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I. INTRODUCTION

Legal scholarship is very comfortable addressing the merit of a particular claim for a right\(^1\) and will, on occasion, critique the manner in which rights claims are brought.\(^2\) Legal scholarship is uncomfortable with explaining how rights arise. This article addresses the question of how rights become embedded in our consciousness.\(^3\) I will

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\(^3\) This article is a companion to two other pieces concerning movements for novel
argue that the formal, legal articulation of a right follows a synergistic process in which public rhetoric, media coverage, and legal action by the state create public awareness and acceptance of the claim. I analyze rights creation from a strategic vantage, taking as my subject the academically neglected gay rights movement. This article traces public conversation about the gay rights claim over two decades, arguing that the tactics of pro-gay rhetors have moved the dialogue through several identifiable stages, to the present stage in which gay rights claims can win acceptance.

This article does not attempt a history of the gay rights movement, but instead traces the evolution of gay rights discourse by epitomizing the different types of rhetoric deployed by both sides. These epitomes are offered sequentially, to give a sense of responsiveness and conversation. First, gays had to establish themselves as a minority social group through public rhetoric and action to present their claims. The first stage of the conversation was the deployment of "visibility rhetoric," containing brash, strongly affirmational messages. Second, the early dialogue was characterized by morality-based arguments against gay claims. This opposition, of affirmational arguments and what I will call "scourge rhetoric," was inhospitable to the rights claim. Third, pro-gay speakers created victimage rhetoric, presenting gays as objects of discrimination and violence. This rhetoric, which entailed arguments for narrowly focused protections, created a narrower dialogue more hospitable to the rights claim. Fourth, I argue that Bowers v. Hardwick\(^4\) shows how these rhetoric types function in judicial opinion and suggests that a window of persuasion is opening to pro-gay rhetors as the dialogue shifts. Fifth, I offer a close reading of California's 1991 gay rights dialogue to show how these rhetoric types are used strategically and interact in a public dialogue. The California dialogue is also an example of what I will argue is a "shifted discourse," in which old rhetorical oppositions have given way to new opposition more hospitable to gay rights advocates.

Finally, I offer a prescription for gay rights claimants based on the foregoing analysis. I will argue that the task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation. To that end, lesbian and gay activists\(^5\) communicate messages


\(^5\) Throughout this article, I will generally use the term "gay" to refer to both lesbians and gays. While this article discusses the power of naming, and I am aware of the argument that it is inappropriate to describe same-sex preferring men and women (as well as bisexuals) as "gay," I hope that any potentially offended...
of group visibility and victimage to advance along the continuum of discourse. Gay rights opponents rely heavily on rhetoric of disapprobation, or scourge rhetoric, and their tactical objective is best described as centering discourse on the rhetoric of moral harm. An irony which doubles as a tactical problem is that the natural (at least symmetrical) response to scourge rhetoric, proclaiming the evil of gays, is affirmational rhetoric, declaring them good. The problem is that the general public is far more likely to tolerate than affirm gayness, so the tepid, halfway rhetoric of toleration may be a more effective counter to disapprobation than more heartfelt responses.

A. Starting the Conversation: Visibility

America's twenty-three year long public conversation about gay rights started with visibility rhetoric, or rhetoric that declared the existence of gays as a class to the polity. As this term implies, visibility rhetoric need not be rhetoric in the strictest sense. Demonstrations or news images that communicate no formal, articulable, cognitive message to an audience can still demonstrate the existence of previously hidden phenomena. Simply put, America had to notice lesbians and gays as a social class before it would talk about or with them as a class. Even more obviously, societal cognizance of lesbians and gays as a social group inevitably preceded any remedy formulated in group terms for injuries suffered by group members. Visibility rhetoric says, "I am," a message gay and lesbian America began delivering in an organized fashion on June 27, 1969.

On that June 27th, New York's Greenwich Village area gave birth to the modern gay rights movement. Late that evening, New York police raided a gay bar, the Stonewall Inn, hauling the bartender, the bouncer, and three patrons into a paddy wagon. Irate because of the arrests, and more generally because of a history of routine raids of gay clubs by the NYPD, Stonewall patrons rioted, heaving bottles and bricks and the police. Although police dispelled the rioting crowd, lesbians and gays reassembled the following night to renew their public protest of constant police raids. The Stonewall incident is hailed by many scholars as the birth of the modern gay rights movement. But the reader will take into account that "gay" is a three letter word, used for compositional ease and not an ulterior semantic purpose.


8. See MAROTTA, supra note 6, at 71-99 for a meticulous account of the events at and following Stonewall.

as the beginning of gay liberation for two reasons. First, it was active, collective, public action by gays as and for gays. Second, Stonewall energized lesbians and gays across the country to spontaneously form political associations and to publicly demonstrate in affirmation of gayness. Thus, Stonewall was a milestone as a public declaration and as a catalyst for gay political activity and consciousness.

An analysis of Stonewall-era advocacy rhetoric begins with the decision to use the word "gay." In his work *The Politics of Homosexuality*, Toby Marotta underscores the importance of the name a band of New York homosexual activists chose for their post-Stonewall group. Marotta asserts that the Gay Liberation Front chose "gay" because it was the term used by homosexuals to describe each other, a stark contrast to "homosexual," a "clinical term bestowed by heterosexuals." Through the act of naming themselves, gay activists took the first step toward reconstructing the social concept of their group, extending their privately preferred self-description into the public sphere. And while the Gay Liberation Front faded from public view in just a few years, the term "gay" has become one of general currency.

Gay rhetors amplified social knowledge of the new category "gay" with large doses of visibility rhetoric. In protests and demonstrations, lesbians and gays took to the streets, loudly proclaiming their existence in a host of affirmational slogans: "Say it loud. Gay is proud."; "Gay is good."; "Three-five-seven-nine, lesbians are mighty fine." A wave of lesbian and gay political organizations sprung up in the years immediately following Stonewall. The first gay lib club in Eugene, Oregon, three thousand miles west of Greenwich Village, was organized shortly after Stonewall, and another gay organization founded shortly thereafter incorporated Stonewall into its name. See *Gay Rights Writers' Group, It Could Happen to You: An Account of the Gay Civil Rights Campaign in Eugene, Oregon* 10-11 (1983) (providing local gay history as predicate to a description of a failed gay rights law in Eugene, Oregon).

11. MAROTTA, supra note 6, at 91.
12. Id.
13. The term "gay" is not as common in the pages of the New York Times. Critics have long contended that the Times shows an editorial bias in generally declining to cover news relevant to lesbians and gays. Until recently, its writers refused to use the word "gay" in headlines and articles, preferring the term "homosexual" despite the longstanding objections of lesbian and gay leaders. George Destefano, *The New York Times vs. Gay America*, THE ADVOCATE, Dec. 9, 1986, at 43. The resistance of the Times' editorial board (which only recently began to use the honorific 'Ms.') as well as the strong protest by the lesbian and gay community, confirms the power of naming.
Public displays of gayness were an important part of the visibility effort. The Gay Liberation Front 'liberated' heterosexual clubs by swamping them with gay patrons who would control the bar or the dance floor for one evening.17 Public "gay-ins" demonstrated and affirmed gay sensuality in public spaces. The American Psychiatric Association and Harper's Magazine18 were objects of widely publicized protests by gay advocates over controversial positions. Mainstream media picked up stories of gay demonstrations, carrying the visibility message to middle America. While the New York Times had carried articles on the disturbances at Stonewall on page 22,19 the first annual Gay Pride March, commemorating Stonewall, was front page news.20 Newsweek ran a largely sympathetic four-page feature on gay liberationists, explaining the range of lesbian and gay activism and highlighting the major issues of the liberationists.21

Visibility rhetoric, I have argued, serves the function of declaring the group's existence to the polity. Lesbian and gay advocates achieved this goal by organizing themselves as a minority group worthy of societal recognition using current archetypes of social group-ness. The public construction of this new identity, gays-as-a-politically-active-minority, began with naming. Choosing the name Gay Liberation Front, the post-Stonewall group self-consciously adopted 'liberation' as a motif that suggested a discrete group seeking relief from oppression. Gay rhetors carried this motif, declaring "the strength and pride of the gay people," noting, "[w]e're probably the most harassed, persecuted minority group in history."22 Lesbian and gay community leaders professed allegiance with the goals of other liberation movements,23 and helped forge an alliance with other liberation movements. This alliance allowed lesbian and gay leaders to credibly present theirs as a movement among similar movements already imbedded in the public consciousness.24

18. Harper's Magazine ran an article perceived as anti-gay; a sit-in by the Gay Activists' Alliance in October of 1970 called attention to the slant of the article and may have chilled the expression of anti-gay invective. See Stuart Byron, The Closet Syndrome in OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 64-65 (Karla Jay & Allen Young eds., 1977).
19. Village Youths, supra note 9, at 22.
22. Fosburgh, supra note 20, at 1.
24. See, e.g., Paul Delaney, Panthers to Reconvene in Capital To Ratify Their Constitution, N.Y. TIMES, Sep. 8, 1970, at 57 (describing meeting of Black Panthers, Women's Liberation movement members, and Gay Liberation Front members to draft proposed revisions to the U.S. Constitution); Will Lissner, New Left Groups in Session Here, N.Y. TIMES, July 19, 1970, at 33.
One of the most important public effects of gay liberation rhetoric in the Stonewall period occurred as an indirect result of the rhetoric. As the liberationists addressed society directly, they also addressed closeted lesbians and gays. The movement redefined and affirmed gay identity in open political activity, and previously closeted lesbians and gays were moved to openly affirm their sexual identity. Karla, a lesbian, was inspired to come out by the movement: "in Gay Lib I saw other people saying they were gay and proud . . . I was really touched by their contagious pride."25 Karla was not alone. Thousands of college students came out in the post-Stonewall period,26 as did a large number of lesbians and gays who became "an army of permanent enlistees" in the gay rights struggle.27 The presence of large numbers of newly out persons (relative to those of the 1950's and '60's) augmented the visibility message of the gay liberationists, carrying mass media messages of gay visibility into the private worlds of other Americans.

