



## **Chapter 5: The Legacy of Discriminatory State Laws, Policies, and Practices, 1945- Present**

The explicitness and pervasiveness of the history of government discrimination against LGBT people has been well researched and documented in recent years.<sup>1</sup> It is a history of discrimination that is difficult to overstate. Understanding this history is important for three reasons. First, the breadth and explicitness of discrimination in public employment partially explains why employment discrimination against LGBT people is so widespread and persistent today in both the public and private sectors. Second, the history of discrimination based on state laws, policies, and practices explains not only why the patterns of discrimination in the public and private sectors are similar, but why discrimination in the public sector has, if anything, been more prevalent than in the private sector. Finally, it is a recent history with legacies that extend to the present day.

This chapter begins by providing a short summary of two intertwined parts of this history— explicit purges of homosexual employees by federal and state governments in the 1950s and 1960s and state sodomy laws that provided a justification for public and private employers to discriminate against LGBT employees. The chapter concludes by tracking two legacies of this history that connect the present with the past: 1) the use of state sodomy laws to

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<sup>1</sup>DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003* (2008); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (University of Chicago Press 1998) (1983); KAREN L. GRAVES, *AND THEY WERE WONDERFUL TEACHERS: FLORIDA'S PURGES OF GAY AND LESBIAN TEACHERS* (2009); ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1990); RALPH S. BROWN JR., *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* (1958). FEDERAL GOVERNMENT (2004); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003* (2008); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (University of Chicago Press 1998) (1983); KAREN L. GRAVES, *AND THEY WERE WONDERFUL TEACHERS: FLORIDA'S PURGES OF GAY AND LESBIAN TEACHERS* (2009); ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1990); RALPH S. BROWN JR., *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* (1958).

justify the exclusion of LGBT people from state and local law enforcement and 2) moral fitness test requirements for professional licenses that barred LGBT people from public and private employment, in particular in education.

### **I. Purges of LGBT Public Employees And Explicit Discriminatory Laws and Policies**

Purges of LGBT public employees by federal, state, and local governments in the 1950s and 1960s and the criminalization of same-sex behavior are two separate but intertwined foundations of employment discrimination against LGBT people in the public and private sectors. While the purges of employees were, in part, motivated by political considerations and moral disapproval of homosexuality, criminal laws greatly facilitated that political agenda and the expression of those beliefs. Purges of government employees often involved coordinated efforts by law enforcement and civil administrators to expose “closeted homosexuals,” charge them with crimes based on private, consensual behavior, and expel them from employment. This governmental policy also served as a model for discrimination by private industry.

The federal government created and popularized justifications for excluding “homosexuals” from the workplace and then state, municipal and private employers followed suit.<sup>2</sup> Between 1946 and 1969, witch hunts for LGBT public employees by their employers meant they were fired *en masse*, not on an individual basis. While these purges saw thousands of employees fired, thousands more were investigated and harassed, and hundreds of thousands of employees were forced to swear that they were not homosexual, forcefully sending the message to all LGBT public and private employees to stay in the closet.

#### **A. Purge of Federal Employees**

Purges of government employees began in the federal government, but were soon copied by state and then municipal employers. The implementation of required “loyalty oaths,” a

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<sup>2</sup> See WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 73-108 (2008).

vehicle that spread the impact of the purges to most of the public sector and much of the private sector, eventually impacted as much as 20 percent of the U.S. workforce.

From 1947 to 1961, more than 5,000 allegedly homosexual federal civil servants lost their jobs in the purges for no reason other than sexual orientation, and thousands of applicants were also rejected for federal employment for the same reason.<sup>3</sup> During this period, more than 1,000 men and women were fired for suspected homosexuality from the State Department alone - a far greater number than were dismissed for their membership in the Communist party.<sup>4</sup>

The Cold War and anti-communist efforts provided the setting in which a sustained attack upon gay men and lesbians took place.<sup>5</sup> The history of this “Lavender Scare” by the federal government has been extensively documented by historian David Johnson.<sup>6</sup> Johnson has demonstrated that during this era government officials intentionally engaged in campaigns to associate homosexuality with Communism: “homosexual” and “pervert” became synonyms for “Communist” and “traitor.”<sup>7</sup> LGBT people were treated as a national security threat, demanding the attention of Congress, the courts, statehouses, and the media.

In February of 1950, Deputy Undersecretary John Peurifoy testified before a subcommittee that 91 State Department employees dismissed for “moral turpitude” were homosexuals. After this hearing, Republicans made national security the centerpiece of their

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<sup>3</sup> JOHNSON, *supra* note 1, at 166-67.

<sup>4</sup> Edward L. Tulin, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 TEX. L. REV. 1587, 1598, n. 64 (2006) (citing DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004))(noting that from the period 1947 to 1953, 402 of the 654 dismissals from the government on the grounds of disloyalty or security threats were tied to homosexuality—more than 60%).

<sup>5</sup> D’EMILIO, *supra* note 1, at 40.

<sup>6</sup> JOHNSON, *supra* note 1.

<sup>7</sup> See JOHNSON, *supra* note 1, at 30-38. One senator said this: “You can’t hardly separate homosexuals from subversives. Mind you, I don’t say every homosexual is a subversive, and I can’t say every subversive is a homosexual. But a man of low morality is a menace to the government, whatever he is, and they are all tied up together.” *Id.* at 37-38 (quoting a senator leading the anti-homosexual witch-hunt).

strategy to discredit the Truman administration,<sup>8</sup> accusing it of running a government filled with homosexuals. The Truman Administration responded by adopting a loyalty security program to weed out Communists and “homosexuals and other sex perverts.”<sup>9</sup> It investigated 382 civil servants (most of whom resigned) in the first seven months of the program.

At the same time, the U.S. Senate created a subcommittee, chaired by North Carolina Senator Clyde Hoey, to evaluate the threat homosexuals presented to public civil service and national security.<sup>10</sup> In December 1950, the Hoey Subcommittee issued its report, entitled *Employment of Homosexuals and Other Sex Perverts in Government*, unanimously concluding that “those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal Government.” In the committee’s view, “homosexuals and other sex perverts” should be barred from civil service positions, those who were already employed should be fired, and the government should expend resources to aggressively ferret them out.<sup>11</sup>

According to historical scholar Robert Dean” “The result was a Lavender Scare... linked to the anticommunist crusade ...complete with congressional investigations, inquisitorial panels,

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<sup>8</sup> D’EMILIO, *supra* note 1, at 41 (citing N.Y. TIMES, Mar. 1, 1950, at 1).

<sup>9</sup> Legal scholar Edward Tulin describes the Republican Party strategy: Within a month after Peurifoy’s testimony, the Republican party organized a political strategy based on what the Republican National Chairman termed the “homosexual angle.” Tulin, *supra* note 4, at 1601 n. 84 (citing *Perverts Called Government Peril*, NY Times, Apr. 19, 1950, at 25)). In a newsletter sent to 7,000 Republican party volunteers, Chairman Gabrielson identified “sexual perverts” as a serious danger to the country, and further implied that because the national media would be unable to give a full, uncensored view of the danger, this responsibility would fall to the Republican faithful. Tulin, *supra* note 4, at 1602 n. 85 (citing D’EMILIO, *supra* note 1, at 41-42). As the midterm congressional elections approached, “[t]he primary issue [became] the [Republican] charge that the foreign policy of the U.S., even before World War II, was dominated by an all powerful, super-secret inner circle of highly educated, socially highly placed sexual misfits in the State Department, all easy to blackmail. While animus against homosexuals was certainly not confined exclusively to the Republican party, capitalizing on public concern about the Communist-homosexual threat was a central tenet of the party’s national political strategy. Tulin, *supra* note 4, at 1602 n. 86 (citing NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 258, 259 (1995).

<sup>10</sup> See generally JOHNSON, *supra* note 1, at 101-18 (providing a thorough account of the subcommittee’s investigation, the “evidence” it ignored, and its report).

<sup>11</sup> S. COMM. ON EXPENDITURES IN THE EXEC. DEP’T, SUBCOMM. ON INVESTIGATIONS, 81ST CONG. 2ND SESS., *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT* 4527-4528 (Cong. Rec. Vol. 96 1950). The report stated “It is the opinion of this subcommittee that those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal Government. This conclusion is based upon the fact that persons who indulge in such degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust.”

executive branch ‘security’ doctrine, guilt by association, threat of punitive exposure, ritual confession, the naming of names, and blacklisting.”<sup>12</sup> Max Lerner, in a New York Post column entitled “Panic on the Potomac,” also compared the effort to Cold War “witch hunts.” He wrote, “The Senators call it the ‘purge of the perverts.’”<sup>13</sup>

The immediate impact of the purge on the careers of civilian government workers was dramatic. Under Truman’s loyalty-security program the number of homosexuals dismissed by the government each month went from an average of five to more than sixty per month.<sup>14</sup> Between 1947 and 1952, the State Department dismissed homosexuals for “security reasons” at about twice the rate of any other security or loyalty risks, including communists.<sup>15</sup> In 1951, the State Department fired 119 employees for homosexuality, and only 35 as other security risks (Communists); the figures were 134 and 70, respectively, in 1952.<sup>16</sup> By 1953, the Truman State Department claimed to have fired 425 employees for “allegations of homosexuality.”<sup>17</sup>

The Eisenhower Administration (1953-61) expanded Truman’s policies.<sup>18</sup> In April 1953, President Eisenhower issued Executive Order 10,405, which officially added “sexual perversion” as a ground for investigation and dismissal under the federal loyalty-security program.<sup>19</sup> Eisenhower’s executive order expanded the government’s anti-homosexual policies and

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<sup>12</sup> ROBERT D. DEAN, *IMPERIAL BROTHERHOOD: GENDER AND THE MAKING OF COLD WAR FOREIGN POLICY* 63-96 (2001).

<sup>13</sup> BERUBE, *supra* note 1, at 269, 269 n.25 (citing Max Lerner, *The Washington Sex Story: #1 – Panic on the Potomac*, NEW YORK POST, July 10, 1950, at 4).

<sup>14</sup> BERUBE, *supra* note 1, at 268-69 n. 24 (citing D’EMILIO, *supra* note 1, at 44).

<sup>15</sup> BROWN, *supra* note 1, at 56.

<sup>16</sup> See D’EMILIO, *supra* note 1, at 44.).

<sup>17</sup> Brown, *supra* note 1, at 258 n. 4 (citing *Departments of State, Justice, and Commerce Appropriations for 1954: Hearing before the Subcomm. of the H. Comm. On Appropriations*, 83d Cong. 114 (1953) (testimony of John William Ford).

<sup>18</sup> JOHNSON, *supra* note 1, at 119-46.

<sup>19</sup> Exec. Order No. 10,450 § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953).

procedures to include every agency and department of the federal government. This affected the job security of more than six million government workers and armed forces personnel.<sup>20</sup>

In the next two years, more than 800 federal employees resigned or were terminated because they had files indicating “sex perversion,” which typically meant charges—not convictions— of loitering, solicitation, or disorderly conduct.<sup>21</sup> These figures understate the number of gay men and women who lost jobs, as they exclude employees who were given the option of resigning quietly and applicants for jobs in the civil service. As a result of Eisenhower’s Order 10,450, an FBI report or background check was compiled for each existing federal employee and every job applicant. Between 1947 and 1950, the FBI denied government employment to 1,700 applicants because they had “a record of homosexuality or other sex perversion.”<sup>22</sup>

The methods used to carry out the investigations were sweeping in their scope and intrusiveness. One scholar describes some of the methods:

[T]he State Department accelerated and broadened its efforts to expose and fire homosexuals. “Skilled” investigators were charged with interrogating every potential male applicant to discover if they had any effeminate tendencies or mannerisms.<sup>23</sup> ...Polygraphs were widely employed when an applicant or employee was accused of homosexual behavior and denied it.<sup>24</sup> ...The program

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<sup>20</sup> BERUBE, *supra* note 1, at 270.

<sup>21</sup> Under Executive Order 10,450, the Civil Service Commission records for the period from May 1953 to June 1955 list 837 cases relating to “sex perversions”, including 147 in the State Department. See BROWN, *supra* note 1, at 258 n. 4 (citing *Departments of State, Justice, and Commerce Appropriations for 1954: Hearing before the Subcomm. of the H. Comm. On Appropriations*, 83d Cong. 114 (1953) (testimony of John William Ford)).

<sup>22</sup> D’EMILIO, *supra* note 1, at 44.

<sup>23</sup> Tulin, *supra* note 4, at 1602 n.87 (citing JOHNSON, *supra* note 1, at 73).

<sup>24</sup> *Id.* at n. 88. (citing JOHNSON, *supra* note 1, at 73)( noting that in addition, two staff members were exclusively assigned the task of investigating suspected homosexuals. They would comb financial and penal records and order

was intended to leave no stone unturned, whether on American soil or abroad. Inspectors sent to every embassy, consulate, and mission were given special training sessions on “methods used in uncovering homosexuals,” instructed to be “continually on the alert” to discover homosexuals, and asked to brief others on the topic during their tours of inspection. A truly radical change had come over American government, sweeping through not only the State Department, but throughout all the agencies of the federal government.<sup>25</sup>

To identify homosexuals in public employment, the FBI sought out state and local police officers to supply arrest records on morals charges, regardless of whether there were convictions; data on gay bars; lists of other places frequented by homosexuals; and press articles on the largely subterranean gay world. Even friendship with a “known homosexual” subjected individuals to investigation. The U.S. Post Office established a watch on the recipients of physique magazines, subscribed to pen pal clubs, and initiated correspondence with men whom they believed might be homosexual. If their suspicions were confirmed, they then placed tracers on victims’ mail in order to locate other homosexuals.<sup>26</sup>

The reach of federal government discrimination was extended by the routine requirement that all private companies contracting with the federal government have similar policies and

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surveillance, following the extensive protocols laid out in a nine-page section in the State Department procedural manual).

<sup>25</sup> *Id.* at n. 89 (citing JOHNSON, *supra* note 1, at 75).

<sup>26</sup> D’EMILIO, *supra* note 1, at 47 (citing J. Edgar Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 NORTHWESTERN UNIV. L. REV. 333-47 (1954) and information from documents obtained from the FBI under the Freedom of Information Act, File Classification nos. 94-843, 94-1001, 94-283, 100-37394, and 100-45888 and General Correspondence, vol. 1, 1965, ACLU papers).

procedures to discover and fire homosexual employees.<sup>27</sup> For example, during this period the number of direct federal employees of the Atomic Energy Commission (“AEC”) was approximately 7500. At the same time, employees of Atomic Energy contractors numbered between 75,000 and 150,000.<sup>28</sup> In the five year period ending December 31, 1952, 400,000 investigations were made by the AEC.<sup>29</sup> In 1955, the General Counsel of the Department of Defense estimated that the number of private employees of Defense Department contractors investigated under the program was between two and three million.<sup>30</sup>

Policies based on the government models were adopted independently by private companies and private organizations such as the American Red Cross, which “summarily dismissed” employees involved in homosexual conduct.<sup>31</sup> This period also saw the growth of a vast system of tests and standards to determine the suitability of employees. During the 1950s, more than twelve million workers, or slightly more than 20 percent of the labor force, faced loyalty-security investigations.<sup>32</sup> Within only a few years, anti-homosexual policies had spread from the federal government to nearly all levels of employment in the United States.

At the same time, the Department of Defense and Civil Service Commission also established procedures to prevent the re-employment of “sexual perverts” in any government job. If homosexual employees refused to resign, they would be charged, investigated, and fired, with

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<sup>27</sup> BROWN, *supra* note 1, at 61. *Loyalty and Security*, 61, *See, e.g.*, AN ACT FOR THE DEVELOPMENT AND CONTROL OF THE ATOMIC ENERGY, 60 Stat. 755, 42 USC 1801, Aug. 1, 1946, requiring “no contract shall be made .. unless ... the contractor or prospective contractor agrees in writing not to permit any individual to have access to restrictive data until the FBI shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual.”

<sup>28</sup> BROWN, *supra* note 1, at 61.

<sup>29</sup> BROWN, *supra* note 1, at 63 (citing ATOMIC ENERGY COMMISSION, FOURTEENTH SEMI-ANNUAL REPORT 70-71 (1953)).

<sup>30</sup> BROWN, *supra* note 1, at 70, 179, 179 n.16.

<sup>31</sup> BERUBE, *supra* note 1, at 270, 270 n. 30 (citing *Are You Now Or Have You Ever Been a Homosexual?*, ONE Apr. 1953, at 5-13.) The Security Division of the American Red Cross described its antihomosexual policy before the Crittenden Board in 1957. RED CROSS POLICY, CRITTENDEN REPORT 54.

