Shahar v. Bowers: That Girl Just Didn't Have Good Sense!

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I. Introduction

Ms. Robin Shahar was employed with the Office of the Attorney General of Georgia during the summer preceding her final year of law school, 1990.[1] In September 1990 the Attorney General offered her a position as Staff Attorney to begin after her law school graduation, and she accepted the offer.[2] During this time, Ms. Shahar was planning a wedding with her partner, who is also a woman.[3] The wedding was to be performed by their rabbi under the auspices of their synagogue and was to take place in late July of 1991.[4] The Attorney General learned of the wedding plans and terminated the employment offer in July, citing her upcoming marriage as the reason for the termination.[5]

Shahar brought action against the Attorney General, claiming violation of her rights of intimate and expressive association, freedom of religion, equal protection and substantive due process.[6] The district court entered summary judgment for the Attorney General, and Shahar appealed.[7] The Eleventh Circuit affirmed summary judgment on equal protection, due process and free expression of religion grounds and remanded the case for reconsid-

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* J.D. expected 1999, University of Minnesota Law School. B.A. 1986, Augustana College. I want to thank Robin Shahar for her commitment to a life of integrity and her perseverance through years of litigation in an attempt to achieve justice. Ms. Shahar's courage to live unapologetically in the face of such tremendous consequences is an inspiration to those of us who struggle to find the courage to live and love and work with integrity. Thanks also to editors Jill Robertson and Joe Thiegs, and to the *Law and Inequality* staff and editorial board.

1. *See* Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See* Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993), *aff'd*, 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

7. *See id.*

eration of the associative interest claims.[8] The Attorney General requested a hearing by the circuit court en banc.[9] The panel's decision was vacated,[10] and the en banc court affirmed the district court's summary judgment for the defendant.[11] The court found that the interests of the Attorney General, as employer, outweighed Ms. Shahar's constitutional interests.[12]

This case raises several important issues. First, what inferences may be appropriately drawn from the existence of gay and lesbian relationships and from expressions of those relationships? How do such inferences effect presumptions and burdens of proof, and to what extent are these inferences determinative? If inferences may be unquestionably drawn and used to deny the constitutional rights of lesbians and gay men, what must be done to ensure adequate protection and democratic participation for sexual minorities? This Article critically examines the *Shahar* decision and asserts that the court allowed impermissible inferences and improperly dismissed Shahar's constitutionally protected rights. Part II briefly surveys the current legal status of sexual minorities and introduces relevant constitutional issues. Part III states the holding and reasoning of the case. Part IV critically examines the court's conclusions, focusing on the inferences the court draws from Shahar's relationship and how those inferences are used to discredit her and to afford complete deference to the Attorney General. Finally, the Article suggests legislative and judicial protections for sexual minorities.

II. Legal Issues Affecting Sexual Minorities

A brief survey of legal issues affecting sexual minorities includes three distinct areas: the criminalization of sexual relations, anti-discrimination measures and legal recognition of same-sex relationships.[13] Sodomy laws are used against gay and lesbian citizens[14] not only through criminal prosecution, but to justify dis-

8. *See* Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995), *vacated*, Shahar v. Bowers, 78 F.3d 499 (11th Cir. 1996).

9. *See Shahar*, 78 F.3d at 500.

10. *See id.*

11. *See Shahar*, 114 F.3d at 1098.

12. *See id.*

13. *See* MORRIS B. KAPLAN, SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE 14-15 (1997). Hate speech could also be included but is beyond the scope of this Article.

14. The author intends the use of the word "citizen" to express the ideal of full and equal participation of persons in a democratic society, as expressed by Morris B. Kaplan in *Sexual Justice: Democratic Citizenship and the Politics of Desire.*

crimination and deny their constitutional rights.[15] Several states have enacted measures against discrimination, yet the majority of jurisdictions do not prohibit discrimination on the basis of sexual orientation. And while domestic partnership is recognized in some locales, lesbian and gay couples are denied the legal status of marriage and ensuing rights and benefits. "Lesbian and gay citizens . . . [are] subject to pervasive legal disabilities and vulnerable to social and economic retaliation for the exercise of civil rights."[16] These legal disabilities erode the constitutional and statutory protection available to gay and lesbian citizens.

A. The Criminalization of Sexual Relations

The criminalization of sexual relations has been accomplished through laws against sodomy, also referred to as crimes against nature,[17] or "the abominable crime of buggery."[18] As of 1961, every state in the union proscribed sodomy.[19] Over the next two decades, many states adopted the *Model Penal Code*,[20] which does not proscribe sodomy, thereby repealing their sodomy laws.[21] Other states have repealed sodomy statutes expressly,[22] and candidates recently debated that issue in Georgia,[23] the state in which the former Attorney General Michael Bowers and Ms. Shahar re-

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> [E]quality for sexual minorities includes a lot more than just freedom from harassment by criminal laws and police. Lesbian and gay oppression results from pervasive legal disabilities that sanction and reinforce social discrimination and subordination. Indeed, the legal and social status of homosexuals in our society amounts to a condition of second-class citizenship. Democratic citizenship extends far beyond formal equality before the law and access to abstract rights. Citizenship is a political status; equality entails the ability to participate on the same terms as others in collectively shaping the conditions of common life.

KAPLAN, *supra* note 13, at x.

15. *See* William B. Rubenstein, *The Stonewall Anniversary: 25 Years of Gay Rights*, 21 HUM. RTS. Q., Summer 1994, at 18, 19.

16. KAPLAN, *supra* note 13, at 227.

17. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1411 (West 1989); IDAHO CODE § 18-6605 (1997); MASS. ANN. LAWS ch. 272, § 34 (Law. Co-op); N.C. GEN. STAT. § 14-177 (1997).

18. S.C. CODE ANN. § 16-15-120 (Law Co-op. 1985).

19. *See* Rubenstein, *supra* note 15, at 19.

20. Model Penal Code § 213.2 & commentary at 364, 366-67 (Official Draft & Revised Comments 1980).

21. *See* Rubenstein, *supra* note 15, at 19.

22. The Rhode Island legislature amended section 11-10-1 of the Rhode Island General Laws. S. 2819, H. 7585 (R.I. 1998).

23. *See* Christina Nifong, *Georgia Adultery Debate Shows Shift in Morality: Candidate's Admitted Affair Stirs Debate on Old and Unenforced Laws Against Sodomy*, CHRISTIAN SCIENCE MONITOR, June 27, 1997, at 3 (describing the movement toward removing adultery, fornication and sodomy statutes); *Throw Out State's Archaic Sex Laws*, ATLANTA CONST., June 17, 1997 (advocating the repeal of adultery, fornication and sodomy laws).

side. Sodomy laws remain on the books in eighteen states: five of these states proscribe only same-sex sodomy;[24] thirteen prohibit sodomy across the board.[25] The laws allow for sentences ranging from thirty days to life imprisonment.[26]

Sodomy has various definitions. Some definitions refer to the gender of the parties involved;[27] others refer only to particular acts.[28] Some definitions apply only to homosexual[29] couples,[30] while others apply only to heterosexual couples in certain activities.[31] with an animal.[32] Under this definition, oral sex between male-female couples constitutes sodomy, whereas oral sex between

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24. *See* ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. STAT. ANN. §§ 21-3501, -3505 (1995); MD. ANN. CODE art. 27, § 554 (1996) (Unnatural or Perverted Sexual Practices), *construed in* Schochet v. State, 580 A.2d 176 (Md. 1990) (holding that the statute did not apply to consensual, noncommercial heterosexual activity); MO. ANN. STAT. § 566.010, .090(1) (West 1999); OKLA. STAT. ANN. tit. 21 § 886 (West 1983 & West Supp. 1999) (Crime against nature), *construed in* Post v. State, 715 P.2d 1105, 1109-10 (Okla. Crim. App. 1986) (holding the statute unconstitutional as it applied to heterosexuals but expressly not reaching the question of its application toward homosexuality).

25. *See* ALA. CODE §§ 13A-6-60, -65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411 to 1412 (West 1989); FLA. STAT. ANN. § 800.02 (West 1992 & West Supp. 1999); IDAHO CODE § 18-6605 (1997); LA. REV. STAT. ANN. § 14:89 (West 1986); MASS. LAWS. ANN. ch. 272, § 34 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 750.158 (West 1991); MINN. STAT. § 609.293 (1998); MISS. CODE ANN. § 97-29-59 (1994); N.C. GEN. STAT. § 14-177 (1997); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie 1996).

As this Article was in the publication process, the Georgia Supreme Court declared Georgia's sodomy law, GA. CODE ANN. § 16-6-2 (1996 & Michie Supp. 1998), unconstitutional. *See* Powell v. State, No. S98A0755, 1998 WL 804568 (Ga. Nov. 23, 1998); *see also infra* note 275 and accompanying text (reflecting on the significance of the *Powell* decision).

26. *See supra* note 25. In Georgia, sodomy was a felony and was punishable by 1 to 20 years imprisonment. *See* GA. CODE ANN. § 16-6-2.

27. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1712 (3d ed. 1992); 2 FUNK & WAGNALLS NEW COMPREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1193 (1980).

28. *See, e.g.*, BLACK'S LAW DICTIONARY 968 (6th ed. 1983).

29. The word "homosexual" is used intentionally throughout this Article in two distinct contexts. When the language of the court has focused on "homosexuals," the author has used the same word to retain the tone of the opinion. The author also uses the symmetrical language of "homosexuals" and "heterosexuals" in an attempt to emphasize the asymmetrical treatment these groups receive.

30. *See, e.g.*, 2 FUNK & WAGNALLS NEW COMPREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 27, at 1193. Other sources define sodomy more broadly as unnatural or abnormal sexual intercourse without reference to the sex of the parties, but further clarify that sodomy is especially sex between male persons. *See, e.g.*, 15 THE OXFORD ENGLISH DICTIONARY 925 (2d ed. 1989); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1385 (1968).

31. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 27, at 1712 (regarding oral sex).

32. *See id.*

male-female couples constitutes sodomy, whereas oral sex between same-sex couples does not.[33] The definition does not include lesbian erotic activities of any kind.[34]

Sodomy also has various legal definitions.[35] The Georgia sodomy law did not apply to sex between women until it was amended in 1968.[36] The most recent version of the law proscribed oral and anal sex without reference to the gender of either party.[37]

Although by definition there is no correlation between sodomy and sexual orientation, the word "sodomy" has become a metonym for "homosexual."[38] Judicial opinions have stated that "[s]odomy is an act basic to homosexuality"[39] and have referred to sodomy as "the conduct that defines the class"[40] of homosexuals. Commentators have noted that the indeterminacy of the definition of sodomy "allows those who oppose gay rights to equate homosexuality with a vaguely repulsive act and to simultaneously remove het-

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33. *See id.*

34. *See id.*

35. *Compare, e.g.*, ARK. CODE ANN. § 5-14-122 (Michie 1997) (applying only to certain sexual acts with a person of the same sex or with an animal), *with* GA. CODE ANN. § 16-6-2 (1996 & Supp. 1998) (including oral and anal sex without reference to the gender of the parties), *with* ARIZ. REV. STAT. ANN. §§ 13-1411 (West 1989) ("the infamous crime against nature"), -1412 ("any lewd or lascivious act").

36. GA. CRIM. CODE § 26-5901 (1933), *construed in* Thompson v. Aldredge, 200 S.E. 799 (Ga. 1939) (holding that sodomy, as defined by Georgia state law, could not be accomplished between two women). The law defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." GA. CRIM. CODE § 26-5901 (1933). The law was amended in 1968. *See* Bowers v. Hardwick, 478 U.S. 186, 201 n.1 (1986) (Blackmun, J., dissenting) (referencing the change in Georgia's sodomy law).

37. *See* GA. CODE ANN. § 16-6-2, *declared unconstitutional in* Powell v. State, No. S98A0755, 1998 WL 804568 (Ga. Nov. 23, 1998). The statute provided that:

> (a) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

Id.

