OBSTACLES TO EQUALITY: GOVERNMENT RESPONSES TO THE GAY RIGHTS MOVEMENT IN THE UNITED STATES

A. S. COHAN
University of Lancaster

Abstract: The Gay Rights movement in the United States, like other social movements, may achieve its goal of full equality before the law through actions by the legislatures or courts. Generally, action by the latter opens the door to concessions by the former. But the Gay Rights movement has not progressed as its adherents have wished for four reasons: (1) the unpopularity of homosexuals; (2) the disjointed nature of American government(s); (3) the absence of cohesiveness of the movement itself, possibly as a result of a lack of economic deprivation among homosexuals; and (4) most significant, the unwillingness of the Supreme Court to accord to homosexuals the same rights it has extended to other minority groups, thereby giving a lead to legislatures as they did in the area of civil rights for Blacks.

Governments deal with a myriad of problems, all of which involve the allocation of societal resources in whatever form those resources may take.¹ Most problems, such as social welfare provisions and defence arrangements, require vast expenditures of money, and the expenditures, through money raising methods and where the money goes, affect entire populations of such societies. Because of the salience of those problems, they have tended to be the ones on which political scientists with a special interest in public policy have focused. Thus, public policy analysis have often been concerned with budgets because ‘if one looks at politics as a process by which the government mobilizes resources to meet pressing problems, then the budget is a focus of these efforts’.² Further, taking all of its facets, the budget is an ideal operational definition of ‘whatever governments choose to do or not to do’.³ Budgets are the most easily manipulable data in policy analysis which actually tell us something important about problems affecting virtually all members of a society.

Some problems, however, involve the allocation of societal resources other than money. Often, these problems to not pertain to whole, or even majorities of, societies. Instead, groups, often very small, may require government intervention for assistance in some way. But because these problems usually do

¹ My view of the allocation of such resources is most strongly influenced by Harold Lasswell. See, especially, Politics: Who Gets What, When, How (Cleveland, Meridian Books, 1958), first published 1936.

Political Studies, Vol. XXX, No. 1 (59 76)
not affect majorities, or even significant minorities, governments respond slowly, if at all, in meeting such problems. In turn, political scientists have given relatively little attention to them. Problems typical of this category relate to questions of civil liberties. While civil liberties questions may entail economic factors, such as the generally lower standard of living among certain minority groups, many do not.

Civil liberties problems arise because members of a group, almost inevitably a minority, collectively believe that the formal and/or informal rules of their society discriminate against them. But the very existence of such rules suggests that for some reason those comprising the majority disapprove of something about that group. Majority disapproval permits decision makers to avoid alleviating whatever grievance members of the minority group may feel. In this paper, by focusing upon the activities of the Gay Rights movement in the United States, the difficulties encountered by such minority groups in bringing about social change will be explored. In this section, two propositions concerning the balance between legislatures and courts in dealing with civil liberties questions will be suggested. Then the activities of the Gay Rights movement will be considered in the context of the American system with a discussion of the differences between agitation for gay rights and for other causes such as equal civil rights for women and Blacks. This will be followed by an analysis of the obstacles to progress for the Gay Rights movement in achieving its goals with special emphasis upon the lack of any major progress in the courts.

Although this is a case study, many of the problems which confront American homosexuals are common to all societies in which citizens take pride in democratic traditions. Indeed, it is not especially easy being a homosexual in any Western democracy. The impulse toward civil liberties that characterizes such societies is often thwarted by public prejudices which affect those who differ from the majority. While fewer states maintain the level of legal discrimination against homosexuals that they once did, some enforce laws

\[\text{footnote}^4\text{The concept of the significant minority is not an easy one with which to deal as it is fraught with problems of tautology. Generally, a significant minority may be seen as one which has the ability to affect the workings of a government, even, perhaps, to help bring it down. By this definition, coal miners in the United Kingdom would be a significant minority while university teachers are almost certainly not. Blacks may be a significant minority, or they may not be, depending upon the strength they are able to mobilize in certain areas. Anomie group activity as in Bristol, for example, may have scant impact upon government policy thus suggesting insignificance. But government recognition of significance may often come too late. The transition from insignificance to significance is very shadowy.}\]

\[\text{footnote}^5\text{Women are the exception, although only a minority of women are interested in the women's movement in whatever country one wishes to study.}\]

\[\text{footnote}^6\text{While there is no great need to justify the case study, this approach had fallen on hard times until recently. Often, works which were really case studies were placed in other categories by their authors. This was usually done in order to justify 'theoretical relevance', a notion which many people still take seriously without considering the theoretical relevance of case studies, even those which make no mention of similar literature. Two works which do extol the virtues of case studies and which are worth reading are Arend Lijphart, 'Comparative Politics and Comparative Method', American Political Science Review, 65 (1971), 682–93, and Jorgen Rasmussen, ‘“Once You've Made a Revolution, Everything's the Same”: Comparative Politics’, in G. J. Graham, Jr., and G. W. Carey (eds), The Post-Behavioural Era: Perspectives on Political Science (New York, David Mackay, 1972), pp. 71–87. See, especially, p. 85.}\]
which are directed largely, if not exclusively, against homosexuals. Even where homosexuals are granted consensual rights, those rights are generally not as extensive as rights enjoyed by heterosexuals. Ages of consent often differ for heterosexuals and homosexuals, and admitted homosexuals may be excluded from government positions. If leaders of the state and/or professional associations believe an individual's sexual preference detracts from his or her relationship with a client, or affects job performance, then the life chances of the homosexual may be limited by exclusion from those professions either through formal or informal means. Such professions may include medicine, law, teaching, and, in most societies, the military.