<sup>32</sup> D’EMILIO, *supra* note 1, at 46 (citing Ralph S. Brown Jr., *Loyalty-Security Measures and Employment Opportunities*, BULLETIN OF THE ATOMIC SCIENTISTS, Apr. 1955, at 113-17 and BROWN, *supra* note 1); ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953).

their names reported to several civilian and military offices.<sup>33</sup> In 1951 and 1952, national registration laws were introduced in Congress that would set up a federal pool of the names of everyone who had been identified by cities, states, and the armed services as “sexual psychopaths” under laws that mainly applied that term to homosexuals.<sup>34</sup> Another way federal anti-homosexual policy spilled over into the private sector was by sharing police and military records with private employers. For these reasons, a person discharged from a federal agency as a “sex pervert” often found himself blacklisted by private employers as well.<sup>35</sup> At the end of the period of federal purges the threat to the livelihoods of federal employees reached absurd lengths. For example, in 1969, the U.S. Court of Appeals for the Tenth Circuit upheld the firing of a janitor’s assistant who worked for the Post Office because he had been convicted of “engaging in a lewd act” with another man.<sup>36</sup>

## **B. Denials of Federal Security Clearance**

As described above, Executive Order 10450, issued by President Eisenhower in 1953, modified the federal loyalty program to include “sexual perversion” as a basis for denial or revocation of security clearances.<sup>37</sup> As a result, federal agencies used “sexual perversion” as a basis for denying security clearances to LGBT people.<sup>38</sup> From the 1950s to the present, the eligibility of LGBT people for clearance has depended on changing interpretations of “sexual perversion.”<sup>39</sup>

In 1995, the United States General Accounting Office issued a report entitled “Security

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<sup>33</sup> BERUBE, *supra* note 1, at 269, n.26 (citing REPORT OF HOMOSEXUAL CASES – CIVILIAN EMPLOYEES, JUNE 14 TO DECEMBER 4, 1950, Folder: “230.741 (1948-1949-1950),” Box 3593, Classified Decimal File 1948-50, RG 407.)

<sup>34</sup> BERUBE, *supra* note 1, at 269, n.27 (citing *Are You Now Or Have You Ever Been a Homosexual?*, *supra* note 31.)

<sup>35</sup> ESKRIDGE, *supra* note 1, at 103.

<sup>36</sup> *Vigil v. Post Office Dept. of U.S.*, 406 F.2d 921 (10th Cir. 1969).

<sup>37</sup> 18 FR 2489 (Apr. 27, 1953).

<sup>38</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, GAO REPORT: SECURITY CLEARANCES: CONSIDERATION OF SEXUAL ORIENTATION IN THE CLEARANCE PROCESS, at 2 (Mar. 1995)(hereinafter “GAO report”).

<sup>39</sup> Although Executive Order 10450 has been amended several times, sexual perversion continues to be a criterion for security clearances. GAO report at 2.

Clearances: Consideration of Sexual Orientation in the Clearance Process” (“GAO report”) pursuant to a congressional request to review “how sexual orientation is treated in the security clearance process for federal civilian and contractor employees, focusing on: (1) whether clearances are currently being denied or revoked based on individuals' sexual orientation; (2) whether sexual orientation is being used as a criterion in granting or revoking security clearances; and (3) how concealment of sexual orientation affects the granting or revoking of security clearances.”<sup>40</sup>

The GAO report provides a review of the history of the use of sexual orientation in the security clearance process and then focuses on the then current security clearance practices of eight federal agencies.<sup>41</sup> The report summarizes the history as follows:

Federal agencies used the sexual perversion criteria in the early 1950s to categorize homosexuals as security risks and separate them from government service. Agencies could deny homosexual men and women employment because of their sexual orientation until 1975, when the Civil Service Commission [now the Office of Personnel Management] issued guidelines prohibiting the government from denying employment on the basis of sexual orientation.<sup>42</sup> The guidelines, which further define the provisions of Executive Order 10450, resulted from court decisions requiring

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<sup>40</sup> GAO report at 1.

<sup>41</sup> The eight agencies were the Department of Defense (DOD), the Departments of Energy and State, OPM, the U.S. Information Agency (USIA), the Federal Bureau of Investigation (FBI), the U.S. Secret Service, and the U.S. Customs Service.

<sup>42</sup> (footnote in original text) The Civil Service Commission is now the Office of Personnel Management (OPM). As a result of legal actions, the Commission initially issued suitability guidelines for federal government employment in Federal Personnel Manual letter 731-3 (July 3, 1975). In May 1980, OPM issued a memorandum to heads of departments and independent establishments clarifying that personnel actions based on non-job-related conduct such as sexual orientation may be considered prohibited personnel practices under 5 U.S.C. § 2302(b). The policy was reaffirmed in February 1994.

that persons not be disqualified from federal employment solely on the basis of homosexual conduct. Although the public policy change resulted in the restrictions against employment of homosexuals being lifted, the guidance for granting security clearances to homosexuals remained generally vague or restrictive until the early 1990s.<sup>43</sup>

According to the GAO report, in 1991 “agencies began to change their security policies and practices regarding sexual orientation,”<sup>44</sup> leading to a reduction in reported denials or revocations of security clearances on the basis of sexual orientation.

The GAO investigation then focused on the period from 1991 through 1994 after the agencies reportedly began to change their policies.<sup>45</sup> Thus, the GAO did not appear to attempt to identify all known or discoverable cases prior to 1991 in which sexual orientation impacted the security clearance process. However, the GAO reported that eight of the sixteen cases it identified prior to 1991 where sexual orientation impacted the security clearance process resulted in revocation of the clearances. The GAO did not identify any cases after 1991 in which a security clearance had been denied or revoked on the basis of sexual orientation, although there were nine reported instances where “employees believed their sexual orientation had an impact on their security clearance investigations,” in that the investigations took longer than necessary or inappropriate questions were asked during the clearance process.<sup>46</sup>

At the time of the 1995 GAO report, three agencies, the Department of Defense, the Secret Service, and the FBI, maintained policies or procedures that required investigation into

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<sup>43</sup>GAO report at 2.

<sup>44</sup>GAO report at 2.

<sup>45</sup>GAO report at 4 (soliciting input from individuals who believe federal agencies denied or revoked their security clearances based on their sexual orientation between 1991 and 1994).

<sup>46</sup>GAO report at 5.

allegations of homosexuality or whether homosexual applicants for security clearances concealed their sexual orientation.<sup>47</sup> These policies were rationalized as addressing vulnerability to blackmail or coercion. However, the GAO report pointed out that these concerns were not substantiated by evidentiary research, and the GAO recommended that these agencies eliminate these policies.<sup>48</sup> The Department of Defense and Secret Service stated that they intended to follow the GAO's recommendation, but the FBI, represented by the Justice Department, indicated that the agency would continue to allow consideration and investigation of sexual orientation in "circumstances in which sexual orientation could reasonably be thought to raise an issue of susceptibility to coercion."<sup>49</sup>

In addition to the GAO report, the following court cases brought by plaintiffs challenging denial or revocation of federal security clearances on the basis of sexual orientation also trace the history of these discriminatory policies from the late 1960s until the mid 1990s.

- ***Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).** A former budget analyst at NASA was fired on grounds of "immorality" after it was alleged that he engaged in homosexual conduct. The court ruled that alleged or proven immoral conduct is not grounds for separation from public employment unless it can be shown that such behavior has demonstrable effects on job performance. The court found that the notion that the federal government could enforce the majority's conventional codes of conduct in the private lives of its employees was inconsistent with the elementary concepts of liberty, privacy, and diversity.
- ***Adams v. Laird*, 420 F.2d 230 (D.C. Cir. 1969).** An employee for a private company that contracted with the Department of Defense was denied security clearance by the DOD

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<sup>47</sup>GAO report at 3-4, 8, 13-14.

<sup>48</sup>GAO report at 15-16.

<sup>49</sup>GAO report at 16.

necessary for his job because he had previously engaged in private, consensual homosexual acts. Both the district court and the Court of Appeals for the District of Columbia upheld the denial of security clearance, with the Court of Appeals finding that “DOD 5220.6 sets forth many ‘Criteria,’ which include ample indications that a practicing homosexual may pose serious problems for the Defense Department in making the requisite finding for security clearance. They refer expressly to the factors of emotional instability and possible subjection to sinister pressures and influences which have traditionally been the lot of homosexuals living in what is, for better or worse, a society still strongly oriented towards heterosexuality.”

- ***Finley v. Hampton*, 473 F.2d 180 (D.C. Cir. 1972).** An employee of the Federal Housing Administration was denied security clearance on the basis that he had two friends who were described as having “homosexual mannerisms.” There were no specific allegations evident from the record in the case that the plaintiff himself was accused of being homosexual. His job was subsequently reclassified as not requiring a security clearance. Consequently, his suit was dismissed for failure to state a claim because he had retained his job and failed to demonstrate any harm caused by the investigation into his personal life.
- ***Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973).** The Department of Defense denied security clearance to an “admitted active homosexual.” The Court reversed the revocation of clearance based on the narrow facts of the case, concluding that in this instance the DOD's questioning intruded too far. However, the Court also noted the Board is entitled to ask questions about “the kind of deviant sexual life the applicant lives” and that homosexual conduct “violates the criminal laws of the State in which

appellee resides and that of every other state except Illinois.” It further opined “[t]hat some human infirmities are beyond the control of the applicant may be unfortunate, but it does not undermine the power of the Executive to hire only those whose employment will ‘best promote the efficiency’ of the public service.”

- ***McKeand v. Laird*, 490 F.2d 1262 (9th Cir. 1973).** An electronics engineer employed by a government contractor was denied a job-necessary security clearance by the Department of Defense on the basis of his homosexuality *per se*. The Ninth Circuit upheld the DOD’s decision, holding that the agency showed an adequate “rational nexus” in concluding that this specific plaintiff’s fear of disclosure made him “a target for coercion or pressure which may be likely to cause action contrary to the national interest.” Thus, the Court did not reach the question of whether homosexuality *per se* could constitute a rational basis for denial of a security clearance.
- ***Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973).** An organization of homosexual individuals and a discharged Civil Service Commission employee brought action to challenge the Commission’s policy of excluding individuals who have engaged in homosexual conduct from government employment. The court found that the Commission could discharge a person for immoral behavior only if the behavior impaired the efficiency of the service, and that the Commission had not met this standard. The court ordered reinstatement of the employee.
- ***Marks v. Schlesinger*, 384 F. Supp. 1373 (C.D. Cal. 1974).** An employee of a government contractor challenged the withdrawal of his security clearance based on his refusal to answer questions about homosexual conduct, including questions asking him to describe specific sexual acts, how many times they had occurred, and in what locations.

The court upheld withdrawal of the security clearance, finding that, although the government may not “conduct a fishing expedition into an applicant's sex life, be it homosexual or heterosexual,” “it was repeatedly explained to the employee that additional information was needed to ascertain whether he was engaging or had engaged in criminal conduct; whether he was subject to coercion and influence; whether he had engaged in acts that might indicate poor judgment and instability such as to suggest that he might disclose classified information, and thus whether it was consistent with the national interest to grant or continue his security clearance.”

- ***Webster v. Doe*, 486 U.S. 592 (1988), on remand, *Doe v. Webster*, 769 F. Supp. 1 (D.D.C. 1991), *aff'd in part, rev'd in part, Doe v. Gates*, 981 F.2d 1316 (U.S. App. D.C. 1993), *cert. denied, Doe v. Woolsey*, 510 U.S. 928 (1993).** An employee of the CIA from 1973 through 1982 was fired for homosexuality *per se* after admitting that he was homosexual. The District of Columbia Court of Appeals ultimately upheld his dismissal, reasoning that the CIA did not have a “blanket” policy against homosexuals, and that it had made an individualized determination that the plaintiff’s homosexuality could be harmful to the agency because “[t]he record establishes that the CIA had a legitimate concern about Doe's trustworthiness, in light of the fact that he hid information about his involvement in homosexual activity despite suspecting or knowing that the Agency considered such involvement to be a matter of security significance.”
- ***Dubbs v. Cent. Intelligence Agency*, 769 F. Supp. 1113 (N.D. Cal. 1990).** An employee at a private non-profit research institute was denied a job-necessary security clearance by the CIA because of her status as an openly homosexual woman. The court denied the CIA’s motion to dismiss her equal protection claim, holding that there was a triable issue

as to whether the CIA had a blanket policy against granting homosexuals security clearance, and if so, whether the policy was rational.

- ***High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).** Plaintiffs brought a class action on behalf of all adult individuals engaging in private, consensual homosexual activity who had either applied for security clearances or who held such clearances at the time of the action. The Ninth Circuit held that the Department of Defense's proffered explanation that homosexuals were more susceptible to targeting by hostile intelligence agencies was adequate to establish a rational basis for the DOD's anti-homosexual policies.
- ***Buttino v. FBI*, 1992 WL 12013803 (N.D. Cal. 1992) (unpublished).** The plaintiff was employed as a special agent with the Federal Bureau of Investigation (FBI). In August 1988, the FBI received an undated, handwritten letter stating that the plaintiff engaged in homosexual activity. The FBI then initiated an administrative inquiry regarding the plaintiff that resulted in the FBI's revoking the plaintiff's security clearance. The plaintiff brought action against the FBI and its director alleging deprivation of constitutional rights, and the court granted class certification "for all past and present employees and all applicants of the FBI, who are gay, or who engage in homosexual conduct with consenting adults in private." In 1994, under the terms of a settlement agreement, the FBI established guidelines for conducting background investigations, employment determinations, and security clearance adjudications intended to prevent discrimination based on sexual orientation.

On August 2, 1995, President Clinton signed Executive Order 12968,<sup>50</sup> which stated that the United States Government does not discriminate on the basis of sexual orientation in granting

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<sup>50</sup>60 FR 40245 (August 2, 1995).

access to classified information and barring the federal government from denying security clearances simply on the basis of sexual orientation.<sup>51</sup> In accordance with Executive Order 12968, on March 24, 1997, President Clinton approved the uniform *Adjudicative Guidelines and the Temporary Eligibility Standards and Investigative Standards*. Guideline D of the *Adjudicative Guidelines* stated that “[s]exual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.”<sup>52</sup>

However, under the Bush Administration new questions emerged about the relationship between sexual orientation and security clearances. For example, in 2001 new guidelines proposed for the clearance process required that applicants be asked about “illegal” sexual acts. This proposal was prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), and consensual homosexual sex was still outlawed in over a dozen states.<sup>53</sup> Then in 2005, the Bush administration promulgated the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, which re-wrote the language in Guideline D and replaced it with: “No adverse inference concerning the standards in the Guideline may be raised solely on the basis of the sexual orientation of the individual.”<sup>54</sup> The new language that removed the clear prohibition on using sexual orientation as a basis for denying security clearance and added the “solely on the basis” language raised concerns that the Guidelines weakened protections for LGBT people applying for or holding security clearances.<sup>55</sup> The current language in the

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<sup>51</sup>This order specifically accommodated the FBI's policy regarding sexual orientation described above, however. *Id.* at Sec. 6.2(4)(b).

<sup>52</sup>U.S. Dep't of State, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (Mar. 24, 1997), available at <http://www.fas.org/sgp/spb/class.htm> (last visited Oct. 1, 2009). In addition, on May 28, 1998, President Clinton issued Executive Order 13087, prohibiting discrimination based upon sexual orientation within Executive Branch civilian employment, although this order does not apply to the “excepted services,” which include many agencies that require security clearances such as the National Security Agency and the FBI.

<sup>53</sup> See <http://www.glapn.org/sodomylaws/usa/usnews31.htm>.

<sup>54</sup>U.S. Dep't of State, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (Dec. 29, 2005) available at <http://www.state.gov/m/ds/clearances/60321.htm#d> (last visited Oct. 1, 2009).

<sup>55</sup>See, e.g., Katherine Shrader, *New Security Clearance Rules Affect Gays*, THE WASHINGTON POST, Mar. 17, 2006,

Guidelines is the 2005 language.<sup>56</sup>

In sum, the current policy regarding consideration of sexual orientation in the security clearance process appears to encompass a broad prohibition on federal employment discrimination on the basis of sexual orientation, and, per federal regulations, proscribes denial of security clearances “solely” on the basis of sexual orientation. The impact of the language changed by the Bush administration remains unclear, although there have been no reported cases in recent years of security clearance denials or revocations solely on the basis of sexual orientation.

