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Lesbians, Gays and Feminist at the Bar: Translating Personal Experience into Effective Legal Argument - A Symposium

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Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument— A Symposium

Moderator: Elizabeth Schneider

Participants: Elizabeth Schneider
Mary Dunlap
Michael Lavery
John DeWitt Gregory

The Reporter has chosen to publish a transcript of a symposium held at Brooklyn Law School in April, 1986, entitled *Lesbians, Gays, and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument*. The idea for this symposium originated in discussions among the members of the Brooklyn Law School Lesbian and Gay Law Student Association during the 1985-86 school year. It was designed to explore two issues: confronting, within the context of litigation, issues of sex, sexuality and gender; and incorporating personal experience into effective legal arguments and strategies.

Briefly restated, the comments centered upon the notion that the practice of law is not devoid of human experience, perception or feeling. As a lawyer, one's personal experience is inextricably linked with one's legal analysis, and discovering and cultivating that connection enhances one's understanding of her client and the client's needs. One's experiences affect how a legal argument is shaped and delivered or discarded.

Much of what follows is the transcription of extemporaneous comments, none of which the participants ever contemplated would appear in written form. We edited lightly, to maintain the unique flavor of each speaker's original comments. Although footnotes have been added in some places, this has been done primarily for the reader's information and convenience. Hence, such footnotes are not meant to be exhaustive with respect to the propositions that they support.

By publishing this exploration of the process by which individuals translate personal experience into effective legal argument, the Reporter's intention is to encourage the reader to consider this process in her or his own practice. This might also stimulate more discussion of this issue and possibly encourage similar symposia.

The event, attended by about forty people, was held in the Moot Court Room of Brooklyn Law School. After an introduction of the speakers and a short exercise in "gendering", four people spoke about confronting sex, sexuality and gender in their practice and their views about translating their own personal experience into effective legal argument. The speakers were each chosen for the integration of their personal experience into their own specific areas of interest to themselves. A conscious decision was made to include men in order to get a range of perspectives, and not treat this approach as something it is not: an entirely "female" approach to practicing law. After each of

the speakers delivered his or her comments, and then a short break, both the speakers and the audience discussed some issues raised by the speakers.

The sponsor of this event, the Brooklyn Law School Lesbian and Gay Law Student Association, wishes to acknowledge the financial support of their friends and colleagues in other Brooklyn Law School student organizations, without which the symposium could not have been a reality: the National Lawyers Guild, the Black Law Student Association, the Hispanic Law Student Association, and the Legal Association of Women (LAW).

ELIZABETH SCHNEIDER:

This workshop, entitled *Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument*, is intended to explore ways in which lawyers have translated personal experience into effective legal arguments and strategies. My name is Liz Schneider. I am a professor of law at Brooklyn Law School, formerly a litigator at the Center for Constitutional Rights in New York City, and a former staff attorney at the Constitutional Litigation Clinic at Rutgers Law School—Newark. I am pleased to be moderator for this workshop as well as one of the panelists. I will introduce you to the rest of our panelists and give you an idea of our program for today.

First, Michael Lavery, who's sitting next to me, is a private practitioner in New York City. He's a founder of LAMBDA Legal Defense and Education Fund and continues to work with LAMBDA as a cooperating attorney. He has represented gay and lesbian clients in a number of important cases in a number of areas. In *In the Matter of Robert Paul P.*,¹ a case decided in the New York Court of Appeals in 1983, he represented two adult males, one of whom wanted to adopt the other. In that case, which I suspect he's probably going to talk about today, the New York Court of Appeals held that the adoption statutes did not apply to such a relationship.

Next, Mary Dunlap, who is sitting next to Michael Lavery, is a private practitioner and law teacher in San Francisco. Mary is also a long-standing colleague of mine, someone with whom I've worked and felt a close connection for many years. She has taught sex discrimination, lesbian and gay rights and civil trial practice. In the 1970's she was a founder of Equal Rights Advocate, Inc., which is a public interest law firm devoted to sex discrimination law in San Francisco.

She is now in private practice and her caseload has a heavy emphasis on issues of sex discrimination and gay and lesbian rights. She has written on many topics and has written some very important groundbreaking articles. Most recently, she is the author of the chapter on employment, and co-author of the chapter on the First Amendment, for the National Lawyers Guild and Clark Boardman publication, *Sexual Orientation and the Law*,² which is a volume many of you are probably familiar with, and if not, should be.

John DeWitt Gregory is a dean at the Hofstra University Law School where he teaches criminal law and domestic relations. He was director and general counsel of Community Action for Legal Services (CALS) from 1967 to 1971 and has had extensive appellate court experience. He has served on the Board of Directors of the New York Civil Liberties Union for many years and also continues to be active with the LAMBDA Legal Defense and Education Fund.

This workshop has a format that reflects its purpose, namely, the desire to move beyond the law as something abstract. Mary Dunlap is going to start us off today with some group work in consciousness-raising that will help us reveal our own perceptions of gender and how our perceptions of gender shape our view of the world. We think that this exercise will give us some concrete experience that will provide a basis for, and then strengthen and reinforce, our discussion. After this preliminary session, we will have brief presentations by the four panelists on our own perspectives on the topic. We will try to focus on the ways in which our own personal experience and our own experience of the world politically has shaped our views of litigation strategy, and the ways in which we have translated that experience as lawyers. We'll take a short break at that point and then open the program up to discus-

1. *Matter of Robert Paul P.*, 97 A.D.2d 991, 469 N.Y.S.2d 833 (App. Div. 1983).

2. M. Dunlap, *Employment and First Amendment* in

SEXUAL ORIENTATION AND THE LAW §§ 5.01-5.07, §§ 9.01-9.03 (R. Achtenberg ed. 1985).

sion, dialogue, and conversation among all of us—audience and panel together.

MARY DUNLAP:

Thank you, Liz. I especially like the part about us being colleagues. It really, really feels good to reinforce Liz's and my connection. We meet each other at conferences and every once in a while we end up having a little social time together too, which is really very nice. Most of the time we just do this kind of work. I've become convinced that we do what we do as well as we do it in part because we make connections that are stronger than the conceptual. The connections between Liz's work and mine are more than conceptual. Her work has been vital in defending women who fight back, getting courts and juries to realize that Yvonne Wanrow³ and others like her are in a different position because of their gender when it comes to issues of violence and threats to their children and their lives. It's a kind of work that has a personal dimension or a whole array of personal dimensions that are undeniable if you pay any kind of attention to it, beyond looking at cases and finding victims and playing the legal game. I don't mean, by referring to "playing the legal game," to put the law down, but I do mean that it is a game with political rules, and the rules are being changed. One of the ways we're trying to change the rules in our lifetimes is by making the law responsive not just to "humanity," but to the human personality. And I think that's part of what we want to do today.

I have this idea, and it's an invitation that I want to make to you, that we can engage in what amounts to an exercise. The exercise works pretty well for loosening up our inhibitions.

What I mean by that are inhibitions about discussing gender, sexism, homophobia and all these kinds of issues in a personal, up-front, "this happened to me," "this is my life," way. This exercise is a sort of general way to do that.

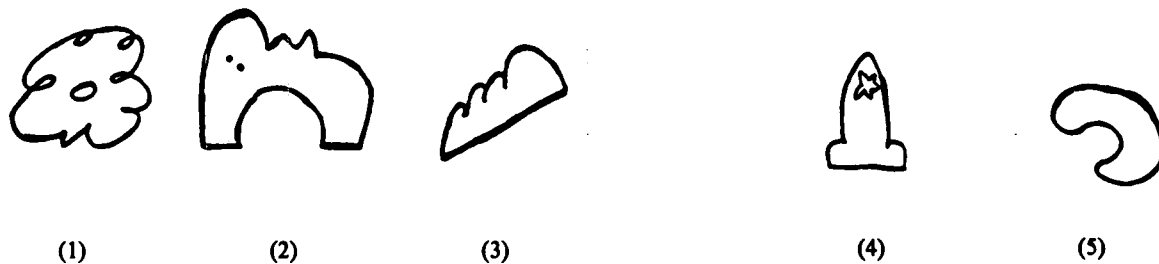
These are five doodles or drawings that came to me in a sort of burst of hieroglyphic enthusiasm about a year ago when I was first preparing for a workshop like this one. The challenge, speaking in terms of these drawings, is to sex them. I ask you to write down according to the number on the drawing, what sex, gender, sexual orientation it represents, or you can package all those three issues together. What comes to your mind or your awareness when you look at these drawings?*

I was kidding around a little bit right before we started and I covered up the right half of my page and I said those were the answers. There are no right answers in this exercise. This is one of those rare cases where you're going to put pencil to paper and not have any confidence that the answer you come up with is right. There are no right answers. Instead, this is an effort to test some preconceptions and some patterning and conditioning we have about the shapes of genders. And so, let me ask you first of all, if you'd be willing to take the paper that's hopefully traveling around and making itself available to you. Just number it one through five and then write down your impressions of the genders, sexual orientations, sexes and maybe even the sexinesses of these five illustrations, and I won't interrupt you. In fact I'll do the exercise myself.

All right. This feels a little bit like "do not turn the page of this test booklet until you are told to do so." (*Laughter*) Remember that experi-

3. State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977).

* Following are the five doodles used by Ms. Dunlap; readers are encouraged to "gender" them as the exercise suggests:



ence in school testing? It all came back to me in a flash. How many people here found this difficult to do? Most of you. Me too.

How many people here in the course of listening to me describe the exercise thought, "What the hell has this got to do with law"? (*Laughter*) This circle of people whose hands went up, I think they're honest. You have had an entirely natural, expected, legitimate reaction to my drawing five silly figures on the board and asking you to gender them. Is this a workshop on translating personal experience into effective legal argument on subjects of gender and sexual orientation? What am I into here?

VOICE

You're from California.

DUNLAP:

Ah, yes, California. (*Laughter*) True, I may be forced to my defenses before I really have a chance to put them together. I'm really not from California, it's all a spoof. I'm really from the planet Mars. (*Laughter*)

Okay. Put this little piece of paper aside. And if you only have one piece of paper, tear it in half because you're going to need another little piece about that size for the other half. Just set aside that sheet.

What I'm going to ask Christina Clarke, if you'd be willing, Christina, is go through there and pick out two or three fascinating answers, and after we're done with the tallying, we'll provide some feedback on our impressions of this exercise. Less important than what anyone said about all these symbols is that we went through that step.

There's a sort of progressive model going on here, which is what got us at least a little more comfortable with the idea of having some kind of personal reaction in the confines of a sort of gladiatorial classroom. Notice how you're sitting. Notice the structure of the room. Notice the way in which ideas will be presented. They're not going to be presented in a way that engages everyone in the circle. They're going to be presented in a way that puts you in rows. I am cognizant that this is a good program. That is part of what we're working on here, not just the architectural but the interpersonal structuring of our interactions. Nothing is taken for granted in that re-structur-

ing. You're sitting so that, at most, you can look at maybe people next to you in your row and the backs of the heads of the people in front of you. That makes the other part of the exercise more difficult. So at some juncture I may ask you to turn around and look at each other. We're going to make the most of our flexibility. Now I want you to keep in mind the effect that this environment is having on the dialogue. The focus that you have on me is partly a function of not being able to be distracted by taking each other in.

So what's the challenge here? Primarily, I am putting together personal experience with effective advocacy. I am relating the personal to the act of putting together the "compelling argument." Having the personal experience or the insight that organizes the case, one reaches the court.

I thought about the title of this symposium. I thought it was a great way to express what those people who organized this conference were trying to do. I got to thinking about that as a challenge. I like the way it was phrased, "translating personal experience into effective legal strategies and arguments." And I challenged myself with the proposition that I ought to be able to convey to you how that has worked for me—how I have been able to translate personal experience into effective legal strategies and arguments. So I really disciplined my thinking with that question. How do I do that? What is it I do that does that? How do I unify myself? How am I both a whole person and a whole advocate?

What came to mind was a story that I will tell you, and then I'll try to unfold it a little bit. Partly I will do this so that you will know more about me and also so that I can give an example of what I think is the process of translating personal experience into effective, productive, creative advocacy.

In December of 1984, my father died. He died rather suddenly in the sense that the health condition that caused him to die was quite sudden. He didn't die suddenly in another sense—among the things that he was all his life was an active alcoholic, and also an effective and accomplished city attorney. He was also a very loyal and dedicated husband; and a very disruptive man. He died. And about two weeks after he died, my mother was experiencing tremendous grief and loss and was very confused. She said to me, "You know, before I met your father, I was

nothing." Those were her exact words. I thought about that, and it haunted me, and I felt it, and it stayed with me, and it was one of those things that qualify as an intensely important personal experience. This is one personal experience that I know in my lifetime has been translated into effective feminist advocacy. I know that my mother's diminution of herself as a human, because she is female, has affected my sense of compensation, by moving me in a direction away from the damaging nature of inequality. I know that I am affected. I am affected, not just by that moment's statement of my mother's feeling of self-worth because she was completely dependent upon my father, but by the entire experience of growing up in a family where men were better than women, where men were more important than women, and where men were more powerful, in terms of what they had to offer, than women.

It is difficult to say exactly which of our personal experiences, for any of us, shapes us to the extent that we are here today, in this room, as opposed to being any of the millions of other places we could be today. It is difficult to figure out why we are all involved in law, as opposed to any of the tremendously diverse array of other occupations and preoccupations that could absorb us. And it is a challenge worthy of more than just a conference in an afternoon. To take apart and put together and look at ourselves sufficiently to know where our arguments and our strategies are coming from is a formidable task.

The premise of my approach is that our arguments and strategies do not simply happen. Lawyers, effective lawyers, effective feminist lawyers, effective egalitarian and humanist lawyers, and the rest of lawyers, don't just happen. Everything that has happened to any one of us can have some effect on how we put together a strategy or an argument.

I think I went deeper in the question to an underlying question, which is, "What are our motivations?" Are we here because someone else is here whose opinion we value? Are we here because we are tremendously tired of what we think is the depersonalizing quality of law school and we hope to get some glimpse of something more earthy, more real, more sensory? Are we here because the title is provocative? "Sex, gender and sexual orientation" is a highly provocative title. There's a lot packaged up, as you experienced while identifying with these funny little line draw-

ings on the board. There's a lot packaged up in those concepts, in those belief systems. And I don't think I can begin to answer the question of why we're here. I'm not proposing that at all. I am saying that I think the question is worth asking. And I think it's worth continuing to ask. And I don't think that one ever gets comfortable with the answers. I think it's important to keep searching for answers to the question: What are our motivations about these issues? What are we up to, both as individuals, and in the combinations of groups, schools of thought and schools of action, in which we locate ourselves?

So, let us do the second part of the exercise, and then we'll do some tallying and putting together of the data and then we're going to go on to some other things. Here's the second part of the exercise. Many of you will find it a little bit more fun than the first part. What I want to ask you to do is study someone in the room who you've noticed, whether you know them from before or you don't know them. Just study them. And I want you to write down, as candidly as you possibly can, the first five things you noticed about that person. I don't want you to write it down in such a way that anyone reading your list can tell who your person is; that isn't what I'm getting at. We're not looking for gossip or confrontation. Rather, what are the variables of that person that you observed right away. Write down just the first five. So, everybody do that; feel free to do it. Don't feel that whether you're focused on or not is of concern. Just see if you can flow into the exercise and do. And I'll try to do it too. And I'll give you about three minutes—three or four minutes to do it, so we'll have time to talk about it. If you need to move around to do the exercise or turn around or anything like that, feel free. Don't let the room confine you because it really is rather obstructionist architecture.