No Western democracy has been as inhospitable to homosexuals in terms of its laws as the United States during the past half century. While other countries have abolished, or at least substantially modified, the laws which once placed homosexuals at great risk, even, possibly, the loss of one's life, the legal restrictions directed against homosexuals in the United States are still extensive and, of course, intimidating.

In all Western countries with relatively democratic institutions, homophile organizations have sought to alter laws which affect their affiliates. Perhaps because of the degree of legal discrimination directed against them, politically active homosexuals in the United States have become the most militantly outspoken in their denunciation of a society they perceive oppresses them. The activists have come together in what may loosely be called a Gay Rights movement. The most widely supported aim of participants is the removal of laws which discriminate against homosexuals.

It is the underlying assumption of this essay that, while the American ethos of individualism and personal liberty against the whims of the state encourages the growth of groups devoted to the enhancement of civil liberties, the disjointed and cumbersome nature of the American policy process enables decision makers to avoid dealing with such questions. When unpopular groups find that the legislative mechanism offers scant relief, only the courts remain where laws which are perceived as being restrictive and discriminatory may be challenged. But the court procedure, too, is difficult in terms of the expenditure of both time and resources, and those who require the assistance of the courts are more often than not least equipped to avail themselves of its services.

The practice of avoiding dealing with questions concerning minorities in society is not unique to the United States. Such questions are seldom high on the policy agenda of any country. Besides overriding government concern with the management of the economy, defence, and social welfare problems, another consideration must be taken into account by decision makers. However apathetic or predictable in terms of traditional voting patterns an electorate may be, civil liberties issues are potentially damaging to the electoral prospects of a political party or to the unity of the different political parties involved in the policy process. Thus, taking the United Kingdom as an example, highly contentious issues tinged with a civil liberties element are often left to the Private Members' Bill mechanism which allows MPs to debate and

---

7 This latter point ought not to be underestimated. Among the less publicized occurrences since the collapse of the Shah's regime in Iran has been the execution of homosexuals.
pass legislation which government and opposition leadership may wish to avoid adopting as an element of a party programme."

In the United States, governments are generally unlikely to act on questions concerned with civil liberties unless either of two conditions is met. The first condition is that the courts order those governments to do so explicitly, or create situations in which change may occur because the state interest is removed. Thus, a court rules that state practices are unlawful as in the maintenance of segregation in the schools. In Brown v. Board of Education (347 U.S. 483, 1954), officials in states were segregation existed were instructed to desegregate their schools. Alternatively, a court orders the state to desist enforcing private forms of discrimination as in Shelley v. Kraemer (334 U.S. 1, 1948). In that case, the Supreme Court found that, while a restrictive covenant was legal, it could not be enforced by the state because it was not a contract.

The second condition is that the public is seen to be overwhelmingly in favour of legislative action in the particular problem area. Following President Kennedy’s assassination and the civil rights march in Selma, Alabama, President Johnson was able to bring about the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Both Acts were far-reaching in terms of their impact, but it is doubtful if they would have enjoyed the easy passage through Congress had the combination of circumstances, as well as the belief that there was widespread support for the legislation, not occurred. Generally, however, success in the courts by minority groups is the first step in any expansion of civil liberties.

THE GAY RIGHTS MOVEMENT

It may be argued that describing agitation for gay rights as a movement is to accept some preliminary conditions about organization and self-conscious purpose as given. But such is not the case in this paper. Instead, the term, movement, will be used uncritically to consider the various activities that have been occurring if only because those involved in the work for full civil liberties for homosexuals tend to describe the agitation as such. It should be noted, however, that the concept of the social movement suggests certain factors which may not be present."

Because they all grew out of the general restlessness that characterized American society in the aftermath of the Second World War, it is tempting to link the Gay Rights movement to the Black, Hispanic-American and, more lately, the Women’s Movements. During the 1950s, the Supreme Court opened the doors through which Blacks first went only to be followed by other groups as well. So, although the radicalism that was to characterize the 1960s had not yet appeared, the foundations for social upheaval had already been laid by

---

* Perhaps because of the lack of emphasis placed on civil liberties legislation generally, and the limited amount of time allocated to Private Members’ bills, there are relatively few works on the subject. See, for example, Michael Ryles, ‘Private Members’ Bills’, Political Quarterly, 37 (1966), 385–93.

what had happened earlier and was, at least in part, initiated by a branch of the central government.

All minority movements owe much to the Black leaders who chose to challenge laws which permitted discrimination against Blacks for no reasons other than race. What was especially significant about most of the movements was the close link between political and economic discrimination. Blacks were, and remain, poorer than the majority Whites. This may also be said about the Hispanic-Americans and groups such as American Indians. The same condition may also be said to have affected women generally and minority women in particular. Although women have made tremendous strides over the past decade, as a group they have not yet attained the economic status of men, and it will, no doubt, be a long time before they do. Thus, residues of discrimination and the coincident economic deprivation affect all of these groups despite the extension of laws protecting them.

It is this close linkage between political and economic deprivation which distinguishes such movements from the Gay Rights movement. As a group, homosexuals cannot be said to have suffered the economic deprivation common to other minority groups for it is only with public openness that a homosexual is at risk. Thus, the motivation for organization into protest groups or a social movement, has probably been less developed than for Blacks. Post-war organizations devoted to the rights of homosexuals did, however, appear in a few of the major liberal cities, most notably New York and San Francisco. Washington, DC, the national capital, also drew politically committed homosexuals. Most of these early activists were in a financial position to contribute their time, efforts and skills and could, therefore, risk the social and legal sanctions that might be applied. But unlike Blacks, Hispanic-Americans, and, of course, women, most of whom are readily identifiable as that with which they are labelled, homosexuals are generally unrecognizable as homosexuals. Most may live relatively anonymous lives, placing themselves at risk only when they choose to declare that they are homosexuals.