In the years immediately following Stonewall, gay liberationists created the foundation of modern gay rights discourse by reconstructing the category "homosexual" as "gay." They established gays as a political minority like blacks and women and captured public attention through an often deliberately jarring flamboyance.28 The liberationists' visibility rhetoric, which consisted of forceful public declaration of the group, necessarily had a strong affirmational tone. As I will argue later in this article, pro-gay affirmational rhetoric facilitates the creation of an affirmation/scourge opposition in gay rights discourse, an opposition which is damaging to the rights-creating pro-gay rhetors. This analysis underscores the intuitive insight that shock tactics decrease the likelihood of real dialogue.29

Stonewall and the early years of gay liberation served an agenda setting function. By creating the new issue of gay rights and calling

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27. D'EMILIO supra note 7, at 236. This phrase (and idea) is from John D’Emilio’s book. D’Emilio argues that the movement prompted a great number of people to come out, giving them a permanent stake in the success of the movement since coming out is generally an irreversible step. Id.
28. See, e.g., Shelley, supra note 15, at 34 (arguing "the function of the homosexual is to make you uneasy"); D'EMILIO, supra note 7, at 235 (arguing that the tactics and posture of gay militants even offended some lesbians and gays).
29. While this intuition is impossible to prove, it is shared by other authors. See, e.g., MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL 182, 213-214 (1989)(advocating "Waging Peace" media campaign as preferred strategy to change attitudes toward lesbians and gays); Peter M. Cicchino et al., Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill," 26 HARV. C.R.-C.L. L. REV. 549, 601-606 (1991)(arguing that shock tactics do not promote and can impede drive for change because legislatures may be more influenced by quiet, persistent lobbying).
attention to it, visibility rhetors made the conversation possible. Prior to 1969, society viewed "homosexuals" much as it did murderers and child molesters: as a silent, isolated, deviant set of outlaws, not as a visible, aggregative, tolerable set of like persons with a positive agenda for themselves. To create new social knowledge, gays needed to reconstitute themselves in the public space and create new meanings for their group that would destroy and replace the old meanings. The task was daunting: polls in the early 1970's showed that over 70% of Americans thought homosexuality was wrong. The conversation had been started in brazen affirmational rhetoric, and forceful replies awaited these eager pro-gay rhetors of the early 1970's.

B. Harm Rhetoric: Reinforcing and Enhancing Negative Moral Valences Assigned to Gays

"Knowledge is . . . the product of a series of social encounters, within movements, between movements, and even more importantly perhaps, between movements and their established opponents."

—R. Eyerman & A. Jamison

Any rhetorical study of rights construction is inevitably a study of rhetoric attacking or thwarting the rights claim. One form of rhetoric heavily utilized in the mid-seventies by gay rights opponents and still commonly deployed today I call "scourge rhetoric." It is rhetoric which conveys disapprobation for homosexuality. Scourge rhetors deploy moral (Biblical), medical (plague/sickness), and other debasing (vermin) images to assert the intrinsic evil of lesbians and gays. While scourge rhetoric had existed for millennia, it was first confronted in public discourse in the seventies. The language of the mid-1970's provides a vivid example of scourge rhetoric and a snapshot of a discourse locked in a scourge/affirmation conflict.

My analysis of scourge rhetoric will center on Anita Bryant, an archetypal anti-gay scourge rhetor, and her opposition to gay rights legislation in 1977. This focus on Bryant illustrates the forms, aims, and strategic worth of scourge rhetoric and provides a snapshot of another moment in the developing gay rights dialogue. Bryant, a former Miss Oklahoma turned singer, was deeply committed to her fundamentalist Baptist beliefs. One element of her particular fundamentalist belief system was a conviction that homosexuality was wrong, Biblically proscribed, and an evil to be legally restricted. Armed with her celebrity

32. This is not to imply that all Christians or deeply religious persons then or now express(ed) moral revulsion for lesbians and gays. See Kenneth A. Briggs, Miami Homosexual Issue Dividing Clerics, N.Y. Times, May 31, 1977, at 14.
and her beliefs, Bryant dedicated herself to opposing a series of gay rights ordinances. Most notably, she opposed a Dade County, Florida ordinance which prohibited discrimination against gays in housing and in other contexts.

Scourge rhetoric is a straightforward rhetorical trope, requiring only brief illustration. Bryant provided a particularly colorful sample: "[w]hy does such an abomination to God as homosexuality exist? It's Satan on the move." Bryant commonly deployed religious text and the language of immorality to deliver her message of disapprobation. She also employed a variant of scourge rhetoric in her persistent focus on the alleged impact of openly gay persons on school children. She claimed gay people would molest or "recruit" school children into the gay lifestyle. Bryant’s organization was named "Save Our Children," and she asserted that the Dade County ordinance was discrimination against children, arguing that gay teachers would proselytize and sexually assault their students. If the rhetoric is viewed as formal argument, it states that homosexuality is a moral disease, and a contagious one at that. The rhetoric can also be viewed as a generator of visceral affect. It pairs the rights claim represented in the ordinance with images of child molestation, jamming the cognitive message of antidiscrimination with an image that induces revulsion.

This rhetorical type posed manifold strategic problems for pro-gay rhetors. Most significantly, the assertion that homosexuality is a moral evil led discourse into an affirmational/scourge polarity, one plainly inhospitable to the goals of pro-gay rhetors. This polar opposition arose because the claim that homosexuality is evil is most readily negated by the affirmational claim that homosexuality is good. The difficulty associated with making this claim, especially in 1977, made scourge rhetoric tactically problematic. A majority of Americans disagreed with the assertion that homosexuality is good: in 1977, 72% of Americans viewed homosexuality as "always wrong," and 74% did in 1989. In addition to the problem of attitudinal barriers, scourge rhe-

33. Id.
34. See generally, ANITA BRYANT, THE ANITA BRYANT STORY (1977). Bryant reprints the text of a letter to the Dade County Board of Commissioners in which she urged them to reject the proposed gay rights ordinance, citing 1 Corinthians 6:8, Leviticus 20:13, and other Biblical passages. Id. at 16-18.
37. Cf. Anonymous Letter to the Editor, N.Y. TIMES, June 4, 1977, at 18 (using psychiatric scourge images to declare, "[o]ne might as well declare influenza to be an alternate life style at the height of an epidemic . . . .")
38. WOOD, supra note 30, at 583.
tors typically use religious, particularly Biblical, motifs. Given that the religious vocabulary of scourge rhetors resonates to the ears of many Americans, it leaves pro-gay rhetors the difficult task of negating the moral claim using religious, especially Biblical materials. Religion is a key source of social knowledge, and in 1977, religious acceptance of gayness was merely a glimmer in the eye of progressive theologians. Gay rhetors lacked the necessary religious materials to rebut scourge rhetors, and the dialogue came to an inevitable dead-end. The scourge/affirmation polarity was beneficial to the position espoused by Bryant and her allies, and the inevitable dead-end reveals the danger that polar opposition poses to pro-gay rhetors.

Scourge rhetoric incorporating references to children presented a troubling persuasion dilemma for lesbian and gay rhetors. First, reference to child molestation is a powerful visceral weapon in the fundamentalist arsenal. Second, it plays into traditional stereotypes of gays, recalling old social knowledge of lesbian and gay persons to stymie the attempt to create new knowledge. Third, the focus on the consequences of gayness enabled anti-gay rhetors to move the discourse from an argument about the need for a particular antidiscrimination measure back to the affirmation/scourge opposition. It gave citizens a rationale on which to premise their distaste for gays without directly expressing distaste for the moral worth of lesbian and gay persons.

Political tolerance research has demonstrated that Americans are much more likely to support the civil liberties of any social group in the abstract than they are when consequences are attached to the granting of such liberties. Given a proposed consequence to the extension of civil rights, popular reluctance to extend the liberty highly


40. See Briggs, supra note 32, at 14 (mentioning John McNeill's book The Church and the Homosexual, then just published and perceived as theologically novel for its suggestion that homosexual relationships be judged by the same ethical standards as heterosexual relationships).

41. See James H. Kuklinski et al., The Cognitive and Affective Bases of Political Tolerance Judgments, 35 Am. J. Pol. Sci. 1, 17 (1991). Kuklinski argues that most whites feel reluctant to express their true feelings for blacks, but that "[l]etting them off the hook by asking them to concentrate on consequences, however, encourages greater forthrightness." Id. Likewise, those who are uncomfortable condemning gays, but who nonetheless feel uneasy when facing them could simply oppose the ordinance's guarantee of rights on the basis of the alleged impact of gay teachers, instead of on an absolute moral position. See also Michael Corbett, Political Tolerance in America 32 (1985)(agreeing that support for abstract civil liberties declines sharply when consequences are attached to supporting the liberty).

42. Kuklinski et al., supra note 41, at 3.
corresponds to the negative valence placed on the group. The efforts of gay rights foes to refocus the debate on historical fears about gays thus made Americans reluctant to embrace gay claims.

Pro-gay rhetors played into the damaging affirmation/scourge opposition at times by espousing the “good” claim instead of steering the discourse toward the question of discrimination or other narrow political question at issue in the referendum. In an op/ed piece in the New York Times on the day of the referendum, Jean O'Leary and Bruce Voeller of the National Gay and Lesbian Task Force focused not on the harms which necessitated antidiscrimination remedies but on affirmational rhetoric claiming moral goodness for their people. While they could have focused on the arbitrariness of firing a gay teacher who would not “proselytize” or “recruit,” they instead asserted, “it is immoral to pretend to children that they don’t have a variety of loving options in their own lives, or to force them to believe that they are the only ones in the world to have loving or sexual feelings for their own sex.” This is absolutely the worst type of advocacy a pro-gay rhetor could offer. It evokes images of child sexuality that frighten the intended audience, and it attempts to win at the general level of approval and public morality instead of on the narrowly focused issue of housing and employment discrimination. Thus, it flies directly into the enormous head wind of the scourge/affirmation opposition. Stating that Bryant rightly places her argumentative emphasis “[o]n children [a]nd on morality,” O'Leary and Voeller conceded the argument by conceding the constructs and issues that framed it.

Given the enormous efforts of the scourge rhetors and the affirmational posture of many pro-gay rhetors, the discourse became polarized. As a result, the referendum, despite its narrow scope, was widely read as a “test of whether homosexuality merits community approval.” The voters of Dade County predictably voted the moral judgment of the community and repealed the ordinance. Anita Bryant's campaign had an interesting and quantifiable effect on American attitudes toward lesbians and gays. While the percentage of Americans labelling homosexuality always wrong held nearly constant through the period of her campaign, there was a one-time dip in 1977.