38. *See* Janet E. Halley, *Reasoning About Sodomy: Act And Identity In And After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1737 (1993). Evidence does not support a correlation between sodomy and sexual orientation. One study found that "eighty percent of married couples practiced oral and/or anal sex; that ninety-five percent of American men had engaged in oral sex; and that homosexuals were no more likely than heterosexuals to violate sodomy laws." Teresa M. Bruce, *Doing The Nasty: An Argument For Bringing Same-Sex Erotic Conduct Back Into The Courtroom*, 81 CORNELL L. REV. 1135, 1143 (1996) (citing PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 387 (1988)).

39. Watkins v. U.S. Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting), *vacated*, 875 F.2d 699 (9th Cir. 1989).

40. Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

erosexuals entirely from the definition of that act."[41] This vagueness of definition has become a source of "rhetorical and political power" for anti-gay initiatives and decisions.[42]

Courts have relied on the legitimacy of states to proscribe "homosexual sodomy," confirmed by the Supreme Court in *Bowers v. Hardwick*,[43] to rule against gay men and lesbians in non-sodomy cases.[44] "[S]odomy laws are given as the reason, for instance, for depriving lesbians and gay men of government jobs . . . and . . . are used . . . against lesbian and gay litigants in nearly every possible legal context."[45] The D.C. Circuit Court of Appeals reasoned that since homosexuals are defined by the act of sodomy, and since the government can outlaw sodomy, it follows that the government is free to discriminate against homosexuals.[46]

Equating sodomy with homosexuality has the effect of exonerating heterosexuals, as evidenced in *Bowers v. Hardwick*,[47] in which Attorney General Michael Bowers defended Georgia's sodomy statute. The case was originally brought by two parties: Hardwick, who had been arrested for oral sex with another man, and a heterosexual couple.[48] The heterosexual couple's claim was dismissed for lack of standing,[49] and the Supreme Court refused to rule on sodomy as it

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41. Bruce, *supra* note 38, at 1150; *see also* Halley, *supra* note 38.

> The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity. Designating homosexual identity as the personal manifestation of sodomy confirms its subordination. At the same time, the ways in which homosexual identity is not sodomy are subject to an organized forgetting. And heterosexual identity becomes superordinate not because it is absolutely immune, but because it is *intermittently and provisionally* immune from regulation under the sodomy statutes. This instability can be a source of rhetorical and political power.

Halley, *supra* note 38, at 1722 (emphasis in original).

42. Halley, *supra* note 38, at 1722.

43. 478 U.S. 186 (1986).

44. *See* Rubenstein, *supra* note 15, at 19 (finding that sodomy laws allow homosexuals to be branded as criminals).

45. *Id.* "Equating homosexuality with sodomy and sodomy with criminal activity figures at the core of governmental discrimination against homosexuals. Police justified their raids on gay bars in the 1950s and 1960s, for example, on the ground that criminal activity might result from homosexual association." Bruce, *supra* note 38, at 1149 (citation omitted).

46. *See Padula*, 822 F.2d at 97 (supporting the FBI's refusal to hire the plaintiff because he was homosexual).

47. 478 U.S. 186 (1986).

48. *See Bowers*, 478 U.S. at 188 n.2 (citing heterosexual couple John and Mary Doe as original co-plaintiffs).

49. *See id.* (affirming the district court's dismissal on standing grounds). The couple had not been arrested. *See id.*

applied to both heterosexual and homosexual couples.[50] The Court explicitly stated that the ruling applied only to what it called "homosexual sodomy,"[51] even though the statute makes no such distinction.[52] Once homosexual orientation has been reduced to the act of sodomy and heterosexual acts have been removed from the definition of sodomy, discrimination against gay and lesbian citizens can be easily justified.[53]

B. Anti-Discrimination Law

Currently, anti-discrimination law inadequately protects lesbian and gay citizens from discrimination. Statutory prohibition of discrimination based on sexual orientation exists only in limited jurisdictions, and its status in some is tenuous.[54] Constitutional jurisprudence may also fail to guarantee gay and lesbian citizens the same fundamental rights and protections enjoyed by heterosexuals.[55] In this environment, concealing one's non-heterosexual orientation becomes a prerequisite for retaining equal citizenship.[56] "[E]quality for unpopular minorities can be secured only if they are protected against retaliation for exercising their civil rights by laws that prohibit discrimination against them in em-

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50. *See id.*

51. *Id.*

52. *See* GA. CODE ANN. § 16-6-2 (1996 & Supp. 1998) (penalizing oral and anal sex, without reference to the gender of either party), *declared unconstitutional in* Powell v. State, No. S98A0755, 1998 WL 804568 (Ga. Nov. 23, 1998).

53. *See infra* Part IV.B.3.

54. Voters have tried to prevent or repeal anti-discrimination laws in several jurisdictions, including Colorado, Cincinnati and Maine. *See* COLO. CONST. art. II, § 30b (held unconstitutional in Romer v. Evans, 517 U.S. 620 (1996)); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); Carey Goldberg, *Maine Voters Repeal Gay Rights Law*, N.Y. TIMES, Feb. 12, 1998, at A1.

55. *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985) (denying First Amendment protection to Rowland's statement that she was bisexual, and denying equal protection because the trial court did not identify whether Rowland was fired for her bisexuality or because she talked about it); *see also* Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986) (refusing to rule on a sodomy statute that applied to persons of any sexual orientation, and instead limiting its holding to "homosexual sodomy"); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974) (holding that denying same-sex couples the right to marry did not violate equal protection); William Rubenstein, *Don't Ask, Don't Tell*, 79 A.B.A. J. 55 (arguing that a policy that permits speech about sexual orientation only if the speech reveals heterosexual, and not homosexual, orientation constitutes viewpoint censorship and is unconstitutional). *But see* Baehr v. Miike, No. CIV 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996) (holding the marriage statute, as construed, to deny marriage licenses to homosexual couples unconstitutional on equal protection grounds).

56. *See* Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993) ("[S]ilence and denial have been the linchpins of second-class status.").

ployment, housing, education, and other critical areas of social and economic activity."[57]

1. Statutory Law and Constitutional Amendments

Eleven states,[58] the District of Columbia[59] and more than 200 municipalities[60] have enacted laws prohibiting discrimination on the basis of sexual orientation. Voter referenda have challenged many of these statutes, sometimes leading to the repeal of the new anti-discrimination laws.[61] Colorado is one example.[62] Several cities, including Aspen,[63] Boulder[64] and Denver,[65] enacted anti-discrimination statutes that protect sexual minorities from discrimination in employment, housing, education and public accommodations.[66] By referendum, voters amended the state constitution to provide that neither the state nor any municipality shall enact legislation entitling a person to claim protected status based on homosexual orientation or conduct.[67] The amendment would not only impact existing laws, but would also make any further legislation possible only by first re-amending the constitution.[68] In

57. KAPLAN, *supra* note 13, at x.

58. Ten states currently have such laws in force: California (enacted in 1992), CAL. LAB. CODE §§ 1101, 1102, 1102(1) (West 1989 & Supp. 1999); Connecticut (1991), CONN. GEN. STAT. ANN. §§ 46a-81a to -81r (West 1995); Hawaii (1991), HAW. REV. STAT. §§ 368-1, 378-2 (1993 & Supp. 1998); Massachusetts (1989), MASS. ANN. LAWS, ch. 151B, § 3(6) (Lexis Supp. 1998); Minnesota (1993), MINN. STAT. § 363.03 (1998); New Hampshire (1997), 1997 N.H. REV. STAT. ANN. §§ 354-A:1 to 17 (Lexis Supp. 1998); New Jersey (1992), N.J. STAT. ANN. § 10:5-12 (West 1993); Rhode Island (1995), 1995 R.I. GEN. LAWS §§ 28-5-2 to 41 (1995 & Lexis Supp. 1998); Vermont (1992), VT. STAT. ANN. tit. 21, § 495 (Supp. 1998); Wisconsin (1982), WIS. STAT. ANN. §§ 111.31-32 (1997). Maine enacted an anti-discrimination law in 1997, but it was repealed by a "people's veto" referendum Feb. 10, 1998. *See* Carey Goldberg, *Maine Voters Repeal Gay Rights Law*, N.Y. TIMES, Feb. 12, 1998, at A1.

59. *See* D.C. CODE ANN. tit. 1, § 2512, 2515, 2519-20, 2533 (1992).

60. *See American Civil Liberties Union Briefing Paper*, No. 18 (last modified Oct. 27, 1997) <http://www.aclu.org/library/pbp18.html> [hereinafter ACLU Briefing Paper].

61. *See, e.g.*, Goldberg, *supra* note 58, at A1.

62. *See* Romer v. Evans, 517 U.S. 620, 623-26 (1996) (holding Colorado Constitutional Amendment, COLO. CONST. art. II § 30b, unconstitutional).

63. *See* ASPEN, COLO., MUN. CODE § 13-98 (1977).

64. *See* BOULDER, COLO., REV. CODE §§ 12-1-1 to -11 (1987).

65. *See* DENVER REV. MUN. CODE ch. 28, Art. IV §§ 28-91 to -116 (1991).

66. *See Romer*, 517 U.S. at 623-24 (1996).

67. *See* COLO. CONST. art. II § 30b.

68. *See Romer*, 517 U.S. at 624 ("[The amendment] prohibits all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians.").

Romer v. Evans,[69] the U.S. Supreme Court struck down this amendment in a rare rational basis defeat. Under a rational basis analysis of equal protection, the government must show that the law in question is rationally related to a legitimate government purpose.[70] The amendment failed to meet the legitimacy requirement. The Court stated that equal protection means "at the very least . . . that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,"[71] and held that

> Amendment 2 . . . inflicts on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed . . . .
>
> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.[72]

Currently, sexual minorities living in localities where state or local anti-discrimination statutes have not been enacted have no protection against discrimination based on sexual orientation. Pending federal legislation would prohibit employment discrimination based on sexual orientation.[73] The passage of the federal Em-

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69. 517 U.S. 620 (1996).

70. *See id.* at 631.

71. *Id.* at 634 (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (emphasis in original). The Supreme Court has held that private biases are not a legitimate ground for governmental interests. *See Romer*, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Palmore v. Sidoti, 466 U.S. 429 (1984); Department of Agric. v. Moreno, 413 U.S. 528 (1973).

72. *Romer*, 517 U.S. at 635 (1996). The state also asserted a claim that the amendment protected First Amendment freedom of association interests of landlords, employers and others who have religious or personal objections to homosexuality. *See id.* The Court, however, rejected the argument as being overbroad and not rationally related to the freedom of association interest. *See id.*

73. *See* Employment Non-Discrimination Act, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act, S. 869, 105th Cong. (1997). The Employment Non-Discrimination Act of 1996 was defeated by a 49-50 vote in the Senate. 142 CONG. REC. S10,139 (daily ed. Sept. 9, 1996) (Rollcall Vote No. 281 Leg.). At a recent hearing before the Senate Labor and Human Resources Committee, no witnesses came forward to testify against the bill. *See* Winnie Stachelberg, *Legislative Recap: Highlights of the First Half of the 105th Congress*, HUM. RTS. CAMPAIGN Q., Winter 1998, at 14-15. "'My staff scoured the country for witnesses with differing opinions, to no avail . . . . Even those who had expressed a desire to testify [against it] changed their minds.'" *Id. at* 15 (quoting Senator Jeffords, Chair of the Senate Labor and Human Resources Committee); *see also The Employment Non-discrimination Act of 1997: Hearings on S. 869 Before the Senate Labor and Human Resources Committee.*, 105th Cong., 1997 WL 664848 (statement of Christopher E. Anders); WL 667695 (statement of Oliver Thomas); WL 667710 (statement of James Jeffords); WL 667731 (statement of Raymond W. Smith); WL 667735 (statement of Elizabeth Birch); WL 673750 (statement of David N. Horowitz); WL 753310 (statement of Chai R. Feldblim) (F.D.C.H.) (testifying in support of the

ployment Non-Discrimination Act[74] would provide legal protection against employment discrimination for persons of any sexual orientation.[75]

2. Constitutional Issues

When discrimination results from governmental action, gay men and lesbians may bring constitutional claims, including rights to intimate and expressive association,[76] free speech and equal protection.

a. First Amendment Guarantees: Freedom of Intimate and Expressive Association

Rights to intimate and expressive association are derived from the First Amendment free speech and free assembly provisions.[77] Courts employ strict scrutiny when considering First Amendment claims: the government action at issue must be narrowly tailored to achieve a compelling governmental interest.[78] When the government acts as employer, rather than as sovereign, the court uses a less stringent standard that balances the plaintiff's constitutional interest against the governmental interest as an employer.[79] A public employer is justly concerned with the effective and efficient functioning of the government, and "review of every personnel decision made by a public employer could . . . hamper the performance of public functions."[80] However, the government's interest as an employer does not "differ significantly" from its

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bill).