The early movement, especially, had no particular attraction for the vast majority of homosexuals. The laws were very restrictive even though unevenly enforced. While police harassment was and remains commonplace, gay bars managed to survive and thrive, and large cities provided some refuge from what could be a repressive and isolated life. Above all, self-declaration carried with it severe sanctions. Social and familial ostracism were common enough as was the possibility of the loss of one’s job. If one were in a position to live a double life, it was probably better to do so rather than be involved in risk-taking in which everything could be lost for the sake of a principle that attracted little public attention and even less public sympathy.

Still, events in the 1960s began to disrupt such attitudes. After the Selma March, and subsequent police reaction, the Civil Rights Act of 1964 and Voting Rights Act of 1965 were passed. The Vietnam War and wasteful affluence among some groups in American society while many were poor gave rise to both the anti-war movement and ‘drop-out generation’ as well as to

---

10 Here, I am especially influenced by Rudolf Heberle who saw social movements largely in terms of being class based. See Heberle, Social Movements: An Introduction to Political Sociology.
more open attitudes toward sex and sexuality. Pornography became readily available and less expensive, people actually talked about abortion, and new forms of contraception provided women with the opportunity of a freer attitude toward sex, which must certainly have had a great impact upon the directions of the women's movement.

So in June, 1969, when police raided a bar in the most pronounced gay ghetto in New York, it was not altogether surprising that many who were present reacted angrily. Homosexuals were simply the latest in the list of minority and/or socially oppressed groups to rebel against harassment by the state. The so-called Stonewall Riots in June, 1969, became the starting point for the Gay Rights movement; for the first time the collective anger felt by members of a group, who had suffered their oppression in silence but usually with profound humiliation, was demonstrated.  

Still, it is difficult to accept the view of one commentator who has suggested that 'by the end of the 1960s, it was apparent that the homophile movement had grown stronger. More local organizations were formed throughout the nation. Then regional and national organizations emerged to coordinate local efforts, while in San Francisco, gay people were beginning to learn how to use political power.'  12 Although, socially, gays had become more visible, this statement is clearly an exaggeration of what had happened. Even now, national co-ordination does not exist. San Francisco may be cited as a locale where political activism among homosexuals is common, but in that respect San Francisco is an uncommon city. What is more, most homosexuals are still 'in the closet', wherever they happen to live.

What has occurred is that legislatures in twenty states have rescinded at least parts of the laws that have discriminated against homosexuals. More than fifty cities and municipalities have adopted gay rights ordinances. Since Stonewall, hundreds of groups have been formed throughout the country. On college and university campuses, gay rights and/or gay social groups flourish. There must be no doubt that this follows on from the heady days of the late 1960s, but strong, more centrally orientated organizations have thus far eluded gay rights activists.

Reflecting the generally disjointed nature of both American society and its governmental structures, it is thought that more than two thousand gay rights groups are in existence.  13 Of this vast number, only two organizations, the National Gay Task Force (NGTF), and the Gay Rights National Lobby (GRNL), exist which are concerned primarily with fighting for the rights of

---

11 The literature on Gay Rights and the development of the movement is idiosyncratic. A fairly useful work is Dennis Altman, Homosexual: Liberation and Oppression (New York, Avon Books, 1973). I disagree with many of Altman's conclusions—indeed, with some of his premises as well—but it is possibly the one restrained, non-personal account of a particularly vital period for Gay Rights activists.


13 This figure is, of course, subject to debate. It is an estimate derived from interviews with NGTF leaders in 1978. Another estimate, by the American Civil Liberties Union, puts the figure at about eight hundred. See E. Carrington Boggan, et al., The Rights of Gay People: The Basic ACLU Guide to a Gay Person's Rights (New York, Discus Books, 1975). My own view is that the NGTF estimate is more likely. If one takes into account all of the colleges and universities in the United States that would possibly have gay groups of either a social or political nature, the figure is easily reached. Of course, many of these groups will be small and relatively inactive.
homosexuals at a national level. But their respective methods of operation differ markedly from each other as well as the resources they have at their disposal. The NGTF is a large, New York-based organization which acts as the major group when speaking for homosexuals. The GRNL is a small, Washington-based lobbying group which has attempted to influence Senators and Representatives particularly in amending the Civil Rights Act of 1964 to bring homosexuals under the protection of that Act.

The most significant lobbying activities of Gay Rights groups take place at the state and local, rather than at the national levels partly because the efforts that are being made to amend the Civil Rights Act are unlikely to bear fruit in the foreseeable future. Indeed, the failure to make dramatic strides at the federal level has not impeded—and, indeed, may have influenced—the work of local organizations. Such groups have lobbied various state, city, and municipal governments to repeal laws or ordinances which discriminate against homosexuals or to adopt laws or ordinances which protect homosexuals.

The efforts at local reform have proceeded in a piecemeal fashion with some successes and some failures. Since 1971, more than fifty municipalities have adopted ordinances ostensibly protecting the rights of homosexuals. The ordinances have ranged from reasonably strong guarantees of protection in areas such as housing and public employment to weak statements of respect for human rights with no enforcement procedures. Often such statements coexist with laws that still discriminate against homosexuals.\(^4\) A major problem with such ordinances is that they have occasionally provoked anti-homosexual groups to work toward repeal, often through the method of the referendum, a pattern of public decision making which is widespread throughout the United States. When such local referendums have been held, Gay Rights Ordinances were generally defeated.

