decided to defend one of its members after his arrest. Dale Jennings was followed home from a popular gay cruising area by a plain-clothes police officer who practically demanded entry to his apartment. Once inside, the officer arrested Jennings for lewd behavior.<sup>59</sup> In an era when this type of police entrapment practice was common, the standard legal advice was to plead guilty and never to admit to being gay.<sup>60</sup> Dale Jennings rejected this advice, admitting to his homosexuality in court and demanding a jury trial.<sup>61</sup> In one sense, Jennings’ legal claims did not require any state respect for the dignity of sexual conduct. Jennings’ formal arguments sounded in police misconduct, not dignity. But given the social context, the decision to openly admit to being gay was a radical demand for recognition and respect.

By the early 1960s, homophile activists increasingly turned to the law to fight police harassment and arrests in gay bars.<sup>62</sup> A police raid on a 1964 New Year’s Eve ball in San Francisco, hosted by the Council on Religion and the Homosexual, was one such turning point. Despite previous promises

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<sup>58</sup> Cain, *supra* note 8, at 1558–64 (discussing litigation under the homophile movement). *See generally* JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970* (2d ed. 1998) (detailing complete history of homophile movement).

<sup>59</sup> D’EMILIO, *supra* note 58, at 70–71.

<sup>60</sup> *See* JOHN D’EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* 30–31 (1992) (describing Jennings’ arrest and typical practices at the time).

<sup>61</sup> *See id.* at 31–32 (discussing Mattachine Society’s decision to fight Jennings’ arrest and legal tactics). Jennings’ trial began on June 23, 1952. After a hung jury, the district attorney decided not to retry Jennings. *Id.* at 33.

<sup>62</sup> Following the Jennings’ trial, homophile activists largely retreated from the public sphere for the remainder of the decade. *See id.* at 37–52 (reviewing turn to less confrontational politics). *But see* D’EMILIO, *supra* note 58, at 115 (discussing *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (reversing the Ninth Circuit’s holding that the Postmaster of Los Angeles, California properly refused to transmit a homosexual magazine because it was obscene, lewd, lascivious and filthy), *rev’g* 241 F.2d 772 (9th Cir. 1957)).

to leave the ball alone, police turned up in force, photographing and intimidating the guests.<sup>63</sup> After the lawyers, who were there as observers, asked for a warrant before allowing the police to enter, the police arrested the lawyers.<sup>64</sup> The ball took place in The Tenderloin, a San Francisco neighborhood that the police considered to be home to homosexuals, prostitutes, drag queens, and other alleged perverts. After the ACLU helped the lawyers fight the criminal charges, the lawyers filed their own civil suit against the city alleging violation of their civil rights.<sup>65</sup> CRH used the lawsuit to raise publicity about police harassment *and* to challenge the characterization of lesbians and gays as sexual perverts.<sup>66</sup> Other homophile organizations formed legal committees and incorporated litigation into other work on police harassment,<sup>67</sup> immigration exclusions,<sup>68</sup> criminal law reform,<sup>69</sup> and federal government employment practices.<sup>70</sup>

On August 29, 1956, Frank Kameny was arrested after undercover police observed another man fondling Kameny's genitals in a San Francisco restroom.<sup>71</sup> Kameny pleaded guilty, paid his fine and served his probation, and thought that the incident was resolved. But in December 1957, Kameny was dismissed from his job at the U.S. Army Map Service after they learned of his earlier arrest.<sup>72</sup> Kameny fought his dismissal all the way to the

<sup>63</sup> D'EMILIO, *supra* note 58, at 193–94.

<sup>64</sup> *Id.*

<sup>65</sup> See Letter from Marshall Krause, ACLU staff lawyer, to Morris Lowenthal (May 19, 1965) (on file with San Francisco Public Library, Evander Smith Papers).

<sup>66</sup> D'EMILIO, *supra* note 58, at 193–94; ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS 1945–1990: AN ORAL HISTORY 147–65 (1992) (interviews with lawyers).

<sup>67</sup> See Pearl Hart, Know Your Rights (1965) (unpublished brochure written for Mattachine Society) (on file with author).

<sup>68</sup> See D'EMILIO, *supra* note 58, at 197 (discussing the establishment of the North American Conference of Homophile Organizations, which funded court cases that dealt with, inter alia, the exclusion of homosexual immigrants).

<sup>69</sup> The North American Conference of Homophile Organizations ("NACHO") formed a Committee on Legal Affairs primarily to reform criminal law with regard to homosexuality. Letter from Franklin E. Kameny to Austin Wade (May 23, 1969) (on file with Mudd Library, Princeton University, Arthur Warner Papers). For more information regarding how NACHO delegated homophile initiatives between committees, see *id.*; Letter from Austin Wade to Franklin E. Kameny (Apr. 28, 1969) (on file with Mudd Library, Princeton University, Arthur Warner Papers).

<sup>70</sup> See *Kameny v. Brucker*, 282 F.2d 823, 823–24 (D.C. Cir. 1960) (per curiam) (challenging the appellant's removal from the Army Map Service, an agency of the U.S. Department of Defense).

<sup>71</sup> FRANKLIN E. KAMENY, PETITION DENIED, REVOLUTION BEGUN: THE 50<sup>TH</sup> ANNIVERSARY OF KAMENY AT THE COURT: FRANK KAMENY'S PETITION TO THE UNITED STATES SUPREME COURT 5 (Charles Francis, ed. 2011) (ebook).

<sup>72</sup> D'EMILIO, *supra* note 58, at 151.

Supreme Court, filing a pro se certiorari petition in 1961.<sup>73</sup> In his petition, Kameny argued that exclusion from government employment “makes of the homosexual a second-rate citizen, by discriminating against him without reasonable cause.”<sup>74</sup> According to Bill Eskridge, Kameny’s argument was important because it ‘went beyond the liberal politics of privacy’ and made an identity-based claim for equality.<sup>75</sup> But it was an identity-based claim that was still infused with sexuality: “[F]or those choosing voluntarily to engage in homosexual acts, such acts are moral in a real and positive sense[.]”<sup>76</sup>

Following the denial of certiorari in his case, Kameny helped found the Mattachine Society of Washington and a local affiliate of the ACLU, the National Capital Area Civil Liberties Union.<sup>77</sup> Kameny aggressively pursued legal reform, representing dozens of lesbians and gays dismissed from the military and other government employment in various administrative hearings.<sup>78</sup> While Kameny was not a lawyer himself, he compiled records of how the government singled out gay sexual conduct. When other lawyers criticized Kameny’s failure to emphasize the traditional theories of administrative law, Kameny responded that most lawyers were ill-equipped to describe the discrimination faced by lesbians and gays.<sup>79</sup> Kameny’s response is important because it shows how he refused to accept the idea that a turn to litigation had to mean dropping claims of sexuality. For Kameny, the turn to litigation could be bold and confrontational, especially when used to demand equality.

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<sup>73</sup> Initially, former California Congressman Byron N. Scott represented Kameny, filing a complaint in the U.S. District Court for the District of Columbia and appealing the district court’s decision to the U.S. Court of Appeals. However, after losing in the Court of Appeals, Scott decided not to represent Kameny in his appeal to the Supreme Court. Instead, Scott provided Kameny with a sample Petition for a Writ of Certiorari and the Supreme Court rules so that Kameny could appeal to the Supreme Court on his own. Charles Francis, *Introduction to KAMENY*, *supra* note 71, at 2–3.

<sup>74</sup> ESKRIDGE, *supra* note 36, at 137.

<sup>75</sup> *Id.* at 137–38.

<sup>76</sup> KAMENY, *supra* note 71, at 8.

<sup>77</sup> D’EMILIO, *supra* note 58, at 152, 155.

<sup>78</sup> *See id.* at 152–53 (discussing Kameny’s activism); *see also* Letter from Alan Reitman to Frank Kameny (July 1962) (on file with Mudd Library, Princeton University, ACLU Papers) (responding to Kameny’s criticisms of ACLU policy); letter from Frank Kameny to ACLU (Nov. 7, 1964) (on file with Library of Congress, Kameny Papers) (outlining police harassment in gay bars); Letter from Frank Kameny to ACLU (May 1966) (on file with Library of Congress, Kameny Papers) (debating protections for government employees); Kameny Files, Library of Congress, containers 12-39 (records of Kameny’s representation of individuals in front of government agencies).

<sup>79</sup> *See* Letter from Frank E. Kameny to Austin Wade, *supra* note 69 (“For example, my remarks notwithstanding, I do not really dislike or look down upon lawyers; I just do not look up to them as a class or group, and I feel that they need badly to be de-deified.”).

*B. National Committee for Sexual Civil Liberties*

Founded in 1970 by Arthur Warner “from the debris of the old NACHO legal committee,” the National Committee for Sexual Civil Liberties (“NCSCL”) set legal reform as its explicit goal.<sup>80</sup> This first attempt at building a permanent legal organization, largely forgotten today, represents a different vision of sexual civil liberties. NCSCL rejected the idea that there are gay or straight issues, instead defining its legal reform agenda broadly as including adultery, prostitution, solicitation, lewdness, and sodomy laws.<sup>81</sup> Among its major litigation victories of the 1970s, it listed cases involving lewd conduct, employment discrimination, prostitution, loitering for sexual conduct, and sodomy.<sup>82</sup>

In addition to its rejection of the identity model, NCSCL differed from modern LGBT legal organizations in its structure. Records describe a year-long review process for proposed new members.<sup>83</sup> NCSCL functioned as a coalition, bringing together an “elite” group of lawyers and academics for annual meetings to discuss sexual civil liberties.<sup>84</sup> While interviewees describe the process of adding new members as more informal, they agree that Arthur Warner had to personally approve any new members.<sup>85</sup>

Despite its legal orientation, the majority of NCSCL members were always non-lawyers and Arthur Warner himself was not licensed to practice law.<sup>86</sup> It described its primary mission as “the pursuit of sexual civil liberties through education, both public and within the executive, legislative, judicial, and administrative branches of government.”<sup>87</sup> One of the key ways that NCSCL carried this mission out was through the publication of the Sexual

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<sup>80</sup> See Advisory Letter on NCSCL (no date) (on file with Mudd Library, Princeton University, Warner Papers).

<sup>81</sup> See NCSCL Legal Report (1982) (on file with Mudd Library, Princeton University, Warner Papers) (“there are no ‘gay’ issues, there are no ‘straight’ issues, there are only sexual issues”).

<sup>82</sup> See *id.* (citing *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970); *Pryor v. Municipal Court*, 599 P.2d 636 (Cal. 1979); *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979); *People v. Norris*, 152 Cal. Rptr. 134 (Cal. App. Dep’t Super. Ct. 1978); *People v. Gibson*, 521 P.2d 774 (Colo. 1974)).

<sup>83</sup> See NCSCL Legal Report, *supra* note 81.

<sup>84</sup> Kosbie, *supra* note 49, at 107 (explaining that NCSCL functioned as a think tank and often held its annual meeting in the same place as the American Bar Association).

<sup>85</sup> Interview with Tom Coleman, former legal counsel, NCSCL, in L.A., Cal. (Aug. 26, 2013). Interviewees also noted a concern with infiltration by the police. Interview with Jay Kohorn, former legal counsel, NCSCL, in L.A., Cal. (Aug. 28, 2013).

<sup>86</sup> One interviewee suggested that Warner’s commitment to sexual civil liberties might have resulted from being denied access to the bar himself for an arrest. Interview with Jay Kohorn, *supra* note 85.

<sup>87</sup> NCSCL Fact Sheet (no date) (on file with Mudd Library, Princeton University, Warner Papers).

Law Reporter. First published in 1975, the Reporter's coverage matched the breadth of NCSCL's own mission.

NCSCL's broad theory of sexual liberties carried through to the doctrinal arguments that it made in court. Sodomy laws were objectionable on more than just privacy grounds. Privacy would not reach NCSCL's concern with laws against prostitution, solicitation, and adultery. For example, in an early major case, NCSCL's brief argued that sodomy "statutes exist primarily to punish, harass and otherwise denigrate the male homosexual, to make him feel inferior, unworthy, and an outlaw of society."<sup>88</sup> The brief continued to explain that sodomy laws prevent homosexuals from fulfilling their full sex drive. It claimed violation of equal protection based on denying homosexuals the only avenue to sexual satisfaction open to them.<sup>89</sup> This theory of equal protection, based upon sexual conduct rather than identity, is truly unique and reflects NCSCL's rejection of traditional identity politics. Even the decision to highlight the connection between sexual conduct and dignity, which LGBT legal groups would embrace decades later in a very different context in *Lawrence v. Texas*, was radical for the time.<sup>90</sup>

Whereas LGBT legal groups are sometimes accused of hiding sexuality, NCSCL very explicitly made a point of highlighting sexuality. It is easy to dismiss this as a failed and forgotten style of organizing. By the early 1980s NCSCL was beginning to fade as the present LGBT legal organizations grew in size and strength.<sup>91</sup> Its non-identarian organization model was eclipsed by the new LGBT organizations. Lawyers organized in their own circles, rather than through NCSCL. But NCSCL's emphasis on a broad understanding of sexual civil liberties did impact how we think about sodomy and the eventual meaning of LGBT rights.

### C. *National Gay Task Force*

Founded in 1973 as the first national gay rights political organization, the National Gay Task Force ("NGTF") played an active role in litigation into

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<sup>88</sup> Motion of N. Am. Conference of Homophile Orgs. for Leave to File Brief as Amicus Curiae & Brief Amicus Curiae at 3, *Buchanan v. Wade*, 401 U.S. 989 (1971) (No. 290). This brief was filed under NACHO's name by Walter Barnett, one of the key early leaders of NCSCL, and NCSCL claims credit for working on *Buchanan*.

