

Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students

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It is now a joke among friends of mine from my first year law school section. Anytime I talk about sexual orientation and the law, they retort: "Mr. Ihrig, you need to divorce your personal politics from your constitutional law."

It started the first semester of my first year in law school. The fifty-four one-Ls of Section A (of which I was a member) spent the semester striving to master the law as written by the highest court in the land. Towards the end of October our efforts brought us to the line of privacy cases. We started with *Roe*,¹ then covered *Poe*,² *Casey*,³ and *Webster*.⁴ On Halloween we arrived at *Bowers v. Hardwick*,⁵ the case I had been waiting for all semester; the sodomy case—the "gay" case.

In August of 1982, an Atlanta police officer entered Michael Hardwick's home, opened the door to Hardwick's bedroom, and saw him engaging in oral sex with another man.⁶ After watching for

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1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. *Poe v. Ullman*, 367 U.S. 497 (1961).

3. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

4. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

5. *Bowers v. Hardwick*, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986). For several good discussions of the decision from different perspectives, see Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Arthur S. Leonard, *From Law: Homophobia, Heterosexism, and Judicial Decision Making*, 1 J. GAY & LESBIAN PSYCHOTHERAPY 65 (1991); RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 49-123, 127-33 (1988).

6. PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 381 (1988).

In Irons' book, Michael Hardwick explains the events leading up to his arrest for violating Georgia's sodomy statute. He was ticketed for drinking in public outside the gay bar where he worked in Atlanta. Officer Torick, who issued the ticket, wrote

about thirty-five seconds, the officer arrested both men for violating Georgia's law prohibiting sodomy.⁷ Michael Hardwick challenged the constitutionality of Georgia's sodomy law all the way to the United States Supreme Court.⁸ In its decision in *Bowers*, the Court upheld the criminalization of gay male sexual activity. They found it "evident"⁹ and "obvious"¹⁰ that no similarities existed between a gay male relationship and a heterosexual marriage.¹¹ The decision has been characterized as the "most flagrant example" of departing from precedent and established court rules in order to obtain a ruling the Justices desired on non-constitutional grounds.¹²

a court date on the ticket that was one day after the date already printed on the ticket. Thus, following Torick's written instructions, Hardwick missed his scheduled appearance in court.

Two hours after Hardwick's failure to appear in court, Torick appeared at Hardwick's home with a warrant for his arrest. Warrants usually took forty-eight hours to be processed, but Torick personally processed the warrant (the first time he had done so in 10 years). Hardwick was not home. After being informed that he had missed his scheduled appearance in court, he went to the courthouse and paid the fine for the ticket that same afternoon.

Three weeks later, Hardwick arrived at home early in the morning to find three men standing in his yard. The men, who he believed to have been police officers, asked him if he was Michael and then proceeded to, as Hardwick put it, "beat the hell out of me." This included kicking him in the face, tearing the cartilage out of his nose, and cracking six of his ribs. He was left lying unconscious in his yard. He had to crawl into his home, leaving a trail of blood.

A few days later, more than four weeks after Hardwick paid his fine, Officer Torick came to Hardwick's home with the now-expired arrest warrant. Torick entered the home through an open door and proceeded to Hardwick's bedroom. He opened the door and found Hardwick and another man engaging in mutual oral sex. Torick then made his presence known and announced that Hardwick and the other man were under arrest for violating Georgia's sodomy statute. The two were taken to the police station, booked, and incarcerated. *Id.* at 381-85, 393-96.

7. *Id.* at 395.

8. *Id.* at 382-91, 396-400. See also *Bowers*, 478 U.S. at 186.

9. *Bowers*, 478 U.S. at 190.

10. *Id.* at 192.

11. This conclusion was not so "evident" or "obvious" to the four dissenting Justices on the Court or the three judges on the appeals court who all found the Georgia sodomy law unconstitutional. The analysis in Blackmun's dissent makes it abundantly clear that the lack of "resemblance" is not at all "evident". See *id.* at 204-06 (Blackmun, J., dissenting).

For an extensive discussion by the lower court on intimate relationships and personal autonomy, see *Hardwick v. Bowers*, 760 F.2d 1202, 1211, *reh'g denied*, 765 F.2d 1123 (11th Cir.), *and cert. granted*, 474 U.S. 943 (1985), *and rev'd*, 478 U.S. 186 (1986). The court recognized the "resemblance" to the Supreme Court's privacy precedents and concluded that the activity Hardwick wished to engage in, within the privacy of his own home, "is quintessential[ly] private and lies at the heart of an intimate association beyond the proper reach of state regulation." *Id.* at 1212. See also Hunter, *supra* note 5, at 536.

12. See Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Prediction*, 54 U. CHI. L. REV. 648, 648 (1987) (criticizing *Bowers* as an imposition of the Justices' personal biases onto the law).

Having written my undergraduate senior thesis on the case, I felt quite prepared for the class discussion. I was expecting a critical analysis of the decision's reasoning and biased logic. But as the class unfolded, I sat stunned. The professor summarily agreed with the Court's holding and reasoning in the case.¹³ She offered a stilted justification for the decision¹⁴ and quickly moved on to *Baehr v. Lewin*¹⁵ and the promise of an equal protection analysis to secure legal gay marriages.

Not only did I disagree with her legal conclusions, I was astounded by her uncharacteristic handling of the case.¹⁶ So I raised my hand and spoke. I explained that the Court's reasoning was based on hideous and biased historical analysis,¹⁷ that it was void

13. Ironically, the textbook used in my constitutional law class (DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (1993)) was co-authored by Georgetown University law professor William Eskridge, Jr., a gay man. See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 608 n.2 (1994).

14. The professor argued that the Supreme Court has never recognized a right to engage in sexual activity. It has only recognized that, once having engaged in sexual activity that results in a pregnancy, a woman has a limited right to have an abortion. Further, the Supreme Court has stated that when choosing to engage in (presumably heterosexual) sexual activity, married couples and unmarried couples have a right to have access to and use contraception.

However, if the rights to an abortion and to use contraception are fundamental, then implicitly a right to engage in heterosexual sexual activity must exist. Otherwise, these fundamental rights are without any substance: the right for a man and a woman to use a condom while having sex or for a woman to obtain an abortion is meaningless without a right to have heterosexual sex.

15. 852 P.2d 44 (Haw. 1993).

16. The professor did not teach *Bowers* in the same fashion as she taught other cases that semester. Typically, we would examine the Court's decision as written and then dissect the decision to decipher what the Court was really saying. We questioned their logic, challenged their use of precedent, and were often encouraged to do a better job of reasoning than the Court. In contrast, *Bowers* was taught in a strict lecture format, without time for questions or discussion.

Although time constraints may have prompted the abbreviated handling of the case, such constraints are not beyond the control of the professor. Decisions are made as to what material to spend time on and what material to skim or omit. It is not a neutral, valueless choice which can be explained away by the lack of time remaining in the semester. Further, the professor taught *Bowers* in a substantially similar manner the following year. Interview with student in the professor's Fall 1995 Constitutional Law Class, in Minneapolis, Minn. (Nov. 20, 1995).

17. In particular, the history of prohibitions against gay sexuality is not as consistent or clear as White's opinion would lead one to believe. Sodomy laws (the "crime against nature" laws) originated to punish crimes against procreation, not crimes against heterosexuality. Colonial sodomy laws regulated sexual acts solely by men, regardless of whether they were done with women or other men. See Hunter, *supra* note 5, at 535. See also Timothy W. Reinig, *Sin, Stigma, and Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 869 (1990) (reviewing the history of sodomy laws and concluding "[i]t is not only the Bible which does not speak clearly about gay sexuality. The post-biblical tradition itself is remarkably inconsistent, at least from the early days of the church to the twelfth to fourteenth centuries."). See generally JOHN BOSWELL, *CHRISTIANITY*,

of logic,¹⁸ and that it was rooted in stereotypical, homophobic, and blatantly offensive views of gay men.¹⁹ I was ready to continue, to tell of the physical torture Michael Hardwick endured,²⁰ to explain that Justice Powell's decisive vote originally was cast with what became the dissent and that he later admitted he made a mistake in *Bowers*,²¹ to tell But I was cut off by the professor with the phrase, "Mr. Ihrig, you need to divorce your personal politics from your constitutional law." And the class moved on.

I sat in disbelief, shocked that the silencing which the Court was able to achieve in its decision was just then recapitulated in the classroom. The professor, like the Court, failed to understand or even consider the reality of gay people's lives and how the assumptions upon which the Court based its decision were rooted in disgust and ignorance.

I spoke with the professor after class and again received the same response. Following the Court, she argued that if we were to legalize sodomy, how could we legitimately criminalize fornication and adultery? I first questioned the validity of criminalizing fornication and adultery and second, assuming their criminalization was justifiable, asked why I had the burden of distinguishing consensual gay sexual activity from adultery and fornication. Why did not the burden rest on her and the Court to distinguish homosexual sexuality from heterosexual sexuality with more than the arrogant proclamation that the distinction is "obvious" and "evident"?

So I wrote her a letter.²² And spoke with her again in class. And again in her office. I retreated to advocating that although she may not agree with my viewpoint, it was an intellectually and legally justifiable position. I kept thinking, "Laurence Tribe of Harvard University, a Constitutional Law guru, argued the case for Michael Hardwick before the Supreme Court. I can't be all wrong." And still, I received the same answer: "Mr. Ihrig, you need to di-

SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 91-117 (1980) (offering an extensive critical examination of Christian Scriptures' position on homosexuality).

18. See generally Stoddard, *supra* note 12; John Charles Hayes, *The Tradition of Prejudice versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after Bowers v. Hardwick*, 31 B.C. L. REV. 375 (1990) (discussing biases behind the decision). See also Hunter, *supra* note 5, at 3 (explaining how anti-sodomy laws reflect social anxiety about sexual orientation).

19. Reinig, *supra* note 17, at 862.

20. See IRONS, *supra* note 6, at 381, 394-96 (describing the physical abuse Michael Hardwick endured at the hands of the police).

21. Chris Bull, *A Hard Look at Hardwick: The Supreme Court Came Close to Voiding Sodomy Laws in 1986, According to Newly Revealed Documents*, THE ADVOC., June 29, 1993, at 31, 38.

22. See Appendix 1 for the text of the letter.

voice your personal politics from your constitutional law." Dismissed. Silenced.

My experience is not unique. Many gay, lesbian, and bisexual (GLB)²³ students have encountered similar situations during their law school careers. This article examines the experience of law school from the perspective of GLB students. It is based upon my own experience,²⁴ the experiences of other GLB students at the University of Minnesota Law School, and an unscientific survey of GLB law students that I conducted for the purpose of writing this article.²⁵ It grew from a continuing discussion with GLB colleagues

23. The narrative content of this essay does not include the experiences of transgender students. This omission is neither intentional nor meant to indicate that the experiences of transgender law students are unimportant. However, I do not know any transgender law students, did not receive survey responses from any transgender individuals, and no school indicated the presence of any transgender students at their institutions.

