# Queer Identities / Political Realities

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# PREFACE

# QUEER POLITICAL IDENTITY IN THE NEW MILLENNIUM: A PREFACE TO CHANGE

BRUCE DRUSHEL AND KATHLEEN GERMAN

In her seminal work, Epistemology of the Closet, Eve Kosofky Sedgewick famously argued that the closet as metaphor for concealed sexual identity was such a durable structure that, no matter how many times someone either came out of it or was forced out of it, public fascination over minority sexualities only increased. In much the same way, it could be argued, however visible lesbian, gay, bisexual, transgender, or queer individuals become as political actors, and however settled social and cultural issues concerning their rights as citizens or freedoms as people become, the contesting of their identities seems to be only more energized. Within a few scant years of the riots at New York's Stonewall Inn that brought the gay rights struggles to prominence, lesbian and gay teachers soon found themselves facing state ballot issues that would have either forced them out of their careers or deeper into secrecy. And not long after San Francisco Supervisor Harvey Milk demonstrated that, not only could an openly-gay man be elected to political office, but be successful once elected, terror over the spread of HIV led to years of blame and stigmatization. When the U.S. Supreme Court ruled in *Lawrence v. Texas* that laws punishing private, consensual, sexual behavior were unconstitutional, Justice Antonin Scalia in his dissent predicted same-sex marriage would be the next front in what his fellow conservatives often have referred to as the "culture wars." Unquestionably, the performance of queer identity is a political act.

This collection examines the intersection of political leadership, media coverage, and sexual identity with particular emphasis on the negotiation of meaning between public behavior and private behavior in the United States. Centering on cases that illuminate key issues, it

questions assumptions about media representations of queer people and extends current theoretical understanding. Each chapter focuses on a specific case within the broader conceptual fabric of queer theory, media theory, or rhetorical criticism. Varied methodological approaches allow us to gauge public discourse of multifaceted controversies that involve same sex behavior.

History reveals frequent instances when private sexual behaviors surface to attract public interest. While the prejudices and discrimination against same-sex partnerships, whether casual or permanent, remain entrenched in United States culture, there have been instances when the public discussion is riveted on instances. This book argues that public interest changes when the partners in such relationships are of the same sex. The extraordinary public prejudice against same sex unions and public censure has been well documented in other research reports and continues to receive attention in other scholarly publications. This collection examines the unique intersection of political leadership, media coverage, and same-sex behavior.

As private behavior becomes part of the public discussion, the controversy surfaces ideologies of voters, political parties, and social institutions. When such behavior transgresses accepted social practices, especially when the behavior betrays a public figure's pretense to moral superiority, it calls into question previously unchallenged values. Each case in this book underscores the extent to which presumptive heteronormative values function as political tools to marginalize other sexualities and further broaden reactionary agendas. This broad focus is one of the fundamental issues of our generation. This collection of essays promises to extend the understanding of this issue in specific cases as well as theoretically.

Following the introduction by Jimmie Manning, in which he establishes the importance of addressing the treatment of sexual identity in media and broader culture and suggests how queer and media theory can be amplified by examining instances of the intersections of the personal and the political, the remaining chapters are organized into sections that provide thematic perspective on the political implications of queer identities.

In Part I, Post-Millennial Politics, five scholars address recent judicial, legislative, and electoral acts impacting the political position of queer people in the U.S. Jeffrey Nelson sets the stage with an analysis of the roles played by personal perspective and emotional appeals in *Romer v. Evans*, a pivotal U.S. Supreme Court decision that established the political context for current issues implicating queer identities by

establishing that LGBTQ persons cannot be relegated to a class of citizenship less than that enjoyed by others. Jennifer Anderson, Carrie Platt, and Richard Jones then employ rhetorical and framing perspectives to the same-sex marriage debate. Anderson's framing study finds political, rather than moral or economic, arguments to predominate in newspaper coverage in Virginia. Platt's essay argues that which of two major "sides" in the debate prevail – for or against marriage rights for same-sex couples – may depend upon which one best exploits new media technologies in the training of activists and the dissemination of messages. Using critical discourse analysis, Jones finds that the two sides both reinforce conventional views that privilege marriage as a preferred social structure. Finally, Alex Ilyasova argues the importance of ambiguity over visibility as strategies for the advocacy of such goals as non-discrimination in employment.