Leaders of different Gay Rights groups such as the NGTF, and the more broadly-based civil liberties groups, especially the American Civil Liberties Union, are antipathetic toward the activity leading to local ordinances because of what popular voting in referendums implies. According to the view that they hold, civil rights are not privileges that the state, as the representative of the majority, may choose to allow the people of that state to have. On the contrary, the constitutional guarantees are specifically designed to protect the individual from the potential tyranny of the state although it must be obvious that throughout American history such protection has not always been available. But, in theory at least, rights inhere in the individual, and it is the state’s function to protect rather than allow or disallow those rights.

Aside from contempt for the notion that rights may be extended or removed by popular vote, recourse to the referendum is feared by advocates of civil liberties for two other reasons. First, the majority is more likely than not to be intolerant of minority rights given that the exercise of those rights may be

---

\(^4\) Washington, DC, for example, has a strongly worded human rights ordinance which ostensibly recognizes the privacy of its residents. This ordinance coexists with laws against sexual activities common among homosexuals. While laws in the latter category are not really enforced any more, that they remain on the statute books does suggest some danger to homosexuals should less sympathetic public figures attain office.
offensive to the majority. And second, financial resources of the different civil liberties groups are almost never as strong as those which the anti-civil liberties forces are able to marshal. Consequently, in defending rights against the vagaries of the popular vote, civil liberties groups are forced into defensive postures whereas they see their real and most effective function in terms of legal challenges, in the courts, of laws they perceive to be unjust. Rights, they believe, are too vulnerable to be trusted to the electoral market place.

OBSTACLES TO THE GAY RIGHTS MOVEMENT

Unlike most organized minority groups, homosexuals have been unsuccessful in achieving a redefinition of their legal position through the legislative process in the United States. Government at the national level, and governments at the state and local levels, have usually been unwilling to meet the demands that various Gay Rights groups have placed before them. Many reasons may be cited for governments avoiding dealing with the Gay Rights issue, but, generally, four obstacles have impeded the Gay Rights movement. They are (1) the general hostility, real or perceived, of the public towards homosexuals, (2) the shape of the movement itself, (3) the structure of United States government(s), and (4) perhaps most significant to any group(s) organized to promote civil liberties in the United States, the failure of litigation in the courts to provide at least a framework within which the various legislative bodies would be forced to act.

Public hostility toward homosexuals is well known. Polls have demonstrated a general antagonism toward the notion that all laws which restrict the liberties of homosexuals ought to be repealed.\(^{15}\) This hostility is magnified when questions are raised concerning whether homosexuals should be permitted to teach in schools, particularly in the primary schools. Probably as a result of this known hostility, as well as the possibility that the individual politician may actually share the public attitude, political figures, generally, have been unwilling to take up the cause of Gay Rights. Of course, leading politicians in cities such as New York, Washington, and San Francisco have been outspoken on the issue, but they have large and vocal gay communities to which they may be electorally accountable.

Politicians at the national level have been loath to take up full civil liberties for homosexuals. During President Carter's outspoken campaign for human rights, for example, he did not extend this concern to the rights of homosexuals. Further, no presidential, or would-be presidential, candidate has ever demonstrated any willingness to support the amendment to the Civil Rights Act which would end legal discrimination against homosexuals in much the same way that Act did for Blacks.

\(^{15}\) A comprehensive Gallup Survey in 1977 (July) indicated that even though a majority (56 per cent) favoured equal rights in job opportunities for homosexuals, this majority turned into a minority when the jobs were teaching or the clergy. Only such employment as sales-persons or, interestingly, the military had majorities in favour of no discrimination. With regard to the question of whether homosexual relations between consenting adults should be legal, the numbers for and against were the same (49 per cent), thus suggesting a fair degree of hostility. Perhaps more pronounced is the question of adoption of children. Those against homosexuals adopting children constituted 77 per cent. Those for the proposition were only 14 per cent of the total (with 9 per cent don't knows).
This lack of sponsorship is most significant because by the time the Black civil rights movement began scoring its major successes with President and Congress in the 1960s, that movement enjoyed a wide base of support within the Federal Government as well as wide support from White Americans. From the end of the Second World War until the Civil Rights Act of 1964 finally was passed, a large proportion, perhaps a majority, of the members of Congress were favourably disposed to the premise of equal rights for Blacks although they were thwarted by the southern minority's use of procedural rules in the Senate. But this majority support has never been forthcoming when the matter of equal rights for homosexuals is raised.

The shape of the movement itself is the second obstacle to its success in bringing about an alteration of the laws as they now exist. Part of the reason for this is the structure of American political institutions, which will be discussed below. Perhaps the key factor other than the disjointed American political system is the fear many homosexuals feel about possible discovery and the accommodation most have made with their environments.

The Gay Rights movement has traditionally involved only a minority of homosexuals. Although, as suggested earlier, the number of organizations is quite large, few of these groups are composed of many participants. Except in more liberal cities, any homosexual affiliating with an organization in an open manner is potentially at risk. No civil rights act prevents a business or government authority from dismissing that homosexual although the courts are beginning to limit the reasons for dismissal when the particular individual shows any willingness to take the matter through the courts.

The various political organizations within the movement must compete with the variety of social attractions that also exist, something that cannot be said for other movements. Not all homosexuals who enjoy what the gay scene has to offer, including many who are open about their homosexuality, are particularly interested in politics. After all, homosexuals share only two basic characteristics. The first is a common sexual orientation in that they prefer partners of their own sex. Second, they suffer a number of social disadvantages because the vast majority of non-homosexuals disapprove of that first characteristic. Other than these factors, the many features that bind members of minority ethnic groups together are missing in the homosexual "community". Unlike the poor, homosexuals are located along whatever economic and social scale one wishes to construct. So the factors that bring homosexuals together are frequently insufficient to forge the bonds which are required to build determined social movements.