The omission of transgender students is not meant to imply that there are no transgender individuals currently in law school in the United States. The population of students receiving a survey for this essay was admittedly not comprehensive. See *infra* note 26 and accompanying text (discussing statistical problems associated with sampling the GLB population). I take full responsibility for this shortcoming and for not pro-actively seeking the transgender population for their participation in this survey.

For literary reasons and ease of reading, I have chosen to use GLB throughout this article, even while discussing works and issues which consider the experiences of transgender individuals.

24. I am a 24-year-old Caucasian gay male who is currently a second-year student at the University of Minnesota Law School.

25. To collect information on GLB students' experiences in law school, I developed a nonscientific survey and distributed it to GLB student organizations at about 50 law schools in the United States. The survey consisted of a series of biographical questions followed by five open-ended narrative questions designed to elicit information about their classroom experiences, the general law school atmosphere, the role of sexual orientation in their study of law, their GLB activism activities, and the effect law school has on their personal ideology. See Appendix 2 for the survey questions.

Approximately 500 surveys were mailed to GLB law student groups across the country. Each school received a packet of 10-15 student surveys, as well as a survey to collect information on the school itself. Surveys were distributed to individuals at the University of Minnesota law school whom I knew to be gay, lesbian, or bisexual. I also sent surveys to friends at law schools across the country who distributed them to GLB law students they knew. Additionally, surveys were distributed over the Internet to students I contacted through ANGELS, an Internet mailing list for GLB law students.

No effort was made to obtain a random sample of GLB law students. The goal in distribution was to reach as many GLB law students as possible given severe time and budgetary limitations. After the initial distribution, a follow-up letter was mailed to all the student groups included in the original mailing reminding them of the survey, requesting that they distribute it to their members to complete, and extending the deadline for its return. I received 32 responses.

The schools included in the mailing were those which the Student Division of the National Lesbian and Gay Law Association identified as having a GLB student group on campus. They are: American University Washington College of Law; University of Baltimore School of Law; Boston College Law School; Boston University

that our lives and experiences were, in many important respects, absent from the law school discourse.

The article draws upon these experiences individually and highlights some common themes found within them. The purpose of the article is to tell some of the many stories of GLB law students. It reveals varied experiences and perceptions of the law school environment. It tells of law schools failing to adequately comprehend and address the issues surrounding sexual orientation. One of the most common experiences among GLB law students is, paradoxically, the lack of an experience: an absence of thought and acknowledgment given to the law's impact on gay men, lesbians, and bisexuals. The article argues that the failure to include and address the concerns of GLB individuals is particularly devastating in the context of legal education and that the main burden of rectifying this failure is currently being shouldered by GLB students.

Throughout, the words of GLB law students are included to assist the reader in fully understanding the impact of current law school environments on GLB students. These accounts provide a narrative from a variety of voices and describe GLB experiences and perceptions while in law school. These experiences do not represent a universal GLB experience of law school,²⁶ nor are they

School of Law; Case Western Reserve School of Law; Illinois Institute of Technology Chicago-Kent College of Law; University of Chicago Law School; Columbia Law School; University of Connecticut School of Law; Cornell University Law School; University of Denver College of Law; District of Columbia School of Law; Duke University School of Law; Fordham University School of Law; Georgetown University Law Center; George Washington University National Law Center; Georgia State University College of Law; Golden Gate University School of Law; Harvard University Law School; University of Houston Law Center; Howard University School of Law; Hastings College of the Law; University of Iowa College of Law; Loyola Marymount University Loyola Law School; University of Maine School of Law; University of Miami School of Law; University of Michigan School of Law; New England School of Law; University of New Mexico School of Law; New York Law School; New York University Law School; University of North Carolina School of Law; Northeastern University School of Law; Northwestern University School of Law; Ohio State University College of Law; University of Pittsburgh School of Law; State University-School of Law-Camden; University of San Diego School of Law; Seattle University School of Law; University of Southern California Law Center; Southern Illinois University School of Law; South Texas College of Law; Stanford University Law School; Suffolk University Law School; University of Texas School of Law; University of Utah College of Law; Vanderbilt University Law School; Washburn School of Law; University of Washington School of Law; Washington & Lee University School of Law; Washington University School of Law; University of Wisconsin Law School; Yale University Law School.

26. This essay does not attempt to make statistically justifiable generalizations about the experiences of GLB law students. Obtaining statistically reliable data on the GLB population is difficult if not impossible. See, e.g., Felicity Barringer, *Polling on Sexual Issues Has Its Drawbacks*, N.Y. TIMES, Apr. 25, 1993, § 1, at 23 (reporting the findings of a study estimating the percentage of gay men and lesbians).

common to all or even most GLB law students.²⁷ By their nature, the experiences depend on the particular cast of characters in any given law school, classroom, hallway, or library.

The experiences, however, do not simply reveal isolated occurrences. The similarities across eighteen law schools support a conclusion of some coalescence, particularly when understood within the context of pervasive discrimination against GLB people. Collectively, they resonate with my own experiences as a gay law student and with the experiences of others with whom I have spoken.

I. A Little Context. . .

First, it is important to understand that the experiences of GLB students in law school matter. The absence of a GLB presence in classrooms and throughout the law school injures the GLB community.²⁸ It reinforces our societal invisibility and denies us the

Several major impediments exist to obtaining such data. Discussing sex in America is generally taboo. Issues of sex and sexuality (especially GLB sexuality) are highly politicized. Further, the ability of GLB individuals to remain closeted, which many do, also skews the pool of potential respondents. These constraints inevitably produce a sample population which is more out of the closet, and at some level, more affirming of their sexual orientation, than a truly random sample of GLB individuals would produce. See URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 29 (1995).

I also recognize that respondents to this survey likely represent a somewhat self-selected subgroup of the entire GLB law student population. Those students who are more dedicated to advancing the civil rights of GLB individuals would probably be more likely to respond, as well as those who have had more intense experiences as a GLB person in the law school setting.

A vast majority of the surveys indicated strong reactions to the law school experience, either positive or negative. Very few respondents reported having what could be characterized as a neutral experience as a GLB student in law school. This could suggest two conclusions. Either those students holding strong feelings about their experience were more likely to respond, or the experiences encountered at law school for most GLB students produce strong feelings. Alternatively, some combination of both could explain the pattern in responses. Those students with strong feelings were more likely to respond to the survey, but these strong feelings are widely experienced by GLB law students.

27. Some scholars would suggest that this is a flawed use of legal narrative. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (arguing that traditional standards of legal scholarship are necessary to assess the use of narratives within legal discourse, including insisting on the use of typical stories). But see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 521-22 (1992) (supporting the use of selective GLB narratives in the law).

28. See *infra* notes 53-138 and accompanying text (describing the experiences of GLB students in law school). See also Wendy Schwartz, *Improving the School Experience for Gay, Lesbian, and Bisexual Students*, ERIC CLEARINGHOUSE ON URB. EDUC., Oct. 1994, at 3. Schwartz discusses recent research findings on the effect of a homophobic educational environment on gay and lesbian youth:

Studies have shown that gay and lesbian students . . . fear violence and harassment from their peers, and constant anxiety inhibits their

privilege of community. Our lack of presence enables the law to continue to develop without our input. As a result, our rights and concerns continue to be ignored by most of the legal community.

Women, as a group, have experienced and struggled against a similar absence from traditional legal discourse. In writing about the experiences of women students at Yale Law School, Catherine Weiss and Louise Melling start with the premise that women's alienation in law school is important.²⁹ The reasoning they set forth captures the essence of many of the thoughts and feelings expressed by the survey respondents referring to GLB alienation in law school:

Our second premise is that women's alienation in law school matters. We are angry about our exclusion and want to feel engaged. Our alienation also impoverishes the intellectual and emotional life of the school. The drowning of women's speech in a flood of men's voices squelches the diversity of ideas and styles that ought to sustain institutions of learning. Worst of all, the perspective of an outsider . . . is lost. Women have criticisms to make that students of the law should hear, criticisms that may unsettle the dominant and help to empower the rest. Finally, the alienation of women in law school affects the legal profession and everyone it touches. What we do in law school shapes what we will do as lawyers, which in turn affects the lives of others. Until women share equally in the learning, and thus in the practice, teaching, and making of law, we will be disabled in shaping society to fit women's needs.³⁰

So too, the alienation and exclusion of GLB students harms the school as whole.³¹ The suppression of our unique perspective from outside the sexual mainstream excludes the insights we have to offer,³² thereby circumscribing the quality of everyone's legal educa-

ability to learn. Some try to make themselves invisible in school so their homosexuality will not be detected, and as a result, limit their learning experiences. Even gay students without such severe problems have a more difficult adolescence than straight students because they feel even more confined by the pressure to conform, and believe that an essential part of them is being dismissed, despised or deleted from school life.

Although these factors may cause poor school performance and high dropout rates, lesbian and gay students are perhaps the most underserved students in the entire educational system [D]iscrimination often interfere[s] with their personal and academic development.

Id. at 3 (alterations in original) (citations omitted).

29. Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1300-01 (1988).

30. *Id.* at 1302.

31. *See id.*

32. *See infra* notes 113-118 and accompanying text (arguing that GLB law students have a unique perspective of the law).

tion. Jeffrey Sherman explains the unique loss to the law school environment:

Legal discourse that excludes the views of a distinctive, significant minority group provides those who participate in the discourse with a distorted vision of reality, leaving them ill-equipped to confront and make sense of society's present circumstances. As outsiders, gays and lesbians are able to bring a fresh perspective to legal issues, affording the entire legal academic community the pleasure of sharpening their legal instincts and the opportunity of enlarging their knowledge of the human condition, so that the ideas shaped in the law school may generate a legal regime that enables all citizens to reach their potential.³³

Understanding this impact and addressing the resulting harms requires an understanding of the ways in which law school communities exclude and degrade their GLB members. Three bodies of scholarship inform this understanding: GLB educational theory, writings on the experiences of law students, and legal narrative theory. Each offers insight to the task at hand, yet all fail to address the unique experiences of GLB law students. Although these bodies of work are not discussed in depth here, aspects from each are drawn upon in an attempt to begin a public discussion about the experiences of GLB law students.

An increasing number of publications examine the effects of the education environment and pedagogy on GLB students, the resources available for them, and the impact of educational environments upon the coming out process.³⁴ This scholarship has revealed that the teaching process, the prevalence of heterosexism,³⁵ and hostility towards GLB people have a negative impact not only on GLB students but the school population as a whole by stigmatizing association with GLB people, narrowly defining gender roles, and limiting the breadth of acceptable dialogue.³⁶

Current GLB educational theory focuses mainly on students at the high school and college levels and conceptualizes the GLB student as a product of the educational environment rather than an active participant in the education of his or her classmates.³⁷ The literature has generally not viewed the GLB student as an agent or

33. Jeffrey G. Sherman, *Speaking Its Name: Sexual Orientation and the Pursuit of Academic Diversity*, 39 WAYNE L. REV. 121, 125 (1992).