<sup>89</sup> *Id.* at 4–5.

<sup>90</sup> See Amicus Brief of Human Rights Campaign et al. in Support of Petitioners at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) ("Laws that brand gay people as criminally deviant do not operate on some abstract 'class.' They harm real men and women . . .").

<sup>91</sup> Interview with Tom Coleman, *supra* note 85.

the early 1980s.<sup>92</sup> The NGTF example is particularly important because it challenges the idea that we should exclusively focus on the litigation-oriented organizations to tell the history of LGBT rights.<sup>93</sup> When we focus only on litigation-oriented organizations, we can see the work happening in one direction: They shape the stories that they tell in court to fit the doctrinal categories that they work with. When we expand our story to include actors like NGTF, we see how they started with the experiences of people on the ground and shaped legal claims around that. The right to be sexual plays a larger role in this story of the origins of LGBT rights. As we expand the actors that we include in this history, we see a broader set of debates over what would become LGBT rights.

NGTF adopted the LGBT-identity model that we are familiar with today. They built networks at the local and state levels, giving them access to lesbian and gay people in local communities across far more of the United States than the legal organizations at the time.<sup>94</sup> When NGTF learned of cases of discrimination, it often played a key role in connecting LGBT people to lawyers who could represent them.<sup>95</sup> NGTF also served as a plaintiff in several cases. For example, NGTF coordinated its efforts with Lambda Legal in developing a challenge to the Federal Bureau of Prison's treatment of gay prisoners.<sup>96</sup> In 1977, Lambda filed the litigation with NGTF as plaintiff, challenging the prohibition of gay publications to prisoners.<sup>97</sup>

NGTF also played a key role in orchestrating an eventual Supreme Court challenge to bans on gay teachers. In 1978, Oklahoma passed a law modeled after the Briggs Initiative in California.<sup>98</sup> The statute allowed the state to

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<sup>92</sup> NGTF later changed its name to The National Gay and Lesbian Task Force (NGLTF) and then to The National LGBTQ Task Force. It is often referred to simply as "The Task Force."

<sup>93</sup> Cf. Tomiko Brown-Nagin, *The Long, Broad, and Deep Civil Rights Movement: The Lessons of a Master Scholar and Teacher*, in MAKING LEGAL HISTORY 140, 150–55 (Daniel J. Hulsebosch & R. B. Bernstein eds., 2013) (describing how her understanding of "accommodationist" civil rights strategies shifted when she studied lawyers outside the NAACP).

<sup>94</sup> John D'Emilio, *Organizational Tales: Interpreting the NGLTF Story*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 469, 473 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000).

<sup>95</sup> See Letter from NGTF to NGTF Members (Mar. 23, 1981) (on file with Cornell University Library, NGTF Files) (soliciting NGTF members who are teachers in Oklahoma to participate in *NGTF v. Oklahoma*). Other records in this archival collection discuss this and other cases.

<sup>96</sup> In 1980, the Lambda Legal Defense & Education Fund announced in its newsletter that the Bureau of Prisons had "agreed to admit gay publications into federal prisons" under the settlement of *NGTF v. Carlson*. For further discussion of the settlement, see *Federal Bureau of Prisons Agrees to Admit Gay Publications*, NEWS FROM LAMBDA (Lambda Legal Def. & Educ. Fund, Inc., New York, NY), Fall/Winter 1980, at 1.

<sup>97</sup> *Id.*

<sup>98</sup> Kosbie, *supra* note 49, at 127.

dismiss public school teachers for engaging in or advocating “public homosexual activity.”<sup>99</sup> Using its networks, NGTF reached out to teachers in Oklahoma who wanted to challenge the law.<sup>100</sup> When it could not find teachers willing to publicly put their name on a lawsuit for fear of reprisal, NGTF became the plaintiff in a challenge to the law.<sup>101</sup> NGTF provided sworn affidavits that it represented the interests of its members who were teachers in Oklahoma and had a real risk of being dismissed under this law.<sup>102</sup> Working with NGRA and the ACLU, NGTF helped design the legal theories in the challenge.<sup>103</sup>

While National Gay Rights Advocates (“GRA”) and the ACLU provided the litigation expertise, NGTF itself initiated the lawsuit.<sup>104</sup> NGTF played a key role in identifying plaintiffs and developing the legal theories used in the case.<sup>105</sup> NGTF also reached out to the National Organization for Women, the National Educational Association, and other groups, asking them to join as amici or parties to the lawsuit.<sup>106</sup> The Tenth Circuit held that the portion of the law prohibiting advocacy of homosexual activity was unconstitutionally vague,<sup>107</sup> and the Supreme Court split 4-4 leaving the ruling in place.<sup>108</sup>

In 1980, NGTF proposed a formal affiliation with a legal organization. NGTF’s board expressed the goal of “creat[ing] a national capability to coordinate the key functions of advocacy, litigation, and public education, with a view towards developing effective strategies to secure the legal rights and human dignity of lesbians and gay men.”<sup>109</sup> While NGTF had good relationships with the legal organizations at the time, board members raised the concern that NGTF’s growing legal agenda demanded a more formal relationship with a legal organization.<sup>110</sup> Potential models for affiliation

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<sup>99</sup> Nat’l Gay Task Force v. Bd. of Educ. of Okla. City, 729 F.2d 1270, 1272 (10th Cir. 1984).

<sup>100</sup> Kosbie, *supra* note 49, at 131.

<sup>101</sup> *Id.* at 130.

<sup>102</sup> *Id.* at 131.

<sup>103</sup> *Id.* at 128–32.

<sup>104</sup> See Helms Memo (June 18, 1980) (on file with Cornell University Library, NGTF Files) (describing NGTF’s early organizing against Oklahoma statute).

<sup>105</sup> Kosbie, *supra* note 49, at 127-32.

<sup>106</sup> *Id.* at 130

<sup>107</sup> Nat’l Gay Task Force, 729 F.2d at 1274.

<sup>108</sup> Bd. of Educ. of Okla. City v. Nat’l Gay Task Force, 470 U.S. 903 (1985) (per curiam). Justice Powell took no part in the decision. *Id.*

<sup>109</sup> See NGTF Board Resolution (Aug. 3, 1980) (on file with Cornell University Library, NGTF Papers) [hereinafter NGTF August Resolution]; NGRA Board Resolution (Jul. 12, 1980) (on file with Cornell University Library, NGTF Papers) [hereinafter NGTF July Resolution] (using nearly identical language).

<sup>110</sup> See NGTF August Resolution, *supra* note 109.

ranged from a formal advisory relationship to full merger.<sup>111</sup> After all the legal organizations at the time responded to its proposal, NGTF entered serious merger discussions with GRA.<sup>112</sup> The proposed merger ultimately failed, but it is important because it suggests a different way of doing LGBT rights.

#### *D. The New LGBT Legal Organizations*

When the major LGBT legal organizations were founded in the 1970s, they marked something new. It was the first time that litigation-oriented organizations openly dedicated themselves to protecting lesbian and gay people. But what did it mean to litigate on behalf of lesbian and gay rights? The new LGBT legal organizations drew on existing models of public interest legal organizations as they defined their own organizational identities, or sense of “who we are” and “what we do.”<sup>113</sup> But these organizations also experimented with different legal theories and different ideas about what it meant to represent LGBT people.<sup>114</sup> By paying close attention to how these new organizations defined their work, I argue that we get more insight into how the right to be sexual was intertwined with LGBT rights as LGBT rights emerged as a category.

In the early 1970s, Bill Thom responded to a request for legal aid from the Gay Activists Alliance (“GAA”) in New York City. As a lawyer at a mid-size firm in the city, Thom was on track to become a partner and was not out at work. Thom explained that he initially ignored the request, sent to all lawyers subscribed to a bar association list for legal aid requests, but

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<sup>111</sup> *See id.*

<sup>112</sup> While the board resolutions from NGTF and NGRA confirm the seriousness of the proposal, no one that I interviewed remembers it. This suggests that NGTF did not entertain the possibility of a merger for long after the initial proposal failed.

<sup>113</sup> *See generally* Stephen M. Engel, *Organizational Identity as a Constraint on Strategic Action: A Comparative Analysis of Gay and Lesbian Interest Groups*, 21 *STUD. IN AM. POL. DEV.* 66 (2007) (describing and comparing the organizational structures and advocacy choices of several prominent LGBT interest groups in the 1990s). Organizational identity includes an organization’s membership demographics, internal self-view, and its external reputation. *Id.* at 67–68. Identity helps establish an organization’s niche in a broader field. *Id.* The identities of the LGBT legal organizations were shaped by the availability of a model of public interest legal organizations. *See id.* at 75–81 (providing a historical overview of two nationally prominent gay and lesbian interest groups and describing their models for success). Beginning in 1969, the number of public interest legal organizations expanded rapidly, creating a public recognition of the idea of a “public interest” law firm. Hilbink, *supra* note 43, at 317; *see also* Ann Southworth, *What is Public Interest Law? Empirical Perspectives on an Old Question*, 62 *DEPAUL L. REV.* 493, 495 (2013) (tracing continued expansion of use of “public interest” label).

<sup>114</sup> I do not include the ACLU in my discussion, but it also played a key role in developing LGBT legal field. *See* Kosbie, *supra* note 49, at 182–225 (explaining the ACLU’s involvement in LGBT rights).

responded several months later when the request was still open. After seeing how the Fordham law student in charge of the GAA legal committee struggled to run the committee, Thom decided to found a gay legal defense and education fund.<sup>115</sup> He chose the name “Lambda” because it was already associated with LGBT culture, but would not raise the same attention from outsiders as a name that included “Gay” or “Lesbian.”<sup>116</sup> Nonetheless facing criticism from his law firm, Bill Thom resigned and later opened his own law firm with Cary Boggan.<sup>117</sup> In the early years of the organization, Lambda operated out of a board member’s living room and later out of Boggan and Thom’s law offices. At monthly board meetings (the board was the entirety of the organization), members debated how to best respond to incoming requests for aid.

Lambda Legal most directly followed the public interest legal model from when it was first founded. Bill Thom copied its charter application from the Puerto Rican Education and Defense Legal Fund, the most recently founded legal fund in New York City prior to Lambda.<sup>118</sup> Even in 1977, Lambda’s newsletter talked about the importance of “test case litigation” to Lambda’s mission.<sup>119</sup> These early newsletters defined its mission in terms of discrimination “perpetuated by the American legal system.”<sup>120</sup>

Lambda also moved to secure its identity as representing the full LGBT community. Although Bill Thom initially chose the name Lambda because it avoided the higher profile of the words Gay or Lesbian, by 1980 Lambda was readily recognized as a gay organization.<sup>121</sup> In 1980, Lambda announced that it had just hired a new national board of directors.<sup>122</sup> And in 1983, Lambda broadened its litigation priorities to include family and relationships (issues more important to lesbians at the time) and the first AIDS discrimination case in the nation.<sup>123</sup>

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<sup>115</sup> Interview with Bill Thom, Founder of Lambda Legal, in N.Y.C., N.Y. (Sept. 11, 2013).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Shepherd Raimi explains that, after starting Lambda, the partners at Thom’s firm told him that if he were to run Lambda Legal, he would not have the time required to make partner. Interview with Shepherd Raimi, Original Board Member of Lambda Legal, in N.Y.C., N.Y. (Sept. 14, 2013).

<sup>118</sup> Interview with Bill Thom, *supra* note 115.

<sup>119</sup> *See Counseling*, 2 LAMBDA NEWS 1, 2 (Apr. 1977) (“Test case litigation or other matters likely to affect gay people as a group is the function for which Lambda was created . . .”).

<sup>120</sup> *Purpose*, LAMBDA: NEWS FROM LAMBDA LEGAL DEF. & EDUC. FUND, INC. (Lambda Legal Def. & Educ. Fund, New York, N.Y.), Sept./Oct. 1979, at 2.

<sup>121</sup> Interview with Bill Thom, *supra* note 115.

<sup>122</sup> *Lambda Elects New National Board of Directors*, NEWS FROM LAMBDA, *supra* note 96, at 1, 3.

<sup>123</sup> *Lambda Fights the First AIDS Lawsuit to Reach Court*, LAMBDA UPDATE (Lambda Legal Def. & Educ. Fund, New York, N.Y.), Dec. 1983, at 1–2; *Lambda Adopts New Priority*, LAMBDA UPDATE, *supra*, at 2.

The founding story of Gay and Lesbian Advocates and Defenders (“GLAD”) is more radical but similarly starts with one person. In 1977, John Ward opened his law office in Boston and began advertising in *Gay Community News* as a lawyer serving the gay community.<sup>124</sup> He explained that he was the first openly gay male lawyer in Boston.<sup>125</sup> After a series of arrests of gay men for lewd conduct at the Boston Public Library, Ward decided to open GLAD in 1978.<sup>126</sup> Ward’s connections with *Gay Community News* played a key role in shaping GLAD. Most of the early board members and staff of GLAD came from *Gay Community News*, which had a reputation for radical politics, even with the gay community.<sup>127</sup> GLAD’s board and staff shared this radical politics. To GLAD, defending gay men arrested in sex stings was not simply a matter of demanding to be left alone by the police; it was also a demand for the state to reorganize police practices to protect lesbians and gays. Early newsletters defined their goal as defending cases “in our own words” in court.<sup>128</sup>

GLAD did not start out as explicitly focused on impact litigation. Instead, it grew out of John Ward’s defense of individual gay men arrested in sex stings in Boston.<sup>129</sup> But as the organization grew, it increasingly defined itself in similar terms of impact litigation on behalf of the LGBT community. GLAD distinguished itself as a New England specific organization. Kevin Cathcart, as then-executive director of GLAD, made an agreement that GLAD would work in the New England states while Lambda could work in the rest of the country. When Cathcart became executive director of Lambda, he continued to honor this agreement, cementing GLAD’s regional identity.<sup>130</sup>

GRA was originally the brainchild of Hastings law students Matt Coles, Jerel McCrary, and Bruce Copen.<sup>131</sup> Before graduating from law school in 1977, the three discussed forming a public interest law firm for LGBT issues. Matt Coles solicited interest and funding from prominent gay political activists. While most were sympathetic, they did not think the time was right

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<sup>124</sup> Interview with John Ward, Founder of GLAD, in S.F., Cal. (Aug. 21, 2013).

