Strangers to the Law
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Chapter 4

A History of Hate

After trying to nail down the elusive—the origin of sexual orientation—attorneys opposing Amendment 2 next set out to hammer in the obvious—that gay people have long been subject to discrimination. This would advance two goals. First, the plaintiffs' legal team needed to demonstrate that the real purpose of the initiative was to allow discrimination against lesbians, gay men, and bisexuals. This would undermine the credibility of the state's various other explanations for Amendment 2 and help prove the absence of a legitimate reason for the amendment. Second, in arguing that laws singling out gay people for negative treatment deserve “strict scrutiny” by the courts, the team sought to prove that there was a history of antigay discrimination and thereby satisfy one of three indicia on which the U.S. Supreme Court frequently relied to determine whether a classification of a particular group was suspect. To make this argument, as the plaintiffs’ team planned, scientists had testified that gay people shared an immutable characteristic; political scientists would explain they were relatively politically powerless; and historians had to tell the court that, “as a historical matter,” lesbians and gay men “have been subjected to discrimination.”

In an important sense, there were no “lesbians and gay men” in much of recorded history. The term gay was not clearly established to refer to a particular subculture until the early 1960s, although it was reportedly in use in smaller circles much earlier. In 1951, for instance, a writer named Donald Webster Cory wrote, in The Homosexual in America, that the word was gaining a secret popularity to “express the concept of homosexuality without glorification or condemnation.” But Cory also acknowledged even then that he was not entirely sure where the term came from. Instead, he said that he had been:

"told by experts that it came from the French, and that in France as early as the sixteenth century the homosexual was called gaie";

informed by "psychoanalysts" that their homosexual patients were calling themselves gay in the 1920s; and

advised that "certainly by the 1930s it was the most common word in use among homosexuals themselves."

The term straight, according to Jonathan Ned Katz in The Invention of Heterosexuality, showed up in 1941 in the glossary of a book about "sex variants" and was defined as meaning "not homosexual."²

From Heaven to Hell

According to the late historian John Boswell, who was openly gay, civilization did not have separate concepts and terms for "homosexual" and "heterosexual" in ancient Greece and Rome.

"The majority of residents of the ancient world," he wrote in his book Christianity, Social Tolerance, and Homosexuality, "were unconscious of any such categories."³ That is not to say that men did not have sex with men or that women did not have sex with women during that time. Writings from Plato give evidence they did. Although "Platonic love" today generally refers to nonsexual love between a man and a woman, for Plato, it referred to love between men. Love, to Plato, could be either sexual and thus beget children, or heavenly and beget "offspring of the soul."⁴ The Greek poet Sappho, of the isle of Lesbos, wrote hundreds of poems, many of them about her passionate love for women.⁵

In the fourteenth and fifteenth centuries, some religious and polit-

ical officials tried to discourage nonprocreative sex for a purely practical reason—to encourage baby-making. Saint Bernardino of Florence, Italy, is said to have railed against sodomy in 1424 because a plague had dropped that city’s population by two-thirds. Those same concerns were apparently at work, too, in the American colonies of the 1600s to mid-1700s.

“In these formative years,” wrote Jonathan Ned Katz, “the New England organization of the sexes and their erotic activity was dominated by a reproductive imperative. These fragile, undeveloped agricultural economies were desperate to increase their numbers, and their labor force.” Colonists were severely punished for sodomy (which at the time included anal intercourse only), bestiality, adultery, or even masturbation.

“The operative contrast in this society,” wrote Katz, “was between fruitfulness and barrenness, not between different-sex and same-sex eroticism.” For that reason, he noted, sex between men might be seen as men wasting their “seed,” whereas sex between women was “not apparently thought of as wasting it... So these were lesser violations of the procreative order.”

The discouragement of nonprocreative sex took a number of forms. Depending on the country and time, a “sodomite” could be burned at the stake, whipped, imprisoned, hanged, or exiled. Research published in the Journal of Homosexuality in 1989 indicates that authorities in Florence in the 1400s used strict supervision to curtail sodomy; in Spain, in the 1500s during the Inquisition, the penalty was death by fire; in the Netherlands in the 1600s sodomites were executed by strangulation; in France in the 1700s they were burned at the stake or exiled to foreign colonies, such as Mississippi.

The first legal definition of sodomy, as a “crime against nature” under English law of the sixteenth century, referred only to anal intercourse and did not specify its application to either same-sex or different-sex activities. This vaguely worded proscription was commonly adopted by the existing state governments in the United States in the eighteenth century and later, and state courts interpreted it in a variety of ways. Some ruled that it included both anal and oral sex; some ruled

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it applied only to sex between people of the same sex; some ruled it applied only to sex between two men.\(^7\)

As early as the 1700s, however, some social thinkers in France began protesting such harsh treatment for sodomites. According to sociologist Michel Rey, one French intellectual suggested that sodomy, “when there is no violence involved, cannot be part of the criminal law. It does not violate the rights of anyone.”

By 1800, a medical doctor, Frederik Moltke, advised his colleagues to treat people who engage in sodomy “as lunatics or sick persons.”\(^8\) That approach gained support and, by the 1860s, medical literature had given this sickness a label and, at the same time, began to differentiate between partners of the same sex engaging in sodomy and partners of different sexes engaging in sodomy. Katz said German writer and attorney Karl Heinrich Ulrichs began giving different names to these people in 1862—identifying the man who loved men as the Uranier, the woman who loved women as the Urninde, and the man who loved women as Dionae. Katz said Ulrichs’s terms were the “foreparents of the heterosexual and homosexual.”\(^9\) At this point, explained Katz, there was only one sexual orientation—a sexual attraction of one sex for the other sex. So a Uranier was considered to be a person having a female’s attraction to men but with the “wrong” body—that is, the body of a man.

The first person to coin the terms homosexual and heterosexual, said Katz, was a Prussian legal activist and writer named Karl Maria Kertbeny, first in a letter to Ulrichs in 1868, and then publicly in 1869. In this letter, said Katz, Kertbeny also invented the terms monosexual and heterogenit (referring to masturbation and bestiality).

Katz said, in The Invention of Heterosexuality, that the earliest use of the terms homosexual and heterosexual in the United States came in 1892 from Dr. James Kiernan. According to Katz, Kiernan used the terms in an article called “Responsibility in Sexual Perversion,” published in the Chicago Medical Recorder in May 1892. In that article, Kiernan credited a professor of psychiatry in Austria named Richard von Krafft-Ebing with using the terms hetero-sexual and homo-sexual in a medical context in 1889.

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Both terms, said Katz, were used to refer to what doctors considered abnormal sex or perversion; the key element to distinguish heterosexuality and homosexuality for these doctors seemed to be whether sex was engaged in for purposes other than procreation.