This is not to underestimate how vital the characteristics held in common are. But despite them, the vast majority of people who are gay, be it for reasons of fear of retribution, of contempt for what 'straight' society has come to represent, or of apathy, have not yet been fit to declare openly that they are gay. Within the United States, the gay sub-cultures have managed to provide enough of a diversion for most homosexuals to discourage political activity. It is easy to fade in and out of the majority society, and this is what most homosexuals do.

From the perspective of the way which the movement has organized, it tends to reflect the dispersal of governmental authority in the United States. Social movements, pressure groups, and all varieties of groups that seek to bring
about change in society, grow in accordance with the organization of political institutions in that society. In the American system, the decentralized nature of the government—indeed, of the society—has frequently led to large numbers of organizations springing up which all foster the same cause. These groups may operate relatively independently, and, occasionally, in direct competition with each other. They may concentrate on change at the national level or at the state and local levels. With the separation of powers, they may approach legislatures, courts, executives, or a combination of the three. During the early part of the civil rights era, the National Association for the Advancement of Coloured People was quite prepared to assist those who would pursue legal claims through the courts while the Southern Christian Leadership Conference organized campaigns of civil disobedience in order to demonstrate both numbers and determination to legislators and to the public as well as to other Blacks who had not become involved in the agitation. In the later years of the movement, the SCLC was viewed as a conservative organization when it was compared with the newer groups devoted to the more evocative cause of Black Power. But each of the main Black civil rights organizations was able to gain the support of large numbers of people probably because of the widespread economic deprivation that existed. Without the numbers, the challenges to discriminatory state and Federal laws would have been virtually impossible.

Yet all of these obstacles would be surmountable in terms of the extent of legal protection afforded to homosexuals if the major obstacle were to be overcome. If the Supreme Court placed the rights of homosexuals under the same cover that others have received, other problems would be less significant.

The classic American method of avoiding civil liberties questions until pressure is overwhelming is simply to leave certain problems to the courts. In much the same way as in Britain where, as was suggested, controversial problems concerning minorities could be left to the mechanism of the Private Members’ Bill, so in the United States, legislatures ignore certain types of problems as long as the possibility exists that the courts will eventually draw the fire that might otherwise be directed toward them.

But the courts, especially the Supreme Court, have demonstrated over the years that they are just as able to avoid confronting certain problems as elected politicians. The courts do this through a variety of ways ranging from the grounds upon which they base their decisions to refusing to hear particular cases, thus allowing decisions of lower courts that tend to uphold existing law to stand.

Against this background, however, Americans have long prided themselves on rights they had ostensibly possessed against state activity. Over time such rights have expanded as wider interpretation of the Constitution, especially through the courts, has brought more people under the protection of its clauses. The evolution of the meaning of the Constitution is central to any expansion of rights, and the significance of the flexibility of that document was expressed in 1910 by Justice McKenna who wrote:

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. [Weems v. U.S., 217 U.S. 349, 373]
Change has been most pronounced in recent years over the issue of the right of privacy. Increasingly, the question of what an individual may do before that action conflicts with a legitimate state interest is one with which the courts have been forced to deal. In a relatively early case in which privacy was of paramount concern, Justice Brandeis argued that

The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the most valued by civilized men. [Olmstead v. U.S., 277 U.S. 438, 478–9 emphasis mine.]

But Brandeis’s view was contained in a dissenting opinion. The majority still held to a very narrow interpretation of the extent of the right of privacy.

Generally, all cases that deal with the right of the individual to be a homosexual without danger to his or her life and life chances or to engage in ‘homosexual activities’—sexual participation of any kind with a person or persons of the same sex—have some connection with the idea of a right of privacy. The difficulty arises because no one can confidently draw up a list of American rights in outline form to be carried around by all citizens (and some aliens) because an accurate understanding of the scope and impact of American rights requires a keen appreciation of the definitions which courts and public officials have given to certain key phrases in the Constitution.16

The phrase, right of privacy, appears nowhere in the Constitution, so if such a right may be said to exist, it must spring from less explicit sources.

The most significant case in raising the right of privacy issue as it may relate to homosexuals came in 1965 when the Supreme Court ruled that a state could not interfere with the private lives of married couples if they chose to use contraceptives. The decision was based upon rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution (Griswold v. Connecticut, 381 U.S. 779). A concurring opinion, written by Justice Goldberg, concentrated on the possible significance of the Ninth Amendment as it may pertain to a right of privacy. The Ninth Amendment states that ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people’, which suggests ‘a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not to be deemed exhaustive.’ (Griswold v. Connecticut, p. 492). The suggestion of a much more extensive range of rights was tempered by Goldberg’s reliance upon a dissent in Poe v. Ullman (367 U.S. 497, 1960) in which Justice Harlan argued ‘The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal inquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State’s rightful concern for its people’s moral welfare’ (Poe v. Ullman, 552–553). So the first

step to extend the idea of the right of privacy through the Ninth Amendment was only tentative with homosexuality probably excluded.

