GRATUITOUS LANGUAGE IN APPELLATE CASES INVOLVING GAY PEOPLE: "Queer Baiting" from the Bench

Lawrence Goldyn

An examination of appellate cases—state and federal—where homosexual behavior is under judicial scrutiny suggests that gay litigants are frequently the targets of gratuitous asides. Such language takes various forms. It also occurs with varying frequency depending on the type of case (criminal, employment discrimination, immigration and naturalization, licensing and incorporation, marriage, or child custody) under examination. The incidence of such language also varies with the level of the court involved (state vs. federal), and it also varies temporally, showing a general decline with the advance of time. The presence of such language is employed as an indicator of the legitimacy accorded gay litigants in the courtroom. Within this context, the impact and efficacy of litigation on behalf of gay people is also assessed.

Oscar Wilde and Alfred Taylor, the crime of which you have been convicted is so bad that one has to put stern restraint upon oneself to prevent oneself from describing, in language which I would rather not use, the sentiments which must rise to the breast of every man of honor who has heard the details of these two terrible trials. (Justice Wills quoted in Hyde, 1956, p. 339.)

In Western countries the topic of homosexuality does not always bring out the most rational or compassionate side of a person's character, particularly when that person is a man. Appellate courts are principally composed of men who are addressing other men, and when the topic of their address is homosexuality one might expect some significant departures from the restraint and brevity which usually characterizes appellate legal decision writing.

This expectation is borne out by an examination of appellate deci-
sions in which homosexuality is under judicial scrutiny. For this study I have examined 191 appellate cases, from both state and federal courts. I obtained the cases from a systematic perusal of law review articles indexed in the Guide to Legal Periodicals since 1926 under the headings “homosexuality” and “sex crimes.”

The cases to be examined here fall within the following categories: sodomy (a criminal offense); solicitation (also a criminal offense); employment discrimination, including employment—mostly in the public sector—and security clearance cases; immigration and naturalization law; licensing and incorporation law, mostly cases involving liquor licenses of gay bars and the chartering of gay student organizations; marriage law, including divorce proceedings and same-sex marriage; and child custody. All the cases used in the empirical analysis that follows occur since 1950, although a few earlier cases are used for illustrative purposes.

In a substantial number of these cases, courts use gratuitous language which is only remotely if at all necessary for the disposal of the case at bar.¹ In the context of legal discourse, this language is derogatory, showing contempt for homosexuals and homosexuality.² The language serves largely to legitimate and justify the punishment meted out under the criminal law and the discrimination to which the civil law often acquiesces. Such language also provides a way for judges, individually and collectively, to distance themselves psychologically from homosexuality, a common attribute of homophobic behavior.³

The incidence of such language varies among the types of cases, and overall the incidence is not high in an absolute count. It occurs in about one quarter of the cases. However, within the specific context of appellate decisions such appearances are significant and telling.

The judges who compose appellate decisions are not addressing the defendant, as was the magistrate who passed judgment on Oscar Wilde. The image of a disgusted trial judge “throwing the book at him” is not appropriate here. Appellate judges address other judges on points of law and procedure, and occasionally on questions of the facts of the case,⁴ and as a result the language found in appellate cases is generally bare, restrained, specific, legalistic, and quite boring. This norm—the result of judicial training and workloads which foster a no-nonsense approach—is so overwhelming that any departure from it is immediately recognizable.

The frequency of verbal asides must be judged in this context, and so must the choice of language. Compared to the verbal abuse to which homosexuals are subject on the street, the language of the courts seems
reasonable and moderate. But in the context of the normal language found in legal opinions, it is quite immoderate.

THE NATURE OF GRATUITOUS ASIDES

Gratuitous language in the cases shows different degrees of emotive content, ranging from the use of "loaded" words all the way to virtual diatribes from the bench.

Earlier cases from the 1950s are more likely to use words like "deviant," "abnormal," and "perverted," which have overtones of medical or psychological judgment. For example, in 1954 a New York court referred to the presence in a bar of "homosexuals or sex deviates" (People v. Arenella, p. 189). In a child custody proceeding, a Pennsylvania court said of a gay father: "'There is much evidence in the record which would warrant the conclusion that the relator's propensities were abnormal'" (Comm. v. Bradley, 1952, p. 381). A District of Columbia Circuit Court characterized a solicitation case as a "prosecution for an invitation to a perverted sex act" (U.S. v. Kelly, 1952, p. 154). And in a divorce action, a New Jersey court said, "'The photographs admitted in evidence if nothing else, strongly indicate an abnormal type of intimacy between these women'" (H. v. H., 1959, p. 752).