74. H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997).

75. *See* Employment Non-Discrimination Act, H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997). Additionally, protection may be available for federal employees. President Clinton issued an Executive Order on May 13, 1998, prohibiting discrimination in federal employment based on sexual orientation. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (1998).

76. *See infra* note 175.

77. *See* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 228 (Leonard W. Levy et al. eds., Supp. I 1992).

78. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (holding that when a government regulation burdens free exercise of religion, the government regulation must pursue a particularly important governmental goal, and an exemption from the regulation would substantially hinder the fulfillment of that goal); NAACP v. Alabama, 357 U.S. 449 (1958) (applying strict scrutiny in assessing associational rights of NAACP members). *But see* Employment Div. v. Smith, 494 U.S. 872 (1990) (limiting the exemption rule to unemployment compensation cases).

79. *See* Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2349 (1996); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (applying a balancing test to burdens on First Amendment rights when the government acted as employer).

80. Rankin v. McPherson, 483 U.S. 378, 384 (1987).

interest in regulating the citizenry in general.[81] Public employees may not be compelled to relinquish the First Amendment rights they normally enjoy as citizens.[82]

The right to intimate and expressive[83] association calls forth values of self-identity, personal choice and expression.[84] Constitutional protection guarantees the right to express one's thoughts and opinions through speech, one's religious beliefs through religious practice, and one's sense of intimacy and belonging through intimate relationships.[85]

Identifying oneself as gay or lesbian is an expression of one's identity.[86] As Justice William Brennan noted with respect to a public employee who was fired after confiding in a co-worker that she was bisexual, "it is realistically impossible to separate [one's] spoken statements from [one's] status."[87] Penalizing an employee for coming-out speech "would make the promise of equality a sham for lesbian and gay citizens, comparable to denying religion-based protection to Jews who wear yarmulkes or Christians who wear crosses."[88]

The choice of one's intimate partner and the choice to marry are also expressions of identity.[89] Freedom of intimate association protects "certain kinds of highly personal relationships" such as marriage and family.[90] The denial of marriage for same-sex couples "limit[s] homosexuals' opportunities for expressive self-identification."[91] "Protecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty."[92]

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81. *Pickering*, 391 U.S. at 568.

82. *See, e.g., id.* (stating that teachers may not be constitutionally compelled to relinquish First Amendment rights to comment on matters of public interest associated with the operation of the public schools in which they work).

83. Freedom of expressive association protects "the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

84. *See* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 783-84 (Leonard W. Levy et al. eds., 1985).

85. *See Roberts*, 468 U.S. at 618-22.

86. *See infra* Part II.B.2.c.

87. *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1016 n.11 (1985) (Brennan, J., dissenting).

88. Hunter, *supra* note 56, at 1718.

89. *See* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 84, at 784. "[M]arriage itself takes on special significance for its expressive content as a statement that the couple wish to identify with each other." *Id.*

90. *Roberts*, 468 U.S. at 618.

91. ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 84, at 788.

92. *Roberts*, 468 U.S. at 619.

b. Equal Protection

A governmental action will be upheld under equal protection review if it is rationally related to a legitimate governmental interest.[93] The scrutiny is heightened if there is a suspect classification, such as race, national origin[94] or gender.[95] Federal courts have not applied heightened scrutiny to classifications based on sexual orientation.[96] However, a classification that distinguishes between same-sex and opposite-sex couples may be regarded as a gender classification.[97] The Hawaii Supreme Court held, in *Baehr v. Lewin*, that denying marriage to same-sex couples constituted sex-based classification, invoking strict scrutiny.[98]

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93. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (applying rational basis in absence of any suspect classification).

94. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (employing strict scrutiny to assess discrimination based on race).

95. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (suggesting intermediate scrutiny for gender discrimination).

96. In *Romer v. Evans*, the Supreme Court did not reach the question of whether to apply heightened scrutiny; government action failed a rational basis inquiry. 517 U.S. 620, 635 (1996); *see also* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 266-67 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996).

> Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected. . . .
> *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir.1994) (*en banc*) (following *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir.1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause")); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.1989), *cert. denied*, 494 U.S. 1004, 110 S. Ct. 1296, 108 L.Ed.2d 473 (1990) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir.1990) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir.1989), *cert. denied*, 494 U.S. 1003, 110 S. Ct. 1295, 108 L.Ed.2d 473 (1990) (homosexuality is primarily behavioral in nature and as such is not immutable; "[a]fter Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm").
> *Accord, Baker v. Wade*, 769 F.2d 289, 292 (5th Cir.1985) (*en banc*), *cert. denied*, 478 U.S. 1022, 106 S. Ct. 3337, 92 L.Ed.2d 742 (1986) (homosexuals compose neither a suspect nor a quasi-suspect class); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir.1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903, 105 S. Ct. 1858, 84 L.Ed.2d 776 (1985) (legal classification of gays is not suspect) (both decided prior to *Bowers*).

Id. at 266-67, 266 n.2.

97. *See* Baehr v. Lewin, 854 P.2d 44, 64 (1993).

98. *Id.* at 68; *see also* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998). In *Brause*, involving a male couple denied a marriage license, the "choice of a life partner" was held to be a fundamen-

The equal protection provision limits governmental authority to make classifications and guarantees that people who are similarly situated will be treated alike.[99] A gay man or a lesbian who is treated differently than a heterosexual person presents a valid claim that a classification was drawn: the classification of "homosexuals."[100] Classifications that fall under equal protection scrutiny are generally based on a person's "status" as defined by belonging to a particular race, nationality or gender.[101] The classifications "heterosexuals" and "homosexuals" are similarly status-based classifications. Yet some courts have denied equal protection review on the theory that the governmental regulation did not draw a status-based classification of "homosexuals."[102] Rather, the regulation merely sought to regulate "homosexual conduct." [103]

c. The Status – Conduct Dichotomy

This status-conduct dichotomy underlies the befuddlement in constitutional jurisprudence concerning sexual orientation.[104] Disagreement surrounds what constitutes "conduct," particularly in the area of coming-out speech.[105] The California Supreme Court recognized speech that identifies one's sexual orientation as political speech.[106] But other courts view coming-out speech as conduct, and have denied both equal protection review and First Amend-

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tal right. *See id.* at *1. The court found it unnecessary to reach the issue of sex-based classification, but commented, "Sex-based classification can hardly be more obvious." *Id.* at *5.

99. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988).

100. *See infra* Part IV.C.

101. *See supra* notes 93-98 (giving examples of cases in which courts have applied various levels of scrutiny).

102. *See* Shahar v. Bowers, 836 F. Supp. 859, 867-68 (N.D. Ga. 1993) (dismissing plaintiff's equal protection claim because the "'classification'—if any—is not based on mere sexual orientation, but on sexual orientation plus conduct"), *aff'd*, 114 F.3d 1097 (11th Cir. 1997) (affirming that plaintiff failed to present an equal protection claim because the record did not support an inference that defendant revoked her job offer "because of her sexual orientation—as opposed to her conduct in 'marrying' another woman"). Other courts have granted equal protection review but denied heightened scrutiny. *See, e.g.*, Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) ("We therefore think the courts' reasoning in *Hardwick* . . . forecloses appellant's efforts to gain suspect class status for practicing homosexuals. It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

103. *See supra* note 102.

104. *See infra* Part IV.C.

105. *See id.* Speech that identifies oneself as gay or lesbian is commonly referred to as "coming-out" speech.

106. *See* Gay Law Students Ass'n v. Pacific Tel. and Tel. Co., 595 P.2d 592, 610-11 (Cal. 1979).

ment protection.[107]

Under the United States military's "Don't Ask, Don't Tell" policy,[108] to admit that one is lesbian or gay is to cross a line from purportedly permissible "orientation" to impermissible "conduct."[109] The policy states that sexual orientation will not be a bar to service unless manifested by homosexual conduct.[110] Conduct is then defined to include "statements by a member that he or she is homosexual or bisexual, or homosexual marriage [sic]."[111] Not only are the words "I am gay," spoken by a service member, considered *evidence* of "homosexual conduct," but speaking the words is *in itself* impermissible conduct. The military treats coming-out speech as conduct, thereby "utilizing the speech/conduct distinction as a sub rosa tool for legitimating the . . . discriminatory policy."[112] This "evidentiary sleight-of-hand"[113] allows the government to escape scrutiny of a classification based on sexual orientation and to downplay the infringement upon free speech.

Another evidentiary sleight of hand is the conflation of homosexuality and sodomy, which employs status (homosexuality) to implicate certain criminal conduct (sodomy). By using a person's homosexuality as evidence of criminal conduct, the court can couch its reasoning in the rhetoric of impermissible conduct, even though the "conduct" was merely assumed from the orientation.[114]

Taken together, classifying speech as conduct, and conflating homosexuality and sodomy, produces a twisted chain of logic. When a gay or lesbian person speaks of his or her sexual orienta-

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107. The Seventh Circuit denied First Amendment protection on the theory that coming-out speech is an indication of probable conduct. *See* Ben-Shalom v. Marsh, 881 F.2d 454, 458-62 (7th Cir. 1989) ("We are here concerned with plaintiff's forthright admission that she is a homosexual. That reasonably implies, at the very least, a 'desire' to commit homosexual acts."). The court granted equal protection analysis, but denied heightened scrutiny based on *Hardwick*. "If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result." *Id.* at 464-65 (footnote omitted).

108. 10 U.S.C. § 654(b)(1)-(3) (1993).

109. *See* Bruce, *supra* note 38, at 1158-59.

110. *See* Summary Report of the Military Working Group, Office of the Secretary of Defense, July 1, 1993, at 13.

111. *Id.* at 4; *see also* 10 U.S.C. § 654(b)(1)-(3) (providing that a service member will be separated from the armed forces for homosexual acts or attempted acts, marriage or attempted marriage to a person of the same sex, or statements by the service member that he or she is a homosexual or bisexual).

112. Bruce, *supra* note 38, at 1159.

113. *Id.*

114. *See id.* at 1140.

tion, the court assumes that he or she must engage in sodomy or some other impermissible "homosexual conduct." The court then relies on that "conduct" to dismiss both equal protection and First Amendment claims. An equal protection claim is disallowed because the regulation is said to target not homosexuals as a class, but "homosexual behavior." The focus on behavior also obscures the fact that coming-out speech is indeed speech, and in this way the court denies First Amendment protection of free speech.[115] By treating speech as conduct, and assuming conduct from sexual orientation, gay and lesbian citizens are denied constitutional guarantees of equal protection and freedom of speech.[116]

This conflation of conduct with speech and orientation muddles judicial and legislative decisions affecting sexual minorities.[117] The failure to clarify these issues produces arbitrary distinctions, legitimizes governmental regulation based on sexual orientation and allows prohibitions against "impermissible conduct" to trump the constitutional protection guaranteed to speech, expression and association.