34. See generally COMING OUT OF THE CLASSROOM CLOSET: GAY AND LESBIAN STUDENTS, TEACHERS, AND CURRICULA (Karen M. Harbeck ed., 1992); ROBERT RHOADS, COMING OUT IN COLLEGE: A STRUGGLE FOR A QUEER IDENTITY (1994).

35. Heterosexism is the assumption that everyone in society is heterosexual. It is different from homophobia, the fear or hatred of GLB individuals.

36. See Schwartz, *supra* note 28, at 3 (summarizing the findings of recent research in this area).

37. See, e.g., *supra* note 34 and accompanying text.

source of input into the educational process, but instead solely as a product of that process.

This view is not entirely appropriate when examining GLB students in law school.³⁸ In addition to examining the effect of the educational environment on the student, we must also consider the GLB students' potential to shape and alter that environment by their presence. As active participants in the education of themselves and their peers, GLB students at the graduate level have the opportunity to shape the educational discourse and overall educational climate.³⁹

Inquiring into the experience of students in law school, however, is not a new phenomenon.⁴⁰ A considerable amount of scholarship has documented and theorized about the experiences of students in law school. Recently, this scholarship has concentrated on the experiences of women.⁴¹ It has demonstrated that members of specific minority groups experience law school differently,⁴² and that the effects of what may appear to be benign actions can in fact result in a tremendous disparate impact. This body of scholarship, however, has yet to include an investigation of the experiences of GLB law students.⁴³

38. This assumes that GLB students are already out of the closet by the time they reach law school. For those GLB students who remain closeted in law school (or at least in the law school environment), the current mode of analysis is more appropriate to understanding their experience. The dominant paradigm of understanding may also not be appropriate for other graduate programs and may be increasingly inappropriate at the undergraduate and high school levels.

39. This is especially true in classrooms in which the Socratic method of instruction is employed.

40. For example, Scott Turow's best-seller describes his experiences as a first-year student at Harvard Law School. SCOTT TUROW, *ONE L* (1977).

41. See, e.g., Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991) (examining the moral reasoning of men and women before and after their first year of law school); Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 SO. ILL. U. L.J. (1990) (reporting findings from a survey on male and female experiences at 14 law schools); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989-90) (reporting findings from a survey of all University of California Berkeley law students); Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988) (reporting the findings of a comprehensive survey of male and female law students); Weiss & Melling, *supra* note 29 (detailing the experiences of women from Yale Law School's class of 1987).

42. Taber et al., *supra* note 41, at 1211 (finding that the experiences of men and women in law school differ); Weiss & Melling, *supra* note 29, at 1299 (concluding that many women find law school alienating).

43. *The National Journal of Sexual Orientation Law* published on the Internet two personal narrative accounts of gay men's first year experiences at Harvard law school; see Kevin S. Reuther, *Dorothy's Friend Goes to Law School*, 1 NAT'L J. SEX. ORIENT. L. 254 (1995); Brad Sears, *Queer L*, 1 NAT'L J. SEX. ORIENT. L. 235 (1995); see also Lynn Miller, *The Legal Closet*, STUDENT LAW., Feb. 1988, at 13 (reporting on

Some inquiries into the experiences of law students focus on storytelling and student narratives to understand the educational experience.⁴⁴ This approach is referred to as legal narrative theory. The narrative is a personal account of an experience: someone's story told to illustrate a point or illuminate a perspective. There is a considerable debate in legal academia concerning the validity of the narrative as a tool in legal discourse. Some authors praise the use of narratives in the law, especially from marginalized groups.⁴⁵ They argue that the narratives "build community among members of the excluded group and . . . provide a more complete picture of our society and particularly the legal system and its effects."⁴⁶

Critics question the use of narratives in legal scholarship. Their main objections center on questions of authority and credibility.⁴⁷ They question the appropriateness of narratives in legal discourse and argue that no academic standards exist for analyzing narratives.⁴⁸

This article does not engage in this debate. Instead, it operates on the assumption that narratives do and should play an im-

the issues facing GLB law students). However, no systematic investigation into the experiences of GLB law students has been published to date.

44. Storytelling is "a form of narrative legal scholarship describing events of legal significance from the perspective of 'outsider' writers." Eskridge, *supra* note 13, at 607.

45. See, e.g., Fajer, *supra* note 27, at 521-22 (noting the power of narrative); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 670-71 (1993) (describing the importance of the narrative to outsider groups); SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 86 (1988) (arguing that everyone's story must be heard).

46. Fajer, *supra* note 27, at 516.

47. See Farber & Sherry, *supra* note 27, at 830-54 (discussing evaluation of the narrative). See also Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 311 (1992) (discussing the need for narrative integrity in constitutional discourse).

48. See Farber & Sherry, *supra* note 27, at 830-54. William Eskridge, a gay man and co-author of a Constitutional Law textbook with Farber, see *supra* note 13, responded to their analysis, finding it "engaging, insightful, and impressively wide-ranging, but also incomplete." Eskridge, *supra* note 13, at 609 (emphasis added). Eskridge was "surprised by the virtual absence of references to gaylegal narratives in their piece, particularly in light of the broad range of gaylegal narrative literature published as of 1992." *Id.* (citations omitted).

It is interesting to note that my classroom experience with *Bowers*, see *supra* notes 1-22 and accompanying text, was substantially similar to Farber and Sherry's scholarly publication: there was no educated discussion of GLB issues. In class, my professor had the "right" answer before engaging in any principled discussion of the realities of Michael Hardwick's experience or GLB lives in general. Any such discussion was excluded from her classroom and her office. In the Farber and Sherry article, *supra* note 27, there is also a marked absence of references to GLB narratives. See Eskridge, *supra* note 13, at 609. This absence is indicative of the main problem for GLB issues in law school: invisibility.

portant role in teaching the law.⁴⁹ This is particularly true for narratives of people from outside the legal mainstream. Narratives play an important role not only in the development and understanding of the law in general, but their presence is vital to legal education itself. The narrative is uniquely suited to enable students to contextualize materials,⁵⁰ to challenge assumptions about the law and its impact on individuals,⁵¹ and to prepare for the practice of law upon graduation.⁵²

II. The Experiences Of GLB Law Students

In many ways the law school environment mirrors that of society in general. The prevailing atmosphere is usually one of tolerance, while issues of sexual orientation are often avoided and ignored. Harassment and violence are always present, even if on the periphery, keeping GLB students aware of the tenuous nature of tolerance. The study of *Bowers v. Hardwick*⁵³ is a focal point for the study of GLB issues in law school. While it both breaks the culture of silence around GLB issues, it simultaneously creates other difficulties for GLB students. Further, pressure from varied sources within the law school silences the voices of GLB students. These pressures operate on several levels, and their effect is to exclude (or greatly diminish) the unique perspective GLB students offer regarding the law. GLB students, however, are becoming increasingly vocal and organized, working to change this exclusion.

Before delving into these experiences, a brief comment on the survey respondents themselves is in order. Thirty-two students from eighteen different law schools responded to the survey.⁵⁴ Wo-

49. For an impressive listing of other publications in which GLB narratives are "central to the argument presented," see Eskridge, *supra* note 13, at 609, n.12.

50. A process which, unfortunately, occurs all too infrequently in the law school classroom.

51. For instance, narrative can challenge the assumption that gender is an identifiable and immutable characteristic in a discussion of discrete and insular minority status for equal protection analysis. See KATE BORNSTEIN, *GENDER OUTLAW 4* (1994) (arguing that gender is neither identifiable nor immutable).

52. See generally Jane S. Schacter, *Poised at the Threshold: Sexual Orientation, Law, and the Law School Curriculum in the Nineties*, 92 MICH. L. REV. 1910, 1925-27 (1994) (book review). Schacter points out that:

[L]aw schools are training lawyers who, with increasing frequency, will be asked to represent gay and lesbian clients. This is true not only because litigation is one important channel for the gay and lesbian equality demand. It is true, as well, because the existence of broad-based social structures of exclusion triggers gay and lesbian reliance on alternative legal structures.

Id.

53. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

54. Respondents attend the following schools: American University Washington College of Law; Case Western Reserve University School of Law; Illinois Institute of

men comprised 40% of the sample, and 13% were ethnic minorities.⁵⁵ The respondents ranged in age from twenty-two to thirty-seven years old, with the average age slightly above twenty-seven. The group included five one-Ls, fifteen two-Ls, and twelve three-Ls. They self-defined their sexual orientation using the terms "gay,"⁵⁶ "lesbian,"⁵⁷ "bisexual,"⁵⁸ "homosexual,"⁵⁹ "Kinsey 6,"⁶⁰ "sexual preference for members of the same sex,"⁶¹ and "queer to the 10th degree."⁶²

On average, the respondents have known they were gay, lesbian, or bisexual for almost ten years, with most having known by their late teens.⁶³ They have been out to others for an average of 7.6 years; two respondents have been out to others for seventeen years, and one first came out to another person within the past year. Most are out to their families,⁶⁴ were out as undergraduate students,⁶⁵ made their sexual orientation known on their applications to law school,⁶⁶ and are members of GLB law student groups at their respective schools.⁶⁷

Technology Chicago-Kent College of Law; Cornell University Law School; District of Columbia School of Law; Duke University School of Law; Georgetown University Law Center; Georgia State University College of Law; Harvard University Law School; Lewis & Clark School of Law; Ohio State University College of Law; Southern Illinois University School of Law; University of Baltimore School of Law; University of Connecticut School of Law; University of Minnesota Law School; University of Washington School of Law; University of Wisconsin Law School; and Yale University Law School. Yale wins the award for most responses from one school, with five responses.

55. The ethnicities include Cuban-American, Greek-American, Hispanic, Jewish, and Mexican-American.

56. Thirteen men; two women.

57. Eight women.

58. Four women, including one woman also using the term "Bike," defined by her as "Dyke identified Bisexual."

59. Three men.

60. One man. Alfred Kinsey devised a six-point scale to describe the continuum between same-sex and other-sex sexual attraction and behavior. A "Kinsey 6" is someone whose sexual behavior is exclusively with partners of the same-sex. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-41 (1948). See BRYAN STRONG & CHRISTINE DeVULT, *HUMAN SEXUALITY* 70-71 (1994) (offering a simple, accessible explanation of Kinsey's scale).

61. One man.

62. One man.

63. On average, respondents came out to themselves at age 17.6 years.

64. All but two of the respondents are out to their families.

65. Twenty-two students (68.75%) were out as undergraduates.

66. Twenty students (62.5%) made their sexual orientation known on their application to the law school they are attending (either implicitly through their activities or explicitly in their personal statements).

67. Twenty-nine students (90.6%) reported they were a member of their school's GLB law student groups, with four noting that they are the group's leader. One respondent noted: "I am the organization in that it is inactive now & I am the only 'out' law student."