In Part II, The Political Becomes Personal, four scholars examine personal encounters at the intersection of politics and queer identities. First, David Terry reveals how the experience of being publicly deputized as queer by a performance artist led him to analyze connections among the erotics, politics, and aesthetics of queer, as well as the consequences of expansive construction of the term. In her essay focusing on lesbian identity in the rural mid-south, Margaret Cooper finds a problematic negotiation of gender expectations in which neither the proscriptions of a very traditional dominate culture nor the rigid archetypes reinforced in queer culture seem appropriate. Joseph Cook uses his experiences as a film festival programmer to explore systemic restrictions on cultural texts by elites that rely on narrow constructions of queerness and that privilege certain representations of queer identity. Finally, Cheryl Nicholas offers a highly personalized, compelling examination of the implications of lesbian identity in the contexts of post 9/11 immigration policy, expectations for academic freedom, and transnational coupling.

Part III, Identities in Motion, comprises pieces that examine negotiations of "queer." Both Michelle Kelsey, Joel Penney, and Amber Johnson are concerned with meanings in language and their political implications. Kelsey's focus is on in-group use of traditionally pejorative terms such as "faggot" and "queer," while Penney's is on the phenomenon of the so-called "*Brokeback* Punchline" – the use in mainstream culture of offensive humor involving characters and situations from the groundbreaking film *Brokeback Mountain* to cognitively process larger issues of queer visibility. Johnson uses the concepts of public space and counterpublic space to explore the boundaries between the deconstruction of dominant ideologies and their reproduction when African-American

slam poets use anti-gay language to critique broader social institutions and actors. Finally, Angelina Tallaj examines clashes in meaning when North American and Western European constructions of "gay," "lesbian," and "queer" are exported to the Dominican Republic and encounter traditional indigenous conceptions of sexuality and gender.

The essays by the editors in Part IV, When Identities Collide, investigate the identity conflicts inherent in public figures whose traditional heterosexual personas and conservative political agendas run headlong into the private reality of closeted homosexual behavior. Bruce Drushel examines ways in which the scandal connecting Republican Congressman Mark Foley with an underage male page was framed in coverage of the important 2006 Congressional elections by prominent national and international newspapers and all-news television channels. Kathleen German contrasts the public apologies of the Reverend Ted Haggard and Idaho Senator Larry Craig, asking how allegations of same-sex behaviors affect the nature of public explanations, commonly known as apologia. She investigates the roles of audiences, the nature of the denials, and ethical implications.

We propose in this volume to present, not a comprehensive exploration of the development of issues of queer identity and politics, but rather a more modest snapshot of the notable traffic through that intersection early in the 20th century. By way of acknowledgements, we are grateful to our families and friends for their love and support, to our colleagues for their encouragement and advice, to our authors for their patience and enthusiasm, and to Cambridge Scholars Press for their confidence in this project.

# INTRODUCTION

# BECAUSE THE PERSONAL *IS* THE POLITICAL—CONNECTING THE QUEER, THE POLITICAL, AND THE RELATIONAL

JIMMIE MANNING

> "We are not automatic lovers of self, others, world, or God… Love is a choice – not simply, or necessarily, a rational choice, but rather a willingness to be present to others without pretense or guile. Love is a conversion to humanity . . . the choice to experience life as a member of the human family, a partner in the dance of life, rather than as an alien in the world . . . aloof and apart from human flesh."
> —Carter Heyward

> "If I can't say, 'No,' with my full being, to your dehumanization of me; if I cannot assert my identity with the full force of my being, then I'm dead inside. I'm as good as dead."
> —Victor Lewis

Michael Warner's 1993 statement that "The appeal of 'queer theory' has outstripped anyone's sense of what exactly it means," (3) has transformed from a reflective statement to a prophetic one. In the face of current political and social climates, queer theorizing is perhaps more popular and accessible to academic audiences than ever before. Despite its continued popularity, however, *queer* is still contested as an academic term (and is still often ghettoized to the corners of academe). So what is *queer*? Is it a discrete, catch-all identity marker for anyone who is not heterosexual? Or is it a representation of a theoretical body that seeks to destabilize heterosexual identity? As enlightenment continues, does queer theory still have a radical edge? Did it ever? Or has queer theory been watered down, signifying little in academic discourses? What about the utility of queer inquiry? Does this play into the idea that queer theory engages more of the life of the mind than the life of the individual? And is

discussion of *queer* too reflexive, overly-focused on what it is or is not as opposed to being a scholarly tool?

Recently, when responding to a paper on lesbian parenting at an academic conference, I made a comment to the paper's author that I thought would be well-accepted: "I think you should incorporate an element of queer theory into your work, especially given that the parents you interview continuously talk about how they tell their kids they are different from other families but still the same. What an interesting, subtle destabilizing of heteronormativity!"