In the cultural context of the 1950s we should not make too much of this language. Within this context, the application of terms like "abnormal" and "perverted" to homosexuals was quite common, if not the norm. It is, of course, not uncommon today. But in the 1950s the gay rights movement was in a fledgling state with almost no public visibility. No one challenged the derogatory labels attached to homosexuality in a forum where there could develop a public consciousness of the arbitrary nature of such labels.

In such a context, courts simply reflected widespread social and legal judgments about the "perverted" nature of homosexuality, but it is a passive reflection of a dominant, largely unchallenged perspective. The use of such language is interesting for what it tells us about the dominant mores of the time. However, in later cases the use of such language is even more interesting because it indicates an active defense of dominant mores, a more active response to the challenge of a developing pro-gay point of view. Such an active defense is more interesting because as the dialectic of the debate develops, more components of the dominant, antihomosexual viewpoint are exposed.

Since the 1950s scientific and public knowledge about homosexuality has increased and improved, and while it seems that most people
still think that homosexuals are sick, it is no longer so widely believed that they are depraved and degenerate, as suggested by the Ninth U.S. Circuit Court of Appeals in 1965:

Parents would not rest secure that their youngsters could use such facilities without fear that they would witness scenes of shocking adult degeneracy. (Smayda v. U.S., 1965, pp. 254-255)

The themes of degeneracy and perversion still occasionally appear, but they have largely given way to ones involving questions of morality, decency, and lewdness:

Any schoolboy knows that a homosexual act is immoral, indecent, lewd and obscene. Adult persons are even more conscious that this is true. (Schlegel v. U.S., 1969, p. 1378)

While such explicit medical, psychological, and moral judgments occur throughout the cases, one also finds a wide variety of other derogatory linguistic devices. For example, one court tells us that a short story about a lesbian romance is "nothing more than cheap pornography" because it does not deal with homosexuality from a scientific or critical point of view (One Inc. v. Oleson, 1957, p. 777). Another tells us that "it is difficult to conceive of a more grievous indignity" to which a man could be exposed than to find out that his wife was sleeping with a woman (H. v. H., 1959, p. 726). One court characterizes the idea of equal rights for gay people as a "socially repugnant concept" (McConnell v. Anderson I, 1970, p. 196). The Supreme Court of Maine writes: "We have no doubt that citizens generally consider sodomy 'detestable' and 'abominable.' It is a dirty business" (State v. White, 1966, p. 215).

Another, indirect way of condemning homosexuality is the use of indiscriminate categorizing, thus placing homosexuals in an unsavory category:

Congress . . . could, as a matter of legislative policy, provide . . . that sex deviates, chronic alcoholics, former felons and various other categories suffering infirmities would be ineligible for federal employment in nonsensitive areas. (Scott v. Macy I, 1965, p. 190, Burger dissenting)

Another indirect technique of showing personal disgust is having someone else do it for you:

It will be unnecessary for us to set out the sordid testimony about the act, which appeared so revolting to one of the two deputies sheriff . . . that he vomited thrice during the evening—the first time as an immediate reaction to his seeing what was taking place in the automobile, and the others while appellants were in custody and being 'booked.' (Carter v. State, 1973, p. 370)
Contempt for homosexuals is also manifested when a court seeks to distance itself from homosexuals or their "practices," as does a New York court in an incorporation case:

The troublesome posture of the petitioners is that by identifying themselves as a 'homosexual civil rights organization,' they are professing a present or future intent to disobey a penal statute of the State of New York. While the court has no personal experience upon which to rely, it would seem that in order to be a homosexual, the prohibited act must have at some time been committed or at least presently contemplated. (Gay Activists Alliance v. Lomenzo, 1971, pp. 996-997)

Courts also disparage gay litigants and groups by using a sarcastic, contemptuous tone. For example, in a California employment case a district court summarizes the proceedings by stating: "Appellants, styling themselves members of the gay community, appeal from an adverse judgement" (Gay Law Students Assoc. v. Pacific Telephone, 1977, p. 467). Similarly, the U.S. Court of Appeals for the Fifth Circuit describes a case under review as follows:

... it is a case in which a nebulous group, the Mississippi Gay Alliance, representing itself to be an association 'basically comprised of homosexuals,' seeks judicial compulsion against a student newspaper requiring publication of an advertisement which that paper does not want to publish. (Mississippi Gay Alliance v. Coudelock, 1976, p. 1074, emphasis added)

The court then refers to "a female, the self-styled chairwoman of the Mississippi Gay Alliance". Later in the same decision the court calls the Alliance an "off campus cell of homosexuals" (p. 1075).