To Kiernan, heterosexual referred to people who felt sexual attraction to both men and women. Kiernan used homosexual to describe people whose "general mental state is that of the opposite sex." Both were considered sick.

But to Krafft-Ebing, a hetero-sexual was attracted to a person of the other sex and was normal as long as he or she had at least an implicit desire for reproduction while engaging in sex. This attraction to the other sex, whether conscious or implicit in its desire for reproduction, amounted to a sexual orientation.

"The idea of a given, physiological sexual orientation (‘healthy’ or ‘sick,’ ‘normal’ or ‘abnormal’)," wrote Katz, became a dominant hypothesis of modern sexual theory.

In contrast to Plato’s thoughts of "heavenly" love between men, and sexual love to beget children, Krafft-Ebing, noted Katz, would have it that same-sex love was "judged a lowly emotion" while procreative sex might be "judged heavenly."

The concept of sickness launched a quest to find a cause and cure. Notably, there was no parallel search for a cause and cure for heterosexuality even though, noted historian Katz, doctors in the 1890s also referred to the "heterosexual" as a pervert if he or she engaged in sex for reasons that were not clearly intended for reproduction.

"Medical views" of homosexuality, wrote another openly gay historian, John D’Emilio, in Sexual Politics, Sexual Communities, "bore a complex relation to the older perspectives of religion and law. In important ways, they reinforced the cultural matrix that condemned and punished persons who engaged in homosexual activity. Whether seen as a sin, crime, or sickness, homosexuality stigmatized an individual. . . . the language of the moralist permeated the scientific literature."¹⁰

Sigmund Freud suggested that homosexuality involved a narcissistic search for a love object that symbolized oneself, plus a fear of castration in men or penis envy in women, and an identification with the parent of the other sex that provoked fear of incest.

Krafft-Ebing believed homosexuality was a hereditary disease caused by domination of the wrong brain center. Another researcher suggested that heterosexuals developed out of close, preadolescent friendships with peers of the same sex while homosexuals resulted from the inability to separate lust from intimacy. Even in 1901, "heterosexuality" was defined in *Dorland's Medical Dictionary* as an "abnormal or perverted appetite toward the opposite sex"—the abnormal part being an appetite separate from the desire to procreate, noted Katz.

**History on Trial**

To make its case that gay people had suffered a long history of discrimination, attorneys for the plaintiffs called on George Chauncey, an assistant professor of history at the University of Chicago. Chauncey taught courses on the history of "the lives of ordinary people" in the United States, including gay people. His specialties were the history of gender and sexuality and gay history. Plaintiffs' attorney Jeanne Winer conducted the direct examination of Chauncey on the witness stand. She asked him to start in the seventeenth century in the United States and give the court an overview of how "homosexual conduct" was treated in the colonies. Chauncey testified that a "handful of people were executed in the seventeenth century for sodomy" and that there were no known records of executions in the eighteenth or nineteenth centuries, "so that's an improvement."

"There are records of severe beatings, whippings, and so forth for people who had been convicted of engaging in sodomy," he said.

Chauncey explained that, in the 1800s, as medical science was fashioning its attitude about homosexuality and a host of other phenomena, scientists frequently sought biological explanations for already established social arrangements.

"For instance," said Chauncey, "many arguments were made by doctors that women would be unable to pursue an education or take on certain kinds of jobs because that would take away their reproductive capacities."

Early thought on homosexuality, he said, regarded homosexuals as people who had "inverted" their gender.

"So someone who looked like a male but was attracted to men wasn't really a male," said Chauncey, "but was some sort of hermaphrodite."
Looking at some of the scientific developments from a historian’s perspective, Chauncey explained that, whatever the theory, homosexuality was commonly considered both a rare and troublesome illness, and, as late as the 1950s and 1960s, the “treatments” commonly included everything from frontal lobotomy and electroshock therapy to using nausea-inducing drugs and pain for “aversion therapy.”

It wasn’t until the famous Kinsey studies of the late 1940s and 1950s that people began to realize that same-sex relations were more common than originally understood. With the Hooker studies of the 1960s, they began to grasp that many people with a homosexual orientation could live open and well-adjusted lives. By 1973, when the American Psychiatric Association declared that homosexuality was not a mental illness, science had done its part to establish same-sex relations as a naturally occurring variance in the human population. The group of people who experienced this variance, however, had much further to go to establish themselves as a naturally accepted part of society.

**Hidden Culture**

“What do people mean when they talk about a lesbian and a gay subculture?” plaintiffs’ attorney Winer asked Chauncey.

Chauncey said the term referred to a “nexus of social networks, meeting places, community, and institutions, collective culture norms and the like, that categorize people.”

Such a subculture had begun developing in a number of American cities in the United States by the end of the nineteenth century, said Chauncey. The gay subculture, he testified, seemed to grow “with the growing size of cities, the growing numbers of single people, large neighborhoods, transient people living outside the family.” Most of this subculture was hidden, noted Chauncey.

“Most people took enormous care to keep their participation in the [gay] subculture secret, to make sure that their everyday associates at work, family members, neighbors, and the like, did not know they were gay,” explained Chauncey, “yet, there were certain parts of the city where remarkably visible subcultures developed around the turn of the century.”

“It’s almost as if there were two subcultures, side-by-side,” he said.

Chauncey outlined the development of political groups from out
of these subcultures. The first, he noted, started in Chicago in 1924 when an American soldier who had been stationed in Germany during World War I decided to begin here what he had seen there: a group to seek equal treatment for people who were homosexual. In Germany, the group had been called the Society for Human Rights, and it published a newspaper called *Friendship and Freedom*.

This, however, was in 1924, and the members of the Chicago group considered themselves, as did society in general, to have "mental and physical abnormalities." Nevertheless, their aim was to combat public prejudice. The Chicago group's first president was Rev. John T. Graves, a minister who preached to small groups of African-Americans. And although Chauncey did not mention this in his testimony, the Chicago-based group even got a legal charter from the state of Illinois.\(^{11}\)

In addition to Graves, there were six other names attached to the charter application, all men. One of those men, Henry Gerber, provided the details of the group's fate in a letter he wrote in 1962 to a gay magazine. In that letter, Gerber explained that the society's work came to an abrupt halt after less than a month when its members were arrested for mailing the group's newsletter through the mail. Authorities said the newsletter—whose content Gerber described as strictly political—was obscene. Although the charges against the members were ultimately dismissed, Gerber lost his job as a postal worker and the group quickly disbanded. Chauncey noted in his testimony that no copies of the Chicago *Friendship and Freedom* newsletter survived.