Although we are probably present in most law schools, our experiences and the realities of our lives are generally not taken into consideration in the development or discussion of the law. GLB individuals are systematically discriminated against by the law,⁶⁸ many times in ways that are not readily apparent.⁶⁹ Our lives are devalued by the judicial system,⁷⁰ and little consideration is given to the way in which the law is used to oppress GLB individuals. As one student observed:

I would say [the overall atmosphere at my law school] is indifferent. No one would dare be hostile towards me in my presence, but I know there are people who don't like a big old fag in their midst.⁷¹

GLBs and their concerns often are misunderstood or ignored. We are called "faggot,"⁷² have our student group bulletin boards vandalized and stolen from,⁷³ are ostracized from other students,⁷⁴

68. See generally *LESBIANS, GAY MEN, AND THE LAW* (William B. Rubenstein ed., 1993) (documenting the systematic legal discrimination against GLB Americans).

69. This discrimination is the result of both acts of omission and commission. It includes the denial of the right to legally marry, the criminalization of our sexual activities, legislating our lives and concerns out of school curricula, the failure to adequately respond to the AIDS epidemic, the development of property and inheritance law based on the assumption of a universal aspiration to marriage, and on and on and on. It is something that I and many of the survey respondents (24 of 32) find painfully obvious on a daily basis while in law school, many times in subtle ways, which have the cumulative effect of engendering a feeling of systematic exclusion.

70. See, e.g., John Young, *Judge's Remarks Show How Society Discounts The Lives of Outcasts*, L.A. DAILY J., Dec. 27, 1988, at A4 (reporting that a Texas judge admitted to sentencing a murderer lightly because both his victims were gay men who deserved to be killed).

71. Survey response of Jack, age 24, Caucasian (on file with author). I have chosen to cite information and statements obtained from surveys, interviews, and letters by using a pseudonym for the respondent's first name and indicating age and race. Critics of the use of narratives in legal scholarship would likely argue this form of anonymity intensifies concerns of credibility and truthfulness. See Farber & Sherry, *supra* note 27, at 838 (arguing that "we need to be aware of the risks in relying on unverified narratives, and take whatever steps are possible to guard against those risks").

Recognizing these risks, I nonetheless do not think it is my prerogative to reveal the names of these individuals in this article. Doing so would risk outing them to family, friends, associates, and potential employers. This revelation may have a detrimental impact on their lives and careers. See generally The Committee on Lesbian and Gay Men in the Legal Profession, *Report on the Experience of Lesbians and Gay Men in the Legal Profession*, THE RECORD 843 (n.d.) (discussing discrimination faced by out gays and lesbians in their legal careers).

72. Survey response of Steve, age 32, Caucasian (on file with author).

73. The University of Michigan GLB student group was compelled to place a Plexiglas cover protecting the surface of their display board. Interview with University of Michigan student, Sandy, age 26, African-American, in Minneapolis, Minn. (July 18, 1995). The Yale Lesbian, Gay, Bisexual Law Students Association displayed a poster of gay and lesbian figures from history, entitled "Unfortunately, History Has Set The Record A Little Too Straight," which was taken down. Survey response of Elizabeth, age 26, Hispanic (on file with author). At the University of

and know that our opinions are often devalued because we are gay, lesbian, or bisexual.⁷⁵ Most of the time, however, law school is not an overtly hostile place. The homophobia present in the law school often is manifest in subtle, insidious ways. For example, our experiences are not represented in legal thought or pedagogy.⁷⁶ Even when they are, misunderstanding GLB issues is common.⁷⁷ As one survey respondent observed:

[S]exual orientation issues are hardly ever discussed in this law school. Usually when they are, they are covered in a brief, sterile way. The homophobia in cases like *Bowers* is not mentioned, but rather the professor will focus on the legal rhetoric of the case. . . . The problem is that there is so little opportunity for queer discussion. And even when there is, it is bypassed because of the conservative professors who teach the material.⁷⁸

In describing her experiences of the discussion of sexual orientation issues in the law school classroom, a second year student

Minnesota, homophobic graffiti has been scrawled on the student group's bulletin board, and several posters have been stolen from it.

74. Eight students expressed feeling shunned by straight members of the law school, and two bisexual women told of feeling excluded from both straight students and gay and lesbian students ("I am the only out bisexual. I feel slighted by rolled eyes, sighs and comments by gay students occasionally." Survey response of Betsy, age 24, Caucasian (on file with author)).

75. Six students explained that they felt their input in classes, especially if from a liberal perspective, was not taken seriously because other students knew them to be gay, lesbian, or bisexual. One woman, currently a second year student and open about her bisexuality, explained that she felt a noticeable decline in people's respect for her positions after making her sexual orientation known. Interview with University of Minnesota student, Margaret, age 27, Caucasian, in Minneapolis, Minn. (Jan. 11, 1996).

76. Schacter, *supra* note 52, at 1911-12.

77. In her book *Virtual Equality*, Urvashi Vaid tells the following story about her experience as a first year law student at Northeastern University in 1980. It demonstrates the misunderstanding of GLB issues and the need for the GLB student's voice in the law school classroom. Vaid writes:

During my first year at Northeastern University Law School, in 1980, my professor of criminal law began class by saying, "Name some famous gay people." This professor was a liberal, and his remarks were meant as a kindly way to introduce the topic of sodomy laws. Following the lead of traditional criminal law textbooks, he had placed a discussion of the legal status of homosexual people in the middle of the course section on victimless crimes. There we were, alongside laws against prostitution, sexual solicitation, and other odd statutes criminalizing acts that arguably had no victims. As one of five openly gay and lesbian students in the first-year class of 133, I sat in stunned silence.

Fortunately, another lesbian student in the class immediately stood up and challenged our professor. Gay rights required a more complex treatment than this, she argued. Sodomy laws had been revoked by half the states and were under legal attack elsewhere; moreover, to lump them in with prostitution and other sex-based regulations was offensive. She ended by noting accurately that such laws represented an illegal incursion by the state into the private life of ordinary citizens.

Vaid, *supra* note 26, at 129-30.

78. Survey response of Pete, age 26, Mexican-American (on file with author).

noted: "There really [h]as been none. . . . I would not say it is noticeably absent, but an issue that just doesn't come up."⁷⁹ Her answer was very common and somewhat troubling. It accepts the lack of attention given to issues of sexual orientation as non-problematic.

Yet exclusion itself matters. Forced invisibility can be more damaging than outright hostility. With hostility, your existence is acknowledged and the hostile acts provide not only a concrete illustration of your oppression but also an opportunity to address the issue. Invisibility and exclusion, though, are elusive; they are difficult to define and grasp. It hides us from history and allows others to deny our existence, to reject our claims to basic civil rights, and to define us as evil-child-molesting-family-wrecking sinners. Invisibility within the law is particularly dangerous: it permits ignorance of the realities of GLB lives to persist and perpetuates the legally subordinate position of GLBs in America.⁸⁰

Within this environment, GLB students go about the business of getting a legal education. For some, the ability to persevere in law school stems from a feeling of acceptance within the law school community.⁸¹ For others, the ability to persist is possible only through a combination of self-determination and support received from other GLB individuals and allies.⁸² One respondent described the environment as follows:

Overall atmosphere—not bad . . . Although this is a *very* conservative student body, the students here are nice people, not

79. Survey response of Erin, age 29, Caucasian (on file with author).

80. See, e.g., Schacter, *supra* note 52, at 1925-26 (pointing out absence of GLB courses in law schools and discussing why this is problematic).

81. Several respondents noted that they felt completely comfortable within the law school. It is of interest to point out that all of the students who expressed this view were Caucasian men who, for the most part, were older than the average respondent. One noted:

The atmosphere here is fairly comfortable. Because I view my [sexual orientation] as ancillary to my legal education, I do not mind the relative inattention to GLB issues in school. Because I do not feel personally threatened by violence/discrimination against GLBs, all of my studies surrounding the law's treatment of [sexual orientation] seem more academic than practical. Quite honestly, I've got better things to worry about.

Survey response of Sam, age 26, Caucasian (on file with author).

82. Two students noted that their experiences were not excessively negative because they haven't allowed them to be. One stated:

I don't think that I have had an extremely negative experience at the University law school, but part of that stems from the fact that I wouldn't tolerate it. I have been so open and out from day one that people have had to accept it or move on . . . I have had a couple of homophobic run-ins with various law students and if I had not been comfortable with my sexuality I might have been intimidated.

Survey response of Pete, age 26, Mexican-American (on file with author).

gay-bashers. I may get frustrated with the politics or apathy of most students, but I've only felt *personally* attacked for my sexual orientation a couple of times.⁸³

A common experience for many GLB law students is studying the case *Bowers v. Hardwick*.⁸⁴ The case is usually encountered in Constitutional Law and Criminal Law courses, often as part of the first year curriculum. More than ninety-two percent of the respondents made some reference to the case and how it was handled in their classes. It has become the "gay case" of law school,⁸⁵ a catalyst for discussion and understanding.⁸⁶

I do wish "gay issues" were addressed more in the courses, i.e., more time on *Bowers*, on sodomy laws, etc. Most of the time, I don't feel discriminated against (as a queer) per se, but just *ignored* (which, I suppose, is a lesser form of discrimination).⁸⁷

Bowers' position as a centerpiece for GLB law students is laden with irony. First, *Bowers* is a case in which the legal question was about sodomy, not sexual orientation.⁸⁸ The two are by no means synonymous, as heterosexuals often engage in sodomy and some GLB individuals do not. Second, it is ironic that the "big case" for GLB Americans is one that defined us as a category solely by participation in a sexual act, which is only a part of one's sexual identity and of the GLB culture.⁸⁹ Finally, we lost in *Bowers*,

83. Survey response of Jane, age 23, Caucasian (on file with author).

84. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

85. *Bowers* has become "the central American legal text regarding homosexuality." Schacter, *supra* note 52, at 1912.

86. "We spent one half of one class in Constitutional Law on *Bowers* and that was the only real discussion on a gay issue and it was poor." Survey response of Vanessa, age 23, Caucasian (on file with author).

Hopefully, *Bowers* as a focal point for GLB constitutional law will soon change when the Supreme Court rules in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (challenging Colorado's anti-gay Amendment 2). The Court heard oral arguments in the case on October 9, 1995, and a decision is expected sometime in the Spring of 1996. Regardless of the outcome, at least the main focus of the case is not GLB people's sex lives, even if the public discourse in support of Amendment 2 focused on it excessively.

87. Survey response of Jane, age 23, Caucasian (on file with author).

88. Although the United States Supreme Court phrased the question in *Bowers* as "whether the federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," the case originally included a married heterosexual couple who were also challenging Georgia's gender-neutral sodomy statute. The court of appeals affirmed the district court's ruling that the heterosexual couple lacked standing to sue in the case. *Bowers*, 478 U.S. at 188 n.2.

Further, and more importantly, participation in sodomy is not a defining or predominant characteristic for GLB people as a group. Sex is only one part of our identities, and the law's obsessive focus on sex as a mechanism to define us is factually unfounded and offensive in that it perpetuates the stereotype that we are sexually insatiable and that our relationships are solely defined in sexual terms.