<sup>125</sup> *Id.*

<sup>126</sup> John Ward explained that these police entrapment cases were paying the bills for his private law firm as well. In one case, he represented the predecessor organization to NAMBLA. *Id.*

<sup>127</sup> Interview with Cindy Rizzo, Former Board Member, GLAD, in N.Y.C., N.Y. (Aug. 9, 2013).

<sup>128</sup> Kosbie, *supra* note 49, at 125 (explaining language used in early GLAD publications).

<sup>129</sup> Interview with John Ward, *supra* note 124.

<sup>130</sup> Interview with Kevin Cathcart, Executive Director, Lambda Legal, Former Executive Director, GLAD, in N.Y., N.Y. (Sept. 12, 2013).

<sup>131</sup> Interview with Matt Coles, Director, Center for Equality, ACLU, Former Founding Member of GRA, in S.F., Cal. (May 31, 2012). GRA would later become National Gay Rights Advocates.

for the new organization. Eventually Richard Rouillard became involved and agreed to help fund the new organization.<sup>132</sup> Rouillard was embittered over rejection by his family and set out to create a “gay ACLU.”<sup>133</sup> On January 1, 1978, GRA and the private law firm of “Coles, Knutson & McCrary” simultaneously opened their doors at 540 Castro Street in San Francisco.<sup>134</sup> The goal was to take paying cases through the private law firm and use the profit to support the public interest work of GRA. Donald Knutson was a law professor at USC and was the most prominent of the founders. By bringing him in as legal director, the founders of GRA hoped to attract prominent gay political activists to serve on GRA’s board and support the new organization.<sup>135</sup>

When this public-private model failed, the private law firm split off from GRA.<sup>136</sup> Later battles over Don Knutson’s leadership style led to a complete staff reorganization, with Jean O’Leary coming on board as Executive Director in 1981. O’Leary was not a lawyer and served as the NGTF’s director before coming to GRA. Because of this, she brought a media-savvy style to GRA. Until its close in 1991, GRA remained more openly political than the other LGBT legal organizations. Lawyers at GRA stressed the importance of public education. According to Leonard Graff, there were so few victories in the 1980s that they were less concerned with setting bad precedent. While they wanted to win their cases, the ability of a case to generate positive media attention was a key consideration for them.<sup>137</sup> For example, in 1988 GRA sued the U.S. Food and Drug Administration (“FDA”) and the National Institutes of Health (“NIH”) for failing to approve AIDS drugs fast enough.<sup>138</sup> Outsiders criticized this lawsuit as a publicity-raising stunt with no chance of success. While recognizing the limited chance of success in the courtroom, GRA argued that the lawsuit could play an important role in bringing media attention to the responsibilities of the FDA

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<sup>132</sup> *Id.*; see also Telephone Interview with Bob Cohen, Executive Vice President of Legal Affairs, 20<sup>th</sup> Century Fox (discussing Rouillard’s involvement with NGRA). Matt Coles specifically met with Frank Kameny and Bruce Voeller, amongst others. Coles explained that he saw the legal work as always political. Interview with Matt Coles, *supra* note 131.

<sup>133</sup> Telephone Interview with Bob Cohen, *supra* note 132.

<sup>134</sup> Interview with Matt Coles, *supra* note 131. 540 Castro Street was directly across the street from Harvey Milk’s camera shop. Telephone Interview with Bob Cohen, *supra* note 132.

<sup>135</sup> Interview with Jerel McCrary (May 13, 2014).

<sup>136</sup> *Id.*

<sup>137</sup> Interview with Leonard Graff, Former Legal Director, NGRA, in S.F., Cal. (Aug. 21, 2013).

<sup>138</sup> See *Nat’l Gay Rights Advocates v. U.S. Dep’t of Health & Human Servs.*, Civ. A. No. 87–1735, 1988 WL 43833, at \*1 (D.D.C. Apr. 26, 1988) (dismissing case filed by NGRA alleging drugs used to treat AIDS were unavailable to patients in the U.S. because the United States engaged in irrational and irresponsible conduct.).

and NIH.<sup>139</sup> After the FDA changed some of its policies, GRA claimed that its lawsuit played a key role.

GRA similarly worked to build an identity as a national impact litigation organization. Originally founded as GRA, in 1983, it became National Gay Rights Advocates (“NGRA”), laying a claim to nation-wide impact.<sup>140</sup> While its legal work was well-respected, NGRA also had a reputation for “shooting from the hip” at times.<sup>141</sup> Lawyers at the other LGBT legal organizations respected the work that NGRA did, but they also questioned some of the litigation as either too risky or as a media ploy. But NGRA embraced this image, describing the “aggressive legal posture” that the organization preferred.<sup>142</sup> NGRA lawyers described the importance of positive media coverage to achieving sociolegal change and required plaintiffs to allow NGRA to use their names in media coverage.<sup>143</sup> This media-savvy style is not necessarily inconsistent with the LGBT rights we think of today, but it does present a different style of doing them.

In 1973, Wendy Williams, Nancy Davis, and Mary Dunlap founded Equal Rights Advocates (“ERA”) as an explicitly feminist legal organization in San Francisco.<sup>144</sup> While not explicitly an LGBT legal organization, ERA was deeply concerned with the discrimination facing lesbians. In 1974, Donna Hitchens interned for ERA while a law student. Through her work at ERA, Hitchens was embedded in feminist political networks. Prior to graduating law school, Hitchens applied for a grant from UC Berkeley, received funding, and opened Lesbian Rights Project under the umbrella of the ERA in November of 1977.<sup>145</sup> She explained that other gay lawyers out there (predominantly men) marginalized child custody and other issues particularly affecting lesbians.<sup>146</sup> LRP was thus founded with an explicitly lesbian feminist philosophy. In a 1980 letter, Hitchens explained that LRP

<sup>139</sup> See Memo from Ben Schatz (May 1988) (on file with author).

<sup>140</sup> *Name Change*, . . . INTO CTS.: NEWSL. NAT’L GAY RTS. ADVOCATES (Nat’l Gay Rights Advocates, S.F., Cal.), Summer 1983, at 1, 3; see also Interview with Leonard Graff, *supra* note 137 (discussing the name change of NGRA).

<sup>141</sup> Interview with Jon Davidson (Aug. 24, 2013) (discussing NGRA’s reputation and its legal strategy compared to other organizations).

<sup>142</sup> See Board Minutes (Oct. 1984) (on file with author) (describing *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984)).

<sup>143</sup> See *id.* (describing policy on plaintiff name usage); see also Interview with Leonard Graff, *supra* note 137 (explaining GRA’s relationship with the media).

<sup>144</sup> See CAIN, *supra* note 31, at 65. Mary Dunlap would later work for NGRA and the ACLU at different times and played a key role in LGBT legal organizing.

<sup>145</sup> Interview with Donna Hitchens, Founder, Lesbian Rights Project, in S.F., Cal. (Aug. 29, 2013). Hitchens also explained that it was important to her to work for a legal-specific organization. A lot of her work was embedded in feminist networks rather than LGBT networks.

<sup>146</sup> *Id.*

would accept almost any case on behalf of a lesbian where her sexual orientation was a major issue.<sup>147</sup> LRP eventually became an independent organization and changed its name to the National Center for Lesbian Rights, but it maintained its lesbian feminist philosophy. When LRP was founded, it did not have the same impact mission as the other organizations. Simply taking cases on behalf of lesbians was a form of impact.<sup>148</sup> But as it established positive precedents in its core areas of custody and family issues, LRP increasingly focused on impact litigation.

### 1. *How the LGBT Legal Organizations Talked About Litigation*

The dockets of the LGBT legal organizations in the late 1970s and early 1980s included a diverse range of issues, including immigration reform, military discharges, employment discrimination, family and child custody, local nondiscrimination ordinances, prisoners' rights, and education. I use three specific cases to examine how the LGBT legal organizations talked about their litigation. From these cases, we see that the LGBT legal organizations did not start out with an image of what constituted LGBT rights. They started from instances of how the state infringed on sexual dignity and autonomy. Both the right to be sexual and LGBT rights offered ways to describe the connections between these cases.

In a key early case, *Hinman v. Department of Personnel Administration*,<sup>149</sup> LRP “asserted that it was a denial of equal protection . . . for heterosexual state employees to be able to provide dental coverage for their spouses when homosexual state employees were unable to provide similar coverage for the family partners.”<sup>150</sup> *Hinman* began after Boyce Hinman’s 1981 application for dental coverage including his partner of twelve years, Larry Beatty, was rejected by the state agency that he worked for.<sup>151</sup> Regulations for the state dental plan limited coverage to a state employee’s spouse and unmarried children.<sup>152</sup>

It is tempting to see *Hinman* as a precursor to modern same-sex marriage cases. Viewed that way, it seems like a building block of LGBT rights. But LRP did not argue for a right to same-sex marriage. Instead, it argued that

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<sup>147</sup> See Letter from LRP to NGTF (1980) (on file with Cornell University Library, NGTF Files) (noting exception of when a lesbian could pay for a case).

<sup>148</sup> Interview with Donna Hitchens, *supra* note 145.

<sup>149</sup> 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

<sup>150</sup> *Fair Treatment for Our Families*, LESBIAN RTS. PROJECT (Lesbian Rights Project, S.F., Cal.), 1983, at 1.

<sup>151</sup> *Hinman*, 213 Cal. Rptr. at 412.

<sup>152</sup> *Id.* at 413–14.

the state discriminated based on marital status.<sup>153</sup> In its newsletters, the LRP would consistently explain that the state privileged marriage over other family forms.<sup>154</sup> Rather than claim that lesbians and gays were just like everyone else, it argued that lesbian and gay families should be respected on their own terms. People should be able to make choices about their sexual and family lives without coercion from the state's preference for marriage as a family form.<sup>155</sup>

Arguments based on privacy and a demand to be left alone by the state were a weak fit in litigation involving prisons. In May, 1977, Lambda Legal initiated *NGTF v. Carlson*, challenging the policy of the Federal Bureau of Prisons ("FBOP"), which excluded gay publications from prisons.<sup>156</sup> The first step for Lambda was to travel across the country, taking depositions from prison wardens. The FBOP denied any uniform policy on gay publications, so these depositions would establish the existence of a ban and document how the ban functioned.<sup>157</sup>

Prisoners do not give up all of their constitutional rights, but their claims to rights are balanced against the goals of prison administration.<sup>158</sup> Thus, typical claims of privacy or LGBT rights would not get far in *NGTF v. Carlson*. Lambda could not simply argue that the prison should leave gay prisoners alone or that gay prisoners were just like other prisoners. Tolerance and equality were part of the case, but Lambda also had to assert the moral integrity of gay identities. Lambda had to argue that the FBOP policy was harmful to gay prisoners. One lawyer explained that litigation like *Carlson* took on "highly visible government programs where we were clearly second-class citizens."<sup>159</sup>

Another area where we see this tension between the right to be sexual and LGBT rights is in immigration. On June 13, 1979, Carl Hill and his lover arrived at San Francisco International airport to cover the Gay

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<sup>153</sup> See *id.* at 415 ("[P]laintiffs argue the term 'spouse' is not neutral as to homosexuals, and is not merely a classification based on marital status, but one based on sexual orientation."). Notably, LRP did not argue for a right to same-sex marriage.

<sup>154</sup> See, e.g., *Pursuing Equal Employment Benefits for Gay and Lesbian Family Partners*, LESBIAN RTS. PROJECT (Lesbian Rights Project, S.F., Cal.), 1983, at 7 (pursuing litigation in which the state privileges married couples and not same-sex couples).

<sup>155</sup> For a full articulation of this theory, see NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

<sup>156</sup> *Federal Bureau of Prisons Agrees to Admit Gay Publications*, *supra* note 96, at 1.

<sup>157</sup> *Id.*

<sup>158</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (citation omitted) ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.").

<sup>159</sup> Interview with Leonard Graff, *supra* note 137.

Freedom Day Parade for the London Gay News.<sup>160</sup> Because Hill wore a gay pride button, he was required to undergo a psychiatric examination by the Public Health Service (“PHS”).<sup>161</sup> NGRA intervened, arguing that after homosexuality was declassified as a mental illness in 1973, PHS could no longer certify it as a “physical or mental defect or disease” under the Immigration and Nationality Act.<sup>162</sup> In response to the pressure from this case, the Surgeon General issued an order on August 2, 1979 preventing the PHS from issuing the required “medical certificates solely because an alien [was] suspected of being homosexual.”<sup>163</sup>

Hill returned to the United States on November 5, 1980. This time Hill made an unsolicited declaration of his homosexuality to the immigration officials when he entered the country. Hill’s statement deliberately provoked the new policy of Immigration and Naturalization Service (“INS”) of only enforcing the ban on lesbians and gays when they openly admitted their sexuality.<sup>164</sup> NGRA again stood by to challenge INS’s new attempt to bar Hill from entering the United States. Now, NGRA argued that INS could not exclude an immigrant based on their sexuality without a medical certificate from the PHS, even if the immigrant openly declared their sexuality.<sup>165</sup> NGRA argued that Congress intended for INS to defer to PHS in determining when immigrants should be barred for medical reasons.