### **C. State and Local Purges**

By the mid-1950s, loyalty and security oaths similar to those at the federal level had been put into effect by many state and local governments, extending the prohibitions on employment of homosexuals to state and local workers, employees of state-funded schools and colleges, and private individuals in professions requiring state licenses.<sup>57</sup> In addition, state and local governments conducted similar purges of LGBT employees.<sup>58</sup> This section describes eight of these purges that have been recently documented by scholars and journalists.

#### **1. California**

In the early 1950s, the State of California enacted laws making homosexuals criminals and then used their criminal records to deny them employment, particularly in public education

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*available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/16/AR2006031601787.html>.

<sup>56</sup> However, on June 17, 2009, President Obama issued a memorandum on “Federal Benefits and Non-Discrimination” to the Office of Personnel Management instructing OPM to issue guidance within 90 days to all executive departments and agencies “regarding compliance with, and implementation of, the civil service laws, rules, and regulations, including 5 U.S.C. 2302(b)(10), which make it unlawful to discriminate against Federal employees or applicants for Federal employment on the basis of factors not related to job performance.”

Memorandum for the Heads of Executive Departments and Agencies (June 17, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/) (last visited Oct. 1, 2009).

<sup>57</sup> BROWN, *supra* note 1, at 103.

<sup>58</sup> ESKRIDGE, *supra* note 1, at 102.

and in professions requiring a state-issued license. As a result, scholars estimate that hundreds of educators in California lost their jobs.

The use of the criminal law to purge LGBT teachers from public education began in California in 1949 when California Governor Warren met with “[m]ore than 70 of the State’s foremost enforcement officers and medical authorities” at a “sex crimes conference” that passed resolutions supporting the fingerprinting of all persons convicted of sex offenses, fingerprinting of all persons applying for teaching credentials, and increasing the maximum penalty for sodomy to 20 years.<sup>59</sup> These resolutions became California law during 1951-1952, as summarized by Yale law professor William Eskridge:

Under California law, a person who engaged in “immoral conduct”<sup>60</sup> (including sodomy and oral copulation) could not be a public school teacher. To give this rule greater enforcement bite, the legislature in 1951 adopted [California Governor] Warren’s proposal to require law enforcement officers to notify the state and local education departments of the arrest of any public school teacher for a sex crime. The following year, the legislature directed the state board of education to deny or withdraw teaching certificates for any person convicted of sodomy, oral copulation, lewd vagrancy, or various crimes against children. School districts were prohibited from employing anyone guilty of those offenses.

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<sup>59</sup> *Death Penalty Urged for Child Molesters*, LA TIMES, Dec. 7, 1949, at 1.

<sup>60</sup> ESKRIDGE, *supra* note 1, at 103. Exclusions for engaging in “immoral conduct” are found in California Education Code §§ 13202, 13209 (certificates for state teachers), 24306(a) (state college employees) (West 1960); California Government Code § 19572(l) (civil service workers) (West 1964)The Warren-era amendments are 1951 California Statutes chap. 872 (June 4, 1951) (arrest notification); 1952 California Statutes, Extraordinary Session chap. 23 (April 17, 1952). ESKRIDGE, *supra* note 1, at 436 n.75.

Hundreds of gay men resigned or were fired after minor scrapes with law enforcement.<sup>61</sup>

Karen Harbeck describes further how local officials, police and school boards used these state laws to purge those suspected of being LGBT from teaching positions -- even if they were never convicted of a crime:

Local police officials, particularly in the communities of Long Beach and Los Angeles, actively used two pieces of state legislation aimed at ferreting out immoral educators. Enacted after World War II, California Penal Code, Section 291, required a sheriff or chief of police to notify the state licensing board and the local superintendent of schools immediately upon the arrest of a teacher for certain enumerated criminal behaviors relating to sex and morality, even if the arrest later proved to be erroneous or unsubstantiated. Immediate job suspension, and often job termination followed. The strong constitutional protections pertaining to criminal matters applied in the arrest but not to the school employment controversy. Thus, while the criminal case against the school employee might be dropped due to lack of evidence, an illegal arrest, or a not guilty finding, all the information could be used in the job termination hearing. With this highly incriminating evidence, the usual outcome was job termination or employee resignation.

In a collateral move, in 1954 the California Legislature passed California Education Code, Section 12756, that permitted the immediate suspension of teaching credentials if an educator was convicted of any one of several statutes pertaining to sex and morality.

This presumption of unfitness to teach streamlined the administrative process in the

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<sup>61</sup> ESKRIDGE, *supra* note 1, at 103.

educational setting by automatically providing the grounds for teacher dismissal. Even in cases where the teacher was found not guilty, school boards used the arrest as grounds for dismissal on the presumption of unfitness to teach.<sup>62</sup>

In 1953, the California legislature considered two additional antigay measures which indicate the extensive legal regime that was being created to hobble the ability of LGBT people to earn a living. First, the legislature passed a law that prohibited anyone civilly committed as a “sexual psychopath” from receiving state unemployment insurance.<sup>63</sup> It also considered, but rejected, a law that would have suspended the driver’s licenses of “sexual deviants.”<sup>64</sup>

## 2. Florida

In his book *Dishonorable Passions*<sup>65</sup> William Eskridge summarizes an even more extensive purge of public employees in Florida in 1957, carried out by the Johns Committee, an investigative committee of the Florida legislature led by state senator Charley Johns:

In 1957, Hillsborough County (Tampa) commenced an investigation of homosexuality in public schools. After staking out lesbian bars, pressuring informants to identify suspected homosexuals, and conducting a trip to Anna Maria Island to spy on lesbian activities, the sheriff by the

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<sup>62</sup> KAREN M. HARBECK, *GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS* 188-189 (1997).

<sup>63</sup> CAL. UNEMP. INS. CODE § 1805 (1953).

<sup>64</sup> Assemb. B. 3049, 1953 Leg., Reg. Sess. (Ca. 1953). In 1953, ONE Magazine, the first publication in the United States to discuss LGBT legal issues, provided a contemporaneous account of how California state law supported a purge of LGBT people in public employment: “The purge fever against homosexuals, and against those who might have personal or social associations with homosexuals, spread from the State Department to every department of Government. At this point, even the lowly mail carrier is required on oath to be anti-homosexual. In 1951, the State of California hastened to slap a [sex criminal] registration law on its books which was tighter than its model... the earlier designed Los Angeles Municipal Registration Law. In 1951 and 1952, National Registration bills were introduced into Congressional hoppers which were to include not only those persons previously registered in cities and states, but also those names heretofore lying unexposed in Armed Services Files, and those names suspected but officially documented by chaplains and personnel officers of the Armed Services. In 1952, the State of California required by law that teachers declare themselves anti-homosexual and allowed municipalities, such as Los Angeles, the mechanics whereby anonymous information could be passed against individuals in the employ of the Board of Education. *Are You Now*, ONE MAGAZINE, Apr., 1953, at 8.

<sup>65</sup> ESKRIDGE, *supra* note 1, at 103.

end of the year had discovered almost sixty admitted or confirmed homosexual teachers, most of whom resigned their posts.

Inspired by this and other local investigations, the Johns Committee engaged in a six-year campaign to remove homosexuals from state schools (1958-1964). The campaign identified suspected homosexuals who were high school teachers, college students and university professors. Most of the suspected homosexuals resigned or were dismissed. The committee also pressured the state board of education to revoke teachers' certificates, which the legislature seconded with a 1959 statute authorizing certificate revocation for "moral misconduct" and a 1961 statute setting forth expedited procedures for revocation. Near the end of its tenure, the Johns Committee announced that the board had revoked seventy-one teachers' certificates (with sixty-three more cases pending); fourteen professors had been removed from the state universities (nineteen pending); and thirty-seven federal employees had lost their jobs, while fourteen state employees faced removal in pending cases.<sup>66</sup>

The Johns Committee also provided information to professional licensing boards about the individuals investigated for homosexuality, causing doctors, lawyers and others to lose their

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<sup>66</sup> *Id.* (citing 1959 Fla. Laws 59-404 (new revocation standard); 1961 Fla. Laws 61-396 (new expedited procedure) FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, HOMOSEXUALITY AND CITIZENSHIP, 10 (Deposition of [Deponent Blacked Out]), FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, February 6, 1959, in Johns Papers, Box 7; REPORT OF THE FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE TO THE 1959 SESSION OF THE LEGISLATURE (April 13, 1959), in Johns Papers, Box 1, Folder 21; FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, STAFF MEMORANDA, July-September 1964, in Johns Papers, Box 1, Folder 6 (final documentation of the Johns Committee-backed removals)); ESKRIDGE, *supra* note 1, at 436 n.76 citing Johns Papers: Papers of the Florida Legislative Investigation Committee (the "Johns Committee" after its Chair, Senator Charley Johns), Florida State Archives, Tallahassee, Florida, Record Group 000940, Series 1486. )

licenses.<sup>67</sup> Scholar Karen Graves recently published an extensive history of the Johns Committee documenting its impact on LGBT public employees in Florida.<sup>68</sup>

### 3. Iowa

In 1955, the Iowa Legislature followed 25 other states and passed a sexual psychopath law, allowing for “the confinement of persons who are dangerous criminal sexual psychopaths.”<sup>69</sup> Specifically, anyone charged with a public offense (but not necessarily convicted) and found to have propensities to commit sex offenses could be labeled a sexual psychopath and detained indefinitely in a state mental hospital.<sup>70</sup> In practice, the states that enforced these laws made no distinction between consensual and nonconsensual offenses and gay men were frequently committed under such laws for offenses including consensual sex in the privacy of their homes or even for merely possessing erotic photographs.<sup>71</sup>

The Iowa sexual psychopath law was passed after the deaths of two children, although none of the men eventually arrested were ever charged with, or even thought to be connected with, the murders. Following the second murder in Sioux City, Iowa, the public and newspapers urged the state to use the law as the basis of a roundup of homosexuals. The state quickly responded by setting up a special ward for sexual psychopaths at a state hospital.<sup>72</sup> Iowa Governor Leo Hoegh, described the target of the roundup as “the guy ... who is now roaming the street but never committed a crime.”<sup>73</sup>

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<sup>67</sup> *Id.* at 104.

<sup>68</sup> GRAVES, *supra* note 1.

<sup>69</sup> NEIL MILLER, SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950S 76, 81 (2002) (citing IOWA CODE ANN. §255A.4 (Supp. 1958)).

<sup>70</sup> *Id.* at 76.

<sup>71</sup> *Id.* at 82.

<sup>72</sup> *Id.* at 84-88.

<sup>73</sup> *Id.* at 88.

Under this law, in 1955 and 1958, two purges in Sioux City, Iowa ruined the lives of 33 men suspected of being homosexual. Many of these men lost their jobs and professional licenses and were then incarcerated in the Iowa State Mental Hospital.

The Sioux City police began the roundup with sting operations at a local hotel that was known as a meeting place for gay men, and then pressured those arrested to name others. Two friends were arrested for merely sitting and having a drink at a bar with each other.<sup>74</sup> Questioned without lawyers, most of the men cooperated, naming other men and pleading guilty to conspiracy to commit a felony (sodomy), rather than face trial on a sodomy charge, which carried a maximum sentence of 10 years.<sup>75</sup> Instead of sending them to prison, the authorities had the men declared criminal sexual psychopaths under Iowa's new law and ordered them committed indefinitely to a state hospital.<sup>76</sup> Within two months, 20 gay men who were not suspected of having any connection to the two child murders that started the purge were committed.<sup>77</sup> In fact, when the citizens near the state hospital objected to having dangerous sex criminals housed near them, officials assured them that it was unlikely the hospital would house any "sex-murderer type of criminal" and "most of those committed would be homosexuals."<sup>78</sup>

For individuals dependent on a professional license, the felony conviction was especially problematic. Five of the men sent to the state hospital were hairdressers.<sup>79</sup> By pleading guilty to a felony, they lost their professional licenses and could no longer work.<sup>80</sup> Neil Miller, the author of a book describing the Iowa purge, describes the effect on one of these men:

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<sup>74</sup> *Id.* at 115.

<sup>75</sup> *Id.* at 115-121.

<sup>76</sup> *Id.* at 121-122.

<sup>77</sup> *Id.* at 122.

<sup>78</sup> *Id.* at 155.

<sup>79</sup> *Id.* at 127.

<sup>80</sup> *Id.* at 160.

For Harold McBride, perhaps more than any of the rest of the 20 men, incarceration was extremely difficult. He worried about [his wife] and the children. He had lost his license to cut hair, a consequence of pleading guilty to a felony. He watched despairingly as his wife was forced to sell his business, put their furniture in storage, and moved herself and the three children out of their...apartment to stay with his family.... And in his darkest moments he was convinced he would never get out of [the state hospital]. “My life was shattered,” Harold said 40 years later. “It was gone.”<sup>81</sup> Three months after his release...Harold got his hairdressing license back. To do this, he had to appear before a judge.... Two women from [the area]...told the judge they would continue to be Harold’s clients. (This was required by law.) The judge asked Harold what he planned to do in the future. Harold said that he planned to leave the state. “That is probably in your best interest,” said the judge, and granted him his license.<sup>82</sup>

In 1958, Sioux City experienced another roundup of thirteen gay men. This time the men were offered a deal to plead guilty to conspiracy to commit a felony and receive two years parole.<sup>83</sup> Four of the men were schoolteachers, two who taught in Sioux City schools.<sup>84</sup> For them, too, the conviction would have meant losing their teaching certificates. One teacher fought the charges, the first time that had been done in either of the Iowa purges, and eventually succeeded in having the charges dismissed. He wanted to keep his teaching certificate and an

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<sup>81</sup> *Id.* at 160, based on personal interview with “Harold McBride”.

<sup>82</sup> *Id.* at 198-201.

<sup>83</sup> *Id.* at 215.

<sup>84</sup> *Id.* at 217.

honorable discharge from the Air National Guard, both of which would have been lost as a consequence of a felony sodomy conviction. After two mistrials, he was able to plead guilty to two misdemeanor counts. Despite this successful outcome, he “never taught in a public school again and was deprived of that great love of his life – teaching.”<sup>85</sup>

#### 4. Massachusetts

In the 1960s, the Massachusetts State Police used obscenity laws to target a group of professors at the University of Massachusetts, Smith College, and dozens of other private and public colleges and universities in a witch hunt that eventually stretched from Massachusetts to throughout New England, and then to New York and California.<sup>86</sup> Just two years later, the Supreme Court would rule that the material the men were charged with possessing was not obscene. But that ruling came too late to salvage their careers and reputations.<sup>87</sup>

In September of 1960, Massachusetts State Police used a new state obscenity law to target a group of gay professors who had shared mildly erotic material at a small gathering at a private apartment.<sup>88</sup> The initial target, highly regarded Smith College professor Newton Arvin, had been identified by federal authorities through use of the mail, most likely from a mailing list seized from a magazine supply house.<sup>89</sup> Using the fact of “displaying the photographs at his apartment and swapping them with others” as evidence of “exhibition” and “circulation” of obscene materials, Arvin was charged with a felony and a misdemeanor charge of lewd vagrancy.<sup>90</sup> Police coerced Arvin into naming colleagues and seized and searched his personal journals to identify more names.<sup>91</sup> They then searched the apartments of the other individuals, in

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<sup>85</sup> *Id.* at 221–233.

<sup>86</sup> BARRY WERTH, *THE SCARLET PROFESSOR* 209 (2001).

<sup>87</sup> *Id.* at 288–289.

<sup>88</sup> *Id.* at 194.

<sup>89</sup> *Id.* at 195.

<sup>90</sup> NY TIMES, Sept. 8, 1960.

<sup>91</sup> WERTH, *supra* note 65, at 196–197.

some cases without warrants, ultimately making the searches and the convictions based on evidence gained in them unconstitutional.<sup>92</sup> From the beginning, the police knew the investigation had the potential to go beyond the Northeast and spread across the country.<sup>93</sup>

The consequences for the jobs and careers of the men caught up in the investigation were devastating. Many feared their academic careers were over.<sup>94</sup> These fears were well-founded: “Within days, the University of Massachusetts would announce its plans to suspend immediately any staff member named in the investigation.” At Smith, instructors and professors were terminated immediately. Arvin, tenured and with 37 years on the faculty, was allowed to resign.<sup>95</sup> Soon, the entire Western Massachusetts gay community felt that they were experiencing a “McCarthy-like purge:”

“The fear spread concentrically, in waves. There were those at greatest risk, like [Smith professor Joel] Dorius, who had shown their pictures to Arvin and to whom he had shown his, and whom Arvin... had named. There were other homosexuals, at Smith and dozens of others schools...There were friends, and friends of friends, who feared that their past connections might implicate them. And there were those heterosexuals who had erotica of their own and whom [Massachusetts State Police Sergeant] Regan was determined to find and punish. Most of these people were veterans of the McCarthy era...who had seen their lives and communities ripped by this kind of thing before. They knew they would be pressed to name others to save themselves, and that everyone

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<sup>92</sup> *Id.* at 214.