The quotations from State v. White and Carter v. State suggest that the crime of sodomy—covering anal, and sometimes oral sex, both hetero- and homosexual—probably because of its lengthy history, provides a context which is particularly conducive to certain kinds of gratuitous asides. The crime, known as "buggery" in English law and sometimes called the "crime against nature" in American jurisdictions, became a secular crime in England in the sixteenth century when the Reformation took from ecclesiastical courts much of their jurisdiction. In the seventeenth century Sir Edward Coke defined the crime of buggery as "a destestable and abominable sin, amongst Christians not to be named" (Coke 1817, p. 58-59). In the following century Blackstone called sodomy "the infamous crime against nature," and said that indictments referred to it as "a crime not fit to be named" (Blackstone, 1811, p. 215).

By labeling the crime unmentionable, these definitions participate in a speech taboo, derived undoubtedly from Christian superstition,
which seeks to ward off the evil of a sin by refusing to give it manifestation in speech. Such delicacy of language has become a tradition in sodomy law, and it has had a number of interesting effects. First of all, the definitions are sometimes taken so literally that they are used to uphold the validity of indictments which name the crime in a euphemistic way. A very early Illinois appeal based on the alleged insufficiency of the indictment illustrates this practice:

The statute gives no definition of the crime, which the law, with due regard to the sentiments of decent humanity, has always treated as one not fit to be named. It was never the practice to describe the particular manner or the details of the commission of the act, but the offense was treated in the indictment as the abominable crime not fit to be named among Christians. (4 Blackstone Comm., p. 215) The existence of such an offense is a disgrace to human nature . . . the records of the courts need not be defiled with the details of different acts which may go to constitute it. (Honselman v. People, 1897, p. 305)

This decision also displays the second effect of the taboo-based definition: law reports are kept well disinfected. A contemporary case shows the same effect:

The State’s evidence was amply sufficient to carry the case . . . It would serve no useful purpose to soil the pages of our Reports with its sordid details. (State v. Stubbs, 1966, p. 901)

Taken together, the condemnation of sodomy inherent in the definition, the upholding of euphemistic indictments, and the hesitance to “soil the pages” with details have further had the effect of promoting a highly polarized approach: courts either remain almost completely silent on the subject of homosexuality or they indulge in vilification. The tradition thus discourages discussion of homosexuality on the rational middle ground between these two extremes. It gives judges an outlet to deal with their usually extremely negative feelings about homosexuality, either by saying nothing or indulging in largely abusive comments. This legal tradition thus helps explain why most cases involving gay people are silent about homosexuality, or say a few irrational things, while a few cases say a great deal that is irrational.

THE VARIATION AMONG THE CASES

The incidence and quality of derogatory language is different for different types of cases. It is most frequent in solicitation, marriage, divorce, and child custody cases. It is least frequent in immigration, naturalization, and employment cases. It is most vituperative in
TABLE 1. Incidence of Gratuitous Language by Substantive Legal Area.

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Incidence</th>
<th>N</th>
<th>%</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solicitation</td>
<td>5</td>
<td>9</td>
<td>56</td>
<td>1</td>
</tr>
<tr>
<td>Marriage and divorce</td>
<td>5</td>
<td>9</td>
<td>56</td>
<td>1</td>
</tr>
<tr>
<td>Custody</td>
<td>5</td>
<td>14</td>
<td>36</td>
<td>2</td>
</tr>
<tr>
<td>License and incorporation</td>
<td>12</td>
<td>41</td>
<td>29</td>
<td>3</td>
</tr>
<tr>
<td>Sodomy</td>
<td>11</td>
<td>51</td>
<td>22</td>
<td>4</td>
</tr>
<tr>
<td>Immigration and naturalization</td>
<td>3</td>
<td>16</td>
<td>19</td>
<td>5</td>
</tr>
<tr>
<td>Employment</td>
<td>6</td>
<td>50</td>
<td>12</td>
<td>6</td>
</tr>
<tr>
<td>Miscellaneous*</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>48</td>
<td>191</td>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>

*Includes a pornography case.

*Note: A list of cases used in the qualitative analysis is available from the author upon request.

sodomy cases. Frequencies for the cases in hand are shown in Table 1.