C. Marriage

A political battle over same-sex marriage has been waged across the nation since the Hawaii courts upheld marriage rights for same-sex couples in *Baehr v. Miike*.[118] In *Baehr*, and more recently in *Brause v. Bureau of Vital Statistics*,[119] same-sex couples challenged the constitutionality of state marriage statutes after being denied marriage licenses.[120] Both the Hawaii Supreme Court and the Superior Court of Alaska required the state to demonstrate the marriage statute was justified by a compelling state interest and was narrowly drawn to avoid unnecessary infringement upon constitutional rights.[121] Both courts found the statutes employed a sex-based classification.[122] On remand, the *Baehr* circuit court held the state failed to meet its evidentiary burden of proving that the statute furthered a compelling state interest[123] and

115. *See* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

116. *See id.*

117. *See* Hunter, *supra* note 56, at 1717.

118. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *aff'd sub nom.* Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1993).

119. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

120. *See* Baehr, 852 P.2d at 48-49; Brause, 1998 WL 88743, at *1.

121. *See* Baehr, 852 P.2d at 68; Brause, 1998 WL 88743, at *6.

122. *See* Baehr, 852 P.2d at 64; Brause, 1998 WL 88743, at *6.

123. *See* Baehr v. Miike, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). The court further noted that "assuming arguendo that Defendant was able to dem-

held the statute unconstitutional on equal protection grounds.[124]

While *Baehr* found no fundamental right to same-sex marriages,[125] *Brause* held the right to choose one's partner is constitutionally protected.[126] *Baehr*'s analysis focused on the link between marriage and the rights surrounding procreation, and concluded that "a right to same-sex marriage is [not] so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."[127] The *Brause* analysis posed a different question.[128] "The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions."[129] *Brause* concluded that "just as the 'decision to marry and raise a child in a traditional family setting' is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected. It is the decision itself that is fundamental."[130]

Public and legislative response to these cases has been dramatic. Voters in both Hawaii and Alaska approved state constitutional amendments to quash the possibility of legal marriage for same-sex couples,[131] and state legislatures across the country have enacted statutes to do the same.[132] Twenty-six states have enacted statutes prohibiting same-sex marriage since the *Baehr* decision,[133]

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onstrate that the sex-based classification of HRS § 572-1 is justified because it furthers a compelling state interest, Defendant has failed to establish that HRS § 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights." *Id.*

124. *See id.* at *22.

125. *See Baehr*, 852 P.2d at 55-57.

126. *See Brause*, 1998 WL 88743, at *4-6.

127. *Baehr*, 852 P.2d at 56-57.

128. *See Brause*, 1998 WL 88743, at *4.

129. *Id.*

130. *Id.* at *6 (citation omitted).

131. Alaska voters, by a 68-32 margin, approved a constitutional amendment that defines marriage as a union between one man and one woman, and Hawaii voters authorized their state legislature "to reserve marriage to opposite-sex couples." Lyle Denniston, *Voters in Alaska, Hawaii Defeat Initiatives on Homosexual Marriage*, BALTIMORE SUN, Nov. 5, 1998, at A15; *see also* H.B. No. 117, 19th Leg. (Haw. 1997); Joint Res. 42, 20th Leg., 2d Sess. (Alaska 1997).

132. *See* Evan Wolfson, Freedom To Marry Organization, *Anti-Marriage Bills 1997—State-by-State Report* (last modified Sept. 25, 1997) <http://www.ftm.org/overview/state-by-state.html>.

133. Twenty-nine states currently ban same-sex marriages. Twenty-six of these states have banned same-sex marriages since 1995: Alabama, *Executive Order of the Governor*, (visited Oct. 13, 1998) <http://www.ngltf.org/97cgal/marriage.gif>; Alaska, ALASKA STAT. § 25.05.013 (Lexis 1998); Arizona, ARIZONA REV. STAT. ANN. § 25-101(c) (West Supp. 1998); Arkansas, ARK. CODE ANN. § 9-11-109 (Michie

and bills are pending in several more.[134]

Federal legislation has been enacted to ensure the accommodation of states' same-sex marriage prohibitions.[135] In 1996, Congress passed the Defense of Marriage Act,[136] an anti-gay initiative that relieved states of the responsibility of recognizing same-sex marriages performed in other states. The Act also established that the federal government will not recognize same-sex marriages, thus denying federal benefits to a same-sex spouse that would be available to an opposite-sex spouse.[137]

Despite prohibitive legislation, gay and lesbian couples continue to marry.[138] The significance of marriage in our society can hardly be overstated. Marriage carries with it considerable recognition in social, religious, economic and political spheres of life.[139] People marry for many reasons: to enter into a committed relationship with one another, to signify to family, friends and acquaintances the nature of the relationship, to follow the teachings of one's religion, to provide for one's spouse financially, and to care for and make decisions on behalf of one another.[140]

Some gay and lesbian couples attempt to marry legally and

1998); Florida, FLA. STAT. ANN. § 741.212 (West Supp. 1999); Georgia, GA. CODE ANN. § 19-3-3.1 (Michie Supp. 1998); Idaho, IDAHO CODE § 32-209 (1996); Illinois, 750 ILL. COMP. STAT. ANN. 5/212 (West Supp. 1998); Indiana, IND. CODE ANN. § 31-11-1-1 (Michie 1997); Kentucky, H.B. NO. 13, 1998 Reg. Sess. (Ky. 1998) (enacted April 2, 1998); Maine, ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998); Michigan, MICH. COMP. LAWS ANN. §§ 551.1, .271-72 (West Supp. 1998); Minnesota, MINN. STAT. § 517.03 (1998); Mississippi, MISS. CODE ANN. § 93-1-1 (West Supp. 1998); Missouri, MO. ANN. STAT. § 451.022 (West 1997); Montana, MONT. CODE ANN. § 40-1-401 (1997); North Carolina, N.C. GEN. STAT. § 51-1.2 (1997); North Dakota, N.D. CENT. CODE § 14-03-01, -08 (1997); Oklahoma, OKLA. STAT. tit.43, § 3.1 (West 1999); Pennsylvania, 23 PA. CONS. STAT. ANN. § 1704 (West Supp. 1998); South Carolina, S.C. CODE ANN. § 20-1-15 (Law. Co-op. 1996); South Dakota, S.D. CODIFIED LAWS § 25-1-1 (Michie Supp. 1998); Tennessee, TENN. CODE ANN. § 36-3-113 (1996); Texas, TEXAS FAMILY CODE ANN. § 2.001 (West 1998); Virginia, VA. CODE ANN. § 20-45.2 (Michie 1995 & Supp. 1998); Washington, Wash. Rev. Code Ann. § 26.04.020(1)(c) (West Supp. 1999). Three other states had same-sex marriage prohibitions prior to 1995: Louisiana (1988), LA. CIV. CODE ANN. arts. 86, 89 (West 1993); Kansas (1995), KAN. STAT. ANN. § 23-101 (1995 & Supp. 1997); Utah (1993), UTAH CODE ANN. § 30-1-2 (1998).

134. *See, e.g.*, H. Res. 382, 77th Gen. Ass., 2d Sess. (Iowa 1997) (enacted Apr. 15, 1998); S. Res. 287, 77th Gen. Ass., 2d Sess. (Iowa 1997) (introduced Feb. 11, 1998) (limiting valid marriages to one man and one woman).

135. *See* Defense of Marriage Act, 28 U.S.C. § 1738C (1996); 1 U.S.C. § 7 (1996).

136. 28 U.S.C. § 1738C (1996); 1 U.S.C. § 7 (1996).

137. According to federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (1996).

138. *See, e.g.*, Shahar v. Bowers, 114 F. 3d 1097, 1100 (stating that Shahar and her partner were married by their rabbi).

139. *See* KAPLAN, *supra* note 13, at 209-11.

140. *See id.*

challenge state laws after being denied marriage licenses.[141] Other couples participate in commitment ceremonies, often performed within their religious communities,[142] without claiming civil or legal recognition of their marriages.[143]

Many rights and benefits are accorded on the basis of marital status.[144] A report by the United States General Accounting Office, completed in response to the Defense of Marriage Act, identified 1049 federal laws in which marital status is a factor, including the allocation of Social Security benefits, food stamps and Veterans benefits.[145] Spouses enjoy property and inheritance rights, tax benefits and government employee benefits that non-spouses are denied.[146] These and myriad other rights and benefits[147] are allocated

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141. *See, e.g.*, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (holding that marriage is a fundamental right, and requiring the state to demonstrate a compelling interest to support the refusal to recognize this fundamental right by those who choose same-sex partners); Baehr v. Lewin, 74 Haw. 530, 580 (1993) (explaining how plaintiffs filed applications for marriage licenses but were denied solely on the ground that the applicants were of the same sex, and requiring strict scrutiny on remand).

142. *See supra* note 138.

143. *See, e.g.*, Shahar v. Bowers, 114 F. 3d at 1100, 1106-07 (11th Cir. 1997) (discussing Shahar's claim of no civil or legal recognition of her marriage).

144. *See* GAO/OGC-97-16 Defense of Marriage Act; *see also* William B. Rubenstein, *Non-Marital Forms Of Recognition, in* LEGAL ISSUES FACING THE NON-TRADITIONAL FAMILY 111-12 (William B. Rubenstein ed., 1994); Freedom To Marry Organization, *Rights & Benefits of Marriage* (visited Mar. 17, 1998) <http://www.ftm.org/overview/benefits.html> (providing examples of benefits afforded married persons, such as child custody, death benefits, income tax deductions and real property exemptions).

145. *See* GAO/OGC-97-16 Defense of Marriage Act.

146. *See id.*

147. *See* Rubenstein, *Non-Marital Forms Of Recognition, supra* note 144, at 111-12.

> These benefits include rights to spousal shares of marital property upon death of one partner, tax benefits (including joint income tax returns, dependency deductions, gift tax exemptions, and exemptions for alimony and property settlements); rights in tort law (including emotional distress, wrongful death actions, and loss of consortium); rights in criminal law (including immunity from compelled testimony and the marital communication privilege); non-exclusion under zoning laws; visitation privileges in hospitals and other institutions; authority to make decisions for an ill spouse; employee benefits for spouses (including health insurance, medical leave, and bereavement leave); government benefits (including Social Security and veterans payments to spouses, workers compensation for those whose spouses move for job-related reasons); lower fees for married couples (including automobile and life insurance, family travel rates, and family memberships); immigration benefits; and draft exemptions.

Id; see also Freedom To Marry Organization, *Rights & Benefits of Marriage* (visited Mar. 17, 1998) <http://www.ftm.org/overview/benefits.html> ("[M]arriage is a powerful legal and social idea that protects and supports intimate family relationships by providing a unique set of rights, privileges, and benefits. Those who can marry often take these rights for granted, but for gay men and lesbians, these benefits

to couples in heterosexual marriages and denied to couples in gay marriages.[148] As the Hawaii Supreme Court noted in *Baehr*, "marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship."[149] The state has conferred legal status and its corresponding rights and benefits only to heterosexual couples.[150]

In summary, the status of the law regarding sexual minorities is ambiguous. While anti-discrimination measures promise equality, marriage statutes deny equal treatment to same-sex couples, and criminal statutes proscribe sexual intimacy for gay and lesbian couples.[151] "In this state [of virtual equality], gay and lesbian people possess some of the trappings of full equality but are denied all of its benefits."[152]

III. Shahar v. Bowers

The *Shahar v. Bowers*[153] court applied a balancing test, rather than a strict scrutiny standard, to weigh Shahar's constitutional interests against the Attorney General's interests as an employer.[154] Relying on *Pickering v. Board of Education*,[155] the court distinguished the role of government as an employer from government as a sovereign and afforded the government employer a higher degree of deference.[156] The court did not consider the question of whether Shahar enjoys the right to intimate association

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are forever denied."). Gay couples also lack rights in family law, inheritance and disclosure law. *See id.*

148. *See* Rubenstein, *Non-Marital Forms Of Recognition*, *supra* note 144, at 111-12.