Did I get everybody's papers? Christina has tallied the primary answers, responses, impressions or reactions to those diagrams. Before I start reading through a few of the observations you have made about each other, just to give you a sense of what you observe about other people, let me ask: how many of you put down gender on your list? Three of you, four of you. How many of you didn't observe the gender of the person in the first five or so things you had on the list? You didn't? Are you sure? Are you sure you didn't? Three of you feel you probably didn't observe

gender in the first five descriptive phrases, which means there were many who did, correct? That's a pretty darn powerful human variable, when so many people pay an awful lot of attention to it.

If you doubt that we observe gender and seek to know it, the evidence of it is your own experience. It's what you just heard and what you just imparted to each other. What this means in part, for those of us concerned about legal advocacy, is that gender is never a disguised variable. There is virtually no litigation in which gender is not present, affecting other variables, and active. The gender of the clients, the gender of the lawyers, the gender of the court, the gender of the case are present; we can gender documents, we can gender diagrams, and we can gender cases.

We live in and operate in and do law in an extremely gender-polarized world. It is enough so that we can get results of this kind. Would anyone like to interpret those? (Showing results of drawing exercise). Does anyone feel particularly confident about what it means that the first diagram is perceived almost universally as male. Do we all feel comfortable that we know what that means? What if I say to you that Diagram 1, which people largely labeled "male," is a clitoris, and that Diagram 2, which people largely labelled "female", is some testes.

All of this is to say that we are powerfully affected by gender in our perceptions of each other and of legal issues, of the law, of the authority of the law, of the structure of ideas, of the times we can talk and the times we must be silent. We are very much affected by gendering. English is not a language in which we have articles that gender, such as "la" and "le" as in French. It is a language in which objects are supposedly not gendered. But I challenge you to go through an hour, just sit down on any given day that you choose, and not gender. Or maybe do five minutes of not gendering. You will see how exhausting an effort it is, and how amazing an effort it is, not to gender, or even to pay attention to your gendering. It may be, and I suggest to you it is very important, that we need to do precisely that.

Gendering obviously is preserving someone's values. I don't mean to offer, by having said everything that I've said, some sort of condemnation or buried criticism of the activity. I'm saying

the activity of gendering is pervasive. There's a tremendously important effect of gender on all of our ideas, on all of our concepts, on any legal argument, and how it operates.

My law school portals read, "The law is a jealous mistress." That's the quote from Oliver Wendell Holmes that was chosen to appear on the wall at Boalt Hall. "The law is a jealous mistress." Do you suppose whoever decided to engrave that on the building was conscious of their own pervasive gendering?

Anyway, onward for jealous mistresses, and with an eye to the clock, I want to read you randomly a few of your own observations about each other, so you sort of know what people around you are looking at. "Jovial, warm, communicative, fit, attractive." And if I'm reading yours wrong, forgive me. I'm not good at handwriting. "Wide eyes, lips, red something else, bushy eyebrows, something strong and healthy, posture relaxed, and calm." "Hairstyle and clothes, hairstyle, hair color blonde." "Jacket, stylish dress, blue eyes." "Smile, tired, happy, sensitive, approachable, self-assured." "Self contained, pleasant untied shoelace." (*Laughter*)

Let me stop here for a very quick story about a friend of mine, Donna Hitchens, who does a lot of lesbian and gay rights litigation in California. Donna founded San Francisco's Lesbian Rights Project. She represented a woman named Denise Krepps who wanted to be a deputy sheriff in Contra Costa County, which is a bit like somewhere way out on Long Island. So Donna found herself representing Denise Krepps before a civil service board that was going to decide whether Denise's lesbianism prohibited her from being a deputy sheriff. The county hired an expert who came in and testified that he could always tell a lesbian right away—no problem—he knew one and here's how: "They all have short hair and they sit with their feet 24 inches apart." (*Laughter*) So as far as he was concerned, it was as easy as that. The category was as superficial as your haircut and your stance. And he knew everything he needed to know, at least about the sexual orientation of lesbians, about that particular group of women. We had a lot of fun with that testimony of that expert. Donna also won the case.⁴

This one says, "sex, race, coloring, posture,

4. Krepps has now been employed as a deputy sheriff for about six years.

clothing, age." It's also interesting to consider, to draw back and consider, whether you tend to observe other people in a defined order? Do you have an order in which you take in particular variables fairly methodically, so that maybe the first three things you notice are race, gender, age, or maybe the first thing you notice are clues to class, such as clothing, which is a clue to class and a clue against class. Perhaps you look for socio-economic status. I have a friend who really tries to perceive level of education. (*Laughter*) Really. And she says she's getting more and more frustrated with it as time goes by because people are getting more and more disguised in all directions. Maybe education is becoming a more expansive concept. I hope so. Because if not, then I'm doing this too soon. Then we have "competent, wide framed glasses, beautiful fluffy curly hair, soft spoken, and provocative; fashionable, trendy." Someone else has put "colorful, composed, subdued, dark and bright." And so on.

I'm not going to take any more time on this. Providing you don't know each other's handwriting, if you're interested you can look at all the rest yourselves. I must preserve your confidentiality as I promised to do. The only point of all this, other than just to warm us up and get us thinking and feeling actively, is to show how gendered and how gendering we are. That is, what we look at, and how we look at each other, and how we look at issues is very much affected by our upbringing, our conditionings, no matter how defiant of our backgrounds we may be. You may have been very conditioned, as I was in my family, to believe that men were better and then have decided to set out on a course to prove that men and women are equal, as I seem to have done. The conditioning is still present. It is part of me effectively, profoundly, if only to make the turn in the road a little sharper, and to make me perhaps more hostile at the point where I was turning. Gender matters, and for family it matters tremendously. I'm not sure of all the ways in which gender matters. Each time I do these exercises, I discover there are new dimensions of the effect of the variable of gender on all of our interactions. If we can evoke genders from shapes, from doodles I draw on the board, then, even educational programs to make people conscious of their own

gendering will not completely erase the effects of gender as an important and powerful variable.

SCHNEIDER:

Thank you, Mary. Now we will begin the part of the program in which each of us will talk briefly about our own perceptions and our own experience concerning the topic of the workshop, and perhaps react a bit to each other's perceptions. I'm going to start by talking about some of my own personal experience which shapes my view of the role that personal experience plays in forming legal strategy.

I went to law school in a different time; I graduated from law school in 1973. My decision to go into law was based on a view of my involvement in the women's movement. When I first thought about going to law school in 1968, I was ambivalent because I had been active in civil rights and other political work in college. I was ambivalent about how much the law could do; I had serious questions about how much the law could assist social change. In 1968 or 1969, the women's movement started to become very active both in the United States and in Europe, where I was at the time. My experience in the women's movement over those two years gave me a sense of real urgency about the importance of women going into law. I thought that women with a feminist consciousness might be able to shape or reshape the law. In a certain sense, my decision to go into law had to do with my sense that feminist lawyers could use our experiences as women, and our insights about women's experience to help change the law.

The historical context is important here. The Supreme Court did not decide that sex discrimination was an issue of constitutional dimension until *Reed v. Reed*⁵ in 1971. So going into law at that time was an opportunity to present arguments about the most fundamental issues of our own experiences, and our own consciousness as women, not only to the Supreme Court but to courts around the country. In law school less than 15% of my class were women. There were few women lawyers who were involved in any kind of women's rights activity. It was a time of enormous excitement for women like myself and Mary, although she was a few years ahead of me in law school. I can remember the third Women

5. 404 U.S. 71 (1971).

and the Law Conference in California where there were seventy of us from around the country. We're now, this year, at the eighteenth National Conference on Women and the Law and thousands of women have attended these conferences. We were the people who were beginning to ask, "What are the issues? What are the ways we can use our own developing consciousness as women to begin to illuminate legal argument and change the law?" That experience had an enormous effect on all of us.

The women's legal movement has been unique in the way in which it has used women's experiences as a basis for legal argument. There are several reasons for this development.⁶ First of all, many feminist lawyers were also activists in the women's movement. We were articulating novel concepts legally at the same time that we were arguing issues politically as activists. We were articulating those same political issues and theories in the law itself. The connection between personal experience and law also came out of notions of feminist theory and politics that many of us were sharing at that time and that had emerged from consciousness-raising groups: namely, that the personal is political. This meant that we perceived that the supposed dichotomy between politics or law and personal experience was not a genuine dichotomy, but that there was a dialectical interrelationship between the personal and the political.

Let me see if I can explain this in a more concrete way for those of you who may not be familiar with feminist theory. For the women's movement, theory is not something which is "out there." Consciousness raising, recounting our personal experience and sharing that experience and deriving our politics and our theory from that personal experience, is the form that the women's movement politics first took. For women, that process had a critical political impact because the experience that we were talking about was experience which, in the world out there, had traditionally been trivialized, devalued and viewed as personal. Right? The stuff about how we feel as women, how our homes are organized, who does housework, how we take care of our children—those aren't issues which in 1970 were viewed as legitimate issues of law, or even public policy.

Those were issues which were personal issues. They were deemed to be trivial and insignificant because they were the things that women talked about to each other. That was gossip. That wasn't law. That wasn't politics. That wasn't policy. For that reason, the transformation of these "personal" issues, which are politics and policy and how we live our lives, public policy into "real" issues such as maternity leave, the transformation of "trivial" personal experience, into appropriate public policy and law, has been a dramatic consequence of the women's movement and the women's litigation effort over the last fifteen to twenty years.

The importance of personal experience as a vehicle for legal argument was also aided by the emphasis within feminist theory and the women's movement on the importance of context, the importance of being very particular, being specific and starting with our own concrete experience, the way we perceived things in consciousness raising. In consciousness raising groups, we didn't talk generally about the law or policy. We started with who we were, how we felt. The politics and theory emerged from there. So in a certain sense it was a classic reversal of the notion of abstract theory that most social theory values, and certainly most of law school, legal education and legal theory values as well. The women's movement also emphasized the importance of naming what we felt and claiming it for our own. The discrimination that we experienced or the ways that we perceived ourselves to be discriminated against were an important part of our own experience. They were important to us as women, and were a rich source of theory and politics.

In my view, feminist theory has had an enormous impact not only on the law but on many other academic disciplines, such as sociology, history, political science. Feminist theory has rekindled an interest in and a rediscovery of our own history and an explosion of feminist scholarship that explores these issues.

But law, particularly, is the paradigmatic, the archetypal example of where the abstract is important, and where we learn general rules that are supposedly "objective." In law what is deemed to be valuable is outside of our human experience. Law is the classic example of the tri-

6. For a further discussion of these issues, see Schneider, *The*

Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. REV. 589 (1986).

umph of the dichotomy between the personal and the political. We are taught from day one in law school never to talk about what we feel, never to talk about our own views. We're taught not to start off thinking about a legal problem from our own sense of ourselves as people, or question a rule based on what might be fair or just or what we might feel is wrong. We are taught to distrust our intuition, to hide who we are and to detach ourselves from our experience of who we are. Thus, the potential for transformation in law has been profound because it is a discipline which values abstraction, values objectivity and places the primary value on detachment of the rational from the emotional. For that reason, feminist theory and feminist litigation have an incredibly important intellectual and transformative potential in the field of law.

I have been extremely privileged to have had legal jobs which have enabled me to put these ideas into practice.

When I finished law school I worked as a law clerk for Judge Constance Baker Motley, former Chief Judge of the United States District Court for the Southern District of New York. Judge Motley was an activist. She had been a lawyer for the NAACP Legal Defense Fund and was a role model for me as a woman because she had integrated her personal experience as a black woman, with the litigation that she had done. After clerking for Judge Motley, I worked at the Center for Constitutional Rights (CCR) for the next seven years, and then at the Constitutional Litigation Clinic at Rutgers Law School—Newark. At the Center, I was able to work in a political context where the effort to use experience in order to articulate legal theory was valued. I was privileged to work not only with other women lawyers at the Center who shared that view, but with a lot of other women around the country, including Mary and many other people with whom I continue to feel an extraordinary degree of sisterhood, collegiality and connection.

I think a central assumption of the women's legal movement has been that law-making is a form of politics. Rather than confirming the di-

chotomy between the emotional or intuitive and the rational, our assumption has been that the best kind of legal theory-making, formulation and strategy comes out of personal experience. This does not mean that we confuse who we are with who our clients are, or try to pretend that all women's experience is the same. But there is an effort to connect, not separate, our experience as women and as lawyers.

Now I can give you some examples of how this has operated in my own experience. *State v. Wanrow*⁷ is a case in which Nancy Stearns, who used to be at the Center for Constitutional Rights and who is now at the New York State Attorney General's office, and I represented a Native American woman named Yvonne Wanrow. Yvonne Wanrow was charged with homicide for killing a white man whom she believed was trying to break into the house where she was staying and assault her kids. Yvonne Wanrow had been convicted at trial. We had not been the trial lawyers. We got the *Wanrow* case on appeal. We had to try to understand what had happened to Yvonne Wanrow. We were struck by a number of things which now, several years later, seem quite obvious. At the time, however, they were not obvious to us. We began to articulate a radical notion. How could the jury have understood Yvonne Wanrow's experience as to why she had to defend herself?

First, as many of you are aware, self-defense is based on a notion of reasonableness.⁸ As we began to think about it we realized that self-defense is problematic for women. Psychological data says women are not perceived as reasonable. People perceive women as hysterical, emotional, incapable of being reasonable. These are commonly held perceptions. They may be wrong, but they're commonly held perceptions. These are perceptions that juries are likely to apply. So how could Yvonne Wanrow convince a jury that she was reasonable? Particularly when, in addition to being a woman, she's a Native American woman who has killed a white man in a community which is highly polarized on racial grounds, and extremely prejudiced against Native Americans.

7. 88 Wash. 2d 221, 559 P.2d 548 (1977). For a further discussion of *Wanrow* see, Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L.L. REV. 623 (1980); Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986);

Schneider and Jordan, *Representation of Women Who Defend Themselves In Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978).

8. For a further discussion of women's self-defense law see Schneider, *Describing and Changing*, *supra* note 7.

Second, how could she present her view that she believed she was in imminent danger when a white man entered the house that she was in in a way that she perceived as threatening? How was she going to communicate that to the jury? We thought hard about the kinds of biases and attitudes which jurors were likely to bring to her view, to her experience. We understood that it was important to challenge the notion of reasonableness, of what it meant in that particular case—to challenge the standards that would govern. It was important to assert that the judge had to consider, and that the jury should have been instructed to consider, Yvonne Wanrow's perspective as a woman and as a Native American woman at the time of the incident. That perception led to our articulation of the notion of sex bias in the law of self-defense in *State v. Wanrow*.

In the first appellate opinion of its kind, we were able to get a plurality of the Washington Supreme Court to hold for us. Because of the articulation of these ideas in *Wanrow* and in other cases where these issues were being raised at the time, such as the Inez Garcia trial,⁹ a whole body of law has developed which has become known as women's self-defense law. Because of that work, because feminist litigators said "There's something wrong here," there has been a re-thinking of traditional criminal law concepts. We said something's wrong in the assumptions we're making. The notion that there was something wrong came directly out of our own experience as women's rights activists, directly out of our own consciousness-raising experiences, out of our understanding of sex bias and the concept of reasonableness and its application to those situations.

