

SYMPOSIUM

SEX, POLITICS & THE LAW: LESBIANS & GAY MEN TAKE THE OFFENSIVE

PREFACE

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On February 22, 1986, the New York University *Review of Law & Social Change* sponsored a day-long symposium entitled "Sex, Politics and the Law: Lesbians & Gay Men Take the Offensive." The articles that follow are edited selections of papers presented at the Symposium, several of which have been revised in light of the United States Supreme Court decision in *Bowers v. Hardwick*.¹ The reasons for committing the *Review's* resources and reputation to the topic of lesbian and gay rights include both pragmatic and political considerations. At the time of the Editorial Board's decision to sponsor the Symposium and solicit papers for publication, few other journals had devoted substantial effort to the topic of lesbian and gay rights.² Thus, from a practical viewpoint, the Board recognized an immediate opportunity to contribute to this emerging body of literature.

More importantly, however, the *Review* sought to address an important social issue in its sponsorship and publication of this symposium on lesbian and gay civil rights. Even before *Bowers*, the legal status of lesbians and gay men was disappointing. In arenas as diverse as immigration, first amendment rights, child custody, the military, and health law, gay people have suffered major defeats.³ In the post-*Hardwick* world, the legal position of lesbians and

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Ms. Rothberg wishes to extend a special thanks to Audrey Rabinowitz, her co-editor, without whom this undertaking would not have been possible. She would like to express appreciation to her lover, Lisa Bloom, for her many invaluable contributions to the Symposium. On behalf of herself and the *Review of Law & Social Change*, Ms. Rothberg also wishes to acknowledge the generous support provided by the members of NYU Lesbian & Gay Law Students.

1. 106 S. Ct. 2841 (1986).

2. Readers wishing to familiarize themselves generally with this field should consult Dean Rivera's surveys of the case law and literature: *Recent Developments in Sexual Preference Law*, 30 *DRAKE L. REV.* 311 (1980-81); *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799 (1979); *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 *U. DAYTON L. REV.* 459 (1985) and *Part II*, 11 *U. DAYTON L. REV.* — (1986) (forthcoming).

3. *Supra* note 2.

gay men is dismal: far from recognizing sexual minorities as equals, the *Hardwick* Court upheld the criminal status of lesbians and gay men in nearly half the jurisdictions of the United States.⁴ The need for effective civil rights advocacy in this area has never been greater.

As Symposium Editor, I proposed an unorthodox approach to this advocacy, one that combines legal and nonlegal activism in a multidisciplinary framework for fostering change. The Symposium structure and the articles selected for publication reflect the view that legal change is inextricably woven into a larger struggle for social and political transformation. This view is particularly appropriate in the struggle for lesbian and gay civil rights: more than a legal effort, it is a movement that challenges the bases of the social and political order. Progress in the area of sexual civil rights and liberties thus requires a careful examination of how legal and social activism interact. Consequently, as legal advocates we must challenge our own conservative tendencies and constantly remind ourselves of the diversity of the lesbian and gay community.

The purpose of this Symposium and the articles contained herein is not, therefore, to debate the wisdom of state sanctions against homosexual conduct. To ask this question is to answer it.⁵ Rather, this work begins with the recognition that lesbians and gay men are a significant and increasingly vocal minority in this country — a minority that will not be silenced by state penal laws, moral condemnation, acts of discrimination, or queerbashing. Given this political and social reality, the Symposium and the articles contained in this issue are presented to assist advocates (using that term in its broadest sense) in formulating appropriate and effective strategies for securing sexual civil rights and liberties on behalf of lesbians and gay men.

From a lawyer's perspective, the relationship between this statement of purpose and the following articles may not be readily apparent. For many attorneys, the idea that laypersons have something productive to say about developing legal strategies is almost unimaginable. After all, in legal education and practice, the respective roles of lawyer and client are well-delineated. The client decides what plea to make, whether or not to testify and, in civil matters, the affirmative claims and whether to settle out of court. The attorney, however, decides the procedural matters and the overall strategy, and is responsible for conducting the litigation.⁶ This scheme may function adequately in discrete individual cases. Where an action has meaning for a social cause, however, limiting access to the legal arena solely to members of the bar may ultimately frustrate the radical potential of that movement.

4. 106 S. Ct. at 2847-48, n.1 (Powell, J., concurring).