Several years earlier in *Boutilier v. Immigration and Naturalization Service*, the Supreme Court interpreted the phrase “psychopathic personality” in the Immigration and Nationality Act as a term of art intended to exclude homosexuals from the United States.<sup>166</sup> One way to view NGRA’s litigation

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<sup>160</sup> *Litigation—National*, . . . INTO CTS.: Q. NEWSL. GAY RTS. ADVOCATES (Gay Rights Advocates, S.F., Cal.), Oct. 1979, at 1.

<sup>161</sup> *Id.* Under the Immigration and Nationality Act, aliens with mental and physical disabilities including affliction “with psychopathic personality, or sexual deviation, or mental defect[.]” could be excluded from entry into the United States. *Hill v. U.S. Immigration & Naturalization Serv.*, 714 F.2d 1470, 1472 (9th Cir. 1983) (citing 8 U.S.C. § 1182(a)(4) (1976)).

<sup>162</sup> *Litigation—National*, *supra* note 160, at 1–2.

<sup>163</sup> *Hill*, 714 F.2d at 1472; *see also Litigation—National*, *supra* note 160, at 2 (“INS lifted its order that Hill submit to the examination immediately after the U.S. Surgeon General issued a directive forbidding certification of homosexual aliens as excludable.”).

<sup>164</sup> *See Hill*, 714 F.2d at 1473 (citation omitted) (explaining that the INS adopted a new policy which allowed an immigration official to examine an alien if the alien “makes an unambiguous oral or written admission of homosexuality”).

<sup>165</sup> *See id.* at 1474 (“The issue presented is whether the INS may exclude self-declared homosexual aliens without medical certification of psychopathic personality, sexual deviation, or mental defect.”).

<sup>166</sup> *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 120 (1967). For a discussion on early twentieth century immigration law, which excluded aliens for sexual perversions, see MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 19–54 (2009).

involving Carl Hill is as a narrow attack on *Boutilier*. If the PHS would not certify lesbians and gays as psychopathic, then they could not be excluded. Under this narrow view, the litigation would be limited to interpreting a single statute and would do little for LGBT rights and nothing for the right to be sexual. Because Carl Hill was not a U.S. citizen, NGRA's lawsuit could only challenge INS procedure, not the underlying immigration policy itself.<sup>167</sup> NGRA's lawsuit did not directly contend that the state could not exclude homosexuals.<sup>168</sup> Despite the narrow legal arguments used, NGRA and Carl Hill always understood these cases through the broader justification of establishing the "good moral character" of LGBT people.<sup>169</sup> NGRA explained that they knew the litigation turned on the court seeing the dignity of LGBT people as much as the formal legal arguments.

These broader justifications influenced the tone of the judicial opinions. NGRA's December 1980 Newsletter quoted the initial decision of the immigration judge to admit Carl Hill to the country:

When a person is, in effect, diagnosed as not normal or insane, he thereby becomes less than human with the inevitable result that he is not entitled to the same human rights as the sane or normal. This, of course, obscures from consideration his civil rights and liberties. Our legal system does not relieve us of the responsibility to consider a person's rights on the basis of his foreign citizenship.<sup>170</sup>

NGRA embraced the national and international media attention that the case produced, and in May 1983, officials from NGRA, Gay Rights National Lobby, and NGTF met with Reagan administration officials to discuss changes to immigration laws regarding lesbians and gays.<sup>171</sup>

What emerges from these cases is not a well-planned agenda to achieve LGBT rights or the right to be sexual. Instead, the LGBT legal organizations

<sup>167</sup> See *Lesbian/Gay Freedom Day Comm., Inc. v. U.S. Immigration & Naturalization Serv.*, 541 F. Supp. 569, 571 (N.D. Cal. 1982) (citation omitted) ("Because he was an alien having no constitutional right to enter the United States, Hill was unable to directly challenge the propriety of excluding homosexuals from entry.").

<sup>168</sup> See *Matter of Hill*, 18 I. & N. Dec. 81, 82 (1981) (noting that the exclusion hearing focused on whether the applicant could be excluded without a certification stating that he was within an excluded class).

<sup>169</sup> *GRA Enters Two New Cases*, . . . INTO CTS.: Q. NEWSL. GAY RTS. ADVOCATES (Gay Rights Advocates, S.F., Cal.), Summer 1982, at 1 (discussing *In re Longstaff*, a case filed by the NGRA in which the petitioner was "denied naturalization simply because he is gay and therefore lacks the requisite 'good moral character'").

<sup>170</sup> *Litigation Report*, . . . INTO CTS.: Q. NEWSL. GAY RTS. ADVOCATES (Gay Rights Advocates, S.F., Cal.), Dec. 1980, at 1, 2.

<sup>171</sup> *NGRA Meets with Reagan Administration Officials*, . . . INTO CTS.: NEWSL. NAT'L GAY RTS. ADVOCATES (Nat'l Gay Rights Advocates, S.F., Cal.), Summer 1983, at 1, 3; see also *Litigation Report*, *supra* note 170, at ("The *Hill* case has brought us important grants from foundations and has provided us with international media attention.").

constantly articulated new justifications and demands on the state across a range of issues and legal venues. I argue against any monolithic understanding of LGBT lawyers falling trap to the allure of the right to be left alone as the ultimate goal. The right to be left alone is justified by a demand for tolerance but falls short of full equality.<sup>172</sup> But some of the strongest criticisms of this assimilationist logic come from within the LGBT legal movement. Recognizing the broader project of a right to be sexual shapes how we understand the history of LGBT litigation.

## 2. *National Educational Foundation for Individual Rights*

When we turn to how the LGBT legal organizations began to organize their work together, we see further evidence that our present-day understanding of LGBT rights misses how the right to be sexual was part of their work. The founding papers for the National Educational Foundation for Individual Rights (“NEFIR”) were signed at a February 1979 conference on “Law and the Fight for Gay Rights,” hosted at NYU Law.<sup>173</sup> Donna Hitchens, the founder of LRP, explained that the idea for NEFIR probably originated more informally out of discussions between the lawyers at the different organizations suggesting that they needed some sort of coordinating mechanism for their work. NEFIR included GLAD, LRP, NGRA, Lambda Legal, the Texas Human Rights Foundation (“THRF”), and a small number of independent lawyers and law professors.<sup>174</sup> While NEFIR would explicitly work on “gay rights litigation,” its goals also included “the basic right to sexual expression . . . and private sexual conduct.”<sup>175</sup>

Grant applications to support NEFIR describe the umbrella organization in grandiose terms. One proposed budget for 1979 was over \$100,000, greater than the budget of any of the individual LGBT legal organizations at the time.<sup>176</sup> These applications described the purpose of NEFIR as

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<sup>172</sup> See SUZANNE DANUTA WALTERS, *THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY* 256–75 (2014) (contrasting tolerance with a robust claim to full civil rights and integration).

<sup>173</sup> Rutgers Law and Lambda Legal also supported this conference. See Invitation to Conference on Law and the Fight for Gay Rights (on file with Mudd Library, Princeton University, Warner Papers). I have not found any record of a discussion about NEFIR at this conference, but two interviewees independently remember this conference as where the papers were first signed. Interview with Matt Coles, *supra* note 131; Interview with Donna Hitchens, *supra* note 145. On May 2, 1979, NEFIR became a California non-profit corporation and later that year it received tax-exempt status from both the state and federal government. See Report to Playboy Foundation (1979) (on file with Yale University Library, GLAD Records).

<sup>174</sup> See Report to Playboy Foundation, *supra* note 173.

<sup>175</sup> NEFIR Project ‘81 Proposal (1981) (on file with Yale University Library, GLAD Files).

<sup>176</sup> See NEFIR Proposal (on file with Yale University Library, GLAD Files).

overseeing and coordinating the work and fundraising of all the legal organizations. Despite this grand language, the LGBT legal organizations never intended to cede autonomy to NEFIR. Instead, the grant language was designed to appeal to funders.<sup>177</sup> The LGBT legal organizations did agree, however, that NEFIR would play a role in developing a legal resource bank and coordinating meetings between the organizations.<sup>178</sup>

NEFIR quickly won a \$15,000 grant from the Playboy Foundation.<sup>179</sup> Created in 1965, the Playboy Foundation supports work related to human sexuality, reproductive health, freedom of speech, and civil rights.<sup>180</sup> In the 1970s, it was one of the only foundations willing to support work related to homosexuality.<sup>181</sup> Using the money from Playboy, NEFIR set out to develop a resource bank to include copies of relevant briefs, court decisions, expert witness reports, law review articles, and any other relevant materials. NGRA took on the project of collecting material for the resource center, and NEFIR entered discussions with Golden Gate University Law School about locating the library there.<sup>182</sup>

In addition to the resource bank, NEFIR also funded GLAD's work compiling a lesbian and gay attorney referral guide. This referral guide was a resource for the LGBT legal organizations themselves (allowing them to refer out cases that they could not handle on their own) as well as to the broader LGBT community. Ultimately, GLAD published several versions of the guide, although later versions were after the demise of NEFIR.<sup>183</sup>

Despite its ambitious beginnings, NEFIR soon collapsed. Fights over organizational autonomy seem to have played a key role in the collapse of NEFIR. While many of the organizations involved supported the idea of having a central organization to fundraise for coordinated projects, they also wanted to continue their own fundraising work. NEFIR rules prohibited the

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<sup>177</sup> Interview with Donna Hitchens, *supra* note 145.

<sup>178</sup> See NEFIR Board Minutes (Oct. 13, 1979) (on file with Yale University Library, GLAD Files) (agreeing to solicit proposals for resource bank); Minutes of Conference Call (Apr. 19, 1983) (on file with Yale University Library, GLAD Files) (discussing Lambda's role in organizing conference calls and other meetings).

<sup>179</sup> See NEFIR Project '81 Proposal, *supra* note 175.

<sup>180</sup> See *Playboy Foundation*, SOCIETY FOR NONPROFITS, [https://www.snpo.org/publications/fundingalert\\_details.php?id=1988](https://www.snpo.org/publications/fundingalert_details.php?id=1988).

<sup>181</sup> See Kosbie, *supra* note 49, at 208 (discussing Playboy Foundation support for the ACLU's Sexual Privacy Project in 1973 and for NGTF's challenges to exclusions of gays from the military in 1978).

<sup>182</sup> See Correspondence Between NEFIR Members (1981-82) (on file with Yale University Library, GLAD Files) (discussing problems with locating resource library at Golden Gate). Despite extensive discussion with Golden Gate, it does not appear that any materials were ever transferred there.

<sup>183</sup> See, e.g., Letter from Richard Burns, Board Member, GLAD, to NEFIR Board Members (Aug. 13, 1981) (on file with Yale University Library, GLAD Files) (discussing GLAD's progress on guide).

LGBT legal organizations from applying for independent funding from any grant agency that NEFIR applied to.<sup>184</sup>

By early 1983, discussions shifted from how to organize NEFIR's activity to how to dismantle NEFIR.<sup>185</sup> While the lawyers involved criticized how NEFIR itself worked, they agreed that some of its coordinating functions were critical to the success of the emerging LGBT legal field.<sup>186</sup> Ultimately, GLAD maintained control of the attorney referral guide and Lambda Legal continued coordinating the conference calls between the organizations. NGRA appears to have kept the legal material it gathered for the resource bank, but there is no clear record of what happened to these materials. The LGBT legal organizations also agreed to maintain the corporate shell of NEFIR to be used to facilitate a potential future LGBT legal conference.<sup>187</sup> Several years later, Lavender Law would use NEFIR to handle the fundraising and finances for its first annual conference.<sup>188</sup> As Matt Coles explained, "NEFIR was sort of the early exploration of the idea of trying to get the legal groups coordinated and pooling resources."<sup>189</sup> Reflecting the humor of the time, Matt also noted that they used to say "When will we succeed? NEFIR!"<sup>190</sup>

### III. SODOMY REFORM AND THE RIGHT TO BE SEXUAL

Why did sodomy reform become central to the work of the LGBT legal field? This question is rarely asked in other scholarship. Sodomy reform and the right to privacy are largely taken for granted as the foundation for LGBT rights.<sup>191</sup> Courts deciding same-sex marriage cases today cite back to

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<sup>184</sup> See, e.g., Letter from Rosayln Richter, Executive Director, Lambda Legal, to NEFIR Board Members (May 23, 1980) (on file with Yale University Library, GLAD Files) (explaining that Lambda will still apply to Playboy Foundation despite NEFIR's applications there).

<sup>185</sup> See, e.g., Minutes of GLAD Board of Directors Meeting (Mar. 1983) (on file with Yale University Library, GLAD Files) ("The discussion in SF was slanted towards NEFIR not continuing to exist").

<sup>186</sup> See, e.g., Letter from Tim Sweeney, Executive Director, Lambda Legal, to NEFIR Board Members (May 20, 1983) (on file with Yale University Library, GLAD Files) (identifying critical functions of NEFIR that should be preserved).

<sup>187</sup> Donna Hitchens of LRP agreed to maintain the NEFIR shell. See Handwritten Notes (1983) (on file with Yale University Library, GLAD Files).

<sup>188</sup> See Lavender Law Steering Committee Minutes (Jul. 1988) (on file with GLBT Historical Society, Donna Hitchens Papers). See also Letter from Bill Weinberger (May 25, 1988) (on file with ONE National Gay and Lesbian Archives, Weinberger Papers) (asking for donations payable to NEFIR).