I think similar perspectives have been developed concerning a range of other legal issues on which the women's rights movement has focused. Sexual harassment is an example. Fifteen years ago there was no notion of sexual harassment. It was not a cause of action. It was not a legal issue. Now the Supreme Court has made it a cause of action in the *Vinson*¹⁰ case, although it also made proving sexual harassment problematic, but that's

a different issue. The whole notion of sexual harassment developed as a legal theory out of women talking about their experiences in consciousness-raising groups around the country. Women said, "This is something which is happening to me which is not private, which is not trivial, which is not something that I should accept in the workplace. It is a harm which requires legal solution and remedy." There are many other examples of the way in which women's rights legal theory emerged from the women's movement, issues such as pregnancy discrimination and the problems of battered women. Fifteen years ago, problems of battered women were not issues of public policy. Battering was something women experienced in our homes. That was something that again was private. It happened to people in their personal lives. It wasn't public policy, it wasn't important. The most common type of criminal activity in this country that happens to women was not deemed criminal because it wasn't important enough, because criminal is public and battery is something that happens to women in the privacy of their homes. You can think of innumerable other examples. I hope you'll think about this and we can talk about it more fully in the discussion later on.

Now, the form that this integration of personal experience into legal theory has taken also deserves some attention. A colleague of mine in California, Carrie Menkel-Meadow, who teaches at UCLA Law School, has written about a friend's brief-writing experience.¹¹ I think this story reflects my experience, and I'm sure Mary's experience, in a way that has a lot to say about this issue. Carrie's friend described a brief-writing session on an important women's rights case that was being litigated in California. People came together for the weekend to write the first draft of the brief. The process involved a vacillating back and forth between the legal work and the personal experience by the brief-writers. People would eat, people would write a draft, then come back together and talk about how the issues in the brief related to their lives. In other words, there

9. Inez Garcia killed a man after she had been raped. She was convicted at her first trial, won retrial on appeal and then was acquitted at her second trial in 1977. The first judge apparently rejected an impaired mental state defense. On retrial she asserted self-defense, *People v. Garcia*, Cv. No. 4259 (Super. Ct. Monterey County). See also *Schneider and Jordan supra*, note 7.

10. *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986).

11. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 56-57 (1985).

was a fluidity, a back and forth process between what the women working on the brief were doing as lawyers and as people. I think this process has strengthened and informed our own capacities as lawyers.

I think it is important to say all of this because it is a crucial message to give to many of you who are law students so that you will not fall into the trap of the dichotomy between personal and professional life. The need to overcome this dichotomy is certainly something that I aspire to communicate to law students as a teacher. The importance of sharing this message with law students and young lawyers motivated my own move into teaching from litigation. Much in legal education tells students to separate the personal from the professional. I don't think it is good practice. I don't think it is good for people to feel that their lives are separated into their professional roles, and who they are as human beings. I think it is profoundly uncomfortable. It is unsatisfying. It is bound to leave people feeling alienated and depressed both personally and professionally.

I want to give you a sense of empowerment. I want to give you a sense of support for the possibility of integrating the personal and the political. Again, I want to emphasize that this does not mean confusing one's own experience and who one is as a human being with who the client is. I was not Yvonne Wanrow. There was no question about it. She was a poor Native American woman in Washington and I am an upper middle class White woman; I don't mean to suggest that our lives were the same. But there was a connection that Nancy Stearns and I had with Yvonne Wanrow that was more powerful than she had with her male trial lawyer who saw her as someone very different. That connection, apart from all the ways in which we were different, gave us some possibility to incorporate our shared experience and develop legal arguments, which not only concretely assisted her, but which, I think, moved the political and legal formulation of these issues and struggle forward, in ways which are important.

Let me leave you with this message about the possibility of that sort of integration, and the importance of not making that separation. I hope we can talk more together later about the ways in which it is possible to make these connections and

the important human, political, legal and theoretical value in making the connection between the personal and the political.

MICHAEL LAVERY:

Some of the givens of this conference were that our personal experiences are (1) useful, (2) beneficial, generally and (3) beneficial to the client. Now isn't that what's really important? What we are talking about is what can and cannot be useful in representing the client. Certainly lawyers understand the importance of the person who is arguing, who is trying to present, as an advocate, their understanding of themselves, and how who that person is affects how they perceive what is useful to their client. I am suggesting that sometimes we have to step outside of our own experience and try to relate either to the experience of the client or of the judge before whom we are arguing.

This is often true for me. I am one of those people who does not believe that "gay rights" is synonymous with "gay liberation." The current trend is to define gay rights in very narrow terms. Here in New York, we've recently had a gay rights bill passed¹² and a lot of people said, "Oh no, this bill means no more than just what it says on paper." Believe me, both sides were saying, "No, we don't want anything more than just this bill, we have no ideas or plans." Although there's not too much I can do, that's simply not the way it is.

I'm not a lawyer in the traditional sense. Many lawyers lie. They say, "I can defend anyone." Well, a prominent civil rights attorney a number of years ago got into problems with the New York Bar Association when he quite honestly said, "I only defend clients whose causes I believe in." That's a "no-no" for the law. The nice stereotypical Wall Street lawyer can say, "I won't defend this client because he can't afford me. I won't defend this client because the firm wouldn't like it." But heaven forbid that someone who's involved in political work says, "I only defend people whose causes are something I believe in."

This is not entirely true with me. I can defend people or present an argument if I can be convinced of its merits, as I was, for example, concerning the adult adoption cases.¹³ I am not

12. New York, N.Y., Local Law 2 (April 2, 1986).

13. See *infra* notes 14, 17, 18, and accompanying text.

necessarily a proponent of same-sex adult adoptions, though at times I am so classified. In fact I have no personal desire for them. But it is a cause which I can fit into a classification within my political perspective. I find that this is particularly true when I'm doing something *pro bono*. I've told people that they may have a great idea, but if they're asking me to do it for nothing, at least I should be able to relate to what they're trying to do. I'm not going to devote my time and energy to do a case *pro bono* for a cause in which I have no interest.

Although I can promote the idea of adoption, I have been approached to promote the concept of gay marriage as a next step. Generally, my response has been, "If you can convince me as to some arguments I should raise, then I would take a case attempting to establish the concept of gay marriage." I have not yet been convinced. And this is so mainly because the people who come to me are those who say, "We want to be married because it will legitimize our relationship." This of course implies that their relationship, outside of marriage, is not legitimate. To me, gay marriage means gay divorce. This is another problem. All the problems that I see with heterosexual marriage, and I'm not a great proponent of heterosexual marriage either, would accompany gay marriage. I don't want the situation arising of someone saying, "Oh, these two guys, they're living in sin, outside of wedlock. That's terrible." But our perceptions often cause us to view things in this way. Many people would say, "Straight society says that, to be in a legitimate relationship, you must have qualities A, B and C." Now, as progressive people, gays and lesbians would say, "Oh no, a marriage need not meet those requirements in order to be a legitimate relationship." We will say that a legitimate relationship need not have quality A or D, but it must still have B and C, and disagree with all those people who want E, where E may be adoption.

*Matter of Adult Anonymous*¹⁴ was the first adult adoption case which went through family court in Brooklyn. It wasn't appealed, so there is a decision on it. That particular case was litigated prior to the New York State sodomy law being declared unconstitutional in *People v. Onofre*.¹⁵

*Onofre*¹⁶ had already been argued. *Matter of Adoption of Adult Anonymous I* was put on "hold" awaiting a decision in the *Onofre* case. When *Onofre* came down, the Surrogate decided *Matter of Adult Anonymous I*. That case involved two people—one, a twenty-two year old male, the other four years older. *Matter of Adult Anonymous II*,¹⁷ which I worked on, was also a New York case involving two men in their late thirties or early forties. *Matter of Robert P.*¹⁸ involved two men, one who was fifty, one almost sixty. Now what does all this mean? Does this mean anything in particular? Certainly none of these cases presented a worst case scenario. In terms of some of my other clients, however, they are atypical. Maybe one can accept the adoption idea in these situations because you have two nice men who are somewhat the same age. But what if an adoption case involves one person who is fifty and one who is fifteen? Then we get into other issues—what do we mean, what are our perceptions of this, how do we react to this? Whether it be in terms of sex, as Mary brought up, although she used the term "gender." I do have some problems as to whether or not we equate "sex" and "gender" as being the same thing. But also, there are our perceptions of age. What is proper, what is improper, all the implications that flow from our perceptions of age. Now, you can use those perceptions and you must be aware of them. You must use your personal experience. This is particularly true for gay and lesbian liberation, gay and lesbian rights, and gay rights litigation. In arguing before a judge, one must attempt either to make the judge aware of what he or his ingrained perceptions are, or to disabuse her or him of the various thoughts that she or he has as to what are proper perceptions.

For example, in the adoption case, *In the Matter of Robert Paul P.*, I believe that the Surrogates had already decided the case before we ever got into court. It began badly and ended badly. They said, "What can you do to convince me that this adoption should go through?" They had read the appellate court decision in *Matter of Adult Anonymous II*¹⁹ and didn't believe that it applied. They said, "Prove to me why I should permit this

14. *Matter of Adult Anonymous I*, 106 Misc. 2d 792, 434 N.Y.S.2d 527 (Fam. Ct. 1981).

15. 51 N.Y.2d 476, 434 N.Y.S. 947, 415 N.E.2d 936 (1980).

16. *Id.*

17. 88 A.D.2d 30, 452 N.Y.S.2d 198 (App. Div. 1982).

18. 63 N.Y.2d 233, 481 N.Y.S.2d 652, 471 N.E.2d 424 (1984).

19. 88 A.D.2d 30, 452 N.Y.S.2d 198 (App. Div. 1982).

adoption." In my opinion, it was not the law to require us to make such a proof.

When *Robert Paul P.* was argued before the Appellate Division, the worst thing that could happen before an appeals court happened. John may talk about a case that we worked on together. He argued *Avest Seventh Corp. v. Ringelheim*²⁰ before the Appellate Term before a panel of judges who asked no questions. You just argue, say "thank you" and then, nothing. The Appellate Division was even worse. We went to the Appellate Division in *In The Matter of Robert Paul P.* I got up to argue. They said "Counselor, we've already decided." The Appellate Division said, "We've already decided *Matter of Adult Anonymous II*. Is there anything in this case which is different from the case that we have already decided?" They approved the adoption in *Matter of Adult Anonymous II*. My response was, "Your Honor, I don't expect to say it often—but this case is, as we say in law school, on all fours. There is nothing in this case, factually or otherwise, which is different from the case in which you approved the adoption." The second Justice said, "Was the *Matter of Adult Anonymous II* appealed?" I said, "No, your Honor, it was not." "Counselor, you don't have anything more to say, do you?" There was no one on the other side in this case either. Corporation counsel sitting in New York declined to submit a brief, and declined to argue the case. So here I have a panel that has already decided the same issues. It has already been told to me and stressed, particularly in the Appellate Division, First Department, that they have little time and they really wish that attorneys would not take up unnecessary time, and that they will only ask questions if they find it necessary. Now the panel is saying, "You don't have anything to say." So I said, "No, Your Honor, I don't have anything to say."

The panel upheld the lower court decision denying the adoption without opinion.²¹ We then

go to the Court of Appeals. Now, that's the only time that I tried to relate, not to my personal experience, but tried to put the issues into the perspective of the judge. Two judges dissented, so I know that maybe I got through to someone.²² The difficulty is that we often talk in terms of abstracts, even to courts. But judges are also human. Some of them need that personalization of the issues in order to relate to them. I attempted to take the judges' experience, dangerous ground though it may be, and connect it with what I was arguing. I did this so that they had some personal connection to the issues, as opposed to those abstract things in the back of their minds, which distance them from the real issues.

One of the questions, actually the whole discussion, was on the nature of child-parent relationships. The lower court decision said "This adoption should not go through because they did not have a parental relationship." My whole argument was that a parental relationship depends on who the parties are. That is, there is no single "parental relationship." The relationship between a six year old and his parents is a different relationship from a relationship between an adult child and her parents. I said to Judge Cooke, who is in his sixties and about to retire, "Your Honor, if your mother were still alive, certainly you would still be your mother's child. But to suggest that, at your age, your relationship to your mother is the same as it was when you were six, is absurd. Nevertheless, it is a parental relationship." Judge Cooke was one of the people who wrote the dissent, who was in favor of the adoption.

It is important to try to make those connections sometimes. Who knows? In sex cases we don't know what judges are doing. Whether we are in the Supreme Court or any other court, we must ask: how much can you really talk about sex? How will they react? In LAMBDA'S *Uplinger*²³ brief, the case involving loitering for

20. *Avest Seventh Corp. v. Ringelheim*, 458 N.Y.S.2d 178 (App. Div. 1982) (*per curiam*). This was a reversal of the lower court opinion (109 Misc. 2d 284, 440 N.Y.S.2d 159 (1981)) which held that lesbians living together do not constitute a family unit and which allowed eviction of such tenants. The Appellate Term's *per curiam* opinion relied on the reasoning in *420 East 80th Company v. Chin*, 115 Misc. 2d 195, 455 N.Y.S.2d 42 (App. Term. 1982). There, the Appellate Term held that the "immediate family" clause in a lease could not be invoked as a predicate for eviction if its application would result in unlawful discrimination.

21. 97 A.D.2d 991, 469 N.Y.S.2d 833 (1983).

22. *Id.* at 239. Judge Meyer wrote a dissenting opinion in which Chief Judge Cooke joined. Judge Wachtler took no part in the decision.

23. *People v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), The LAMBDA Legal Defense and Education Fund wrote an *amicus* brief for the case, as did the Center for Constitutional Rights and the New York Civil Liberties Union. In *Uplinger*, the Court held that the New York State statute that prohibited loitering in a public place for the purpose of engaging in or soliciting sexual behavior of a

the purposes of sexually deviant conduct, it was asked, "How clearly can you talk about sex?" Does it matter? In our brief, we used the phrase, "an invitation to acts of personal intimacy." What is "an invitation to an act of personal intimacy?" Does the court really know what you're talking about? Do they know that the man was sitting on the stoop and he said to the police officer, "Come home with me and I'll suck your cock?" That was supposed to be covered by the phrase, "an invitation to an act of personal intimacy." Does it really matter? I don't know anymore whether it matters if it is said graphically or obscurely. If it is said obscurely, the court may not even have any idea what you're talking about. If it is said graphically, then they're offended because, my God, you have said such words in front of the Court of Appeals of the State of New York. The hall has been sullied by your language. No one knows whether it matters, and if it does matter, no one knows which way is better. Lawyers have to face that kind of decision.

LAMBDA'S brief in *Hardwick v. Bowers*²⁴ cites to *The Advocate*.²⁵ What does that mean? I have no idea anymore. Is the Supreme Court going to go to the Library of Congress and look up *The Advocate*? Certainly they have access to it. Should you be concerned that they may see a photograph or an ad when one of the law clerks is looking up the citation? Are they really going to look it up? Is it necessary to search around to find, as opposed to *The Advocate*, a citation for the point to the *Tasmanian Law Review* because it's a law review, but equally obscure? I don't know. The main thing that I'm suggesting is that you have to realize what your perceptions are.