No other organizations emerged until after World War II. Then, after World War II, said Chauncey, two types of groups developed. First, there was a group of gay veterans who organized to try to upgrade their discharges from the military. Second, he noted, was the Mattachine Society.

Although Chauncey was not asked to elaborate on the Mattachine Society, the group was important historically as the first enduring gay political group in the United States. It was founded in November 1950 in Los Angeles by Harry Hay, a man who, at the time, was married and had two children. The name "Mattachine" came from the name of a band of unmarried people in medieval France who wore masks while performing protest comedies.

Like their predecessors in Chicago, the members of the Mattachine

Society in Los Angeles in 1950 also considered themselves to have "physiological and psychological handicaps." Their purpose was to foster an "ethical homosexual culture . . . paralleling the emerging cultures of our fellow minorities—the Negro, Mexican, and Jewish Peoples." They anticipated chapters springing up around the country, but they also expected their membership would remain anonymous.

As their numbers grew, so did their internal conflicts and worries. One worry was about Hay, who, at the time he founded the group, was also involved with the Communist Party. At this time, Senator Joseph McCarthy and his House Committee on Un-American Activities were vigorously pursuing Communists and "homosexuals." Hay quit his Communist Party activities to protect the gay group, but two Mattachine members were still called before the Committee on Un-American Activities, and many of Mattachine's anonymous members grew uneasy that the group would be associated with Communism. Some feared the Communist Party would attempt to blackmail Mattachine members and use Mattachine to infiltrate the American political system. By April 1952, the worries were great enough that Hay felt pressured to resign from Mattachine.

Of course, there were plenty of other risks to being a member of the Mattachine Society or of the groups that quickly followed it. Chauncey testified that members of these early groups lived with a "tremendous fear" that they would lose their jobs if their employers found out about their affiliation. Beginning in 1953, the Federal Bureau of Investigation "conducted exhaustive and apparently illegal surveillance of the gay rights movement and its leaders," according to journalist Randy Shilts, in an article in the San Francisco Chronicle.\(^{12}\)

FBI agents "made extensive use of informants," wrote Shilts, "tape-recorded meetings, collected lists of members of gay organizations, photographed participants in early homosexual rights marches and investigated advertisers in gay publications." According to Shilts, J. Edgar Hoover, the FBI director at that time, justified these investigations by citing an executive order from President Dwight Eisenhower. That executive order, No. 10450, said that "the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerv-

ing loyalty to the United States."\textsuperscript{13} The order identified security risks to include persons with "any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion."

It directed the head of every federal department and agency to investigate each of its civilian employees and that each employee's fingerprints be checked with the FBI. Shilts found one FBI memorandum indicating that Hoover turned over the names collected by FBI surveillance to the U.S. Civil Service Commission, which used the information to purge gay people from its employee ranks.

In addition to the risks associated with merely meeting or belonging to a gay organization, the gay groups also faced difficulty in trying to disseminate information to their members through newsletters and other publications. The FBI, for example, implored postal authorities to block the Mattachine Society from mailing its monthly magazine, \textit{One}. The magazine's staff was able to thwart this directive, however, by dropping its 600 mailed subscriptions in several different postal boxes throughout Los Angeles.

In his testimony before the Colorado court, Chauncey recounted a historic battle of \textit{One} magazine in court. That battle began in October 1954, when the Los Angeles postmaster refused to forward copies of the magazine, claiming the publication constituted "filthy" and "obscene" pornography and that mailing it violated federal laws against using postal services for distribution of such material. The magazine sued and lost in the lower federal courts. But in January 1958, the U.S. Supreme Court—without ever hearing oral argument in the case and with no written opinion to explain why—summarily reversed the federal appeals court decision.\textsuperscript{14}

Whether their names were on a list or their faces were at a meeting, gay people in these early years in the United States, said Chauncey, constantly faced the fear of arrest and loss of employment if identified as homosexual. And, ironically, he pointed out, Colorado had its own specific history in this regard:

Mattachine had a national conference every year over the Labor Day weekend, and in 1959, when it was held on the East Coast,

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\item \textsuperscript{13} \textit{Federal Register}, vol. 18, no. 82, April 29, 1953, 2489–92.
\item \textsuperscript{14} \textit{One, Inc. v. Olesen}, 355 U.S. 371 (1958).
\end{itemize}
they decided to have their sixth conference here, in Denver. And it was considered a tremendous breakthrough to get [the meeting] off the coast. . . . it was the first time that they had dared to have a public press conference where they didn’t use pseudonyms and [they] allowed the press to come in, and they felt they got reasonably good coverage in the *Denver Post* especially. Three or four weeks later, three of the organizers of that conference had their homes raided by Denver police. One of them was arrested; he later lost his job. The mailing list to the organization [and other] records were seized by the police.

Even beyond the political tug-of-war, other constraints worked against publishing materials for lesbians and gay men. Chauncey discussed the ruckus around publication of the lesbian novel, *The Well of Loneliness*, by Radclyffe Hall. The book, he noted, was published in 1928 and “instantly suppressed in England.”

It was, for many women, the first book ever to mention lesbians—albeit as “inverts”—and provided confirmation that there were women loving women in the world. But when a book house tried to publish it in the United States, police in New York seized the copies and the publisher was taken to trial for obscenity.

In film, gay characters were “usually used to ridicule gay people,” said Chauncey, and these films, too, were considered obscene. When Hollywood adopted the Production Code for censoring films in 1934, “something like homosexuality could not appear at all.” That lasted until 1960, said Chauncey.

Stage plays, too, had their difficulties.

“There were, in the mid-twenties, two or three plays,” said Chauncey, that “were either produced on the New York stage or there was an effort to bring them to the New York stage. One [was] a serious French drama, *The Captive*, about a lesbian teen. Another production, by Mae West, was called *The Drag*.

“The police raided *The Captive* after it made money for a while; kept *The Drag* from coming into the city,” said Chauncey, adding that, “in response to this controversy, the state legislature passed a law which prohibited any stage from presenting a play in which sex perversion or sex degeneracy, i.e., homosexuality, was represented on threat of . . . losing access to the theatre, having it padlocked for a year. So there was tremendous consequence.”
In the 1930s, around the time of the Production Code, a number of jurisdictions adopted laws, in an attempt to garner support for repealing Prohibition, that promised to limit the congregation of unpopular groups around the consumption of alcohol. In New York City, noted Chauncey, the state liquor authority ruled that "for a bar or restaurant or theater or cabaret or any other place that had a liquor license to serve a drink to a single homosexual or to allow homosexuals to gather on the premises made that place disorderly and could lose the license of the place."

"How would they know that they had served a glass of beer to a homosexual?" asked Winer.