<sup>93</sup> *Id.* at 206-209

<sup>94</sup> *Id.* at 215.

<sup>95</sup> *Id.* at 213.

around them would be, too.... Many people stopped using their phones, on the chance that they were tapped. Others abruptly left town, hoping the hysteria would end before the term began.... As the trial loomed...there were hushed, cryptic confessions and terrified talk of tapped phones, secret mail blocks, more police raids, more lives ruined<sup>96</sup>.

Two years later, the Supreme Court would rule that the material the men were charged with possessing was not obscene, removing the last legal basis for their persecution and convictions, but not removing the devastating consequences on their academic positions and community reputations.<sup>97</sup>

## **5. Texas**

Predating the federal purges, in the 1940s at least ten members of the faculty of the University of Texas were investigated by the Board of Regents and then fired for being suspected of being homosexual. In 1944, the University of Texas Board of Regents fired University President Homer P. Rainey. Orville Bullington, one of the members of the Board of Regents, testifying before a Texas state senate committee, stated that one of the reasons Rainey was fired was that he had been slow to get rid of a “nest of homosexuals” on the University of Texas faculty. Bullington reported that since an investigation into the presence of homosexuals had been initiated, ten faculty members and fifteen students had been forced to leave the University.<sup>98</sup>

## **6. Oklahoma**

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<sup>96</sup> *Id.* at 205- 220.

<sup>97</sup> *Id.* at 288-289.

<sup>98</sup> See, e.g., *Education: In the Lone Star State*, TIME MAGAZINE, Nov. 27, 1944; *University Row Laid Partly to Homosexuality*, LATIMES, Nov. 18, 1944, at 4.

According to an article in the *New York Times*, in 1966, Oklahoma City experienced a similar purge of gay men in public employment. On July 11, 1966, the attorney for Oklahoma County, Curtis Harris, announced that 26 teachers and administrators in the city's schools had resigned as the result of a six-month investigation of alleged homosexual activity. According to Harris, the purpose of the investigation lead by his office was to weed out sex deviates from public jobs but not prosecute them. The executive assistant to the school superintendent of Oklahoma City said the school board had not worked closely with the attorney's office but had conducted its own investigations after charges had been filed. Teachers and administrators were asked to resign if, according to the school board representative, "evidence substantiate[d] the charges."<sup>99</sup> Nothing in the *New York Times* article indicates any of the men were suspected of anything but private, consensual sex with other adults.

## 7. Idaho

In November 1955,<sup>100</sup> the arrest of three men on charges of sexual activity with teenagers "precipitated a massive witch hunt" in Boise, Idaho. An investigator who had worked for the State Department purging homosexuals from federal employment was called to Boise to "clean up the city."<sup>101</sup> Over a 15-month period, some 1,472 men were brought in for questioning, over 3 percent of Boise's population of 40,000. Eventually sixteen men were arrested including a public school teacher. Under the headline "Crush the Monster," a November 3, 1955, *Idaho Daily Statesman* editorial called for "immediate and systematic cauterization" in the wake of the first arrests.<sup>102</sup>

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<sup>99</sup> 26 *Quit School Jobs in Drive on Oklahoma City Deviates*, N.Y. TIMES, July 12, 1966, at 36.

<sup>100</sup> MILLER, *supra* note 48, at 108-109.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

In addition to those arrested, large numbers of gay men fled the Idaho capital. An anonymous source explained: “I know hundreds of Gay people left the city, schoolteachers, people in every walk of life – Gay people who had never gotten involved in anything, who were just afraid.”<sup>103</sup> Their fears were justified. Investigators publicly exposed and humiliated those suspected of being homosexual. Many of the men lost their jobs and families. Some entered the criminal justice system while others faced involuntary commitment to psychiatric treatment facilities. Several years later, one man who fled to California described the mood of Boise during that period:

Even before [the Vice-President of Idaho First National Bank] got arrested, friends of mine warned me that a witch hunt was going on. I didn't believe it. But when they went after [him], Christ, I saw the hand-writing on the wall. And that editorial, too! First they say, “Save the kids.” Then they say, “Crush the homosexuals.” Enemies of society – that's what we were called. I remember very well. So I asked myself, where will this stop? I've never had any kind of relations except with consenting adults. But is Boise going to be calm enough to draw the difference? Will they look for the difference? No, I knew they'd go after anybody who wears a ring on their pinky. I wasn't going to take the chance and get swallowed up in a blind, raging witch-hunt. I got the hell out.<sup>104</sup>

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<sup>103</sup> JACKIE M. BLOUNT, FIT TO TEACH, 95 (2005) (quoting *Witch-Hunt in Boise, Idaho; An Interview with a Victim, “They Lit a Match to a Bonfire,”* GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.; A DOCUMENTARY HISTORY, 109-119 (Jonathan Ned Katz ed. 1992), 109-119.

<sup>104</sup> *Id.* at 95 (quoting JOHN GERASSI, THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY 15-17 (1966) 15-17).

## 8. North Carolina

Another purge of public employees occurred in Greensboro, North Carolina in 1956 and 1957. In 2006, journalist Lorraine Ahearn described what Greensboro residents referred to as “the purge” in an article for the *Greensboro News & Record* based on dozens of interviews with those who lived through it.<sup>105</sup> According to Ahearn “the purge was the largest attempted roundup of homosexuals in Greensboro history and marked one of the most intense gay scares of the 1950s.”<sup>106</sup> Thirty-two men were eventually caught up in the investigation including a judge, two lawyers, at least one teacher, and a policeman. All 32 were found guilty at trial with 24 of the convictions resulting in prison terms of five to 60 years. Some defendants were assigned to highway chain gangs.

Under Greensboro Police Chief Paul Calhoun, who took office in the summer of 1956, the juvenile and vice squads were assigned full time to morals investigations. The purpose, in the words of the police chief, was to “remove these individuals from society who would prey upon our youth,” and to protect the town from what a presiding judge called “a menace.” According to trial transcripts at the North Carolina Supreme Court, after police charged each suspect, they were questioned about a list of names detectives were developing. The investigation began “to skyrocket,” in the words of a former Greensboro sheriff.<sup>107</sup>

On Feb. 4, 1957, the grand jury issued indictments against the 32 men accused of being homosexual. The men were tried for “crimes against nature,” almost exclusively for conduct with consenting adults in the privacy of their homes. Rather than try to argue against the fairness of the state's sodomy law - which at the time carried a maximum sentence of 60 years - they pled for mercy. A few defendants persuaded judges to set suspended sentences, on the condition that

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<sup>105</sup> Lorraine Ahearn, *One officer called morals trials*, GREENSBORO NEWS & RECORD, Sept. 17, 2006.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

they remained under the care of psychiatrists. “It would be hard to imagine a blacker mark against a man,” recalled Percy Wall, a veteran trial lawyer, about the Greensboro purge. “You could be accused of murder and be acquitted and people would forget. But this was considered dirty, sinful.”<sup>108</sup> One of the legacies of these purges of the 1950 and 1960s, were more explicit policies by state and local governments prohibiting LGBT people from public employment. Although there is less information documenting the aggressive enforcement described above, the examples below document some of these policies:

### 1. **New York**

Until 1969, New York City had an explicit policy denying city employment to LGBT people. That year, the City’s Civil Service Commission officially changed its employment policy so that homosexuality was no longer “a bar to all employment under its jurisdiction.” The overtly discriminatory policy was changed as a result of a successful lawsuit by two individuals who had been refused employment as social workers because they were thought to be homosexual.<sup>109</sup> In *Brass v. Hoberman*, Plaintiff Brass was denied employment following a mandatory medical exam by a psychiatrist who found him unfit for the position “because of a history of homosexuality.” The City Personnel Director wrote to Brass, “[i]t is our policy to disqualify homosexuals for employment as Case Workers, Hospital Care Investigators, and Children's Counselors.” Plaintiff Teper had a similar experience. The City argued that the policy was not unconstitutional when restricted to a few selected positions because, based on recognized and accepted medical and psychiatric opinions, it had a reasonable basis in denying employment to homosexuals.<sup>110</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> See 2 *Denied City Jobs As Deviates Suing*, NEW YORK TIMES, Jul. 25, 1968, at 29; *City Lifts Job Curbs for Homosexuals*, NEW YORK TIMES, May 9, 1969, at 1.

<sup>110</sup> *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968).

Despite the change in policy, the City's Civil Service Commission indicated its intent to continue to consider homosexuality as a condition that could render an applicant unfit for the duties of certain positions. The Commission gave as an example "an admitted homosexual, when the acts are frequent and recent, would probably not be qualified for the position of Correctional Officer, whose duty it would be to guard prisoners in one of the city penitentiaries. Nor would such a person be probably qualified as a children's counselor or playground attendant."<sup>111</sup> In 1970 and 1971, the Gay Activists Alliance of New York ("GAA") presented a pair of reports to the New York City Commission on Human Rights describing public and private employment discrimination, including by public commissions, private employers, credit reporting agencies and employment agencies.<sup>112</sup> These reports indicate that the New York City ban, although purportedly repealed, was continuing to have an impact.

New York City was not the only municipality in New York to have such a policy. In 1971, in response to a survey, Erie County admitted to using morals convictions as a basis for disciplinary action and firing of homosexuals; the chairman of the Civil Service Commission of Nassau County reported that the department refused to hire an applicant for a lifeguard position because of the discovery of a "history of homosexuality" and Suffolk County used an employment questionnaire that expressly asked the applicant to indicate "Homosexual Tendencies: yes or no."<sup>113</sup>

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<sup>111</sup> See 2 *Denied City Jobs As Deviates Swing*, NEW YORK TIMES, Jul. 25, 1968, at 29; *City Lifts Job Curbs for Homosexuals*, NEW YORK TIMES, May 9, 1969, at 23.

<sup>112</sup> *Employment Discrimination Against Homosexuals*, Presentation by the GAY ACTIVISTS ALLIANCE to the NEW YORK CITY COMMISSION ON HUMAN RIGHTS (Jul. 14, 1970); *Employment Discrimination Against Homosexuals Supplement #1*, Presentation by the GAY ACTIVISTS ALLIANCE to the NEW YORK CITY COMMISSION ON HUMAN RIGHTS (Feb. 3, 1971). The 1971 report describes personal histories of discrimination by the New York City Public Schools against two individuals. In both cases the individuals had passed all other screening procedures and in one case was already teaching when they were asked to sign a waiver releasing the information in their draft records, which in both cases indicated "homosexual tendencies". Both were sent to psychiatrists for evaluation and ultimately refused certification and / or discharged.

<sup>113</sup> See *Employment Discrimination Against Homosexuals Supplement #1*, *supra* note 170.

## 2. South Carolina

In 1976, the Attorney General of South Carolina issued the following two sentence opinion confirming that homosexual could not be state employees, “Thank you for your letter of recent date asking whether an individual may be fired or refused employment on the grounds that he is a **homosexual**. In my opinion, a **homosexual** may validly be refused employment by the State and if he is employed, discovery of such a practice would be a valid basis for termination of his employment.”<sup>114</sup>

## 3. Ohio

In 1982, the Ohio Attorney General issued an opinion that an employee could be dismissed from the Department of Youth Services on the basis of sexual orientation, if it was shown that his or her sexual orientation impacted job performance. The opinion states that if a person’s homosexual orientation was known or could become known, it would be a reason to fire the employee, because a youth could have a “homosexual panic.” The opinion states: “In your request, you have advised that fifteen to twenty percent of youths served by the Department have the fear that they will be sexually molested, and that such fear may manifest itself in a ‘will kill if approached’ attitude toward homosexual persons. I must assume, for the purposes of this opinion, that the facts regarding ‘homosexual panic’...are correct”<sup>115</sup>

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<sup>114</sup> S.C. Op. Atty. Gen. 4345 (1976) (emphasis added).

<sup>115</sup> Ohio Op. Atty. Gen. 2-213 (1982).

## II. The Impact of State Sodomy Laws on Public and Private Employment

State criminal law provided the basis for the purges of state and local LGBT employees described above, and state and local law enforcement provided the investigative and implementation tools necessary to carry them out. This relationship between state criminal law and law enforcement did not end with the purges of the 1950s and 1960s. Until at least 2003, sodomy laws served as a central reason for LGBT people staying in the closet and artificially crippling their potential in the workplace.<sup>116</sup> Despite the Supreme Court's ruling in *Lawrence v. Texas*<sup>117</sup> that sodomy laws are unconstitutional, their impact on employment continues today.

At common law, "sodomy" denoted certain types of sexual conduct, whether engaged in by a man and woman or by two persons of the same sex.<sup>118</sup> As gay people became more socially visible, the selective enforcement of sodomy laws, often achieved indirectly through employment discrimination, became one of the leading ways in which gay people were forced to lie about their identity and to take on secret lives.<sup>119</sup> Beginning in the 1970s, several states decriminalized sodomy for male-female couples, but maintained the criminal prohibition for identical conduct if the parties were of the same sex.<sup>120</sup> Even though the majority of state laws remained neutral as to the sexual orientation of the parties, over time the term "sodomy" became synonymous with homosexual sexual conduct. This perception reached its zenith in *Bowers v. Hardwick*,<sup>121</sup> where the Supreme Court conflated sodomy, homosexual sodomy and homosexuality.

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<sup>116</sup> See generally ESKRIDGE, *supra* note 1.

<sup>117</sup> 539 U.S. 558 (2003).

<sup>118</sup> Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073, 1086-89 (1988).

<sup>119</sup> Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV 813 (2001); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. REV. 103 (2003).

<sup>120</sup> Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. REV. 531 (1992).

<sup>121</sup> 478 U.S. 186 (1986).

The nature of the link between sodomy laws and employment discrimination was succinctly stated by Professor Patricia Cain, who wrote that “[s]o long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals.”<sup>122</sup> State governments used this argument to deny employment and licensing with particular frequency in the fields of education and law enforcement. The link between sodomy laws and job discrimination was so widespread and pervasive that it was relied on by the U.S. Supreme Court in *Lawrence* and by numerous state courts in making the decision to prohibit criminalization of private consensual sexual conduct between two adults of the same sex.

#### **A. The U.S. Supreme Court**

In *Lawrence v. Texas*, both the majority opinion and Justice O’Connor’s concurring opinion relied on the impact of sodomy statutes on employment as one reason that *Bowers* should be overturned:

- The majority noted that if an adult was convicted in Texas for private, consensual homosexual conduct, “the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.”<sup>123</sup>
- Justice O’Connor’s concurrence also noted the impact on employment, with the restrictions that would keep a homosexual from joining a variety of professions.<sup>124</sup>

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<sup>122</sup> Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1588 (1993).

<sup>123</sup> *Lawrence*, 539 U.S. at 576.

<sup>124</sup> *Id.* at 581 (O’Connor, J., concurring) (“It appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer).”).

- O'Connor also noted that “the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”<sup>125</sup>

It is not surprising that the Court picked up on the employment issue, as the *Lawrence* Petitioners’ brief and several amicus briefs filed before the Supreme Court detailed several specific instances of sodomy statutes impacting employment. These instances included (discussed in chronological order):

- In the 1920s, private institutions like Harvard University mounted secret but systematic efforts to root out gay people.<sup>126</sup>
- A spot check of the records of the Civil Service Commission indicates that between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion.<sup>127</sup>
- In 1950, following Senator Joseph McCarthy’s denunciation of the employment of gay persons in the State Department, a Senate Committee recommended excluding gay men and lesbians from all government service because homosexual acts violated the law.”<sup>128</sup>

The Committee also cited the general belief that “those who engage in overt acts of

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<sup>125</sup> *Id.* at 582 (citing *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

<sup>126</sup> Petitioner’s Brief at 47 n.36, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Amit R. Paley, *The Secret Court of 1920*, HARV. CRIMSON, Nov. 21, 2002, available at <http://www.thecrimson.com/article.aspx?ref=255428> (accessed Jan. 14, 2003)).

<sup>127</sup> Amicus Brief of History Professors at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing S. Rep. No. 241 (1950) at 9); see also Amicus Brief of LGBT Associations at 17-18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *Developments in the Law-Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1556 (1989)).