It's important to make some judgment about what the perceptions of the person to whom you're arguing might be. Now, you can't do that without some self-examination. Unless you know yourself, it is very difficult to try to perceive what kind of person someone else is. You should at least be aware of when you are using someone else's phrase. There is a publication from Philadelphia from a number of years ago by Gay Liberation which asked the question, "Does the enemy have a battle line in your head?" That is, how much of your perceptions, how much of your

argument is based upon things which you may not clearly realize—things like your conceptions of race, sex, gender-stereotyping, that you have not previously examined.

One of my clients is a constant problem to me. I have represented the North American Man Boy Love Association, NAMBLA. Certainly, NAMBLA was an organization which, at best, consisted of members of the gay community. To put it mildly—this raises questions. It may not raise the question that I would like to consider. It may not raise the questions that you would like to consider. Many of the things that I am arguing today on behalf of NAMBLA are the same questions that were raised a number of years ago in regard to most lesbians and gay men. We would hear people say, "This is outrageous, how could anyone even talk about this?" I am old enough to remember that when I went to law school the concept that a woman should have the State pay for an abortion was an outrageous concept because abortions were illegal. This was not even to suggest that Medicare or Social Security should pay for the abortion, or to suggest that a fifteen year old female should be able to consent to an abortion without her parents' knowledge. These were matters which were, at best, unthinkable.

Times change. Some things which were so easy to say, "Oh no," to before, now I don't know which way to decide. It's much easier to dismiss something and say "Oh, it's unthinkable." I don't want to spend time thinking about the unthinkable. I only want to suggest that those things that you can easily say, "Oh, no, we can't examine that now. This is etched in stone. It is so important. You can't challenge it." I don't care how you end up. In some ways I do, but it's more important that the assertion be challenged. You have to know what those perceptions or unchallenged assertions are. If you say, with regard to relationships, they are acceptable only within a certain age. If you say it's okay if you are a twenty-year-old who has a relationship with a forty-year-old, maybe with a fifty-year-old, maybe with a sixty-year-old. All these situations challenge the perception that we have made, in terms of ageism. Certainly, as Mary pointed out, a number of things that you see, for example, a

deviate nature could not stand without a requirement that the conduct be offensive or annoying to others.

24. 106 S. Ct. 2841 (1986).

25. *The Advocate* is a bi-weekly publication with a primarily gay male readership.

couple with one thirty-year-old and one eighty-year-old, we ask, "Is that right? What are they doing together?" It's there as part of our perception. Be aware of it as part of your perception; also be aware that part of it is your conclusion.

It has been the issue observed that most men spend their time defending opinions, not because we believe them to be true but simply because at one time we thought that they were. One of the first things I came across with regard to experience, internalized experience, is something from Donald Webster Cory's *The Homosexual in America*.²⁶ Cory idealistically maintained that, as gay people, we are constantly bombarded by what other people think of us, and that we know that many of the things that are said about us are untrue. We should use that experience to understand how we view other people. There's a world out there, outside, that says gay people are, this or that, and we're saying from our experience, "No, that's not true." You should be able to realize that if other people are making group generalizations, you should at least be able to challenge them. Life is a constant challenge in terms of those perceptions and those givens. The ability to confront and challenge those perceptions and givens is what makes effective lawyers. You must learn to use your personal experience, without allowing it to control you. It is most important to be aware of what your own perceptions are, from your personal experience, and what are the perceptions of others.

DUNLAP:

I appreciate what Liz and Mike had to say. I enjoyed tremendously their articulation of their own distinct, and at the same time, common experiences of being lawyers, litigators, advocates and people applying their humanity to a series of both very real, close-up situations and sometimes more distant and personal challenges. Thank you both very much.

I want to talk about *Bowers v. Hardwick*,²⁷

on the question of how you phrase the issue so you win. So I've had to phrase it right. The state of Georgia phrases it as whether an individual homosexual has the right to commit sodomy. That is a really terrific way to phrase an issue in such a way as to determine the outcome. It was Wendy Williams who said, "The lawyer who gets to characterize the issue tends to win."²⁸ I think she's right.

SCHNEIDER:

Characterize the issue or state the facts.

DUNLAP:

Yes. When you can state the facts in such a way as to govern the conclusion sufficiently, then you've done your job as an advocate. *Bowers* is a case that involves not only the constitutionality of Georgia's sodomy law but, obviously, its implications. In its political magnitude, in its symbolic value, *Bowers* involves legitimation, validity, legal survival, and eventually political and human survival, because it involves gay men, lesbians, bisexuals and anyone who engages in oral-or anal-genital contact. That's what the Georgia law prohibits. I love it. I love that law for its framing of sodomy, because it brings home that almost anything you might do sexually is illegal. As Norm Nickens, who is a former assistant dean of New College and a gay rights activist has said, "If your lips leave their lips, then you're a felon."²⁹ That gets it all across. The "capaciousness", as Laurence Tribe might say,³⁰ of the category is so complete that almost anyone has committed sodomy.³¹ That's important, at least for people who have some memory of their sexual experience.

I want to talk about *Bowers v. Hardwick* in terms of the issues of translation that both Liz and Mike raised. "Translation" is the key word, I think, in the title of this conference. We translate that which we do not believe someone else will understand. That's what a translation is. And

26. D.W. CORY, *THE HOMOSEXUAL IN AMERICA* (1951).

27. 106 S. Ct. 2841 (1986).

28. Professor Wendy Williams, who teaches sex discrimination and law, among other courses, made this observation in courses that she and Ms. Dunlap taught together in the San Francisco Bay Area law schools during the years 1972-1975.

29. Mr. Nickens made this remark in a class he taught with Mary Dunlap at New College Law School in San Francisco in the Fall of 1985.

30. "[O]nce that tradition [of sexual activity in private as a 'reverse liberty'] is recognized . . . it provides an umbrella capacious enough to subsume homosexual as well as heterosexual variants." (emphasis added). L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-43, at 947 (1978).

31. See Brief Amicus Curiae for Lesbian Rights Project in support of petitioner in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) n.3, reprinted in 14 N.Y.U. REV. L. SOC. CHANGE 953 (1986), for reference to the pervasiveness of sodomous sex practices as defined in the Georgia law upheld in *Bowers*.

when it comes down to it, a lot of the things that we have been saying up here are about our expectations of what will not be understood. I think it is largely an informed and an enlightened expectation that the members of the U.S. Supreme Court would not readily grasp or understand or accept or identify with the gay and lesbian experience. It is a lot of both personal experience and personal lawyer experience that all of us have been outlining. Those are our premises.

The other side of the coin is that we are all alike naked and, as Barbara Deming said, "We are all part of one another." Barbara Deming was a magnificent feminist skill lesbian activist skill writer who was one of the stars in "The Silent Pioneers," a film made about senior gays and lesbians. Barbara Deming, who is now dead, said we are all part of one another. When Liz was articulating the *Wanrow*³² case, I realized that she, Nancy Stearns³³ and Yvonne Wanrow came closest to the meaning of that idea. While our clients are independent, separate human beings, with a series of problems only parts of which we can touch or do much about as lawyers, at the same time, we are all part of one another. It is that understanding, that knowledge, that consciousness of our connectedness, of the idea that what I do will affect you, will have some impact on you, that I think begins to challenge us to do that translating in the most caring and inspired way possible.

On *Bowers v. Hardwick*³⁴, I wanted to talk about translation in a more concrete sense. I have in front of me an *amicus curiae* brief filed by the Lesbian Rights Project, the Women's Legal Defense Fund, Equal Rights Advocates, of which I am one of the mothers, the Women's Law Project and the National Women's Law Center,³⁵ which I wrote and which some other people edited and worked on and refined and approved. So it's a team effort. I also have a brief for the respondent by Laurence Tribe, Kathleen Sullivan, Brian Koukoutchos and Kathleen Wilde.³⁶ This is the respondent Michael Hardwick's brief; Mr. Hardwick is the individual who was arrested in his

bedroom for committing the crime of sodomy under Georgia law. He was arrested by a cop who came to serve him a warrant on a drunk-in-public charge. It makes you think that maybe the guy is in a little bit of political trouble if they'd serve this warrant, for such a petty offense, at his home.

I looked at the briefs to try to identify the commonalities between the arguments. Our *amicus* briefs were all prepared with some knowledge on Professor Tribe's part and with some collaboration and interpretation of ideas. So it's not as if Laurence Tribe entered his brief for the respondent completely uninformed of what we were doing in California and what others were doing on behalf of LAMBDA,³⁷ the ACLU and some of the other organizations that filed *amicus* briefs.

Tribe's argument on why the Georgia sodomy law is unconstitutional centers on a construction of the fourth amendment privacy of the home.³⁸ The focus is not on the gay rights aspect nor on the impact of the sodomy law. It is on the transgression of an inviolable boundary of the castle. Remember, "a man's home is his castle." Tribe's argument very carefully emphasizes a relatively safe constitutional approach, I don't mean to say it was necessarily a "winning approach." I don't mean to say it was necessarily an approach that would satisfy five members of the Court. It was safe in terms of an effort to de-homosexualize the case. It was conscious. It was done advertently. It was done with the knowledge that the Court is homophobic.

This is a very primitive, thumbnail, quick summary of all the really complex scholarship and argument and collaboration that went into the decision to emphasize the fourth amendment with which I profoundly and adamantly disagree. We can talk at great length about why I do and I would love to do that, but I think that will get us off the point. In Tribe's brief, there are several paragraphs, two of which are crucial,³⁹ on the question of the impact of this law on gays and lesbians. The first instance in which one realizes that Tribe makes the point that there is also a dis-

32. 88 Wash. 2d 221, 559 P.2d 548.

33. Nancy Stearns is currently employed at the office of the New York Attorney General, Bureau of Environmental Protection.

34. 106 S. Ct. 2841.

35. Brief *Amicus Curiae* for Lesbian Rights Project, *supra*, note 31.

36. Brief for Respondent, *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

37. LAMBDA Legal Defense and Education Fund.

38. Brief for Respondent, *supra*, note 36, at 17-29.

39. *Id.* at 8-9.

criminy element in this law is in footnote fourteen. I think it's interesting that the very argument that forms thirty pages of our brief forms a footnote and then another paragraph in Tribe's brief. In the footnote Tribe says that it is for just this reason, a reason having to do with the nature of interpreting fundamental rights, that Justice Harlan in *Poe v. Ullman*⁴⁰ said, in dicta, that homosexuals have no privacy protection, that the general public opinion of a by-gone day condemning contraceptives could not justify the criminalization of their use. Likewise, the general public opinion of an earlier day that led Justice Harlan to take for granted the condemnation of homosexual practices could not justify the criminalization of those practices today. In the quarter of a century that has passed since Justice Harlan wrote, more than half the states in the union have decriminalized private homosexual acts between consenting adults and our nation's professional societies have taken the position that such acts should not be condemned either by medicine or by law.⁴¹

Now, over here in the Lesbian Rights Project *amicus* brief is what amounts to the same argument, in very different language. We are talking about issues of translation, and I want you to have the contrast in your mind. This is in the summary of the argument. "The *amici* believe that the privacy decisions of this court, from the earliest to the most recent, support the position that it is within the fundamental rights of the individual person to make such intimate personal choices as are not only proscribed, but criminalized, by the 'anti-sodomy' law of the state of Georgia. *Amici* for respondent assert that the need for love is natural and that the determination to express and receive love of a sexual nature by engaging in sexual activities with another adult of the same gender is one possible type of behavior within the range of medical and psychological normalcy."⁴² What ends up feeling interminable in the process of translation are the arguments about how to translate among all of us who are on Michael Hardwick's side.

I'd like to go back to a little story that I pulled out of a book called *Simple Justice* by Richard

Kluger,⁴³ a book that should be required reading in law school. The book is an effort to tell the story of *Brown v. Board of Education*⁴⁴ in its full, historical context, with a richness of detail that describes the lives of people affected by the movement for racial equality, civil rights, and integration that *Brown* symbolizes. In *Simple Justice* Kluger tells a story with which Justice Marshall is credited. In some small town in the South, in the course of putting things together in order to get school integration cases brought, this small town had a group of black citizens who were like a Black Chamber of Commerce. They were well-groomed, very polished, very diplomatic, quite conservative and very dedicated to the proposition that the schools ought to be integrated. The same small town had a group of black citizens whose members' identities were kept secret. These latter Blacks were fire-brands, and very radical people, who pushed a "freedom now" agenda with no compromises. What Marshall discovered, of course, working in a small town, was that the memberships of the two groups were identical.

That's the way it ought to be. Sometimes that doesn't turn out to be true. I don't mean to say that all our differences are unreal, but when it comes to moving the Court forward, we are all at the same table. We are at the same table, but we may disagree so profoundly about how to translate, that one says to the other, 'Please don't file that brief. You're ruining my case. I can't get up there.' Or that one says to the other (the sexual harassment case previously mentioned⁴⁵ is an example), "Please don't use the word 'fuck' in the Supreme Court; they're not ready for it." We could go on forever among ourselves about whether or not anyone ought to do that. But all of this is an effort to say that we must work very conscientiously with the idea that there are various ways to translate these ideas, no one of which is necessarily overwhelmingly better.

So I disagree with Tribe's fourth amendment approach and let me tell you why. Substantively speaking, Chief Justice Rehnquist already has gone off on the fourth amendment. Fourth amendment privacy is the only form of privacy he

40. 367 U.S. 497, 546-47 (1961) (Harlan, J., dissenting).

41. See Brief for Respondent, *supra* note 36, at 8-9 n.14.

42. See Brief Amicus Curiae for Lesbian Rights Project, *supra* note 31.

43. R. KLUGER, *SIMPLE JUSTICE*, passim (1977).

44. *Brown v. Bd. of Educ. (I)*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (II)*, 349 U.S. 294 (1955).

45. *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986).

recognizes, constitutionally. See the *University of Kansas Law Review*, 1974,⁴⁶ in which he published an article called, *Is Effective Law Enforcement Consistent with an Expanded Right to Privacy?*, subtitled *Privacy, You've Come a Long Way Baby*. But the article is wonderful. I think it is a tirade. It gives one an insight into the person of Chief Justice Rehnquist. This is a person who rarely ventures outside his narrow realm. He depends on his wife's experiences in express check-out lines in supermarkets for the idea that people cheat.⁴⁷ Yet Tribe, in *Bowers*⁴⁸, chose to emphasize not privacy of the person but privacy of the home. One of the problems that the privacy of the home argument creates, and it came up in Tribe's argument, is what about motels? What about cars? What about bath houses? In oral argument, Tribe's reputed to have stated something like "Well, I'm not sure about motels, and I agree with you, cars are different than homes." The fact of the matter is that all the time, all over this country, people are arrested for sex acts that occur someplace other than in the home. We are all struggling womanfully and manfully to determine what the boundaries of privacy are. It is not time to give it all away by saying, "If you own a house then you can fuck who you please, but if you don't, good luck." That's a mistake. It's a mistake if Laurence Tribe says it and it's a mistake if Justice Powell says it.⁴⁹

But the other side of the coin is that what they're saying is that if you aren't willing to accept our argument, our "little house" argument, you ain't got nothin'. There is no place that is safe. Nobody's going to get to do it. So just face it, this is the beginning. The house is the foundation, or the home is the foundation, for the expansion of a right to privacy that will not be generous enough to include those of us who don't fit in this house, or who don't have a house. I am concerned about poor gay people and public gay peo-

ple. These too must have privacy, or it is another rich person's niche in the Bill of Rights.