As Table 1 shows, employment cases rarely contain gratuitous language. Immigration and naturalization cases also have few asides, and, furthermore, the language found in them is more detached than that found in other categories. For example, in an early case from 1956, a U.S. Circuit Court of Appeals upheld the deportation of a gay man on the following grounds:

Defendant was convicted of having solicited men in a public place to commit with him an homosexual act. Such behavior is most emphatically not socially approved behavior in these United States ... a sex deviate so afflicted with such a defect of mentality as to publicly solicit an unnatural act is very likely to be brought into repeated conflict with our social customs, constituted authority, and social environment. He will find it extremely difficult to adapt himself, and to become a useful member of the American community. (U.S. v. Flores-Rodriguez, 1956, p. 142)

As strong as the language of this case is, it clearly belongs in the same category as the 1950s cases discussed above: it passively reflects a dominant, unchallenged perspective which understood homosexuality as a mental pathology. It is not actively abusive like some of the language found in later sodomy cases.

In the following citation from a naturalization case the court is more detached:

If the criterion were our own personal moral principles, we would deny the petition, subscribing as we personally do to the general 'revulsion' or 'moral conviction' or instinctive feeling against homosexuality. (In re Labudy, 1971, p. 927)

We also find a rather condescending but not malicious piece of rhetoric:
Although a relatively young segment of contemporary society prides itself on its readiness to cast off conventional and tested disciplines and to experiment with nonconformance and the unorthodox merely to act out its contempt for traditional values . . . certain areas of conduct continue to be as controversial in modern and beau monde circles as they were in bygone and more staid eras. (Boutiller v. I.N.S. I, 1966, pp. 489-490)

Such language is mild indeed compared to some of that found in other kinds of cases.

In child custody cases gratuitous language occurs frequently, but it is also relatively mild compared to that found in sodomy cases. Here is an example:

Appellant does not merely say she is homosexual. She also lives with the woman with whom she has engaged in homosexual conduct, and she intends to bring up her daughter in that environment. The trial court was not required to believe appellant's self-serving statements about the present nature of her homosexual relationship, nor was it required to disregard the potential psychological influence that appellant's homosexual relationship might have upon her daughters . . . The fact that in certain respects enforcement of the criminal law against the private commission of homosexual acts may be inappropriate and may be approaching desuetude, if such is the case, does not argue that society accepts homosexuality as a pattern to which children should be exposed in their most formative and impressionable years. (Chaffin v. Frye, 1975, pp. 46-47)

The court could have disposed of this case without calling the mother's testimony self-serving—the testimony involved her assertion that she did not engage in "immoral" conduct in front of the children, and had not had sexual relations with her partner for two years. Nor did the court need to comment on the decriminalization of homosexual behavior, saying that it is irrelevant to the court's judgment regarding the protection of children. But the language is still not as harsh as that found in sodomy cases.

The incidence and type of language found throughout the cases seem to vary along three dimensions: (1) the amount of subjective moral judgment required of the court, (2) the extent to which the case triggers homophobia by the presence of actual homosexual behavior, and (3) the nature of the object being "protected."

1. The greater the amount of personal discretion and subjective judgment required of a court, the more one might expect to find gratuitous language. Characterizing the gay litigant in a negative way directs audience attention away from the subjectivity of the opinion by invoking an emotional response which would parallel that of the court.

In the area of custody law, courts operate essentially as equity tribunals, with almost unlimited discretion and almost no precedent to guide
them. They are directed to rule “in the best interests of the child” in each individual case, and to do so, accept into evidence a great deal of information which, in other proceedings, would be judged irrelevant. Such information includes the sexual behavior of the parent—particularly that of the gay parent. In all other areas of the law represented here, courts operate under the normal standards regarding precedent and the admission of evidence characteristic of both criminal and civil law.

Thus the legal setting of custody proceedings invites judgments about homosexuals since courts are directed to determine the fitness of a homosexual parent or household on the basis of far-reaching standards. In one sense, such judgments are therefore necessary for the disposal of the case at bar; however, the language used often indicates that the judgments are made at least partly on the basis of personal prejudice, as shown in the citation from *Chafin v. Frye*.

This analysis implies that the frequency of gratuitous language in custody cases, as in other areas of the law, is partly due to the presence of judicial discretion which provides an outlet for homophobia. But in custody law the presence of the language is also a function of the workings of the legal system itself, which invites the use of judgmental language.

The infrequency and mildness of gratuitous language in the immigration and naturalization cases can be explained by the fact that judges can largely avoid subjectively moral judgments. In these cases courts have recourse to a medical model of homosexuality provided by the wording of a federal statute. This ideological framework has allowed them to avoid the possibly uncomfortable procedure of personally labeling the litigant as morally unfit and justifying the label. The medical profession has provided the label and the justification for it.

