

CONTRACTS AND HOMOPHILE LEGAL STRATEGY

*Jackson Springer**

Law was central to the homophile movement, the main movement for queer rights between World War II and Stonewall. But examinations of this movement’s engagement with law have exclusively focused on public law. Private law has received virtually no attention. This Note corrects that oversight. It unearths instances in which groups advocating for queer rights invoked contract law during the 1950s and 1960s. These moments reveal contract law’s important—and previously overlooked—role in homophile legal strategy.

Homophile groups’ use of contract law changed over the two decades of the movement. During the 1950s, those in the homophile movement used contract law to avoid legal disputes—a sort of “preventative law” that shielded queer people from the outside world’s scrutiny. But after the movement’s militarization in the early 1960s, queer organizations began making affirmative claims based in contract law. These claims served two purposes. On one hand, they were a tool queer people used to protect their public law rights when those rights were under attack. But organizations also saw the assertion of contract law rights as a goal itself—a key part of queer people’s growing rights consciousness.

This Note thus gives contract law its rightful due in the history of homophile legal strategy. Its findings demonstrate that private law should play a larger role in both our study of social movements’ legal strategy and our vision of a future in which marginalized groups have full equality under the law.

INTRODUCTION	461
I. SITUATING CONTRACT LAW IN LEGAL HISTORIES OF THE HOMOPHILE MOVEMENT	464
A. Studying Homophile Legal Strategy	465

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B.	Problematizing Public Law’s Predominance in Homophile Legal Histories	469
1.	Public Law in Histories of Homophile Legal Strategy	470
2.	Private Law in Histories of Homophile Legal Strategy	472
3.	Blind Spots in the Current Approach.....	473
C.	An Approach to Studying Contract Law’s Role in Homophile Legal Strategy.....	476
1.	Methods and Sources	477
2.	What These Methods and Sources Miss	478
II.	CONTRACT LAW’S CENTRAL ROLE IN HOMOPHILE LEGAL STRATEGY.....	480
A.	Contract Law as “Preventative Law” in the 1950s.....	480
B.	Contract Law as an Affirmative Tool in the 1960s.....	483
1.	Contract Claims in the 1960s Homophile Movement	484
a.	ONE v. Continental Travel Service	484
b.	ECHO v. Gramercy Inn and Manger Hamilton	484
c.	Haight Theater v. KMPX-FM.....	488
d.	<i>Odorizzi v. Bloomfield School District</i>	488
2.	Contract Law as a Space-Creating Tool.....	490
a.	ONE v. Continental Travel Service.	490
b.	ECHO v. Gramercy Inn and Manger Hamilton	492
c.	Haight Theater v. KMPX-FM.....	494
3.	Contract Law Rights in Queer People’s Growing Rights Consciousness.....	495
a.	ONE v. Continental Travel Service	495
b.	ECHO v. Gramercy Inn and Manger Hamilton	496
c.	<i>Odorizzi v. Bloomfield School District</i>	496
C.	The Limits of Contract Law.....	497
III.	QUEER PEOPLE AND CONTRACT LAW: LOOKING FORWARD	499
A.	Private Law and Queer Legal Scholarship	500
B.	Private Law and Queer Movement Lawyering.....	501
1.	Using Contract Law to Support Queer Youths Experiencing Homelessness.....	502
2.	Contract Law’s Increasing Importance After <i>303 Creative</i>	503
	CONCLUSION	505

INTRODUCTION

In its October 1960 issue, *ONE* Magazine—the United States’ first widely distributed queer publication¹—began promoting a thirty-day, seven-country tour of Europe that it was helping organize.² Set to depart in September 1961, the “CRUISE THROUGH EUROPE”³ aimed to bring *ONE*’s “world-wide readership”⁴ together “Under the Wing of the World’s Outstanding Ceramic Designer.”⁵ At a time when law enforcement commonly targeted queer Americans for associating with each other publicly—calling it vagrancy, disorderly conduct, solicitation, or something similarly vague⁶—it is no surprise that over 300 *ONE* readers inquired about the trip⁷ in hopes of leaving the country and experiencing the “Gay Capitals of Europe” together.⁸

1. Rodger Streitmatter, *ONE Magazine*, in *Gay Histories and Cultures: An Encyclopedia* 648, 648 (George E. Haggerty, John Beynon & Douglas Eisner eds., 2d ed. 2012) [hereinafter Streitmatter, *ONE*]. The magazine was founded in the early 1950s by a group of men in Los Angeles and published a collection of personal essays, news stories, and literature related to the queer experience. Id. While the magazine’s publication of queer material was radical for the time, it did not represent all queer people—its authors and audience were largely white, middle-class gay men. Mairead Case, *ONE: The First Gay Magazine in the United States*, *JSTOR Daily* (July 15, 2020), <https://daily.jstor.org/one-the-first-gay-magazine-in-the-united-states/> [https://perma.cc/4E4M-9A4S] (last updated May 7, 2021).

2. *Cruise Through Europe*, *ONE*, Oct. 1960, at 32, 32.

3. Id. The advertisement’s double entendre surely wasn’t lost on the magazine’s readership.

4. Letter from Bd. of Dirs., *ONE*, to the Readers of *ONE*, in *ONE*, Nov. 1961, at 4, 4 [hereinafter *ONE* Board Letter].

5. *Cruise Through Europe*, supra note 2, at 32.

6. See Risa Goluboff, *Vagrant Nation* 46–52 (2016) (discussing police use of vagrancy laws to arrest queer people); see also Anna Lvovsky, *Vice Patrol: Cops, Courts, and the Struggle Over Urban Gay Life Before Stonewall* 101–04 (2021) (“[V]ice squads in the 1950s turned their attention to the more public pockets of queer life. And, conveniently, they found themselves armed with a number of laws to enforce against them.”); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 *Va. L. Rev.* 1551, 1564–65 (1993) (“Various sorts of laws have been used to harass gay people.”). Police could also target private queer conduct using sodomy laws, John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*, at 14 (2d ed. 1998), which carried harsh penalties but also high “evidentiary burdens,” Lvovsky, supra, at 104. Sodomy laws were on the books in every state until Illinois repealed its law by adopting the Model Penal Code in 1961. William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Law in America, 1861–2003*, at 111 (2008) [hereinafter Eskridge, *Dishonorable Passions*].

7. See *ONE* Board Letter, supra note 4, at 4; see also *Let’s Cruise Through Europe*, *ONE*, May 1961, at 32, 32 (noting “Only a Few Reservations Still Available”).