But Griswold, and the possibilities it raised, became clearer eight years later when the question of abortion was decided by the Supreme Court. While other questions, such as the standing of the case, were raised, the central issue in the abortion decision was the right of privacy. The lower court decision extending the right of a woman to obtain an abortion without state interference was founded upon the Ninth Amendment, but the Supreme Court decision was more broadly based. In striking down the stringent laws of forty-nine states Justice Blackmun argued

This right of privacy, whether founded in the Fourteenth Amendment’s concept of reasonable liberty and restrictions upon state action, as we here think it is, or as the District Court determined in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. (Roe v. Wade, 410 U.S. 113, p. 153, 1973. See also Doe v. Bolton, 410 U.S. 179).

Privacy, however, ‘is not unqualified and must be considered against important state interests in regulation’ (Roe v. Wade, p. 157). This view is of great significance because guidelines determining the weight to be attached to rights inhering in the individual when compared with legitimate state interests do not exist.

The movement by the courts into the area of the right of privacy was not exactly without reservation. Yet those interested in civil liberties perceived that the Supreme Court could not for long avoid the inevitable decision regarding general relations among members of the same sex if it were to be consistent with its earlier rulings concerning private activities. One commentator, for example, argued in 1975, ‘the developing right of privacy offers a traditional constitutional argument that requires no major doctrinal change in order to protect homosexuality. In extending the right of privacy to all forms of heterosexual conduct, the courts have gone so far that exclusion of homosexuality cannot be justified.’

The opportunity the Supreme Court had to alter the restrictions on individual freedom through reliance on the right of privacy came in 1977 when an appeal was made from Virginia (Doe v. Commonwealth’s Attorney for City of Richmond, 403 F. Supp. 1199, 1975). In that case, the District Court found that the state statute which, loosely stated, forbade crimes against nature was constitutional. Using the section of Griswold which excluded homosexuality from coverage by that decision the Senior Judge stated that

No judgement is made upon the wisdom of policy of the statute. It is simply that we cannot say that the statute offends the Bill of Rights or any other of the Amendments and the wisdom on policy is a matter for the state’s resolve [Doe v. Commonwealth, 1200]... We believe that the statute, so long in Virginia, has a rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court [Doe v. Commonwealth, 1203].

18 The case upon which the decision was largely based was a ruling which dealt with a Florida Statute (Wainwright, Corrections Director, et al. v. Stone et al. 414 U.S. 21, 1973). The Doe case was not unanimous at the District level. In a dissent it was argued that ‘To say, as the majority
The Supreme Court chose not to hear the case on appeal and, by so doing it implied that the right of privacy, under certain circumstances, must take second place when weighed against what might be termed the legitimate state interest in areas of morality. In this instance, one can only assume that the avoidance by the Supreme Court of dealing with potentially highly controversial matter is based, at least in part, upon a perception by the Supreme Court that a decision striking down the laws of most states for so unpopular a cause would be impolitic. But it is difficult to separate the private acts of mature people of the same sex from the category that contains the right of privacy with regard to questions such as abortion or the use of contraception.

If the Supreme Court and law courts have avoided decisions about the right of privacy, they have done so in other areas as well. Another category of cases deals with the general question of discrimination against an individual simply because he or she is a homosexual. Once again, it could be reasonably assumed that just as it may be said that discrimination against different classes of people on the basis of race or sex in fields such as employment (job security) or housing violates clauses in the Constitution, so it is the case with homosexuals, but this is not so. Even when finding for homosexuals, the courts have avoided the Constitutional questions of the rights a homosexual may possess against such discrimination, and the courts have also found that discrimination may be practised against homosexuals partly because of a lack of precision concerning the nature of homosexuality. By this, the issue of whether homosexuality constitutes some type of sickness may be raised.

At the federal level, discrimination against homosexuals occurs largely within the bureaucracy, usually in either one of two ways. The first is through bureaucratic rule-making which may happen when laws enacted by Congress, frequently years earlier, are vague or purposely permit the bureaucracy to have great latitude in law making; and the second is job security, a question that has arisen both in the civilian and military sides of employment. The lack of any recent action by the Supreme Court has not helped to clarify the situation of homosexuals with regard to these particular problems. The Supreme Court has left the matter to the lower courts which have in turn hesitated in taking any radical steps.

The clearest use of authority in the area of bureaucratic rule making with regard to homosexuals is the question of immigration and naturalization. The law which affects homosexuals is the Immigration and Nationality Act of 1954. Section 212 states:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . .
(4) Aliens afflicted with psychopathic personality
(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offence).

docs, that the right of privacy, which every citizen has, is limited to matters of marital, home or family life is unwarranted under the law.' (Doc v. Commonwealth, p. 1203.) The dissent concluded 'That the sole basis of the prescription of homosexuality was what the majority refers to as the promotion of morality and decency. As salutary a legislative goal as this may be, I can find no authority for intrusion by the state into the private dwelling of a citizen.' (Doc v. Commonwealth, p. 1285.)
According to the definition of the law, homosexuals fall under the category of Clause 4. Cases arising under the Act which have come before the Supreme Court have had various interpretations, some favourable to the homosexual involved (Rosenberg, District Director, Immigration and Nationalization Service v. Fleuti, 347 U.S. 449, 1963), others unfavourable (Boutilier v. Immigration and Nationalization Service, 387 U.S. 118, 1967). But the Court has yet to decide a case on constitutional grounds, i.e., whether the particular part of the act which suggests that homosexuals are afflicted with a psychopathic personality is valid. Because of this lack of direction, lower courts have varied in their interpretation, but the general rule that seems to have emerged is that if the alien is considered to be of good 'moral character' (In Re Labady, 326 F. Supp. 924, 1971) and/or has not lied about his/her homosexuality on the application for a visa (Kovacs v. United States, 476, F. 2d. 843, 1973), the person can be admitted to the United States and considered for citizenship. But the state of the law is so indefinite that homosexuals who had never been convicted of some offence related to being a homosexual would be foolish to admit to homosexuality. While nothing might happen to disadvantage the individual, no guarantee could be given that this would, in fact, be the case. Indeed, in 1980, a German homosexual in Virginia was denied citizenship in the United States after fourteen years residence simply because he was a homosexual.