<sup>128</sup> S. Rep. No. 241 (1950) at 3.

perversion lack the emotional stability of normal persons,”<sup>129</sup> and that homosexuals “constitute security risks”.<sup>130</sup> It also portrayed homosexuals as predators: “[T]he presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. . . . One homosexual can pollute a Government office.”<sup>131</sup>

- In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian.<sup>132</sup> In addition, President Eisenhower’s executive order required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees.<sup>133</sup>
- Furthermore, to enforce Eisenhower’s executive order, the FBI initiated a widespread system of surveillance to enforce the executive order. As one historian has noted, “Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press articles that provided information about

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<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.* at 5.

<sup>131</sup> *Id.* at 4; *see also* Amicus Brief of History Professors at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). *See also* Petitioner’s Brief at 46-47, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“Beginning in the 1950s, McCarthy-era and later witch hunts led to the firing from federal and federal-contractor employment of thousands of persons suspected of being homosexuals”) (citing JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 91-109 (1976)); *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969); *see also* Amicus Brief of LGBT Associations at 17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“In 1950, a Senate Investigations Subcommittee concluded that homosexuals were unfit for federal employment because they ‘lack the emotional stability of normal persons’ and recommended that all homosexuals be dismissed from government employment”).

<sup>132</sup> Amicus Brief of History Professors at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102)(citing D’EMILIO, *supra* note 1, at 44; DEAN, *supra* note 12).

<sup>133</sup> *Id.* at 17 (citing David Johnson, *Homosexual Citizens: Washington’s Gay Community Confronts the Civil Service*, WASH. HISTORY, Fall/Winter 1994-95, at 45, 53).

the gay world. Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected.”<sup>134</sup>

- Beginning in 1958, the Florida Legislative Investigation Committee turned its attention to homosexuals working in the State’s universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and lesbians. It pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities.<sup>135</sup> Countless state employees, teachers, hospital workers, and others lost their jobs as a result of official policy.<sup>136</sup>
- In 1973, when an open homosexual applied for admission to the New York Bar, a New York appellate court noted: “Accordingly, so long as this statute is in effect (Penal Law §130.38), homosexuality, which, in its fulfillment, usually entails commission of such a statutorily prescribed act, is a factor which could militate against the eligibility of an applicant for admission to the Bar who proposes to pursue this way of life in disregard of the statute.”<sup>137</sup>
- A review of twenty surveys conducted across America between 1980 and 1991 showed that between 16 and 44 percent of gay men and lesbians had experienced discrimination in employment. As one example, Cheryl Summerville’s separation notice from Cracker

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<sup>134</sup> *Id.* at 17 (citing D’EMILIO, *supra* note 1, at 46-47).

<sup>135</sup> *Id.* at 19 (citing Stacy Braukman, “*Nothing Else Matters But Sex*”: Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963, 27 FEMINIST STUDIES 553, 555 (2001); *see also id.* at 553-557, 573 & n.3).

<sup>136</sup> *Id.* (citing Braukman, at 561).

<sup>137</sup> Amicus Brief of the American Bar Association at n.7, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102)(citing *Matter of Kimball*, 40 NY A.D. 2d 252, 257 (2d Dept. 1973)).

Barrel read: “This employee is being terminated due to violation of company policy. This employee is gay.”<sup>138</sup>

- In the 1990s, the Dallas Police Department had a policy of denying jobs to applicants who had engaged in violations of § 21.06, without regard to whether they had ever been charged with, or convicted of, any crime. By contrast, the department did not disqualify from consideration heterosexual applicants who engaged in oral or anal sex.<sup>139</sup>
- In 1990, the Texas Attorney General issued an opinion that conviction of “homosexual conduct,” a class C misdemeanor, was an acceptable basis to automatically bar an applicant or dismiss an employee from working for the Texas State Department of Health. The Attorney General maintained this position even though the penal code explicitly stated that conviction of a Class C misdemeanor “does not impose any legal disability or disadvantage.”<sup>140</sup>
- Also in the 1990s, the state attorney general of Georgia was able to rescind a job offer to an attorney who had received excellent evaluations as a summer intern because she participated in a religious marriage ceremony with another woman.<sup>141</sup>
- In 1999, one law firm in Virginia explained that it does “not employ and would not knowingly employ a homosexual attorney” because sodomy “is a crime in Virginia” and

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<sup>138</sup> Amicus Brief of History Professors at 28, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy); *see also id.* at 6.

<sup>139</sup> Amicus Brief of Constitutional Law Professors at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. Ct. App. 1993)).

<sup>140</sup> Tex. Op. Atty. Gen. JM-1237 (1990).

<sup>141</sup> *Id.* at 16, citing *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (finding rescission of job offer justified because of the mere *existence* of a sodomy law, when she could be *presumed* to be violating the state law against homosexual sodomy).

“[i]t therefore would be wrong ... for a law firm to employ homosexuals or condone homosexual conduct.”<sup>142</sup>

- In 2002, the New York state legislature found that anti-gay prejudice “has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering.”<sup>143</sup>
- In 2002, the Texas Homosexual Conduct Law was used to justify opposition to the candidacy of an openly gay justice of the peace. As one member of the candidate’s own party argued, “whether you like it or not, there is a state law that prohibits sodomy in the state of Texas, and having a judge who professes to have a lifestyle that violates state law ... is wrong.”<sup>144</sup>
- In the pre-*Lawrence* landscape, “individuals *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).”<sup>145</sup>

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<sup>142</sup> Amicus Brief of the American Bar Association at 12-13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing REPORT OF THE DISTRICT OF COLUMBIA BAR TASK FORCE ON SEXUAL ORIENTATION AND THE LEGAL WORKPLACE App. C, at 39 cmt. 166 (Mar. 1999)).

<sup>143</sup> Petitioner’s Brief at 47, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing N.Y. Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2).

<sup>144</sup> Amicus Brief of the American Bar Association at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, HOUSTON VOICE, Nov. 8, 2002, at 1).

<sup>145</sup> Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

- In January 2003, just as briefs were being filed in the *Lawrence* case, a Virginia legislator suggested that a gay person’s violations of a sodomy law could disqualify her from being a state judge.<sup>146</sup>

## B. State Courts

In half a dozen states, spread geographically across the nation, state court judges who struck down sodomy laws as unconstitutional under state constitutions have considered evidence concerning the relationship between those laws and employment – and specifically how state government officials had exploited that linkage to discriminate against gay citizens.

### 1. Arkansas<sup>147</sup>

The Supreme Court of Arkansas struck down that state’s sodomy law in 2002.<sup>148</sup> Employment discrimination was presented, and considered, in this case: the opinion itself discusses the fact that the plaintiffs “fear prosecution for violations of the statute and claim that such prosecution could result in their loss of jobs, professional licenses, housing, and child custody.”<sup>149</sup> Three of the plaintiff/appellees brought up employment discrimination as they set forth the harms they had suffered because of the law.<sup>150</sup> One plaintiff/appellee had been hired as a school counselor, but when school administrators learned he was gay, they refused to honor his contract;<sup>151</sup> another had to conceal her relationship because her lover was afraid she would be

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<sup>146</sup> Amicus Brief of LGBT Associations at 13, n.35, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Scanlon & Halladay, *Sex Life May Be Used Against Judges*, DAILY PRESS, Jan. 15, 2003).

<sup>147</sup> Brief of National Conference for Community Justice et al. as Amici Curiae in Support of Appellee, *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002) (No. 01-815); Brief of the American Psychological Association et al. as Amici Curiae in Support of Appellees and the Ruling of the Court Below, *Jegley*, 394 Ark. 600 (2002) (No. 01-815); Appellant’s Reply Brief, *Jegley*, 394 Ark. 600 (2002) (No. 01-815); Appellant’s Supplemental Brief and Addendum, *Jegley*, 394 Ark. 600 (2002) (No. 01-815).

<sup>148</sup> *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002).

<sup>149</sup> *Id.* at 609.

<sup>150</sup> Appellee’s Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

<sup>151</sup> Aff. of Brian Manire, *Jegley*, 349 Ark. 600 (No. 01-815).

fired from her teaching job if her sexual orientation became known;<sup>152</sup> and a third feared that if his sexual orientation became known, he would be reported to the State Board of Nursing and lose his nursing license.<sup>153</sup>

## 2. Maryland<sup>154</sup>

The Maryland sodomy law was overturned in *Williams v. Glendening*, in which four of the plaintiffs were members of the Maryland bar.<sup>155</sup> For those plaintiffs, loss of state licensure was a real concern.<sup>156</sup> The court noted this effect of the law, and relied on the legitimacy of these fears as the basis for the plaintiffs' standing: "Since many of the plaintiffs are lawyers, they express anxiety that a conviction might jeopardize their licenses to practice law and thereby their means of earning a livelihood. . . . This court cannot say that the concerns of these plaintiffs are not real."<sup>157</sup>

On the basis of these fears, the court held that "the Plaintiffs' concerns are real and that a justiciable issue, ripe for resolution, is presented."<sup>158</sup> The ACLU attorney who brought the Maryland case cited the sodomy law's effect of denying jobs to gays and lesbians as central to defining the injustice alleged in the case.<sup>159</sup> In the press, the issue of job discrimination was

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<sup>152</sup> Aff. of Charlotte Downey, *Jegley*, 349 Ark. 600 (No. 01-815).

<sup>153</sup> Aff. of George Townsend, *Jegley*, 349 Ark. 600 (No. 01-815).

<sup>154</sup> Resources consulted include those noted as well as those listed *supra* note 7, and Dwight H. Sullivan, Michael Adams & Martin H. Schreiber, II, *The Legalization of Same-Gender Sexual Intimacy in Maryland*, 29 U. BALT. L. F. 15 (1999)

<sup>155</sup> No. 9803 6031, 1998 WL 965992, at \*1 (Md. Cir. Ct.).

<sup>156</sup> *Id.* at \*1 ("Since all are members of the Maryland Bar, they contend that a conviction would affect their ability to continue to practice law.").

<sup>157</sup> *Id.* at \*5.

<sup>158</sup> *Id.*

<sup>159</sup> Press Release, American Civil Liberties Union, Maryland's Criminal Ban on 'Unnatural Sex' Targeted by ACLU Class-Action Suit (Feb. 5, 1998) available at <http://www.glapn.org/sodomylaws/usa/maryland/mdnews01.htm>.

mentioned repeatedly.<sup>160</sup> One of the plaintiffs aspired to be a judge, and feared having to admit to having broken the law if the opportunity one day arose.<sup>161</sup>

### 3. Massachusetts<sup>162</sup>

Although the legal action taken in Massachusetts did not result in judicial invalidation of the statute, it did result in a stipulation by the state Attorney General not to “prosecute anyone under the challenged laws absent probable cause to believe that the prohibited conduct occurred either in public or without consent.”<sup>163</sup> The opinion mentions that the plaintiffs “fear arrest and prosecution, and the attendant consequences for their careers and personal lives.”<sup>164</sup> The briefs filed in the case discussed employment discrimination more extensively.<sup>165</sup> The plaintiff’s briefs state that they believed that they would lose their jobs and not get the professional licenses as a result of the sodomy law;<sup>166</sup> the ACLU’s *amicus* brief noted that the plaintiffs feared losing job prospects if they had a criminal record;<sup>167</sup> the history of sodomy laws and discriminatory denial of employment and security clearances for government work was presented in the *amicus* brief by the Massachusetts Psychological Association and others as justifying the fears of the

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<sup>160</sup> Caitlin Franke, *Homosexuals Win Challenge to State Sex Practices Law*, THE BALTIMORE SUN, Oct. 17, 1998; Caitlin Franke, *Gay, Lesbian Activists Target Maryland Law Southeast County Briefs*, THE BALTIMORE SUN, Aug. 26, 1998.

<sup>161</sup> Franke, *Gay, Lesbian*, *supra* note 32.

<sup>162</sup> Resources consulted include those noted as well as those listed *supra* note 7, as well as Pls.’ Reply Br., *Gay & Lesbian Advocates & Defenders (GLAD) v. Attorney General*, 436 Mass. 132, 133 (Mass. 2002).

<sup>163</sup> *Gay & Lesbian Advocates & Defenders (GLAD) v. Attorney General*, 436 Mass. 132, 133 (Mass. 2002).

<sup>164</sup> *Id.* at 134.

<sup>165</sup> Br. of Am. Civ. Lib. Un. of Mass. as Amicus Curiae in Supp. of Appellant’s Br. at 29, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. for Defs.-Appellees at 5, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. of Mass. Lesbian and Gay Bar Assoc. et al. as Amici Curiae at 37, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. of Mass. Psych. Assoc. et al. as Amici Curiae at 19-23, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. of Pls.-Appellants at 6, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Reply Br. of Pls.-Appellants at 17, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

<sup>166</sup> Br. of Pls.-Appellants at 6, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

<sup>167</sup> Br. of Am. Civ. Lib. Un. of Mass. as Amicus Curiae in Supp. of Appellant’s Br. at 29, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Mass. Lesbian and Gay Bar Assoc. et al. as Amici Curiae at 37, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

plaintiffs;<sup>168</sup> and the plaintiffs argued that the potential for loss of licensure, teaching jobs, and Bar membership gave them standing to bring suit.<sup>169</sup>

#### 4. Minnesota<sup>170</sup>

The Minnesota state sodomy law was invalidated in 2001 by a statewide class action suit.<sup>171</sup> Like in Maryland, the Minnesota court used the possibility of adverse effects on the plaintiffs' employment to give them standing. The plaintiffs here represented a wide variety of professions—teachers and doctors joined lawyers in fighting the state sodomy law. The court noted that the “state-mandated application for a medical license requires applicants to swear under oath that they have ‘not engaged in any of the acts prohibited by the statutes of Minnesota’” and that the lawyers must adhere to their rules of professional conduct, which dictates that all attorneys will “follow the requirements of the law.”<sup>172</sup> The court then detailed these “collateral injur[ies]”: “Dr. Krebs, who is now in her residency, faces the prospect of having to state under oath, as part of her application later this year for a physician license from the Minnesota Board of Medical Practice, that she has ‘not engaged in any of the acts prohibited by the statutes of Minnesota.’ Similarly...Mr. Roe,<sup>173</sup> a licensed elementary school teacher, and Mr. Duran and Ms. Doe, licensed Minnesota lawyers, fear adverse licensure consequences from any disclosure, voluntary or otherwise, of their past and future violations” of the state sodomy statute.<sup>174</sup>

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<sup>168</sup> Br. of Mass. Psych. Assoc. et al. as Amici Curiae at 19-23, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

<sup>169</sup> Reply Br. of Pls.-Appellants at 17, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

<sup>170</sup> Resources consulted include those noted as well as those listed *supra* note 7.

<sup>171</sup> *Doe v. Ventura*, 2001 WL 543734 (D. Minn. May 15, 2001).

<sup>172</sup> *Id.* at \*1.

<sup>173</sup> It should be noted that in the case of Mr. Roe, the adverse effect on employment could not be linked to his sexual orientation—he is a heterosexual, married man, and therefore outside the class of plaintiffs who make up the focus of this memorandum.

<sup>174</sup> *Id.* at \*4.

## 5. Montana<sup>175</sup>

Montana's same-sex sodomy statute was invalidated in 1997.<sup>176</sup> Again, the issue of employment discrimination came in the arguments for standing: “[Respondents] contend that the damage to their self-esteem and dignity and the fear that they will be prosecuted or will lose their livelihood or custody of their children create an emotional injury that gives them standing to challenge the statute. For example, two Respondents are employed or are seeking employment in positions requiring state licenses. Because they engage in conduct classified as a felony, they fear they could lose their professional licenses.”<sup>177</sup> The specifics of the respondents’ fears were laid out with greater detail in the filings in the case. The two respondents who needed to be licensed by the state were a high school history teacher with more than 25 years experience, and a midwife seeking certification. Neither of these respondents could attain licensure if they were convicted of a felony (which sodomy was under then-existing Montana law).<sup>178</sup> Not only would they have been unable to attain licensure were they prosecuted and convicted under the statute, but they could have had their licensure revoked at any time, even without prosecution: “[C]ertification in both professions requires that the individual be ‘of good moral and professional character’.”<sup>179</sup> “Even if they are never prosecuted, the statute could be used to support a finding that they are engaged in immoral conduct.”<sup>180</sup>

## 6. Tennessee<sup>181</sup>

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<sup>175</sup> Resources consulted include those noted as well as those listed *supra* note 7.

<sup>176</sup> *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

<sup>177</sup> *Id.* at 441.

<sup>178</sup> Br. of Resp’t at 7, *Gryczan v. State*, 283 Mont. 433, No. 96-202 (1997).

<sup>179</sup> *Id.* at 8.