43. Id. at 14-17.
44. See Jean O'Leary & Bruce Voeller, Anita Bryant's Crusade, N.Y. TIMES, June 7, 1977, at 35.
45. Id.
46. Id.
49. Id.
50. WOOD, supra note 30, at 583-84. The numbers show a gradual increase over the period from 1974 to 1988. The percentage of respondents labelling it “always
in the percentage of Americans who were willing to allow gays to teach in colleges. The constancy of disapprobation for gays but increase in concern over gays as teachers strongly suggests that Bryant won by tapping into existing anti-gay sentiment, a sentiment which was experienced by some citizens as concern about particular consequences of gay civil liberties.

With the conversation about lesbians and gays truly joined, success would not be forthcoming for pro-gay rhetors until the development of rhetorical types that would move into new, more favorable oppositions. Such oppositions would give the gay community a fighting chance in later discourses and would reconstruct the category comprised of lesbians and gays in the public psyche.

C. Gay-Bashing: The Emergence of Victimage Rhetoric

[The young men] entered The Ramble, a well-known gay cruising area, wielding baseball bats, a hammer and a couch leg, to “get us some faggots...” One of the defendants, Kenneth Straw, 19, delivered ten or fifteen blows to one man’s head as the victim screamed and tried to escape. The beatings left former Olympic skating star Dick Button with permanent loss of hearing in one ear, while another victim suffers from recurring periods of blurred vision.

In the early to mid-1970’s, gay rights rhetoric invoked images of demonstrators declaring their existence and affirming their lifestyle on one hand, and ominous images of children in jeopardy on the other. As we have seen, these images fed into a dichotomy ultimately detrimental to the positions of pro-gay advocates. Yet as the post-Stone-wall lesbian and gay community increased in visibility, coherence, and political organization, a powerful new trope emerged: victimage rhetoric. Victimage rhetoric was embodied in gay-bashing, a new category of knowledge to serve as the basis of public policy. The elevation of the phenomenon of anti-gay violence to the status of a category of knowledge powerfully illustrates what progressive sociologists mean by the “social construction of knowledge.” More importantly, it

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51. "Id." was as follows: In 1974 and 1976, 70%, 72% in 1977, 73% in 1980, 1982, and 1984, 75% in 1985, 77% in 1988, and 74% in 1989. Id.
52. Id. at 574. While 54% of Americans surveyed would allow gays to teach in 1976, and 57% in 1980 (the next time the question was asked), the 1977 figure was a mere 51%. Id. The dip is all the more remarkable because the percentage of respondents who would allow gays to teach in college rose steadily from 49% to 67% from 1973 to 1989. Id.
53. News item cited in Doug Ireland, Open Season on Gays, NATION, September 15, 1979 at 207, 208-09.
54. This phrase refers to the position, popularized by Peter Berger and Thomas Luckmann which asserts that knowledge and categories of knowledge have no intrinsic meaning, but are instead “socially constructed.” Peter L. Berger & Thomas Luckmann, Social Construction of Reality 1 (1967). Although the conceptual framework this school offers could seem rigid and schematic if uni-
shows how one social group advanced discourse toward the validation of its rights claim by creating new knowledge.

Public knowledge of attacks on gays had long existed, and it served as the factual predicate to the construct 'gay-bashing.' Gay liberationists began to amplify this knowledge in early complaints about anti-gay violence. In the wake of Stonewall, lesbian and gay media and political organizations flourished and addressed the issue of violence against lesbians and gays. Organizations such as Community United Against Violence (CUAV), founded in San Francisco in 1979, began to counsel and aid victims of anti-gay violence and to publicize their cause. Anti-violence groups began to grow locally and nationally, and leftist media outlets began to report gay-bashing stories, particularly after Bryant's victory in Dade County. In March 1981, Newsweek ran a piece entitled "The Growing Terror of 'Gay Bashing'" which recited a gory litany of crimes against gay men, and the concept of gay-bashing entered mainstream discourse.

Ironically, the traditional journalistic and governmental neglect of crimes against lesbians and gays may have heightened the urgency attached to reports of anti-gay violence, making this image of victimage even more powerful. Because the news media has a tendency to characterize previously slighted phenomena as "new," discussion of anti-gay violence is apt to be framed in terms of its enormous recent increase. This increase may be deceptive, since historically, gays have been reluctant to report bias crimes. Thus, the enormous increases in

formally applied to explain all attempts at rights generation, it seems particularly apt as a description of how pro-gay rhetors created the category "gay-bashing."

54. See How Gay is Gay, TIME, April 23, 1979, at 72 (arguing that before the advent of the gay rights movement, one would assume that open displays of gayness would have resulted in anti-gay violence, and that only now might citizens organize to curtail such violence).

55. See, e.g., Letter from William T. Wood, TIME, Jan. 29, 1979, at 3 (symbolizing "persecution" of gays by reference to "the stunned brain in a fractured skull").


57. Groups like CUAV sprang up in such diverse locales as Northampton, Massachusetts, Jackson, Mississippi, and Houston, Texas. Peter Frieberg, Antigay Violence—Is It On the Rise?, THE ADVOCATE, Dec. 22, 1983, at 37, 40. This piece also describes the work of the National Gay Task Force to combat hate crimes against gays. Id.

58. See Ireland, supra note 52, at 207.


60. For a fascinating example of this phenomenon, see Jack Shafer, Flashback, NEW REPUBLIC, Mar. 2, 1992, at 206 (describing how major news dailies describe the frequency of LSD use among youths during the last thirteen years as "comebacks" or "increases" in use, despite evidence that use among youths has remained constant over the last fifteen years).
anti-gay crimes may just be an increase in reporting of those crimes by the victims.

As "gay-bashing," a phrase which both defines and criticizes anti-gay violence, worked its way into the vocabulary of gay rights advocates, political institutions were persuaded to gather information about the "new" phenomenon. By 1982, the New York City Human Rights Commission was compiling data on the number of complaints of anti-gay violence.61 Remarkably, the Reagan Administration's Justice Department conducted a study in 1987 that concluded that gays and lesbians are more commonly the victims of hate crimes than are black, Hispanic, or Jewish persons.62 This evolving public consciousness of gay-bashing culminated in Congressional passage of the Hate Crimes Statistics Act,63 which requires the Justice Department to collect and publish statistics on the number of crimes showing prejudice based on race, religion, ethnicity, and sexual orientation.

Government creation of information about anti-gay violence enormously aids pro-gay rhetors because of the acknowledged synergy between the media and the state in the subjects they address. As political communication theorists have declared: "[n]ews prioritizes the state and its agents."64 News operates in a public realm defined and shaped by the state to the extent that the news is "a reproductive discourse" which "represents social reality in forms and categories generated by the state."65 State recognition of gay-bashing increases media coverage, makes the phenomenon part of our collective definition of the public sphere, and provides the factual predicate for measures that might criminally and civilly punish hate crimes. Such measures, of course, play into the state/media synergy in which social phenomena become public issues through state action.66 Remedial laws would necessarily acknowledge the victimization of gays and increase public awareness of anti-gay violence as a social ill.

The advent of viable victimage rhetoric also held deeper rhetorical significance for pro-gay rhetors. Discourse cast in the affirmation/scourge opposition inevitably leads to anti-gay victories. In contrast, a focus on the issue of violence against lesbians and gays does not impli-

61. See John T. McQuiston, City Finds Rise in Complaints of Bias Against Homosexuals, N.Y. TIMES, Mar. 8, 1986, at 7C.
62. NEWSDAY, July 25, 1988, at 52.
65. Id.
66. Jesse Helms (R.-North Carolina) underscored (perhaps unintentionally) the role of the government in constructing reality and disparaged the HCSA with the assertion: "[i]n North Carolina we punish real crimes." Cicchino et al., supra note 29, at 554 n.31.
cate moral concerns, because one need not approve of lesbians and gays to favor shielding them from violent attacks. Thus, moral disapproval does not resolve the issue of violence conclusively, unless the disapproval is accompanied by an affirmative wish to subject lesbians and gays to abuse. The problem of gay-bashing, then, implicates a debate about negative rights, or rights to be free from certain harms. In a negative rights debate, pro-gay rhetors could assume a moderate position, asking for protections grounded in toleration, not approval. Arguments for and against such protection would fall into a narrower protect/no-protection-needed opposition. Such a debate would entail more nuanced fact and policy arguments and would guide the discourse away from the issue of public disapproval of lesbians and gays. This new opposition would be characterized by more political and social policy appeals, and less overt moralizing and normative rhetoric.

These new oppositions hold inherently greater promise for pro-gay rhetors. Gay rights advocates have had trouble establishing the concept of gay as good in the public consciousness; however, establishing the notion that gays are victims in the public psyche is an attainable goal. Casting lesbians and gays as victims of club-wielding homophobers creates problems for scourge rhetoric. It recasts hate not as the defense of hapless children, but as the source of brutal, unprovoked assaults on individuals because of a particular characteristic of their beings. "Gay-bashing" assimilates the history of lesbians and gays with the story of other groups more commonly accepted as minorities. The HCSA did as much by gathering data on crimes committed because of race, religion, and sexual orientation. Victimage is arguably the archetypal image a minority wishes to present publicly, and the spectacle of bloodied assault victims provides a fertile source for such images. Further, government-created statistics and a press corps eager to frame this novel issue as new and urgent strongly reinforce the victimage message of pro-gay rhetors.

Of course, images of gay-bashing are but one type among numerous imaginable victimage images. The sad face of a young woman fired because she is a lesbian is another. Images of famous gays in history whose genius or talents would have been scorned by society had their

67. Kirk and Madsen suggest that the term homophobe should be replaced by homohater, except for the rare instances in which anti-gay persons demonstrate actual fear of lesbians or gays. Since "homohobe" euphemizes the hate involved in most antilebian and gay acts, I adopt their term, which seems especially useful when describing assailants who show precious little fear of their chosen targets. KIRK & MADSEN, supra note 29, at xxiii.

68. I am describing an actual ad used by pro-gay rhetors in the 1978 campaign to support a proposed gay rights ordinance in Eugene, Oregon. GAY RIGHTS WRITER'S GROUP, supra note 10, at 44. The measure failed by the same two-thirds margin which marked the Dade recall. Id. at 74.
homosexuality been widely known is yet another.\textsuperscript{69} The advent of the gay-bashing construct was a step forward for pro-gay rhetors as they learned to steer discourse toward negative rights and protection-based tolerance arguments, and away from the volatile turf of moralism that empowered late-'70's scourge rhetors such as Anita Bryant.