149. Baehr v. Lewin, 74 Haw. 530, 533 (1993).

150. *See* Rubenstein, *Non-Marital Forms Of Recognition*, *supra* note 144, at 111-12 (describing the difficulties gay couples experience in gaining legal recognition of same-sex marriages).

151. *See, e.g.*, MINN. STAT. § 363.03 (1997) (prohibiting discrimination based on sexual orientation); MINN. STAT. § 517.03 (1997) (prohibiting same-sex marriage); MINN. STAT. § 609.293 (1987) (prohibiting sodomy); KAN. STAT. ANN. §§ 21-3501, -3505 (1988) (prohibiting same-sex sodomy).

152. URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 4 (1995).

153. Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

154. The district court applied the *Pickering* balancing test. *See* Shahar v. Bowers, 836 F. Supp. 859, 864 (N.D. Ga. 1993). The 11th Circuit panel remanded the case with instructions to apply strict scrutiny. *See* Shahar v. Bowers, 70 F.3d 1218, 1225 (11th Cir. 1995), *vacated*, 78 F.3d 499, 500 (11th Cir. 1996). The en banc court reestablished *Pickering* as the appropriate standard of review. *See Shahar*, 114 F.3d at 1103-11.

155. Pickering v. Board of Educ., 391 U.S. 563 (1968).

156. *See Shahar*, 114 F.3d at 1102-03 (explaining why the *Pickering* balance test is the appropriate test for evaluating a government employer's decision).

and expressive association regarding her relationship with her partner, but rather assumed arguendo that such rights exist.[157] The court then weighed the interests of the Attorney General against the plaintiff's assumed constitutional rights.[158]

The court considered that a staff attorney in the Office of the Attorney General is in a "special class" of employment: the attorney is involved in policy making, has access to high level confidences, and acts as a spokesperson for the Department.[159] The position demands that the attorney exercise good judgment and discretion, and maintain her employer's trust.[160] The court further distinguished the position as being one of "personal staff" of the Attorney General and noted that Eleventh Circuit precedent held such personal staff were not protected under certain anti-discrimination statutes.[161]

The court considered the interests of the Attorney General and concluded that it was not unreasonable for him to lose confidence in Shahar. Stating that Attorney General Bowers "may properly limit the lawyers on his professional staff to persons in whom he has trust,"[162] the court accepted Shahar's same-sex "marriage" and "wedding" as evidence she lacked good sense.[163] Her willingness to discuss her homosexual relationship demonstrated her lack of discretion.[164] The court held the Attorney General could reasonably conclude Shahar may interfere with the Department's ability to handle controversial matters such as gay marriage licenses, gay parents' rights, employment benefits or insurance coverage for domestic partners, or law enforcement relating to homosexual sodomy.[165] The Attorney General, having reasonably lost confidence in Shahar, "made a personnel decision which none of the asserted federal constitutional provisions prohibited him from making."[166]

The court also determined that the Attorney General was not

157. *See id.* at 1099-1100. The court expressed grave doubt about the existence of such rights, but exercised judicial restraint to avoid reaching constitutional questions where unnecessary. *See id.* The court stated that "even a favorable decision on these constitutional questions would entitle Plaintiff to no relief in this case." *Id.*

158. *See id.* at 1103-11.

159. *Id.* at 1103-04.

160. *See id.*

161. *Id.* at 1104 n.15.

162. *Id.* at 1104.

163. *Id.* at 1104-06.

164. *See id.* at 1103-06.

165. *See id.* at 1105.

166. *Id.* at 1110-11.

unreasonable to believe that Shahar's presence on his staff could damage the Department's credibility with the public.[167] "[R]easonable persons may suspect that having a Staff Attorney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy."[168] The court granted the Attorney General a "wide degree of deference" when an employee has a "special personal interest" that may interfere with a state interest, such as prosecuting sodomy cases.[169] While Shahar was to work in an area which posed no apparent conflict with her personal interests, [170] the court did not require a particularized showing of the potential interference and refused to impose "limited utility" of a staff member who could work on certain types of cases but not on others.[171]

The court concluded that the Attorney General acted reasonably, considering the Department's concerns for credibility and public perception, the ability to handle controversial matters and the working relationships of people within the Department.[172] The special nature of the employment requires that a Staff Attorney exercise good judgment and discretion, and maintain the trust of her employer.[173] In summary, the court found that none of the asserted constitutional measures prohibit the Attorney General from withdrawing Shahar's employment offer.[174]

IV. Discussion

The *Shahar v. Bowers* court's analysis centered on the issue of reasonableness,[175] determining whether it was reasonable for

167. *See id.* at 1103-06.
168. *Id.* at 1105 n.17.
169. *Id.* at 1107-08.
170. Shahar would have handled mostly death penalty appeals. *See id.* at 1108.
171. *See id.*
172. *See id.* at 1110.
173. *See id.*
174. *See id.*
175. Four separate dissents criticized the *Shahar* ruling on several different grounds, only some of which are discussed in this Article. *See Shahar*, 114 F.3d at 1118-22 (Godbold, J., dissenting); *id.* at 1122-25 (Kravitch, J., dissenting); *id.* at 1125-29 (Birch, J., dissenting); *id.* at 1129-34 (Barkett, J., dissenting). The dissenters challenged the reasonableness of the Attorney General's decision. Judge Godbold concluded that the Attorney General acted unreasonably because he never discussed the situation with Shahar. *See id.* at 1121 (Godbold, J., dissenting). By failing to conduct a reasonable investigation, his decision was based on his own erroneous assumptions. *See id.* at 1120-22 (Godbold, J., dissenting). Judge Kravitch noted that to the extent the Attorney General considered Shahar's acts political, and thus disruptive to the office, he did not act reasonably. *See id.* at 1124 (Kravitch, J., dissenting).

the Attorney General to think that the public and Department personnel might react negatively to Shahar's employment.[176] But the court failed to thoroughly examine whether Bowers' concerns about public reaction constituted a legitimate interest[177] and

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Another ground for dissent was the court's avoidance of the question whether Shahar enjoyed constitutionally protected rights of intimate and expressive association. *See id.* at 1099-1100, 1102; *supra* Part II.B.2.a. While the court expressed "considerable doubt" that Shahar's relationship deserved such protection, the court assumed "for the sake of argument only" that these rights exist. *Shahar*, 114 F.3d at 1099-1100. In his concurring opinion, Judge Tjoflat criticized the court for sidestepping the constitutional question and argued simply that homosexual relationships are not protected under the First Amendment right to intimate association. *See id.* at 1111-15 (Tjoflat, J., concurring). To find constitutional protection for intimate association between homosexuals, Tjoflat would first require a finding that "homosexual relationships have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *Id.* at 1114 (Tjoflat, J., concurring). Tjoflat asserted that gay and lesbian relationships have played no such role. *See id.* at 1113-15 (Tjoflat, J., concurring). Instead, Tjoflat implied that lesbian and gay relationships more closely resemble brief hotel room encounters than family relationships. *See id.* at 1113-15 (Tjoflat, J., concurring) (relying on FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), in which associations formed in a hotel room rented for only a few hours did not constitute relationships that have "played a critical role in the culture and traditions of the Nation") (citation omitted). While *Hardwick* found no connection between *sodomy* and family relationships, Tjoflat would find no connection between *relationships* of gay and lesbian couples and family relationships. *See id.* at 1113-15 (Tjoflat, J., concurring).

The Tjoflat concurrence and majority opinion dicta present troubling assumptions and implications. First, Tjoflat would establish an additional burden of proof on the plaintiff: a prerequisite showing that gay and lesbian relationships have substantially contributed to society. While this issue was not determinative in this case, these judicial arguments are nonetheless disturbing because there are no such burdens placed on heterosexuals. Equally disturbing is the conflation of sexual orientation and sodomy, and the presumption that if there is no right to engage in homosexual sodomy, there is no right to enjoy gay and lesbian relationships. *See supra* Part II.A. This obsession with sodomy runs throughout the majority opinion and was highly influential in, if not ultimately determinative of, the outcome. *See Shahar*, 114 F.3d at 1101, 1104-05, 1105 n.17, 1108, 1110, 1110 n.25. While the court did not plainly reject the existence of a protected intimate relationship, the court afforded it very little weight.

Finally, the dissenting opinions criticized the court's failure to weigh Shahar's interests in the balance. *See id.* at 1124-25 (Kravitch, J., dissenting); *id.* at 1129-30, 1134 (Barkett, J., dissenting). While the court professed to employ a balancing test, it admittedly failed to determine what weight to assign Shahar's interests. *See id.* at 1106. Judge Barkett referred to the court's "wholesale restructuring of *Pickering*," and argued that the Attorney General had "an evidentiary burden to offer credible predictions of harm or disruption based on more than mere speculation." *Id.* at 1129, 1133-34.

Likewise, Judge Kravitch asserted that the court "employed a balancing test in name only," *id.* at 1124, and "inappropriately grant[ed] virtually absolute deference to Bowers, without weighing the countervailing interests on which he impinge[d]. Such an approach categorically exempts Bowers' employment decisions from scrutiny . . . ." *Id.* at 1124 n.4.

176. *See id.* at 1109-10.

177. *See id.* at 1108. The court dismissed cases in which public perception was

whether his inferences were permissible.[178] Once the illegitimate interests and impermissible assumptions are removed, little remains on the Attorney General's scale to weigh against Shahar's constitutionally protected rights. The decision ultimately fails on grounds of illegitimate interests and impermissible inferences.

A. Illegitimate Governmental Interests

While the court's examination of the Attorney General's reasonableness was cursory at best, the court completely failed to examine the legitimacy of the governmental interest.[179] As Judge Birch stated, "[T]he key question is not whether the government official reasonably could assume that the public might have a negative reaction to the employee's presence; it is *whether the public's perception . . . is itself a legitimate basis* for government action."[180] The Supreme Court has held that private biases are not legitimate grounds for governmental interests.[181]

The *Shahar* court never specifically addressed the legitimacy of the governmental interests.[182] Judge Birch argued in dissent,

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held to constitute an illegitimate basis for governmental action. *See id.* at 1105 n.17, 1110 (citing Loving v. Virginia, 388 U.S. 1 (1967), which held that prohibition of interracial marriages is unconstitutional, and Romer v. Evans, 517 U.S. 620, 635 (1996), which struck down an amendment to a state constitution because it impermissibly disadvantaged a particular class of people). *But see Shahar*, 114 F.3d at 1108-09 (relying on public perception concerns in McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985)).

178. *See Shahar*, 114 F.3d at 1101, 1105-06, 1108, 1110 (accepting inferences that Shahar lacked discretion and good judgment, that Shahar's special personal interests would interfere with the efficient workings of the office, and that the public and Department employees would assume that Shahar violated Georgia's sodomy law); *id.* at 1126-27 (Birch, J., dissenting) (arguing that the inferences and assumptions do not constitute a legitimate state interest).

179. *See id.* at 1126-27 (Birch, J., dissenting).

180. *Id.* at 1128 (Birch, J., dissenting) (emphasis added).

181. *See Romer* 517 U.S. at 635 (holding that the amendment to the Constitution of Colorado is unconstitutional since it classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (requiring a permit for a group home for the mentally retarded rests on an irrational prejudice and is therefore invalid); Palmore v. Sidoti, 466 U.S. 429 (1984) (holding racial prejudice cannot justify racial classifications); Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that "a purpose to discriminate against hippies" cannot justify the "unrelated person" provision).