89. Being part of GLB culture is, in turn, only part of being a whole person.

which has been used to justify denying us rights ever since.⁹⁰ However, some students noted that their professors handled the case well:

Exceptionally good [was] my Con[stitutional] Law professor, who didn't wait until we got to *Bowers* before referring to [the] Supreme Court Justices' illogical homophobia as an example of how the Supreme Court isn't always guided by the u[t]most objective wisdom. Throughout the semester, he referred to the absurdity of the *Bowers* decision.⁹¹

The study of *Bowers* provides an excellent opportunity to discuss issues of sexual orientation and the law. It is a logical time to at least acknowledge the presence of GLB people's existence in our society. For many students, it is the only time where there is any discussion of sexual orientation in the classroom. Students' experiences vary greatly, seemingly most dependent upon the professor.⁹² Sometimes, this opportunity is seized and an open discussion of sexual orientation and the law ensues. Unfortunately, such discussion does not always occur. Many times there is little or no real discussion:

[T]he way *Bowers* was handled in my Con[stitutional] Law class, there was a great deal of silence from the students and it seemed like we moved past it pretty quickly. Actually the response of the class was pretty disappointing to me. I had been looking forward to the case and had decided on some points I wanted to bring up and it was just dead. Unfortunately, I didn't want to just jump in myself and I kicked myself later that night for my silence too. I guess I didn't want to have the ball entirely in my court. I wanted to see what the mood of the class was like before I spoke. But there was no way to judge the mood since they were dead.⁹³

For some, the study of *Bowers* was a frustrating, demoralizing experience. Many students noted that the class discussion, like the Court's opinion, failed to deal with the facts and issues presented by the case.⁹⁴ One student wrote:

In my Con[stitutional] [L]aw class, we discussed *Bowers* without discussing the history and what really happened. The next

90. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1733-40 (1993) (discussing use of the *Bowers v. Hardwick* decision by opponents of GLB rights).

91. Survey response of Jane, age 23, Caucasian (on file with author).

92. See *infra* notes 1-22 and accompanying text for an account of my negative experience with the case in a first-year Constitutional Law course, as compared to "Jane's" positive experience noted above.

93. Letter to the author from Aaron, age 31, Caucasian (Jan. 16, 1996) (on file with author).

94. For a narrative account of the experiences of Michael Hardwick leading to his arrest and eventually to the *Bowers v. Hardwick* decision, see IRONS, *supra* note 6, at 379-403.

day, several of the gay students (including myself) raised the issue as to what really happened to Michael Hardwick. The professor was receptive to our providing the additional information. As a result, the class got a more complete picture of *Bowers* and a good example of how gays are treated by the legal system.⁹⁵

Many of the classroom discussions about *Bowers* focus on a narrow, "logical" analysis of the Court's decision. Consequently, they fail to consider or challenge the historical basis for the Court's decision, or even question its application of precedent. The discussions also fail to address the moral basis of the court's reasoning, as one student observed:

All of the discussions I have participated in with regard to *Bowers* have been good—my Con[stitutional] Law professor] was very liberal and my Crim[inial] Law professor kept the discussion focused on the "why we have criminal laws". The discussions didn't go pro-gay or anti gay. There was no fight between what is moral [and] immoral.⁹⁶

But teaching *Bowers* without discussing morality is like teaching the American Revolution without mention of the Boston Tea Party. Morality is the basis of the decision. The rhetoric employed by the court is not neutral or void of moral and ethical implications. Morality informs both the Court's framing of the issue and the majority's reasoning.⁹⁷ Chief Justice Burger indicated the role of morality in his concurrence, stating that the "[c]ondemnation of [homosexual sodomy] is firmly rooted in Judeo-Christian moral and ethical standards."⁹⁸ He ultimately concluded: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."⁹⁹ Teaching the case as if it were void of moral conclusions necessarily legitimizes the vision of morality embraced by the majority of the Court. The tense classroom climate was described by one respondent:

I sat through two lectures of mind-numbing right wing ideology when the conservative professor called on the class relig[i]ous zealot and a [W]est-[P]oint-grad-and-squared-away-officer to discuss *Bowers* and related penumbra rights cases. The treatment was, to say the least, less than understanding. In addition, *everyone* was holding their breath waiting for me to commit [suicide] over some of the ridiculous things my two classmates said.¹⁰⁰

95. Survey response of Mike, age 24, Caucasian (on file with author).

96. Survey response of Bob, age 25, Caucasian (on file with author).

97. *Bowers*, 478 U.S. at 190-95.

98. *Id.* at 196 (Burger, C.J., concurring).

99. *Id.* at 197 (Burger, C.J., concurring).

100. Survey response of Jack, age 24, Caucasian (on file with author).

Studying *Bowers* presents another unique problem for GLB students. By being asked to take the Court's reasoning seriously, GLB students are asked to logically evaluate the homophobic rhetoric which condemns us as immoral, deviant, and worthy of condemnation. GLB students remain one of the few groups, if not the sole group, who are asked to divorce themselves from their personal identity and somehow, in some disinterested way, consider the possibility that a core aspect of their existence is flawed.¹⁰¹ This difficult personal "disconnect" was obvious in one student's comments:

Bowers was not the first time gay issues came up in Constitutional Law. Since one of our casebook authors . . . is gay, references to queers dot the casebook and the [professor], like the casebook, used queers to discuss the notion of a discrete minority. Now how did this make me feel—looking back I am glad queers were used as an example in the class (we weren't being ignored) on the other hand I felt like exhibit number one. I had just come from an exceptionally supportive environment . . . and here part of my identity was being discussed in a "logical" and "disinterested" way. . . . We were being asked to disassociate from ourselves and analyze. But how can you do this when you know after years of reflecting every day on the issues that you are worthy of protection and respect. How when you know in your gut that your relationships are worthy, yet in this society so weakly protected and open to attack, how after you have struggled for whatever length [of] time in coming to accept yourself—how can you just say yes my identity is up for discussion and we can vote against it, which is how *Bowers*, when you denude it of its legal rationalizations, reads to queers, well at least this queer boy—it reads to me as saying you are less, you are unworthy, we have always looked at you as sinners and can, if we wish, continue to do so.¹⁰²

Making the validity of one's identity subject to discussion and being asked to consider the logic, perverse and inaccurate as it may be, which concludes that one's existence is immoral and rightfully sub-

101. Imagine, for example, asking an African-American student to take seriously the analysis and conclusions of *Dred Scott v. Sanford*, 19 U.S. (How.) 393 (1856) (holding that African-Americans are not citizens within the meaning of the Constitution). Or consider asking a female student to consider Justice Brewer's words of condemnation in *Muller v. Oregon*, 208 U.S. 412 (1908) (holding that the differences between the sexes justify limiting the hours women can work). Further, imagine doing this in an environment in which *Brown v. Board of Education*, 374 U.S. 483 (1954), *Reed v. Reed*, 404 U.S. 71 (1971), and their progeny have not been decided.

It is preposterous to ask students to engage in the mental task of seriously considering the Court's decision questioning a fundamental characteristic of their existence. Because the positions expressed in *Dred Scott* and *Muller* have been repudiated in subsequent case law, African-American and women students are not placed in this position. The tenor of the discussion is diffused by the knowledge that later cases exist.

102. Letter from Aaron, age 31, Caucasian, to the author (Jan. 16, 1996) (on file with author).

ject to criminalization¹⁰³ is exactly what GLB students are forced to do when reading *Bowers*. This is especially true when the ensuing classroom discussion, if one even occurs, is dominated by perspectives that agree with the Court.

Looking beyond the specific context of *Bowers*, the broader environment of law school is dominated by assumptions about sexual orientation, with heterosexuality being ever-present. It pervades the classroom and the hallways, is displayed on the ring fingers of married students and faculty, and is imposed upon the characters in most hypotheticals. Its presence is assumed until explicitly denied.¹⁰⁴ The presumption of heterosexuality is difficult to overcome, seemingly a stricter burden than the "presumption of innocence" faced by a criminal prosecutor. Brad Sears, who wrote of his experiences as a gay man at Harvard Law School, explains:

Although I came out during One-L orientation, my classmates just didn't seem to get it. At the first class wide party, a beautiful woman with a full head of dark curls strode across the auditorium and introduced herself. She seemed so aggressively friendly I wasn't sure what to make of it. At first I wrote it off as another example of the healthy self-confidence of my fellow students. When she invited me to drop by her house that night I knew what was up By February, when a woman in my section asked me if I was dating another woman in the section, however, coming out had become tedious. This inquiring woman had met the man I was dating first semester and had been sitting right next to me in Contracts when he delivered flowers and a kiss on my birthday. No matter what I wore or said, some students couldn't seem to understand that I wasn't just articulating some wacky political position; that I actually dated and slept with men.¹⁰⁵

My own experience provides a similar example of the resilient power of the heterosexual presumption. During one-L orientation, I explicitly revealed my sexual orientation to my new classmates. While engaged in a discussion on diversity, one of the orientation leaders questioned the entering class about how we should utilize our awareness of individual differences in our study and practice of law. I responded, saying that I felt it was important to remember that many of our colleagues, employers, and clients will not share our perspectives. Then I said: "For example, as a gay man, my view of the world or any given situation is likely to be very different

103. Although I argue that one's identity as a gay man, lesbian, or bisexual is not based on one's participation in acts of sodomy, the Court does not make such a distinction. See *supra* note 88.

104. In this sense, the law school mirrors society in general. People are generally presumed to be heterosexual until they or someone else specifically and unequivocally remove them from the category.

105. Sears, *supra* note 43, at 237.

than the view of a heterosexual Latina." Throughout the semester, I wore shirts with gay slogans and staffed the Lambda Law Society's¹⁰⁶ table in the hallway during National Coming Out Week and frequently talked openly about gay issues both in and out of class. Fairly explicit, I thought. But it proved to be not explicit enough. Several months into the first semester, a friend overheard a conversation in the library about me. A student who sat next to me in class was shocked when someone referred to the fact that I was gay. He said he had no idea.

The strength and prevalence of the heterosexual presumption veils the issue of sexual orientation. Sexual orientation is a non-issue if everyone's orientation is assumed to be the same. As a result, those whose sexual identity does not conform are left with the unique burden of raising the issue. If silent, we perpetuate our invisibility. If outspoken, we become the "other"—different, deviant, a minority. Yet we must speak in order for there to be any discussion. Without GLB students' persistence, the little attention GLB issues currently receive would likely diminish greatly.¹⁰⁷ Although some professors raise GLB-related issues, this is still relatively rare.¹⁰⁸ Unfortunately, these progressive professors are not present in every classroom:

Because the gay and liberal students in my classes have been so outspoken most discussion[s] of sexual orientation have been very good. But without outspoken [g]ay students some orientation issues would be ignored by our teaching staff.

Many professors when the issues are b[r]ought up add little to the discussion. Nothing negative is said but they appear to be confused by the issues. Homophobic students exist in these classes but do not express their viewpoints openly. (When confronted with an openly gay student they remain totally silent.) Again, if there were no gay students (open that is) I don't know what the discussions would be like.¹⁰⁹

Many GLB students feel reluctant to continually raise issues of sexual orientation in class because they do not want to be branded as the "the gay student."¹¹⁰ This label distorts others' perceptions of the student and his or her contributions to the classroom.¹¹¹ It

106. Lambda is the gay, lesbian, bisexual, transgender student organization at the University of Minnesota Law School.

107. "I cannot imagine that professors are going to bring [GLB] issues up on their own. They will be noticeably absent unless raised by a student." Survey response of Carrie, age 22, Caucasian (on file with author).