<sup>189</sup> Interview with Matt Coles, *supra* note 131.

<sup>190</sup> *Id.*

<sup>191</sup> See *infra* Part II for discussion of historical foundation of LGBT rights.

*Lawrence* and *Hardwick* as they analyze the claims of LGBT rights.<sup>192</sup> A rich doctrinal scholarship analyzes these cases, identifying the various assumptions that they make about the cultural meaning of privacy.<sup>193</sup> Scholars tell the legal history of LGBT rights through the prism of sodomy reform.<sup>194</sup> There is good reason for this. Sodomy reform was at or near the top of the agenda for LGBT legal organizations by the 1970s. But forgotten in all of this is that sodomy reform was not only about litigation and not only about the right to be left alone. My organizational approach to studying the emergence of LGBT rights forces us to ask why sodomy reform became central to the work of the LGBT legal field. What emerges is that LGBT activists brought multiple strategies and motivations to bear on their early sodomy reform work. The right to be sexual was as important of an organizing principle as the right to be left alone.

In the most detailed study of sodomy laws, Bill Eskridge “traces the rise, evolution, decline, and fall of the crime against nature[.]”<sup>195</sup> Eskridge attributes the changing regulation of sodomy to interactions between social movements and cultural, political, and constitutional values. Challenging

<sup>192</sup> See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1217 (10th Cir. 2014) (discussing the Supreme Court’s sexual orientation jurisprudence and specifically analyzing the holdings in *Hardwick* and *Lawrence*).

<sup>193</sup> Following *Hardwick*, scholars analyzed the meaning of privacy and identified new arguments to protect LGBT rights despite the setback from *Hardwick*. See, e.g., Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 533 (1992) (undertaking a “gay-friendly deconstruction of the new sexual orientation categories” under Equal Protection despite the holding in *Hardwick*); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 799–802 (1989) (reframing the injury of sodomy laws as the imposition of a heterosexual sexual identity upon lesbians and gays). Following *Lawrence*, scholars again analyzed the meaning of privacy, now in relation to morality and other areas of the law. See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1185 (2004) (arguing that “*Lawrence* is neither irrelevant . . . nor dispositive” to the question of same-sex marriage); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1233–36 (2004) (arguing *Lawrence* only prevents use of explicit morals-based justifications for the law); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1899 (2004) (using *Lawrence* to explore meaning of substantive due process and protection of human dignity). Feminist and queer criticisms of *Lawrence* questioned the limits of privacy for protecting sexual rights. See Catherine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1090 (2004) (claiming that “[p]rivacy works to protect systemic inequality . . .” produced by sexual violence and patriarchy); Teemu Ruskola, *Gay Rights versus Queer Theory: What is Left of Sodomy after Lawrence v. Texas?*, 23 SOC. TEXT 235, 239 (2005) (“The Court, and the Constitution, will respect our sex lives, but on condition that our sex lives be respectable.”).

<sup>194</sup> See, e.g., CAIN, *supra* note 27, at 169–253 (spending several chapters on development and impact of *Hardwick*); see generally CARPENTER, *supra* note 39 (discussing legal, political, and cultural factors influencing legal strategies in *Lawrence*); ESKRIDGE, *supra* note 25, at 15 (discussing “[t]he initial struggle . . . to protect private gay spaces”); Ellen Ann Andersen, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 318 (1998) (analyzing the phases of sodomy reform).

<sup>195</sup> ESKRIDGE, *supra* note 36, at 2.

the idea that sodomy laws always regulated same-sex intimacy, Eskridge shows how following World War II, states added stiffer criminal penalties for sodomy and made their laws increasingly gay-specific.<sup>196</sup> Beginning in 1955, many states established commissions to modernize their criminal codes.<sup>197</sup> Several states decriminalized sodomy or reduced the penalties for it as part of this process. But in 1969, Kansas became the first state to criminalize sodomy for only same-sex conduct.<sup>198</sup> Nonetheless, until 1980, LGBT activists continued to have some success with legislative decriminalization of sodomy.<sup>199</sup>

This explains why sodomy reform was not obvious as *the* goal of LGBT rights when the modern LGBT legal organizations were founded. Reform was ongoing in state legislatures and it was not yet clear if that effort would succeed. My organizational analysis reveals that it was also not clear how sodomy reform would advance other goals of the LGBT legal organizations. Thus, rather than telling the story of how sodomy reform was the starting point for LGBT rights, we need to tell the story of how LGBT rights emerged and was shaped by debates over sodomy reform and the right to be sexual.

#### A. Sodomy Roundtables

On November 20, 1983, the “Ad Hoc Task Force to Challenge Sodomy Law” first met at the ACLU’s offices in New York City.<sup>200</sup> Organized by Abby Rubenfeld of Lambda Legal (who rented office space from the ACLU at the time), the Task Force included representatives from Lambda, GLAD, NGRA, LRP, THRE, NCSCS, and lawyers from several ACLU offices. The Task Force’s goals included developing litigation strategies to overturn sodomy laws, providing information to lawyers working on relevant cases,

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<sup>196</sup> See *id.* at 88–108 (tracing change in sodomy laws between 1935 and 1961). This book builds on Eskridge’s historical analysis in an earlier article, William N. Eskridge, Jr., Hardwick and *Historiography*, 1999 U. ILL. L. REV. 631 (1999). Eskridge was a primary author on the amicus brief filed in the Supreme Court on behalf of the Cato Institute in *Lawrence v. Texas*, and the brief relies heavily on a historical analysis of sodomy statutes. Brief of the CATO Institute as Amicus Curiae in Support of Petitioners at 9–16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

<sup>197</sup> For an in-depth discussion of state initiatives regarding sodomy laws, see ESKRIDGE, *supra* note 36, at 73-108.

<sup>198</sup> *Id.* at 165.

<sup>199</sup> See Andersen, *supra* note 194, at 297 (explaining that between 1971 and 1983, “the course of sodomy reform proceeded mainly through legislative reform and only secondarily through litigation”); Melinda D. Kane, *Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961–1998*, 54 SOC. PROBS. 211, 213 (2007) (noting that around 1980, the decriminalizing sodomy movement shifted from the legislative arena to the courts).

<sup>200</sup> *Lambda and ACLU Hold Conference on Sodomy Laws*, LAMBDA UPDATE (Lambda Legal Def. & Educ. Fund, New York, N.Y.), Feb. 1984, at 1, 3.

and advertising the existence of the Task Force to gay men and lesbians who might be arrested for sodomy.<sup>201</sup> Rubinfeld explained that she chose to host the meetings at the ACLU offices partially to secure the legitimacy afforded by the ACLU name.<sup>202</sup>

The roundtables, as the Task Force soon came to be known, played a key role in producing movement cohesion.<sup>203</sup> Meeting two or three times a year, these roundtables provided a space for lawyers to debate constitutional theories for sodomy reform and share emerging new cases. The roundtables were invitation only and always included the major LGBT litigation-oriented organizations. Other lawyers, particularly those at ACLU state affiliates, were often invited when they were working on relevant cases. Law professors working on law and sexuality were the final group of regular participants at these meetings. Rubinfeld explained the reasoning behind only inviting lawyers to these roundtables: The goal was debating and refining judicial arguments. To keep the meetings productive, they wanted to only invite those with relevant expertise.<sup>204</sup>

The LGBT legal organizations' newsletters provide evidence of how the roundtables were an identity-building project. Lambda Legal's own newsletter announced that the meeting "represents the first joint effort of the ACLU and gay/lesbian rights organizations to fight anti-gay discrimination."<sup>205</sup> GLAD's newsletters from the time advertised their ongoing participation in a new coalition effort to reform sodomy laws.<sup>206</sup> LRP described the "exchange [of] ideas and research" and their own role in "compiling a national list of psychiatrists and psychologists who might serve as expert witnesses."<sup>207</sup> NGRA described the new "strategy planning

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<sup>201</sup> *Id.*

<sup>202</sup> Telephone Interview with Abby Rubinfeld, Former Legal Director, Lambda Legal (Apr. 18, 2014).

<sup>203</sup> See ANDERSEN, *supra* note 46 at 121 (explaining that the "[t]he Litigators' Roundtable, successor to the Ad-Hoc Task Force, played an important role in facilitating . . ." the incorporation of federal constitutional claims into sodomy cases); Steven A. Boucher, *Mobilizing in the Shadow of the Law: Lesbian and Gay Rights in the Aftermath of Bowers v. Hardwick*, in 31 RES. IN SOC. MOVEMENTS, CONFLICTS, AND CHANGE 175, 192 (Patrick G. Coy ed., 2010) ("The Roundtables continued as a more formal coalition of various organizations headed by Lambda to coordinate litigation strategies among a variety of different issues."); Arthur S. Leonard, *A Retrospective on the Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 403, 410 (2000) (noting that Lambda hosts roundtable meetings every six months); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 973-74 (2010) ("Lawyers at these lead organizations meet frequently, including at an annual litigators' roundtable, to develop and implement strategy." (footnote omitted)). For criticism of the roundtables, see *infra* note 212.

<sup>204</sup> Telephone Interview with Abby Rubinfeld, *supra* note 202.

<sup>205</sup> *Lambda and ACLU Hold Conference on Sodomy Laws*, *supra* note 200, at 3.

<sup>206</sup> See GLAD Annual Report 3 (1984) (on file with Yale University Library, GLAD files).

<sup>207</sup> See Lesbian Rights Project Newsletter (1984) (on file with author).

conference” in its newsletters, and even the Gay Rights Coalition of the ACLU of Southern California mentioned the efforts.<sup>208</sup> This prominent advertising of the roundtables, which tapered off by the late 1980s, signals how the lawyers understood their importance in developing a new field form. They saw the roundtables as conferring additional legitimacy on their identities as LGBT *legal* organizations. As the form of the roundtables was institutionalized and assumed, it no longer merited mention in newsletters.

While the first meetings of the roundtables were organized informally by Abby Rubenfeld as legal director of Lambda; by 1985 Lambda’s board of directors voted to officially incorporate the roundtables into Lambda’s goals.<sup>209</sup> They defined the goals as focusing on litigation, legislation, and education efforts to repeal sodomy laws and providing a space for face-to-face meetings between litigators. By this time, LGBT legal organizations were preparing to challenge sodomy laws at the U.S. Supreme Court. During this Supreme Court challenge, the roundtables came to be taken for granted.

This early history of the sodomy roundtables reveals a growing consensus that the LGBT legal organizations should coordinate their work and that sodomy reform litigation would be central to several overlapping litigation goals.<sup>210</sup> But the roundtables were never only about sodomy. The lawyers understood that the Court was not going to overturn sodomy laws based only on the right to privacy or the right to be left alone. The Court needed to understand how sodomy laws infringed on concepts of dignity that went beyond narrow forms of LGBT rights. Thus, discussions about sodomy reform were also discussions about all the other issues that LGBT legal organizations were handling.<sup>211</sup>

By making the roundtables lawyer-only, the LGBT legal organizations set out to maintain space for critical dissent over litigation strategy.<sup>212</sup> The

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<sup>208</sup> NGRA Newsletter (summer 1985) (on file with GLBT Historical Society, NGRA Files); ACLU of Southern California, Gay Rights Chapter, Newsletter (1984) (on file with ONE National Gay and Lesbian Archives, Gay Rights Chapter Files).

<sup>209</sup> *Sodomy Challenge Project*, LAMBDA UPDATE (Lambda Legal Def. & Educ. Fund, New York, N.Y.), Winter 1985, at 1, 5.

<sup>210</sup> This coordination would result in a set of shared norms and expectations for an LGBT legal field. See NEIL FLIGSTEIN & DOUG MCADAM, A THEORY OF FIELDS 10 (2012) (describing shared norms as key element of an established organizational field).

<sup>211</sup> Cf. NeJaime, *supra* note 6, at 677–78 (arguing that marriage, even though not explicitly mentioned, “set the stage for discussion, provided the context for analysis, furnished the basis for comparison, and highlighted the points of conflict” for discussions on LGBT issues).

<sup>212</sup> At various times, different lawyers have criticized the roundtables’ exclusiveness. My analysis identifies key benefits and limitations of the roundtable model, but ultimately these criticisms are

debate over whether to invite Arthur Warner underscores how the roundtables were in fact used to foster dissent rather than to create homogeneity. Many of the lawyers at the LGBT legal organizations preferred to deal with Warner “at arm’s length” because of his difficult personality.<sup>213</sup> Despite concerns that he would seek to dominate the conversation, Abby Rubinfeld ultimately decided to invite Warner because all the relevant voices should be heard in the debates over sodomy reform.<sup>214</sup> This institutionalization of dissent over legal strategy supports my argument that LGBT rights as a category was more capacious than we imagine it.

### B. *Pre-Hardwick Sodomy Reform Litigation*

Now I turn to debates within the LGBT legal organizations over sodomy reform. In Walter Barnett’s 1973 study, prepared as part of a challenge to Texas’s sodomy law, Barnett explained that privacy offered the most obvious doctrinal foothold for sodomy reform litigation.<sup>215</sup> But, Barnett stressed, the doctrinal meaning of privacy was not clear and its application to sodomy laws was uncertain.<sup>216</sup> Barnett thus explored other legal theories that would apply to sodomy laws. Barnett’s motivations for his study reveal the influence of the right to be sexual: “Individuals should be encouraged, rather than discouraged, to venture as close to the line [of acceptable sexual behavior] as they wish.”<sup>217</sup>

Barnett’s study set out the doctrinal tension between the right to be left alone and the right to be sexual. Debates over sodomy reform within the LGBT legal organizations reveal the same tension. In a classic explanation for the importance of sodomy reform, NGRA said: “We consider the sodomy statutes important because, although rarely enforced, they create a hostile climate and provide specious justification for discrimination in

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beyond the scope of this article. See Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 586–94 (2010) (criticizing roundtables for excluding trans people and people of color); see also VAID, *supra* note 7, at 133 (arguing that gay rights lawyers have built structures for cooperation through formal conferences like the Sodomy Roundtables but, operationally, cooperation is minimal); Chai R. Feldblum, *Gay People, Trans People, Women: Is It All about Gender?*, 17 N.Y.L. SCH. J. FOR HUM. RTS. 623, 632–35 (2000) (noting interest in raising issues regarding gender nonconformity at the roundtable discussions and mixed reception to those discussions).