The difference about which guarantee of the Constitution to emphasize is obviously bigger than our understandings of the constitutional doctrines involved. There is more to this disagreement between Professor Tribe and myself than whether or not the fourth amendment says "unreasonable search and seizure" or whether it says right of the person to have privacy vis-a-vis the government. Justice White is very hung up about that.⁵⁰ The word privacy occurs nowhere in the Constitution. He's quite right. But neither does the word racism. If anyone reads the Constitution to understand what some of the guarantees are, certainly the word racism, not only as an idea but also as a reality of surpassing constitutional presence and importance, would emerge.

In terms of translating personal experience to effect legal argument, I want to say one more thing about *Bowers*. Then I want to give an answer to Mike's question about how direct to be about sexual talk with the Supreme Court, because I have a position I want to take. Here's what I think the answer is to the question about how direct to be with the Supreme Court. This is also in the *amicus* brief we filed. Feminist poet and philosopher Adrienne Rich (now that's as wild as any cite to the U.S. Supreme Court ever was), has written of the danger of hypocrisy about sexuality, in moving terms, as follows: "Heterosexuality as an institution has also drowned in silence the erotic feelings between women. I myself lived half a lifetime in the lie of that denial. That silence makes us all to some degree into liars. The possibilities that exist between two people are the most interesting things in life. The liar is someone who keeps losing sight of these possibilities."⁵¹

It seems to me that one of the troubles we've had historically in sex litigation, which is related to and different from gender litigation, is a lack of

46. Rehnquist, *Is Effective Law Enforcement Consistent with an Expanded Right to Privacy?*, 23 U. KAN. L. REV. 1, 19 (1974). See also M. Dunlap, *Where the Person Ends, Does the Government Begin? An Exploration of Present Controversies Concerning 'The Right to Privacy'*, 12 LINCOLN L. REV. 47 (1981) (discussing the Rehnquist article); see generally *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting).

47. Rehnquist, *supra* note 46.

48. 106 S. Ct. 2841.

49. *Id.* at 2847 (Powell, J., concurring).

50. *Id.* See also *Roe v. Wade*, 410 U.S. at 221 (White, J.,

dissenting). Justice White served as one of the moot court judges for the moot court finals at Stanford University Law School in the Spring of 1985. The moot court problem was one of the constitutionality of a Georgia-type "sodomy" law that had been used to prosecute two lesbians for oral sex. Justice White repeatedly questioned counsel for the two lesbians about where they found "privacy" in the U.S. Constitution.

51. A. RICH, *WOMEN AND HONOR: SOME NOTES ON LYING* (5th printing, 1979) quoted in Brief *Amicus Curiae* for Lesbian Rights Project, *supra* note 31, at 19.

directness, a lack of candor, a lack of truthfulness, and a lack of people looking each other in the eye and saying this is what's going on here.⁵² I think that the reality that several tens of millions⁵³ of people depend to some extent for the legitimation of their legal (if not their human) existences on the outcome of *Bowers* is to dodge, among other things, the opportunity to break through. We have a chance here to break through and raise consciousness, not only in the law, but in human tolerance and human understanding. We are all part of each other and our sexualities are all part of a healthy, medically and psychologically normal spectrum.

And so, I have an opinion on how direct to be about sex. I want us to tell truth of the kind Adrienne Rich talked about. We will differ and we must differ about the language that we use. But I think within those differences we have to have a basic understanding that we're not going to sell out on the fundamental questions. In the same way, when the ERA was being ratified, we couldn't accept the position of some organizations that you could talk about the ERA, but not about abortion choice, not about lesbian rights, not about sexual harassment.⁵⁴ Don't, in short, talk about anything hot. Ladies could have equality. Ladies, as it turned out, given the legal system, didn't need it. It was everybody else who did. So that we were being asked, we were being invited, we were being encouraged to trade off the very thing that we were fighting for. You've gotta watch out for that. I think Laurence Tribe's gotta watch out for it. I gotta watch out for that. We all gotta watch out for that.

I think there is an element of an answer to the question about how direct to be in Adrienne Rich's ethic. It is this: we've got to figure out, with all our diversity, how to be truthful. The power my clients have is that they, as victims of sexual harassment, employment discrimination because they're gay or lesbian, or a whole panoply of invasions of civil rights, are telling important personal truths in legal context. They're translating, in the law, their own lives and suffering in a

system that has yet to develop principles to deal with some of their experiences. That system challenges all of us to do the translating.

JOHN DEWITT GREGORY:

The topic, as I understand it, is an exploration of ways to translate personal experience into effective legal arguments and strategies. When I was called about this, I'll have to confess that I wondered why I was recommended. It was explained to me that it was because of a case Mike Lavery mentioned, *Avest Seventh Corp. v. Ringelheim*.⁵⁵ I have to tell you how I got involved in that case, which involved an attempt to evict two unrelated lesbian women from an apartment. I was called on to help with the appeal of the case because I have an interest in family law. I teach family law. One of my former students was involved in the LAMBDA Legal Defense and Education Fund. We had talked after she graduated, and I told her if she got cases involving family relationships and the like, I might be interested in doing some appellate *amicus* work. So they called me about this case and said it was a case involving a gay family relationship. I said, "Terrific." And then it turned out to be a landlord/tenant case. That's really what it was.

Now that I have heard what has gone before, I must say that I'm even more mystified as to what my expected role is here, because if I understand the premise underlying this discussion, I probably disagree with it. Incidentally, there is apparently some relevance, at least I gathered that as I was discussing the reason for the invitation, to my being viewed as a black lawyer or as a lawyer who happens to be black. I don't know which, but I think there's a difference. And I suppose that there was some notion that there might be some analogies to feminist lawyering and gay lawyering in the sense of my membership in still another traditionally despised minority group. But as I have already suggested, I have some problems with the underlying premise.

One of the things that troubles me is that I

52. *See id.*

53. "There are some 20 million lesbians and gay men living in the United States today," Hitchens, *foreword* to H. CURREY and D. CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (2d ed. 1985) and J. Marmor estimates 5-10% gay male and 3-5% lesbian population, MARMOR, *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* 7 (1980) cited in Brief *Amicus Curiae* for Lesbian Rights Project, *supra*, note 31, at 6.

54. Ms. Dunlap lobbied throughout California, Nevada and Washington for federal ERA ratification. She was often discouraged from raising abortion choice or lesbian right issues in these efforts. *See also* Linker, *The Equal Rights Amendment: An Analysis of the Campaigns for Ratification in California and Utah* in *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 181 (B. Badcock ed. 1975).

55. 458 N.Y.S.2d 178 (App. Div. 1982) (*per curiam*).

suspect when one talks about ways to translate personal experience into effective legal argument, this might be to suggest that we *should* translate personal experience into legal argument and strategies. Now, with that, two things occur to me which may seem to be contradictory, but I don't think they are—they're just different. The first thing that occurs to me, and I think Michael Lavery has suggested this in a way, is that personal experience is always going to affect the way in which we practice law. It seems to me that to say that, and to go on and on and on about it, is really to place otiose emphasis on the obvious. I think everything we do is bound to reflect our personal experience. My concern is about some of the implications of suggesting that there's something special or something better about personal experience affecting our lawyering.

Since we were told to look at personal experience for this symposium, which I rarely do, because I think other things out there are more interesting than I am, I forced myself to look at my own personal experience as a lawyer. I didn't think about it long, but I guess it has encompassed five or six areas. For a while I was simply working in firms. For a while in the beginning I did some negligence work up in Harlem. The only place I could get a job at the time was as a single practitioner on 125th Street, which wasn't bad, by the way. Then, I went downtown and did some labor law representing management and some commercial law, and things of that kind. Another area where I spent a lot of time was litigating for the state, which is where I got this appellate experience. And what I did mainly was to represent wardens of state prisons when prisoners on writs of *habeas corpus* were trying to get out. I guess my job was to keep them in.

I don't agree with Michael that lawyers who say they can represent anyone are lying. I basically believe this. I think the lawyer's task was best described in another context by a writer, I think, who said, "Whose bread I eat, whose wine I drink, his song I sing." I think that's really what lawyers do. I do believe that I can represent just about anybody, but I have two exceptions. One, I don't think I could represent a drug dealer who was selling heroin and crack and the like in poor, black neighborhoods. Two, I don't think I could represent someone who was accused of sex-

ual molestation of a child. But that has to do with my own personal values, or whatever you want to call them. I think that any ethical standards you read will say that if a lawyer finds a cause personally obnoxious, so that he could not do his best job in representing a client, he's free not to accept it. But those are the only categories of cases that I can think of.

When I went back to review this experience, I couldn't think of any occasion when my personal experience significantly contributed to my legal argument or strategies. It seems to me that lawyers who are generally the best advocates for any cause are those who have two essential qualities: brains and analytical ability. I can see by the facial expressions that some of you object to that, but this is based on my personal experience. The lawyers I've met who have been most successful in representing clients effectively have had those two qualities. This is why I would suggest to you that it is precisely Laurence Tribe, who wrote one book which you really shouldn't get out of law school without reading, which is *Treatise on Constitutional Law*,⁵⁶ who *should* have argued before the United States Supreme Court in the *Bowers* case.⁵⁷ I doubt whether anybody worried for long about what his sexual orientation may be or what his personal experiences were, except for his personal experiences before the United States Supreme Court where he has been eminently successful.

What I fear, and you know as I heard all this passion I promised myself for once that I was not going to become passionate, is that too often when we talk about personal experience we are really talking about our personal biases, or bigotry, or hang-ups. And that's why we have to be careful. I know that. I find that in teaching there are times when I've had great difficulty understanding a case. I thought it was because of an intellectual inability and then I finally realized that I had some personal life experience which was hanging me up on a case and then I understood it. So it is really a two-edged sword. Personal experience can certainly be useful and helpful as I suggest. We can't get away from it but it can also be disabling if we don't recognize the emotional baggage that comes from personal experience so that we can deal with it.

I'll give a few examples. The first case book

56. TRIBE, *supra*, note 30.

57. 106 S. Ct. 2841 (1986).

which was developed on women and the law, as far as I know, was edited by a man. Everybody was grateful to have it. A lot of people seized on it and taught the course. The only point I want to make is now I hear people questioning whether any man is qualified to teach a course in women and the law. I'm not expressing an opinion, I'm simply saying, there's something funny going on. Now the next example. I remember when there were serious objections at Harvard Law School when a white lawyer sought to teach a course on law and race. I think that white lawyer had gained most of his experience working for Thurgood Marshall. People did not see the irony that existed there. I think that's a little strange. Personal experience? I also know of a young woman who went to a quite prominent national law school in another state who wanted to teach one of these courses on sex and the law. She persuaded a fairly conservative administration to let her teach such a course so she could expose students to legal issues as they affect sex, sexual orientation and sexual preference. I was particularly interested because I have been thinking of teaching such a course, and I have accumulated about three file cabinets worth of notes which I shared with her. She was prepared to teach, but very few students signed up. There were a number of students who didn't sign up because they didn't want anything like that on their transcript, because they were afraid about the difficulty in getting jobs. There was another group of students, gay and lesbian students, I understand, who did not sign up because they heard that she was a married woman and they learned that she was straight. It seems to me there's something funny going on there which is probably related to personal experience.

Now, I'll give you just a few examples from my experience on the LAMBDA Legal Committee. I remember that there was a sexual harassment case that came to the attention of the Board. It happened to involve a man who was sexually harassing another man. There was great consternation about whether the case should be taken. "We can't take the case because this case involves gay on gay." That was the way in which one super intellectual member of that Board at that time put it—"This case involves gay on gay." To me, that comment involves stupid on stupid. It

seems to me the whole point is that a gay person is entitled to the same rights and protections as anybody else, regardless of how the harm was inflicted. That is the point. Equality is the point. I can also think of an adoption case, where LAMBDA was asked to be an *amicus*. The adoption was not the kind of adoption between two adults that Michael Lavery was talking about, but a regular old adoption by a single gay man who wanted to adopt a child. He put a great deal in his papers about his lack of involvement in gay liberation organizations and so on and so forth, and that at the time he was celibate. He was a gay man. He acknowledged it. And people on the LAMBDA Board sat there and said, "Why should we represent him? He's not even proud about being gay. We shouldn't represent him." This is another example of stupid on stupid because this was a man who was being denied the right to adopt because he was gay and that ought to be the answer—not his politics or our superior judgment of what his values ought to be.

PARTICIPANT:

My name is Jim Williams. I am a law student here at Brooklyn Law School. I am not going to pose a question; I just want to address something that John said. It comes from my own personal experience as a law student. He was talking about someone who was going to teach a course in lesbian and gay rights and the law. He was surprised that some students had expressed that they didn't want to learn that subject from a straight woman. Although I understand how you can be repelled by that sort of discrimination, I can also really identify with the experience of those law students because I go to a law school where there are no "out" lesbian or gay professors. It is very lonely.

SCHNEIDER:

Other comments, responses to that?

PARTICIPANT:

I want to make a comment. I am a recent graduate of Rutgers Law School. When I heard that Larry Tribe was going to argue the *Bowers*⁵⁸ case, part of me had a similar feeling. Where are the lesbian and gay lawyers? I understand that

Tribe has had a lot of experience and he is a well-respected constitutional scholar. But at the same time, one of the things I thought developed in all movements has been autonomy, our own autonomy: women's autonomy, gay people's autonomy, third world people's autonomy. To have a straight man get up and argue our cases, well I felt that he was going to get into certain kinds of problems or get into discussions like: are we protected in a motel, or in a car or something like that. Those of us who've had those kinds of experiences, would probably look at the issues in a broader fashion than someone who looks at it from a purely intellectual and non-personal experience. I think it is important to look at where our experiences, how our experiences are certain to be reflected in the kinds of law we choose to do and the ways we develop argument. I think that our own experience will make the argument broader and will reflect the gay movement and consciousness.

PARTICIPANT:

I'm a first year student at Brooklyn Law School and, coincidentally, the subject for my moot court writing course this semester has been the issue of challenging a sodomy statute on the grounds that it violated the right to privacy. I read *Bowers*, both Tribe's brief and the one that Mary was involved with. One of the most profound experiences that I have had, occurred this past week during my practice session and even prior to that, in talks with the students who were representing the appellants who were challenging the statute. I found that a lot of the students' remarks, as well as those of the students representing the state who wanted to uphold the statute, were full of outrageous myths about gay people. I think for some of these people it was the first time they took a good hard look at the law and how it dealt with gay people. Not only that, but it was the first time that they read some of the hard facts about AIDS. During one of the practice session arguments someone said, "This statute really isn't a problem because it affects so few people." Since the appellee was arguing, I [as the appellant] and the professors who were acting as judges could question the speaker. I said, "Wait a minute, this is totally unsupported by the record. You don't know how many people are in this ficti-

tious state and regardless of that, I think it's apparent that you don't realize the number of gay people that there are." But that comment and so many others really were the result of that person's own experience. I know that some of the things I was able to bring to the class, although they might have been too self-conscious—because of my experience in a relationship similar to that of the fictitious appellants whom I was representing—were useful in class discussion. This was apparent to me and to the other people in my writing class, as a result of my heightened knowledge about AIDS and how it has affected the gay population.

LAVERY:

The question that was raised about Professor Tribe is similar to the question that I raised about *The Advocate*.⁵⁹ LAMBDA's brief is primarily an attempt to attack Georgia's brief, which quotes Paul Cameron. Of course my initial reaction was certainly that a citation to the *New York Times* is essentially the same as a citation to *The Advocate*. But when you really get down to it, does it matter whether it's the *New York Times* or *The Advocate*—or whether it was Laurence Tribe's constitutional law text as a secondary reference? Part of the citation's significance is the reaction it gets. But one must also ask, "Why is this case in there?"