8. *Calendar of Events*, *ONE* (Dec. 1969) (on file with the *Columbia Law Review*). This document, and many others this Note relies on, come from the extensive Gale Archives of Sexuality and Gender. Archives of Sexuality and Gender, Gale, <https://www.gale.com/primary-sources/archives-of-sexuality-and-gender> [https://perma.cc/MZ8J-BMAT] (last visited Oct. 25, 2023). Some of the sources related to this dispute come from the *ONE*

Four days before the group's scheduled departure, however, Continental Travel Service—the travel agency helping ONE, Inc. organize the trip—abruptly canceled it⁹ “on the pretext that too few had signed up to make the tour profitable.”¹⁰ After the cancellation, ONE's Board of Directors published a letter that both accused the travel agency of “grossly violat[ing] . . . standards of honorable conduct” and urged the magazine's readers to “completely shun[]” the service “as unreliable.”¹¹

But the Board did more than express anger; it countered Continental Travel Service's actions using the law of contracts. The Board alleged that the travel agency sent ONE a signed statement saying that “the tour would take place in any event, even should registrations fall below the hoped-for quota.”¹² The Board then asserted: “[T]he above constitutes a contract. . . . It is our intention to prosecute this view to the fullest possible extent.”¹³ In private correspondence to the travel agency, the Board demanded either that a ONE representative be sent “on the identical itinerary specified . . . at no cost” or that Continental Travel Service compensate ONE \$5,000 for its losses.¹⁴

Engaging with legal concepts was not new to ONE. Its magazine discussed the law in nearly every published issue.¹⁵ It even litigated a case before the Supreme Court and won a seminal ruling declaring its queer

Archives. ONE Archives at the USC Libraries, Univ. of S. Cal., <https://one.usc.edu/> [<https://perma.cc/4HND-J6MD>] (last visited Feb. 3, 2024).

9. See Bd. of Dirs., Let's (Not) Cruise Through Europe, ONE, Oct. 1961, at 32, 32.

10. ONE Board Letter, *supra* note 4, at 4.

11. *Id.*

12. *Id.* The actual contract involved a question ONE posed to Continental Travel Service asking about “[t]he obligations of the Corporation, or its representative, should fewer than the thirty-two persons you have designated as the quota sign up for the tour.” Letter from William Lambert, Bus. Manager, ONE, to Continent Tour (June 7, 1961) (on file with the *Columbia Law Review*). The agency responded: “If fewer than 32 sign up, the tour will still go.” Letter from Newt Deiter, Exec. Vice-President, Cont'l Travel Serv., Inc., to William Lambert, ONE (June 14, 1961) (on file with the *Columbia Law Review*).

13. ONE Board Letter, *supra* note 4, at 4.

14. Letter from George Mortenson, Chairman, ONE, to William Kraker (Sept. 21, 1961) (on file with the *Columbia Law Review*).

15. For some of the magazine's notable discussions of law, see, for example, Lyn Pedersen, An Open Letter: Do Constitutional Guarantees Cover Homosexuals?, ONE, Jan. 1956, at 6, 6–8 (arguing for protection of queer people's “basic legal rights”); E.B. Saunders, Reformer's Choice: Marriage License or Just License?, ONE, Aug. 1953, at 10, 10 (wondering—in an issue whose cover read “Homosexual Marriage?”—if queer people would be “subject to marriage laws” in 2053 if “homosexuality were accepted to the point of being of no importance”); Don Slater, Victory! Supreme Court Upholds Homosexual Rights, ONE, Feb. 1958, at 16, 16–17 (explaining the recent Supreme Court case, *One, Inc. v. Olesen*, 355 U.S. 371 (1958), in which the Supreme Court found the magazine was not obscene); The Law, ONE, Jan. 1953, at 21, 21 (discussing the law of entrapment in its very first issue); Your Rights in Case of Arrest, ONE, Mar. 1953, at 16, 16 (conveying queer people's criminal procedure rights to readers).

material not obscene.¹⁶ And ONE wasn't alone. Engagement with the law was a crucial component of the homophile movement, the main movement for queer rights during the 1950s and 1960s.¹⁷

What was new in ONE's response to the canceled Europe tour, however, was the Board's decision to frame its response in terms of contract law. Homophile groups usually focused exclusively on public law topics like administrative law, constitutional law, and criminal law in their engagement with the law.¹⁸ ONE's Board, however, recognized both the importance and novelty of using contract law: "Our intention . . . is to make it as clear regarding commercial matters, as ONE has for years been doing concerning civil . . . rights, that homosexuals cannot be trampled under foot with impunity."¹⁹ With this, the magazine announced contract law as an important legal tool queer people could use to assert their rights.

ONE's response to the cancellation of the 1961 "Gay Tour of Europe"²⁰ invites us to turn our attention to the role of contract law (and private law more broadly) in the fight for queer rights. How did queer people use private law, and specifically contract law, in their fight for equality and dignity under the law? How effective was contract law in this fight? What are the implications for queer people today?

Reading the archive's statements and its silences, this Note unearths previously unstudied instances of homophile groups invoking contract law in their fight for queer rights. These moments reveal contract law's important role in homophile legal strategy. Over the course of the two-decade movement, however, homophile groups' use of contract law changed. During the 1950s, homophile groups urged queer people to use contract law to avoid legal disputes and keep the outside world from invading their private lives.²¹ But after the movement's militarization in the early 1960s, queer organizations began making affirmative claims—

16. *One, Inc.*, 355 U.S. at 371; see also Gregory Briker, *The Right to Be Heard: ONE Magazine, Obscenity Law, and the Battle Over Homosexual Speech*, 31 *Yale J.L. & Humans* 64, 69–70 (2020) (outlining the history of the case); Slater, *supra* note 15, at 17 ("By simply not finding ONE Magazine obscene, the Supreme Court has completely and unanimously reversed the Post Office ban on the mailing of our October 1954 issue . . .").

17. See D'Emilio, *supra* note 6, at 2 (periodizing the homophile movement); Cain, *supra* note 6, at 1559–64 (highlighting litigation that organizations at the time brought); see also *infra* section I.B. For an explanation of why the leaders of the movement chose the term, see Cain, *supra* note 6, at 1558 n.42; see also Donald Webster Cory, *History of the Homophile Movement*, in *East Coast Homophile Organization Conference '64*, at 1, 1–2 (1964) (on file with the *Columbia Law Review*) (using the term "American homophile movement" to describe the broad movement for queer rights at the time); *The Ladder*, *The Ladder*, Oct. 1956, at 1, 2 (using the term "female homophile").