Similarly, in employment law, although courts do make moral judgments about gay litigants, they do so on the basis of explicit statutes which used to make immorality a cause for dismissal in the federal civil service, and still does for school teachers. Furthermore, there is a large body of precedent which has ruled that homosexuality is inherently an indicator of moral turpitude. Therefore, although judges do render judgments about a highly subjective topic—morality—they do so in a perceptual framework which makes the topic seem less subjective and the judgment less a matter of personal discretion.

2. One would expect the presence of actual homosexual behavior, as opposed to a homosexually identified person, to trigger greater homophobia on the part of the courts. This proposition also helps explain why the gratuitous language found in sodomy cases is so strong,
as it is here that courts most frequently confront recent, actual, and often detailed homosexual conduct. One author has, in fact, suggested that the use of gratuitous language in sodomy cases is motivated by reaction formation. In this view, judges punish gay people for doing what the judges themselves may have felt temptation to do, and one way to suppress this temptation is to vilify those who succumb to it (Hollis, 1968). According to this theory, the abusive language found in homosexual cases, and especially sodomy cases, is the judicial equivalent of "queer baiting."

A related explanation for the use of gratuitous language in sodomy cases is that a court upholding a conviction of a "crime against nature" may feel compelled to do some explaining to a modern audience which presumably does not believe in a concept like "crime against nature." A court can divert the challenge to the justification for such laws by characterizing the litigant as such a depraved person that he or she is beyond the pale of rational judgment.

3. One might also expect gratuitous language to be more frequent and/or stronger when the object of judicial protection is more immediately tangible to the court. Thus when protecting a child in custody law, the object of protection is not only tangible, but clearly without the resources necessary to protect itself. This would account for the high incidence of gratuitous language in custody cases.

Where immigrants or aliens are concerned, a court is protecting a vast, rather intangible society from a single person. If the protection proposition under consideration here is correct, we would expect that immigration law would therefore have a very low incidence of gratuitous language. In fact it is the second lowest category, and furthermore, the language is relatively mild and detached.

In federal employment cases, some courts seem to think that they are protecting the reputation and image of the government, a cause which apparently does not evoke a strongly emotional response. Judging from the school teacher cases, the protection of students does not evoke much gratuitous language either. However, as already discussed, the principal reason for the low incidence of such language in employment—and immigration—law is probably the presence of a perceptual framework, such as expressed in the formal-legal or medical framework, which allows courts to avoid what appear to be personal judgments.

It has already been noted that the kind of gratuitous language found in the cases varies over time. Table 2 indicates that the incidence of such language also has changed over time.

The last column of Table 2 indicates that on the whole the use of
TABLE 2. Incidence of Gratuitous Language over Time.

<table>
<thead>
<tr>
<th>Period</th>
<th>Cases with Language</th>
<th>Total Cases</th>
<th>% of Total with Language</th>
<th>% of Total with Language by Decades</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950-54</td>
<td>8</td>
<td>12</td>
<td>67</td>
<td>58</td>
</tr>
<tr>
<td>1955-59</td>
<td>7</td>
<td>14</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>1960-64</td>
<td>4</td>
<td>21</td>
<td>19</td>
<td>25</td>
</tr>
<tr>
<td>1965-69</td>
<td>11</td>
<td>39</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>1970-74</td>
<td>11</td>
<td>67</td>
<td>16</td>
<td>16</td>
</tr>
<tr>
<td>1975-78</td>
<td>7</td>
<td>38</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>48</td>
<td>191</td>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>

Gratuitous language has declined since the 1950s. The decline is probably because of the slow but steady emergence of the gay liberation movement and the pro-gay ideas which took shape with it. Both the movement and the ideas pushed actors in the judicial system to reconsider the antigay point of view which had characterized the system for so long. The decline in the use of abusive language indicates an increasing willingness on the part of the courts to consider the claims of gay people in a rational and serious manner.

The year 1969 is usually heralded as the beginning of the public, large-scale gay liberation movement, and this explains the large number of cases which occur in the period from 1970 to 1974. During this period the vastly increased amount of litigation coupled with political activity outside the courts brought about some judicial reconsideration of its stance toward homosexuality.