<sup>213</sup> Interview with Tom Coleman, *supra* note 85.

<sup>214</sup> See Letter from Abby Rubinfeld, Legal Director, Lambda Legal, to Bill Gardner, Member, NCSCS (1983) (on file with Mudd Library, Princeton University, Warner Papers).

<sup>215</sup> WALTER BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION: AN INQUIRY INTO THE CONSTITUTIONALITY OF REPRESSIVE SEX LAWS* 52 (1973).

<sup>216</sup> *Id.* at 54.

<sup>217</sup> *Id.* at 30.

employment, the military, immigration, and child custody and visitation cases.”<sup>218</sup> The concerns with a “hostile climate” and issues of military, immigration, and child custody all go beyond the narrow bounds of the right to be left alone.

Lambda’s newsletters presented this broader set of demands as “the opportunity to make the sexual expression of our homosexuality legal in New York[.]”<sup>219</sup> In an editorial comment in the Lambda newsletter, Rosalyn Richter connected sodomy reform to abortion rights. She described the privacy interest at stake as “including the right to make choices affecting one’s body.”<sup>220</sup> Richter framed the decision from the New York Court of Appeals striking down their sodomy law as based on this broader right.

An NCSCL report at the ACLU biennial convention in 1983 provides a good example of how this tension played out with respect to specific doctrinal arguments. The NCSCL report described a decision to add a motion to dismiss for discriminatory enforcement of sodomy laws.<sup>221</sup> They were concerned that winning on this procedural argument could let the court avoid the substantive arguments about sexual privacy, but included it because a hearing on the question of enforcement would allow them to introduce statistical evidence showing how sodomy laws were used to restrict a wide-range of sexual conduct and choices.<sup>222</sup> The same report explained the advantage of the consolidated appeal in *People v. Onofre*.<sup>223</sup> In particular, including a prostitution arrest of a heterosexual woman would bring to light the full range of sexual choices implicated by the sodomy law, “making it more difficult to distinguish the ruling on a narrow factual pattern of the case below.”<sup>224</sup>

Internal debates within the ACLU over sodomy reform are particularly revealing for understanding the complicated politics around the right to be left alone and the right to be sexual. In 1966, the ACLU adopted a policy

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<sup>218</sup> Letter from NGRA to National Gay Task Force (1980) (on file with Cornell University Library, NGTF Papers).

<sup>219</sup> *The Challenge to New York’s Sodomy Statute*, LAMBDA: NEWS FROM LAMBDA LEGAL DEF. & EDUC. FUND, INC. (Lambda Legal Def. & Educ. Fund, New York, N.Y.), Spring 1980, at 1.

<sup>220</sup> Rosalyn Richter, Editorial, *The Right to Privacy*, NEWS FROM LAMBDA (Lambda Legal Def. & Educ. Fund, New York, N.Y.), Spring 1981, at 2.

<sup>221</sup> See NCSCL Report for 1983 ACLU Biennial Conference (on file with Mudd Library, Princeton University, Warner Papers) (discussing companion case to *People v. Onofre*).

<sup>222</sup> See *id.*

<sup>223</sup> 415 N.E.2d 936 (N.Y. 1980). In *People v. Onofre*, the New York state Court of Appeals in a consolidated case held that New York’s sodomy law was unconstitutional. *Id.* at 937.

<sup>224</sup> See NCSCL Report, *supra* note 221, at 3 (discussing *People v. Sweat*). See also Memo of William Gardner (1983) (on file with Mudd Library, Princeton University, Warner Papers) (suggesting combined appeal introduces “overbreadth” concerns of sodomy law).

on sexual privacy that included homosexuality.<sup>225</sup> The ACLU policy “support[ed] only the private behavior of consenting adults.” It refused to take a position on the morality of any conduct and did not cover solicitation laws. The policy also stated that “in certain jobs there may be a relevancy between the job and a person’s private sexual conduct, including homosexuality.”<sup>226</sup>

This ACLU national policy embraced only the narrow right to be left alone as the justification for overturning sodomy laws. But this was not the only voice within the ACLU. A year earlier, the ACLU of Southern California adopted a policy on homosexuality with broader justifications: “In respect to private conduct by adults, each individual has the right to decide what kind of sexual practices he or she will or will not engage in, what techniques will be used, and whether or not a contraceptive should be used.”<sup>227</sup> Even with the national board, there was fierce debate. Some board members seemed comfortable with allowing sodomy laws to remain on the books, questioning only police enforcement practices, while other board members argued that the policy should logically extend to cover employment and other issues as well.<sup>228</sup>

Using ACLU policy on privacy as a starting point, lawyers for the ACLU setting out to challenge sodomy laws pushed for a broader agenda that fully encompassed the right to be sexual. Marilyn Haft described sodomy laws as a starting point for the work of the ACLU Sexual Privacy Project. She explained that these laws are “a thin veneer for societal disapproval of differing modes of sexual orientation and life styles.”<sup>229</sup> Haft saw overturning sodomy laws as one piece of the broader project of challenging social norms about sexuality. Her correspondence related to potential sodomy litigation does not show a pre-determined legal theory but a grappling with various legal theories and fact patterns.<sup>230</sup> Flowing from her understanding of privacy, her legal agenda included concerns with solicitation and loitering

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<sup>225</sup> See ACLU Board Minutes (Nov. 16, 1966) (on file with author).

<sup>226</sup> See *id.* (noting in general that sexual orientation should not be a bar to employment).

<sup>227</sup> *Sex-Civil Liberties Statement Passed*, OPEN FORUM (ACLU of Southern California, L.A., Cal.) Jan. 1966, at 1.

<sup>228</sup> Compare ACLU Board Minutes, *supra* note 225 (focusing on police enforcement practices as greater concern than sodomy laws themselves) with ACLU Due Process Comm. Minutes (Dec. 1965) (on file with author) (discussing extension of American Law Institute policy position to employment).

<sup>229</sup> See Letter from Marilyn Haft to ACLU State Affiliates (June 25, 1973) (on file with Mudd Library, Princeton University, ACLU Papers) (describing founding of Sexual Privacy Project).

<sup>230</sup> See *id.* Other correspondence in this collection discusses specific potential litigation, including fact patterns, state and federal laws, affidavits, and concerns with injury and standing.

laws, the dignity of LGBT prisoners, and the expression of gender nonconformity by trans people.<sup>231</sup>

LGBT activists did see some signs that the courts might be receptive to the concerns raised by the right to be sexual. *Hardwick* was the first time that the Supreme Court fully addressed the constitutionality of sodomy laws, but the Court had previously summarily affirmed a lower court decision upholding the constitutionality of a sodomy law in *Doe v. Commonwealth's Attorney for Richmond*.<sup>232</sup> An ACLU lawyer in Virginia argued the case after political activist Bruce Voeller discussed a potential sodomy challenge with Justice William Douglas. Justice Douglas suggested that the Supreme Court might be open to a sodomy challenge if the case showed that plaintiffs “lived in dread of [the law’s] enforcement.”<sup>233</sup>

According to the district court in *Doe*, the right to privacy enunciated in *Griswold v. Connecticut* was also about the sanctity of home and family.<sup>234</sup> But the court did not consider homosexuality part of home or family life. Moreover, the court explained that sodomy laws are justified because homosexuality “is likely to end in a contribution to moral delinquency.”<sup>235</sup> The dissenting opinion described privacy in terms of “one’s decisions on private matters of intimate concern.”<sup>236</sup> The advice from Justice Douglas and the dissenting opinion in *Doe* both reflect activists’ contention that privacy included respect for dignity and sexual autonomy.

In *People v. Onofre*, which held New York’s sodomy law unconstitutional, LGBT legal organizations again hoped to bring a sodomy challenge to the U.S. Supreme Court.<sup>237</sup> Unlike in *Doe*, which relied on affidavits testifying that the plaintiff feared prosecution, Ronald Onofre was prosecuted for private, consensual sex with another man, “almost unheard of in modern New York legal lore.”<sup>238</sup> In addition to addressing concerns over standing,

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<sup>231</sup> *See id.*

<sup>232</sup> *Doe v. Commonwealth's Att'y for Richmond*, 425 U.S. 901 (1976). The Supreme Court affirmed a district court’s holding that a state sodomy statute was constitutional as the state had a rational basis for criminalizing sodomy in the “promotion of morality and decency[.]” *Doe v. Commonwealth's Att'y for Richmond*, 403 F. Supp. 1199, 1200, 1202 (E.D. Va. 1975).

<sup>233</sup> RANDY SHILTS, CONDUCT UNBECOMING 283 (1993); *see also id.* (discussing Voeller’s meeting and strategy).

<sup>234</sup> *Doe*, 403 F. Supp. at 1201–02 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486(1965)).

<sup>235</sup> *Id.* at 1202.

<sup>236</sup> *Id.* at 1203 (Merhige, J., dissenting).

<sup>237</sup> ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 36, at 219–22 (discussing role of LGBT legal organizations in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981)).

<sup>238</sup> *See* Memo of William Gardner, *supra* note 224. Gardner explains that Onofre’s seventeen-year-old partner initially alleged use of force, but the District Attorney dropped the charges for forced

this fact pattern allowed the lawyers to more vividly describe the violation of privacy in terms of personal integrity. The Supreme Court denied certiorari in *Onofre*, but the opinion from the New York Court of Appeals partially reflected advocates' understanding of the right to be sexual:

[T]he right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint[.]<sup>239</sup>

### C. Debates over *Hardwick* and the Right to Be Sexual

*Hardwick* is remembered as “a carefully selected test case designed to build on a decade of legal and political mobilization[.]”<sup>240</sup> Under this telling, *Hardwick* was the chance to finally test at the Supreme Court the LGBT movement's claim that a narrow right to be left alone protected consensual sodomy in private. This version of the story is not incorrect, but it misses the tensions over how to capture the broader right to be sexual.

On August 3, 1982, Michael Hardwick was arrested for oral sex in the privacy of his own bedroom by a police officer entering Hardwick's home on an invalid warrant.<sup>241</sup> Clint Sumrall, who was working with the local ACLU, first identified Hardwick's arrest three days later and contacted Hardwick.<sup>242</sup> Sumrall had been searching for a case to challenge Georgia's sodomy law for the last five years, but every other case involved complicating factors such as marijuana possession.<sup>243</sup> Hardwick's case seemed perfect: A police officer with no legitimate reason to be in Hardwick's apartment arrested Hardwick in his bed for consensual sex. Sumrall put Hardwick in touch with John Sweet and Louis Levenson who agreed to represent him. John Sweet was on

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sodomy after evidence showed it was fully consensual. This created a “perfect standing situation.”

*Id.*

<sup>239</sup> *Onofre*, 415 N.E.2d at 939 (citations omitted).

<sup>240</sup> ANDERSEN, *supra* note 46 at 4.

<sup>241</sup> PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 381–82 (1988). Officer K.R. Torick entered Hardwick's apartment on “warrant for Hardwick's arrest on a charge of failing to appear in court for drinking in public.” *Id.* at 381. However, Torick never served the arrest warrant and the warrant was invalid because, three weeks earlier, Hardwick appeared in court, paid a fine for his public-drinking ticket, “which wiped out the warrant.” *Id.* at 381–82.

<sup>242</sup> *Id.* at 396. Sumrall consistently searched arrest records for sodomy cases so he could try to get a test case. *Id.* George Brenning suggested that Sumrall may have also learned of Hardwick's arrest through the local bar scene. Telephone Interview with George Brenning (Jul. 8, 2014).

<sup>243</sup> Interview with George Brenning, *supra* note 242; see also IRONS, *supra* note 241, at 396 (“For the last five years, [Sumrall] would go to the courts every day and find sodomy cases and try to get a test case.”).

the board of the ACLU of Georgia, but he took the case as a private case and not through the ACLU.<sup>244</sup> After the Fulton County District Attorney decided not to press charges, John Sweet asked another lawyer in his office to file a federal challenge.

Kathy Wilde explained that she began receiving calls accusing her of “ruining the law for gays nationally” from the day she first filed the federal challenge.<sup>245</sup> In particular, Arthur Warner of NCSCL was adamant that her federal challenge threatened the state-by-state approach to sodomy reform he had designed.<sup>246</sup> The ACLU supported the case by the time it reached the Supreme Court, but initially it too resisted supporting *Hardwick*.<sup>247</sup> Because of the devastating loss in *Hardwick*, it is easy to give too much credit to these criticisms. But at the time, most lawyers thought they could win.<sup>248</sup>

By the time Kathy Wilde filed *Hardwick* in Georgia, the Texas Human Rights Foundation was waiting for a ruling from the federal district court in its challenge to the Texas sodomy law.<sup>249</sup> When the sodomy roundtables first took up *Hardwick*, one of the key strategic questions was over the relative merits of these two cases as potential vehicles for a Supreme Court challenge. Unlike Michael Hardwick, Donald Baker was never arrested for sodomy. THRF recruited Baker for a proactive challenge to the sodomy law. Baker, a former schoolteacher in Dallas, swore in court that he had sex with men and was afraid of prosecution under the state sodomy law.<sup>250</sup> Michael Hardwick, the bartender, was sucked into his case after a citation for public drinking. The lack of any arrests meant that *Baker v. Wade* lacked the visceral image of the police at the foot of Michael Hardwick’s bed. On the other

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<sup>244</sup> Telephone Interview with Kathy Wilde, Former Lawyer for Michael Hardwick (Jun. 6, 2014); Interview with George Brenning, *supra* note 242.