D. \textit{Bowers v. Hardwick} as Rhetoric and Public Event

"Why don't ev'rybody leave ev'rybody else the hell alone."
—J. Durante\textsuperscript{70}

In 1986, the Supreme Court ruled on a gay rights claim for the first time.\textsuperscript{71} In a sharply divided five-to-four decision, the Court held that Georgia did not violate the constitutional privacy rights of gays by enacting a law that criminalized private, consensual homosexual sodomy.\textsuperscript{72} The Court's opinion in \textit{Bowers v. Hardwick} aptly illustrates the types of rhetoric occupying the new space created by the gay rights movement. The opinions of Justices White, Burger, Powell, and Blackmun illustrate one moment in an evolving discourse and show how the types of rhetoric examined above are deployed in a judicial context. Close examination of the Justices' rhetoric in \textit{Bowers} shows competing constructions of lesbian and gay which undergird their opinions. \textit{Bowers} is a piece of important public rhetoric revealing the Supreme Court's struggle with the question of whether to extend the right to privacy to protect gay men and women from the impact of sodomy laws. The majority's narrow decision against the gay privacy claim, and the ambivalent reception it received from the American polity, suggest how to frame gay rights issues to ensure that they move the public.

White's majority opinion was the object of derision in mainstream newspapers for unnecessary moralism and "going beyond the issues."\textsuperscript{73} It actually rests on more than simple scourge rhetoric. Fundamental to White's opinion is his comparison of homosexual sodomy

\textsuperscript{69} This comes from the "Waging Peace" media campaign proposed by \textsc{Kirk & Madsen, supra} note 29, at 222, in which ads featured pictures of Walt Whitman, Alexander the Great, and Leonardo DaVinci. The captions were thought-provoking: under the picture of Walt Whitman: "would Walt Whitman be allowed to teach English in Virginia?" under the picture of Alexander the Great: the U.S. army wouldn't accept him as an enlistee; and under Da Vinci: would probably be a "criminal" in many American states. \textit{Id.}


\textsuperscript{72} \textit{Id.}

\textsuperscript{73} The hostile editorial reaction to \textit{Bowers} included such articles as \textit{States, Think Again}, \textsc{Houston Post}, July 3, 1986, at B1; \textit{Crime in the Bedroom}, \textsc{N.Y. Times}, July 2, 1986, at A30; \textit{Public Moralizing, Private Behavior}, \textsc{Chicago Tribune}, July 2, 1986, at 14; \textit{A Far Greater Threat}, \textsc{L.A. Times}, July 2, 1986, at II, 4.
to "adultery, incest, and other sexual crimes." White declines to cognize gays as a social group: to him, they are more similar to adulterers than to blacks. White is the rhetor who has not received or will not acknowledge the message of group existence declared in the wake of Stonewall. By refusing to recognize the group, White short-circuits the debate. "Homosexual" to him is only that-which-engages-in-sodomy, and sodomy is regulable behavior. This conclusion becomes problematic when one considers that gays form a self-defined social group which engages in but is not entirely defined by the sexual conduct at issue in Bowers.

Justice White's rhetoric constructs gays as a set of individuals who engage in proscribed conduct rather than as a social group. Additionally, he undercuts their claim with scourge rhetoric which he incorporates by reference. Without using language of moral disapprobation, White refers to the "ancient roots" of antisodomy laws and to the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." He incorporates these sources of moral disdain for homosexuality by stating "[t]he law . . . is constantly based on notions of morality." Thus, White conveys an attitude of moral disapproval without pronouncing the words of moral condemnation. White's use of scourge by reference suggests that the politics/morality distinction makes overt moralism unseemly. Though morality may be deployed in legal discourse, it is best incorporated as history, or as permissible legislative motive.

Warren Burger's vitriolic concurrence flouts the convention that legal conclusions cannot rest on morality. In one long paragraph, Burger invokes the "ancient roots" of proscriptions against sodomy, "Judeo-Christian moral and ethical standards," the codes of Theodosius and Justinian, and commentary describing homosexuality as "the infamous crime against nature," having "deeper malignity than rape," and "a crime not fit to be named." Epitomizing scourge rhetoric, Burger closes, "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

The structure of the Chief Justice's moral argument suggests two ways in which scourge rhetoric can be employed in judicial opinions: as moralist invective or as the premise of a constitutional argument. In a brief introductory paragraph, he asserts that this concurrence will "underscore my view that in constitutional terms there is no such

75. Id. at 192, 196.
76. Id. at 196.
77. Id. at 196-97 (Burger, C.J., concurring).
78. Id. at 197.
thing as a fundamental right to commit homosexual sodomy." The paragraph of argument notes the ancient roots of opposition to sodomy, cites almost exclusively theological sources, and notes that Georgia's statute reflects the theologically-grounded English law position. Thus, to grant the right would "cast aside millennia of moral teaching."

Burger appeals directly to morality as the reason for his decision, citing no constitutional provision, no federal law, and little American or modern law. Strikingly, his brief concluding paragraph reasserts that "nothing in the Constitution" precludes the Georgia sodomy statute. Burger is either using his platform as Chief Justice to deliver invective and is merely mouthing the forms of constitutional argument, or he genuinely intends the moralism as a constitutional argument, in which case his arguments are an instance of scourge-as-natural law.

Justice Blackmun's strong dissent joins the conceptual argument apparent in the White and Burger opinions. While Burger and White cast homosexuality as a moral stain, Blackmun declines to respond on the affirm/reject axis. Instead, Blackmun provides a paradigmatic example of tolerance rhetoric, framed in terms of negative rights. Denying that the case presents a claim of an affirmative right to the conduct at issue, Blackmun reasserts the issue as "the right to be let alone."

Blackmun also strikes repeatedly at the denial of groupness implicit in White's construction of gays as sex offenders. Invoking the line of cases prohibiting criminalization of a status, Blackmun asserts that homosexuality is not "simply a matter of deliberate personal election," but is instead a condition or state of being. He invokes Wisconsin v. Yoder to compare the interests of lesbians and gays in "controlling the nature of their intimate associations" with the set of choices that characterize the Amish "way of life." This language approaches the depiction of gays as a people, a distinct social group; however, as a comparison, the statement remains oblique. Blackmun finishes his construction of lesbians and gays as a social group and political minority by citing cases which overturned racially discriminatory practices.

79. Id. at 196.
80. Id.
81. Id. at 199 (Blackmun, J., dissenting).
82. Id. at 202-03, n.2 (citing Robinson v. California, 370 U.S. 660 (1962)).
83. Id.
84. 406 U.S. 205, 223-24 (1972)(holding that public interest in educating 12 year olds was outweighed by competing interest of the Amish community to limit public schooling to help preserve Amish way of life).
86. Id. at 210 (citing Brown v. Board of Education, 347 U.S. 483 (1954)(holding unconstitutional racial segregation in public education); Loving v. Virginia, 388 U.S. 1 (1967)(holding unconstitutional Virginia statute prohibiting interracial marriage)). Blackmun found "the parallel between Loving and . . . [Bowers] almost
Blackmun's position recognizes gays as a social minority and deploys tolerance and negative rights rhetoric which shifts rights discourse from the affirmation/scourge opposition to a protect/no-new-laws opposition. This opposition is cast in more political and less moral terms, and it is characterized by greater commonality of premise among opponents. A third feature of Blackmun's rhetoric is its contempt for moralism in judicial argument. He attempts to push the discourse back to a more purely political opposition, and presumably toward a dialogue more hospitable to tolerance rhetoric. Religion is not enough, as Blackmun mockingly asserts: "before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'"87 Citing the Biblical justifications for prohibiting interracial marriage, Blackmun implicitly suggests that moralist arguments can be mounted in favor of propositions that will later seem morally improper. Blackmun's argument robs morality of its intended conversation-stopping force. Blackmun then recites the politics/morality distinction in the form of First Amendment establishment doctrine. He argues that religious justifications, standing alone, are an improper basis for governmental action, and that use of secular force is justified insomuch as it has justification beyond "conformity to religious doctrine."88

Justice Powell's concurrence constitutes the swing vote that gives White his majority.89 Powell's intriguingly ambivalent concurrence suggests the shape of the new rhetorical opposition that could replace affirmation/scourge if pro-gay rhetors such as Blackmun shift the discourse from primarily moral to political conceptual turf. The preponderance of Powell's opinion is devoted to an expression of his apparent lack of support for antisodomy statutes. Although he asserts that the Georgia statute90 at issue in Bowers might amount to cruel and unusual punishment in violation of the Eighth Amendment because it carries a maximum penalty of 20 years, he declines to reach that issue because it was not explicitly raised below.91 Powell then cites the lack of a trial, conviction, or sentence in Hardwick's case and a "history of nonenforcement" of sodomy laws to show "the moribund character" of the proscription.92 Powell avoids the mootness doctrine, the accepted judicial formulation for the idea that there is no adjudicable

uncanny," in the theological justifications offered by the state in both cases. Id. at 210 n.2.
87. Id. at 199-200 (citation omitted).
88. Id. at 211 (citations omitted).
89. Every vote in a five-person majority is a "swing vote" in a sense.
92. Id. at 198 n.2.
case or controversy. He seems to agree that there is a justiciable dispute as to the validity of the law, but he argues for the continued worth of the statute on the very grounds that it is no longer applied. This analytically perverse approach is necessary to reach the point at which the restrictive law is implicitly condemned, but any further move toward a rights claim is rejected. Justice Powell concludes with a dip into the affirm/reject opposition, arguing: "I cannot say that conduct condemned for hundreds of years has now become a fundamental right."93 This is more a refusal to affirm gays (by granting a right) than an attempt to label them evil (as evidenced by his emphasis on nonenforcement and potential cruelty in laws proscribing lesbian and gay sex).

Justice Powell's opinion shows the emergence of a new opposition as public gay rights discourse displaces the old affirm/reject opposition. Pro-gay rhetors assert group identity as a premise and claim mistreatment and the right to protection, or simply the right to be left alone (both negative rights and tolerance claims). Anti-gay rhetors who accept group identity or the claim of mistreatment are reduced to asserting that the particular gain sought is not needed to protect rights because the status quo is adequate. As Justice Powell's opinion illustrates, this argument seems truly bizarre. It is used to assert that gay rights are adequately protected by a status quo law which reflects public judgment of moral disapproval and imposes criminal penalties. The protection consists of the nonenforcement of the penalties. The argument is much stronger when it is used to support the absence of protections for lesbians and gays. This opposition of tolerance/law-not-needed rhetoric is a muddier opposition than the stark contrast of the affirmational rhetoric of Gay Liberation with the Biblical imagery of Anita Bryant. The tolerance/law-not-needed rhetoric actually accommodates opposing positions which rest on shared premises of the undesirability of discrimination or hate crimes. The resulting discourse is productive of some consensus in the ongoing public construction of lesbians and gays. This new opposition is also more likely to use the language of politics which is often distrustful of overt moralism.