182. *See Shahar*, 114 F.3d at 1105 n.17 (dismissing Loving v. Virginia, 388 U.S. 1 (1967), in which the Court held that public perception of miscegenation was not a legitimate governmental interest); *id.* at 1110 (dismissing *Romer*, in which the Court held that public hostility toward homosexuals was not a legitimate governmental interest); *id.* at 1126-27 (Birch, J., dissenting). *But see id.* at 1108-09 (relying on McMullen v. Carson, 754 F.2d 936, 940 (11th Cir.1985), in which the court considered public perception determinative in ruling that a sheriff's interest outweighed the First Amendment interest of an employee who was a recruiter for the Ku Klux Klan).

> If the public's perception is borne of no more than unsupported assumptions and stereotypes, it is irrational and cannot serve as the basis of legitimate government action. In this instance, the public's (alleged) blanket assumption that "if it's homosexual, it would have to be sodomy" is based not on anything set forth in the record but rather on public stereotyping and animosity toward homosexuals.[183]

The Attorney General has a legitimate interest in the efficient workings of his office and in the credibility of the Department. What is not legitimate is his reliance on public stereotypes and erroneous assumptions about lesbians and gay men.[184] "Under the principles articulated in *Romer*, this does not provide the state with a legitimate, rational basis to discriminate against Shahar. Bowers' 'concern' for the public's perception of homosexuals, therefore, is entitled to no weight in balancing Shahar's right of intimate association."[185]

B. Impermissible Inferences

Shahar wrongly allowed inferences favorable to the Attorney General[186] and did not allow inferences in Shahar's favor.[187] In a summary judgment proceeding, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[188] If a jury could possibly find the Attorney General's decision unreasonable, the court must deny his request for summary judgment.[189] The court must construe inferences in light most favorable to Shahar, the nonmovant.[190] Specifically, the court accepted the following inferences: Shahar lacked discretion and good judgment such that she was incapable of the professionalism required by the position;[191] Shahar had special personal interests, and these interests would interfere with the efficient workings of the Department;[192] and the public and Department

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183. *Id.* at 1128 (Birch, J., dissenting) (citation omitted).

184. *See Romer*, 517 U.S. at 634-35.

185. *Shahar*, 114 F.3d at 1128 (Birch, J., dissenting). *See supra* text accompanying notes 62-72 (discussing statutory and constitutional prohibitions against discrimination on the basis of sexual orientation).

186. *See id.* at 1101, 1105-06, 1108, 1110.

187. *See id.* at 1110, 1111 n.27.

188. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986).

189. *See id.*

190. *See* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.").

191. *See Shahar*, 114 F.3d at 1101, 1105-06, 1110.

192. *See id.* at 1101, 1108.

personnel would assume that Shahar was engaged in criminal activity (sodomy), which would be detrimental to the Department.[193] The court did not permit an inference that would have been favorable to Shahar: the Attorney General withdrew the employment offer based on Shahar's sexual orientation.[194]

1. Portrait of a Lesbian – Discretion

The court portrayed Shahar as a person too wild to be trusted, who lacked discretion, good judgment and the ability to keep confidences.[195] In contrast, Judge Godbold, in dissent, portrayed a person deeply devoted to the teachings of her religion and the life of her synagogue, and committed to having her intimate relationship recognized and sanctified through a religious ceremony.[196] The facts of the case tell us only that Shahar participated in a wedding ceremony, and that she shared this information with friends and associates.[197] What one infers from these facts is a crucial matter in a summary judgment proceeding.[198] "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment."[199] In this case, reasonable minds clearly could and did differ.

To the Attorney General and to the court, Shahar's commitment ceremony was evidence not of her commitment to her partner and her faith, but evidence of poor judgment.[200] Her refusal to secretly guard the status of her relationship was taken as evidence that she lacked discretion, not only in regard to her relationship, but generally and to the extent that the Attorney General determined her unfit to serve as an attorney in the Department.[201] Because Shahar chose to share information about her personal life with friends and associates, her ability to keep professional confidences was suspect. These assessments of Shahar's professional capabilities qualify as inferences drawn from undisputed facts, and the court should have denied summary judgment on this ground.

Instead, the clear message of the court is that gay and lesbian

193. *See id.* at 1101, 1105, 1110.
194. *See id.* at 1110, 1111 n.27.
195. *See Shahar*, 114 F.3d at 1099-1111.
196. *See id.* at 1118-22 (Godbold, J., dissenting).
197. *See id.* at 1100-01.
198. *See* Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992) (citing Mercantile Bank & Trust v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985)).
199. *Id.*
200. *See Shahar*, 114 F.3d at 1101, 1105-06, 1110.
201. *See id.*

citizens can achieve legitimacy only by secretive living. Any acknowledgment of one's sexual orientation or intimate relationship will be considered a breach of discretion and evidence of poor judgment. A reasonable expectation of privacy and discretion may require employees to maintain some boundaries between their personal and professional lives, and to refrain from discussing extremely personal details of their intimate relationships in the office or other public settings. It means, perhaps, not talking about sex. But who ever imagined that discretion would mandate an employee not reveal that she is in a life-long relationship or shares a home with someone. A simple standard of privacy should not dictate that one not speak the name of a partner or let a gender-referenced pronoun slip. It is appropriate for the Attorney General to expect a sense of privacy and require professional discretion. But requiring a person to vehemently guard the common details of every day life is too unreasonable a burden. For employees who choose not to shroud themselves in a veil of secrecy and who acknowledge the truth about themselves, inferences about professional capabilities of good judgment, discretion and confidentiality should not be permitted.

2. The Set-Up – Shahar's "Special Personal Interest"

The court noted Shahar's "special personal interest" and allowed an inference that Shahar could not act professionally in matters of a "controversial" nature, namely, matters relating to homosexuals.[202] In addition to the perceived conflict of interest regarding Georgia's enforcement of the sodomy law, the court assumed that conflicts would arise around marriage licenses, parental rights, insurance coverage and other employment benefits for gay and lesbian people.[203] Justice Tjoflat's concurring opinion even went so far as to suggest that Shahar staged a "set-up" to advance her personal political agenda under the auspices of the Department.[204]

The court's opinion piled inference upon inference: Shahar was first assumed to have a special interest; it was further assumed that such interest would present an insurmountable conflict of interest,

202. *See id.* at 1108.

203. *See id.* at 1105.

204. *Id.* at 1111 n.1 (Tjoflat, J., concurring). "The record in this case supports an inference that the Attorney General withdrew Shahar's offer of employment because he thought Shahar had 'set him up;' once ensconced in the Department . . . she would use her position to advance a homosexual-rights agenda." *Id.*

disrupt the Department and damage the Department's credibility.[205] In her dissent, Judge Barkett objected to these presumed implications of Shahar's assumed personal interests.[206]

> [E]ven if Shahar has a "special personal interest" in homosexual rights, such an interest tells us nothing about its disruptiveness to her work environment. Surely the Attorney General's office has lawyers who have a "special interest" in any number of topics: abortion, school desegregation, affirmative-action or rights for the disabled, for instance. When those issues arise and the Attorney General is forced to take a view, some attorneys may personally disagree with that view and may even ask not to work on the matter, but that does not establish that those views have been disruptive to the office as a whole.[207]

A *Washington Times* commentary provides examples of other potential personal interests.[208] "Lawyers routinely rise above personal creeds or behavior in their professional capacities. Janet Reno, [A]ttorney [G]eneral of the United States, testified at her confirmation hearings to moral scruples against the death penalty, but promised to enforce capital punishment laws nonetheless. And that promise has been fulfilled."[209] The commentary rhetorically questioned whether every black attorney in the California Attorney General's office could be fired the day after an anti-affirmative action measure was approved.[210] Could Jewish attorneys be assumed to present conflict where student-initiated prayer in public school was allowed, or male attorneys presumed to resist the enforcement of sexual harassment statutes?[211] A presumption that Shahar has an insurmountable conflict of interest is no more legitimate an assumption.

One might just as easily assume that the Attorney General would resist enforcing Georgia's law against adultery. Michael Bowers announced during his campaign for governor that he had

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205. *See id.* at 1108 (discussing loss of morale and loss of cohesiveness in the department, and the difficulties of Shahar moving from department to department).

206. *See id.* at 1134 (Barkett, J., dissenting).

207. *Id.* at 1134 (Barkett, J., dissenting) (stating a conflict between a "special personal interest" and a state's position is not a reasonable basis on which to expect disruption of a work environment).

208. *See* Bruce Fein, Commentary, *Janus-Faced Justice,* WASH. TIMES, June 10, 1997, at A14.

209. *Id.*; *see also Shahar,* 114 F.3d at 1129 n.7 (Birch, J., dissenting) ("Bowers has no reason for believing that Shahar's personal conduct would affect her abilities to ethically represent the state . . . . Lawyers are trained to be advocates of legal positions with which they may personally disagree.").

210. *See* Fein, *supra* note 208, at A14.

211. *See id.*

participated in a decade-long adulterous affair with a woman who had been a Department employee.[212] Bowers himself could be said to have a "special personal interest."[213] As for the Attorney General's concern for a potential loss of morale and disruption within the Department, his adulterous relationship with a subordinate in the office arguably would have caused more internal disruption and loss of confidence than Shahar's committed relationship with someone who had no ties to the Department. Had the same standard been applied to everyone in the office, Bowers himself would have been fired.[214] Neither Bowers nor the court offered any explanation why Shahar presented a greater threat to public credibility and efficient administration than did Bowers himself.

The fact that Bowers never met with Shahar to inquire whether she had political or personal interests which may present conflicts, and, if so, how she planned to handle the conflict, did not bother the court.[215] Without investigation or evidence, Bowers drew inferences about Shahar's professional capability to uphold the state's laws and the Department's policies.[216] He assumed conflicts of interests for Shahar that were not assumed for others in the Department.[217] Furthermore, Shahar was presumed to be incapable of balancing her assumed political interests against her professional responsibilities.[218] The court must not allow such inferences in favor of the moving party on a motion for summary judgment.[219]

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212. *See id.* The announcement came one week after the *Shahar* decision. *See id*; *see also* Shahar v. Bowers, 114 F.3d 1097 (11th Cir.), *reh'g denied*, 120 F.3d 211 (11th Cir. 1997) (requesting a rehearing based on Bowers' announcement). The court, however, denied a rehearing because Shahar had an earlier opportunity to learn of Bowers' adultery through discovery, and she had not expressly done so based on an agreement between the parties to forego inquiry into the parties' sexual history. *See* 120 F.3d at 213.

213. *Shahar*, 114 F.3d at 1101, 1105, 1111 n.17 (arguing that the public and Department personnel could assume that she committed sodomy because Shahar participated in a homosexual marriage); *see Shahar*, 120 F.3d at 213 (providing that Bowers violated the adultery law by his own admission; no assumption required); *Candidate in Georgia Discloses Own Adultery*, STAR TRIB. (Minneapolis), June 6, 1997, at A21.

214. *See Judging the Bowers Affair*, ATLANTA CONST., June 17, 1997, at A20.

215. *See Shahar*, 114 F.3d. at 1106 n.18.

216. *See id.* at 1118-22 (Godbold, J., dissenting).

217. *See id.* at 1129 n.7 (Birch J., dissenting) (citing Moseley v. Esposito, No. 89-6897-1 (Super. Ct. DeKalb Co.) (providing Bowers' argument that whether department attorneys committed sodomy was irrelevant to their professional positions)).

218. *See id.* at 1104-05.

219. *See* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (stating that on summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion).

3. The Sodomites

Heterosexuals don't practice sodomy . . . .

-Senator Strom Thurmond[220]

This is not a case about only homosexuals . . . all sorts of people do this kind of thing.

-Daniel C. Richman[221]

Obscurity is part of what sodomy is, a means by which it attains its social effects.