108. Very few respondents (3) indicated that their professors raised GLB issues in class.

109. Survey response of Mark, age 31, Caucasian (on file with author).

110. "Sometimes I am very tired of being queer—of being seen as 'the gay student.'" Survey response of Jim, age 29, Caucasian (on file with author).

111. See Sears, *supra* note 43, at 244.

enables others to dismiss one's contributions or challenges because of sexual orientation.

The role of being the "gay student" can also lead to heightened expectations within the classroom. Brad Sears writes about how this pressure effectively silenced him during a Criminal Law class discussion of *Bowers v. Hardwick*:

This response [of expecting my participation on gay-related topics] from other students sometimes made me clam up on topics I very much would have liked to discuss. When our Criminal Law class discussed *Bowers v. Hardwick*, for example, I didn't say anything because I felt several glances my way in anticipation of my comments. I felt so put on to say something I couldn't say anything. It would seem like I was engaging in a piece of over-determined theater rather than making a substantive point.¹¹²

The silencing of GLB students excludes the unique perspective of the law we have to offer. GLB students overwhelmingly report that their sexual orientation affects the way they view and understand the law.¹¹³ The experience of being an outsider uniquely informs our values and perceptions.¹¹⁴ It facilitates our perceptions of inequality and discrimination. As one respondent put it:

I think that being gay definitely affects m[y] perception and understanding of the law in that being a minority inevitably changes the way that one perceives social structures that are created by majorities. I am sensitive to legal traditions and statutes that discriminate arbitrarily against any group of people. Beyond clear sexual orientation issues, I am particularly

At the end of the year, students who had felt they had come to know me would jokingly chide that all I ever spoke about in class were issues dealing with AIDS or gays. Although I did bring up these issues from time to time, they definitely did not make up the majority of my class comments.

Id.

112. *Id.*

113. Ninety-two percent of the respondents and people interviewed held this belief to varying degrees. See also Reuther, *supra* note 43, at 258.

114. Urvashi Vaid writes about this experience as an outsider:

I believe that we [GLB individuals] differ markedly [from heterosexuals] in our view of sexuality, gender, power, and morality. The values around which we have built gay and lesbian relationships, made family, and formed communities are not identical with the values that we were raised to hold by our heterosexual parents—nor are they merely gay and lesbian mirror images of those straight values. They are values that are uniquely our own, arising out of our experience as outsiders, built out of the experience of resisting sexual repression. I believe that social science research may well prove that homosexual and bisexual people have strikingly different ideas from those of straight people about gender, sexual behavior, relationships, nonbiological family ties (including the importance of friends as family), and power.

Vaid, *supra* note 26, at 46. See also *infra* notes 139-48 and accompanying text (making the connection between the existence of this different perspective and its place within the law and the law school classroom).

sensitive to issues of sex and gender discrimination, the use of "history" and "tradition" to shape legal norms, and limitations on the power of the state to regulate personal conduct.¹¹⁵

Some argue that being gay, lesbian, or bisexual gives them a unique perspective as an individual from outside the sexual mainstream, a perspective that heterosexual students cannot offer.¹¹⁶ In this sense, we are claiming a truly unique "queer" perspective informed by our marginalized position.¹¹⁷ Others go further and claim that their sexual orientation impacts a vast array of areas of their analysis, some specifically legal in nature, others more accurately understood as general paradigms:

I definitely think sexual orientation affects the way I perceive and understand the law generally as it impacts my world view. I don't think I can explain it in this space and I don't have time to write more. A list of areas I quickly brainstormed which I have a different view based on my sexual orientation are: relationships, contracts, agreements, purpose, goals, religion, breeding/pregnancy, discrimination, marriage, gender, sex, privacy, race, domestic violence, rape, AIDS, employment discrimination, colonialism, working, . . . sexuality as politics, and feminism.¹¹⁸

This unique perspective is not totally absent from law schools. GLBs in the law, both in practice and in academia, are becoming increasingly organized and active.¹¹⁹ GLB law students have brought suit to challenge the discriminatory practices of employ-

115. Survey response of Alex, age 25, Caucasian (on file with author).

116. "I believe my orientation affects the way I perceive the law. I can see issues/problems with the law that non-gay students can't see. I look at the law as being oppressive but also our best bet of obtaining equal status in this society." Survey response of Mark, age 31, Caucasian (on file with author).

117. Jeffrey Sherman argues that gay and lesbian law faculty offer a unique perspective which is attributable to a "gay sensibility" informed by an "instinctive awareness of the absurdity and arbitrariness of gender-based expectations and of the damage such expectations can inflict." Sherman, *supra* note 33, at 126 (citations omitted).

Sherman concludes by questioning whether this unique perspective is a result of the oppression of GLB individuals, or a perspective which stems from same-sex sexual attraction itself. He queries:

At the present time, lesbians and gays are outsiders. But are they outsiders *because* they are lesbian and gay, or because a heterosexual society excludes them? If we lived in a sexual utopia in which gays and lesbians experienced as much reinforcement and inclusion as heterosexuals, would there continue to be a uniquely gay and lesbian voice? . . . Would the experience of being a man who finds his primary intimate connections with other men or a woman who finds hers with other women continue to create a unique voice even in the absence of heterosexual repression?

Id. at 137.

118. Survey response of Betsy, age 24, Caucasian (on file with author).

119. See Sara Hoban, *Intolerance Levels*, STUDENT LAW., Feb. 1988, at 2. Hoban notes that even with this increase in organization, "homophobia is still an active force in the education and practice of law." *Id.*

ers¹²⁰ and law schools alike.¹²¹ Students at Ohio State University, for example, rallied to keep the Judge Advocate General (JAG) from recruiting on campus because of the military's discriminatory policy towards GLB Americans.¹²² GLB students have formed an Internet mailing list for information on legal, political, and social issues.¹²³ We sponsor GLB visibility events, and work in a variety of ways to inform the members of our law schools about the issues we face. One student described his activities in law school:

My position as a gay law student is interesting. My conservative background has given me a philosophy of "touch one person at a time." I believe that I want the same thing straight people want in life—only with a same sex partner. This has actually led me to have less contact w[ith] the gay community and at times a feeling that I am seen as a traitor to the gay cause—because I do not throw it in people's faces and support any type of gay agenda. This feeling comes from gays across campus—not only the law school.

I do participate in gay activities (i.e.—coming out week and occasional social functions) but on a daily basis I am "[Bob] the law student" and I happen to be gay. I guess my philosophy is to get to know people as people . . . not hiding my sexuality but not needing to bring it up until I feel that they are comfortable with me as a person. I find most people . . . are fine with homosexuality once they realize that they know one and actually have a friend who is one (a homosexual).¹²⁴

During the spring 1995 academic semester, I produced a series of posters for the Lambda Law Society's bulletin board at the University of Minnesota Law School. The series originated as an effort to increase GLB visibility at the law school and to educate people about GLB issues. Each week, I chose a person or institution whose actions were unacceptable and designated that week's target the "Homophobe Of The Week."¹²⁵ The name and an explanation of

120. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 135 Cal. Rptr. 465 (Ct. App. 1977), *vacated*, 595 P.2d 592 (Cal. 1979).

121. *Gay & Lesbian Law Students Ass'n v. Board of Trustees*, 1992 WL 310610 (Conn. Super. Ct. Oct. 14, 1992). See also Mark Hansen, *Lesbian Law Student Wins Suit*, A.B.A. J., Feb. 1994, at 32 (discussing *Doe v. Rosa*, No. 92-22487 (N.Y. App. Div. Nov. 17, 1993)).

122. Survey response of Mike, age 24, Caucasian (on file with author).

123. The Internet mailing list is called the American Network of Gay & Lesbian Law Students (ANGLES). To subscribe to the service, send an e-mail message to: majordomo@lists.stanford.edu. In the body of the message, type: *subscribe angles youraddress@anywhere.anyplace*. If you have questions, contact crandon@leland.stanford.edu.

124. Survey response of Bob, age 25, Caucasian (on file with author).

125. Recipients included: Senator Jesse Helms (R-N.C.) (for the introduction of anti-gay rights legislation); Senator Dick Armey (R-Tex.) (for referring to openly gay Representative Barney Frank (D-Mass.) as "Barney Fag. . . er, Frank"); the South Dakota House of Representatives (for voting to nullify any same-sex marriages of people who move to the state); Mary Dean Harvey, Director of Nebraska Department

that person's or institution's actions were printed on a large poster which was prominently displayed at the law school.

The display created much controversy. Many people objected to its "confrontational" nature; others defaced the display by scrawling homophobic epithets upon it or tearing it down. Some observers posted letters on the board expressing their views, both positive and negative. Students would stand in disbelief while reading about what GLB people face on a daily basis. Most importantly, people read the posters and paid attention. It made people think and talk about issues affecting the GLB community.

GLB students also seek to institute more formal ways of educating their peers. Many students have attempted to get their law school to offer a course on sexual orientation and the law.¹²⁶ The students from Yale who reported being enrolled in William Rubenstein's Sexual Orientation and the Law class praised it and the opportunities it presented.¹²⁷ One stated:

I took a sexual orientation and the law course in the spring and the course offered an amazing opportunity to discuss all aspects of sexual orientation and how this concept is regulated and affected by the law. Many of the discussions in this class were excellent and it was great to take a course in which the issues we were discussing were ones to which I could so closely relate.¹²⁸

Activism efforts are not limited to improving the environment of the law school. GLB students at Lewis and Clark's law school sponsored a "No on 13" week in opposition to Oregon's anti-gay ballot measure.¹²⁹ The support they received from fellow students and faculty was "amazing."¹³⁰ During the fall 1995 round of on-campus interviewing by firms at Harvard and Yale, students protested the firm Sidley & Austin for representing Colorado in *Romer v. Ev-*

of Social Services (for issuing a policy banning lesbians and gay men from being foster parents in Nebraska); The University of Notre Dame (for banning a gay and lesbian student group from meeting on campus); and "YOU?" (questioning who took a poster from Lambda Law Society's bulletin board and who wrote homophobic comments on the board).

126. Survey response of Vanessa, age 23, Caucasian (on file with author). Classes on sexual orientation and the law are rare in law schools. See Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscrimination Policies: A Survey of American Law Schools*, 2 LAW & SEXUALITY 131, 135-37 (1992) (reporting findings from a survey of law schools).

127. Survey response of Jason, age 23, Caucasian; survey response of Elizabeth, age 26, Mexican-American; survey response of Alex, age 25, Caucasian (on file with author).