18. See *supra* note 15 and accompanying text.

19. ONE Board Letter, *supra* note 4, at 4.

20. The magazine adopted this name for the tour a few years later. See *Gay Tour Triumphs*, ONE, Jan. 1965, at 21, 21.

21. See *infra* section II.A.

like ONE's—based in contract law, some of which had limited success.²² These contract claims served two purposes. On one hand, they were a tool queer people used to create space to exercise and advocate for their public law rights.²³ But queer people also sought to advance and protect contract rights for their own sake, mirroring their approach to advocating for public law rights.²⁴ Contract law was thus a key part of queer people's growing rights consciousness.²⁵

This Note gives contract law its rightful due in the homophile movement's story. Imbuing contract law into the existing narrative both nuances our understanding of homophile legal strategy and calls attention to the porous divide between doctrines of law commonly studied in social movement histories (public law) and those often neglected (private law).²⁶ These lessons suggest that private law should play a larger role in our vision for a future in which queer people have full equality under the law.²⁷

This Note is the first study to examine queer people's assertion of their contract law rights in the pre-Stonewall era.²⁸ Part I surveys previous scholarship on homophile legal strategy, uncovers blind spots that arise from the field's almost exclusive focus on public law, and explains this Note's novel approach. Part II then illustrates the role of contract law in homophile legal strategy, beginning with the 1950s and continuing to the 1960s. Part III considers the present-day implications of these findings, offering potential avenues for further research and inviting today's movement lawyers to increase their focus on private law as a tool to serve the queer community.

I. SITUATING CONTRACT LAW IN LEGAL HISTORIES OF THE HOMOPHILE MOVEMENT

Nearly all scholarship on queer legal history—especially scholarship examining the homophile movement—has focused on public law topics

22. See *infra* section II.B.

23. See *infra* section II.B.2.

24. See *infra* section II.B.3.

25. Rights consciousness is usually considered in the constitutional context, but this Note injects contract law into the discourse. For a foundational work on the topic, see Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong To Us All"*, 74 *J. Am. Hist.* 1013, 1014–16 (1987) [hereinafter Hartog, *Constitution of Aspiration*] (outlining what it means to study "constitutional rights consciousness" and calling it "the mark of groups engaged in constitutional struggles"); see also Ely Aaronson & Arianne Renan Barzilay, *Rights-Consciousness as an Object of Historical Inquiry: Revisiting the Constitution of Aspiration*, 44 *L. & Soc. Inquiry* 505, 506 (2019) (reflecting on how Hartog's foundational work has shaped the field). Studying rights consciousness involves locating "law[]" in the changing aspirations of diverse groups within the society," which this Note applies to the homophile movement. See Hartog, *Constitution of Aspiration*, *supra*, at 1034.

26. See *infra* Part I.

27. See *infra* Part III.

28. See *infra* section I.B.

such as administrative law, constitutional law, and criminal law. Part I problematizes existing scholarship's fixation on public law and explains this Note's contributions. It begins by explaining what it means to study homophile legal strategy within the broader field of queer legal history. It then provides an overview of existing studies on this era of queer legal history. It concludes by describing this Note's methods and primary sources and the limits associated with its approach.

A. *Studying Homophile Legal Strategy*

It is important to first explain the field of queer legal history and position this Note within the field. Queer legal history analyzes the mutually constitutive interactions between queer people and law.²⁹ This Note looks at how queer people used contract law as part of their legal strategy³⁰ during the homophile movement and how this use of law shaped the movement. This Note uses the word “queer” to refer to both the

29. For further explanation of what the field entails, see Marc Stein, *Crossing the Border to Memory: In Search of Clive Michael Boutilier (1933–2003)*, 6 *Torquere* 91, 111–12 (2004) (stating that “what might be called queer legal history” involves “examin[ing] LGBT subjects who are regulated by the law . . . [and] explor[ing] the law’s constitution of LGBT and heteronormative subjects”). For a discussion of legal history as a broader field, see Hendrik Hartog, *Four Fragments on Doing Legal History, or Thinking With and Against Willard Hurst*, 39 *Law & Hist. Rev.* 835, 856 (2021) (“[T]o do . . . legal history . . . is to imagine the intersections of diverse doctrinal streams and legal cultural streams at particular historical moments, as they became manifested and helped produce and reproduce the formations and structures in our legal histories.”). Hartog says part of doing legal history is looking at a group’s “own legal consciousness,” which I intend to do here. *Id.* at 864.

30. This Note uses the term “legal strategy” to refer to the plan and goals queer people had when deciding whether and how to interact with the law. Other scholars use the term “legal strategy” similarly. See, e.g., Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 *Wis. L. Rev.* 503, 570 (critiquing queer rights organizations’ “assimilationist legal strategy”); Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 *Law & Hist. Rev.* 679, 682–87 (2022) [hereinafter Redburn, *Before Equal Protection*] (“[G]ender outlaws across the country developed their own legal strategy to decriminalize cross-dressing, and in some cases, constitutionalize protections for gender non-conformity.”). “Interactions” or “confrontations” with the law involve any time a subject comes into contact with the law, whether using the law to their advantage or resisting others’ use of the law as a mechanism of control. See, e.g., Lvovsky, *supra* note 6, at 2 (explaining queer legal history involves studying “[t]he law’s confrontations with gay life” and “the types of interactions that most commonly defined gay individuals’ encounters with state power”). This Note’s focus is on how queer people chose to interact with the law as part of a strategic plan, but it leaves considerations of how those interactions shaped internal identity to other scholars. For scholarship that tracks the creation of a distinct queer identity through law during this period, see generally Margot Canaday, *The Straight State* (2009) [hereinafter Canaday, *The Straight State*] (“[T]he state’s identification of certain sexual behaviors, gender traits, and emotional ties as grounds for exclusion . . . was a catalyst in the formation of homosexual identity.”); Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 *Yale L.J.* 316, 318–24 (2009) (explaining how gay legal identity during this time was “constructed” as an analogy to the racial justice movement).

people in this story (even though they would not have preferred that term³¹) and the organizations that represented and defended their interests. The term “queer” intends to unify the diverse identities of people in this story who made legal arguments to advance the rights of those marginalized due to their gender identity or sexuality.³²

Within the broader history of queer people’s legal strategy, this Note focuses on the homophile movement of the pre-Stonewall 1950s and 1960s.³³ While problems arise from any attempt to neatly periodize history,³⁴ most historians agree that World War II was a watershed moment in the formation of organized, politically engaged, and visible queer communities.³⁵ But an increase in visibility and numbers did not translate into societal acceptance. Instead, postwar anticommunist sentiment triggered widespread legal targeting of queer people and their communities.³⁶ This

31. See, e.g., David L. Freeman, *The Homosexual Culture*, ONE, May 1953, at 8, 8 (preferring the term “homosexual”); *The Ladder*, supra note 17, at 2 (preferring the terms “Lesbian” and “homophile”).

32. Additionally, because the goal of this Note is to track a legal strategy rather than explain the development of a unique identity, it makes sense to use a term that unifies all the study’s subjects and is recognizable to readers.

33. Despite declining to use era-appropriate terms to refer to queer individuals’ identity, see supra notes 31–32 and accompanying text, this Note uses the era-appropriate term “homophile” to describe the activism of the era. See supra note 17 and accompanying text.

34. See, e.g., Jerry H. Bentley, *Cross-Cultural Interaction and Periodization in World History*, 101 *Am. Hist. Rev.* 749, 749 (1996) (“Periodization ranks among the more elusive tasks of historical scholarship.”).