I don't have any problem with Laurence Tribe arguing the case as long as you understand why he is arguing the case. It doesn't say that Laurence Tribe is better because he is straight. Laurence Tribe is an authority on constitutional law. Whether or not he should be an authority is a separate question, but he is an authority. He has a good record before the Supreme Court. Now, if this is supposed to be entirely a political exercise, that he is not a lesbian or gay attorney arguing the case, does not necessarily imply that there is no lesbian or gay attorney who could argue the case. It reflects a decision to choose the person based upon their chance of winning. Beneath the question, "Why are you there?" is another question. That question is, "Is winning the only thing?" Anything that you can do within certain bounds, is that the purpose? That is, can we find someone else, not Laurence Tribe, but someone who, based upon statistical analysis, has

59. See Note 25, *supra*.

a greater track-record, a better relationship with the Justices? We may analyze all these things, as jury projects do, and come up with a name.

DUNLAP:

Did you know that Gary Hart was selected as a candidate for the presidency by that very same type of statistical method? It is interesting, isn't it?

LAVERY:

As long as you're aware of it.

SCHNEIDER:

It didn't work for Gary Hart.

DUNLAP:

It's interesting for that aspect, too.

LAVERY:

Yes, and I feel the emotion of what you're saying. Gee, wouldn't it be nice? But that's not the real world. It is not the real world, at least to me. To me, the decision that I'm making in this particular case is balancing what is important and what is not that important. I may make other decisions. For example, what if we were at trial and someone said, "Oh no, we have a fag for a lawyer. What will the judge think? Shouldn't we get someone who is straight?" The answer is not clear. This is a narrow question. I try to make it clear to my clients that, in certain cases, I have a reputation. If I come in and defend someone, there is at least some chance the judge, blowing my reputation out of proportion, is going to say, "Well this person has been associated with those causes." Of course judges aren't supposed to take that into consideration. Ideally, they will put it out of their minds. But I should make my clients aware of the possibility that some type of prejudice might occur. That is, if I am arguing, the judge may make connections between this client and other clients I have represented and arrive at conclusions which may be harmful to this case. Clients should consider that factor in deciding whether or not they want to hire me to represent them. Do your best to be aware of what those connections are, and don't let them control you. Be aware of what they are and then make your decision.

PARTICIPANT:

I don't think the point that was made earlier was, "Wouldn't it be nice if we could have a gay or lesbian attorney up there arguing this case for us?" I thought her comments went to the issue that Liz raised when she was discussing *Wanrow*. That is, that she could bring to her attorney/client relationship experiences from her background, from her personal experience, from her feminism, that the male trial attorney could not bring. She saw things that he didn't see. She was able to articulate an argument that never occurred to him. The point about lesbian and gay representation in lesbian and gay cases is that, perhaps had there been a lesbian or gay lawyer arguing *Bowers*, that attorney might not have conceded that mobile homes were clearly out of bounds in fourth amendment search and seizure cases because that's what the Supreme Court has said. The back seat of a car is also clearly out of bounds, because cars are moving vehicles. It may have been a different argument. Privacy wouldn't, as Mary implied, have been confined to the house. I thought that that was what this panel was addressing. How feminists, how gay and lesbian attorneys address issues, bring their own personal experiences to issues in a way that is different when it is their own group that they are representing. It is the issue of autonomy.

SCHNEIDER:

Let me add to that. I think that that is right. People see issues differently based on their personal experience. They perceive the existence of an issue differently and have an ability to perceive an issue and to articulate it in ways that are different based on experience. Now, that doesn't mean, for example, that only feminists or only women can make women's rights arguments. There may be reasons why in a particular situation you may choose to have other people make those arguments. There may be reasons why one chooses, as in the *Bowers* case, to be represented by Larry Tribe. That's a political decision and you have to acknowledge that it's a political decision. It may be a problematic political decision, precisely because the notion of privacy to gay people is a more expansive notion than just homes because of gay and lesbian life experience. Knowledge of what "privacy" means to the attorney's gay client

will inform the attorney of what the client is willing to give up.

I don't know, for example, in *Bowers* how much dialogue there really was among *amici* and Larry Tribe on those issues. I can understand that it is a very personal choice how much you're willing to struggle with, expand, and challenge traditional assumptions. Individuals may demonstrate a lack of sensitivity to or a different conception of their role in this process, which may have class, gender, or other implications.

So there are strategic reasons why in some contexts you use lawyers who are not necessarily of that same experience, but you recognize it as the political decision that it is. You recognize that in some circumstances there are things that a main brief can say and other things that you get across more effectively, politically, by an *amicus* brief. You can fashion *amici* briefs on a number of different issues, to broaden the perspective of the main brief. These are strategic decisions regarding how one argues a case in its entirety. These are not just neutral decisions that have no impact.

When Mike talked about the issue of *The Advocate*, I thought of a situation that arose in the litigation of *Coker v. Georgia*.⁶⁰ In *Coker*, the Supreme Court faced the question of whether the death penalty was unconstitutional for rape and ultimately decided that it was. This was a very hard question. Feminists who were opposed to the death penalty decided to write an *amicus* brief. We didn't want to say that the death penalty shouldn't be for rape because rape isn't important. We wanted to say that the death penalty shouldn't be for rape for other reasons, such as the history of racism in the South and patriarchal attitudes towards women as property of fathers and husbands. We unearthed some wonderful historical material concerning petitions that groups of women in the South had written at the time of the lynchings for rape that said, "We stand against the death penalty for rape because

it's not really protecting us, it's reinforcing white male protection of our chastity." A number of women's rights organizations came together to work on that brief, and one of the struggles we had concerned the use of Susan Brownmiller's book, *Against Our Will*⁶¹ in the *amicus* brief. This was 1975, and one of the only empirical and sociological studies of rape from a woman's perspective was Susan Brownmiller's book. Some of the lawyers were dismayed when we cited it. They said, "This is not scholarly. This is not objective." We said, "This is documentation of what rape is like for the woman victim, and the impact it has on women as a class." It was important to use Brownmiller's book in order to support some of our points.

In *Coker* we were using Brownmiller's book because it was important for the Court to see a view of rape which was more grounded in women's experience, and which documented the picture more fully. Those Justices didn't know about rape. They didn't know what the experience was like. We were saying that it was important for them to know it.⁶² While Brownmiller's book may be shocking to them in a certain way, it's important as a consciousness raising vehicle. Today there's a lot more traditional authority which takes the same position as Brownmiller, such as Susan Estrich's book, *Real Rape*.⁶³ In some ways it's harder today. It is not 1974. *Off Our Backs*⁶⁴ is not the only material you have. You have a lot of feminist law review articles. You have law review articles on gay rights by people such as Mary Dunlap and Rhonda Rivera⁶⁵ and a lot of other "legitimate" scholarship that says similar things. That doesn't mean that there might not still be a reason to make the Court read *The Advocate* in some circumstances. Larry Tribe's not going to do that. Maybe you don't even want to do that in the main brief, but maybe you need to do it in an *amicus* brief to show that there is a wide diversity of experience here. It's important for the Justices to know that

60. 433 U.S. 584 (1977). The *amicus* brief urged that the death penalty for rape was "a vestige of an ancient, patriarchal view of women as the property of men, * * * a reflection of societal ambivalence toward the woman victim, and * * * a barrier to proper and vigorous enforcement of rape laws." Brief *Amici Curiae* of the American Civil Liberties Union, the Center for Constitutional Rights, The National Organization for Women Legal Defense and Education Fund, the Women's Law Project, the Center for Women Policy Studies, the Women's Legal Defense Fund, and Equal Rights Advocates, Inc., at 9.

61. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN & RAPE* (1975).

62. For further discussion of the need for the Supreme Court to hear different perspectives, see Minow, *The Supreme Court 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

63. S. ESTRICH, *REAL RAPE* (1987).

64. *Off Our Backs* is a feminist newspaper.

65. Rhonda Rivera is a professor at Ohio State, who has written on lesbian and gay rights issues.

experience. You think about it strategically. Who should say it? Where and when should it come in? I don't think you pretend that some of that other reality doesn't exist and try to "pass." I don't think the issues that we're talking about are issues where one can "pass" anymore. I think we're talking about issues that everyone realizes are deeply political, problematic, and difficult and which for me, politically, shape my sense of the strategy I use in a case. But again, I would suggest that it is something one has to think about in every situation as a lawyer.

PARTICIPANT:

There is something completely aside from the present discussion that I wanted to ask Michael. He talked about the adult adoption cases that he worked on and I wanted him to expound on the reasons for adult adoption.

LAVERY:

The reasons come from two areas. First, from my clients' perspective, it is to create a structure to fulfill their needs. Second, there are the legal reasons. The easier area is the legal one. The New York adoption statutes say that one person may adopt another. In the area of marriage, the statute doesn't say anything, but the case law doesn't support same sex marriage. So there is already an existing barrier to same sex marriage. Hence, people seeking a "legitimate," legally authorized relationship who don't qualify for marriage may choose adoption.

I did not go out and solicit the adoption clients. Before the first case, people came to me and asked me about adoption. It was an idea that they had come up with. Prior to the case here in Brooklyn, I had investigated the issue with the New York Surrogate. I had an interview with the adoption court. The Surrogate told me, "Oh yes, it's been done for years." There was this famous heart surgeon, he couldn't tell me his name, who adopted his protégé. There was a famous musician conductor who adopted his "friend." It's been done a number of times. The Surrogate's only requirement was that they know about it so that they could arrange the investigation so it would return the right results.

His first question when I went in to ask about adult adoptions was, "Are these two homosexuals?" And I said, "Does it matter?" He said,

"Yes, because if we know it and arrange it, it'll be okay, but if they hide it we won't approve it." The Surrogate ended his talk about the heart surgeon and the famous composer by saying, "Well, you know, these people all had their reasons. But if it were some truck driver on Christopher Street, we're not going to permit it." My reaction then was outrage! If you have money and power and you make a lot of waves, it's okay. But if you're the average guy on the street, no!

So two people approached me and asked if they could adopt each other. I told them that I didn't think it would be approved by the Surrogate. As I read the statute, it should be okay, but in my opinion it was probably a losing case. They said they were willing to try anyway. They didn't care about the publicity. They were interested in trying. I'm that type of lawyer, I was willing to spend the time, and there was nothing I could see that was clearly against it. They weren't afraid of the publicity, so we tried it. It was an idea that a number of people had always raised, so we decided, let's see what happens, let's run it up the flagpole.

I went to the court and got the papers. They didn't seem to know what was going on. They never did adult adoptions. The woman in the clerk's office said, "Gee, if you know Frank Sinatra, tell him he could adopt me anytime." So there wasn't any problem. They weren't terribly shocked. We filled out the papers. That was it.

In the case that I appealed, the individuals had a number of reasons for wanting the adoption. One of the men was a photographer. His life's work were his negatives, his slides—all that he had produced. He is fairly well-known in the particular field that he's involved in. He knew a number of other people, also artists, who had tried to will their estates, their slides, everything to their lovers. Either the family destroyed the work, there were challenges to the wills, or there were long hassles. These individuals wanted something to ensure that their work passed to their lovers, or at least gave them a better chance than just a will. They wanted a legal recognition of a relationship—whatever that relationship might be. Ultimately, I would suggest that their main reason was testamentary.

My argument before the courts has been that prior to the Victorian Era or the Post-Victorian Era, most adoptions, in the Roman tradition, were done in order to add to the blood line.

Victorians did not adopt children. After all, you didn't know who this person's parents were. You didn't know what sort of people they came from. If you were a charitable Victorian gentleman or a charitable Victorian family, you may have taken in a child and become that child's guardian, but you didn't adopt. Adoption is a relatively recent idea of bringing into your blood line people of unknown and certainly untested parentage. Adoption had always been for the continuation of relationships. That's why I argued it.

PARTICIPANT:

The reason I asked this question is because you had stated earlier that if someone could give you a good reason for a gay marriage, you would certainly litigate it. And I can't understand what the difference is between the arguments that were posed before the court in the adoption case that couldn't have been solved by gay marriage. Secondly, I suggest that it's an abuse of the judicial system to bring a case solely because the statute doesn't specifically prohibit the adoption of another adult. It is a waste of time. Certainly if you were litigating a gay marriage, although you have some precedents against you, you have the same argument that the New York statute doesn't specifically mention a marriage between a male and a female.

LAVERY:

You hit on the crux of a whole lot of things. That is, how do you interpret that which is not explicit? Should it be: a) that which is not explicitly permitted is thereby prohibited, or b) that which is not prohibited is permitted? Karst discusses this⁶⁶ in terms of the concept of personal privacy. Can a court blithely say that the lifestyle of a lesbian mother will affect a child negatively, or does someone have to prove that the lifestyle of the woman will negatively affect the child? The court may accept as a given that sodomy is an act which has been disapproved throughout the centuries and is therefore injurious to family life. Or the court may say, "Show us the proof that it is injurious." Are you saying, "It's a waste of time; how dare these people come before the court?"

PARTICIPANT:

No, I'm not saying that. You were saying that if a gay couple came to you with a real reason for getting married, or a good solid reason for getting married, you would take the case. I'm saying, weren't all the gay adoption cases, in effect, a way to circumvent the absence of a gay marriage? If that couple had approached you and, instead of asking if you could arrange an adoption, had said, "We want to be married," why wouldn't you have taken that case? It seems to achieve the same end.

LAVERY:

I'm really not an advocate of gay marriage. To me, and I stress "*to me*," marriage has certain parameters as an institution which are different from those of adoption. The effect of an adoption cannot be changed by the individuals, as it can in marriage. Marriage requires the intervention of the state. They are two historically different traditions. In many states, though not in New York, adoption is solely a matter of contract. It is a contractual relationship. In marriage, there is the concept of contract but there are also all those things about the state standing behind the marriage bed.

SCHNEIDER:

Mike, are you saying that the reason why you wouldn't have framed the case as marriage as opposed to adoption if these folks came to you is because . . .

LAVERY:

I think gay marriage is a loser.

SCHNEIDER:

All right, that's what I was trying to say. These folks came to you and they said, "We want to solve the ambiguity of our relationship through some form of legalization." Let's say that they were more explicit, they said, "I'd like to adopt my lover." You could have said, "I think a more effective way would be through marriage." Did you choose adoption because you believed it was a more persuasive argument?

66. See, e.g., Karst, Kenneth L., *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

LAVERY:

First, it was the client who chose adoption. And second, I did not suggest marriage because, in my opinion, it is a losing proposition. At the present time, considering case law both here and everywhere else, gay marriage is a loser. We had as much of a chance of getting a gay marriage approved as a cellulose cat has of chasing an asbestos rat through hell. But we had a fair chance of getting a gay adoption approved.

PARTICIPANT:

I realize that it was a loser based on past cases. All I'm saying is that the rationale is the same. And Mike said that if anyone came to him with a good reason for a gay marriage, he would take it.

LAVERY:

Yes, if someone would convince me. Most of these cases are done with little or no fee. In terms of fighting and spending time and effort, it's got to be something I believe in. I'm not going to make a charitable donation to a cause that I think is for nothing.

SCHNEIDER:

Any more questions?