<sup>180</sup> *Id.*

<sup>181</sup> Resources consulted include those noted as well as those listed *supra* note 7. Filings beyond the APA brief (cited below) were not available.

Employment issues arose several times in the case that invalidated the Tennessee sodomy law. In the opinion itself, the court noted that the identity of one of the plaintiffs (John Doe) had been sealed “due to concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer.”<sup>182</sup> The court also noted that the plaintiffs “believe they are threatened with prosecution for violations of the statute, which could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted.”<sup>183</sup>

*Lawrence v. Texas* and these state court cases document how state criminal law and law enforcement was used to limit LGBT people’s ability to work in the public and private sector, starting with the purges in the 1950s and 1960s and continuing until this decade. Thirteen states still had sodomy laws on their books in 2003 when the Supreme Court declared them unconstitutional. Of those thirteen states, only the legislature of one state, Missouri, has repealed its sodomy law statute. Efforts to repeal sodomy laws in the other states, both before and after *Lawrence*, have failed:

- In 2004, SB 560 was introduced in the North Carolina<sup>184</sup> state senate to amend the state sodomy law in order to comply with *Lawrence* but the effort failed.
- In 2007, a similar attempt to amend Utah’s sodomy law<sup>185</sup> to comply with *Lawrence* also failed.<sup>186</sup> The 2007 amendment was sponsored by Utah Senator Scott McCoy, who said it was ““bad form when we have unconstitutional laws on

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<sup>182</sup> *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Tenn. Ct. App. 1996).

<sup>183</sup> *Id.* at 253.

<sup>184</sup> NC GEN. STAT. ANN. § 14-177 (2004).

<sup>185</sup> *Id.* at § 76-5-403.

<sup>186</sup> Text of the proposed bill, S.B. 169, 2007 General Session, available at <http://le.utah.gov/~2007/bills/sbillint/sb0169.pdf>.

the books,” which may be misused by prosecutors and judges.<sup>187</sup> However, according to Senate Majority Leader Curt Bramble, ““The Senate caucus unanimously decided that sodomy should not be legal in the state of Utah.””<sup>188</sup>

- Seven attempts to repeal Texas’s sodomy law<sup>189</sup> prior to the *Lawrence* decision failed and the law still remains on the books
- In Virginia, attempts to decriminalize consensual sodomy in 1997 and to reduce penalties in 2000 both failed, and its sodomy law<sup>190</sup> remains on the book today.
- Idaho’s sodomy laws was taken off the books in 1971 but then reinstated in 1972, where it remains today.<sup>191</sup>
- An effort to repeal Louisiana’s sodomy law<sup>192</sup> in 2001 failed in the state house and senate.

None of the thirteen states that had sodomy laws when *Lawrence* was decided had anti-discrimination statutes prohibiting discrimination in employment on the basis of sexual orientation or gender identity. In fact, state sodomy laws have been used as a basis to argue against passing such protections. For example, when Rhode Island enacted its anti-discrimination law in 1995,<sup>193</sup> at least one state senator argued that its sodomy law, which remained on the books until 1998, prevented the state from enacting an anti-discrimination

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<sup>187</sup> Arthur S. Leonard, LESBIAN & GAY L. NOTES (Mar. 2007).

<sup>188</sup> *Id.*

<sup>189</sup> TEX. CODE ANN. § 21.06.

<sup>190</sup> VA. CODE ANN. § 18.2-361 (2009).

<sup>191</sup> IDAHO CODE ANN. §§ 18-6605, 18-6606 (2008).

<sup>192</sup> LA. REV. STAT. ANN. § 14:89 (2008).

<sup>193</sup> R.I. GEN. LAWS § 28-5.1-5.2 (1949).

statute. Senator Lawrence noted that if Rhode Island “has a right to criminalize sodomy, it should not be required to adopt legislation protecting homosexuals from discrimination.”<sup>194</sup>

The following sections trace two legacies of the purges of LGBT people from public employment and the criminalization of same-sex behavior: the use of state sodomy laws to deny LGBT people employment in law enforcement, and state occupational licensing requirements that impaired the ability of LGBT people to work in the public and private sectors, in particular in the field of education.

### **III. Sodomy Laws and Discrimination in Law Enforcement**

One of the areas of public employment where the legacy of purges and the criminalization of same-sex sexual behavior have had the most impact is in law enforcement. Federal, state and local law enforcement agencies adopted policies that no LGBT people could serve in law enforcement because they were potential felons under state sodomy laws, and these decisions were upheld by courts. Explicit policies ranged from those in Dallas, Texas challenged in the 1980s<sup>195</sup> and 90s,<sup>196</sup> to a policy in Puerto Rico<sup>197</sup> that was in place until 2001. The legacy of this history is clearly demonstrated in Chapter 12 of this report, which provides almost 400 specific examples of discrimination against LGBT public employees. Over 40 percent of these examples deal with law enforcement -- 144 involve discrimination against public safety officers and 30 deal with corrections officers.

The following court cases illustrate how sodomy laws were the basis for discrimination against LGBT employees in law enforcement:

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<sup>194</sup> See Senator Lawrence, Floor Statement, Rhode Island Senate, June 28, 1995.

<sup>195</sup> *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).

<sup>196</sup> *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993).

<sup>197</sup> *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).

- ***Childers v. Dallas Police Dep’t*, 513 F. Supp. 134 (N.D. Tex. 1981).** In *Childers*, the plaintiff was not hired for a position with the Dallas Police Department following his disclosure during his interview that he was gay.<sup>198</sup> Among the reasons stated for the Department’s refusal to hire Childers was that he was a “habitual lawbreaker” because “his sexual practices violated state law.”<sup>199</sup> The interviewer also considered that he would be a security risk “because of the kind of contraband that the property room controls [which included sexual paraphernalia] and because Childers might warn other homosexuals of impending police raids.”<sup>200</sup> In upholding the Department’s refusal to hire Childers against Childers’ due process challenge, the court noted that he had admitted conduct that violated the Police Department Code of Conduct in a number of ways, including by violating Texas’s sodomy laws and “cohabit[ing] with a sex pervert of the same sex.”<sup>201</sup> It also held that “tolerance of homosexual conduct might be construed as tacit approval, rendering the police department subject to approbation and causing interference with the effective performance of its function.”<sup>202</sup>
- ***Termination Of An Assistant United States Attorney On Grounds Related To His Acknowledged Homosexuality*, 7 U.S. Op. Off. Legal Counsel 46, 1983 WL 187355 (O.L.C.).** In a 1983 opinion, the Office of Legal Counsel of the Department of Justice responded to a request for advice on the legal implications of failing to retain an Assistant U.S. Attorney who is “an acknowledged homosexual.”<sup>203</sup> The only reason for the proposed termination was the particular Assistant United States Attorney’s (AUSA)

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<sup>198</sup> *Childers*, 513 F. Supp. at 137-38.

<sup>199</sup> *Id.* at 138.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 144.

<sup>202</sup> *Id.* at 147.

<sup>203</sup> *Termination Of An Assistant United States Attorney On Grounds Related To His Acknowledged Homosexuality*, 7 U.S. Op. Off. Legal Counsel at 46.

“homosexual conduct.” The opinion assumes that any letter of termination “would note that homosexual acts are a crime under law of the state in which the AUSA is stationed, and that the Department believes that any such violations of local criminal law reflect adversely on the AUSA’s fitness to represent the government as a prosecutor.”<sup>204</sup> The opinion further notes that “it would be permissible for the department to refuse to retain an AUSA upon a determination that his homosexual conduct would, because it violates state criminal law, adversely affect his performance by calling into question his and, therefore, the Department’s, commitment to upholding the law.”<sup>205</sup> In discussing the requirement established by the courts of a nexus between the conduct and the job performance, it further states that “the most effective way to prove adverse effect on job performance would be to prove that the special nature of a prosecutor’s job -- his public representation of the entire department, his duty to uphold the law, and the potential for accusations of hypocrisy for hiring a lawbreaker to enforce the law -- requires that there be no taint of criminality.”<sup>206</sup> The opinion then acknowledges that on the particular facts of the case—the AUSA in question had an excellent record, and the laws of the state in which he was stationed only enforced the criminal sodomy law against private conduct—the arguments would not likely prevail without stronger evidence of a nexus between any state law violations and adverse effects on job performance.<sup>207</sup>

- ***Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).** Appellant Margaret Padula applied for a job as a special agent with the FBI, and ranked well among all applicants based on her interview and a written examination. After a background check revealed, and a

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<sup>204</sup> *Id.* at 47.

<sup>205</sup> *Id.* at 46.

<sup>206</sup> *Id.* at 51-52.

<sup>207</sup> *Id.* at 46, 55-56.

follow-up interview confirmed, that she was a lesbian, however, she was not hired for the position. Padula alleged that she was not hired based solely on the fact that she was a lesbian, and argued that this decision denied her equal protection of the law under the Fourteenth Amendment. Padula requested that the court treat homosexuality as a suspect or quasi-suspect classification for purposes of its analysis. The court rejected Padula's claim that discrimination against gays and lesbians merited any kind of heightened standard of review, especially following the U.S. Supreme Court's decision in *Bowers v. Hardwick*, noting that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that the state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."<sup>208</sup> In subjecting the FBI's hiring practices to rational basis review, the court also invoked the criminality associated with homosexuality as a justification for employment discrimination: "To have agents who engage in conduct criminalized in roughly one-half of the states would undermine the law enforcement credibility of the Bureau. Perhaps more important, FBI agents perform counterintelligence duties that involve highly classified matters relating to national security. It is not irrational for the Bureau to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality

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<sup>208</sup> *Padula*, 822 F.2d at 103.

exposes many homosexuals, even ‘open’ homosexuals, to the risk of possible blackmail to protect their partners, if not themselves.”<sup>209</sup>

- ***Todd v. Navarro*, 698 F. Supp. 871 (S.D. Fla. 1988).** The Plaintiff was a deputy sheriff who asserted that she was discharged from the sheriff’s office solely because she was a lesbian. In denying any claim to heightened scrutiny, the court cited approvingly the D.C. Circuit’s discussion in *Padula v. Webster* of the “anomal[y]” of providing strict scrutiny for purposes of equal protection analysis when the conduct that defines the class may be constitutionally criminalized concluding that “[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end.”<sup>210</sup> In applying rational basis review, the court summarily denied the Plaintiff’s claim.<sup>211</sup>
- ***Dawson v. State Law Enforcement Div.*, 1992 WL 208967 (D.S.C. Apr 6, 1992).** The Plaintiff worked with the State Law Enforcement Department (SLED) for sixteen years, but was asked for his resignation following allegations that he had been involved in sexual activity with a co-worker’s husband. Dawson denied any homosexual activity, but claimed that to the extent the denial was based on homosexual conduct, he had been the victim of an equal protection violation because “SLED continues to employ an officer who was charged with a criminal violation involving off-duty gambling; an employee who is the mother of a child born out of wedlock; and employees who committed adultery while employees of SLED.”<sup>212</sup> Accordingly, he argued that he should not have been terminated on the basis that he was suspected of violating state sodomy laws when

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<sup>209</sup> *Id.* at 104.

<sup>210</sup> *Todd v. Navarro*, 698 F. Supp. 871, 874-5 (S.D.Fla. 1988).

<sup>211</sup> *Id.* at 875.

<sup>212</sup> *Dawson*, 1992 WL 208967, at \*6.

other employees were also engaged in criminal activity but were not terminated for violating other state laws (gambling, adultery, and fornication). The court, however, dismissed the argument and upheld his dismissal because “homosexual conduct is not a fundamental right and because Dawson is not a member of a suspect class.”<sup>213</sup>

- ***City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993).** The Dallas Police Department denied the plaintiff employment because she stated truthfully that she was a lesbian, which meant that she was, in the eyes of the Department, in presumptive violation of departmental policy and the Texas sodomy statute.<sup>214</sup> The trial court ruled that the state sodomy statute, and the Department’s anti-gay hiring policy that derived from it were unconstitutional, and the Texas court of appeals affirmed.
- ***Woodward v. Gallagher*, No. S9-5776 (Orange Co., Fla. Cir. Ct., filed June 9, 1992) (discussed in 21 Fordham Urb. L.J. 997, 1035 (1994)).** In Florida, the Orange County Sheriff fired a deputy, despite his concededly “exemplary” record, when it was discovered that he was gay. The sheriff’s office cited the existence of sodomy laws as a justification for the dismissal, noting that Florida prohibits oral or anal sex, and that deputies might have to work with agencies in other states that also have such laws. The court rejected these arguments and found that the anti-gay discrimination violated the state constitutional right to privacy.
- ***Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).** Shahar’s offer to work at the Attorney General’s office in Georgia was rescinded after she made comments to her

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<sup>213</sup> *Id.* at \*7.

<sup>214</sup> *City of Dallas v. England*, 846 S.W.2d at 958.

coworkers about her upcoming wedding to her same-sex partner.<sup>215</sup> The Attorney General's office revoked the offer because employing Shahar "would create the appearance of conflicting interpretations of Georgia law and affect public credibility about the Department's interpretations [and] . . . interfere with the Department's ability to enforce Georgia's sodomy law."<sup>216</sup> In an *en banc* decision, the Eleventh Circuit accepted the Attorney General's arguments and held that the discrimination against Shahar was justified based in large part on the existence of sodomy laws in Georgia. For example, in rejecting Shahar's attempted analogy between her case and *Loving v. Virginia* as "not helpful," the court noted "concerns about public perceptions about whether a Staff Attorney in the Attorney General's office is engaged in an ongoing violation of criminal laws against homosexual sodomy--which laws the Supreme Court has said are valid."<sup>217</sup> In addition, in referring to the U.S. Supreme Court's 1986 decision in *Bowers v. Hardwick* (in which the Georgia Attorney General was the defendant), the court noted that hiring Shahar would not only have raised issues of perception but also of morale, given that the lawyers in the department had worked hard to ensure that sodomy could still be constitutionally criminalized.<sup>218</sup>

- ***Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).** Until 2001, a Puerto Rico Police Department had a policy of prohibiting employment of an officer who

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<sup>215</sup> *Shahar*, 114 F.3d at 1100.

<sup>216</sup> *Id.* at 1101.

<sup>217</sup> *Id.* at 1105 n.17.

<sup>218</sup> *See id.* at 1108 (noting that the Department had recently won "a recent battle about homosexual sodomy--highly visible litigation in which its lawyers worked to uphold the lawful prohibition of homosexual sodomy. This history makes it particularly reasonable for the Attorney General to worry about the internal consequences for his professional staff (for example, loss of morale, loss of cohesiveness and so forth) of allowing a lawyer, who openly--for instance, on her employment application and in statements to coworkers--represents herself to be 'married' to a person of the same sex, to become part of his staff").

even associated with homosexuals. In *Gay Officers Action League v. Puerto Rico*,<sup>219</sup> the First Circuit upheld the District Court decision to declare the policy unconstitutional. The First Circuit noted in its decision that the policy had a chilling effect on First Amendment rights even if, as the Commonwealth claimed, it was an unenforced policy. The court cast doubt on the Commonwealth's assertion that the policy was a dead letter, observing that the case history revealed a bitter fight on part of the Commonwealth to maintain the policy, including an offer to rewrite the regulation to prohibit association with "persons of dubious reputation."<sup>220</sup>

## **V. State Occupational Licensing Requirements and Discrimination in Education**

The legacy of the purges of LGBT public employees and the criminalization of same-sex behavior also continues to the present in the form of morality requirements for state issued occupational licenses. Under these requirements, LGBT people across the country have been considered immoral and denied professional licenses or have had them revoked. While this form of employment discrimination against LGBT people by state governments has impacted thousands of public and private employees, it has had a disproportionate impact on public employees who are much more likely to be in professions that require occupational licenses.

One of the areas where this discrimination in licensing has been the most prevalent is in education. The legacy of this history of discrimination in public education is clearly demonstrated in the chapter of this report providing almost 400 specific examples of discrimination against LGBT public employees, over 27 percent deal with public employees in education- 7 percent employed by college and universities and 20 percent employed by elementary, middle, and high schools.

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<sup>219</sup> 247 F.3d 288 (1st Cir. 2001).

<sup>220</sup> *Id.* at 292.