35. See Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War II*, at 6–7 (twentieth anniversary ed. 2010) (describing World War II as a widespread “coming out” event that also forced queer people to recognize the government’s hostility toward them); D’Emilio, supra note 6, at 23–39 (describing how World War II “created something of a nationwide coming out experience” and helped queer people create a group identity). D’Emilio specifies that the demands of World War II forced young people to leave their rural hometowns and go to places—either cities or the armed forces—where they were previously unknown and surrounded by people of the same sex. D’Emilio, supra note 6, at 23–24. This then allowed them to explore their same-sex desires and form connections and a sense of community with others like them. *Id.* at 24. For an explanation of how the war years facilitated male and female same-sex sexual intimacy in different ways, compare *id.* at 24–27 (explaining how experiences in the armed forces shaped men’s experiences), with *id.* at 27–31 (explaining how the armed forces also shaped women’s experiences but were less influential than “the economy’s production requirements”).

Of course, this openness didn’t arise out of nowhere. Historians have uncovered the existence of a remarkably dynamic and self-conscious queer world in early twentieth-century America. See, e.g., Nan Alamilla Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965*, at 25–62 (2003) (describing San Francisco’s open queer male community of the early twentieth century); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of a Gay Male World, 1890–1940*, at 1–6 (1994) (unearthing a highly complex “gay male world” in New York before World War II); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* 62–117 (1992) (describing the lesbian world of the 1920s and 1930s).

36. See D’Emilio, supra note 6, at 40–41 (“The Cold War and its attendant domestic anticommunism provided the setting in which a sustained attack upon homosexuals and

involved increased policing of queer spaces,³⁷ shutting down queer bars,³⁸ purging queer people from federal employment,³⁹ denying queer veterans welfare benefits,⁴⁰ and barring queer immigrants from entering or remaining in the country.⁴¹ In short, queer people were “smothered by law.”⁴²

Facing unprecedented legal attacks, queer people created a handful of grassroots organizations fighting for a common goal: to secure queer people’s rights and inclusion in society.⁴³ Thus the homophile movement, a (relatively) unified “gay emancipation movement,” was born.⁴⁴ Unsurprisingly, law was a central topic within the movement—

lesbians took place.”); Walter Frank, *Law and the Gay Rights Story* 9–18 (2014) (“The postwar campaign against homosexuals was stunning both in its scope and callousness.”); Cain, *supra* note 6, at 1565–67 (explaining that postwar McCarthyism elevated suspicion and targeting of queer people).

37. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 60–67 (1999) [hereinafter Eskridge, *Gaylaw*] (explaining that during the 1950s “the criminal law targeted [queer people] for an increasing variety of conduct” including “consensual adult intercourse, dancing, kissing, or holding hands,” and violations came with “escalating penalties”); Lvovsky, *supra* note 6, at 2 (explaining the tactics police officers used to enforce laws aimed at suppressing queer communities); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 *Mich. L. Rev.* 2062, 2161 (2002) [hereinafter Eskridge, *Effects of Identity-Based Social Movements*] (“[T]he postwar anti-homosexual terror . . . landed many lesbigay people in prison, outed them and others, and triggered a moderate ‘homophile’ politics seeking constitutional protection of private gay spaces.”); see also *supra* note 6 and accompanying text.

38. See Eskridge, *Gaylaw*, *supra* note 37, at 93–94 (discussing state governments’ revocation and suspension of liquor licenses for observing “tone of voice, bodily movements, gestures, and other mannerisms [that are] common characteristics of homosexuals” (internal quotation marks omitted) (quoting William Wright, Lillian Hellman 101 (1986))).

39. See David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* 2, 13–14 (2004) (explaining the Lavender Scare, a “witch hunt[]” of queer people working in the federal government).

40. See Canaday, *The Straight State*, *supra* note 30, at 137–73 (discussing the government’s policy of denying benefits to veterans who were caught in “homosexual acts or tendencies” (emphasis omitted)).

41. See *id.* at 214–54 (explaining how immigration law adopted tools from the military to police homosexuality).

42. Eskridge, *Gaylaw*, *supra* note 37, at 98.

43. See Cain, *supra* note 6, at 1558–64 (describing the earliest grassroots organizations to form during the homophile movement); see also Frank, *supra* note 36, at 23–26 (describing these early organizations as “respon[ding] to the status quo”).

44. D’Emilio, *supra* note 6, at 5; see also *id.* at 103–05 (describing how the different homophile organizations cooperated but noting “tensions between male and female homophile groups” due to “[d]ifferences in the experiences and concerns of gay women and men, the prior presence of men in the movement, and male attitudes of superiority”). For an account from the 1960s, see Cory, *supra* note 17, at 1 (identifying “the breakdown of traditional sexual standards during and after the Second World War” as a force that contributed to the formation of “what has come to be known as the American homophile movement”).

organizations held conversations about the law's effect on queer communities and brought lawsuits on behalf of queer individuals and causes.⁴⁵

After a more militant faction of the movement—inspired by Black activists in the civil rights movement⁴⁶ and responding to increasingly invasive police tactics⁴⁷—emerged on the East Coast in the early 1960s, homophile groups began staging organized, large-scale confrontations with the law.⁴⁸ This involved publicly making legal arguments based in equality,⁴⁹ directly protesting unjust laws,⁵⁰ and coming together to form a visible and radical cooperative—East Coast Homophile Organizations (ECHO)—to discuss and fight for queer rights.⁵¹ These developments make the homophile movement a rich moment in history to investigate queer people's legal strategy.⁵² By looking at homophile legal strategy, this

45. See *supra* notes 15–17 and accompanying text. While law was a central topic in the homophile movement, no homophile organization focused exclusively on legal issues. Cain, *supra* note 6, at 1564.

46. D'Emilio, *supra* note 6, at 150.

47. See Lvovsky, *supra* note 6, at 142–79 (describing a new “ethnographic approach” to policing during the late 1950s and early 1960s).

48. See D'Emilio, *supra* note 6, at 149–75 (explaining this new militant approach and the background of its leader, Frank Kameny); see also Eskridge, Gaylaw, *supra* note 37, at 98–101 (calling the homophile movement in the early 1960s “invigorated” due to the formation of the Mattachine Society of Washington and the Society for Individual Rights in San Francisco). For accounts of the new militancy from the period, see Warren D. Adkins & Kay Tobin, Part One: Sidelights of ECHO, *The Ladder*, Jan. 1965, at 4, 4 (quoting an attendee at the 1964 East Coast Homophile Organizations (ECHO) conference as saying “there seems to be a militancy about the new groups and new leaders” (internal quotation marks omitted)).

49. D'Emilio, *supra* note 6, at 150; see also William N. Eskridge, Jr., January 27, 1961: The Birth of Gaylegal Equality Arguments, 58 *N.Y.U. Ann. Surv. Am. L.* 39, 40–42 (2001) [hereinafter Eskridge, *Gaylegal Equality Arguments*] (noting how Kameny advanced queer legal arguments by demanding equal treatment rather than just tolerance).