Does gratuitous language appear with the same frequency in state and federal decisions? Table 3 shows that it does not. In each decade under consideration here we find that state courts, as a whole, indulge in gratuitous language more frequently than federal ones. Given the

TABLE 3. Incidence of Gratuitous Language over Time: State v. Federal Courts

<table>
<thead>
<tr>
<th>Period</th>
<th>% Federal</th>
<th>N</th>
<th>% State</th>
<th>N</th>
<th>% Combined</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950s</td>
<td>50</td>
<td>(6)</td>
<td>60</td>
<td>(20)</td>
<td>58</td>
<td>(26)</td>
</tr>
<tr>
<td>1960s</td>
<td>15</td>
<td>(20)</td>
<td>30</td>
<td>(40)</td>
<td>25</td>
<td>(60)</td>
</tr>
<tr>
<td>1970s</td>
<td>13</td>
<td>(40)</td>
<td>20</td>
<td>(65)</td>
<td>16</td>
<td>(105)</td>
</tr>
<tr>
<td>Overall</td>
<td>17</td>
<td>(66)</td>
<td>30</td>
<td>(125)</td>
<td>25</td>
<td>(191)</td>
</tr>
</tbody>
</table>
history of civil rights in the United States this outcome is not surprising: those challenges to oppressive state laws that have succeeded have usually taken place in federal courts. And it can probably be safely assumed that federal courts are therefore somewhat more likely to take seriously the claims of an oppressed minority.10

Does the general decline in the use of gratuitous language reflect a decline within all categories of cases or is the aggregate figure masking more variation within some categories? Table 4 indicates that the general decline is characteristic of all substantive legal areas: reading down most of the categories, one notes a general decline in the occurrence of gratuitous language over time. The only substantive area that shows an increase is employment law which has the lowest overall incidence and shows an increase principally because it starts at zero.

CONCLUSION

Gratuitous language in appellate cases involving gay people occurs with a significant frequency, and does not occur at random. It occurs most often in those cases where courts are confronted by actual homosexual behavior as opposed to homosexuals, when courts are "protecting" children, and when courts are protecting the institution of monogamous, heterosexual marriage.

The crudeness of much of the language indicates that courts are still reacting to homosexuals on a visceral level, and not granting them the rational discourse which the legal system is meant to provide. However, the trend away from gratuitous language suggests that as gay litigation continues, courts will increasingly attempt to formulate a rational justification for their treatment of gay people.

That such a justification may be rational—as opposed to visceral or emotional—does not mean that it is necessarily rational in the sense of being based on sound scientific evidence, logical thought, and/or deliberative judgment; nor, of course, does it necessarily mean that court decisions will be more progay.11 The appearance of rational justifications simply means that courts are taking gay litigants as serious actors in the judicial process.

While such observations do counsel caution, they are not meant to suggest that courts are completely nonresponsive to homosexuals. Currently, gay people are not only receiving a more respectful audience in court; they are also winning some important civil rights protections there. Such victories have significant limitations: I have argued elsewhere that for the most part courts have shown only a willingness—and not much of one at that—to protect "exemplary" homosexu-
TABLE 4. Gratuitous Language by Type of Case, over Time.

<table>
<thead>
<tr>
<th></th>
<th>Solicitation</th>
<th>Marriage &amp; Divorce</th>
<th>Custody</th>
<th>License &amp; Incorporation</th>
<th>Sodomy</th>
<th>Immigration &amp; Naturalization</th>
<th>Employment</th>
<th>Misc.</th>
<th>Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
<td>% (N)</td>
</tr>
<tr>
<td>1950s</td>
<td>57 (6)</td>
<td>75 (4)</td>
<td>50 (2)</td>
<td>63 (8)</td>
<td>100 (1)</td>
<td>33 (3)</td>
<td>0 (1)</td>
<td>100 (1)</td>
<td>58 (36)</td>
</tr>
<tr>
<td>1960s</td>
<td>100 (2)</td>
<td>100 (1)</td>
<td>50 (2)</td>
<td>31 (16)</td>
<td>19 (16)</td>
<td>11 (10)</td>
<td>8 (13)</td>
<td>—</td>
<td>25 (60)</td>
</tr>
<tr>
<td>1970s</td>
<td>0 (1)</td>
<td>25 (4)</td>
<td>30 (10)</td>
<td>16 (17)</td>
<td>21 (34)</td>
<td>33 (3)</td>
<td>11 (36)</td>
<td>—</td>
<td>17 (105)</td>
</tr>
<tr>
<td>Overall</td>
<td>56 (9)</td>
<td>56 (9)</td>
<td>36 (14)</td>
<td>29 (41)</td>
<td>22 (51)</td>
<td>19 (16)</td>
<td>12 (50)</td>
<td>100 (1)</td>
<td>25 (191)</td>
</tr>
</tbody>
</table>
als, those who lead discreet, quiet, preferably celibate lives and do not come into contact with children (Goldyn, 1979). However, in spite of the limitations, more gay people are safe in their jobs and on the street than was the case five years ago. And this result is partly due to successful litigation carried on in conjunction with other forms of political activity.