Bowers was an opportunity for the Supreme Court to rule on a lesbian and gay rights-claim, and it was also a major public event. Newspapers across the nation ran the story on page one.94 In an unusual and dramatic move, Justice Blackmun read his stinging dissent from

93. Id.

the bench, giving coverage of the story a theatrical air. The results of a Gallup poll conducted shortly after Bowers showed that 73% of those surveyed were familiar with the decision, a statistic which reveals that the case was an unusual moment in which the gay rights dialogue had deeply touched the public consciousness. Results of post-Bowers polls exploring public attitudes suggested that we are a nation of Lewis Powells, uncomfortable with lesbians and gays and unlikely to approve of them, yet almost equally uncomfortable with letting the state regulate their sex practices. While Americans declared homosexuality an unacceptable lifestyle by a 61-32% margin, they disapproved of Bowers by a 47-41% margin and declared that states should not have the right to regulate the private sex practices of consenting gays and lesbians by a whopping 57-34% margin. The statistics arguably revealed a cognizance of gays as a social group and suggested some degree of success in the reconstruction of the popular notion of lesbian and gay. Disapproval of the lifestyle mixed with aversion to sodomy laws suggests that the nation is willing to tolerate but not approve. This is the rhetorical window that began to open in 1986: laws directed toward the gay community could be accepted if necessary to prevent harm to gays, while laws ratifying their lifestyle would likely fail. On this discursive terrain, pro-gay rhetors set forth, targeting countless Lewis Powells.

E. The California Gay Rights Discourse of 1991

This article has thus far delineated types of gay rights rhetoric: visibility-affirmational, scourge and victimage rhetoric. Bowers provided an example of these types of rhetoric deployed in the judicial context. The opinions and the public ambivalence after Bowers suggested an opening for pro-gay rhetors. While Justice Blackmun narrowly failed to move Powell to embrace the rights claim in Bowers, pro-gay rhetors continued their struggle in cities such as St. Paul, and states like California, Hawaii, and Massachusetts.

California was the site of a highly energized public discussion about gay rights in 1991. It centered around Assembly Bill 101 (AB 101), a measure designed to protect lesbians and gays from housing and em-

95. See Philip Hager, Ruling Upholds Ban on Homosexual Conduct, L.A. Times, July 1, 1986, at II.
97. Id.
99. For a painstakingly thorough account of the history of the Massachusetts gay civil rights bill, see Cicchino et al., supra note 29.
ployment discrimination. After newly elected Governor Pete Wilson expressed a willingness to sign such a bill during the gubernatorial race, he vetoed AB 101, sparking a political furor that has not yet subsided. Beyond AB 101, Californians engaged in a dialogue about gay rights in discussions about municipal ordinances, and in public controversies on college campuses. California provides a laboratory in which to examine the clash of rhetorical types in contemporary discourse. Additionally, it provides a view of what rights-discourse looks like in a polity that accepts basic elements of the rights claim. Finally, California provides a template for suggestions about how gay rhetors should argue to move discourse to more fertile ground for rights claims. The California discourse reveals how scourge and affirmation rhetoric and symbol are deployed and how the scourge/affirmation opposition has largely given way to more nuanced oppositions of tolerance/no-need-to-legislate rhetoric. In consonance with this transformation, Californians favored protection for gays by a 62-29 margin. Thus, California exemplifies a shifted, post-scourge discourse in which disapproval coexists with tolerance in the polity.

1. Groupness: A Foundational Construct

The gay rights conversation that began at Stonewall was concerned largely with declaring the existence of gays and lesbians as a social group. Although two decades have passed and gays have taken their rights claims to the Supreme Court, state legislatures, and the American public through the media, the threshold question, “are gays and lesbians a social group?” is far from resolved. Groupness offers a dual window on gay rights discourse. As a definitional tool, groupness


101. Wilson was followed by pro-gay protesters for months. See, e.g., George Skelton, Wilson Emerges From First Year Battered But Feisty, L.A. TIMES, Nov. 23, 1991, at A1, A29. His controversial veto is widely credited with being one of the sources of Wilson’s unpopularity during his first year. Id. The controversy may continue through 1992 as a bill similar to AB 101 has been reintroduced in the California Assembly. Jerry Gillam, Bid Revived to Ban Job Bias Against Gays, L.A. TIMES, Feb. 12, 1992, at A3.

102. The arguments against legislating here, notably, fall within none of the three categories of reactionary rhetoric identified in ALBERT HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991)(identifying the perversity thesis (change intended to further a social good will have the unintended consequence of hindering that good-i.e. welfare keeps the poor poor), the futility thesis (reforms will have no effect on the problem they aim to reduce), and the jeopardy thesis (reforms may solve the problem but will undermine other, more consequential social goods)). The arguments against legislating in California fit a fourth rhetorical type. This type grants the importance of the problem but denies that any legislation is needed to attack the problem, because the status quo will solve the problem.

shows contrasting views about gays that operate as subtext in the gay rights dialogue and strongly condition the outcome of each side's argument. As a goal to be attained, groupness is that which is embraced by the affirmational rhetoric of pro-gay rhetors while anti-gay rhetors deny that gays are a social group to block the expansion of lesbian and gay claims at the level of premise.

Pro-gay rhetoric often assumes that the visibility rhetors' message of gay existence and collective self-definition has reached the polity, and that the polity recognizes gays/lesbians as a group. In a letter to the Los Angeles Times, one pro-gay rhetor argued: "[a]ll other minority groups have been provided for by law, why not homosexual persons?" When a San Diego community affairs program selected panelists for a show entitled "Being Gay in the '90s," and included the anti-gay crusader, Rev. Louis Sheldon, ACT-UP member Ben Schultz noted, "[t]hey wouldn't have [brought in an extreme point of view] if the program included a Jewish, black, or Chicano issue." Schultz' objection shows the fundamental nature of groupness to gay rights claims and the degree to which gays and lesbians have failed to fully attain groupness in the popular imagination.

The offending panelist, Rev. Sheldon, epitomizes anti-gay rhetors who deny that lesbians and gays are a social group. Sheldon characterizes gayness as a choice, not a state of being, and as a disease, not a benign or positive aspect of personhood: "an immoral but chosen and curable illness." To Sheldon, as to Justice Byron White, gays and lesbians are those-who-commit-sodomy. The disease metaphor, like the criminal metaphor, takes the lesbian or gay person outside the realm of a social group, and beyond the pale of societal protection. The most direct denial of groupness in rhetoric opposing AB 101 came from the California Republican Central Committee when it urged Wilson to veto the bill it called an "insult to legitimate minorities." The reference to "legitimate" minority groups suggests the fundamentality of groupness as a conceptual device to conservatives. Additionally, it reveals their appreciation of the strategic need to keep

106. Id.
lesbians and gays from assimilating their story to the minority group archetype.

The fundamentality of groupness in gay rights discourse is evident in the fact that each side’s rhetoric and public action attempts, consciously or unconsciously, to move the public to share the rhetor’s view that lesbians and gays are/are not a group. The visibility and affirmational rhetoric of pro-gay rhetors supported the premise that lesbians and gays are a group. One symbolic affirmation of gay existence as a social group was the Los Angeles Police Department’s temporary decision to allow openly gay and lesbian officers to recruit other gay persons while wearing their L.A.P.D. badges. Though Police Chief Daryl Gates later withdrew L.A.P.D. authorization for the recruitment of lesbian and gay officers, the practice was widely reported in the press and hailed as a victory for gay and lesbian rights. The fact that a widely respected branch of municipal government was seeking gays as a group in a widely reported move was an unmistakable recognition of gay and lesbian groupness. It could even be construed as affirmation of lesbians and gays themselves.

Other public events served to affirm gays as a community and to assimilate them to the minority group archetype. October 11, 1991, was National Coming Out Day, a day for the politics of visibility. October 11 saw veteran actor Dick Sargent for the first time publicly declare himself gay. The “coming out” of Sargent and others made the day even more of a media occasion than it would have been otherwise. National Coming Out Day was an extensively reported collective affirmation of lesbian and gay identity communicated to the American people. In a widely publicized move in the midst of the debate over AB 101, a prominent California business changed its antidiscrimination policies to bar workplace discrimination against lesbians or gays in all shops operating on its properties. Thus, a diverse

108. Visibility and affirmational rhetoric remain closely linked, as they were during the early Gay Lib years.
111. Americans value and respect law enforcement agencies more than most public institutions. But see Seth Mydans, Los Angeles Policemen Acquitted in Taped Beating, N.Y. TIMES, Apr. 30, 1992, at A1, D22 (describing widespread perception that Los Angeles police department is racist in wake of assault acquittal of officers videotaped clubbing motorist Rodney King).
114. Orange County Perspective: The Best Answer is Legislation, L.A. TIMES, Oct. 24,
array of persons and institutions affirmed lesbians and gays as a social group. In so doing, they implicitly urged society to recognize them as a social group and acknowledged that such recognition was a necessary predicate to legal protections.

Anti-gay rhetors, by contrast, express the belief that lesbians and gays are people who should not be recognized by society as a group. When the California Republican Central Committee called AB 101 an "insult to legitimate minorities," it urged Wilson and the general public to adopt the same view. Daryl Gates' decision to bar recruitment aimed at gay officers arguably signified a separation of the category "gay" from the archetype "minority group." The L.A.P.D. openly recruits members of other more accepted "minority groups." Reverend Louis Sheldon's rhetoric of criminality and illness likewise impresses on the public the position that lesbians and gays are a problem to be addressed, not a self-defined social group deserving protection. The anti-gay position that lesbians and gays are not a group plays a more central role in attacks on gay rights than affirmation of group status plays in pro-gay rhetoric. While pro-gay rhetors accept the proposition that lesbians and gays are a group and advocate particular remedies for that class, anti-gay rhetors, who genuinely contest groupness, explicitly rebut the implicit premise of minority group status in pro-gay advocacy.

2. Arguments For AB 101

Representative Terry Friedman (D.-Los Angeles) introduced AB 101 in December of 1990. AB 101 would have added "sexual orientation" to the list of categories including "race, sex, religion, national origin, physical handicaps, and marital status" protected from discrimination under the California Fair Employment and Housing Act.