Over 40 percent of public employees in the United States are in professions that require professional licenses issued by state governments, and many of these licenses have moral fitness requirements. In 2003, the Council of State Governments estimated that in the United States, more than 800 occupations were licensed in at least one state. Altogether more than 1,100 occupations are either licensed, certified or registered by state governments.<sup>221</sup> According to a recent analysis of data collected in a 2006 Gallup Poll, over 29 percent of the workforce in the United States is required to hold an occupational license from a government agency.<sup>222</sup> Government workers are more likely to need a license than workers in the private sector: 41 percent of government workers were in jobs that required an occupational license in 2006, compared with 25 percent of workers in the private sector.<sup>223</sup>

A large number of these licenses have moral fitness tests that were used to exclude LGBT people. These tests ranged from exclusions based on “gross immorality,” “immoral conduct” and acts or crimes involving “moral turpitude” to more general bans on “unprofessional conduct.” For example, in the 1950s and 1960s in California, as in virtually all the other states, “gross immorality” was a statutory basis for professional disciplinary action against doctors, dentists, pharmacists, embalmers, and guardians.<sup>224</sup> In addition, conviction of a “crime involving moral turpitude” precluded people from dozens of more occupations and was also a common basis for revoking a professional license in most states.<sup>225</sup> In 1969, the California Supreme Court

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<sup>221</sup> Council of Licensure, Enforcement , and Regulation (CLEAR) (2004), <http://www.clearhq.org>.

<sup>222</sup> Morris M. Kliener and Alan B. Krueger, Institute for the Study of Labor, *The Prevalence and Effects of Occupational Licensing*, Discussion Paper No. 3765, Aug. 2008, at 2. Prior studies suggest that over 20 percent of the U.S. workforce works in occupations licensed by state governments. *Id.* at 3.

<sup>223</sup> *Id.* at 12 panel C.

<sup>224</sup> Cal. Business and Professions Code §§ 2361(d) (doctors), 1680(8) (dentists), 3105 (optometrists), 4350.5 (pharmacists), 7698 (funeral directors and embalmers) (West 1954); Cal. Probate Code § 1580(4) (guardians) (West 1954).

<sup>225</sup> E.g., Cal. Business and Professional Code §§ 1000-10(b) (chiropractors), 1679 (dentists), 2383 (doctors), 2685(d) (physical therapists), 3105 (optometrists), 4214 (pharmacists), 6775 (engineers) (West 1954).

summarized the state's rules in *Morrison v. State Board of Education*,<sup>226</sup> where a gay schoolteacher was unconstitutionally discharged because of his sexual orientation:

Along with public school teachers, all state college employees (Ed. Code, § 24306, subd. (a)), all state civil service workers (Gov. Code, § 19572, subd. (1)), and all barbers (Bus. & Prof. Code, § 6582) can be disciplined for “immoral conduct.” The prohibition against “acts involving moral turpitude” applies to attorneys (Bus. & Prof. Code, § 6106) and to technicians, bioanalysts and trainees employed in clinical laboratories (Bus. & Prof. Code, § 1320), as well as to teachers. The ban on “unprofessional conduct” is particularly common, covering not only teachers, but also dentists (Bus. & Prof. Code, § 1670), physicians (Bus. & Prof. Code, § 2361), vocational nurses (Bus. & Prof. Code, § 2878, subd. (a)), optometrists (Bus. & Prof. Code, § 3090), pharmacists (Bus. & Prof. Code, § 4350), psychiatric technicians (Bus. & Prof. Code, § 4521, subd. (a)), employment agency officials (Bus. & Prof. Code, § 9993), state college employees (Ed. Code, § 24306, subd. (b)), certified shorthand reporters (Bus. & Prof. Code, § 8025), and funeral directors and embalmers (Bus. & Prof. Code, § 7707) . . . .

“Gross immorality” constitutes ground for disciplinary measures against doctors (Bus. & Prof. Code, § 2361, subd. (d)), dentists (Bus. & Prof. Code, § 1680, subd. (8)), optometrists (Bus. & Prof. Code, § 3105), pharmacists (Bus. & Prof. Code, § 4350.5, subd. (a)), funeral directors and embalmers (Bus. & Prof. Code, § 7698) and guardians (Prob. Code, § 1580, subd. (4)) . . . . [T]he most common basis for revocation of licenses and certificates is conviction of a crime involving moral turpitude. Among those covered by such a provision are trainers of guide dogs for the blind (Bus. & Prof. Code, § 7211.9, subd. (d)), chiropractors (Bus. & Prof. Code, § 1000-1010), laboratory technicians and bioanalysts (Bus. & Prof. Code § 1320, subd. (k)), dentists (Bus. & Prof. Code, § 1679), doctors (Bus. & Prof. Code, § 2361, subd. (e)), physical therapists (Bus. & Prof. Code, § 2660, subd. (d)), registered nurses (Bus. & Prof. Code, § 2761, subd. (f)), vocational nurses (Bus. & Prof. Code, § 2878, subd. (f)), psychologists (Bus. & Prof. Code, § 2960, subd. (a)), optometrists (Bus. & Prof. Code § 3094), pharmacists (Bus. & Prof. Code, § 4354), psychiatric technicians (Bus. & Prof. Code, § 4521, subd. (f)), veterinarians (Bus. & Prof. Code, § 4882, subd. (b)), attorneys (Bus. & Prof. Code, § 6101), barbers (Bus. & Prof. Code, § 6576), engineers (Bus. & Prof. Code, § 6775, subd. (a)), collection agency officials (Bus. & Prof. Code, § 6930), private detectives (Bus. & Prof. Code, § 7551, subd. (d)), shorthand reporters (Bus. & Prof. Code, § 8025, subd. (a)), geologists (Bus. & Prof. Code, § 7860, subd. (a)), social workers (Bus. Prof. Code, § 9028, subd. (a)), and employment agency officials (Bus. & Prof. Code, § 9993, subd. (e)).

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<sup>226</sup> 1 Cal. 3d 214, 227-29 & n.21 (1969).

These requirements remain common for occupational licenses today. For example, in Utah, the Division of Occupational and Professional Licensing (the “Division”) administers and enforces all of the states licensing laws.<sup>227</sup> Currently, the Division issues licenses in approximately 60 categories of licensure, with most categories including several individual license classifications.<sup>228</sup> The Division may refuse to issue, renew, revoke, suspend, restrict, or place on probation a license of any licensee if “the applicant or licensee has engaged in unprofessional conduct.”<sup>229</sup> The definition of “unprofessional conduct” includes “probation[s] with respect to a crime of moral turpitude.”<sup>230</sup> Moreover, most of the occupations and professions that must be licensed under Title 58 also contain language requiring that the applicant must “be of good moral character.”

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<sup>227</sup> UTAH CODE ANN. § 58-1-103 (2008) (“Occupations and Professions.”.) The Division is assisted by approximately 60 professional boards and commissions that advise the Division by recommending, assisting and supporting the Division in taking appropriate action in licensure and investigative matters. General Information About the Utah Division of Occupational and Professional Licensing, <http://www.dopl.utah.gov/info.html> (last visited Sept. 3, 2009).

<sup>228</sup> The Division issues licenses for the following occupations and professions promulgated by the appropriate acts under Title 58: Architects Licensing Act; Podiatric Physician Licensing Act; Funeral Services Licensing Act; Barber, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act; Health Care Providers Immunity from Liability Act; Health Facility Administrator Act; Utah Optometry Practice Act; Pharmacy Practice Act; Environmental Health Scientist Act; Professional Engineers and Professional Land Surveyors Licensing Act; Physical Therapist Practice Act; Certified Public Accountant Licensing Act; Veterinary Practice Act; Nurse Practice Act; Nurse Licensure Compact; Advanced Practice Registered Nurse Compact; Utah Controlled Substances Act; Utah Drug Paraphernalia Act; Imitation Controlled Substances Act; Utah Controlled Substance Precursor Act; Clandestine Drug Lab Act; Drug Dealer’s Liability Act; Alternative Dispute Resolution Providers Certification Act; Recreational Therapy Practice Act; Athletic Trainer Licensing Act; Speech-language Pathology and Audiology Licensing Act; Occupational Therapy Practice Act; Nurse Midwife Practice Act; Hearing Instrument Specialist Licensing Act; Massage Therapy Practice Act; Dietitian Certification Act; Private Probation Provider Licensing Act; Landscape Architects Licensing Act; Radiology Technologist and Radiology Practical Technician Licensing Act; Utah Construction Trades Licensing Act; Utah Uniform Building Standards Act; Respiratory Care Practices Act; Mental Health Professional Practice Act; Psychologist Licensing Act; Security Personnel Licensing Act; Deception Detection Examiners Licensing Act; Utah Medical Practice Act; Physicians Education Fund; Utah Osteopathic Medical Practice Act; Dentist and Dental Hygienist Practice Act; Physician Assistant Act; Naturopathic Physician Practice Act; Acupuncture Licensing Act; Chiropractic Physician Practice Act; Certified Court Reporters Licensing Act; Genetic Counselors Licensing Act; Professional Geologist Licensing Act; Direct-entry Midwife Act.

<sup>229</sup> UTAH CODE ANN. § 58-1-401(2)(a)(2008).

<sup>230</sup> *Id.* at § 58-1-501(2)(c).

Ample documentation supports that these moral fitness tests were used to deny LGBT people licenses and limit their employment opportunities.<sup>231</sup> Moreover, the documented cases likely under represent the actual impact on LGBT employees since “it is most likely that homosexual individuals in licensed professions keep a low profile for fear of potential dismissal or discipline.”<sup>232</sup> For example, when Governor Mario Cuomo issued New York’s executive order forbidding employment discrimination the basis of sexual orientation in 1983, he stated: “As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there.”<sup>233</sup>

As explained above, the fact that applicants and licensees could even potentially violate state sodomy laws also resulted in the denial and revocation of occupational licenses issued by state governments. In her concurrence in *Lawrence* striking down all remaining sodomy laws in the United States, Justice O’Connor’s noted that “[i]t appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design.”<sup>234</sup> State courts also recognized the direct link between sodomy laws and LGBT people’s eligibility for occupational licenses when

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<sup>231</sup> Rivera, *supra* note 230, at 1078. (“From those cases which have been published, however, it is evident that the homosexuality of a prospective licensee is often a dispositive factor”).

<sup>232</sup> *Id.*

<sup>233</sup> Mario M. Cuomo, Nov. 18, 1983, Executive Order 28: Establishing a Task Force on Sexual Orientation Discrimination, N.Y. COMP. CODE R. & REGS. tit. 9, § 4.28 (1983).

<sup>234</sup> *Lawrence*, 539 U.S. at 581 (O’Connor, J., concurring) *See, e.g.*, Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer.)” See also, Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). (“In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).”)

striking down their sodomy laws. Plaintiffs from numerous professional disciplines requiring state licensure initiated a number of challenges to sodomy laws in state courts. In each of these cases, the plaintiffs were granted standing because they feared losing their licenses and the sodomy laws were declared unconstitutional.<sup>235</sup> In *Jegley v. Picado*,<sup>236</sup> a nurse joined two educational professionals to challenge Arkansas's sodomy law. In *Doe v. Ventura*,<sup>237</sup> two licensed Minnesota lawyers and a doctor joined a teacher to challenge the state's sodomy law. Both *Gryczan v. State*<sup>238</sup> and *Campbell v. Sundquist*<sup>239</sup> were brought by plaintiffs employed in or seeking employment in positions requiring state licenses. The *Campbell* plaintiff requested that his identity be sealed "due to the concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer." The Maryland case which overturned the state's sodomy law, *Williams v. Glendening*,<sup>240</sup> was brought by four licensed lawyers who legitimately "express[ed] anxiety that a conviction might jeopardize their licenses to practice law and thereby their means of earning a livelihood."<sup>241</sup> The court went on to admit that it "cannot say that the concerns of [the] plaintiffs are not real."<sup>242</sup>

Court cases and historians also document a number of specific cases of people who lost their licenses because they were, or were even suspected of being, LGBT, including lawyers,<sup>243</sup>

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<sup>235</sup> *Jegley*, 349 Ark. at 621-622; *Doe*, 2001 WL 543734 at \*9; *Gryczan*, 283 Mont. At 446; *Campbell*, 926 S.W.2d at 266; *Williams v. Glendening*, No. 9803 6031, 1998 WL 965992, at \*1 (Md. Cir. Ct.).

<sup>236</sup> 349 Ark. at 608.

<sup>237</sup> 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001).

<sup>238</sup> 283 Mont. 433 (Mont. 1997).

<sup>239</sup> 926 S.W.2d 250, 253 n.1 (Tenn. Ct. App. 1996).

<sup>240</sup> *Williams*, 1998 WL 965992 at \*1.

<sup>241</sup> *Id.* at \*5.

<sup>242</sup> *Id.*

<sup>243</sup> See, e.g., *In re Boyd*, 307 P.2d 625 (Cal. 1957) Marcus, *Making History*, 149-151; *In Application of Kimball*, 301 N.E.2d 436 (N.Y. 1973). (Plaintiff, a lawyer who had previously been licensed in Florida and then had his license revoked based on his sodomy conviction under the Florida sodomy law, brought suit against the New York State Bar for denying his bar application on the basis that his homosexuality per se made him unfit. The court held that a bar applicant may not be rejected as "unfit" or "lacking in character" because of homosexuality per se, and ordered the State Bar to reconsider the application.) *Fla. Bd. of Bar Exam'rs v. Eimers*, 358 So. 2d 7 (Fla. 1978). ( The Florida State Bar sought guidance from Florida Supreme Court as to whether applicant should be denied admission for lack

doctors,<sup>244</sup> pilots,<sup>245</sup> hairdressers,<sup>246</sup> and realtors.<sup>247</sup> For these plaintiffs, and other LGBT public employees, the ramifications of having a license denied or revoked extended beyond the immediate loss of a job. The loss of an occupational license means it is illegal to get *any* job in the state in that occupation.<sup>248</sup> As legal scholar Rhonda Rivera explains further: “The denial of entrance into a profession toward which time and money have been invested or the revocation of

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of “good moral character” because of his admitted orientation as homosexual per se. The court held that a “rational connection” to fitness was required to deny bar admission, and held: “[w]hile Respondent’s act definitely affronts public conventions...there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent’s part to live up to the professional responsibility and conduct required of an attorney.” ) *Florida Bd. of Bar Examiners Re N.R.S.*, 403 So.2d 1315 (Fla. 1981). (A lawyer applying to the Florida Bar admitted a preference for men but refused to answer questions about his sexual practice. He petitioned the Court to order the Board to certify him for admission to practice. The Florida Supreme Court held that “[p]rivate noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law. This might not be true of commercial or nonconsensual sex or sex involving minors....In the instant case the board may ask the petitioner to respond to further questioning if, in good faith, it finds a need to assure itself that the petitioner’s sexual conduct is other than noncommercial, private, and between consenting adults. Otherwise, the board shall certify his admission.”)

<sup>244</sup> See, e.g., *McLaughlin v. Bd. of Med. Exam’rs*, 35 Cal. App. 3d 1010 (Cal. Ct. App. 1973). (Plaintiff, a medical doctor, had his medical license revoked for “moral turpitude” after he was charged with the solicitation of a homosexual act from another adult (an out-of-uniform police officer) in a public restroom. The court upheld the revocation, reasoning that Plaintiff’s homosexual proclivities could cause him to be a danger to his patients if he was unable to control his sexual urges; Frank Wood Jr., *The Homosexual and the Police*, ONE, INC., May 1963, at 21-22..

<sup>245</sup> Rivera, *supra* note 230, at 1078 (internal citations omitted) (“In *Doe v. Department of Transportation*, [412 F.2d 674 (8th Cir. 1969)], the court upheld the finding of the National Transportation Safety Board that the applicant had a “character or behavior disorder severe enough to have repeatedly manifested itself by overt acts.” Such a disorder constituted statutory grounds for denial of the medical certificate necessary for a pilot’s license. In reaching its decision, the court considered the testimony of an Air Force psychiatrist that the applicant was a “constitutional psychopathic personality,” as well as the applicant’s conviction of sodomy and several traffic violations. The court justified the severity of the penalty as a necessary incident to its main concern, the safety of the airways.”)

<sup>246</sup> Marcus, *Making History*, 57; NEIL MILLER, *SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950s* 127 (2002).

<sup>247</sup> *Harden v. Zinnemann*, 2003 WL 21802250 (Cal. App. Aug. 6, 2003). (The California Court of Appeal, 3rd District, upheld a decision by the state’s Department of Real Estate to deny a realtor’s license to Fred Harden, who had been ordered to register as a sex offender after two convictions for “lewd conduct in a public place” based on his soliciting sex from male undercover police officers in public restrooms. Although the administrative judge who first reviewed Harden’s application issued a decision finding that the department failed to show that Harden’s convictions were substantially related to the qualifications, functions, and duties of a real estate salesperson, and recommended that he be issued the license, the commissioner denied the license, focusing on a real estate salesperson’s access to house keys, and potential access to “unsupervised children.” The Superior Court held that although there was no dispute that Harden’s offenses involve moral turpitude as that concept is defined in California, no substantial relationship had been shown between the offenses and the job of a real estate salesperson. The Court of Appeal reversed, finding, “the court order that he register as a sex offender conclusively establishes he committed the second offense ‘as a result of sexual compulsion or for purposes of sexual gratification.’...Based on his former conduct, it cannot be said Harden will not use this opportunity, under the right circumstances, to engage in lewd conduct.”)