PARTICIPANT:

I don't have a question, it's only a comment that Mary Dunlap made at the NYU workshop on gay and lesbian law. It was something that impressed me very much. It was very beautiful. She said, "Imagine yourselves not here among your peers, your gay and lesbian peers, but on the other side. On the side of those people that want to roast you on the stake. Imagine how they would fight against you and what they would say against you. That would give you a sense that what we should be doing here is not fighting each other but discussing strategies to fight to shape some progress." I think that it is a very illuminating discussion, but at least the tone is too hostile for me. I'd like to suggest that we should change the discussion to the issue of empowerment and directions for change.

PARTICIPANT:

My name is Joan Gibbs. I'm on the national staff at the ACLU. One of the things I wanted to raise, which you just began to hit on, is about negative comments made about Kluger's book, *Simple Justice*.⁶⁷ In my mind, that book and some of the things Mary Dunlap raised created a tension. One of the good things in Kluger's book, for people who haven't read it, is the way he documents the strategy that the NAACP Legal Defense Fund used in getting to *Brown v. Board of Education*.⁶⁸ They started out very systematically, I think, with law schools and churches, and then they moved on. And what I'm wondering, having worked in the NAACP, having had that as my model for all of my years of thinking about being a lawyer, is that maybe we should litigate systematically. Then the radical part of me says, "That's crazy." We should just go ahead, and I know that what you're saying is right. The thought of Tribe arguing *Bowers* really didn't bother me, because I knew that he was the one who was going to be selected. But in writing briefs, I've had arguments about the use of the term "homosexual." I have actually sat down and worked on briefs with lawyers from various organizations and have debated the use of the term "homosexual" versus lesbian and gay rights. So I'm wondering which of those two paths we should be following as a model. At times I sense LAMBDA goes between the LAMBDA Legal Defense Fund model, the strategic five year plan, versus the automatic, let's go full speed ahead argument. I vacillate between those two principal models.

DEWITT GREGORY:

Nobody knows the answer to that. It's going to be debated on and on. We've heard two sides of it. It depends upon a lot of things, some of which we may not even be conscious of. The more I listen to this discussion, the more I conclude that many of our differences are generational. As each year goes by, I think that about more and more things.

I've had the same argument with people at LAMBDA about whether, in a particular brief, one should use the term "gay" or use the term "homosexual." This was a few years ago. Now, at the time, I was not even sure the court would

67. KLUGER, *supra* note 43.

68. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

clearly understand what was being argued if the term of choice was used. It seems to me, that if I knew which term would result in a favorable decision, that's the term I would use. But I would get a favorable decision. They would not even use the term if it would get a favorable decision. They would prefer to use the term which would raise consciousness and revolutionize a racist, sexist, homophobic society. I simply don't think that revolution is best waged in the courtroom. I don't think you have the audience for it. I don't know what the answers are. I simply have a point of view and certain values. And I find some of the movement rhetoric empty, flawed and sometimes just dead wrong. Particularly when people speak as if they know what is true. There was a time when I knew a great deal more than I know now. And as the old rock song says: "But I was so much older then, I'm younger than that now." I find that I'm sure of less and less. I know that much of what I hear other folks say that they're sure of is not true. That is why I really think we ought to question and examine.

I don't relate to litigation as political theatre. I just don't relate to that. My training and experience suggests that litigation, the kind of litigation I'm interested in, involves advancing the rights of individual clients. Now if you have a client who wants to make a political point, fine. But in my view of the ethical obligations of a lawyer, you never make your political point at the expense of the client, or try to persuade the client that the political point is more important than the client's right. I say those things because I have seen lawyers do that. If I were to joke around I would say something like "In every poverty lawyer there's a raving maniac struggling to get out." But I'll be serious and say that that has happened, and it really is a danger. I have seen self-styled radical lawyers dealing with political issues at the expense of the individual client. When that happens, I think it is an abomination.

DUNLAP:

I am a self-styled radical lawyer who has committed the ultimate transgression in that I believe that one can seek favorable decisions and

raise consciousness and revolutionize the legal system all in one grand fell swoop. I will offer you as an example my representation of a relatively unknown client in a case called *Lesbian/Gay Freedom Day Parade Committee v. Immigration and Naturalization Service*.⁶⁹ There was a controversy as to whether they were called gay or lesbian/gay. In this case, we went to federal court in San Francisco in 1981, contending that the INS's policy of interpreting Section 1182(a)(4) of the Immigration and Naturalization Act⁷⁰ to exclude homosexuals from immigrating to the United States violated my client's first amendment rights. I heard the word "loser" in that case more often than I've heard it on this panel. Virtually everyone said, "That argument is a dead loser. It's the most absurd thing we've heard." Just about every self-styled moderate gay rights litigator in the San Francisco Bay area was buzzing with how completely outrageous and ridiculous such litigation would be. It was. It was outrageous, ridiculous, foolish, foolhardy, daring, challenging and delightful.

Three things made it delightful for me. One, that we conceived that the first amendment empowered my clients to hear from foreign nationals who were gay and lesbian, drawing from dictum in the original opinion about immigration of gays and lesbians, *Boutilier v. INS*.⁷¹ In that case a gay Canadian was deported, thanks to the decision of the U.S. Supreme Court in 1967. The Circuit Court, however, had talked about how if the INS means what it says about keeping homosexuals out of the United States, then Leonardo da Vinci, Michelangelo, Sappho and other interesting people wouldn't be able to come here.⁷² So we thought maybe we could get a judge to listen to a list of the people who would be affected by the exclusion of gays and lesbians from the United States. Nothing was more immediate in our minds than educating, using the litigation to educate. Now we could play all day with terms like "revolutionize." I think that the word has an obvious red taint. I like to use it for that reason, because it gets everybody up in their chair at 4:30, but the truth of the matter was, the primary verb in terms of activity in this litigation was "educate." Lots

69. 541 F. Supp. 569 (N.D. Cal. 1982), affirmed in part and vacated in part as moot, *sub nom*, Hill v. Immigration and Naturalization Service, 714 F.2d 1470 (9th Cir. 1983).

70. 8 U.S.C. 1182 (a)(4) explicitly prohibits aliens who are "afflicted with psychopathic personality, or sexual deviation, or

a mental defect[.]" from receiving visas or being admitted into the United States.

71. 387 U.S. 118 (1968).

72. *Boutilier v. INS*, 363 F.2d 488, 497-98 (2d Cir. 1966) (Moore, J., dissenting).

and lots of gay people didn't know that they were supposed to answer yes to the question, "Are you afflicted with a psychopathic personality?"

We had two clients, one from England and one from Mexico who had the audacity to come and say, "I'm a homosexual." The people at the airport said to one of them, "Well, we've got to get you a doctor." He responded, "No, I'm not sick. I'm a homosexual." They had to get a doctor to certify that he was excludable. They had to go to the Navy to get one because no civilian doctor would do the job. The absolutely vital key to our success in the suit was. . . . I would love to say it was my advocacy. I would love to say it was my client's bravado and willingness to take on the legal system, to take the bull by the horns and realize that one's politics are inseparable from the law, whether they're conservative law and conservative politics or radical law and radical politics. It was none of those things. It was U.S. District Judge Robert P. Aguilar⁷³ who proceeded to accept and advance the idea that the first amendment really did provide a right for U.S. citizens to hear from foreign gay and lesbian persons.

Indeed, we don't know Larry Tribe's sexual orientation. I don't know John's. I don't know Mike's. I happen to know Liz's because we're friends. I know some of yours because I know you. Everyone's premise is that Larry Tribe is straight. It ain't mine. What's key there is not what he is, but how "out" he is. It's not irrelevant. It's crucial. It's just as crucial as when Thurgood Marshall stood before the Supreme Court of the United States as a black man and argued *Brown v. the Board of Education*.⁷⁴ It is as crucial as when Ruth Bader Ginsburg argued *Reed v. Reed*⁷⁵ before the U.S. Supreme Court as a woman. Indeed Rehnquist knew how crucial it was because when Ruth Ginsburg came back on another occasion to argue against the exclusion of women from juries,⁷⁶ Rehnquist supposedly leaned over and said to her at the end of the argument, "I take it you're not satisfied with Susan B. Anthony's picture on the dollar." If you would

like to try to explain that situation to me without reference to gender, I'd love to listen.

The point is that our identities are vital to the directions in which we go and we cannot stay in our closets, whatever they're made of, whether the outside reads Harvard or anything else. We cannot stay in our closets. That is not to say that we all have to walk out of the closet in lock-step fashion with a label across our chest. But we cannot stay in them. No one can afford to stay in them.

That's what I'm getting at when I talk about translating personal experience into legal, political and educational strategy. My clients stuck their necks out, and I stuck my neck out, and Judge Aguilar⁷⁷ stuck his neck way out—because you know what the judges on the Ninth Circuit do when they get a case that's favorable to gays. They immediately embark upon a speculation about the sexual orientation of the judge that cited it favorably. "Ah, the guy's gotta be queer. He ruled for those queers." That's the level of unsophistication at which we will remain if we don't come out, if we don't speak up. I don't mean by "coming out" some sort of parody of the only way to come out, which is an act by which one comes out and it's all done. Coming out is a life-long process. Recovery from discrimination is a life-long, society-wide process.

On the airplane coming here I sat down with somebody who immediately engaged in the same activity that our earlier exercise involved. They sized me up. Who is this? What is this person? What's she made of? I can do a lot of different things about that. Sometimes I choose to preserve my intellectual privacy because I want to read or something, so I exchange a few pleasantries and I don't engage the person in conversation. They have the same choice. Sometimes when they ask me what I do I say, "I'm a lesbian and gay rights lawyer. I also do women's rights and I also represent disabled people," and their eyes widen for the most part and they're surprised. Then, very often we have a good, fulfilling, enriching, moving conversation, in which

73. The federal district court judge presiding over *Gay Parade Comm. v. INS*, 541 F. Supp. 569 (N.D. Cal. 1982).

74. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

75. 404 U.S. 71 (1971). In *Reed v. Reed*, Ruth Bader Ginsburg, who is now a judge of the U.S. Court of Appeals for the District of Columbia Circuit, argued that the State of Idaho could not give a preference to fathers over mothers in the

administration of the estates of deceased minors. Ginsburg succeeded in having the U.S. Supreme Court apply the fourteenth amendment's guarantee of equal protection in favor of women, for the first time in the history of the Court or the amendment.

76. See generally, *Duren v. Missouri*, 439 U.S. 357 (1979).

77. See *supra* note 73.

they tell me something equally important about themselves.

All of this is not to loft genderism or sexual orientation identification above all the other important things we can say about ourselves. It is to say that Adrienne Rich⁷⁸ is right about truth. Truth is an incredibly powerful thing. If we bullshit each other about who we are, and we come back with arguments which fake facts about the real relationships involved, which, with all respect, is what I heard in the debate about adult adoption if we come back with hostility, then somehow we missed the gist. In that sense there is a common premise here, that truth is good, that truth is not to be avoided. We tell all different kinds of truth. We differ with each other profoundly about how to tell it. But if we differ about whether truth matters, then we have a difference that is engulfing. I can't bridge that. I can't bridge the gulf with a gay lawyer who turns up on the other side of my INS case, who works for the government and whose job, he "guesses," is to keep people out of the country. I can't deal with a gay lawyer who is among those on the other side of my Gay Olympics case⁷⁹ whose job is to squish my little Gay Olympics clients in the name of the U.S. Olympic Committee, because, after all, we know where the power lies. I can't deal with the idea that the real world says Lawrence Tribe is greater authority on gay people than openly gay people.

Let's unpackage that. The point was made and made well by Mike; how come you people all did my exercise? I said, "Gender these," and you did them. By the way, I did not say call them male or female. I said, "Identify their sex." I thought some people would come up with some new sexes. I am ever in search. I've written an article on the subject.⁸⁰ It is my view that there are very many more than two sexes, but the legal system, as usual, can only see two. It's not a surprise. In any case, what I'm getting at is this. I have incredible respect and admiration for Lawrence Tribe. When his book⁸¹ first came out I was in Austin, Texas, also first coming out, and I dove into this treatise and thought, "God, this needed

to be written for a long, long time." Tribe wrote this beautiful book. I wrote him a letter. I said, "I love your book. It's beautiful." I love the preface, which says that it is fine ethical scholarship, to say where you're coming from. I say, right, it certainly is.

Ultimately, the most successful advocates before the U.S. Supreme Court (and I'm talking not just about favorable decisions, but processes which give the Court the grounds upon which to base the *next* decision, when they can be a little braver perhaps), are advocates who unite the emotional and the intellectual, the political and the personal. Successful advocates don't give in to phony debates about whether men's views of law are better than women's, or whether Blacks' views are better than Whites', or even whether conservatives' views are better than radicals'. We engage in phony debates out of fear of getting to more painful feelings, in and out of the law.

I want to offer just one more example of why it is so important to own up to how legal and fact situations affect us. This is an example involving the beloved and difficult William O. Douglas who wrote an opinion in a case called *Kahn v. Shevin*,⁸² a little known case except for those who take exception to sexism in the law and have dwelt on it. It is a case involving whether or not Florida's tax exemption for widows was constitutional. Douglas did this incredible turnaround. In *Frontiero*,⁸³ Douglas was with the plurality saying that sex is suspect, just like race. Sex is different from race, their histories are different, but in constitutional terms, these things are the same. When sex is a proxy for discrimination, you can't have it. In *Kahn*, Douglas turns around and upholds Florida's tax exemption for widows, despite the very clear demonstration that there were plenty of poor men and that the proper analytical variable was poverty and not gender. What you gotta know about Bill Douglas is what he says in his autobiography,⁸⁴ which is that when his father died and he was very young, his mother got ripped off by a lawyer. The lawyer took the five thousand dollars in life insurance that his father left behind. I think that William O. Douglas

78. See RICH, *supra* note 52.

79. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee, 107 S. Ct. 312 (1987).

80. M. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979).

81. TRIBE, *supra* note 30.

82. 416 U.S. 351 (1974).

83. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

84. W. DOUGLAS, *GO EAST, YOUNG MAN* (1974).

had a tremendous stereotypical attachment to the plight of widows arising from personal experience, which interfered with his ability to reach a doctrine of true equality and embrace it in that case. Now, let's not fault him and let's not belabor it and let's not pound William O. Douglas into the ground. The point I'm getting at is that none of us here can pretend that it isn't terribly important what we're doing at this workshop. Yes, I agree that it is absolutely a truth that personal experience translates into and affects our legal strategies, no matter how conscious we are. What we've been doing today is trying to make ourselves more conscious, and that is different, and that is special and that isn't everyday legal education. It should be, and it should've been long ago, and it's gonna be, as long as I'm educating.

SCHNEIDER:

Let me take Mary's last message and give another example of it and then I'll turn to John, unless other people want to speak. Mary is raising the question of dealing with who we really are. This is something that is not only important in the context we're discussing, but in the context of arguing to judges. Mary's example of Douglas and *Kahn* is a very good example. I wanted to tell you a story based on my own experience in a recent New Jersey Supreme Court case called *State v. Kelly*,⁸⁵ which I think reveals a very similar point. *State v. Kelly* involved the issue of the admissibility of expert testimony on "battered woman syndrome" in a case involving a woman who had killed her husband. I worked on this case while I was at the Constitutional Litigation Clinic at Rutgers Law School with a number of my students. We wrote an *amicus* brief and petitioned the court to let me argue the case as *amicus*. This was very unusual, but the court granted my motion to argue. It seemed that this was an important opportunity to take some of the arguments which we were developing as *amicus* and present them before the court.