"I would feel really uncomfortable with that," the paper's author responded, much to my surprise. And, after I asked why, she explained, "I don't have any evidence that they were trying to do that. They were just trying to explain to their kids how they were different."

"Right," I said. "And yet they claim to be the same–so they are reshaping the identity of the American family. They're queering it."

"But I don't think that is what they were trying to do," the researcher argued. "I don't want to push something on them that they didn't say. As an interpretive researcher, I don't think I can make those claims."

We never did end up seeing eye-to-eye on this issue. I believe, though, that both of us understood the data in the same way even though our understanding of queer theory was different. I concur with the author that the lesbian parents she interviewed were not having these conversations with their daughters as a way of reshaping heteronormative functions of their culture; but by the simple act of being, in their engagement of talking with their family about who they are and what they are, they defied heterosexual expectations and definition and, whether they intended to or not, queered the world a little more. Thus, the misunderstanding between the paper's author and me was not about what was happening in the lives of these people—because, at their root, the data capture moments in the relational lives of families—but instead about what it means to queer, to be queer, and to understand the queering of relationships.

In interacting with the researcher, I was also reminded that queer theory is not as embraced as I sometimes imagine it to be, especially in social scientific realms. As many in academic circles tend to do, I oftentimes become immersed in work specifically related to my research agenda, and this leads me to take for granted that many share the same thoughts, values, and assumptions about identity, relationships, politics, media representations, and sexuality. While I am sure my views are not shared by all (even among my peers in queer theorizing), what I am unsure about is whether or not this is a problem. As important as it is for queer

theory to be understood, it is even more important that the spirit of queer theory be enacted through research, scholarship, and—most importantly—accessible public dissemination. It is these publics who must come to understand "that every part of our identity is both fluid and mixed, and is thus capable of transformation" (Gearheart, 2003, xxi). Queer theory is not about an individual or a set of individuals; but it is about all individuals who may be marginalized or excised. Its roots begin in gender and sexuality, but they expand to all realms of human existence where individuals who cause no harm to other individuals are nonetheless marginalized and ordered unruly through laws, media and public discourses, organizational policy, and everyday talk (or lack thereof). Queer theory's spirit, then, is about not accepting one way of living and being; it is about the radical notion that we are not trapped in essentialized identities. Who we are personally should not be subject to politics, even if that is the current way it is often socially established.

This discussion, in many ways, alludes to the renowned feminist phrase "The personal is the political" (Hanisch, 1970, 204). In coining the phrase, activist and scholar Carol Hanisch did not intend the term to reflect political campaigns or even political movements. As she shares in her reflections on the essay that entered the phrase into feminist discourse, "'Political was used here in the broard [sic] sense of the word as having to deal with power relationships, not the narrow sense of electoral politics" (2003, 1). Much like women's rights, queer rights have largely depended upon broader power relations; and, also like movements for women's equality, queer movements often calculate their victories based upon legal decisions, ballot counts, and even public endorsement of queer individuals or events. As many of the essays in this book will reflect, this can be demoralizing and frustrating for those who hunger for queer liberation. In terms of legal decisions, the "grudging acknowledgment of the court's authority to adjudicate the matter" (as noted by Justice Greaney in his concurring opinion in the 2003 *Goodridge v. Department of Public Health* case that decided marriage equality for Massachusetts) has led to frustration as the adjudicating of rights has often been avoided in the name of avoiding legal activism. Courts avoiding their duties to interpret equality is problematic, as it often forces people to vote on civil rights, weakening notions of inherent constitutional rights and lessening freedoms instead of exposing them. Of course, before some courts can intervene (and even after others do) legislators/politicians seize upon the opportunity to literally make a dehumanized personal the political as they make inherent rights an issue of morality. Fortunately, scholars (and media

commentators) have begun to unpack these legislative tendencies, and some of these interrogations appear in this collection.

Perhaps the personal/political connection being decided by legislators is the larger problem – especially since legislators tend to weight it toward the political. It is oftentimes easy to forget that behind the politics (and behind queer theory, even) are people – often people who are struggling to enjoy the same dignities, privileges, and rights to self-expression and full life as others. As Greaney (2003) also noted in his opinion,

> The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts.

Quite simply, Greaney notes the human aspects of the personal/political connection – structuring his statement to weigh in favor of the personal. While the full humanity of the statement is tempered by the necessary legal use of "plaintiffs" in the statement, the sentiment expressed in the rest of the language is overwhelming. Even the capitalist notions of initially listing queer individuals by their professions is given a humanity as the text following immediately reminds readers of the personal connections: queer people pray together, they have families, and they come in contact with every culture every day. They are human, and they deserve to be recognized fully in this right.