Such other forms of political activity may be, in fact, the crowbar that ultimately forced open the courtroom door. It is very possible that homosexual litigants and their attorneys were perceived by courts as illegitimate petitioners until they were compared to the gay militants out in the street, by comparison to whom the gay petitioner looked respectable, and may even have seemed a welcome relief.\textsuperscript{12}

The nonrandom incidence of gratuitous language suggests the subjects around which a rational albeit antigay justification might take form. One theoretical tie which binds the subjects of homosexual behavior, children, marriage, and the homophobic behavior exhibited by men is the sex roles associated with the nuclear family. The popular movement against homosexual rights, which is part of the “New Right” in American politics, has already shown its tendency to gravitate to these topics in its political rhetoric, emphasizing the effects of homosexuals on children and family life. It is likely that the courts which continue to wage the battle against homosexual rights will formulate a more sophisticated version of this sex role and family oriented point of view.\textsuperscript{13}

NOTES

1. Other authors have noted the presence of such language. See Hollis (1968), Cantor (1964).
2. There is some gratuitous language which shows some sympathy for homosexuals: “His lot, in short, was an unhappy and uncomfortable one, as is true of anyone who occupies as ambivalent a position as does the homosexual in the contemporary social order” (Adams v. Laird, 1969, p. 236). However, even such mildly positive statements are rare, and for our purposes here are not counted as gratuitous language.
3. Homophobia, the fear of homosexuality, pervades American culture. It is shown in the common dread of close contact or association with homosexuals. Homophobia appears among homosexuals themselves in the form of self-contempt. See Weinberg (1973), p. 4.
4. Appellate courts generally defer to lower courts on questions of fact, since the latter hear witnesses, cross-examine, and are deemed better able to judge what was believable testimony and what was not. See Frank (1949), p. 23.
5. In the 1970 National Survey by the Institute for Sex Research, 62 percent of the respondents said that they believed that for at least half of the homosexual population, homosexuality is a sickness that can be cured. See Levi and Klassen (1974).
6. There have been about 500 sodomy decisions reported in the United States since 1812. Even a brief perusal of the West Digest System shows that one of the most common challenges raised on appeal is the sufficiency of the indictments which
often use euphemistic language, often that of Coke or Blackstone, verbatim. The convictions are almost always sustained, on the grounds that the acts are so "heinous" or "abominable" that "they should not be named." This quaint justification, of course, flies in the face of the principle that a person has the right to know exactly what he or she has done—a basic principle of the rule of law, recognized in the requirement that indictments and information be very specific.

7. The Immigration and Naturalization Act of 1952 declares the following persons excludable or deportable: "Aliens afflicted with a psychopathic personality, epilepsy, or a mental defect . . . Aliens who have been convicted of a crime involving moral turpitude" (8 U.S.C.A. § 1182 (a) (4)(9)). The Immigration and Naturalization Service considers gay people as possessing psychopathic personalities, a classification approved by the Supreme Court in *Boutilier v. I.N.S. II* (1969). In 1980 the Public Health Service refused to examine and so categorically classify gay aliens. The matter awaits Congressional resolution.

8. The often strong language found in homosexual sodomy cases appears to be a response to homosexuality—the fact that two people of the same sex are performing the acts involved—and not just to the sex acts involved, which can also be performed by heterosexuals. It would not be surprising if the acts themselves prompted verbal comment, since in these cases courts are usually looking at rather ugly behavior; these are not for the most part consensual sodomy cases. Some involve sex with young children and some the use of force. But similar cases involving heterosexuals do not appear to prompt the kinds of comments under examination here.

In the course of this research 27 heterosexual sodomy cases were examined and only one of them contains the sort of language we find in the gay cases, and in that one case the language is comparatively civil, as we shall see in a moment. Furthermore, the behavior under scrutiny in the heterosexual cases is no less appalling: some involve forced sex with children, including one's own, violence, and rape. For example, in a 1974 case, a man had broken into a home, tied up the man living there, raped the woman present four times, and molested a child living with the couple. Convicted of first degree rape, robbery with firearms, taking indecent liberties with a child, and the crime against nature, the intruder was sentenced to a total of 140 years! The court did not make a single gratuitous comment about the man's behavior (*Carson v. State*).