"Well, this is precisely the question that many bar owners came back to the state liquor authority with," said Chauncey. "So, a wide range of behaviors were sometimes pointed to: One man trying to pick up another man, men talking about opera, women wearing trousers in a bar indicated it was probably a lesbian. . . . The way men wore their hair, the way women wore their hair. Someone saying, 'I'm a homosexual.' So, a fairly wide range. But it's clear on the basis of my review of all the court literature—reports from the thirties, forties, and fifties—that the point was to imply that they were closing the bar because homosexuals had been allowed to gather there. . . . most bar owners would not challenge it. It was expensive because they always did lose in courts."

License and Law

Police used the disorderly conduct law to prosecute a wide range of activities, testified Chauncey. For instance, in 1923, disorderly conduct laws were used to raid private parties. There were also licensing regulations for bars that required applicants to be fingerprinted.

"So, if they had ever been arrested in any sort of homosexual context—being at a gay bar or whatever," said Chauncey, "they could be kept from having a license" to operate a bar.

Chauncey said he calculated that in New York City more than 50,000 gay men were arrested over the course of 40 years. Of the 70 gay men he interviewed while researching his doctoral dissertation, "half of them had been arrested at some point in their lives [on] a homosexual charge, which is just a stunning figure."

While records about these types of arrests are fairly common, said
Chauncey, there are very few records demonstrating violence against gay men and lesbians in the early twentieth century.

"Records weren't kept" about incidents of violence against gay people, said Chauncey. "We know it was a problem, but it's hard to say."

The history of discrimination against gay people in the military can be tracked historically to World War I, said Chauncey, when a servicemember could be court-martialed for engaging in sodomy. But a simple declaration of one's homosexuality was not a problem until World War II, when the military sought to exclude people self-identified as homosexual. "Psychiatrists were brought in as the experts," said Chauncey, "who would confirm a diagnosis, but [a diagnosis of homosexuality] initially depended on self-declaration. . . . And they also decided to give homosexuals an undesirable discharge."\(^{15}\)

Following World War II, said Chauncey, there was again a dramatic increase in the number of gay-related arrests in cities around the country. "In the late forties, more than 3,000 men were arrested in a single year in New York City alone," Chauncey testified. "In Philadelphia, they arrested more than 200 a month. In southern California, they established special police squads to deal with homosexuals. And in Boise, Idaho, an investigation began . . . after there was a charge—a man charged with having sex with three teenagers—that led the police to interrogate 1,400 residents of Boise, forcing gay people to name names of friends. Literally, swarms of people fled the city and left their jobs and belongings behind."

The escalation in arrests after World War II, explained Chauncey, was "linked to other kinds of hostility" against homosexuals, most notoriously the hearings orchestrated by McCarthy and the House Committee on Un-American Activities.

"He supposedly had the names of [gay] men," said Chauncey. "In

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\(^{15}\) Although psychiatrists are no longer brought in to confirm a self-declaration of homosexuality, this policy of excluding openly gay servicemembers remains essentially intact today, through a law signed by President Clinton after passing with overwhelming support from Congress in July 1993, just prior to the Amendment 2 trial. Under the 1993 law, servicemembers who identify themselves as being homosexual are presumed to engage in a wide range of prohibited sexual conduct the military identified with homosexuality. Unless the gay servicemember can somehow prove that he or she will never engage in such conduct, he or she is discharged. By contrast, a servicemember who indicates he or she is heterosexual is not presumed to engage in the prohibited conduct related to sex and is not made to prove that he or she will never engage in such conduct.
fact, he put so much pressure on that issue that a special subcommittee was established which published a report in December of 1950 called ‘On the Employment of Homosexuals and Other Sex Perverts in Government,’ which traced the number of people that had been discharged [and] argued there needed to be stricter regulations on homosexuals. The number of people who had been discharged averaged about five a month before this ban; it leapt to 60 a month after that.”

While Joseph McCarthy’s campaign to smoke out homosexuals and Communists was the most notorious of its time, as Chauncey testified, there was another campaign which he was not asked to chronicle. That campaign was launched in February 1950 by two other senators after a State Department official revealed that the department had “allowed” 91 employees to resign “for personal reasons” and that the majority of those had been homosexuals. Senator Lister Hill of Alabama and Kenneth Wherry of Nebraska embarked on their own inquiry into how many “sex perverts” were working for the federal government. Many of the documents surrounding their investigation were ordered sequestered in the National Archives until the year 2000. But both senators released their own separate reports about their investigation. Senator Wherry urged the Senate to take action.

“The obligation upon society to eradicate this menace and to lift the minds of moral perverts from the extreme depth of depravity to which they have sunk is recognized,” wrote Wherry. “But while this wholesome and necessary process is fostered, there should be expeditious action to ensure that the departments and agencies of our government are cleansed of moral perverts, especially to guard and protect security secrets upon which the life of our beloved country may depend.”

Senator Hill also felt society had to do something about homosexuals. But he thought the Senate should pass legislation to provide for the medical treatment and rehabilitation of gay people.

The Senate did do something. On May 19, 1950, it passed Resolution No. 280, authorizing another investigation. This one was to look into the employment of homosexuals by the federal government. Hearings, again mostly behind closed doors, began in mid-June under the supervision of Senator Clyde Hoey of North Carolina. In December, the Hoey Commission issued a report saying that 4,954 homosexuals had been discovered: 4,380 in the military and 574 in federal civilian jobs. In writing about this investigation, D’Emilio noted that 192 homosexuals
were dismissed from their federal jobs from 1947 through April 1, 1950. The bulk of the 574 in civilian jobs (382) were dismissed in the next seven months alone. In addition, 1,700 job applicants were rejected between 1947 and August 1950 because of “sexual perversion.” But D'Emilio said the actual numbers were likely much greater because many departments allowed such employees to resign rather than be fired.

“In 1951,” noted D'Emilio, “the State Department fired only 2 employees based on evidence of homosexual conduct. But, during the same period, 117 other State Department employees resigned rather than face a full investigation on allegations of homosexuality.”

The commission concluded that there were two reasons to prohibit homosexuals from working for the government: “First, they are generally unsuitable, and second, they constitute security risks.” (Thirty-five years later, in 1985, another congressional investigation would come to the exact opposite conclusion of Hoey’s Commission.)

The conclusions were readily accepted. In 1953, newly elected president Dwight Eisenhower took office and within three months signed Executive Order No. 10450, which had the effect of firing gay people from federal employment.

In an article about the federal government’s official policies toward gay people, D'Emilio noted that the Eisenhower order replaced one that originated with President Harry S. Truman in March 1947. Truman’s Executive Order No. 9835 authorized investigations of government employees to make sure the employees had “complete and unswerving loyalty” to the United States and that they were not members of “subversive” organizations. In August 1950, said D'Emilio, Congress expanded on Truman’s “loyalty” requirement, allowing for the dismissal of employees whose “behavior, moral character, or personal associations made them appear a danger to national security.”