50. D'Emilio, *supra* note 6, at 154–57 (describing the protests and tactics of the Washington Mattachine Society, which Kameny led).

51. *Id.* at 161–62; see also Cain, *supra* note 6, at 1562 (calling ECHO “an umbrella group” of homophile organizations). These new tactics drastically increased membership. D'Emilio, *supra* note 6, at 173–75.

52. A final justification for focusing on the 1960s is that scholars who have looked at queer people's interactions with private law have almost exclusively examined the post-Stonewall era. See *infra* note 82. Stonewall vastly increased the size of the movement for queer rights and changed activists' approach. See D'Emilio, *supra* note 6, at 1–3 (describing how, while the homophile movement of the 1950s and 1960s “open[ed] a debate,” queer emancipation didn't become a “mass movement” until after Stonewall); *id.* at 239 (“Stonewall . . . marked a critical divide in the politics and consciousness of homosexuals and lesbians.”); Frank, *supra* note 36, at 36–39 (“Before Stonewall, magma had been building up among gay people for at least a decade below the slowly thinning crust of oppression. With Stonewall, it burst forth, consuming the fears of many and for the first time creating a real sense that the future might be different.”). After Stonewall, new organizations informed by the more radical activism of the decade's civil rights, feminist, and antiwar movements supplanted homophile organizations in the fight for queer rights. See Frank, *supra* note 36, at 34 (contrasting the values and ideals of the new generation of activists with the old); see

Note focuses on interactions with law that further homophile goals or relate to homophile organizations, including the Daughters of Bilitis,⁵³ ECHO,⁵⁴ Janus,⁵⁵ *The Ladder*,⁵⁶ the Mattachine Society,⁵⁷ ONE,⁵⁸ and *Tangents*.⁵⁹

B. *Problematizing Public Law's Predominance in Homophile Legal Histories*

While this Note focuses on the role of contract law in homophile legal strategy, nearly all scholarship focusing on homophile legal strategy up to this point centers what has traditionally been called public law.⁶⁰ Public law is the body of law that deals with “relations between private individuals and the government.”⁶¹ It includes fields such as administrative law, constitutional law, and criminal law, all of which have been the subject of queer legal histories of the homophile movement.⁶² Private law, on the other hand, deals with relationships between private parties and includes the fields of contract law, property law, and tort law.⁶³ This subsection provides an

also D’Emilio, *supra* note 6, at 233–38 (“Numerical strength allowed the new breed of liberationists to compile a list of achievements that could only have elicited awe from homophile activists.”); Cain, *supra* note 6, at 1581–82 (explaining how Stonewall prompted queer rights activists to make a “symbolic radical shift” away from demanding equality and tolerance toward “demanding respect and . . . the right to be different”).

53. See Kristin G. Esterberg, *Associations and Organizations*, in *Lesbian Histories and Cultures* 76, 76 (Bonnie Zimmerman ed., 2d ed. 2012) (“Daughters of Bilitis . . . was the first national lesbian organization in the United States. Founded in San Francisco in 1955, . . . it quickly became a social and political organization . . .”).

54. See *supra* note 51 and accompanying text.

55. See Marc Stein, *Janus Society*, in 2 *Encyclopedia of Lesbian, Gay, Bisexual, and Transgender History in America* 93, 93 (Marc Stein, Brenda Marston, Leisa Meyer, Robert Reid-Pharr, Leila Rupp & Nayan Shah eds., 2004) (noting that Janus was a Philadelphia-based homophile organization that published *Drum* and catered to lesbians, bisexuals, and gay men).

56. See Rodger Streitmatter, *Gay and Lesbian Press*, in *Gay Histories and Cultures: An Encyclopedia*, *supra* note 1, at 366, 366 (noting *The Ladder’s* founding in 1956, making it the third widely distributed queer publication and the first one specifically “for lesbians”).

57. See D’Emilio, *supra* note 6, at 58 (“The founding of the Mattachine Society in Los Angeles in 1951 marked the beginning of what would grow into a nationwide [homosexual emancipation] effort.”).

58. See *supra* note 1.

59. *Tangents* was an offshoot magazine of ONE. Streitmatter, ONE, *supra* note 1, at 648.

60. This is mostly true in other fields focused on telling the stories of oppressed groups. See, e.g., Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 *UCLA L. Rev.* 674, 680 (2022) (“The majority of scholarship about . . . systems [of racial and economic oppression] examines them within the rubric of public law.”).

61. Public Law, *Black’s Law Dictionary* (11th ed. 2019).

62. See *infra* notes 66–79 and accompanying text.

63. Private Law, *Black’s Law Dictionary* (11th ed. 2019). Scholars have critiqued the distinction between public law and private law. See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 191 (1989) (noting that feminism has “explode[d] the private”); Leon Green, *Tort Law Public Law in Disguise*, 38 *Tex. L. Rev.* 1, 1–2 (1959) (“We the People’ are

overview of previous scholarship on the queer legal history of the homophile movement. It then illuminates the blind spots that arise from the field's almost exclusive focus on public law.

1. *Public Law in Histories of Homophile Legal Strategy*. — There is a near universal focus on public law in queer legal histories, especially those focused on the homophile movement. This is not entirely surprising: A main project of the movement—like many other social movements—was the transformation of public law and the protection of queer people's public law rights.⁶⁴ Homophile organizations' explicit focus on administrative law, constitutional law, criminal law, and other fields of public law has invited scholars to turn their attention to those areas of law when studying homophile legal strategy.⁶⁵

On the topic of constitutional law, scholars have shown that queer people of the homophile movement (1) gained First Amendment protection to both publish queer content⁶⁶ and gather in queer spaces⁶⁷ (though

a party to every lawsuit . . ."); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1423, 1426 (1982) (noting the history of attacks on the public/private distinction and the legal realists' conclusion that all law is "a delegation of coercive public power . . . and could only be justified by public policies"). But see Randy E. Barnett, *Foreword: Four Senses of the Public Law–Private Law Distinction*, 9 Harv J.L. & Pub. Pol'y 267, 267 (1986) (arguing for at least four "ways to distinguish between public law and private law"). This Note, on the other hand, accepts this distinction to problematize it.

64. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 420–22, 521 (2001) (arguing that public law was of central importance to social movements of the second half of the twentieth century and that these social movements both "flourished . . . and transformed American public law" during that period). For specific attempts by queer rights organizations to transform public law, see *supra* notes 15–17 and accompanying text.