-Janet E. Halley[222]

The notion of sodomy played heavily in the mind of Michael Bowers and in the ruling of the court. Bowers had, after all, defended Georgia's sodomy law against constitutional challenge, and he had won.[223] In the present case, the word "sodomy" is used at least eighteen times in the court's opinion,[224] and *Bowers v. Hardwick* is cited or referred to no less than six times.[225] In reading the opinion, one might easily forget that this is not a sodomy case; rather, it is an employment case in which no charge or admission of sodomy existed.[226] Yet the court based its decision on the inference of sodomy and further assumptions about the implications of having a sodomite on staff.[227]

The court reasoned that if the public believed Shahar to be a sodomite, it would damage the credibility of the Department.[228] The court explained that it is reasonable for people to think that a couple who claims to be married engages in "marital relations," and that "[s]odomy is an act basic to homosexuality."[229] "We acknowledge that some reasonable persons may suspect that having a Staff At-

220. *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at A9.

221. Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1 (quoting Memorandum from Daniel C. Richman to Justice Thurgood Marshall on Bowers v. Hardwick, 478 U.S. 186 (1986)).

222. Halley, *supra* note 38, at 1757.

223. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that criminal prosecution of homosexual sodomy does not violate substantive due process).

224. *See* Shahar v. Bowers, 114 F.3d 1097, 1101, 1104-05, 1105 n.17, 1108, 1110, 1110 n.25 (11 th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

225. *See id.* at 1099 n.2, 1104-05, 1105 n.17, 1108, 1110 n.25. *See generally supra* text accompanying notes 44-52 (discussing *Hardwick's* holding, which upheld Georgia's law prohibiting homosexual sodomy).

226. *See id.* at 1099-1101 (focusing primarily on Shahar's homosexual relationship rather than the details of the revocation of her employment offer).

227. *See supra* Part II.A.

228. *See Shahar*, 114 F.3d. at 1108 (discussing the conflict between Shahar's personal interest and the state's upholding of the lawful prohibition of homosexual sodomy).

229. *Id.* at 1105 n.17 (citing Watkins v. U.S. Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting), *vacated*, 875 F.2d 699 (1989)).

torney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy."[230] This reasoning begs a number of questions.

First, why is sodomy basic to homosexuality but not to heterosexuality? The court relied on the authority of one circuit court judge who proclaimed "[s]odomy is an act basic to homosexuality."[231] Assuming this matter to be undisputed, the *Shahar* court further assumed that people would equate Shahar's sexual orientation with criminal acts of sodomy and that such thinking would harm the Department.[232] But the equation of homosexuality and sodomy is not undisputed. Studies show that heterosexuals are as likely to practice sodomy as homosexuals.[233] Furthermore, Shahar presented studies showing that lesbians prefer non-sodomy sexual practices.[234] A reasonable trier of fact could find that homosexuality does not indicate a propensity to engage in sodomy and conclude that sodomy is not basic to homosexuality. Evidence exists to support Shahar's case, and "a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[235]

The second question that must be asked is why a staff attorney's sex life is being scrutinized at all. Bowers himself argued in *Moseley v. Esposito*[236] that the sexual activities of the Department's staff are irrelevant.[237] Whether staff attorneys violate Georgia's sodomy law "has nothing to do with professional impropriety, but rather is wholly irrelevant . . . ."[238] If Bowers' position that whether his staff engaged in sodomy was irrelevant to their professional positions, then why does sodomy play such a crucial role in this case? Shahar was scrutinized differently than other Department attorneys. Yet the court refused to acknowledge even the possibility that this differential treatment was based on Shahar's sexual orientation

230. *Id.* at 1105 n.17. The sodomy law has since been declared unconstitutional. *See infra* note 276 and accompanying text.

231. *Shahar*, 114 F.3d at 1105 n.17 (citing *Watkins*, 847 F.2d at 1357 (Reinhardt, J., dissenting)).

232. *See id.*

233. *See supra* note 38.

234. *See Shahar*, 114 F.3d at 1127 n.4 (Birch, J., dissenting).

235. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986).

236. *See Shahar*, 114 F.3d at 1129 n.7 (Birch J., dissenting) (citing Moseley v. Esposito, No. 89-6897-1 (Super. Ct. DeKalb Co.)).

237. *See id.* (Birch J., dissenting) (citing *Moseley*, No. 89-6897-1) (discussing the prosecution's charge of heterosexual sodomy and the defendant's futile effort to seek discovery as to whether any of the department's attorneys had ever violated the sodomy law).

238. *Id.* (Birch J., dissenting) (citing *Moseley*, No. 89-6897-1).

and accordingly dismissed her equal protection claim.[239]

Finally, what if Shahar had not married? Would the court still assume that she engaged in "marital relations"? If Shahar had stated that she was involved in a lesbian relationship, but said nothing about a marriage, would the court have refrained from an inference of sodomy? Would Bowers have agreed that Shahar's sex life, like the sexual activities of other Department attorneys, was irrelevant to her professional position? It is highly unlikely the case would have been argued or decided differently if Shahar had been open about her intimate relationship but had refrained from marriage. It is more likely that the idea, "sodomy is basic to homosexuality," would have been applied to any homosexual relationship, not just one in which a wedding ceremony occurred. If any homosexual relationship is suspect, the suspicion is obviously based on sexual orientation, and an equal protection claim should be allowed to proceed.

The equation of homosexuality and sodomy should not have been allowed in this case. No evidence of sodomy existed. References to sodomy appeared only by unsupported assumptions and inferences.[240] The issue was not whether the Attorney General was reasonable in assuming the public would infer acts of sodomy. The real issue was what inferences would be allowed in a court of law, and in whose favor would inferences be allowed in a summary judgment decision. The court simply and blatantly employed inferences of sodomy, a red herring, to inappropriately dismiss Shahar's constitutional claims.

C. The Basis Of Bowers' Decision – Status Versus Conduct

Throughout the opinion, the court maintained that the Department terminated Shahar's offer, not because of her sexual orientation, but because of her conduct.[241] By employing the status-

239. *See id.* at 1111 n.27; *supra* Parts II.B.2.b-c.

240. *See supra* text accompanying notes 205-07.

241. *See Shahar*, 114 F.3d at 1107 n.21, 1110-11 (11th Cir. 1997) (providing that Shahar's "conduct" consisted of the following: her marriage to another woman in a wedding ceremony performed in her synagogue, the exchange of rings, a change of names, co-ownership of a house and a joint insurance policy with her partner). The most significant conduct on which the opinion hinged was Shahar's candor, her refusal to remain closeted about her sexual orientation. *See id.* at 1105, 1107, 1107 n.21. The court stressed Shahar's openness about her marriage, referring to her "decision to 'wed' *openly*—complete with changing her name—another woman (in a large 'wedding')." *Id.* at 1105 (emphasis added). The court treated any expression of Shahar's sexual orientation as conduct, in essence "hanging coming-out speech on the 'conduct peg.'" Bruce, *supra* note 38, at 1159.

conduct distinction,[242] the court accomplished several feats. First, the court rid itself of the *Romer v. Evans*[243] prohibition of discrimination based on stereotypes and animosity, and justified its reliance on *Hardwick*'s[244] proscription of "homosexual sodomy."[245] Second, the court denied the possibility that Bowers' treatment of Shahar could have been based on her sexual orientation.[246] In a single footnote at the end of the opinion, the court dismissed Shahar's equal protection claim, stating only that Shahar failed to produce sufficient evidence the job offer was withdrawn because of her sexual orientation.[247]

The court apparently saw a bright line separating the fact that Shahar participated in a lesbian marriage and the fact that she is a lesbian.[248] Dissenting Judge Birch refers to the majority's reliance on conduct as "a distinction without a difference."[249] "It is a matter of simple logic that only [homosexuals] would enter into a [homosexual] marriage. Bowers' action, therefore, draws a distinction that, on its face, reaches homosexuals only and distinguishes among similarly situated people on the basis of one trait only: that they are homosexual."[250]

Only homosexuals were assumed to have a conflict in upholding the state's sexual conduct laws. Bowers does not assume "that an unmarried [heterosexual] employee who is openly dating . . . has . . . committed fornication . . . . Nor . . . does he apparently assume

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242. *See supra* Part II.B.2.c.

243. 517 U.S. 620 (1996).

244. Bowers v. Hardwick, 478 U.S. 186 (1986); *see supra* text accompanying notes 44-52.

245. *Shahar*, 114 F.3d at 1110, 1110 n.25. The court stated that "*Romer* is about people's condition; this case is about a person's conduct," and "*Bowers v. Hardwick* . . . was similarly about conduct." *Id.* at 1110, 1110 n.25. But the court's analysis in distinguishing *Romer*, *Hardwick* and *Shahar* was flawed. The court stated that "*Romer* is no employment case," but conveniently overlooked the fact that *Hardwick* is not an employment case either. *Id.* at 1110. And *Romer* is arguably more relevant to employment discrimination against sexual minorities than *Hardwick*: the government act in question in *Romer v. Evans* forbid anti-discrimination measures, including measures prohibiting employment discrimination. 517 U.S. at 620. *Bowers v. Hardwick*, on the other hand, was about sodomy, 478 U.S. 186 (1986), and *Shahar* is not a sodomy case. Finally, the *Shahar* court relied on the fact that *Romer* was about government as sovereign, rather than an employer, but failed to admit that *Hardwick* was also a government as sovereign case. *See* 114 F.3d at 1110 n.26. None of the reasons the court cited for its reliance on *Hardwick* rather than *Romer* stand up under scrutiny.

246. *See Shahar*, 114 F.3d at 1111 n.27. *See supra* Part II.B.2.b.

247. *See* 114 F.3d at 1111 n.27.

248. *See id.* at 1110.

249. *Id.* at 1127 n.2 (Birch, J., dissenting).

250. *Id.* (Birch, J., dissenting).

that married [heterosexual] employees could well have committed sodomy."[251] Certainly he did not assume a conflict for heterosexual married employees who committed adultery, that is, he did not assume a conflict of interest for himself.[252] Heterosexuals, whether married and monogamous, married and adulterous, or single and dating, were completely exempt from assumed sexual behaviors and conflicts of interests. The court only distinguished and scrutinized homosexuals.[253]

This scrutiny raises equal protection concerns,[254] and the court should have allowed Shahar's claim to proceed.[255] Whether Shahar's conduct or her sexual orientation motivated Bowers' decision is a question of fact and should not have been dismissed in a summary judgment proceeding.[256] The court's insistence that insufficient evidence existed to allow an inference that Shahar's orientation may have been a factor is hardly believable, especially given the extreme latitude the court allowed for inferences to be drawn in favor of Bowers.[257] The court simply employed an artificial distinction of conduct and status to deny that Shahar's orientation had any relevance in Bowers' decision to terminate her employment.

The court's own reasoning, based on the status of homosexuality, provides further evidence of the falsity of the court's reliance on conduct.[258] The court's presumption that a homosexual person engages in sodomy is itself a presumption based on status.[259] The court's insistence that Bowers did not act based on sexual orientation would be more convincing if the court was able to recognize its own reliance on sexual orientation. When one's conduct is inferred

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251. *Id.* at 1128-29 (Birch, J., dissenting).

252. Bowers admitted to a decade-long adulterous affair. *See supra* text accompanying note 212.

253. *See id.*

254. *See id.* at 1127-29 (Birch, J., dissenting).

255. *See supra* Part II.B.2.b-c.

256. *See Shahar*, 114 F.3d at 1115-16, 1116 n.9 (Tjoflat, J., concurring) ("A reasonable trier of fact could find from the record in this case that the Attorney General's decision was motivated not by the fact that Shahar is a homosexual, but because she and her partner were maintaining an open homosexual relationship.").

257. *See Shahar*, 114 F.3d at 1101, 1105-06, 1108, 1110. Judge Birch commented, "I find it difficult to understand how we can seriously contend that an inference of discrimination on the basis of homosexual status cannot be made." *Id.* at 1127 n.2 (Birch, J., dissenting).