128. Survey response of Alex, age 25, Caucasian (on file with author).

129. Survey response of Lara, age 27, Caucasian (on file with author).

130. *Id.*

ans,¹³¹ the challenge to Colorado's Amendment 2.¹³² One respondent described his activism on this issue:

In response to Sidley & Austin's representation of Colorado in *Romer v. Evans*, a friend and I placed a memorandum up in our free speech zone and in the mailboxes of people who interviewed with Sidley. In the memorandum, we encouraged our classmates to question them about their participation in the case and to consider going to another firm. The response to this memo has been very encouraging and many of my classmates are seriously considering this issue as an important factor in making their employment decisions. I think that this event indicates the extent to which gay and lesbian issues are taken seriously at the law school.¹³³

Students at Harvard Law School picketed Sidley & Austin when they came to interview, the day before oral arguments were heard by the Supreme Court in *Romer*.¹³⁴ The reaction to the protest,

131. 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1061 (1995).

132. Amendment 2 was an attempt to incorporate a new section into article II of the Colorado Constitution. *Id.* at 1338. It sought to ban GLB individuals from consideration as a protected class of persons for the purpose of any state or municipal anti-discrimination laws; essentially opening the door for state and private discrimination against GLB people. *Id.*

133. Survey response of Alex, age 25, Caucasian (on file with author).

134. The organizers of the protest sent the following announcement and request for support to members of the ANGLES mailing list (*see supra* note 123 for explanation of the ANGLES mailing list):

HARVARD LAW SCHOOL LAMBDA NEEDS YOUR HELP OPPOSING THE FORCES OF AMENDMENT 2! . . .

SIDLEY & AUSTIN THINKS IT CAN PROFIT FROM HOMOPHOBIA. A right-wing partner of the high-profile law firm of Sidley & Austin, Rex Lee, took up defending Amendment 2 as a personal cause. But he didn't stop there. This partner lobbied the partnership of Sidley & Austin to defend Amendment 2, and take on the State of Colorado as a "paying client" for this case.

Evidently, the lure of money overcame the partnership's hesitation about damage to the firm's reputation because Sidley & Austin will argue to the Supreme Court on October 10 that gays, lesbians, and bisexuals are undeserving of any constitutional protection from discrimination. In briefs filed to the Court, they assert that Amendment 2 "enhances individual freedoms" by permitting people not to associate with gays, lesbians, and bisexuals. Sidley & Austin will also argue that citizens are not constitutionally guaranteed the right to participate fully in the political process.

Harvard Law School Lambda has organized a boycott of the law firm of Sidley & Austin. We have started an informational campaign, and as a result, over three hundred of our classmates have pledged not to interview with Sidley & Austin. However, our posters have been defaced with "Support Gay Bashing!" and Lambda's members have been confronted in class with "What do you fags want now?" **WE NEED THE LESBIAN, GAY, AND BISEXUAL COMMUNITY'S HELP IN SENDING A LOUD AND CLEAR MESSAGE.**

Tell Sidley & Austin that economic decisions have economic consequences. Show Harvard Law School students that we won't stand for homophobia.

however, was mixed, even among GLB students.¹³⁵ The students at Chicago-Kent Law School used the situation to discuss the ethical implications of legal representation.¹³⁶

Some students take a more personal-is-political approach to GLB visibility in their law schools. They engage their classmates in the social sphere, appropriating privileges which are commonly denied GLB individuals. One man told the following story:

On the plus side, I outed myself by taking my boyfriend (newly acquired at that time) to our Barrister's Ball (Law School meets High School Prom). Many of my classmates stood behind my decision to do this. The scene was this: I had brought a specially selected song for the D.J. to play and when he did there was no one on the dance floor . . . except me and my date. It was really, really uncomfortable but soon I noticed most of my friends had come to the floor too in a sort of group support. It was very touching, and it gave me hope that our future as G/L/B/T people may in fact be brighter than our past.¹³⁷

Amidst all this activism, not everyone has the luxury of support. A poignant example is the University of Mississippi students' struggle for financial support for their GLB law student group:

As an officer in the Gay Lesbian Bisexual Association (GLBA) at the University of Mississippi, I am interested in finding ways to overcome a specific barrier our group is facing. Currently, since the group was organized this semester, we are embroiled in several issues concerning funding from the Associated Student Body. They have cited as reasons for denial of funding our

Letter from gay law student at Harvard Law School to angles@lists.stanford.edu (Sept. 26, 1995) (format adjusted) (on file with author).

135. One respondent articulated this confusion:

I too have trouble determining exactly what is being boycotted here. Surely no-one is suggesting that [Colorado] does not deserve representation, or are they? Or is it unethical to accept money from a client who can pay? I don't think either of those assertions are convincing. If a law firm is to be boycotted it should be because that firm discriminates against gays and lesbians, or because they have a history of taking anti-gay cases with no counter balancing history of accepting pro-gay cases, and this only because it evidences the likelihood that the firm has anti-gay and lesbian discriminatory practices. As I recall, based on letters to this listserv last spring, S&A has taken on pro-gay cases, has a sexual orientation anti-discrimination policy, and has no record of sexual orientation discrimination. Based on this and without further information to the contrary, I cannot understand why we should be boycotting a firm because of one case and any [arguments] they may advance in it.

Letter from gay law student sent to angles@lists.stanford.edu (Sept. 29, 1995) (on file with author).

136. The GLB students group at Chicago-Kent Law School in conjunction with the Offices of the Dean of Students and Career Services, presented a forum "to address the relationship between personal values and professional duties" using the *Romer v. Evans* case as a focus point for discussion. Letter from student at Chicago-Kent to angles@lists.stanford.edu and others (Sept. 29, 1995) (on file with author).

137. Survey response of Jack, age 24, Caucasian (on file with author).

status as a "special interest group" as opposed to a peer education group], which is what we are. Other reasons for withholding the funds allocated to other organizations on this campus were along the lines of "we won't risk our positions by supporting a group that is not favored by the whole campus . . ." a line of logic that is intrinsically faulty and self-actualizing; if we aren't allowed funding for peer education, we won't gain support, and consequently won't be able to receive funding at future finance-committee meetings. Are there any measures at all that we, as a publically [sic] recognized, legitimate student organization can take to get around this?¹³⁸

The overall experience of law school for GLB students is a mixture of oppression and activism. Although GLB issues and concerns are not included in much of the discourse currently occurring at law schools, this exclusion is slowly dissipating.

III. Some Final Thoughts . . .

[Being gay] teaches me that beyond the walls of law school there is a real world where there are no hard and fast rules, where "fairness" doesn't matter, and where you can't rely on anyone else to enforce your rights and liberties.

I know more about judges, justices, students, professors and editors creating artificial distinctions to explain away inequitable treatment of two similarly situated groups. I know that if I want the law to change society, then I must be willing to help in that endeavor, even when I feel as if no one else believes in me or my position.¹³⁹

Gay, lesbian, and bisexual students in law school need to strive to come out in as many ways as possible.¹⁴⁰ It is a responsibility which, although maybe not comfortable, is necessary for advancing the GLB liberation movement.¹⁴¹ Our presence enriches the law school environment and presents a unique opportunity to effectuate positive change in the lives of all Americans, not just those within the legal community.

138. Letter from gay law student to queerlaw@abacus.ox.y.edu. (Nov. 7, 1995) (on file with author).

139. Survey response of Patrick Smith, the only openly gay student at Southern Illinois University Law School, age 24, Caucasian (on file with author). Patrick Smith gave express permission for his name to be used here.

140. I realize that this task may be easier to accomplish for those GLB students who are members of the dominant culture with regard to race, ethnicity, gender, economic status, or other characteristic. This includes me.

141. VAD, *supra* note 26, at 198. ("[T]he refusal to be public about homosexuality is a refusal to take responsibility for our political movement, something too many gay people still do.").

We must be more than just present in the classroom. We must engage our colleagues, students and faculty alike, in a principled dialogue about the realities of our lives and the ways in which the law's construction intentionally excludes or inadvertently overlooks us. We must work to transform the fears held by straight people into acceptance.¹⁴² Visibility alone is no longer sufficient.

Likewise, heterosexual members of law school communities across the nation need to speak out and demonstrate their support. GLB students and faculty should not be the only people questioning the law's application to GLB individuals, raising GLB issues within the law school, and working to create an environment which does not perpetuate the exclusion of GLB issues. The result will be a richer, more fulfilling academic environment for everyone.¹⁴³

Cultural and legal transformation are both necessary for GLB individuals to obtain genuine equality in America.¹⁴⁴ The relationship between the two is symbiotic: some legal reforms are an essential prerequisite for cultural transformation, and entering the cultural sphere is itself political and fosters further legal reforms.¹⁴⁵ By engaging law school communities, we educate the future lawyers, judges, legislators, and leaders of America.¹⁴⁶

142. See *id.* at 200.

143. Schacter, *supra* note 52, at 1927.

This educative value of studying sexual orientation and the law, moreover, extends beyond expanding what people know about the legal treatment of gay men and lesbians. The study of sexual orientation and the law is intellectually rich and can shed important light on a host of other issues—such as the regulation of sexuality and sexual activity more generally, the relationship between legal rules and gender roles, the role of law in supporting or suppressing difference, and the boundary line between individual and communal rights.

Id.

144. VAID, *supra* note 26, at 212. ("To win genuine equality, a rights-oriented movement and a gay liberation movement are both necessary. Being visible, challenging stereotypes, making queer family and community are all political acts. Conversely, passing laws, electing supportive politicians, and organizing ourselves into a voting bloc are power-oriented strategies, essential to cultural transformation.")

145. See Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723, 724 (1993) ("[T]he formal, legal articulation of a right follows a synergistic process in which public rhetoric, media coverage, and legal action by the state create public awareness and acceptance of the claim . . . [T]he tactics of pro-gay rhetors have moved the dialogue to the present stage in which gay rights claims can win acceptance.")

146. This education is especially important now. Only nine states have legislation protecting gays and lesbians from discrimination. And there is a dramatic increase in new anti-gay legislation.

[A] new legislative trend seems to have grown in the 1990s: affirmatively anti-gay legislation. . . . [I]n 1994 there were twenty-four anti-gay bills pending in state bodies. In the early months of 1995, eleven anti-gay bills had been introduced. Utah and South Dakota debated anti-gay marriage bills; the Utah law was passed. Montana, South Carolina, Oklahoma, and Washington sought to place restrictions on gay

In telling our stories and being present in the law school, we assume the power to define ourselves and destroy the alienating, destructive myths surrounding the lives of gay, lesbian, and bisexual people.¹⁴⁷ Only by engaging in dialogue, entering into debate, and being active in our community will positive transformations occur. And through this process, we improve our own education and the education of everyone in law school.¹⁴⁸

adoption and foster parenting. Montana even passed and shortly repealed a law that would have required all persons convicted under the state sodomy law to register their whereabouts with the state for the rest of their lives. . . . [A]n ever-more specific and sophisticated legislative backlash to gay rights is under way at the state and local level.

VAID, *supra* note 26, at 8. See also Schacter, *supra* note 52, at 1926 (arguing that the absence of GLB issues in the law school curriculum is problematic because it fails to teach the future attorneys and policymakers "to be able to think intelligently about the pressing social and legal questions raised by the gay and lesbian demand for equality" and because the absence perpetuates "the traditional invisibility of gay and lesbian life").