Once one leaves the problem of bureaucratic rule making, three themes appear to have emerged from the different cases that have come before the courts in the general area of employment in the civil service and armed forces. First, private homosexual acts probably do not constitute grounds for dismissal from the civil service. The US Court of Appeals in DC ruled that:

We are not prepared to say that the Commission [Civil Service Commission] could not reasonably find appellant's homosexual advance to be 'immoral', 'indecent', or 'notoriously disgraceful' under dominant conventional terms. But the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. [Norton v. Macy, 417 F. 2d. 1161, 1969].

Related to this is the issue and the question of security clearance for homosexuals, especially given the possibility of blackmail. The view that seems to be current suggests:

The applicant's own public revelation avoids the usual blackmail threat, of disclosure of homosexuality ordinarily relied upon as a reason for such denial. That does not necessarily end the enquiry, but it suffices to establish that if the agency seeks to justify further enquiry into the details of what would ordinarily be considered the private sexual life of the applicant, as a matter required by the public interest, it must identify with particularity the relevance of such further enquiry with respect of applicable data. [Gayer v. Schlesinger, 490 F. 2d. 740, 1973, Leventhal concurring, 755].

But the general view holds that the Commission, or any body granting security clearance, has the right to make reasonable enquiries into a person's homosexuality which may be relevant to that clearance. Each case must be treated on its merits and no constitutional rights protect the individual from the enquiries (Wentworth v. Schlesinger, as part of Gayer, 490 F. 2d. 740, esp. 744).
A second theme is that people who openly 'flaunt' their homosexuality may not be protected by an appeal to First Amendment rights. In a case involving a Gay Rights activist who had been dismissed by the Equal Employment Opportunities Commission (the Director of which had been informed that the new employee was a homosexual before that individual was hired) the Circuit Court of Appeals ruled 'that notorious conduct and open flaunting and careless display of unorthodox sexual conduct in public might be relevant to the efficiency of the service' (Singer v. United States Civil Service Commission, 530 F. 2d. 247, 1976, p. 255). Further, where First Amendment rights are weighed against possible damage to the efficiency of the service, those rights are outweighed by the good of the majority. So appeal to First Amendment rights of free speech over perceived state interest seems not to hold, although once again, in the absence of any definite rule, each case may go through the courts. The question of what constitutes 'flaunting', however, is a vexing one. Does the decision imply that any political activity outside of work time might affect 'the efficiency of the service'?

A third theme relates directly to military service. As the situation now exists, known homosexuals cannot serve in the armed forces although the proportion of homosexuals in the military probably reflects the number in the country. As a result of the Doe case, a recent decision held 'that there is no constitutional right to engage in homosexual activity'; therefore, the decision by the Air Force to discharge honourably a career officer had to be upheld (Matlovich v. Secretary of Air Force, 13 FEP Cases, 267 and 269). The judge in this case, however, was clearly troubled by the limits he believed were placed upon him by the absence of leadership by the Supreme Court. He argued that he had no authority, given the current state of the law, to order the Air Force to grant reinstatement of the discharged officer. But, he concluded:

While the Court has reached its conclusions, as a judge must do, on the law, I hope it will be recognized that after months of intense study of this problem, matters within and without the record the Court, individually, for what it is worth, has reached the conclusion that it is desirable for the military to re-examine the homosexual problem, to approach it in perhaps a more sensitive and precise way. [Matlovich v. Secretary of Air Force, 13 FEP Cases, 269, p. 272].

At the state and local level the issues before the courts remain basically the same: job security and laws which protect the civil rights of homosexuals. In certain respects, the laws at this level are more significant than federal practices because they deal with the more sensitive areas such as avowed or, as is usually the case, closet homosexuals, holding positions as school teachers, as well as the rights of landlords to evict homosexual tenants, not because the homosexual has been noisy or destructive, but because the landlord in question finds homosexuals offensive. The level of hostility directed openly to the homosexual in teaching is especially well known and was seized upon during the Dade County referendum on the extension of Gay Rights with, it is assumed, particular effect.

This antagonism to homosexual teachers may be extracted from the various court decisions. In a California case, the court seemed to have been saying that an individual's private life was beyond the reach of individual authorities by arguing that 'the power of the state to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual
to live his private life, apart from his job, as he deems fit’ (Morrison v. State Board of Education, 461 P. 2d. 375, 1969, p. 394). But, the court did not go so far as to uphold the absolute right of homosexuals to hold teaching positions. Instead, the court stated

we do not, of course, hold that homosexuals must be permitted to teach in the public schools of California. As we have explained, the relevant statutes, as well as the applicable principles of constitutional law, require only that the board properly find, pursuant to the precepts set forth in this opinion, that an individual is not fit to teach. (Morrison v. State Board of Education, 461 P. 2d. 375, 1969, p. 394).

As it turns out, while widely cited in books dealing with the rights of homosexuals, this rule does not seem to be the guiding principle. In a number of recent cases, for example, as the Gay Rights campaign has developed and homosexuals have attained greater visibility, more homosexual teachers have lost their jobs. Such dismissals have been implicitly and practically upheld by the Supreme Court which refused to hear appeals in the cases (Gaylord v. Tacoma School District, 435 U.S. 879, 1977, Gish v. Board of Education, 434 U.S. 879, 1977; see also, Burton v. Cascade School District No. 5, 512 F. 2d. 850, 1975).