After consultation with leaders in the California business community, Friedman removed AB 101's only provision which would have directly affirmed gay relationships by forcing employers to provide domestic-

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115. Skelton, supra note 107.
116. Pope & Rofe, supra note 110. The symbolic message of the decision was diluted by Gates' declaration that discrimination against gays in hiring would not be tolerated, but that gays would not be sought out on basis of group membership. The antidiscrimination principle, of course, is another facet of groupness, since only a socially cognized "minority group" gets access to the antidiscrimination norm. Thus, Gates' message was a weak symbol of anti-gay sentiment.
partnership benefits.\textsuperscript{119}

Public argument for AB 101 coupled victimage rhetoric with appeals to the antidiscrimination principle. Supporters appealed to victimage by describing the pervasiveness of gay discrimination. A letter to the \textit{San Francisco Chronicle} typified this claim, urging passage of the bill in recognition of "centuries of persecution, fear, harassment, discrimination, and violence."\textsuperscript{120} Supporters adduced examples of persons fired or harassed to the point of quitting their jobs because of their sexual orientation.\textsuperscript{121} AB 101 advocates buttressed these empirical claims about mistreatment of gays with appeals to accepted antidiscrimination norms. Urging passage of the bill, one editor vocated, "[s]urely, every person residing in California deserves [an] equal chance to find a job and have a home. It's as basic—and as truly important—as that."\textsuperscript{122} Another pro-gay rhetor described AB 101 as "a bill to promote civil rights and end unjust discrimination" and asserted that sexual orientation discrimination abridges "freedom to ‘life, liberty and the pursuit of happiness,’ which all citizens deserve . . . ."\textsuperscript{123}

The character of the pro-AB 101 arguments illustrate one shift in gay rights discourse that had taken place between the early-mid 1970's and 1991. The California arguments for gay rights appeal to victimage and make empirical claims, while the visibility rhetoric of the early '70's sought to publicly establish gay identity and the normative ("gay is good") claims of affirmational rhetorics. Pro-gay rhetoric moved from the moral to the political, and as it moved, it used empirical claims of harm to narrowly focus the rights-claim. This enabled the polity to alleviate victimization and prevent discrimination with narrowly-tailored remedies which did not endorse homosexuality. The shifted discourse was political, not moral, and it used victimage images to convey the need for negative rights, or freedoms from particular harms.

If gay rights rhetoric is moving from an affirm/reject opposition to a tolerate/no-law-needed opposition, the public ambivalence to pro-gay rhetors is one indication that the discourse is still in a transitional

\textsuperscript{119} Id.
\textsuperscript{121} Jon Matthews, \textit{Anti-Bias Bill for Gays Advances in Assembly}, SACRAMENTO BEE, Mar. 14, 1991, at A3. AB 101 supporters arranged for former L.A.P.D. officer Mitch Grobeson to testify to the Labor and Employment Committee of the California Assembly that he had harassed on the job and forced to resign from the L.A.P.D. over his sexual orientation. \textit{Id}.
state. One of the most striking features of argument favoring AB 101 was the small number of public statements made by political allies on the bill's behalf. In apparent recognition of the latent power of anti-gay sentiment in the public imagination, political figures who voted for AB 101 produced very little rhetoric on the bill's behalf. While the Sacramento Bee, Los Angeles Times, and San Francisco Chronicle assiduously covered the bill's progress, the vast majority of articles mentioning AB 101 quoted the forcefully delivered arguments of Republican and fundamentalist opponents, with little, if any, reply. The reluctance of AB 101 supporters to vocalize their support was obvious when the House Ways and Means Committee silently favored the bill 12-8 with no debate, and the pro-101 committee chair answered the conservative vice-chair's call for discussion by initiating the roll call vote.

3. Arguments Against AB 101

The arguments against AB 101 were of two types: traditional scourge rhetoric like that from Anita Bryant and arguments which granted the validity of some pro-gay premises but held that this particular law was not needed. This section will briefly treat scourge and its place in the dialogue, and it will then address the emerging form of moderate, politically-couched rhetoric against pro-gay measures. Scourge was among the types of rhetoric in the 1991 gay rights conversation, just as it had been in the preceding twenty-year period. California's leading scourge rhetor was the Rev. Louis Sheldon, head of the Anaheim-based Coalition for Traditional Values. Sheldon depicted lesbians and gays as sick, likened their sexual practices to bestiality, and invoked the myth of homosexual recruitment of youths in the style of Anita Bryant. Fundamentalist Sheldon was

124. Editorial bias cannot explain this imbalance, as press coverage analyzed in this paper ranges from even-handed to pro AB 101. This imbalance is all the more striking in light of polls showing that the majority of Californians favored the bill. See Harrison & Chandler, supra note 107.

125. See Greg Lucas, Assembly Panel OKs Measure Banning Bias Against Gays; Floor Vote Could Be Held This Week, S.F. CHRON., June 26, 1991, at A11. As this article attests, the House Ways and Means Committee favored the bill 12-8, with no debate. Id. "Democrats appeared eager to avoid any testimony . . . ." Id.

126. Rev. Sheldon has a long history of anti-gay political activity, including leadership of three successful drives to repeal local gay rights initiatives. See Richard Bernstein, NEA Opponents See Only Blasphemy, DAILY NEWS OF L.A., June 6, 1990, at L18.

127. See Brass, supra note 105.

128. Matthews, supra note 121.

129. Catherine Gewertz, Activists Pile Their Arguments, L.A. TIMES, June 13, 1991, at B2. Sheldon recalled the recruitment myth by asserting that AB 101 would lead to the teaching of homosexuality in public schools, and mockingly asked, "[w]hat's next on their agenda, pedophilia?" Id.
not the only public figure to employ the rhetoric of condemnation. In its message asking Wilson to veto the bill, the California Republican Central Committee damned AB 101 as "anti-family." Just before the Assembly voted on the bill, opponent David Knowles (R.-Sacramento) launched into a lengthy and explicit description of what he asserted were the sexual practices of some gay men, in an attempt to illustrate his claim that homosexuality is "shocking" and "horribly offensive."

Reactions to this description by other opponents of AB 101 revealed that scourge rhetors were outside the mainstream of the dialogue over the bill. When Knowles began his tirade on the Assembly floor, conservative Assemblyman Tom McClintock (R.-Thousand Oaks) interrupted: "[i]t is a monumental embarrassment for us [sic] who intend to vote against this bill that we appear to be on the same side as this speaker." McClintock was not the only opponent of AB 101 to disavow scourge rhetoric. In his veto message, Governor Wilson denounced "the abhorrent excesses" of a "tiny minority of mean-spirited, gay-bashing bigots" who fought the measure. The new form of "cool" political rhetoric opposing pro-gay legislation strove to identify itself as rational and empirical. The statements by scourge rhetors confirm that scourge rhetoric was marginalized in the California discourse. Knowles began his recitation of sex practices with the stated expectation that his anti-gay harangue would provoke a charge of bigotry. Sheldon recognized the ascent of political rhetoric in gay rights dialogue by adapting his religious condemnations to the form of public policy arguments.

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130. Skelton, supra note 107.

131. Ilana DeBare, *Despite Graphic Plea, Assembly OKs Gay Rights Bill*, SACRAMENTO BEE, Sept. 14, 1991, at A5. The recitation was so explicit that no newspaper published any portion of it; hence, the lack of description here.

132. *Id.* Notably, McClintock is a very conservative member of the Assembly, conservative enough to disparage the Republican governor's budget deal: "[t]he governor's position is the fetal position—just make it go away." Skelton, *supra* note 99, at A28. (Wilson compromised with Assembly Democrats and raised state taxes over the objections of the Republican right).

133. Skelton, *supra* note 101. Ironically, though Wilson's message did not mention him personally, the Rev. Sheldon demanded an apology, prompting Wilson to remark, "I thought it was interesting that some people sort of rose to the bait and self-identified." *Id.* at A1.

134. Knowles began his remarks by stating, "[i]t is very trendy for people to call people like me, who oppose a bill like AB 101, a bigot." DeBare, *supra* note 131 at A5.

135. Sheldon argued, for example, that AB 101 would enable gay persons to embroil churches in frivolous antidiscrimination litigation as a method of draining the coffers of their foes. Duke Helfand, *Activists Hoping Gay Parade Will Rally Public Support for Rights Bill*, L.A. TIMES, June 20, 1991, at J5. In this bizarre and counterfactual argument (religious organizations are exempted from the antidiscrimination provisions of the California Fair Housing and Employment Act,
The marginalizing of scourge characterized the new rhetorical opposition, as did the content of the arguments against AB 101. The new arguments were opposed to the pro-gay enactment—in this case, AB 101—but did not contain anti-gay rhetoric. The new rhetoric granted the either the fundamental premise of groupness, or the empirical claim that lesbians and gays are victims of mistreatment, or both, claiming merely that the law was unnecessary, went too far, or was disadvantageous in a utilitarian sense.

Senator Phil Seymour (R.-Cal.), a close political ally of Wilson,\(^{136}\) opposed AB 101 on the grounds that existing California antidiscrimination laws protected lesbians and gays, rendering the legislation unnecessary.\(^{137}\) As Seymour announced his position on the bill: “I share the revulsion and the outrage of the vast majority of Californians when I see instances of violent hate crimes and gay-bashing,” and he added, “[t]hat cannot and should not be tolerated.”\(^{138}\) By acknowledging the need for some protection against discrimination, Seymour granted the foundational premise that lesbians and gays are a social minority group and even embraced images of gays as victims. In these respects, his position is worlds away from that of Louis Sheldon and Anita Bryant. The politically moderate Seymour tried to carve a space in the center of public opinion en route to re-election. His nod toward gay victimage and groupness suggests that some concept of gays as a group entitled to some minimal level of protection (from violence, discrimination, or other mistreatment) is embedded in the psyche of Californians.

Governor Pete Wilson’s veto message likewise suggests the vitality of gay groupness and victimage in California’s political psyche. Wilson acknowledged the victimage claim by stating, “there is no question that bigots exist and engage in abhorrent, utterly repugnant gay-bashing . . .” but argued that the litigation generated by an expansion of the class of persons protected under California law outweighed the


\(^{137}\) This argument parallels the familiar contention that the Equal Rights Amendment was unnecessary because the equal protection clause and the body of federal and state antidiscrimination law already protected women from discrimination.

benefits that AB 101 would generate.\(^{139}\) This bad-for-business argument, like Seymour's argument, is couched in political language and rests on disputable factual assertions which can be resolved without debate about the moral worth of homosexuality. If premises hold constant, pro-gay rhetors could (theoretically) win one of these arguments, though the current popular argument about the rightness or wrongness of homosexuality is unwinnable.