147. Telling stories about our lives and offering accounts of outsiders in the classroom does change others' perspectives and understanding of us. See Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1849 (reporting his students' beliefs that classmates' stories and accounts of outsiders' experiences were very beneficial to the students' education).

148. In writing this essay, I have continually re-visited experiences which are painful and emotionally tiring, joyful, and sometimes quite funny. Many of the respondents added comments to their surveys like "Best of luck with the research" and "Scott—Thanks for doing this. I hope your article paves the way for other research/writing on GLB students!" One of the individuals who distributed the surveys to students at his school wrote on the front of them "Please help—It's for your own good." For those comments, and to everyone with whom I spoke and who returned a survey, thank you. It is your stories that made this essay and your perspectives that both reflected some of my experiences and challenged my thinking on many issues.

To all the gay, lesbian, and bisexual people either in law school or contemplating going, I encourage you and your efforts. Don't let the experiences included here dissuade you from entering law school or becoming a lawyer. There are a lot of good schools for GLB students and a lot of good places to work as well. There is also a lot of work within the law that remains to be done and I believe GLB lawyers have a very important role to play in that work.

Appendix 1: Letter to My Constitutional Law Professor¹⁴⁹

November 1, 1994

Dear Professor,

I am writing concerning Monday's class "discussion" of *Bowers v. Hardwick*¹⁵⁰ and our discussion following class. After much continued thought, I find the handling of this issue both by the Court and in class problematic. While I have many problems with the decision, including the [majority's] characterization of the precedents (and subsequently your wholesale approval of their interpretation), what I find most problematic is the lack of principled discussion of the issues presented by the case. It is this lack of investigation and discussion that does the most invidious harm to gay men, lesbians, and bisexuals.

Independent of the way you read the six decade line of "privacy" cases, Justice White felt at liberty to disregard them, in only two paragraphs, by announcing that it was "*evident* that none of the rights announced in those cases bears *any resemblance* to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."¹⁵¹ . . .

Overlooking the fact that this was not the right asserted by the defendant in this case, White offers no explanation as to why his conclusion is "evident." It was not so "evident" to the four dissenting Justices on the Supreme Court,¹⁵² the three judges on the Circuit Court of Appeals who all found otherwise,¹⁵³ and the millions of gay, lesbian, and bisexual Americans and their allies who find such a conclusion legally unacceptable when grounded not on an examination of the issue, but simply on an assertion that the conclusion of the Court is "evident."

After engaging in a discussion of the role of sodomy in the life of the defendant, the [c]ourt [of appeals] acknowledged that Hardwick's sexual activity, although not procreative, involved "important associational interests" and that these activities "serve the same purpose as the intimacy of marriage."¹⁵⁴ The court recognized this "resemblance," examined the privacy precedents, and thus concluded that the activity Hardwick wished to engage in within the privacy of his own home "is quintessential[ly] private

149. Footnotes have been added for publication purposes. Any other significant changes from the original are indicated by brackets.

150. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

151. *Id.* at 190 (emphasis added).

152. *See id.* at 204-06.

153. *See Hardwick v. Bowers*, 760 F.2d 1202, 1211-12, *reh'g denied*, 765 F.2d 1123 (11th Cir.), *and cert granted*, 474 U.S. 943 (1985), *and rev'd*, 478 U.S. 186 (1986).

154. *Id.*

and lies at the heart of an intimate association beyond the proper reach of state regulation." This, combined with Blackmun's analysis in dissent, makes it abundantly clear that the lack of "resemblance" is not at all "evident."

In addressing the question of whether there is a fundamental right to engage in homosexual sodomy, independent of precedential considerations of privacy, White invokes the *Palko v. Connecticut* and *Moore v. East Cleveland* precedents as tests to avoid the Justices' imposition of their own values on the States and Federal Government.¹⁵⁵ *Palko* held that fundamental liberties should be protected with heightened judicial scrutiny if they are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed"¹⁵⁶ and *Moore* held that they should be protected if they are "deeply rooted in this Nation's history and tradition[s]."¹⁵⁷

This time, it was not "evident" but "obvious" that "neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."¹⁵⁸ . . . White proceeds at this point in the decision to discuss the "ancient roots" of sodomy laws in the United States (which, even given existing scholarship at the time, is *not at all* as clear as the majority would have you believe) and thus he addresses the *Moore* standard.¹⁵⁹ He fails, however, to address the standards established in *Palko* at all. But of course, the lack of connection between a homosexual person's right to engage in private, consensual sexual activity with the same legal protection a heterosexual person would enjoy (such as any of the Justices themselves) is "obviously" not necessary for liberty or justice to exist.

If Michael Hardwick had not initially been identified as a gay man during his first encounter with arresting officer Torick outside of the gay bar where Hardwick worked, he would have never been seen engaging in or arrested for sodomy. Hardwick's arrest was the first in some 50 years in Georgia, a state where the law was not applied to heterosexuals (according to Hobb's arguments for Georgia before the Court) even though the law was specifically amended to include them.

155. *Bowers*, 478 U.S. at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937) and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

156. *Bowers*, 478 U.S. at 191-92 (citing *Palko*, 302 U.S. at 325-26).

157. *Bowers*, 478 U.S. at 192 (citing *Moore*, 431 U.S. at 503).

158. *Id.*

159. *Id.* at 192-94.

In fact, the entire line of cases from *Poe v. Ullman*¹⁶⁰ to *Hardwick* and beyond demonstrate blatantly heterosexist thinking. In many of the cases, including *Poe* and *Griswold*,¹⁶¹ the Court specifically distinguishes between the sacredness of marriage (the epitome of a heterosexual relationship) and the immorality of homosexuality, likening it to adultery, bigamy, and incest. In the same year that *Hardwick* was decided, the Supreme Court denied certiorari to *Post v. State*¹⁶² in which a state appellate court overturned a heterosexual sodomy charge on the grounds that the federal Constitution guaranteed a right to privacy "to matters of sexual gratification." The simple recognition that heterosexuality and homosexuality are moral equivalents, just as being black or white or male or female are moral equivalents, would lead to a different result in *Hardwick*. To a heterosexist thinker, homosexual sexual expression bears no resemblance to heterosexual sexual expression, even if the same body parts come into contact.

I am not sure if this letter is appropriate given our professor-student relationship. I write not to specifically critique your pedagogy, but to point out that what is most problematic about the [majority's] reasoning was recapitulated by the structure of our class discussion. As a matter of constitutional reasoning, I think it is important to continually question and probe. While perusing these issues on equal protection grounds may, in the end, be a more successful strategy, it does not necessitate accepting the prejudicial attitudes of the Court. In fact, without first probing to see if such attitudes exist, any equal protection argument made before the Court could be just as likely to be dismissed.

Sincerely,
Scott Ihrig

160. 367 U.S. 497, *reh'g denied*, 368 U.S. 867, and *reh'g denied sub nom.*, Buxton v. Ullman, 368 U.S. 869 (1961).

161. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

162. 715 P.2d 1105 (Okla. Crim. App.), *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), and *cert. denied*, 479 U.S. 890 (1986).

Appendix 2: Student Survey**GLBT LAW STUDENT SURVEYS¹⁶³**

Hello. My name is Scott Ihrig and I am a gay 2L at the University of Minnesota Law School. As a staff member of *Law and Inequality: A Journal of Theory and Practice*, I am writing a journal article on the experiences of gay, lesbian, bisexual, and transgendered students in law school.

I am interested in collecting information on three general areas: institutional statistics, GLB law school activism, and personal narratives and experiences.

Because there is very little written on the experiences of GLBT law students, I am asking for your assistance in collecting original data. I am most interested in collecting stories of your experiences as a GLBT law student. I realize that your time is very precious and that describing your experiences will take longer than simply checking YES or NO to a question, but I believe this is the only way to begin to collectively understand the experience of law school for GLBT students.

These experiences may not necessarily focus specifically on themes of sexual orientation; they may simply be experiences in which you feel your sexual orientation uniquely affected your perception or viewpoint. I would also appreciate the opportunity to speak with you on the phone about your experiences if you would be willing to do so.

I am acutely aware of the problematic nature of focusing on the experiences of gay, lesbian, bisexual, and transgendered law students, for none of us are without a gender, race, class, level of physical ability, and other defining characteristics. All of these factors substantially effect [sic] our experience and perception of law school. I hope these differences will be reflected in the article.

Please don't feel obligated to answer questions which request information you do not wish to give.

If I receive surveys back from your school, I will send a copy of the final article to your school so that you can read the findings.

Law School: _____ Year: 1L 2L 3L

Race/Ethnicity: _____ Age: _____ Gender: _____

163. The term "GLBT" was initially used to denote gay, lesbian, bisexual and transgender individuals. The abbreviated "GLB" was used later in response to the lack of any survey responses from transgender law students. See *supra* note 23.

How do you define your sexual orientation? _____

At what age did you first come out to:

 Yourself _____ Friends _____ Family _____

Which of the following would you use to describe yourself (Circle all that apply):

Democrat	Feminist	Conservative	Politically
Republican	GLB	Moderate	active in
Independent		Liberal	GLB issues
Other _____		Radical	

Undergraduate School: _____ Class of: _____

Major: _____

Were you out as an undergraduate? YES NO

Were you out when you entered law school? YES NO

Did you make your sexual orientation known on your application to this law school? YES NO

Were sexual orientation issues a factor you considered in choosing which law school to attend? YES NO

If YES, what factors did you consider and how did you weigh them:

Why did you choose to go to law school:

What area of law are you interested in practicing:

Are you a member of a GLBT law students group at your school?
YES NO

Do you make your sexual orientation known on your resume?
YES NO

Who of the following are you out to at your law school (Check all that apply):

_____ Almost no one	_____ Members of the Faculty
_____ Close friends	_____ Members of the Administration
_____ Most or all students	_____ Generally anyone and everyone

Please check one:

_____ I am comfortable with this level of outness at law school.
_____ I would prefer to be <i>more</i> out at law school.
_____ I would prefer to be <i>less</i> out at law school.

NARRATIVE QUESTIONS:

Please answer the following questions. Your answers can be as long or short as needed. Feel free to discuss other issues as well if

you feel they are relevant to your experience as a GLBT law student. Include additional sheets as necessary.

1. Describe any classroom or law school related experiences in which you felt the discussion of sexual orientation issues was exceptionally good, exceptionally bad, or noticeably absent.
2. How would you describe the overall atmosphere of your law school for you as a GLBT student? Please consider the attitudes and actions of other members of the law school community as well as the substance of the law and the process by which it is taught.
3. Do you think your sexual orientation effects [sic] the way you perceive or understand the law generally? Does it shape your view of the law beyond issues which are clearly related to sexual orientation?
4. Describe any GLBT activism efforts you have participated in at the law school or as a member of the law school. Please include some indication as to the response from the law school community and the effectiveness of the action(s).
5. Has law school changed your personal politics or ideology? If so, please indicate in what ways and whether you consider this a change for the better or worse.