Unfortunately, making the personal the political dehumanizes the sense of humanity that equal rights allows the individual. Checking yes or no at a ballot box dehumanizes the people whose very rights are being legislated. People become political issues, and it might very well be the job of scholars and activists to let the stories behind the political images be known. For instance, one of the most touching and humanizing forms of queer enlightenment came in the form of Phyllis Lyon and Del Martin, a lesbian couple who finally married after 55 years of being partnered when California became the second state to allow same-sex marriage. Watching 80-something women exchange vows, reading the descriptions of them gently embracing and declaring their love, and listening to their reflections about how long they had been waiting for the right to marry and what marriage meant to them as a symbolic institution transformed the notion of marriage as a right to marriage as an expression of love. Instead of a political issue, people saw other people in love – a refreshing antidote to

negative attitudes toward queer relationships and much harder to deny than most equal rights rhetoric.

Of course, queer rights (and queer theory) is not about love; it—like feminism—is also about a person's right to do what they please with their body. It is about changing perceptions of what it means to love, connect, pleasure, and perform. Unfortunately, both politics and queer theory share the same strangling tendency to minimize the living, breathing, feeling humans that under gird the discourses surrounding them. In talks about fucking and radical gender expression and transformative notions of the iterative, it is often lost that all people—often framed as *bodies* in queer explorations or as *homosexuals* or *gays and lesbians* in the political—are at the center of both structures, and that the personal lives and liberties of everyone is at stake.

While politics and the political are the key foci of this collection, it is also important to consider (as this essay collection also does) how American media systems, and American people, continue to ask the wrong questions when it comes to sexuality in culture. While new media often allow for broader discussion of political issues and an ability to educate one's self and others about personal sexual issues, unidirectional media still lack sex-positivity. The pleasurable aspects of sex are often minimized in media representations in favor of foci on reproduction, sexually transmitted diseases, and the immorality of particular sex acts. One could grouse about how these important but overstressed issues are the result of abstinence-only sex education, the religious right, Republicans, or any other sinister force they can conjure up. Perhaps the best place to begin pointing fingers, however, is on the individual level and at our own practices. How do we respond to sexual topics as they emerge in public discourses?

I know that for me I often, in reaction to sexual representations in the media (or in everyday talk), find myself asking the wrong questions. For instance, when Britney Spears was photographed in November of 2006 nude from the waist down, captured by photographers after her skirt rode up while she was wearing no panties, I found myself asking many of the same questions I heard others asking as well: What was wrong with this girl? Why didn't she hurry and pull the skirt down? Doesn't she know better than to not wear panties with all of those photographers around? Was this a publicity stunt? Why does she shave herself down below? It took me a while to think to ask why photographers would be so crude as to photograph a woman who may have accidentally exposed her naked body. It is easy to say that the press needs these types of pictures to stay competitive and to make money – but that begs the larger question of what

the larger cost is in this social transaction; and whether or not this is acceptable to sex-positive individuals and the culture they hope to transform. After all, many of my female friends have shared with me that they do not always wear panties when wearing a tight skirt – not to be crude, or to be sexual, but to avoid panty lines. The criticisms wagered against Britney, in a sense, could be wagered toward many women that I know and respect.

To move this discussion to a queer-centric domain, the wrong questions were also asked about Senator Larry Craig; and it was largely the liberals, those who are stereotypically painted as tolerant, accepting, and enlightened about sex and sexuality who were mocking him. Larry Craig, of course, was literally caught with his pants down when he was arrested in a June 2007 airport restroom sting where men were allegedly engaging in same-sex sexual activity. In response, one Democratic blog asked, "Why is it that every anti-gay Republican turns out to be a closet case sicko?" Another teased about Craig "having his panties in a twist." Larger social discourses focused on questions such as whether Senator Craig is gay or straight; and about how terrible his wife might have felt about the situation. The former question completely excludes the possibility that Craig may be bisexual, thus stifling the full possibility of his sexual identity; and the latter indulges the tendency of American people to seek out the horror of a given situation and to imagine the terror of others who are not them. It also largely ignores the notion that his wife might have known (and, perhaps even more terrifying, might have been okay with it).