The Eisenhower order also applied to private companies that had contracts with the federal government.

Chauncey testified about the Eisenhower order, noting that, at the
time of the order, about a fifth of the work force was employed by private companies that had federal contracts.

"Because of the federal ban on homosexual employment, any number of companies which might have chosen to behave differently were required to fire their homosexual employees," Chauncey testified. "And I think much more generally that the number of federal officials, state, and local officials, who spoke against homosexuality, who warned about the dangers of homosexuality and the like, tended to demonize homosexuals to increase public antipathy toward them."

Out of this general trend of "demonizing" gay people, there developed, said Chauncey, a "general association" of gay people with child molestation.

"In the course of a few months," he testified, "more than 20 states passed laws which . . . allowed courts to order a psychiatric examination of someone convicted of an offense or simply suspected in some states of being a sex deviant which could lead them to be incarcerated indefinitely in psychopath hospitals until their homosexuality had been cured."

The FBI began "cooperating" in this effort, said Chauncey, "to try to get names" of employees in federal jobs.

"Once the gay organizations were established," he noted, "their meetings were sometimes ended by plainclothes investigators. . . ."

"Were they looking for communists or homosexuals?" asked Winer.

"They were looking for homosexuals here," said Chauncey.

Chauncey testified that although "most lesbians and gay men did take very special care to remain very secretive" about their being homosexual, they were vulnerable nearly everywhere.

"They were still in a situation of possibly going to a gay bar once and having it raided. They were in the situation of possibly going to a private party in a private apartment and having it raided and being taken to the police station. They were in the situation of having people lying for them. There was—people hid, but it was sometimes difficult to hide during this period," said Chauncey.

"So if they just stayed home and kept their door shut and didn’t do anything, they might be okay?" asked Winer.

"If they just stayed home and didn’t read anything related to gays and didn’t do anything and never said I’m a homosexual, [they] probably would survive," said Chauncey. "Yes."
A Turning Point

Chauncey noted that this institutionalized hostility toward gay people continued and, in some places, escalated in the 1960s. "In the context of growing civil rights movements for blacks, women, and the like" in the mid-1960s, he stated, "more successful efforts were made to try to curtail some of that police harassment of the gay world. And as courts became more scrupulous about the protection of due process, equal protection, and the like, some of the legislation governing gay bars in some states was eliminated."

According to Chauncey, some laws hostile to gay men and lesbians—like those prohibiting the sale of alcoholic beverages to homosexuals—were slow to die. In fact, some of the laws that emerged in the 1930s as a way of gaining support for the repeal of Prohibition only recently have been repealed. For instance, a Virginia law that promised to keep "undesirables" out of the bars—including homosexuals, pimps, panderers, drunks, and "B-girls"—noted Chauncey, was in place until 1991 when a federal judge declared it unconstitutional.

Even when laws did not target gay people explicitly, police would enforce some general laws specifically against gay people—laws concerned with disorderly conduct, public indecency, and censorship—and that, too, was slow to change.

In Denver, said Chauncey, police used public indecency laws to harass lesbians and gay men.

"Here in Denver," he said, "in 1974, the Colorado Gay Alliance signed an agreement with the police department of Denver in settlement of a suit that they filed in '73, charging a pattern of harassment and of selective discriminatory enforcement of a public indecency [law]. In the settlement agreement, the police department said it would stop going through gay bars and arresting two people simply over holding hands or arrest people for stealing a kiss."

But, instead, those arrests doubled within a year of the settlement, he said. In addition, police stood outside the city's most popular gay bar and gave out jaywalking tickets to "everyone who left the bar."

It was this sort of police harassment that triggered a turning point in American gay social history in June 1969 when patrons of a gay bar in New York City's Greenwich Village, known as the Stonewall Inn, erupted into riots during a police raid. Police documents indicate that undercover officers entered the bar on the evening of June 27, 1969, and
determined that it was operating without a license. But gay activists believed police were enforcing the license law selectively against gay bars. According to gay people who frequented the Stonewall and other bars at the time, the Mafia operated many gay bars and paid off police to leave them alone. One of the Stonewall's two bouncers recalled that the owners paid police $1,200 a month in payoffs to avoid being raided. 18

On June 27, however, there was apparently no payoff, and the undercover team called headquarters for additional officers to help make arrests. According to eyewitness accounts, the raid was proceeding in a routine, almost festive, manner around midnight. Having sequestered the patrons inside, the police had begun releasing them one by one. Village Voice reporters Howard Smith and Lucian Truscott IV gave this account:

As the patrons trapped inside were released one by one, a crowd started to gather on the street. It was initially a festive gathering, composed mostly of Stonewall boys who were waiting around for friends still inside or to see what was going to happen. Cheers would go up as favorites would emerge from the door, strike a pose, and swish by the detective with a "Hello, there, fella." . . . Suddenly the paddywagon arrived and the mood of the crowd changed . . .

Three of the more blatant queens—in full drag—were loaded inside [the police wagon] along with the bartender and doorman, to a chorus of catcalls and boos from the crowd. A cry went up to push the paddywagon over, but it drove away before anything could happen. With its exit, the action waned momentarily. The next person to come out was a dyke and she put up a struggle from car door to car again. It was at that moment that the scene became explosive. . . . Beer cans and bottles were heaved at the windows, and a rain of coins descended on the cops. At the height of the action, a bearded figure was plucked from the crowd and dragged inside. . . .

Almost by signal the crowd erupted into cobblestone and bottle heaving. . . . The trashcan I was standing on was nearly yanked out from under me as a kid tried to grab it for use in the window smashing melee. From nowhere came an uprooted parking meter—used as a battering ram on the Stonewall door. I heard several cries of “Let’s get some gas,” but the blaze of flame which soon appeared in the window of the Stonewall was still a shock.19

At that moment, additional police reinforcements arrived to regain control over the scene and rescue the many police officers who were still inside the bar itself.

As Chauncey suggested, the Stonewall riot that night and the riots that ensued in the days following it became a catalyst for gay people to fight back against abuse from police and other authorities. But the riots did not end police raids in New York City, as police records show. Just months after the Stonewall rebellion, police arrested and herded 167 patrons of another gay bar into the local police precinct. One of the patrons, a gay man who had immigrated from Venezuela, was so distraught over the likelihood that his arrest would result in his deportation, that he leaped from a second-floor window of the police station. His body was found impaled on a wrought-iron fence post below. He survived, but his plight and the continuing raids fueled more protests and more gay political organizing.