Another pragmatic argument against AB 101 is that it goes too far by conferring a unique advantage on lesbians and gays.\(^{140}\) A spokesman for the Los Angeles-based Manufacturers and Merchants Association made this argument, recalling President Bush's claim about the Civil Rights Act of 1990: "it could lead to a quota for hiring."\(^{141}\) The argument does not explicitly embrace pro-gay premises, as Seymour's and Wilson's did; however, in denying that this bill is an appropriate protection for a minority, it implies that some bill would be an appropriate remedy for the social ill of discrimination aimed at the group.

The "special rights" argument was brought perilously close to its logical conclusion by one California writer, who opined, "how can Friedman expect Wilson to sign a bill that would give gay men and lesbians civil and constitutional rights above those already granted to every California citizen? Isn't this reverse discrimination?"\(^{142}\) One wonders if the writer considers the already protected racial, religious, and ethnic groups to be uniquely privileged. The writer may have misconstrued antidiscrimination law as a primary affirmative tool, instead of construing it as a reparative tool which protects against mistreatment along a negative rights model. Yet the writer's rhetoric, putting aside the aforementioned fallacy, clearly conceives of equal protection for gays and lesbians as the desirable state. The reader should immediately rejoin that rhetoric which acknowledges the ideal of equality but misconstrues actual equality as a privilege. It treats actual subordination as equality and is no better than scourge rhetoric. Such rhetoric altogether misses the point of this paper. In a shifted discourse in which equality is the focus, anti-gay rhetors are forced to use constructs (equality) and empirical claims that do not have anti-gay impact. Although the rhetors are inflexibly anti-gay, their message no longer is, and it is vulnerable to refutation and failure on its own terms. The anti-gay message is more deeply submerged in the rhetoric


\(^{140}\) This claim tracks the argument of affirmative action opponents that protection against racial discrimination is a form of privilege (which implicitly asserts that antidiscrimination is reverse discrimination).


when it is expressed as a political and not a moral argument, and it becomes garbled in transmission.

4. Aftermath of the Veto: Victimage Redux

Governor Wilson's veto message which mouthed so many of the key premises of gay rights rhetoric, evokes the question: with friends like Wilson, what need does the gay community have for enemies? During the gubernatorial campaign, Wilson publicly stated that he would probably sign a bill barring job discrimination against lesbians and gays, and expectations in the lesbian and gay community ran high.143 When Wilson announced his veto, feelings of anger and betrayal fueled two weeks of daily demonstrations in Sacramento.144

As gay protests kept the gay rights issue alive in the California media, several strands of pro-gay rhetoric converged to produce a powerful message of victimage. Demonstrators expressed feelings of displeasure and betrayal caused by Wilson's earlier courting of the gay vote. An acerbic letter to the San Francisco Chronicle summarized the feeling of manipulation which pervaded the demonstrators' statements and placards: "[t]hank you governor for deceiving me into voting for you. I will now return to the Democratic Party."145 Californians widely believed Assemblyman Friedman's assertion that lesbians and gays had been sold out to secure Wilson's right wing.146 A second source of victim imagery was the claim of police brutality at post-veto protests made by anti-Wilson demonstrators. Protesters' allegations of police brutality in the month following the veto were publicly aired, prompting Chief Gates to launch an internal investigation to rebut the charges. The spectacle of injured protesters moved into the media spotlight, and they brought reports of increased violence and threats against lesbians and gays, and renewed claims of anti-gay job discrimination.147

The protesters' message was twofold. On one level, lesbians and gays used what I have termed visibility rhetoric, a public showing of

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143. Skelton, supra note 101.
146. Friedman called the veto "a cowardly cave-in to the right-wing extremists and hate groups." Skelton & Gillam, supra note 139, at A18. By a substantial majority, Californians refused to believe Wilson's assertion that his veto was motivated by a genuine conviction that the measure was unwarranted and instead believed that partisan politics moved him. Skelton, supra note 101.
the group's existence, to send a message of group disgust for Wilson's veto. On a deeper level, protesters mobilized victimage rhetoric to express the group's need for negative rights like those bestowed by AB 101: protections against discrimination and freedom from brutality, violence, and prejudice. Communication at the level of visibility rhetoric was loud and constant, but elements of the protests were problematic. The presentation of lesbians and gays as victims generated an unintended, competing victim image: that of a governor prevented from exercising his freedoms of movement and public speech.

While the idea of Wilson as a victim may sound bizarre, there is evidence that Wilson consciously cast himself as the victim of protests in an attempt to blunt public criticism of his veto. Images of the governor pelted with eggs, interrupted by shouting during a speech at U.C.L.A. Law School,149 and followed by protesters for weeks wherever he appeared150 provided fertile ground for Wilson to shift the public focus from his veto to protesters' treatment of him. Wilson labelled their tactics "fascist," and likened the protesters to tantrum-prone five-year-olds.151

There is some evidence that Wilson's tactic succeeded in shifting public concern from the veto and related policy issues to concern over protest extremes. Letters poured into California newspapers after the veto, and some writers expressed sympathy with the aims of the protesters but condemned the measures aimed directly at Wilson: "[p]elting the governor with eggs is reprehensible, and makes gays look foolish . . .," commented one backer of AB 101.152 A poll conducted shortly after the veto suggested that Wilson's strategy had intrinsic appeal to Californians. The poll found that Californians opposed the veto 46-40 and held more favorable views of lesbians and gays than of the Republican far right; however, they were more than twice as likely to view pro-gay protests as hurting rather than helping the gay rights cause.153

151. Skelton, supra note 101.
152. Lekas, supra note 148.
153. The Los Angeles Times Poll, L.A. TIMES, Oct. 6, 1991, at A26. According to the Times' poll, 23% of Californians thought gays and lesbians had too little power in the state, 36% thought they had the right amount, and 28% thought they had too much. Id. By contrast, only 14% thought extreme conservatives had too little power, 31% said they had the right amount, and 43% thought extreme conservatives had too much power. Id. Only 23% of the same sample, when asked if protests helped or hurt the gay rights cause, said they believed they helped the cause,
Wilson's positioning of himself as the victim of protesters' excesses illustrates how a negative rights protest message can be confounded through the unintentional construction of other victims. The $250,000 in damage to state property inflicted by enraged San Franciscans on the Monday following the veto\textsuperscript{154} made the taxpayer a victim, as did protesters’ defacing of property and inhibiting the freedom of motion of bystanders.\textsuperscript{155} In sum, the argument that gays are deprived of negative rights is confounded by a public perception that gays, deny other Californians their negative rights.

F. Conclusion: Progress and Prospects

Statistics show that moral disapproval for homosexuality has remained constant during the twenty year period addressed by this paper.\textsuperscript{156} However, a political tolerance has evolved during this time, with Americans increasingly likely to support the rights of gays and protections against abridgment of those rights. This article is one account of the way lesbian and gay America reached that point in this conversation. But what does the conceptual framework of this paper tell us about how lesbians and gays could increase American tolerance of gays and support for antidiscrimination measures? I tentatively offer the following prescription: 1) shift the discourse from debate about the moral worth of gayness to a political discussion of the need for narrowly focused measures; 2) optimize the mix of visibility and victimage rhetoric; and 3) continue creating new knowledge to seed future policy discussions.

First, lesbian and gay rhetors must help shift gay rights discourse from moral language containing the affirmation/rejection dichotomy toward political language with narrower, more nuanced oppositions. In the Bryant campaign, and again in the California discourse, pro-gay rhetors believed an attractive rhetorical flourish was to proclaim that the real debate was about morals and values, and that immorality lay with the conservative foes' intolerance of gay rights. Yet people commonly agree with the claims of anti-gay rhetors about the immorality while 54% said that protests hurt the cause. \textit{Id.} This disapproval of protest is all the more striking because a plurality of those polled were self-identified supporters of the gay rights movement (44% supported strongly or somewhat, while 42% opposed strongly or somewhat). \textit{Id.}


\textsuperscript{155} These anecdotal cases are reported with great interest and sympathy by the press. See, e.g., Scott Harris, \textit{Charges Traded in Gay Protest at Mall Demonstration: Blind Activist, Security Guard Accuse Each Other of Assault}, L.A. TIMES, Oct. 15, 1991, at E3 (describing how gay protesters spit on and damaged a Toyota as they prevented it from exiting a parking garage, and allegedly struck the driver in the face); Harris, supra note 144, at A32 (describing the "plight" of motorists whose car was blocked and shaken by pro-gay marchers).

\textsuperscript{156} See supra note 50.
of homosexual conduct, and moral discourse provides a more fertile source of condemnatory rhetoric than does political discourse.

Gay rights advocates can help shift the discourse by avoiding the elements of the Bryant/Sheldon conceptual scheme, and instead using rhetoric and constructs that belong to the conceptual universe of the California dialogue. Thus, pro-gay rhetors should shun language of moralism, affirmation, and normative appeals. Normative appeals to values seek not persuade but to articulate some truth which seems self-evident to both speaker and listener. The divergence between the moral views of homosexuality held by gay rights advocates and those of the American public makes normative appeals problematic. Pro-gay rhetors should emphasize factual claims of discrimination and anti-gay violence that portray lesbians and gays as victims and that can be easily verified. Additionally, pro-gay speakers should invoke "neutral" political concepts such as the antidiscrimination norm and privacy and liberty rights. As the California dialogue shows, this type of argument benefits the lesbian and gay community at a structural level. If gays lose the public policy argument, the loss will be based on the asserted reason disagreement over the degree of discrimination present and what the appropriate remedy should be. It is important that the loss be on terms that allow for the continuation of the debate and the possibility of winning.

My suggestion that moral, normative, and affirmational rhetoric is ineffective should not be read as a criticism of the content of such public statements. I am not passing here on their truth or falsehood; I am simply arguing that they interfere with the achievement of subsidiary political goals which logically precede a climate in which total acceptance and affirmation prevails. Thus, the protective rhetoric and policies of tolerance can be appropriately understood as a way station en route to rhetoric and policies which embrace and affirm.