In fact, the only comment I came across even approaching the kind found in gay cases comes from a 1977 Massachusetts case in which a man was convicted of indecent assault and unnatural sexual intercourse with a seven-year-old girl. The court commented as follows: "It is difficult to imagine conduct more violative of social and behavioral expectations or more disruptive of psychic integrity" (*Comm. v. Gallant*, p. 715). This comment would count as gratuitous by the standards employed in this research, although it is clearly of the more detached and rational variety.

The implications of this sort of comparison of homo- and heterosexual sodomy cases are disturbing. The comparative analysis is not sufficiently systematic here to warrant any definitive conclusions, and any arrived at must be considered very tentative. However, the analysis suggests more than that courts react more strongly to homosexuals than to heterosexuals. It also suggests that appellate courts are more disturbed by nonconsensual homosexual behavior than by the aggravated rape of women and perhaps even the incestuous rape of female children. Without more systematic data I shall defer from discussing the obvious sexual implications here, noting only that this would be a fruitful area of research.

10. I have shown elsewhere that gay people also fare better on the whole before federal courts than state tribunals in regard to, the outcome of the litigation. See Goldyn (1979). Aside from the historical explanation there is theoretical work which suggests that federal institutions are inherently more likely to further universal values like liberty and equality. The theory, based on a rather creative interpretation of Madison's Federalist #10—where he argues that a large national government will keep the drive for equality under control—and the ideas of Schattschneider (1960) is explicitly formulated in McConnell (1966).

The theory might help explain the greater success before federal courts. Thus it might be argued that by broadening the scope of political conflict to the federal arena, gay people can marshal resources and allies not available at the state or local level. They can also avoid some of the local, hostile opposition. However this theory cannot explain the history of legislative protection for the employment rights of gay people since there is no protective state or federal legislation while ordinances currently protect gays in approximately 40 municipalities.

11. In fact, on the whole the trend is toward a somewhat more pro-gay position. See Goldyn (1979).

12. Lipsky (1968) directs our attention to the fact that the success of protest groups often depends on the sympathetic arousal of third parties like the media and other "legitimate" civic groups. He also suggests that one way for protest groups to manage organizational difficulties is to divide up leadership responsibilities (p. 1153). With some adjustment, this analysis helps explain the side effect of protest activity described here. The needed adjustment requires that we distinguish between particular protest groups and the larger protest movements of which they are a part. Within such a framework it seems clear that the activities of one group (The Black Panthers, a Gay Liberation Front) may, by way of contrast with more "respectable" groups (the N.A.A.C.P., the National Gay Task Force) legitimate the latter. Thus sympathetic third parties are not simply aroused: in one sense they are created as groups are legitimated. Furthermore, in these cases the division of tasks that Lipsky discusses takes place between groups rather than within them.

13. To my knowledge, such a sophisticated version of this position first appears in the case law in 1978 in Schuster v. Schuster, Rosellini dissenting, pp. 135-136. The argument is mostly a lengthy citation from a law review article, Wilkinson and White (1977). This is the first law review article of which I am aware which formulates an antihomosexual position in a rational, although unconvincing manner. In fact, one of the joint authors remained unconvincing by his colleague's argument (p. 596).

APPENDIX

Cases Involving Homosexuality That Were Cited in the Quantitative Analysis

Boutiller v I.N.S. I, 363 F. 2d 488 (2d Cir. 1966).
Commonwealth v Bradley, 91 A. 2d 379 (P.A. 1952).
Gay Law Students Assoc. v Pacific Telephone & Telegraph, 135 Cal. Rptr. 465
"QUEER BAITING" FROM THE BENCH

*Kelly v U.S., 194 F. 2d 150 (D.C. Cir. 1952).
*One Inc. v Oleson I, 241 F. 2d 772 (9th Cir. 1957), reversed 355 U.S. 371 (1958).
Scott v Macy I, 349 F. 2d 182 (D.C. Cir. 1965).
*Smyda v U.S., 352 F. 2d 251 (9th Cir. 1965), cert. denied 382 U.S. 981 (1966).
*State v White, 217 A. 2d 212 (Me. 1966).
*U.S. v Flores-Rodriquez, 237 F. 2d 405 (2d Cir. 1956).
*Cases displaying gratuitous language.

Other Cases Cited

Honselman v People, 48 N.E. 304 (III. 1897).

REFERENCES