But some slight shift in policy may be detected in two cases. The first involved the removal of a school teacher from a position in a Maryland school district (Acanfora v. Board of Education of Montgomery County, 491 F. 2d. 498, 1974). What is confusing about this case is that the Court of Appeals did not uphold the right of that Board of Education to remove the individual from his teaching post because of his homosexuality; instead, it did so on the ground that his application form could be construed as being incomplete. He had failed to inform the employers that he had been an active member of a homophile organization while at university. Indeed, the Court stated that public statements regarding his homosexuality were not grounds for dismissal. But given the reaction by the Board of Education when it learned that Acanfora was a homosexual it is clear that he would not have been employed by Montgomery County had he revealed his homosexuality on his job application.

On the higher education level, it seems that homosexuality per se may not be used as a reason for non-renewal of contract provided that there is no evidence that such sexual orientation impairs the individual’s abilities to teach. Further, the university cannot infringe upon that individual’s First Amendment rights of free speech if the interests of that institution are not really affected by the exercise of those individual rights (see Aumiller v. University of Delaware, 434 F. Supp. 1273, 1977). The problem with this case, of course, is that while it appears to uphold the individual’s First Amendment rights, it extends the constitutional rules with regard to homosexuals no further than they are now. So, it may be concluded that ‘there can be little doubt that many judges and others are still strongly influenced by fear of “contagion”. Any evidence or suggestion that students may be influenced by a teacher’s sexual preferences may be regarded by such judges as enough to sustain a dismissal.’19 Unless a teacher has been arrested for public indecency, or something carrying greater

19 Boggan et al., The Rights of Gay People, p. 29.
penalties, a revelation about homosexuality will not make that job any more secure.

The cases discussed in this essay are by no means exhaustive. Dozens of cases have been before the various courts ranging from the right of privacy to the activities of gay student groups on university campuses. Through all of the cases, the overriding theme is one of uncertainty. Without some lead from the Supreme Court, the lower courts have tended to act on the side of caution. The Supreme Court has avoided any clarifying decision either by refusing to hear the case, thus upholding the decision of the lower court without comment, or by finding against the homosexual litigant. Where crimes against nature such as sodomy or buggery exist, they are still binding in law although enforcement varies radically from location to location. But overall the Supreme Court has continued to avoid dealing with the constitutionality of such laws and, therefore, has failed to provide the protection activist homosexuals have required before challenging other disadvantages in legal and social terms when compared with other groups. Until the most stringent legal impediments are removed by the courts, homosexuals are unlikely to commit themselves to activities which may be directed to the alleviation of other social disadvantages. It is no accident that the Black civil rights movement expanded after the 1954 Brown decision.

CONCLUSION

In the Introduction, two conditions were suggested, either of which would be necessary before controversial matters, especially those with a civil liberties component, would be resolved in the United States. The first was that the courts at the different levels, but usually the Supreme Court, rule that certain laws clash with constitutionally protected rights. The second is that legislatures act to alter laws which are restrictive to particular groups. Of course, the two are not mutually exclusive. More often than not action in the courts is the spur to legislative action, but legislative action without some impetus from the courts in civil liberties areas is generally unlikely because such problems affect minorities usually possessing fewer political resources than other groups in society who are demanding the attention of decision makers.

Theoretically, the courts are seen to be immune from public pressure. Judges reach decisions based upon the application of precedent and rules of equity, and they ostensibly disregard the popularity or unpopularity of the litigant seeking redress of the particular grievance. Realistically, however, the courts do reflect public opinion and popular attitudes to a varying extent. During some periods, the Supreme Court has been more liberal than in others. In addition, members of the judiciary may have the same prejudices and biases that other members of the elite, even those less insulated than the judges from the electorate, may have. Further, the courts traditionally have not been trail-blazing. Indeed, civil liberties groups may have become too expectant of support by the judges as a result of the Warren Court's judicial activism. While the Burger Court has probably not been as conservative as some would suggest, given its qualified support of access to abortion, bussing, and the very difficult problem of affirmative action, it is not as adventurous as the Warren
Court was, Still, were consistency to be a general attribute of the Supreme Court—and it is not—one might have expected the Court to be somewhat more open to the arguments of those homosexuals who have pursued cases through the courts, at least in the area of the individual's right of privacy.

The existence of multiple centres of power in the United States has never made life easy for groups who have made claims against the national rules. Successful groups, such as Blacks, have been able to gain the attention of national decision makers largely through their ability to mobilize large numbers of people to fight for what is generally accepted to be a just cause by the majority. But the Gay Rights movement has been less a movement than a loose aggregate of groups seeking, with greater or lesser fervour, vaguely similar goals. These groups, however, represent a relatively small proportion of homosexuals in the United States for the majority have been unwilling to commit themselves to the quest for full and equal civil rights. Further, the justness of the cause is not widely accepted by non-homo sexuals perhaps because of continued perceptions by many of homosexuality as mental illness or depravity.

Thus, governments are able to avoid dealing with such minority claims if the cause is unpopular and the group ill-organized even if those claims are consistent with decisions which have been reached in related situations. For homosexuals in the United States, especially those activists who have, often with considerable personal risk, pursued goals both through the courts and legislatures with only occasionally favourable results, the changes in other areas must be both exhilarating and frustrating. They are exhilarating because such expansion of rights demonstrates the possibilities for the future. They are frustrating because that same expansion shows that bestowing rights still rests with authorities, who are more often than not more concerned with the possibly adverse reaction of the majority than they are with the justness of the claim by the minority.