65. As Professor Adrienne Davis points out, scholars often respond to the fact that it is "easiest . . . to be upset" by public law attacks on marginalized groups "because [they] present[] us with the ultimate violation of liberal political morality." See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan. L. Rev. 221, 287 (1999) (discussing the context of interracial marriage). Public law arguments are "easiest to make within the language of liberal legalism" and thus receive much of scholars' attention. *Id.*

66. See, e.g., Carlos A. Ball, *The First Amendment and LGBT Equality 1–2* (2017) ("One of this book's objectives is to give the First Amendment the credit it deserves for making possible many of the LGBT movement's successes."); Eskridge, *Gaylaw*, *supra* note 37, at 95–96, 116–23 (explaining that the Supreme Court's obscenity decisions of the 1950s and 1960s "contributed to the growth of lesbian and gay subcultures" because they "gave nationwide protection against" censorship of various forms of queer expression); Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court*, 28 Colum. J. Gender & L. 229, 229–30 (2014) [hereinafter Ball, *Obscenity*] (pointing out that the Supreme Court declared queer speech not obscene in the first two cases involving queer rights it heard, *One, Inc. v. Olesen*, 355 U.S. 371 (1958), and *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962)); Eskridge, *Effects of Identity-Based Social Movements*, *supra* note 37, at 2161–65 (explaining that common censorship of queer material led queer people to resort to the First Amendment to protect their right to express themselves as they pleased); see also *supra* note 16 and accompanying text.

67. See Eskridge, *Gaylaw*, *supra* note 37, at 93–95 ("The first amendment . . . assure[d] [queer people] some breathing room to socialize and organize."); Cain, *supra* note 6, at

the protection was limited⁶⁸); (2) began arguing for civil rights in equality-based terms⁶⁹ (though courts rejected these arguments⁷⁰); and (3) actively learned and argued for due process rights⁷¹ (though due process had little “bite” as a protection measure⁷²). Trans subjects, related to but distinct from gay homophile activists, also began challenging the constitutionality of cross-dressing bans.⁷³

On the topic of criminal law, scholarship has pointed out that homophile groups (1) began agitating for the repeal of consensual sodomy laws⁷⁴ (though disorganization and the immense whiteness and maleness

1567–69 (recounting state court victories that protected queer people’s right to gather in queer bars).

68. See Eskridge, *Gaylaw*, supra note 37, at 93–96 (arguing that “[t]he first amendment was not *that* empowering to homosexuals” and pointing out that “lower federal and state courts did not read [the Supreme Court’s obscenity rulings] liberally”); Frank, supra note 36, at 18–19 (noting that queer people remained “vulnerable to obscenity charges” even after *Olesen* and *Day*); Cain, supra note 6, at 1569–72 (pointing out that queer people’s right to associate in public was limited because queer conduct was still criminalized). Still, scholar Carlos Ball argues that queer people’s First Amendment victories affected First Amendment doctrine, pushing it toward a more unbiased, less normative baseline. See Ball, *Obscenity*, supra note 66, at 230.

69. Eskridge, *Gaylegal Equality Arguments*, supra note 49, at 40–42 (calling a brief written by Kameny, which used the language of equality to challenge his dismissal from federal employment, “a landmark in the history of gay rights and sensibility”); see also Eskridge, *Effects of Identity-Based Social Movements*, supra note 37, at 2169–71 (“The ideas in Kameny’s brief were revolutionary and important. The brief was an announcement that the objects of the postwar anti-homosexual *Kulturkampf* were insisting on equal citizenship and not just an easing of persecution.”).

70. Eskridge, *Gaylegal Equality Arguments*, supra note 49, at 42. The Supreme Court denied Kameny’s petition for a writ of certiorari. *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960), cert. denied, 365 U.S. 843 (1961).

71. Eskridge, *Gaylaw*, supra note 37, at 101–03; see also Eskridge, *Effects of Identity-Based Social Movements*, supra note 37, at 2165–69 (describing due process arguments made by queer people in the pre-Stonewall years).

72. Eskridge, *Effects of Identity-Based Social Movements*, supra note 37, at 2165; see also Eskridge, *Gaylaw*, supra note 37, at 88–90 (noting that these procedural rights did little to “slow down the antihomosexual juggernaut”). Scholar William Eskridge notes, however, that due process arguments had some success in state courts, which were more willing to strike down or limit anti-queer laws. Eskridge, *Effects of Identity-Based Social Movements*, supra note 37, at 2166.

73. See Redburn, *Before Equal Protection*, supra note 30, at 683–87 (describing the emergence of the “trans legal subject” through these challenges). These trans subjects “sprouted from the . . . root” of the homophile movement but operated separately from gay rights campaigns. *Id.* at 685–86.

74. Eskridge, *Dishonorable Passions*, supra note 6, at 139–41, 148–49 (demonstrating that various players in New York, Philadelphia, San Francisco, and Washington formed a consensus “that consensual sodomy laws must be repealed”). The agitation for repeal, however, wasn’t uniformly strong. When New York considered a sodomy bill that “only concerned homosexuals, [homophile groups] did no lobbying in Albany.” *Id.* at 146.

of the homophile movement compromised efforts⁷⁵) and (2) used criminal defense litigation to expand their reach and create a unified legal strategy.⁷⁶

On the topic of administrative law, scholars have shown how homophile groups fought legal rules used to purge queer people from federal employment⁷⁷ (sometimes successfully⁷⁸). Scholars have generally centered public law when focusing on queer subjects from the era—even when the queer subjects were not explicitly affiliated with the homophile movement.⁷⁹

Each of these studies has made an invaluable contribution to our understanding of the queer legal subject during this era. But they all assume that public law provides both the source of and potential escape from queer people’s legal persecution. This Note complicates that assumption, arguing that private law has served as both a mechanism to oppress queer people and a tool for queer people to combat that oppression.

2. *Private Law in Histories of Homophile Legal Strategy.* — While a rich set of scholarship has looked at public law to uncover queer legal strategy during the 1950s and 1960s, studies of the era have not examined private law in depth. No studies focus on private law exclusively, and most don’t

75. *Id.* at 141–43 (arguing that the Mattachine Society of Washington’s activism was “marginal[] during the most liberal decade of American history” because of “its inability to form coalitions with other progressive civil rights groups”).

76. See Eskridge, Gaylaw, *supra* note 37, at 87 (“[T]he entrapment defense helped establish the [Mattachine] Society as the nation’s premier homophile group.”); Frank, *supra* note 36, at 23 (recounting how the Mattachine Society’s ultimately successful defense of Dale Jennings, who was later the editor of *ONE*, led to “the proliferation of more Mattachine discussion groups”).

77. See Eskridge, Gaylaw, *supra* note 37, at 125–28 (describing attempts by the Mattachine Society of Washington to challenge the exclusion of queer people from government employment); Eskridge, Gaylegal Equality Arguments, *supra* note 49, at 40 (calling Kameny’s response to being fired by the government “unusual” because “he sued the federal government to get his job back”).