The second element of my prescription for pro-gay rhetors based on this paper's analysis of rhetorical forms is that lesbians and gays

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157. The experience of African-Americans is instructive here. While it is realistic to assume that societal sentiment will more from disgust for gays to tolerance and protections from abuse, and then to cultural and political affirmation, arguments that try to create the end-state (often in the name of "radical transformative politics") ignore the difficulty other groups have experienced in trying to move past tolerance. The battle over the King holiday, arguably a symbolic affirmation of black contributions to American politics and culture, suggests that such symbolic affirmations are not easily achieved. The virtual absence of African-Americans from any elective office for which the voters are not predominantly black also suggests that blacks have not been "affirmed" and welcomed into American culture. See Lani Guinier, The Triumph of Tokenism: The Voting Rights Acts and the Theory of Black Electoral Success, 89 MICH. L. REV. 1077, 1112, especially nn.164-69 (1991). Affirmational appeals on behalf of a less tolerated and lower-valued minority are unlikely to touch common moral ground in the popular psyche.
must optimize the mix of visibility and victimage rhetoric. The protests after AB 101 illustrate the paradox that protests can elevate public awareness of an issue, and at the same time can galvanize opposition to the cause.\footnote{158}{While Californians opposed the veto by 46-40, they also believed by a large margin that protests and demonstrations hurt. \textit{The Los Angeles Times Poll}, supra note 153. Wilson played into the popular belief that such tactics are alienating, which might have confounded the message of pro-gay protestors even if it did not aid Wilson as intended. \textit{See id.} The disputatious reader who believes that Wilson did not succeed in confounding the message is encouraged to imagine a state more anti-gay than California in which a more aggressive or skilled governor could clearly demonstrate this effect.} The interdependence of visibility and victimage suggests the need for a middle road between outsider strategies that rely heavily on protest, and insider strategies which emphasize the need for rational, "cool" argument, and quiet, institutional action to achieve social change. One vision of the gay rights movement is populist, spontaneous, and strongly anti-hierarchical, entailing small group action, brash groups such as Queer Nation, and a commitment to the politics of the street. An alternative vision is institutionalist, pragmatic, and characterized by a devotion to intentional use of "establishment" devices such as lobbying a state legislature and waging media campaigns. Activists from the first camp often decry the approaches of the second as elitist,\footnote{159}{For two examples, see Cicchino et al., supra note 29, at 586, describing the contempt with which much of the Massachusetts gay activist community viewed lobbyist Arline Isaacson for her devotion to an insider strategy of social change, despite the fact that Isaacson, more than any single person, was responsible for the passage of the Massachusetts gay civil rights bill. Note also the uniformly hostile reception Kirk and Madsen's \textit{After the Ball} received in the gay press for suggesting that a well-funded mass media campaign designed to change public attitudes toward gays would be more effective than street protests and shock tactics. \textit{Id.} at 603, n.288.} while those in the second camp caution that the tactics of the first are counterproductive and alienating.\footnote{160}{\textit{See generally Kirk \\& Madsen}, supra note 29 (asserting repeatedly, that effete men and drag queens featured at public events must not be allowed to personify gayness in the public imagination); \textit{see also} Cicchino et al., supra note 29, at 586 (describing lobbyist Arline Isaacson's apparent distaste, or at least disregard, for her critics). This tension was also apparent in AB 101 sponsor Terry Friedman's appeal against provocative public demonstrations, which Friedman apparently regarded as harming the gay rights cause.}

This article's analysis implies that the two wings of the movement perform interdependent functions: street activists are the visibility rhetors and they set the agenda for action, while institutionalists attempt to shift public attitudes using "establishment" levers. Without the "alienating" aggression of street protest, the Wilson veto (and lesbian and gay issues) might well have faded quickly from public consciousness. Yet without institutionalists like Friedman, the powerful voice of government could never be mustered to aid in the reconstruc-
tion of "lesbian and gay" in the public imagination. How are these two indispensable parts to work together?

The suggestion here is that the movement should ideally perform a cost-benefit analysis and continually recalculate how much protest, demonstration, disruption, and civil disobedience is enough to keep gay rights-claims in the media and in the public eye. Visibility displays are often affirmational or are represented in the media as affirmational. They can inconvenience the public, and the costs of such actions must be balanced against the benefit of increased public discussion, which may be poisoned by competing victim images if visibility is too high, or may be drowned by other stories if too low. Additionally, the costs of visibility rhetoric can be minimized through adherence to what could be termed a set of supercivility rules which would promote maximal media coverage with minimal distortion of the victim message via violence or shock tactics.

A reader acquainted with lesbian and gay politics might immediately interject that such a cost-benefit analysis could never be performed, because the movement is grass-roots and decentralized with no unifying central decision-making to orchestrate such decisions. My reply is that this paper presents a theory of what could work. To the degree that my proposal does work, this objection supports the notion that such intercoordination should be undertaken, as it would benefit the gay rights cause. The main insight of my second prescription is not the trite idea that each side should work with the other. Rather, general acceptance of this model would lead practitioners of street politics to understand the limited utility of visibility rhetoric when it is primarily affirmational or represents an incursion on someone's liberty in the popular imagination. Further, street politicians who see visibility rhetoric as a means to the end of energizing public dialogue with minimum interference would optimize their communicative impact and help promote the construction of gay-as-victim. Such a construction is the shortest path to basic pro-gay enactments.

161. See KIRK & MADSEN, supra note 29, at 143, (describing how gay rights marches often get covered as affirmations of the more visually jarring elements of the gay polity by media looking for "human interest"). A political march of 100,000 can be reduced to a soundbite of a few cross-dressers, which can shortcircuit the political message of the march and crush the nascent attempt at establishing common ground with the audience. Id.

162. Kirk and Madsen suggest civil disobedience with five characteristics: 1) event should be large and massive; 2) protesters must be entirely nonviolent; 3) act must be portrayed as last resort; 4) gays must expect and accept arrest to underline that their goal is political statement not disruption; 5) the right protested for should be related to the act of protest. KIRK & MADSEN, supra note 29, at 196-97.

163. See Harris, supra note 144, at A32. See also KIRK & MADSEN, supra note 29, at 247-49, (describing the highly decentralized nature of gay politics, which is characterized by tons of organizations numbering in the hundreds, a few in the range of one to twenty thousand, and a deep distrust of hierarchy.
which protect gays from harm and help to reconstruct “gay” in the public imagination.

The prescription of efficient use of visibility rhetoric leads to disparate evaluations of two prominent practices in today’s movement. I have already argued that National Coming Out Day affirmatively declares lesbian and gay existence and that the message is amplified by the media because the day is a public event. As public symbol, the day is an efficient use of visibility, declaring existence with no extrinsic costs of disruption. Coming out helps to desensitize the polity to lesbian and gay existence and to establish lesbians and gays as a social group.

While coming out is one of the most laudable and efficient symbolic tools available to pro-gay rhetors, outing, or revealing an individual’s sexual orientation without his or her permission, is one of the least effective tools. Outing fails as a tool for constituting the group in the public space, because at the core of coming out is a personal declaration. Outing attempts to construct as gay someone who resists the construction and thereby dilutes and confounds the message. Moreover, outing creates a competing victim image by invading the target’s privacy and constructing that person as a member of a minority against his or her will. It constitutes the person as gay and as a victim-of-gays, as well. Outing is an ineffective rhetorical tool which reveals the dangers of the mentality that any publicity for a cause is good publicity.

The third element of my prescription is the continued production of new knowledge and information. The main innovation this paper describes is the creation of the construct “gay-bashing,” a new category of knowledge. While a suggestion of a new type of knowledge that might revolutionize gay rights discourse is beyond the scope of

164. Cf. F.G. Bailey, The Tactical Uses of Passion 55 (1983). Bailey asserts that public presentation of a self persuades the most when that self conceals nothing and emotion, cognitive message, and “self” are all in line. Id. A good example occurs when a public figure comes out, often in an emotional experience, carrying the message that discrimination and silence hurts. Outing pits these components of public presentation of a self against each other. Emotion is disconnected from the cognitive message, because the outer makes the communication in the face of anti-gay emotions expressed by the target which confound the outer’s message that gays should be valued and not harmed. Most obviously, the outing self disconnects from pro-gay cognitions and emotions as the target denies or refuses to acknowledge the outer’s sexuality.

165. It must be noted that prominent advocates of lesbian and gay rights overwhelmingly repudiate outing as an invasion of privacy. See Harris, supra note 144, at A32 citing Roberta Achtenberg, then an openly lesbian attorney on the San Francisco Board of Supervisors, as an example of a gay-rights advocate with an abhorrence for outing. The argument against ‘outing’ offered here does not reach the moral arguments mustered for and against this practice; they are not relevant to the aims of this paper.
this paper, it is clear that creation of new categories of thought has aided public perception of lesbians and gays, from the public construction of gays-as-group to the idea of "gay-bashing." As journalists and others tell the story of lesbians and gays, new concepts inevitably arise as descriptions of present social phenomena proliferate. This much is not a prescription but is instead a prediction about how the movement will help itself.

This article recommends the production of new information. Armed with the category "gay-bashing," activists have succeeded in collecting information about hate crimes against lesbians and gays and inducing the government to collect such information. The collection of information has had the dual effect of amplifying claims of victimage and creating the factual predicate for remedial laws. The shifted discourse urged by this paper relies on political argument and empirical claims to keep the discourse in a "cool" language with which lesbians and gays can win the debate. To keep the discourse as focused and political as possible, and to win the argument (two independent purposes), lesbians and gays must reveal the story of their oppression. They must elaborate on the toll violence and discrimination exact from them each year. As their facility at creating information grows, the benefit is twofold. First, tales of harm strengthen their argument. Second, as the numbers describing victimage grow, the press will prioritize the news and cover the story as a phenomenon "on the increase" which will heighten the sense of imminence created by the figures and stories themselves.

This article is an account of how one group's rights-claims have entered the public imagination. It establishes which tactics work best for these novel rights claimants given a variety of rhetorical forms and dynamics. The current controversy regarding President Clinton's attempt to lift the military ban on gays will replay the struggles described in this article. Even some people ambivalent about Clinton's plan concede that Americans have undergone a marked change in their acceptance of gays in recent years, and that the change in attitudes is inexorably pushing society toward favoring changes like those in the Clinton plan. The outcome of the controversy will test this generalization, and show the extent to which the American polity has accepted claims of gay rights. Using the rhetorical tools described in this article, gay rights advocates and their foes write the history of claims to gay rights, and Americans move slowly toward an uneasy acceptance of gay claims, grounded not in affirmation but in tolerance.

167. See, e.g., id. at A14 (comments of conservative Senator John Glenn (D.-Ohio).