Also lost in this discussion are some questions not only important to sex positivity and queer rights, but to people in general. For instance, what is wrong with a world when a grown man feels that the only way he can find the sexual contact he craves is to seek it in an airport restroom? Or, if Craig could find sexual pleasures in other ways (not an unfair assumption, given his stature and power it is hard to imagine he could not), why did he seek out restroom sex? Did he find a pleasure and/or excitement in the possibility of being caught or exposed? Did he enjoy the anonymity of it all? And how much do we, regardless of our sexual identity, feel discomfort with the situation, and why? Are we responding to our own sexual frustrations, shames, or urges? Finally, what does it mean when the Democrats, the people who politically are supposed to be on the side of gay and lesbian rights (despite dominant statements suggesting same-sex marriages should not be legal) begin to attack "closet cases" and make offhand, pejorative statements stereotypically linking gay men with "panties"?

As scholars, we often leave these issues unaddressed. While much of the work done toward queer understandings has been valuable, and while marginalized voices have begun to be reclaimed, asserted, realized, and theorized, much work is to be done. This is true theoretically, methodologically, contextually, and interdisciplinarily. If queer theory is truly an umbrella theory (something, as noted in my first point, that is still being disputed), then it is time for the queer to go where it may not be welcome. For example, interpersonal communication is filled with heterosexual white able-bodied statistics about relationships; and a (very) small percentage of them deal with sexuality. This lack of interpersonal inquiry into human sexuality has been noticed (Foster, 2008), but it has not been remedied. Queering relational-dialectical theory or social exchange is a political act that takes the queer directly into the heart of the personal – or, in this case, the interpersonal. Of course, empirical studies about queer people are at a disadvantage given current statistical journeys that seek to capture large sample sizes – something not always available when dealing with minority populations. This means that much queer scholarship must be autoethnographic, interpretive, or otherwise qualitative. This essay collection takes a bold step in the right direction – a methodological richness is found here that is typically found in political scholarship or media studies but not in queer political studies. Appreciation for multiple methodological paradigms is crucial for the future of queer scholarship.

So is building intercontextual relations within disciplines and interdisciplinary reverence across them. Queer theory, politics, and relationships are studied in a variety of disciplines in a variety of ways, and understanding (and respecting!) these various approaches is key to allowing the full breadth of queer theory to be understood and to building upon these understandings. On the micro level, this includes engaging (and arranging) academic colloquia that cross disciplines and incite discussion; fostering dialogues in departments and universities related to queer issues; and, perhaps most importantly, bringing the discussion to public institutions and organizations dealing with (and even fighting against) queer rights and issues. As queer theory is disseminated across and from the ivory tower, it should be done so with the understanding of how it can help uncover or create bodies of knowledge (especially from minority perspectives) and whether or not the questions to be asked about the queer (or non-queer) can be expanded for (un)conventional understandings of and application to everyday life.

Of course, we can also seek to continue educating ourselves about queerness, politics, and how these affect our identities and our relationships regardless of our own sexual identities and personal politics.

Queer theory ultimately represents a spirit of understanding how we are essentialized and how we can undo this essentialization; begs questions about the imbalance between the personal and the political; and calls into multiple and thoughtful questions what we know about our own identities, about the identities of others, and how it all intersects. I hope the studies in this collection, as well as future additions to queer theory in various disciplinary contexts, soon add to the discourse.

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# PART I | POST-MILLENNIAL POLITICS

# CHAPTER ONE

# *ROMER V. EVANS*: A CRITICAL CASE FOR GAY RIGHTS IN AMERICAN JUDICIAL RHETORIC

JEFFREY A. NELSON

On May 20, 1996, the United States Supreme Court exerted a critical impact on the gay-rights movement and all of American society by striking down a provision in the Colorado Constitution adopted in a 1992 statewide referendum. That provision, known as Amendment 2, disallowed all existing local ordinances banning discrimination against homosexuals and it forbade any state or local action at the executive, legislative, and judicial levels that would provide legal protection for this group. The rationale for the amendment given by its backers included: (1) homosexuals deserve no privileges that most other Americans do not have, (2) individuals with religious or personal objections to homosexuality should not be compelled to treat homosexuals in the same way as others, and (3) the cost of enforcing nondiscrimination ordinances for homosexuals would take from funds aimed at insuring that civil-rights laws for worthy groups are enforced (Supreme Court 1996, 8).

The Court's *Romer v. Evans* ruling came about due to a suit filed against Governor Roy Romer and the state of Colorado by Richard Evans, a homosexual Denver municipal employee who claimed that the proviso deprived him of basic civil rights. He had several allies as plaintiffs including the cities of Denver, Boulder, and Aspen, whose gay rights laws would have been nullified had Amendment 2 taken effect. The Amendment, composed and championed by the organization Colorado for Family Values, had received solid popular support with more than 53 percent of the electorate voting for it. Regardless, after appeals from gay rights supporters, the Colorado Supreme Court granted a temporary injunction preventing Amendment 2 from taking effect until its compatibility with the United States Constitution could be verified.