78. See Cain, *supra* note 6, at 1576–79 (noting that after Kameny’s termination, some queer people won lawsuits declaring their terminations from government employment improper (citing *Norton v. Macy*, 417 F.2d 1161, 1164–65 (D.C. Cir. 1969); *Scott v. Macy*, 349 F.2d 182, 184–85 (D.C. Cir. 1965))).

79. Scholars have shown (1) that queer defendants participated in legal battles about policing that “meaningfully alter[ed] . . . debates” surrounding the policing of queer people and their place in society. See Lvovsky, *supra* note 6, at 3, 14. They have shown (2) that people were denied welfare benefits based on their queer activity or identity. See Canaday, *The Straight State*, *supra* note 30, at 137–73 (describing how veterans discharged due to same-sex sexual activity combated the denial of welfare benefits that accompanied such a discharge). They have shown (3) how immigration laws prevented queer people “from entering or remaining in the country.” See *id.* at 214–54. And they have shown (4) how military policies prevented queer people from openly serving. See *id.* at 174–213.

mention it at all.⁸⁰ Although some works allude to queer people’s use of private law during the period, they all lack in-depth analysis.⁸¹ While there is a somewhat greater focus on queer people’s use of private law after the homophile movement,⁸² this Note is the first in-depth analysis of private law’s role in homophile legal strategy.

3. *Blind Spots in the Current Approach.* — An almost complete focus on public law has left some blind spots in our understanding of what it meant to be a queer person within the legal system of the 1950s and 1960s. First, focusing only on public law obscures how queer people—and homophile groups representing them—used law in their daily lives.⁸³ Private law governs where people live, what they produce and purchase, and who they do business with. And these experiences can be especially formative for

80. In fact, Eskridge’s *Gaylaw*, a comprehensive study of “the ongoing history of state rules relating to gender and sexual non-conformity,” only briefly mentions private law doctrine in its roughly 120-page survey of interactions between queer people and the law before 1981. See Eskridge, *Gaylaw*, supra note 37, at 1, 134–37 (discussing private contracting within the family).

81. This mostly appeared in the employment context. For example, Eskridge remarks that during the 1950s it was “nothing new” to lose a job “over a minor incident suggesting . . . homosexuality.” Eskridge, *Gaylegal Equality Arguments*, supra note 49, at 39; see also Margot Canaday, *Queer Career: Sexuality and Work in Modern America* 39 (2023) [hereinafter *Canaday, Queer Career*] (describing how queer people could lose their jobs in what Canaday calls the “straight work world” and be forced to look for temporary work with low pay and low status (internal quotation marks omitted)); D’Emilio, supra note 6, at 119–24 (describing the “job discrimination” that queer people faced). The observation that people lost private employment because of their sexual identity did not directly analyze queer people’s use of private law, but it implied an interaction with contract law. For example, private law seems to be lurking in the background of historian Margot Canaday’s recent work, *Queer Career*. Canaday describes how homophile organizations helped queer people find work. See Canaday, *Queer Career*, supra, at 47–48. She also outlines the unspoken “agree[ments]” by straight employers “to try not to ‘see’” and gay employees “to try not to be ‘seen.’” See *id.* at 60.

82. Scholars have shown (1) how certain tort law doctrines have disadvantaged or excluded queer people since the 1980s. See Geoffrey Christopher Rapp, *LGBTQ+ Rights, Anti-Homophobia and Tort Law Five Years After Obergefell*, 2022 U. Ill. L. Rev. 1103, 1109–33. They have shown (2) how municipalities have used property law, and specifically zoning ordinances, to exclude queer (and other nontraditional) families from living in communities since the 1970s. See Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law’s Functional Turn*, 128 Yale L.J. 2412, 2448–52 (2019). And they have shown (3) how queer people have used contract law and family law since the late 1960s to “create and sustain families.” See Martha Ertman, *Love’s Promises: How Formal and Informal Contracts Shape All Kinds of Families*, at xi–xiii (2015).

83. The “daily lives” verbiage follows scholars, especially Davis, who examine the “law of daily life”—how contracts, torts, and property shape people’s daily experiences and identities. See Law of Slavery: Course Examines Slavery Through the ‘Lens of the Law of Daily Life’, Duke L. News (Aug. 22, 2013), <https://law.duke.edu/news/law-slavery-course-examines-slavery-through-lens-law-daily-life/> [https://perma.cc/E94U-2URC] (explaining a course Davis taught that examines slavery through the law of daily life); see also Dylan C. Penningroth, *Before the Movement: The Hidden History of Black Civil Rights*, at xiv (2023) (exploring “how ordinary Black people used law in their everyday lives,” which mostly involved private law).

marginalized groups like queer people.⁸⁴ Public law governs only moments when people come into contact with the government, like in cases of arrest. Of course, the government is ever-present in people's lives, especially the lives of federal employees⁸⁵ and heavily surveilled groups like queer people and people of color.⁸⁶ But focusing solely on interactions with the state can lead us to overlook the law's role in queer people's daily lives.

Second, focusing solely on public law overlooks the symbiotic relationship between public law and private law.⁸⁷ Looking only at one realm can obscure key details shaping or motivating queer people's overall legal strategy. The series of events that provoked Frank Kameny's impassioned arguments for equal rights,⁸⁸ which radicalized the homophile movement⁸⁹ and landed him the unofficial title "[f]ather of the gay rights movement,"⁹⁰ illustrate this point.

When Kameny lost his federal government job after soliciting sex from an undercover police officer, the Civil Service Commission not only barred him from working in the federal government ever again but also prohibited him from obtaining the security clearances necessary

84. See Karen Engle, Elizabeth M. Schneider, Vicki Schultz, Nathaniel Berman, Adrienne Davis & Janet Halley, Round Table Discussion: Subversive Legal Moments?, 12 *Tex. J. Women & L.* 197, 218 (2003) (featuring Davis's statement that "much of women's lives and much of gender generally is shaped through private law" because private law "allocates economic rights and duties between individuals" and "shapes . . . the ability to engage in economic relations of production, control, and ownership versus mere consumption").

85. This may explain the attention that scholars have paid to the law governing federal employment—it is a context in which a government and its subjects interact closely. See *supra* notes 77–78 and accompanying text.

86. Policing of queer people after World War II was especially unsettling because queer people knew neither when they were interacting with law enforcement nor what conduct constituted a violation of the law. See Eskridge, *Gaylaw*, *supra* note 37, at 108–11 (highlighting the vagueness of criminal laws targeting queer people); Lvovsky, *supra* note 6, at 2 (highlighting tactics police officers used to entrap queer people). For a modern analysis, see Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 *NYU. Rev. L. & Soc. Change* 253, 255 (2018) ("[M]arginalized people experience . . . privacy extremes—being seen or tracked too much or too little.").

87. Cf. Canaday, *Queer Career*, *supra* note 81, at 13 (describing how private capital "t[ook] advantage of . . . aggressive state policing" to further oppress queer subjects).