258. *See id.* at 1105 n.17.

259. *See id.* The court relied on the opinion of a circuit court judge who declared that "[s]odomy is an act basic to homosexuality." *Id.* (citing Watkins v. U.S. Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting), *vacated*, 875 F.2d 699 (1989)). "Homosexuality" refers to one type of sexual orientation. *See* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 867 (Stanford H. Kadish ed., 1983).

from one's orientation, it is disingenuous to claim that orientation played no role in the decision–either Bowers' decision or the court's.[260]

In the final analysis, the real distinction is not homosexual status versus conduct; the crucial distinction is between homosexuality and heterosexuality. It is irrelevant whether an attack on Shahar's constitutional rights was based on her status as a lesbian or her participation in a lesbian marriage. What is relevant is that a heterosexual's right to expression stemming from her sexual orientation would have been protected, and Shahar should have been afforded the same protection. The court would not permit inferences of illegal sexual activity, poor judgment and conflict of interest[261] for a heterosexual who participated in a heterosexual marriage. The invisible norm of heterosexuality must not be used to discredit sexual minorities and to deny them constitutional protections guaranteed to all.

D. The Politics Of Marriage – A Political Act Only For Sexual Minorities

Shahar: *But I'm not really married.*

The Court: *Yes you are. And if you're not, you might as well be.*[262]

In justifying the Attorney General's decision, the court employed a public versus private distinction.[263] Shahar argued that her conduct was personal, not political; her expression was private, not public.[264] She further asserted that her wedding was a personal, private and religious affair.[265] Shahar did not claim to be married in a civil or legal sense, and she affirmatively disavowed a right to employee benefits for her partner.[266] Shahar asked the court to consider that "[she] took no action to transform her intimate association into a public or political statement,"[267] but the court maintained that Shahar's marriage was a public and political

260. *See supra* note 257; *Shahar*, 114 F.3d at 1125-29 (Barkett, J., dissenting) (discussing whether the employment decision was based on status or conduct).

261. *See Shahar*, 114 F.3d at 1101, 1105-06, 1108, 1110.

262. *Id.* at 1106-07. "If Shahar is arguing that she does not hold herself out as 'married,' the undisputed facts are to the contrary. . . . Even if Shahar is not married to another woman, she, for appearance purposes, might as well be." *Id.* at 1107.

263. *See id.* at 1106-07.

264. *See id.*

265. *See id.* at 1124 (Kravitch, J., dissenting); *id.* at 1119 (Godbold, J., dissenting) (citing Shahar v. Bowers, 70 F.3d 1218, 1225 (1995)).

266. *See Shahar*, 114 F.3d at 1106, 1124 (Kravitch, J., dissenting).

267. *Id.* at 1106 (citation omitted).

act for which the Attorney General might reasonably have terminated Shahar's employment.[268]

There is something truly bizarre about a lesbian plaintiff, who has identified herself as married, arguing against the existence of any civil, legal or political ramifications of the marriage while the court argues the marriage's significance. One has the sense that the scripts have been handed to the wrong players. But perhaps this result is rather unsurprising when one considers that the court arbitrarily imposed a fictitious distinction. The question of whether marriage is personal or political cannot be answered based on any intrinsic characteristic of marriage, but only in the context of a society that allocates benefits to certain groups (people in heterosexual marriages) and withholds those same benefits to others. Only persons in the dominant group have the luxury of living private lives.

This phenomenon can be seen in a variety of contexts, including marriage, housing and voting. When a White family moves into a wealthy White neighborhood, it would generally be considered a private action without any particular political ramifications. It would likely be unnoticed. But when a Black family breaks the color line and moves to the mostly White, wealthy neighborhood, that act is invariably thrown into the public discourse of integration and, all too often, the accompanying political discourse of rising crime rates and declining property values.

Earlier this century both women and Blacks were kept from the ballot box.[269] When persons in these groups finally gained and exercised their right to vote, that action was a political activity beyond the political nature of voting itself. Blacks and women not only participated in the political process of voting: there was an additional political element in exercising one's right of citizenship against the powers that would deny that right. In this context, almost any action of a minority becomes an action against the oppressive force—not because of the inherent nature of the act, but because of the discriminatory force against which the act is initiated.

When a heterosexual couple marries, they are presumed to be engaging in a private, and perhaps religious, endeavor. There is no political element to a wedding ceremony, the exchange of rings or a name change. Nor is there anything overtly political about joint

268. *See id.* at 1107.

269. Women gained the right to vote in 1920 through ratification of the Nineteenth Amendment. U.S. CONST. amend. XIX. While Black males attained the right to vote in 1870, U.S. CONST. amend. XV, Jim Crow laws and practices kept many from the ballot box, as evidenced by the need for the passage of the Voting Rights Act of 1965, codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994).

home ownership and insurance policies, except to the extent that the legal classification of marital status gives rise to certain economic benefits. When a gay or lesbian couple marries, however, they are not afforded the luxury of remaining within the private realm. Although Shahar believed she engaged in a deeply personal and religious act, in effect she "lived in a fish bowl and thus had no private reality whatsoever."[270] The court declared Shahar's marriage a political act and used it to bolster the Attorney General's concerns regarding that act's public ramifications.

V. Conclusion And Recommendations

In *Shahar v. Bowers*, the court used the public-private distinction to displant Shahar's personal life into the public arena and thereby justify infringement upon her rights to intimate and expressive association.[271] Shahar's candor and expressive conduct were declared separate from her identity as a lesbian in the court's attempt to circumvent an equal protection challenge to classification based on sexual orientation.[272] The court accepted inferences and conclusions based solely on prejudice and ignorance. In summary, the court exercised its discretion to protect these prejudices rather than protect Shahar's rights of intimate and expressive association, religious expression and equal protection.

Courts hearing cases involving sexual minorities should not exercise discretion as did the *Shahar* court, but rather should consider the following recommendations. First, governmental interests based on animosity or disapproval toward social groups should not be tolerated. Private prejudices are not legitimate bases for governmental action and must not be allowed to prevail.

Second, courts must not impose an additional burden on gay men and lesbians to prove their relationships deserve protection under the First Amendment guarantee of intimate and expressive association. A cause of action must not be dismissed for a homosexual association if the same claim would be allowed for a heterosexual association. When a claim is not dismissed and the court weighs the plaintiff's interest against the governmental action that would infringe upon that interest, the court must not afford less value to a same-sex relationship than to any other relationship.

Third, courts should not allow the inference that homosexuals

270. Amy D. Ronner, *Amathia and Denial of "In the Home" in Bowers v. Hardwick and Shahar v. Bowers: Objective Correlatives and the Bacchae as Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263, 307 (1996).

271. *See supra* Part IV.D.

272. *See supra* Parts II.B.2, IV.C.

engage in criminal sodomy while ignoring the possibility that heterosexuals may also violate sodomy laws. Inferences based on stereotypes and unsupported by factual evidence must not be permitted. Furthermore, sexual orientation should not be used to implicate conduct. Permissible conduct, such as a religious wedding ceremony, should not implicate impermissible conduct, such as criminal sodomy.

Finally, courts must not frame issues in a case as issues of "conduct" in order to dismiss free speech and equal protection claims. Coming-out speech is an expression of one's identity and is entitled to First Amendment protection. Courts must not deny this protection by treating speech as "conduct." Nor should courts obscure a classification based on sexual orientation because the plaintiff spoke of her orientation and expressed a commitment to her partner through marriage. "Homosexual conduct" should not bar an equal protection claim any more than "female conduct" would bar a claim based on gender classification. When homosexual citizens are treated differently than heterosexual citizens, a valid claim of improper classification exists.

Unfortunately, as long as sexual activity is criminalized, discrimination is permissible and same-sex relationships are not accorded legitimacy, courts are free to use their discretion against sexual minorities. Statutory changes are necessary to ensure that gay and lesbian citizens will find justice in the courts. The following recommendations outline the minimum statutory changes required so that lesbians, gay men and bisexuals may exchange second class status for full citizenship.

First, sodomy laws must be repealed. Sodomy laws not only criminalize sexual activity, they also "serve as the legal basis for the regulation of . . . lesbian and gay life generally" and are used "against lesbian and gay litigants in nearly every possible legal context."[273] If adult consensual sexual activity is illegal for gay and lesbian citizens, they will not find equality in the courts, even for non-sexual issues such as discrimination in the workplace.

Second, anti-discrimination statutes are necessary to protect sexual minorities against discrimination in employment and other civil matters. Human rights statutes protect citizens against discrimination based on animosity or bias on account of race, nationality, gender and religion. As recognized in some jurisdictions, discrimination based on animosity toward homosexuals is similarly harmful. As long as discrimination is permissible, lesbians and gay

273. Rubenstein, *supra* note 15, at 19.

men will retain second-class status.

Finally, same-sex relationships must be given equal status with heterosexual relationships through legal and civil recognition of domestic partnership and marriage. Laws proscribing same-sex marriage are not consistent with constitutional guarantees or with statutes prohibiting discrimination based on gender or sexual orientation. Anti-marriage laws deny gay and lesbian couples the same rights, privileges and responsibilities afforded other couples. "Until homosexual couples are permitted the opportunity to enjoy the legal status of marriage, they will never gain equality."[274]

The values and policy considerations that underlie these judicial and legislative recommendations are consistent with other legitimate governmental concerns about marriage and families, discrimination in civil matters, and constitutional guarantees of speech, expression, association and equal protection. The policy considerations favoring marriage, fidelity and financial interdependence for heterosexual couples are equally relevant to gay and lesbian couples. Discrimination based on animosity and bias is detrimental to society and to the individual, regardless of whether the discrimination is on account of race, religion, gender or sexual orientation. Rights to free speech and expression are the same whether one reveals a heterosexual, homosexual or bisexual orientation. Rights to intimate and expressive association do not depend on the gender of the associating parties.

The sexual orientation of citizens must not determine whether constitutional guarantees are applicable or whether discrimination is permissible. This Article's recommendations, stemming from an analysis of the *Shahar v. Bowers* court improperly granting summary judgment, recognize that sexual minorities must be ensured full citizenship, with guarantees of freedom of speech and expression, intimate and expressive association, and equal protection under the law.

Epilogue

On November 23, 1998, the Georgia Supreme Court declared the state's sodomy law unconstitutional.[275] The court examined "whether the [state's] constitutional right of privacy screens from governmental interference a non-commercial sexual act that occurs without force in a private home between persons legally capa-

274. Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 92 (1997).

275. *See* Powell v. State, No. S98A0755, 1998 WL 804568 (Ga. Nov. 23, 1998).

ble of consenting to the act."[276] The court stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than consensual, private, adult sexual activity,"[277] and concluded "that such activity is at the heart of the Georgia Constitution's protection of the right of privacy."[278]

If *Shahar v. Bowers*[279] were decided today, would the Eleventh Circuit find Attorney General Bowers' decision to terminate Shahar's employment offer reasonable? The court's decision was based on the notion that people would assume Shahar violated the criminal prohibition against sodomy, and those assumptions would cause internal disruption to the Office and damage the credibility of the Department.[280] Now, with no sodomy law to be violated, the assumption of Shahar's law breaking could not stand.

If *Shahar v. Bowers* were decided today, would the Eleventh Circuit rely so heavily on *Bowers v. Hardwick*,[281] in which the United States Supreme Court held the Georgia sodomy law did not violate one's right to privacy under the federal constitution? While *Bowers v. Hardwick* may still be "good law" in federal court, perhaps with the Georgia sodomy statute declared unconstitutional by the Georgia Supreme Court, *Hardwick* and all that it stands for will have a little less sting and a lot less credibility.

276. *Id.*
277. *Id.*
278. *Id.*
279. 114 F.3d 1097 (11 Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).
280. *See id.* at 1105.
281. 478 U.S. 186 (1986).