“It was a time when people were rioting all over the country,” noted Chauncey.

Even though a gay political movement had been organized and operating since the beginning of the Mattachine Society in the 1950s, those riots at Stonewall, said Chauncey, are frequently referred to as the “beginning of the militant gay movement.” Before the Stonewall rebellion, there had been only a dozen and a half gay groups around the country; within three months of the riot, there were, according to Newsweek magazine, at least 50 more.

Chauncey added that the Mattachine Society “pretty much disappeared” in the 1970s, when a “new generation of gay groups took shape.” At the same time, a handful of gay publications from the existing groups were suddenly joined by a string of regional newspapers for the gay community. Coverage in the mainstream media jumped, too. In

the 20 years before Stonewall, there were only 10 magazine articles written about homosexuality in the general press; in the 18 months after Stonewall, there were 18. Only about 100 books had been written on the topic from 1901 until 1968, but within five years after Stonewall that number doubled.

Life for gay people in the United States did improve after the Stonewall riots, said Chauncey. One reason for the improvement, he said, had been "a kind of polarization in American society on gay issues so that there are a growing number of cities, college towns, and the like, where people feel much safer than they did 25 years ago." More people feel safe identifying as gay publicly, he said, because there are fewer sanctions against them now. There were also a growing number of laws to prohibit discrimination against them where, before Stonewall, there had been none.

*A Second Wind*

But the plaintiffs' attorneys had to do more than demonstrate a history of discrimination against gay people; they had to prove that such discrimination was still a significant threat. To this end, Chauncey testified that many states continued up to the present to criminalize consensual sexual activity between two adults of the same sex. (At the time of the trial, at least 22 states still had enforceable sodomy laws on the books.) Studies had also shown "a fairly dramatic increase" in violent attacks against gay men and lesbians over time. That violent backlash "became really visible" in 1977, noted Chauncey, when a former Miss America runner-up, Anita Bryant, launched a highly public and hostile political campaign to repeal the Dade County, Florida, ordinance that prohibited discrimination based on sexual orientation. It was one of about a dozen such laws passed by city governments in the years following Stonewall.

Bryant's campaign, just eight years after Stonewall, became a second major turning point in the gay civil rights movement. Within three months of the law's passage, her "Save the Children" campaign had gathered enough signatures to put a repeal measure before the voters. Bryant argued that gay people wanted the new law to gain jobs as teachers and "recruit" children into the "gay life-style." She said homosexuality was a sin and that "the Lord" called on her to fight this law. Her high profile as the commercial spokesperson for Florida's orange juice industry gave the campaign quick national visibility, and on June
7, 1977, Dade County voters repealed the law. When Bryant took her campaign to other cities where such laws had been passed, the voters in each city repealed the laws.

Gay people fought back by staging protests at her various public appearances and calling for a national boycott on Florida orange juice. The attention soon made Bryant the brunt of many jokes and, within a year, her repeal efforts began to fail at the ballot box, as did a highly visible initiative to ban gay people from being teachers in California. But the ballot battles did not go away. Over the next 14 years, 25 more ballot measure campaigns were waged against various local laws prohibiting discrimination based on sexual orientation and two-thirds of those repeal measures passed.

Then, in November 1992, a new antigay initiative effort raised the stakes. Instead of seeking only to repeal an existing law, the measures—including the Colorado Amendment 2 initiative—sought also to prevent any future laws from prohibiting discrimination against gay citizens.

Chauncey said he thought voters approved Colorado’s ballot measure for two reasons: one, as a general backlash against the gay civil rights movement’s limited successes; and, two, because proponents of the initiatives were successful in convincing the public that the gay civil rights movement was seeking “special rights.”

“A campaign which most people would think of as being protecting [gay people] from discrimination . . . is characterized as a campaign . . . for special rights—that [gay people],” said Chauncey, “are going to be able to do something that other people aren’t allowed to do.”

National Backlash

Chauncey was also asked to testify about the recent gay civil rights struggle on the national level—a struggle that, like Amendment 2, harkened back to the November 1992 ballot. While running for president during 1992, Arkansas governor Bill Clinton made public statements indicating that he considered the ban against gay people in the military to be discriminatory. Shortly after being elected, he was asked by reporters whether he intended to follow through on a campaign promise to gay voters that he would end the ban.

“Yes, I want to,” said Clinton. “My position is that we need everybody in America that has got a contribution to make, that’s willing to
obey the law and work hard and play by the rules. That's the way I feel.” The *New York Times* reported that Clinton added that he would consult with armed services chiefs to determine the timing and the best way to go about repealing the ban that originated 50 years earlier out of a now-abandoned belief that homosexuality was a mental disorder.

But even before Clinton was sworn in, right-wing groups began organizing to oppose any change in the policy. In January 1993, Operation Rescue organized demonstrations in cities throughout the country to protest the idea. Former Moral Majority leader Jerry Falwell broadcast a nationwide television program against the inclusion of gay people in the military on Sunday, January 17—just three days before president-elect Bill Clinton took office.

When Clinton finally made his first official move on the matter, on January 29, 1993, he directed Secretary of Defense Les Aspin to consult with military and congressional leaders about it. But the military and key members of Congress had already indicated publicly that they would fight any attempt to repeal the ban, and the national fight over whether gay people should be permitted to serve in the military was on.

Ultimately, Clinton never issued an executive order. Aspin issued a directive that gay men and lesbians could stay in the military so long as they kept their sexual orientation secret and remained celibate both on and off duty. By July, Clinton was talking compromise and endorsed an even more restrictive version of this “new” policy fashioned by U.S. senator Sam Nunn, a Democrat from Georgia. Under the new policy, any acknowledgment of being gay was sufficient grounds for discharge based on the “presumption” that a gay servicemember had a “propensity” to violate the military law’s prohibition on “homosexual conduct.” The only way such a servicemember could stay in the military would be to rebut that presumption. Heterosexual servicemembers, however, did not have to rebut any presumption that they might engage in sodomy.

In September, Congress passed the Nunn policy and Clinton signed the measure into law.

Attorneys opposing Amendment 2 sought to use the debate over gay people in the military as an example of the widespread discrimination against gay men and lesbians in the United States. Plaintiffs’ attorney Winer asked Chauncey, “As a historian, how do you view the recent decision by the Clinton administration not to overturn the ban
on gays in the military?" Could it be, she asked, similar to the backlash campaign by Anita Bryant against gay civil rights protections?