Ultimately the Colorado Court struck the Amendment down, declaring that it violated the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution. Supporters of the 1992 referendum results appealed to the U.S. Supreme Court.

The historic importance of the finding centered on the fact that *Romer* stood as the first decision in which the U.S. Supreme Court treated favorably constitutional claims by homosexuals. Indeed, just 10 years earlier in *Bowers v. Hardwick* the Court had ruled that homosexuals, even in private, had no right to engage in certain sexual acts if the state forbade those acts (Supreme Court 1986). That the media understood the import of *Romer* to the American people came clear the next day as front-page headlines in newspapers across the country focused on the ruling (*NewYork Times* 1996; *Washington Post* 1996; *Chicago Tribune* 1996; *USA Today* 1996; *Los Angeles Times* 1996).

Commentators referred to the decision as "a transforming moment in the fight for equality for lesbians and gay men" (quoted in Hetter 1996, 28), a ruling that "will change the course of civil rights for years to come" (quoted in Mauro 1969a, 1A), and a judgment having "momentous symbolic value" (Kaplan and Klaidman 1996, 25). As important as anything else, the decision gave gay-rights leaders a foundation for arguing future legal disputes, an option those leaders planned to use often (Mauro 1996b). In fact, in three critical, nationally recognized court rulings made just a few years later—the 2003 U.S. Supreme Court *Lawrence* opinion striking down all laws banning private sexual acts between persons of the same sex (Supreme Court 2003), and the 2003 Massachusetts and 2008 California Supreme Court judgments permitting same-sex marriage in those states—the Justices pointed to *Romer* as a key precedent influencing their respective decisions.

Justice Anthony M. Kennedy wrote the 1996 opinion for the six-person majority. Those joining in the ruling included Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer. That none of those five Justices chose to write separately may well have indicated that they wished to display to the public absolutely full support for Kennedy (see Biskupic 1996), one sign of the Court's persuasive aim. Another sign may have shown in the remarkably brief six pages used to explain the finding, a concise statement having a better chance of actually being read by potential audience members (Hasian, Condit, and Lucaites 1996, 334). The majority opinion actually ran two pages less than the dissenting report. Further, the "unusual forcefulness" (Biskupic 1996, A12) with which Kennedy wrote suggested a firm resolve by the Justices that the legal community and the

general population should grasp the Court's unflinching faith in its conclusion.

The author would argue that Kennedy and his colleagues relied heavily on attention to emotional appeals. Certainly they considered rational arguments, and this study does not overlook an analysis of those arguments. However, the use of emotion gets considerable attention as well. The analysis begins with a review of research on the use of emotional appeals by the judiciary in laying down their decisions. Next comes an examination of the *Romer* majority opinion as well as the minority report written by Justice Antonin Scalia for himself and Justices Clarence Thomas and William H. Rehnquist, the justification for Scalia's inclusion being that an understanding of his rhetoric sheds a fuller light on the conduct of the majority. A final section speculates on the significance of the study for other research delving into judicial decisions and the manner of their construction.

## Emotion in Court Decisions

Investigators of judicial discourse have realized for some time that thoughtful, perceptive judges use not only analytical, rational methods to arrive at decisions but also rely on the standing of key individuals in the community as well as the current values and feelings of community members. Further, the values and feelings owned by the judges themselves certainly play a role in their decisions. A number of the most memorable findings in U.S. court history include not only carefully reasoned arguments but a notable display of the judges' personal sentiments regarding the primary issues (Wright 1964).

Emotions can aid a jurist in viewing an episode clearly, offering increased potential for a truly just ruling. In showing compassion for an individual, for example, a judge takes not just an impersonal look at another stock legal case but demonstrates concern for a specific human being, or even a group of which that person is a member. The judge in turn can provide audiences, both legal and popular, with more than a dry, seemingly distant understanding of events (Nussbaum 2004, 5-37).

Moreover, it would be difficult to comprehend the rationale for many legal practices without taking emotion into account. Unless the people have a generally similar view of what transgressions are outrageous, what harms cause deep-seated grief, what violations strike intense fear into persons' lives, society would have a troublesome time determining what damages deserve consideration under the law. Further, since no individuals are totally self-sufficient, all have areas of vulnerability to

which they react emotionally, a number of those areas covered under the legal code. To leave the emotional out of legal deliberations would be to ignore an essential part of the human experience (Nussbaum 2004, 7).