In the course of researching the issues that we were going to present, we discovered an interesting opinion written by Justice Wilentz, who, as many of you know, is Chief Justice of the New

Jersey Supreme Court and a very progressive Justice. He is someone who is concerned about women's issues. He convened a very broad ranging Task Force on Women in the courts of the state of New Jersey.⁸⁶ In the course of our research we found an opinion of his in a case involving a man who killed his wife. In this case, *State v. Powell*,⁸⁷ there was nothing in the record to explain why the defendant might have killed his wife. Justice Wilentz supplied some explanation on appeal that made the man's actions seem reasonable. As we considered why he might have done this, we wondered about the issue of "male bonding." We perceived that in a situation involving a male defendant who had killed his wife, this Justice, who's as conscious about women's issues as you could expect a Justice to be, might have reflexively identified on some level with this man and developed an explanation for his actions.

Now, the importance of that, as I thought about that, was what we were asking the court to do in *State v. Kelly* was to recognize that the battered woman who killed her husband had nobody in the courtroom who was explaining her actions, who could identify with her and explain her experience and translate it to the jury. The jury would have trouble understanding her because of myths and misconceptions about battered women. They couldn't hear her story. They needed somebody else to translate and legitimate it to them, because nobody was "female-bonding" or "battered woman-bonding" with her in the courtroom. The jury wasn't likely to do that.

Well, I thought about that and I thought, "Could I possibly talk directly to the court about this issue when I argue this case?" So, as we normally did in the Constitutional Litigation Clinic seminar, we discussed our current cases, and talked about the strategy. I raised the question of talking directly to the court about this issue to the students in the seminar and to my colleagues on the faculty. Some people said, "Are you nuts? You can't do that. Justice Wilentz is clearly sympathetic. Why alienate him? It can only alienate him to raise the issue of his own experience and what it means to really have someone who is thinking about the defendant's situation in the courtroom. It can't help." I thought about that

85. 97 N.J. 178, 478 A.2d 364 (1984).

86. Loftus, *The First Year Report of the New Jersey Supreme*

Court Task Force on Women in the Courts—June 1984, 9 WOMEN'S RTS. L. RPTR. 129 (1986).

87. 84 N.J. 305, 419 A.2d 406 (1980).

and I thought, okay, that's probably the wiser approach. I'll try to see if I can do that.

The argument ended up taking several hours and they let me speak for quite a long time. Justice Wilentz was pushing to know why it was necessary to admit expert testimony on Battered Women's Syndrome. Despite the better judgment of my colleagues and my students, I decided that it was important to answer directly since he was talking to me directly. The court had let me argue the case as *amicus* knowing full well what my perspective was. I thought I should address the issue directly. In my experience, the best aspect of appellate argument is talking directly to the court by responding to the real concerns, not hiding behind the strengths and weaknesses of the case. So I did. I explained to Justice Wilentz my reading of this case, *State v. Powell*. I explained to him that I thought he might have unwittingly and unconsciously identified with the male defendant in that case, and that we needed an expert witness to translate the battered woman's experience in the same way. He seemed very surprised. He didn't really respond. It was hard for me to evaluate its effect. He didn't seem hostile afterward. He looked moved. It seemed to have gotten to him in some way.

Well, we won the case. The New Jersey Supreme Court issued an excellent broad-ranging opinion written by Justice Wilentz. *State v. Kelly* is the most useful opinion on the use of expert testimony in a Battered Syndrome case. I hope that speaking directly to him and suggesting that he consider something that he otherwise might not have thought about had helped. The issue of sex discrimination had not been discussed before the court in *State v. Powell*. If it had been, Justice Wilentz might have been sensitive to it. In *State v. Powell*, the legal issue had taken another form. It focused on imperfect self-defense and the court wasn't thinking about sex bias. Justice Wilentz wasn't thinking about why he might have subconsciously identified with a male defendant.

State v. Kelly could have had a different result. There's no question about it. Talking directly to a Justice was a calculated risk. I am not suggesting that it's a strategy one should adopt in every case. I am using it as an example to say that in some circumstances, and frequently in appellate argument (which really is your opportu-

nity to speak directly to the court), one has the opportunity to deal directly with what you anticipate the biases and attitudes of the judges to be. It is an opportunity to grapple directly with the court's biases. I don't think that I was confrontational or hostile. My argument was, "This is hard stuff and I understand that you're grappling with it. Let me give you an example of how important it is to have somebody there in the courtroom, thinking about the situation that the defendant is in. Think about whether you were able to relate differently to the *Powell* situation. You may have been there for *Powell*, even subconsciously. Nobody was there for Gladys Kelly." I think that this is an example of the way in which sensitivity to personal experience can be important from the perspective of both advocate and judge. Now I said I would turn to John.

DEWITT GREGORY:

Thank you. I guess to say what I said earlier in another way would be to say, "there's not truth in here." There are a variety of opinions. There's a fellow on our faculty, one of the first things he tells his classes is, "Don't believe anything I say. Don't believe anything anyone says." Sometimes he tells his classes things that aren't true so that they can't simply go away believing what he has said. I think that's good advice here also. If someone comes to hear things which makes them comfortable and to avoid disagreement which may be perceived as hostility or lack of love, I can imagine what the disagreements must have been when people were preparing for a case like *Brown v. Board of Education*.⁸⁸ I think it is also possible to disagree very strongly with someone's point of view without necessarily despising the person. I have very little time to spend despising people.

I really don't think that it was critical that a black man argued *Brown*. If he dropped dead the night before and a qualified white person argued it, I doubt the decision would have been different. As a political matter, I can see that it is incredibly important. I suspect that one of the reasons I realize it so strongly is because of my personal experience, being black. I'm not going to get into all the war stories, some of which I was telling out in the hall about having lips too thick to play the trumpet and having my kid brother's head rubbed for luck by the Wonder Bread man.

88. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

All I'm suggesting is that I don't think we should make such a lot of this. I guess I can tolerate more than some of the panelists. I mean the business of not being able to deal with a gay attorney on the other side of a case, well, I really don't understand that. Maybe I don't understand it because in a way maybe that condemns me, since I was representing wardens in some of the prison cases which convicted black folks. I'm really not sure. This whole business of "We must come out, we must come out." As I said at the beginning, that's what bothers me the most. The implications that if we talk about ways to translate personal experience we'll end up saying to people, you must translate personal experience and it is your obligation to do this, that and the other. I don't like musts. I don't like oughts. I suppose that I think people ought to do pretty much whatever they damn please, as long as it's not hurting somebody else. I can't see why some people should tell other people what they ought to be doing. I mean I always resent that when that happens.

I was up for tenure some years ago and one of the people who thought that he was going to be very influential in the tenure decision said to me, "John, you are not doing the kinds of things you should be doing in terms of your outside activities." Conceding that I was active in the American Civil Liberties Union and a number of other things, he said, "You should be representing migrant workers." I found that insulting. I consider that to be a form of the new slavery—Not only when Whites are telling Blacks what they ought to do, but when Blacks are telling Blacks what to do, or when gay people are telling other gay people, who happen to be lawyers, what they must do.

I resent it when a black student comes to me feeling terribly guilty because of having had an offer for a job in a large firm, and other black students, probably of less talent, are saying, "You shouldn't go there because you know that's helping the enemy. You shouldn't be representing corporations, you should be going into the community." Well if somebody wants to work in the community, and I have, that is that person's business. But if somebody doesn't want to, and doesn't want to use personal experience in the way that has been suggested, it seems to me that it is that person's right. I guess that's the reason there's only one organization which I have found

no problems with, no questions with, no conflict about and that's the Civil Liberties Union because I suppose that's the principle that they will always defend. They're never telling anybody what to do. They are simply saying you are free to do what you wish, as long as it doesn't harm anybody else and we will protect you all the time. Politics is personal. Politics is a matter of choice. What people are thinking is good politics today, is bad politics another time. I want to tell you to question everything you hear.

SCHNEIDER:

Any other comments?

PARTICIPANT:

I have a question for any one of the panelists. When you are before the court and you're arguing on a topic in which personal experience has generated a great deal of emotion for you, how do you control that and channel it in an effective way, given the impositions that are placed on you in the setting, the decorum of the court room, deference to the judge and opposing counsel. It was a problem I ran into during my moot court practice and it confronts other students as well.

DUNLAP:

It's a tricky balance. There are as many different styles that can make an argument effective as there are people in this room. I can tell right away when a lawyer does not believe in her or his position. I can feel it. So in that way, the passion and emotions that we're talking about today are crucial in advocacy. But the panel has focused on the visible thing, maybe the more rewarding aspects of litigation are preparing the brief and comprising the conceptual position.

Another place where the balance between one's own beliefs and experiences and one's lawyerly equipment comes into play is with a client, advising a client about options. It is so easy when a client trusts you to persuade them in a given direction but not as easy to live with the consequences. It seems to me that the point at which the lawyers are most likely to disempower their clients is at that juncture of projecting their personal selves. I like, for that reason, what Liz said consistently, which was that she was not Yvonne Wanrow. I am not my Lesbian and Gay Freedom Day Parade clients. I have a very real bond with

them and I don't mind a bit that the court happens to know that I'm an open lesbian. I will use that; it will be a source of strength for me. That's how I want it to be in my life and your lives and that's what I mean about coming out. To whatever extent anyone might've understood what I was saying about "shoulds" and "musts," I was speaking rhetorically, in the sense that these are things I believe we must do. I am no more or no less than one person saying these things.

DEWITT GREGORY:

Maybe I am out of touch with reality because I have really not had the sense that in order to represent a client effectively that I've had to believe in a client's cause. Of course I go back to my experience of representing a warden of Attica prison and nothing I did before that and nothing I did after would suggest that I believed in the cause of the warden in Attica prison. I don't believe that when I argued or opposed *habeas corpus* petitions, time after time in the Second Circuit, I don't believe that Mary could have detected whether or not I believed in the cause of avoiding jail releases. I really don't. I really *do* believe that if you are a good lawyer and you're reasonably smart, which is not too hard to be, and reasonably articulate and work hard enough, and the cause is not repugnant to you, that you can represent causes whether you're necessarily committed to them passionately or not.

As for the question of arguing before an appellate court, I give you a simple answer, which some might even think is simple-minded. I know that there are some things which I have to watch out for when I'm arguing an appeal. What I do is write myself a little note so that I don't do those things. For example, when I get emotionally involved, which is usually not with causes but with my own rhetoric, I start to talk too loud. So I write myself a note to quiet down and I put it on the podium. I also write myself a note to smile occasionally and not get so intense as I'm talking to the court. If you're going to do appellate advocacy these are simple techniques. I know they're not idle notions and all that, and you'll get different kinds of answers from intellectuals than from me. I'm just a country school teacher and that's the best advice I can give.

SCHNEIDER:

Any other questions? Go ahead, you haven't spoken before.

PARTICIPANT:

I'm just speaking as a country law student. I would like to request that some of the law professors here think about their students who are lesbian and gay and feminist, and not skip those portions of the cases that deal with their lives if they should come up in the courses because there's not enough time. Usually that's the excuse that we've been given. "There's not enough time to do these cases. You can read them at home." No one reads what's not assigned if they read at all. It's very difficult to discuss these cases. If this is the field in which we have chosen to work, it's very disturbing because we don't have one who is willing to talk about these issues. I don't think I'm getting the proper legal education. I don't care how smart I am or how logical I learn to be or how well I learn to think as a lawyer. I want some substance with it and I want it to stop being ignored.

DEWITT GREGORY:

It is not ignored in my classes, you may be sure.

PARTICIPANT:

That's very good, I'm very glad to hear it. As a dean, I would hope you would argue for that in all the courses where these issues come up.

DEWITT GREGORY:

A dean doesn't tell professors what to teach.

PARTICIPANT:

No, I didn't say that. I'm not asking for that. But I think that we often hear how important it is to have both sides of the argument to be able to make a well-informed decision. When one side is constantly left out I find it difficult to learn how to make those decisions and arguments.

PARTICIPANT:

I want to address myself to Professor Gregory. One of my questions has always been why some people do certain things. For instance, why did we actually follow Mary's command to "gen-

der" when we're free not to do it. It's because of the situation here that we did it, that is, we obeyed. For me, it is a mystery how there can be several million people who will follow the commands of government and kill other people even though they may not believe in what they're fighting, just because someone told them this is what they should do. The same thing applies to lawyers. There's an ethical code that says you have to represent your client to the best of your ability and this is true. You're also perfectly capable of making decisions and looking for certain kinds of cases which will advance a certain political interest that you have. I don't think a lawyer is neutral. I don't think the law is neutral. I was gay and I was Hispanic and a minority before I came to law school, and coming out I'm still gay and Hispanic. I think I will try my best both as an individual and as a lawyer to advance the interests of those two minorities to which I belong. I will not deny representation to the client, for instance, if he's assigned to me even though his interests may be contrary to mine. But I will damn well look for cases and damn well do everything I can to further the interests of my minorities. I think that is what Mary is getting at. But I think people must be political, must take a stand, must be personal and must be emotional about these issues. Because there's no such thing as objectivity. If you're being "objective" you're taking a side without realizing it.

DEWITT GREGORY:

I think there is objectivity, I just don't think there is neutrality and most of the time people say they are neutral. There is no neutrality but I think there can be objectivity.

DUNLAP:

Sounds like a grounds for an agreement here. I think we have come to one agreement this afternoon.

PARTICIPANT:

This doesn't relate directly to the law. It relates more to professionalism and the fight to be open in any professional study. I'm currently working for a federal civil service agency. I am also in my fourth year in the evening at Rutgers Law School. Rutgers is a very open, a very pro-

gressive school. It's been a terrific experience. In my workplace there are between ten and twelve gay people on the staff that I know. I am the only one that is open. I'm the one who gets all the gay flak. I'm the one who always has to be the gay spokesperson. I'm the one who always gets the sick jokes. The only people in my office who are really afraid of me are the other eleven gay people. And really, talking before about what we should and shouldn't be doing, we shouldn't tell people they should be coming out. We shouldn't tell people they should be up front. Damn it. I am really tired of carrying that burden by myself. I say that to these people, and they just look at me and say "you're right" or "you're idealistic" or "you're alienating everybody." They're cop-outs. It saddens me that this is a representation of the gay community. Sometimes I get really sick of the gay community because there are so many people who are proud that they pass. They went to a job interview and no one suspected. No one suspected anything. They took a woman to the Christmas party and passed as straight. This is just a personal comment. I am really tired of it.

DUNLAP:

I'm glad you made that comment. It was very powerful.

SCHNEIDER:

Comments? Other reactions? I don't know. The only thing that I can say in response to that is it seems to me that that's very poignant and a very telling note that comes full circle to where we started today. That separation really is hateful and how difficult it is to be in a situation where you are not able to fully express, through your work and through your way of living, the numerous dimensions of which you are as a person. I think what we're setting to do in our discussion today is to try to explicate and talk about the ways in which, as lawyers and as human beings, we can bring both sides of that painful separation together. It doesn't respond to the poignancy of the problem you're talking about, but it does at least say something about the on going struggle. If we talk more directly to each other about the difficulty of that, then perhaps we can facilitate a better integration for all of us as lawyers and as human beings. So thank you all for being here.

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