5. For an example of this sort of unabashed bias, see Judge Bork's facetious approach to the rights of lesbians and gay men in the military in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

6. This proposition is well established by custom in the profession, and was adopted explicitly by the American Law Institute in the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 and comment (1983).

As attorneys, we cannot help becoming somewhat entrenched in the status quo. In studying and practicing law, students and attorneys make certain investments in the structure and operation of the legal system. First, because the law and lawyers are highly valued in this society, we tend to separate from, and elevate ourselves above, the lay population. As professionals, we speak a technical language comprehensible only to the elite few who have received a legal education. The guild mentality is difficult to resist, and many of us are reluctant to demystify our trade.

A second investment is made when the lesbian and gay rights attorney adopts a rights-oriented approach to law. Under the legal rights model, lawyers argue on behalf of unpopular groups by suggesting legally supportable grounds for extending or reforming existing doctrines. Because of our legal training and practice, we tend to accept this approach uncritically and to shape our arguments accordingly.⁷ Well-established legal theories and patterns of practice are adhered to even though they may not most accurately support the objectives of a political movement.⁸ This process of compromise is especially constraining for the lesbian and gay rights movement, which by its very nature poses a fundamental challenge to the social order. As Rhonda Copelon aptly pointed out while moderating a Symposium panel: "Law narrows. And law channels. And law takes liberatory visions and makes them smaller. As advocates we fear that process, and as we move from the broader question of the political movement and political goals to the integration of law and politics we have to be aware of that danger as well as the opportunities it affords us."⁹ Particularly in a time of social and political conservatism, it is important that we, as organizers and advocates, understand and consider carefully this double-edged character of the law.

For the lesbian and gay rights attorney involved in this process of compromise, a special danger exists. As a professional working within the system, the lesbian and gay rights attorney is pressured to perpetuate the mystique and authority of the law. In doing so, however, the lawyer risks alienation from the community that inspires and sustains her in the struggle for civil rights.

As activist lawyers, therefore, we have a need as well as a responsibility not to become alienated from the communities we represent. We have an obli-

7. This critique is set out fully in an excellent article by Gabel & Harris, *Building Power & Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

8. I do not mean to suggest, however, that attorneys should instead advance frivolous legal theories. Legal arguments which are informed by radical language and which express the contributions of lesbian and gay people to society serve to educate the Court. In the long run, this strategy has the potential to facilitate real social change. See Dunlap, Introduction and Brief *Amicus Curiae* for Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project, and National Women's Law Center, *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), 14 N.Y.U. REV. L. & SOC. CHANGE —.

9. Remarks of Professor Rhonda Copelon, *Review of Law and Social Change Symposium* (Feb. 22, 1986) (Transcript at 26-27. On file at the offices of the New York University *Review of Law & Social Change*).

gation to demystify the law and open up the decision-making process to our constituents. In recognizing the trade-offs inherent in arguments which only slightly modify traditional legal doctrines, we must ask ourselves: Do we gain respectability at the price of experimentation? Do we trade our radical vision and the change it demands of society for the safety of acceptability? In a society that barely tolerates difference, are traditional avenues even open to us, or is the pursuit of acceptability and "equal rights" illusory?

Regardless of the ultimate resolution of the choices before us, it is essential that the process by which decisions are made include all members of the lesbian and gay community. Yet the responsibility for ensuring that this rapport is achieved and maintained lies not solely with legal advocates. Non-lawyers have traditionally failed to challenge the position of attorneys in the struggle for lesbian and gay civil rights. With few exceptions, community activists contacted to speak at the Symposium shared a common initial response: "I'm not a lawyer and I don't really know very much about legal topics." Although the lesbian and gay movement *is* acutely legal in its orientation, due to the simple fact that its members continue to be uniquely vulnerable under the laws of this system, the input of non-lawyers in legal decisions that go to the very definition of self is crucial. Social activists must refuse to allow lawyers free rein in characterizing and representing the community.

The Symposium and the articles are in part a proposal for mutual responsibility. They have been designed to focus attention upon the complex ways in which the law interacts with politics, society, and radical visions for change. If civil rights are to be gained on behalf of lesbians and gay men, we, as advocates, must explore the radical implications of being gay in a hostile society. As we meet this challenge, we must recognize the interdependence of legal and political progress and begin to value and seek the contributions of both legal and non-legal participants.

Finally, because of the traditional lack of communication among lawyers, academics, and organizers, much of the work of these groups receives little, if any, cross-fertilization. The success of the Symposium and this published collection will ultimately be judged by the dialogue they inspire among us.