Certainly emotions can lead to poor decision making in the sense that they are irrationally employed. They may be grounded in false information as when a husband becomes angry with a neighbor in believing that the neighbor has wooed his wife but no such act has occurred. Or they may be grounded in false values as when a person reacts with great anger to a minor affront, for example a professor with a doctorate becoming furious with a student for addressing her as "Ms." instead of "Doctor." Jurists must decide how a reasonable person might be influenced by emotion in particular instances. While capable judges respond to existing social norms in the making of these decisions, in doing so the judges may either bolster these norms or cast doubt on their worth. Jurists then do not merely react to emotions, they interpret and evaluate them (Nussbaum 2004, 10-12).

Disgust serves as a powerful emotional tool for the citizens of a society. It involves revulsion at the thought of some object, action, or person contaminating the disgusted individuals. Often these individuals use disgust in an unreasonable way, as when members of a society's dominant group, not wanting to admit imperfection but searching for a kind of purity for themselves, lay weaknesses and disreputable traits almost exclusively with selected minorities. Since the minority population is contaminated, normal societal members must separate themselves from that group, one way of doing this involving the enactment of laws aimed at the restriction of the rights of the group members (Nussbaum 2004, 336-338).

Further, what seems unreasonable to one person may appear perfectly reasonable to another. A number of legal and social scholars believe that the enactment of policy based on what arouses disgust for most of society's citizens stands as an absolutely justifiable exercise. The argument goes that every community has the right to preserve itself and its moral traditions in order to maintain integrity and stability (Devlin 1965; Miller 1997). Thus societies throughout history have found it advisable to set a "boundary line between the truly human and the barely animal" (Nussbaum 2004, 107). Understandably the dominant group tends not to view favorably attempts by the branded minority to gain equal rights since such a gain allegedly would lessen the power and control of that dominant sector (Nussbaum 2004, 336-337).

All of the above matters need to be taken into consideration for the fullest possible understanding of the *Romer v. Evans* decision.

## The Majority Opinion

Apparently realizing the momentous, groundbreaking nature of his *Romer* opinion, one that would have a prominent place in the nation's legal history, Justice Kennedy began his finding in a grand manner: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'" Kennedy went on to note that Harlan's judgment in *Plessy v. Ferguson* went "unheeded then" (Supreme Court 1996, 2), a reference to the fact that the majority in the case upheld the government's interest in providing separate facilities for blacks and whites. Kennedy was implying a striking analogy here, for in the recent *Bowers* decision the Court majority had ruled that the state could write separate laws for heterosexuals and homosexuals, with the minority justices protesting just as Harlan had that all individuals should receive equal treatment. With the analogy fully extended, though Kennedy did not outwardly acknowledge it, if the majority in the 1954 decision *Brown v. Board of Education* for all practical purposes overturned *Plessy*, the majority in the existing *Romer* finding was rejecting the principles favored by the ruling judges in Bowers.

Of course some analogies lack validity since the items being compared do not merit comparison—they are of different natures (Burke 1984, 97; Ewbank 1996, 226). A number of prominent African-American civil rights activists have asserted that lesbians and gays have no right to parallel their movement with the African-American one for several reasons, two of the most prominent being that allegedly (1) lesbians/gays have not experienced the blatant, notorious discrimination suffered by the other group and

(2) African-Americans are born into their condition with no choice in the matter while gays and lesbians choose their lifestyle. Lesbian/gay leaders have vigorously disputed these contentions but nonetheless the two assertions have a number of backers in the African-American community (Vegh and White 2006). Apparently Justice Kennedy felt it unnecessary to take sides in the dispute but clearly he felt that the lesbian/gay and African-American movements had enough similarities that he could boldly liken them.

Another remarkable component of Kennedy's rhetoric, both near the beginning of his presentation and throughout, had to do with what he did not say. Never did he even mention the *Bowers* ruling. The significance of this omission comes clear when one realizes that *Bowers* at the time represented the only decision in the history of the Supreme Court in which

the justices concentrated their efforts on what civil rights homosexuals should have, and when one appreciates that Court members pride themselves on carefully considering legal precedent in making decisions. Though silence may hold a variety of significant rhetorical meanings (Brummett 1980; Lippard 1988; Noelle-Neumann 1974; Scott 1993), Kennedy's ignoring the 1986 judgment suggested that the Justice found that opinion lacking in sound judicial thought.

If judges frequently use history and social custom to support their views (Ewbank 1996, 226; Hagan 1976, 194-195; Wright 1964, 65), Kennedy set out to show that his finding was in step with present-day societal mores as well as the mores of Americans over the past three decades. He pointed to a number of specific court decisions and legal codes, in Colorado and other states, to demonstrate that the nation had taken an increasing interest in protecting citizens from discrimination based on "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability," "and in recent times, sexual orientation" (Supreme Court 1996, 5).