"It is," said Chauncey. "I actually think I would say that [Clinton] made two miscalculations which are quite telling. First of all, he did not begin to grasp the depth of antigay hostility in American society. It's very difficult for people who aren't gay ... to grasp it, just as it's very difficult for people who aren't black to grasp the everyday indignities that black people face in society. So, I think it's clear in the way that he talked about it in his campaign and his assurance about it right after his election and after the inauguration, he had no idea he would get the response he did. And secondly, I think he thought that the gay political movement was more powerful and more effective than it proved to be in that case, where it was clearly ... outgunned, outmaneuvered by the opposition."

That was not the first time gay people had lost a battle against discrimination at the national level. Even after the witch-hunts for gay people in federal employment in the 1950s, the federal government had made gay people the object of official exclusion. Between 1977 and 1981, Congress passed several measures to prohibit the federal Legal Services Corporation from taking on any cases alleging antigay discrimination. When the District of Columbia government repealed its sodomy law in 1981, Congress—which has control over the D.C. government—overturned that action and reinstated the law. And on the day after lesbians and gay men took part in a mammoth national march on Washington in 1987 to demonstrate their expectation of equal rights, the Senate, on a 94 to 2 vote, approved an amendment introduced by Senator Jesse Helms, a Republican from North Carolina, to prohibit the use of federal funds to support any educational effort—even AIDS prevention—that would appear to "encourage, or promote ... sexual activities outside of a sexually monogamous marriage." But, no state, of course, allowed a same-sex couple to obtain a marriage license.

Attorneys challenging Amendment 2 also sought to show how the historical stigma against gay people was costing lives currently. They brought to the stand Marcus Conant, an internationally known expert in treating AIDS and a physician with the largest private AIDS practice in San Francisco. Conant testified that prejudice against gay people had made some physicians "unwilling" to care for people with AIDS. Because people with AIDS were often perceived to be gay, said Conant, prejudice against gay people had also made some people "hesitant to..."
come forward and be tested because of fear of discrimination which can result in loss of [their] friends, loss of [their] home, and more importantly, loss of [their] job to which is tied health care insurance."

“If people are afraid to come in and be tested,” said Conant, “they don’t find out they are infected, they engage in denial which is well documented in the National Commission on AIDS report, and because of that denial they may have unsafe sex, they may transmit the disease.”

Reasons and Relativity

While the plaintiffs had certainly made a case that there was a long history of discrimination against gay men and lesbians and that that discrimination continued, their job was not yet over. The state and its witnesses would make two arguments to undermine them on this point: First, that the history of discrimination against gay people had never been as bad as the history of discrimination against other minorities for whom antidiscrimination laws were in effect. And second, that there were good reasons for state law to discriminate against gay people.

The latter argument was the most crucial to the state’s case. Ordinarily, a government must have at least a conceivably rational reason for any law or policy that singles out a group of people for negative treatment. But because the Colorado Supreme Court, in its first ruling, upholding the lower court’s preliminary injunction of Amendment 2, held that the initiative appeared to infringe upon the fundamental constitutional right of gay people to participate equally in the political process, the state would have to come up with a “compelling” reason for the measure’s discriminatory treatment of gay people.

The plaintiffs’ attorneys knew that the state’s witnesses, who would be called to the witness stand later in the trial, would argue that discrimination against gay people currently was not as bad as that against other minorities or as bad as it had been for gay people in the past. Wilford G. Perkins, a car dealer from Colorado Springs, Colorado, who served as chair of Colorado for Family Values, would argue that discrimination against gay people did not require legal protections because there was no evidence that gay people had been economically or educationally disadvantaged by discrimination. If someone verbally or physically assaults a person because he or she is gay, or destroys that
person's property, other laws, Perkins would argue, are already in place to prosecute such criminal activities. But laws prohibiting sexual orientation discrimination, Perkins and other state witnesses would argue, create a "special right." And the plaintiffs' attorneys expected that testimony of state witness Ignacio Rodriguez, a former member of the Colorado Civil Rights Commission, would echo the idea that, unlike Mexican-Americans, gay people did not see in restaurants humiliating signs saying, 'No dogs or Mexicans allowed' and did not have their employment prospects limited because of their sexual orientation.

In anticipation of these arguments, plaintiffs' attorney Winer asked Chauncey, when he was on the witness stand, to comment on such comparisons.

"I don't think it's a contest," said Chauncey. "The various groups which have been marginalized in this country have been marginalized in different kinds of ways."

"Blacks have obviously suffered an extraordinary burden, having been brought here as slaves and [suffered attacks] that kept them subordinate for a number of years. And that attack doesn't lessen a claim that Jews have been discriminated against [or] women have been discriminated against... There was enough discrimination to go around."

Chauncey also testified later that most historians agree that the black civil rights movement of the 1950s and 1960s enabled a gay civil rights movement to emerge. The success of the black civil rights movement in securing laws to prohibit discrimination based on race, he said, made it possible for the gay civil rights movement to consider advocating for similar laws to prohibit discrimination based on sexual orientation.

"I think probably the most useful historical comparison," said Chauncey, "might be between the size of the gay political movement now and the black political movement in the forties and fifties. It's very clear that there was a very powerful system in place subordinating blacks in American society in the forties and fifties. And yet, as a social historian talking about blacks and/or groups, I would want to look at the ways that they did have some political power. And in some ways, they were in a position that the gay movement is" in now.

There were other comparisons, said Chauncey. Moral values and religious values were raised as justifications for discriminating against
blacks. To support segregation, said Chauncey, some claimed “God had intended the segregation of the races.”

“It seems today obvious that blacks and whites should be able to marry,” said Chauncey. “And in the forties and fifties, it was blasphemous, almost, to think that blacks and whites should be able to marry—that this was against God’s plan.”

**Status–Conduct**

But while Chauncey had chosen the notorious laws barring interracial marriage to illustrate his point that laws sometimes have no basis other than expression of bigotry, one of the state’s attorneys, Gregg Kay, had another point in mind. During his cross-examination of Chauncey, Kay sought to illustrate that, throughout history, laws according disparate treatment to homosexuals did so because of the “conduct” those people engaged in, “not on their status” as gay people.

“All the records we have from the eighteenth and nineteenth centuries would suggest that, yes,” said Chauncey.

Even the laws that were not gay-specific, noted Kay, “criminalized someone’s conduct, didn’t they—the law itself?”

Chauncey could apparently see what Kay was attempting to do—that is, Kay wanted to suggest that laws treating gay people differently than other groups were justifiable because they were aimed at something that gay people did, not just at who they were. Chauncey’s responses struggled against Kay’s motives:

*Chauncey:* Well, there are two stages of it really. One would be [the] disorderly conduct law itself which criminalized a kind of behavior. But if we look at the enforcement of it, it’s clear that they were arresting people. . . .

*Kay:* I understand you want to separate the law from the enforcement, but the law itself dealt with conduct, didn’t it?