<sup>245</sup> Interview with Kathy Wilde, *supra* note 244.

<sup>246</sup> *See id.*

<sup>247</sup> When *Hardwick* was appealed to the Eleventh Circuit, Kathy Wilde wrote to the legal director of the national ACLU requesting assistance. ACLU national refused because the Georgia state affiliate was not involved. *See* Letter from ACLU to Kathy Wilde (1983) (on file with Mudd Library, Princeton University, ACLU Papers). George Brenning suspects that the ACLU of Georgia simply did not have the resources to dedicate to the case. *See* Interview with George Brenning, *supra* note 242.

<sup>248</sup> Immediately after oral arguments at the Supreme Court, some of the lawyers involved suggested they could win by as much as 7-2. *See* Letter from Gene Guerrero, Executive Director, ACLU of Georgia, to Burt Neuborne, ACLU National (Apr. 2, 1986) (on file with Mudd Library, Princeton University, ACLU Papers).

<sup>249</sup> *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982).

<sup>250</sup> *Id.* at 1126, 1128.

hand, *Baker* did include a full trial record while *Hardwick* was appealed from a motion to dismiss.<sup>251</sup>

In addition to the strikingly different fact patterns, lawyers at the roundtables debated the legal theories at play in the two cases. The Texas sodomy law applied only to same-sex conduct. This allowed THRF to make an equal protection argument unavailable in *Hardwick*.<sup>252</sup> Because the Georgia law on its face applied equally to heterosexual and homosexual intercourse, any equal protection challenge would require extensive fact-finding to show unequal application of the law.<sup>253</sup>

Once the Supreme Court granted certiorari in *Hardwick*, mooted the debate over which case was the best vehicle, roundtable discussions turned to oral arguments. Because there were no out lesbian or gay lawyers in the country with experience arguing before the Supreme Court, lawyers at the roundtable settled on inviting Professor Laurence Tribe to argue the case.<sup>254</sup> Mistakenly assuming Kathy Wilde was a lesbian, some lawyers at the roundtable resisted this idea, suggesting that “one of us” should argue the case before the Court.<sup>255</sup>

A final debate at the round table concerned the exact legal theories to be used in the brief to the Supreme Court. The first draft of the brief included sections on privacy, equal protection, and due process. One of the lawyers at the roundtables described this strategy as appropriate for academic analysis. But, using it at the Supreme Court invited the Court to issue an

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<sup>251</sup> Cf. *id.* at 1126–1134 (summarizing the trial testimony by the plaintiff, plaintiff’s expert witnesses, and defendants’ witnesses and expert witnesses) *with* *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985) (noting the procedural posture—an appeal from the district court’s ruling that the suit lacked standing, did not state a valid legal claim, and must be dismissed).

<sup>252</sup> Justice O’Connor would later vote to overturn the Texas sodomy law at issue in *Lawrence v. Texas* solely on the basis of the Fourteenth Amendment’s Equal Protection Clause. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring).

<sup>253</sup> ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 36, at 235 (explaining that arguments in the case included an equal protection challenge). While Kathy Wilde added a heterosexual couple to her original federal case in *Hardwick*, the district court dismissed them for lack of standing. *Id.* at 234.

<sup>254</sup> Multiple interviewees confirm that the idea to invite Tribe came from the roundtables but cannot recall exactly who suggested it. See, e.g., Interview with Kathy Wilde, *supra* note 244; Interview with Jay Kohorn, *supra* note 85; see also ANDERSEN, *supra* note 46, at 255 n.46 (confirming that the historical record is vague but recalls that members of roundtable task force suggested bringing in Tribe). A year later, in 1987, openly lesbian lawyer, Mary Dunlap, argued before the Supreme Court in *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 524 (1987).

<sup>255</sup> See Interview with Kathy Wilde, *supra* note 244 (noting that she outed herself as heterosexual to these lawyers in later conversation). Wilde participated in writing the brief but explained that she was happy to relinquish control of the case.

anti-gay ruling across all three doctrinal arguments.<sup>256</sup> If the Court wanted to rule against the sodomy law, it would reach whatever legal theory it wanted whether or not it was in the main brief. But LGBT legal organizations were already making important advances under equal protection. Better not to risk that along with privacy and due process.<sup>257</sup> Responding to this concern, the final brief submitted to the Supreme Court focused more narrowly on privacy and the demand to be left alone by the state.

There are multiple ways to interpret these debates. Perhaps the most obvious way is just to see them as a debate over legal strategy. Because of uncertainty over the precedential value of *Doe* and broader implications of privacy, *Baker's* equal protection theory was arguably a more promising route to challenge sodomy laws than *Hardwick's* privacy argument. In addition, *Baker's* factual record included testimony that could be helpful in establishing an equal protection violation. A second way to interpret these debates is through the lens of a politics of respectability. Donald Baker was an upstanding schoolteacher in a long-term relationship. Michael Hardwick was a bartender having sex with a married man. Donald Baker fit the wholesome American image better than Michael Hardwick. By barely discussing homosexuality at all and stressing the narrow right to be left alone, the final brief in *Hardwick* also seems consistent with this interpretation. Without denying the validity of either of these, I turn to a third interpretation. These debates reveal the ongoing tension between strategies based on the right to be left alone and those based on the right to be sexual.

Finally, I turn to the amicus briefs in *Hardwick* for further support for my arguments. The brief of the LRP most explicitly argued for the right to be sexual.<sup>258</sup> In a law review article introducing the amicus brief, Mary Dunlap described LRP's brief as the only one to forthrightly argue for the legitimacy of LGBT people and relationships.<sup>259</sup> In contrast, Dunlap described the main brief as arguing only that the state needs to leave LGBT people alone: Tolerance can include disapproval for what is tolerated. Dunlap was right

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<sup>256</sup> Jay Kohorn voiced his concern at a roundtable discussion regarding Tribe's legal theories, arguing that the legal theories, while good, went against the strategy of forming consensus among lower courts prior to being argued at the Supreme Court. See Interview with Jay Kohorn, *supra* note 85 ("[D]on't play with these legal theories at the expense of our lives.").

<sup>257</sup> *Id.*

<sup>258</sup> Brief for Lesbian Rights Project et al. as Amici Curiae Supporting Respondents, *supra* note 11, at 9 ("The Right To Be Sexual In Consenting, Non-Violent And Physically Private Ways Constitutes One Essential Dimension Of Personal Privacy Of The Adult Human Being.").

<sup>259</sup> See Dunlap, *supra* note 11, at 950 (describing the Lesbian Rights Project et al.'s amicus brief as unique because it took a more radical position than other briefs).

to describe the LRP brief as more explicitly arguing for a right to be sexual, but the LRP brief was not as radically different from the others as her description might suggest. LRP's amicus brief also drew on the right to privacy.<sup>260</sup> The key difference is that LRP started from the importance of sexuality and built to privacy from there. Lambda Legal's amicus brief discussed homosexuality as a "healthy and natural expression of love"<sup>261</sup> but focused on a more traditional understanding of privacy than evidenced in the LRP brief. Lambda's brief continued on to primarily focus on the failure of Georgia's sodomy law to be narrowly tailored to any state interest. Here Lambda's brief wandered further from the right to be sexual, as alleged by Dunlap. Finally, NGRA's brief argued that state police power does not extend to regulating moral behavior.<sup>262</sup> This can be read, as suggested by Dunlap, as a very narrow demand that the police leave LGBT people alone. Whatever else they can do, the police cannot enter the bedroom. Another way to understand NGRA's brief is through the literal image of the police officer standing in Michael Hardwick's bedroom. Understood through this lens, NGRA's focus on the reach of police power is a visceral image of how the state denies the dignity and moral integrity of same-sex intimacy.

#### IV. CONTINUED VIABILITY OF THE RIGHT TO BE SEXUAL

By tracing the development of LGBT rights from an organizational perspective, Parts II and III of this Article show the key role that the right to be sexual played in early LGBT legal activism. The idea of LGBT rights emerged and was shaped by the right to be sexual as much as by the doctrinal categories of privacy and equal protection. With this history as background, we are better equipped to understand the ongoing tensions in LGBT rights today.

In constitutional litigation on LGBT rights, we see an ongoing tension between ideas of formal legal equality (LGBT rights) and respect for dignity and autonomy (the right to be sexual). The right to be sexual is implicit in *Romer's* rejection of animus,<sup>263</sup> *Lawrence's* emphasis on equal liberty and

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<sup>260</sup> Brief for Lesbian Rights Project et al. as Amici Curiae Supporting Respondents, *supra* note 11, at 9.

<sup>261</sup> Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Def. & Educ. Fund, Inc. et al. at 3, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

<sup>262</sup> Brief of Nat'l Gay Rights Advocates et al. as Amici Curiae Supporting Respondents at 11, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

<sup>263</sup> See *Romer v. Evans*, 517 U.S. 620, 624, 632 (1996) (declaring that Colorado's state constitutional amendment, which repealed ordinances that prohibited discrimination on the basis of sexual orientation, is "inexplicable by anything but animus").

autonomy,<sup>264</sup> and *Windsor* and *Obergefell*'s discussion of dignity.<sup>265</sup> Together, these opinions reflect a new regime of respect for the autonomy of sexual conduct. Most importantly, all four of these opinions reject a mode of constitutional inquiry that treats equality and liberty as separate and distinct inquiries.<sup>266</sup> While none of these opinions explicitly recognize the right to be sexual, the growing recognition of liberty and autonomy carry with them an inherent recognition of the right to be sexual.

In *Bowers v. Hardwick*, the Supreme Court explained that there was no history of protecting homosexual sodomy in the United States.<sup>267</sup> In fact, quite the opposite, the Court claimed that homosexual sodomy had long been singled out and criminalized by every state in the country.<sup>268</sup> Based on this view of the history, *Hardwick* described the claim that sodomy laws violated the right to privacy as “at best, facetious.”<sup>269</sup> As a formal legal matter, the opinion was only about whether privacy extended to consensual sex between two adults in private. The Court rejected claims to formal equality, or the idea that lesbians and gays are “just like” everyone else. But *Hardwick* was also an expression of disgust towards lesbians and gays.<sup>270</sup> It was a deep-seated rejection of the right to be sexual. The lawyers understood that overturning *Hardwick* would not be simply a matter of changing privacy doctrine.<sup>271</sup> It also required winning respect for the dignity of LGBT people.

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<sup>264</sup> See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its special and in its more transcendent dimensions.”).

<sup>265</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.” (citation omitted)); *United States v. Windsor*, 570 U.S. 744, 763 (2013) (considering the notion that same-sex couples aspire to have the same dignity as heterosexual couples in lawful marriage).

<sup>266</sup> See Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1134 (2004) (arguing the Supreme Court in *Lawrence* recognized the synergy between the doctrines of equal protection and due process).

<sup>267</sup> See 478 U.S. 186, 192–94 (1986) (analyzing the history of sodomy laws).

<sup>268</sup> *Id.* at 193. However, Bill Eskridge challenges that conclusion, explaining that Kansas was the first state to single out same-sex conduct in 1969. ESKRIDGE, *supra* note 36, at 165. Prior to 1969, sodomy laws included all sexually deviant behavior and data suggests that most arrests were not for consensual same-sex adult intimacy. *Id.* at 98.

<sup>269</sup> *Hardwick*, 478 U.S. at 194.

<sup>270</sup> See MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 77–84 (2010) (discussing principle of disgust within *Hardwick*).

<sup>271</sup> For law review articles on this point from two prominent lawyers in the LGBT rights movement, see Hunter, *supra* note 193, at 533 (describing a “gay-friendly deconstruction of the new sexual orientation categories”); Abby R. Rubinfeld, *Lessons Learned: A Reflection upon Bowers v. Hardwick*, 11 NOVA L. REV. 59, 68 (1986) (stressing the importance of grass-roots organizing and education to overturn *Hardwick* in the future).

In *Romer v. Evans*, the Supreme Court indicated a new willingness to consider the claims of LGBT people.<sup>272</sup> Justice Kennedy's majority opinion described the harm imposed by Colorado's Amendment 2 in broad, sweeping language: "[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."<sup>273</sup> The majority opinion is very short, uses no footnotes, and barely mentions sexuality at all.<sup>274</sup> As prominently pointed out by Justice Scalia in his dissent, the majority opinion did not mention or cite *Bowers v. Hardwick* at all.<sup>275</sup>

This short opinion is susceptible to at least two major readings. One reading is that *Romer* is a very narrow decision, barely changing existing equal protection precedent at all. On this reading, Amendment 2 was invalid because it was blatantly discriminatory.<sup>276</sup> Less overt discrimination might still pass muster. According to this narrow reading, *Romer* said nothing about laws that targeted sexual conduct. On the other hand, *Romer*'s discussion of animus supported a broader reading. Louis Seidman explained that "most discrimination against gay people rests at bottom on moral disapproval, which the Court has now recharacterized as irrational animosity."<sup>277</sup>

I argue that *Romer*'s discussion of animus offers tentative support for the right to be sexual. *Romer* is consistent with the principle that moral disapproval of sexual conduct is not a rational basis for the law.<sup>278</sup> Amendment 2 illegitimately defined a group for the sole purpose of casting them out from society.<sup>279</sup> This conclusion is particularly supported by the

<sup>272</sup> 517 U.S. 620 (1996).