Contrary to recent custom, according to Kennedy, Amendment 2 "withdraws from homosexuals, but not others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." The Justice continued: "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres" (Supreme Court 1996, 4). To those backers of Amendment 2 who claimed that the enactment did no more than insure that homosexuals have no special rights, Kennedy answered: "To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint" (Supreme Court 1996, 5).

Kennedy admitted that the "Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." As long as the "law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legislative end" (Supreme Court 1996, 6). The Justice then relied on precedent in pointing to a number of cases in which courts ruled, for example, that individuals without experience in an occupation, those without specific professional accomplishments in a field, and those with criminal convictions could be treated differently from others. In this sense the Justice was defining the existing case, *Romer*, by

what it was not. He was also acting aggressively by anticipating an argument of the opposition—certain classes of people justifiably experience discrimination—and putting his audience on notice that this case did not allow for the justification of discrimination.

As Kennedy went on, he made it clear that in the Court's vision those responsible for the enactment of Amendment 2 had no valid rational basis for their action, certainly not within the purview of the United States Constitution. What they wanted, according to the Justice, was the degradation of a group upon which they looked with disgust. The following words from Kennedy hinted at his finding: "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group," with words in the next sentence being more pointed on the issue: "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects" (Supreme Court 1996, 6). The jurist proceeded to back his assessment by referring to statements made by federal judges in previous Fourteenth Amendment cases: "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect"; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision"; "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities"; and "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws'" (quoted in Supreme Court 1996, 7).

No doubt a judge must clearly and firmly attack the opposition in order to make the strongest case possible (Hunsaker 1978, 101), and Kennedy specifically pointed to the three major assertions by Amendment 2 backers: homosexuals merit no special rights, those with moral objections to homosexuality should not be forced to treat homosexuals as others, and the cost of enforcing rights ordinances would unnecessarily burden the state. To these claims the Justice replied simply: "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them" (Supreme Court 1996, 8). According to him then, Amendment 2's broad, far-reaching denial of homosexual rights could never be justified by any of these claims. In fact, he refused to rebut them individually, implying that they merely served as a façade for wholly disenfranchising the homosexual community. Laws aimed at groups with which society feels disgust, and the rationale for passing those laws, often seem legitimate on the surface, with the lawmakers working to demonstrate to the audience that they are doing no more than acting in sensible fashion (Nussbaum 2004, 3-5), and Kennedy

proposed that such was the case here, declaring: "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" (Supreme Court 1996, 8).

Evidently understanding that disgust with some others exists as a powerful emotion in many people's lives (see Nussbaum 2004), throughout his opinion Kennedy avoided scolding or denigrating those having a disgust for homosexuals. He admonished only those who wanted to translate this disgust into a legal status for homosexuals below that for the rest of the citizenry.

## The Minority Opinion

Writing for the three-person minority, Justice Antonin Scalia employed a rhetoric just as forceful for his side as Kennedy had used for the other. The rhetoric's intense tone showed at the very beginning of Scalia's commentary: "The Court has mistaken a Kulturkampf for a fit of spite"; then, "That objective [Amendment 2], and the means chosen to achieve it, are . . . unimpeachable under any constitutional doctrine hitherto pronounced" (Supreme Court 1996, 8); "This Court has no business imposing upon all Americans the resolution favored [by the Court's majority]" (Supreme Court 1996, 9).

Later Scalia warned that the people of Colorado who passed Amendment 2 acted more rationally than the Court's majority who declared the Amendment unconstitutional. According to Scalia, the people simply used good common sense in refusing to give homosexuals "preferential treatment" while the Court's opinion, based on the notion that there is "something special" about the homosexual sector, "is so long on emotive utterance and so short on relevant legal citation" (Supreme Court 1996, 10). In the Justice's view the Court majority, in acting on its feelings for homosexuals, skipped over important legal-rational considerations relevant to the case.

Scalia pointed to *Bowers v. Hardwick* as one crucial matter his opponents on the Court failed even to mention. Their failure in this regard became more understandable seven years later when in *Lawrence v. Texas* the same six Justices responsible for the *Romer* decision overruled *Bowers* and attacked that 1986 opinion as poor judicial practice. *Bowers*, as noted earlier, allowed governments in the nation to bar homosexuals from engaging in certain sexual acts. Since *Bowers* up to that point represented the only Supreme Court decision focused almost exclusively on homosexuality, providing a neat and clear precedent, it is understandable that Scalia turned to it for backing. And *Bowers* played nicely into Scalia's