<sup>248</sup> *The Prevalence and Effects of Occupational Licensing*, Moris M. Kliener and Alan B. Krueger, Discussion Paper No. 3765, Institute for the Study of Labor (August 2008) at page 1.

a license to practice is a severe penalty, especially when the denial or revocation is based upon an administrative determination, which is predictably arbitrary and arguably irrelevant to the individual's ability to practice his or her profession.”<sup>249</sup>

One of the employment sectors that discrimination in state licensing has had the biggest impact on LGBT public employees is education. In all 50 states, a teaching certificate, granted by the state, must be obtained in order to teach in a public school system at the elementary or secondary level.<sup>250</sup> Explains Rivera:

The homosexuality of an individual teacher may be raised on application for the teaching certificate or on application for a particular teaching position. It can also become an issue as a cause for dismissal from a particular job and, more severely, as a cause for the revocation of the license to teach. The main legal issues confronting the homosexual teacher are dismissal from a current position and revocation of his or her teaching certificate. While dismissal from a current position is certainly injurious to the teacher, revocation of his or her teaching certificate is a personal catastrophe. Without proper credentials a teacher cannot be hired anywhere in that state and is thus essentially banned from his or her profession. All states have statutes that permit the revocation of teaching certificates (or credentials) for immorality, moral turpitude, or unprofessionalism. Homosexuality is considered to fall within all three categories. Dismissals of homosexual teachers, as differentiated from loss of credentials, have also usually been based on charges of —immorality.<sup>251</sup>

In some states, the state legislature or state officials created explicit policies of prohibiting LGBT people from teaching. For example, in 1983, the West Virginia Attorney General issued an opinion that homosexual teachers in the state would be considered “immoral” under West Virginia law and therefore could be dismissed. The opinion stated: “From the information given us, it appears clear that homosexual and lesbian behavior, even if legal, is

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<sup>249</sup> Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1074 (1999).

<sup>250</sup> *Id.* at 1079.

<sup>251</sup> *Id.* at 1079.

strongly contrary to the moral code of the Hampshire County community. It similarly appears to violate community standards of acceptable sexual behavior. Thus, by the definition adopted by our Court, it is immoral in the first instance.”<sup>252</sup>

Until 1990, Oklahoma had a law explicitly barring LGBT people from teaching.<sup>253</sup> The law provided that “a teacher, student teacher or teacher’s aide may be refused employment or reemployment, dismissed, or suspended after a finding that the teacher or teacher’s aide has: (i) engaged in public homosexual conduct or activity; and (2) has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teacher’s aide.”<sup>254</sup> The statute defined “homosexual conduct” broadly to include “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.”<sup>255</sup> Thus, in effect, the statute barred openly gay teachers from employment in the Oklahoma public school system. In 1982, the U.S. District Court for the Western District of Oklahoma upheld the statute’s constitutionality.<sup>256</sup> On appeal, the Tenth Circuit Court of Appeals upheld the statute with respect to the ban on public homosexual activity, but struck the

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<sup>252</sup> 60 W. Va. Op. Atty. Gen. 46 (1983).

<sup>253</sup> See, *Nat’l Gay Task Force v. Bd. of Educ. of the City of Okla. City, State of Okla.*, 729 F.2d 1270 (10th Cir. 1984). The law provided for public school teachers to be fired or suspended for “public homosexual activity,” defined as specific acts committed with a person of the same sex that is “indiscreet and not practiced in private,” or for homosexual “conduct,” defined as “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employers.” In a constitutional challenge to the law, the 10<sup>th</sup> Circuit found “no constitutional problem in the statute’s permitting a teacher to be fired for engaging in ‘public homosexual activity,’” but struck down the “conduct” clause as overbroad and violative of the First Amendment because it included terms such as “encouraging” and “promoting” that “do not necessarily imply incitement to imminent action.”

<sup>254</sup> OKLA. STAT 70, § 6-103.5 (repealed in 1989) (statutory text available in *Nat’l Gay Task Force v. Bd. of Ed. of the City of Okla. City*, 729 F. 2d 1270 (10th Cir. 1984)).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 1272.

statute with respect to the ban on public homosexual conduct as unconstitutionally vague.<sup>257</sup> In 1989, the statute was repealed.

The following cases exemplify the discrimination against LGBT teachers over the last 50 years to obtain and retain state-issued credentials:

- ***Sarac v. State Bd. Of Educ.*, 249 Cal. App. 2d 58 (1957).** In *Sarac*, the California Court of Appeal affirmed the revocation of Sarac’s teaching credential because he was charged with “lewd or dissolute conduct” under the California Penal Code, and subsequently convicted, for soliciting sex from a male undercover police officer.<sup>258</sup> The trial court upheld the education board’s determination that Sarac’s homosexual conduct made him unfit to teach, and the Court of Appeal affirmed. It noted that “[h]omosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of Education Code, section 13202. It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children. It certainly constitutes evident unfitness for service in the public school system within the meaning of that statute.”<sup>259</sup> Accordingly, there was an “obvious rational connection between [Sarac’s] homosexual conduct on the beach and the consequent action of respondent in revoking his secondary teaching credential on the statutory

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<sup>257</sup> *Id.* at 1270.

<sup>257</sup> *Id.* at 1272.

<sup>258</sup> *Sarac v. State Bd. Of Educ.*, 249 Cal. App. 2d at 60-61 (citing Cal. Penal Code § 647(a)).

<sup>259</sup> *Id.* at 62.

grounds of immoral and unprofessional conduct and evident unfitness for service in the public school system of this state.”<sup>260</sup>

Even after the California Supreme Court’s decision two years later in *Morrison*,<sup>261</sup> which required a nexus between the alleged immoral conduct and the teacher’s fitness to teach, several California cases continued to revoke teaching credentials based on arrests or convictions of gay teachers for sex offenses with other adults.<sup>262</sup> Following these cases, the California Supreme Court in *Board of Education v. Jack M.* clarified that even those convicted of a criminal sex offense were entitled to a fitness hearing and that “proof of the commission of a criminal act does not alone demonstrate the unfitness of a teacher, but is simply one of the factors to be considered.”<sup>263</sup>

- ***McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), rev’d 451 F.2d 193 (8th Cir. 1971).** In April 1970, James McConnell was offered a post as a librarian at the University of Minnesota, which he accepted. In May 1970, he moved to Minnesota, and there, he sought a marriage license with his partner, Jack Baker, a move that drew substantial publicity.<sup>264</sup> Following these events, McConnell’s job offer was withdrawn upon a determination by the Board of Regents that McConnell’s “personal conduct, as

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<sup>260</sup> *Id.*

<sup>261</sup> *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214 (1969).

<sup>262</sup> See e.g. *Moser v. State Board of Education*, 22 Cal. App. 3d 988 (1972) (revocation of teaching credentials upheld where the appellant’s homosexual conduct was considered violative of California Penal Code sections, and distinguishing *Morrison* on the basis that the conduct alleged there was non-criminal); *Purifoy v. State Board of Educ.*, 30 Cal. App. 3d 187 (1973) (upholding revocation of teaching credentials where teacher was convicted under California Penal Code § 647 and distinguishing between criminal sexual misconduct and “noncriminal sexual misconduct or other sexual misconduct,” with only the latter requiring a separate showing of unfitness); *Board of Education v. Calderon*, 35 Cal. App. 3d 490 (1973) (upholding revocation of teaching credentials where teacher was acquitted of “oral copulation” charge because the legislature intended “to permit school boards to shield children of tender years from the possible detrimental influence of teachers who commit [sex offenses] even if they are not found guilty beyond a reasonable doubt).

<sup>263</sup> 19 Cal. 3d 691 (1977).

<sup>264</sup> *McConnell v. Anderson*, 316 F. Supp. at 810. Baker and McConnell took their marriage case to the U.S. Supreme Court, resulting in the Court’s denial of their cert. petition for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972).

represented in the public and University news media, is not consistent with the best interest of the University.”<sup>265</sup> The Regents’ position was that “even though plaintiff may be a very capable librarian, his professed homosexuality connotes to the public generally that he practices acts of sodomy, a crime under Minnesota law; that the Regents have a right to presume that by his applying for a license to marry another man plaintiff intended, were the license to be granted, to engage in such sodomous criminal activities; that the Regents cannot condone the commission of criminal acts by its employees and thus plaintiff has rendered himself unfit to be employed.”<sup>266</sup> McConnell appealed the withdrawal of the offer, and the lower court found that McConnell’s constitutional rights had been violated, because the University had established no nexus between his sexual orientation and his likely job performance, and issued an injunction.<sup>267</sup> The Eighth Circuit reversed, noting that this was not case in which an applicant was excluded from employment because of a desire clandestinely to pursue homosexual conduct, but rather one in which the appellant sought to “pursue an activist role in implementing his unconventional ideas” and thus the court concluded that the Board of Regents’ action was not arbitrary or capricious.<sup>268</sup>

- ***Acanfora v. Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974).** Acanfora faced discrimination first while still a student at Pennsylvania State University, then while seeking licensure in Pennsylvania, and again after he was employed as a teacher by Montgomery County. While a student teaching at Penn State University, Acanfora was suspended for "public acknowledgement of homosexuality." Though a state court

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<sup>265</sup> *McConnell*, 316 F. Supp. at 811.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 814-15.

<sup>268</sup> *McConnell v. Anderson*, 451 F.2d 193, 194-96 (8th Cir. 1971).

ordered reinstatement, the discrimination did not stop. When Acanfora applied for teacher certification, Penn State officials differed as to his qualifications and forwarded his application to the Pennsylvania Secretary of Education without recommendation. While awaiting a decision on his application by the Pennsylvania Secretary of Education, Acanfora was hired to teach junior high school in Montgomery County. Montgomery County learned that Acanfora was gay when the Pennsylvania Secretary of Education held a widely publicized press conference to announce favorable action on his certification application. At that point, the county demoted Acanfora to a non-teaching position.

When analyzing Acanfora's speech in this case, the district court pointed out that it was necessary to realize the degree to which homosexuality was *sui generis* in American culture-- that it is "peculiarly sensitive" and of special concern to the family-- distinguishing it from the race relations, armbands, and long hair that were subjects of First Amendment precedent in the schoolhouse setting. The court decided that the correct standard for unprotected speech in the schoolhouse was that "speech which is likely to incite or produce imminent effects deleterious to the educational process." Applying this special standard, the court found Acanfora's "repeated, unnecessary appearances on local and especially national news media" unprotected speech that rendered Defendants' choice to not reinstate Acanfora or renew his contract neither arbitrary nor capricious.

On appeal, the Fourth Circuit found that Acanfora's public discussion was protected by the First Amendment, but affirmed the lower court decision on other grounds. The Court found the decision not to reinstate acceptable because Acanfora failed to disclose on his teaching application his affiliation with Homophiles, a Penn State

student organization—an affiliation which, had it been disclosed on his application, would have kept the Board, by its own admission, from hiring him in the first place.<sup>269</sup>

- ***Gaylord v. Tacoma School Dist. No. 10*, 559 P.2d 1340 (Wash. 1977).** Gaylord was a teacher who was dismissed based on a Tacoma School Board policy that allowed removal for “immorality.” The lower court noted, in upholding the dismissal, that Gaylord’s admission that he was a homosexual “connote[d] illegal as well as immoral acts, because sexual gratification with a member of one’s own sex is implicit in the term ‘homosexual’ These acts were proscribed by RCW 9.79.120 (lewdness) and RCW 9.79.100 (sodomy).”<sup>270</sup> While the case was pending, however, the Washington sodomy statute was repealed. The Supreme Court of Washington nonetheless held that “the fact that sodomy is not a crime no more relieves the conduct of its immoral status than would consent to the crime of incest.”<sup>271</sup> Accordingly, it affirmed the lower court’s decision, finding that Gaylord’s “immorality” impaired his fitness as a teacher.

Examples of discrimination in the credentialing of teachers extends into the 1990s and the present decade. For example, in 1992, a committee on teacher credentials recommended to the California Teacher Credentialing Commission that two San Francisco high school science teachers have their teaching credentials revoked as a result of a single incident in 1992 when a classroom speaker from Community United Against Violence, a gay anti-violence group, made sexually explicit comments to a class of eleventh graders. According to news reports, the teachers had combined their classes to hear the speakers, who engaged in discussion with the

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<sup>269</sup> *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974).

<sup>270</sup> *Gaylord*, 559 P.2d at 1342.

<sup>271</sup> *Id.* at 1346.

students that led to some sexual comments by one of the speakers.<sup>272</sup> In 1998, a sting operation in Fresno, California led to the arrests of five schoolteachers and a high school football coach. Police were required by state law to notify their supervisors of that arrest, which could have meant the end of their careers.<sup>273</sup>

As noted above, during the past decade courts in several states have granted standing to LGBT teachers to challenge their state's sodomy law because they anticipated state revocation or denial of credentials. For example, in *Jegley v. Picado*,<sup>274</sup> among the plaintiffs who challenged Arkansas's state sodomy law in 2002 were a school counselor and a public school teacher who "fear[ed] prosecution for violations of the statute and...that such prosecution could result in their loss of jobs, professional licenses, housing, and child custody."<sup>275</sup> Also, in *Doe v. Ventura*,<sup>276</sup> one of the plaintiffs challenging Minnesota's sodomy law in 2001 was a licensed elementary school teacher who "fear[ed] adverse licensure consequences from any disclosure, voluntary or otherwise, of their past and future violations of [the state's sodomy law]."<sup>277</sup> And, in *Gryczan v. State*,<sup>278</sup> a teacher who had been licensed in the state for 25 years "contend[ed] that the damage to [his/her] self-esteem and dignity and the fear that [he/she] will be prosecuted or will lose their livelihood...create[d] an emotional injury that g[ave him/her] standing to challenge the statute."

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<sup>272</sup> Art Leonard, LESBIAN & GAY L. NOTES (Oct. 1995), available at <http://www.qrd.org/qrd/www/legal/lgl/10.2005.pdf>.

<sup>273</sup> See Charles McCarthy, *Arrests Help Cut Sex Acts At Park*, FRESNO BEE, June 14, 1998, at B1. Today, California has a requirement in its Penal Code that if a public school employee is arrested for certain sex offenses, that arrest must be reported to the employer by police; this provision appears to capture arrests for public consensual same-sex sex. See Cal. Penal Code § 290.

<sup>274</sup> 349 Ark. 600, 609 (Ark. 2002).

<sup>275</sup> Appellee's Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815); Appellee's Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

<sup>276</sup> No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001).

<sup>277</sup> *Id.* at \*5.

<sup>278</sup> 283 Mont. 433 (Mont. 1997).

In each of these cases, the teachers were granted standing and the sodomy laws were declared unconstitutional.<sup>279</sup>

## **VI. Conclusion**

This chapter summarizes the very explicit and pervasive history of discrimination against LGBT people in public employment throughout the 1950s and 1960s and extending into the present. This history provides the context for the documentation of current discrimination against LGBT people in public employment presented in chapters 6 through 14. Why does this more recent documentation show such a high level of discrimination against LGBT people in public employment? In part, because the individual cases of LGBT public employees and the personal experiences they report in surveys are not the result of random bad actors, but are the legacy of an era when discrimination in state employment was by policy and pervasive. Why do some of the surveys and the wage gap analysis show more discrimination in the public sector than the private sector? In part, because discrimination against LGBT people began in the purges, prosecutions, and policies of federal and state governments and were then copied by private employers. Why does the pattern of discrimination by state governments look so similar to the pattern of discrimination by local governments, in particular the widespread patterns of discrimination in law enforcement and education? In part, because the same discriminatory policies of state governments, including sodomy laws and occupational licensing requirements, formed the legal foundation for discrimination in all employment sectors. Put differently, this chapter illustrates state laws, policies and practices that either required, or resulted in, discrimination against LGBT employees who not only worked for the state, but for federal, local, and private employers as well.

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<sup>279</sup> *Jegley*, 349 Ark. at 621-622; *Doe*, 2001 WL 543734 at \*9; *Gryczan*, 283 Mont. At 446.