<sup>273</sup> *Id.* at 632.

<sup>274</sup> One academic describes these characteristics of the opinion as "generative." Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 70 (1996).

<sup>275</sup> *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

<sup>276</sup> *See id.* at 635 (describing the breadth of Amendment 2 as incongruent with any alleged government interest). Several scholars have interpreted *Romer* in these terms. *See, e.g.*, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2317 (1997) (describing *Romer* as standing only for the "tentative" conclusion that "majorities cannot express overt hatred for groups"); Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 148 (1997) (describing *Romer* as "both narrow and shallow"); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257 (1996) (contending that *Romer* "does not significantly expand current law").

<sup>277</sup> Seidman, *supra* note 274, at 85. *See also* Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 93 (1997); *see also id.* (describing all laws singling out lesbians and gays as suspect based on an impermissible purpose analysis under *Romer*).

<sup>278</sup> Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on Romer v. Evans*, 82 MINN. L. REV. 833, 850 (1998).

<sup>279</sup> *See* Farber & Sherry, *supra* note 276, at 258 – 60 (explaining the background of *Romer* and the Supreme Court's ruling).

Supreme Court's refusal to use the rationale offered by the Colorado Supreme Court. Under the state court's approach, Amendment 2 was unconstitutional because it disabled lesbians and gays in the political process. The Supreme Court relied on animus instead of the political process doctrine, which necessarily implicated questions of morality.<sup>280</sup> In the broadest reading, *Romer* encompasses the relationship between equality, privacy, and bodily integrity in queer lives.<sup>281</sup>

*Lawrence v. Texas* explicitly overruled *Bowers v. Hardwick*, announcing a new era of judicial respect for lesbians and gays.<sup>282</sup> But the exact meaning of *Lawrence* was up for debate.<sup>283</sup> Particularly noteworthy was *Lawrence's* seeming rejection of the language of privacy for the language of liberty. In its opening lines, *Lawrence* announced: "The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."<sup>284</sup> Picking up on this language, some scholars went so far as to describe *Lawrence* as the gay rights movement's *Brown*.<sup>285</sup>

On this reading, *Lawrence's* invocation of liberty embraced respect for decisional autonomy. Noting that the opinion barely uses the word "privacy," Nan Hunter argued that *Lawrence* signals a move towards "a new principle of equal liberty."<sup>286</sup> *Lawrence* accomplished this partially by recasting the *Griswold* line of cases as about sexual activity, rather than the abstract decision to become a parent.<sup>287</sup> In so doing, *Lawrence* made consent and autonomy the touchstone of protection for sexual activity.

<sup>280</sup> Flagg, *supra* note 278, at 841.

<sup>281</sup> See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 219 (1996) (arguing that the Attainder Clause of the Constitution illuminates the opinion in *Romer* and the spirit of the Equal Protection Clause).

<sup>282</sup> Even critics who read *Lawrence* narrowly agreed that it was an important decision for LGBT rights. See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1401 (2004) ("The Court explicitly and unequivocally repudiated its prior jurisdictions in declaring that sodomy laws violate the U.S. Constitution." (footnote omitted)).

<sup>283</sup> In addition to the readings I suggest here, other scholars argued that *Lawrence* is based on tolerance or libertarianism. See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 21 (identifying libertarianism as an underlying principle in *Lawrence*); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004) (identifying tolerance as an underlying principle in *Lawrence*). *Lawrence's* meaning for morality as a justification for the law is also relevant, but there is greater agreement on that point that *Lawrence* only rejected "explicit morals-based rationales for lawmaking." Goldberg, *supra* note 193, at 1234–35 (footnote omitted).

<sup>284</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>285</sup> See, e.g., Tribe, *supra* note 193, at 1895 ("For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America.").

<sup>286</sup> Hunter, *supra* note 266, at 1104..

<sup>287</sup> *Id.* at 1110.

Other language in *Lawrence* suggested that it still relied on a “privacy [that] relegates sexuality to the home, the bedroom, and then into the closet.”<sup>288</sup> Katherine Franke argued that *Lawrence* embraced a “domesticated liberty.”<sup>289</sup> Although *Lawrence* repeatedly invoked liberty, “Justice Kennedy territorializes the right at stake as a liberty to engage in certain conduct in private.”<sup>290</sup> Franke contrasted the discussion of liberty in *Lawrence* with *Planned Parenthood v. Casey*, which she described as a “thick form of autonomy.”<sup>291</sup> In contrast, *Lawrence* “resuscitate[s] a very early, more limited, and more institutional version of the privacy right.”<sup>292</sup>

If *Hardwick* rejected the right to be sexual, *Lawrence* did not embrace it in full. But *Lawrence* does show a partial and tentative embrace of the right to be sexual. Two comparisons to *Hardwick* underscore this point. Most notably, *Lawrence* rejected the fundamental rights inquiry used by *Hardwick*.<sup>293</sup> *Hardwick* held that there was no fundamental right to sodomy because it was not “deeply rooted in this Nation’s history and tradition.”<sup>294</sup> *Lawrence* rejected *Hardwick*’s discussion of the history of sodomy regulation, but the decision in *Lawrence* did not rest on whether there was a fundamental right, rooted in the history and tradition of the nation.<sup>295</sup> Nan Hunter and Laurence Tribe both argued that in *Lawrence*, a newer model of substantive due process inquiry crystalized that turned the Court’s inquiry to whether a law imposed a dignitary burden.<sup>296</sup>

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<sup>288</sup> Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 397, 398 (2004). While Hunter is correct that *Lawrence* barely references “privacy” as a doctrinal principle, it frequently discusses “private” conduct.

<sup>289</sup> See Franke *supra* note 282, 1400 (arguing that *Lawrence* relies on “a narrow version of liberty that is both geographized and domesticated”).

<sup>290</sup> *Id.* at 1403.

<sup>291</sup> *Id.* at 1402.

<sup>292</sup> *Id.* at 1404.

<sup>293</sup> See Hunter, *supra* note 266, at 1107–14 (arguing that *Lawrence* more closely resembles Justice Stevens’s dissent in *Hardwick* than Justice Blackmun’s dissent in *Hardwick*); Tribe, *supra* note 193, at 1899 (“[T]he *Lawrence* Court . . . took the *Bowers* Court to task for the very way it had formulated the question posed for decision.”).

<sup>294</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (citing *Moore v. E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

<sup>295</sup> *Lawrence v. Texas*, 539 U.S. 558, 567–74 (2003) (criticizing discussion of history and morality in *Hardwick*).

<sup>296</sup> See Hunter, *supra* note 266, at 1122 (defining test in terms of arbitrariness of state action); Tribe, *supra* note 193, at 1936 (defining test in terms of state interference with primary relationships and associational rights).

*Lawrence* also makes equality far more important.<sup>297</sup> In *Hardwick*, the lower court dismissed a heterosexual couple because they were at no risk of persecution under the law.<sup>298</sup> The Supreme Court described the question before it as one of “homosexual sodomy,” even though the Georgia law in question was not gay specific.<sup>299</sup> In *Lawrence*, on the other hand, advocates deliberately challenged a law in a state that was gay specific. But the Supreme Court now expressly rejected a more limited equal protection-based decision.<sup>300</sup> Overturning the Texas law on this equal protection logic would have resulted in a sort of shallow, formalistic equality.<sup>301</sup> But the Court chose instead a deeper equality that was about the dignity of the couples involved.

Even to the extent that *Lawrence* can be described as using a privacy that relegates sexuality “into the closet,”<sup>302</sup> that privacy was only accepted because the Court also tentatively accepted the dignity of human sexuality. Here, I ask whether we can imagine an opinion in *Lawrence* that reached the same legal conclusion but with a similar tone of disgust for gay sex as evidenced in *Hardwick*. This counterfactual might be logically possible, but I argue that in practice it was impossible. Privacy does not prevent the state from regulating a great deal of conduct that it finds truly deviant.<sup>303</sup> It might be possible to imagine a *Lawrence* opinion that took a similar tone of moral distance to *Stanley v. Georgia*.<sup>304</sup> But even that *Lawrence* would be different from the one that we have. *Lawrence* only gets to where it does because of some partial acceptance of the dignity of human sexuality.

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<sup>297</sup> Some scholars interpreted *Lawrence* as primarily an equal protection decision. See, e.g., Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) (arguing that “*Lawrence* is more of an equal protection case than a substantive due process case). But *Lawrence* itself expressly rejects equal protection alone as a sufficient basis for its decision. *Lawrence*, 539 U.S. at 574–75.

<sup>298</sup> Kathy Wilde added this couple to the complaint to show the reach of the Georgia law. The couple claimed that they regularly violated the sodomy law and feared arrest. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 36, at 234–36.

<sup>299</sup> *Hardwick*, 478 U.S. at 191.

<sup>300</sup> *Lawrence*, 539 U.S. at 575 (“[T]he instant case requires us to address whether *Bowers* itself has continuing validity.”).

<sup>301</sup> Laurence Tribe argued that the question of whether sodomy laws formally applied to everyone or singled out same-sex sexual conduct was irrelevant because sodomy was so thoroughly culturally identified with gay people. Tribe, *supra* note 193, at 1905.

<sup>302</sup> Robson, *supra* note 288, at 398.

<sup>303</sup> Here, for example, it is relevant that *Lawrence* itself notes as a limit to the decision that it does not deal with prostitution. *Lawrence*, 539 U.S. at 578.

<sup>304</sup> See *Stanley v. Georgia*, 394 U.S. 557, 559, 566 (1969) (overturning arrest for private possession of obscene material at home but suggesting such material might be without real worth).

However, *Lawrence* also signals deep ambivalence on the Court over the meaning of sexuality. I think the Court does not even recognize this tension. Franke reads *Lawrence*'s description of the deep and intimate bonds between a couple as signaling a limit to the reach of liberty in *Lawrence*. But the Court uses this language as a signal of how sexual autonomy is a basic part of human dignity. Both of these readings are correct. Like Franke, I fear that this logic can lead us down a road to accepting a domesticated liberty that at best accepts a right to be sexual for only some people. But I also argue that we can exploit this tension, using the Court's implicit and partial acceptance of the right to be sexual as a tool to further expand it.

In *United States v. Windsor* and *Obergefell v. Hodges*, we see how the tension between the approaches of LGBT rights and the right to be sexual continue to shape Supreme Court doctrine.<sup>305</sup> If liberty is the dominant theme of *Lawrence*, dignity is the dominant theme of *Windsor*. But the locus of that dignity has also shifted. *Lawrence* began a shift from the individual to the couple. In *Windsor*, individual LGBT people disappear entirely. The decision is now entirely about the couple, and sexuality is almost entirely absent from the pages of the opinion.<sup>306</sup> Moreover, doctrinally, the opinion can be read as a narrow decision based on federalism rather than anything else.<sup>307</sup> In this sense, *Windsor* can be read as a retreat further into the domesticated liberty that Franke described in *Lawrence*.

On the other hand, the discussion of dignity is potentially a signal of a broader transformation. On this reading, the liberty of *Lawrence* becomes the dignity of *Windsor* and represents a broader willingness of the Court to consider sexual conduct as a basic part of human identity. *Obergefell* continues this trajectory. On the one hand, it is even more couched in the notion of protecting the domesticated vision of marriage than *Windsor*. On the other hand, *Obergefell* applies a more robust analysis to the state's justifications for restricting activity based on sexual identities.

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<sup>305</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (“The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”) (citations omitted). See *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (explaining federalism concerns inherent in issue of marriage).

<sup>306</sup> See Ben-Asher, *supra* note 21, at 258 (“[T]he legal homosexual is now consistently represented as a ‘same-sex couple’ . . . while the term ‘homosexual’ has virtually disappeared.”) (footnote omitted).

<sup>307</sup> Justice Roberts stresses this reading of the opinion. See *id.* at 261 (“[T]he dissenters emphasized that, after *Windsor*, it is still legitimate at the state level to confer dignity on opposite-sex couples but not same sex couples.”) (footnote omitted); see also *Windsor*, 136 S. Ct. at 2696 (Roberts, C.J., dissenting) (noting that the Court was not decided the question of whether states may continue to “utilize the traditional definition of marriage”).

## CONCLUSION

Inherent to the history of LGBT rights is the tension between claims to being just like everyone else and claims to being different and deserving of autonomy and respect. This Article offers deeper insight into how that tension has shaped debates within the LGBT legal movement, and ultimately how that tension has shaped the development of constitutional law.

Lawyers at the LGBT legal organizations exploited the ambiguity between tolerance and the right to be sexual. Tolerance demanded merely that the state ignore deviant conduct. The right to be sexual defined allegedly deviant conduct as a healthy and natural part of the human experience to be valued and nurtured. Tolerance has been described as too limited a justification for real social change, but this Article shows how tolerance was not merely a trap.<sup>308</sup> Tolerance was a hook to begin a dialogue on dignity and LGBT rights. Before LGBT people could be accepted as just like everyone else, they had to be accepted for their right to be different.

I do not mean to suggest that the courts are likely to embrace the right to be sexual in such explicit terms. But even without such explicit embrace of the right to be sexual, this Article has shown how doctrine regarding privacy and equality has subsumed at least some of the ideas generated by the right to be sexual. Thus, the history discussed in this Article suggests the key role that the right to be sexual could continue to play in new claims to LGBT rights.

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<sup>308</sup> Cf. WALTERS, *supra* note 172, 260–70 (discussing “the tolerance trap”).