*Chauncey:* It . . . depends on the context in which you are discussing. For instance, the liquor authority prohibited premises from . . . becoming a disorderly premises, and they said that the simple presence of a lesbian or gay man at one of those premises constituted disorder.

*Kay:* The law, the written, published law, said if a lesbian or gay man is found at a bar, its license shall be revoked?

*Chauncey:* Well, as is generally the case in regulatory agencies . . .
Kay: Did it say that?
Chauncey: You have to look at the regulations themselves and their enforcement. The law itself refers to disorderly conduct and leaves it to the liquor board to define it, which really defined it as simple presence.
Kay: How did the liquor authority define that? How did they know whether somebody in that bar was a lesbian or gay unless it was based upon their conduct?
Chauncey: Well, it depends on what you want to call conduct. Are you calling speech conduct?
Kay: Well, of course.
Chauncey: Are you calling the way someone dresses conduct?
Kay: Of course. They had to do something to get dressed like that.

Kay was apparently referring to the popularity among some gay men of dressing up in women’s clothing as another form of conduct. And, as Chauncey explained, gay people often used “some interesting legal maneuvers” to avoid police raids on their more large and elaborate gatherings where such attire was especially popular. Large “drag balls” held in Harlem during the 1920s and 1930s, he said, registered as “masquerade balls.”

In trying to illustrate that many other groups had been treated more harshly than gay people by the legal system, health officials, and society, Kay also attempted to use Chauncey’s time on the witness stand to press the state’s points that discrimination against gay people today is not as bad as it used to be and not as bad as it has been for other minorities. He noted that some harsh treatments for homosexuality that were popular in the 1950s—such as electroshock therapy and lobotomies—were also used to treat other groups of people in the past and are no longer automatically prescribed today.

“They don’t treat the mentally retarded today the way they did in the eighteenth and nineteenth centuries, do they?” asked Kay.

“That’s correct,” said Chauncey.

He also got Chauncey to acknowledge that, while the Hollywood Production Code had censored gay people from existing on the screen, it censored “a lot more than just homosexual images.”

But again, Chauncey apparently could see Kay’s strategy and answered very carefully, emphasizing that the Production Code prohibited “any homosexual images or characters” but only certain heterosexual ones:
Kay: They were trying to prevent a lot of heterosexual images from being in the films, too, didn’t they?

Chauncey: They tried to prevent selected heterosexual images from being in the films.

Kay: Well, they were trying to keep nudity out of the films, weren’t they? It didn’t matter whether it was heterosexuals or homosexuals?

Chauncey: Yes, that’s correct.

To show that society no longer discriminated against gay men and lesbians in many arenas in which it did in the past, Kay moved on to the theater. Again, Chauncey couched his answers carefully:

Kay: Now, you talked about the theater in New York and how that was repressed. They raided the show The Captive and others. That’s not the case today, is it? In fact, didn’t Angels in America win a Tony last year? Wasn’t that a homosexual theme play?

Chauncey: Well, I guess the way I characterize a censorship campaign in general is that, in the thirties, you had a mass-based censorship unit that threatened boycotts of the studios. The studios capitulated and established an elaborate censorship code. Those codes have discontinued, but you still have mass-based censorship units that regularly threatened advertisers on network shows if they advertised with a gay character represented. We see more of these images today than then, certainly. Just a couple of years ago, Thirty Something [a television series] lost a million dollars when it broadcast a scene 30 seconds long with two men in bed together.

Kay: Lots of shows lost a lot of money without homosexual images in it, haven’t they?

Chauncey: I’m not arguing that homosexuality is the only thing that’s being targeted; but, that doesn’t mean that it isn’t being targeted.

In other lines of questioning, Kay brought out on the record that, with the exception of the military and some security agencies, the federal government no longer discriminates against gay people in employment; that gay publications are no longer banned from publishing or using the postal system; that liquor boards are no longer shutting down
gay bars for catering to gay clientele; and that Hollywood no longer enforces a censorship code to prohibit the appearance of gay characters.

Kay also tried to discredit much of Chauncey’s testimony by suggesting that Chauncey had no real authority or documentation to back up his views. Regarding the reports of violence against gay people, Kay said, “That’s just all anecdotal evidence, isn’t it? You don’t have any hard crime statistics on the incidence of homosexual assaults as opposed to assaults against anybody else in the forties and fifties, do you?”

Chauncey said the presumption of Kay’s question “sounds dismissive” and noted that historians are often left with such evidence and have to rely on analyzing such information “as best we can.”

But, countered Kay, Chauncey’s testimony that 50,000 gay men may have been arrested in New York during a certain period of time is not very informative because “we don’t know whether that’s a hundred percent of the gay male population of New York or whether that’s one percent of the gay male population of New York.”

Kay’s final line of questioning aimed at making his point, in a stark fashion, that discrimination against gay people simply does not compare to discrimination against black people:

Kay: Now, you equated black civil rights in the forties and fifties to gay civil rights today. But gays don’t have the same history of discrimination as blacks, do they?
Chauncey: Well, I never equated them. I talked about some relationship between them and some comparable measures. And what is your question about history of discrimination?
Kay: Gays don’t have the same history of discrimination as blacks in this country, do they? Gays were never enslaved in this country, were they?
Chauncey: That’s true.
Kay: Gays were never prevented from voting in this country, were they?
Chauncey: I’m not aware of gays having been prohibited from voting in this country. Again, obviously, each group has been subject to its own particular history of discrimination.

But attorneys opposing Amendment 2 did not make any concessions in their effort to illustrate a long, significant history of discrimi-
nation against gay people. They called Joe Hicks, executive director of the Southern Christian Leadership Conference's Los Angeles chapter, to the stand as a rebuttal witness just prior to the close of the trial. He was a 25-year veteran of the black civil rights movement.

Hicks said he did not believe that extending antidiscrimination protection to gay people would "diminish in any way" the rights of or respect for African-Americans or other minorities. He recalled arguments made by fundamentalists that enforcing protections for African-Americans would require adding staff and financial resources for government enforcement agencies.

Hicks said he felt Amendment 2 "sets a very bad precedent" because it allows "civil and human rights to be put to a popular vote."

"I think had that vote been put to the population around civil rights in the fifties and sixties," said Hicks, "black folks would have lost."

Between the testimony and the affidavits, Judge Bayless received a fairly complete historical tour. But it was not self-evident how much knowledge about the penalties for sexual acts during colonial times, censorship of gay-related themes during the early and mid-1900s, or even raids on bars in the 1960s could reveal about whether Amendment 2 was another point in the history of antigay bias or whether it reflected, as its defenders urged, concerns about "special rights" but not disapproval of gay people as such.