88. See *supra* notes 69–70 and accompanying text.

89. See *supra* notes 48–51 and accompanying text.

90. Brooke Sopelsa, #Pride50: Frank Kameny—Father of the Gay Rights Movement, *NBC News* (June 3, 2019), <https://www.nbcnews.com/feature/nbc-out/pride50-frank-kameny-father-gay-rights-movement-n1005216> [<https://perma.cc/PT34-PH7L>]; see also Lisa Rein, *Frank Kameny's Legacy: A Reminder of the Federal Government's History of Unfriendliness to Gays*, *Wash. Post* (Oct. 12, 2011), https://www.washingtonpost.com/blogs/federal-eye/post/frank-kamenys-legacy-a-reminder-of-the-federal-governments-history-of-unfriendliness-to-gays/2011/03/23/gIQACACzfl_blog.html (on file with the *Columbia Law Review*) (recounting Kameny's legacy). For a thorough history of Kameny's contribution to the queer rights movement, see generally Eric Cervini, *The Deviant's War: The Homosexual vs. the United States of America* (2020).

for private-sector employment.⁹¹ Soon Kameny had no money and depended on Salvation Army handouts for food.⁹² Only vaguely aware of the homophile movement before losing his job, Kameny's lack of job prospects compelled him to push the homophile movement's public law demands in a radical new direction.⁹³ Kameny's response to losing his job likely would not have been the same had he retained the ability to find another job.⁹⁴ The undermining of Kameny's private contracting rights, just as much as his initial firing, motivated and informed his strategy for his future confrontations with public law. Kameny's story demonstrates that understanding queer people's legal strategy requires contemplating how their interactions with public law and private law are interrelated.⁹⁵

Third, focusing exclusively on public law does not fully capture queer people's agency. When queer people interacted with public law, they did so from an unequal position. The party they opposed—the government—was immensely powerful and resistant to change.⁹⁶ Queer people, in opposition, were social and moral outcasts defending against criminal charges⁹⁷ or attempting to claim unrecognized civil rights.⁹⁸ This dynamic made it unsurprising that, despite some victories,⁹⁹ many queer people felt powerless vis-à-vis the government¹⁰⁰ and were

91. Eskridge, *Gaylegal Equality Arguments*, supra note 49, at 39.

92. D'Emilio, supra note 6, at 151.

93. *Id.*; see also supra notes 48–51, 60–61 and accompanying text.

94. See D'Emilio, supra note 6, at 151 (explaining that Kameny looked for work but couldn't find any because of his inability to obtain a security clearance).

95. For an explanation of this in a different context, see Penningroth, supra note 83, at 348 (“Th[e] private-law tradition of civil rights helped pave the way for the more familiar modern vision of civil rights that finally began to tear down discrimination in voting, schools, the workplace, and public accommodations.”).

96. See John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 *Tul. L. Rev.* 1121, 1142 (2001) (“One common . . . dividing line between private and public law states that private law governs relationships among equals, but public law governs the relationship between the state and its citizens when they are not in a relation of equality . . .”).

97. See Eskridge, *Dishonorable Passions*, supra note 6, at 85–99 (explaining how social panic led to increased policing of queer activity through the criminal law); Goluboff, supra note 6, at 46–52 (explaining how queer people often were charged with vagrancy and lewdness).

98. See Eskridge, *Gaylegal Equality Arguments*, supra note 49, at 44 (explaining that Kameny's arguments for civil rights in his brief “were almost unimaginable in 1961”).

99. See supra notes 66–67, 76, 78 (describing wins in the areas of free speech, criminal defense, and government employment).

100. Frank Kameny said of his fight to keep his job: “The mills of justice in this country grind slow and exceedingly expensive, and unless the Government decides to surrender, there will be much time and money needed before victory is ours.” D'Emilio, supra note 6, at 151 (quoting Letter from Frank Kameny to *ONE* (Aug. 27, 1960)). Of course, the immense power of the government did not keep all queer people from fighting back, including Kameny. Legal historian Anna Lvovsky said of this “dark chapter of American history”: “[It] is frequently heartbreaking and appalling but also full of resistance, of surprising alliances and remarkable legal gambits, of courage, perseverance, and humor in the shadow of the law.” Lvovsky, supra note 6, at 3.

forced into the closet.¹⁰¹ This immense power imbalance was not as present in the private law context. Queer people had more choice over what claims to make—and when they made claims, they did so not as presumed criminals or outcasts but as equal subjects of private law doctrine. Focusing on private law claims can thus reveal instances of agency in queer people’s interactions with the law that may not be evident in the imbalanced public law context. With the government tilted so strongly against queer people,¹⁰² focusing on private law may also reveal hope that is invisible in the public law archive.

Additionally, legal historian Kenneth Mack has pointed out that “perform[ing]” legal acts—such as making arguments, defending rights, and appearing in court—is an important manifestation of agency, especially for marginalized groups.¹⁰³ To the extent that a legal act is a site for understanding queer people’s agency, it is useful to look at all types of claims rather than restrict inquiry to one realm of law.

C. *An Approach to Studying Contract Law’s Role in Homophile Legal Strategy*

The key contribution this Note makes to the field of queer legal history is positioning private law, specifically contract law, as an important part of homophile legal strategy. This intervention follows the work of recent scholars who have uncovered the key role private law played in Black people’s drive for equality,¹⁰⁴ including during the mid-twentieth

101. See Eskridge, *Gaylaw*, *supra* note 37, at 57–97 (describing how the postwar campaign against queer people forced them into “an *apartheid of the closet*, whereby homosexuals were segregated from civilized society, not physically, but psychically and morally”).

102. See *supra* notes 36–42 and accompanying text.

103. Kenneth Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* 6–7 (2012) (“In every action that black lawyers [during the civil rights movement] took in their professional lives, but particularly so in their performances inside the courtroom, they remained powerful symbols of the fragility of racial boundaries in a nation committed to maintaining them.”); see also Penningroth, *supra* note 83, at xxii (“African Americans’ property and contracts had legal meaning . . .”).

104. This Note is influenced by the work of scholar Brittany Farr, who examines formerly enslaved people’s use of contract law in the post-slavery South. Farr, *supra* note 60, at 680 (using “the lens of private law to provide new insights into this history of racial and economic exploitation.”). It also draws on the work of Professor Davis, who argues that property law played a central role in the formation of racial and sexual relationships between Black women and white men in the nineteenth-century South. Davis, *supra* note 65, at 223–25. Finally, it is inspired by the recent work of legal historian Dylan Penningroth, who has unearthed a rich history of Black people using private law “at every step of their lives” since the 1830s. See Penningroth, *supra* note 83, at xiv (“These civil rights are like an invisible thread woven into the fabric of Black people’s lives since before they even had rights, patterning how they loved, worshiped, worked, learned, and played.”). For an example of Penningroth’s extensive findings about private law and Black life, see *id.* at 196–201 (describing how Black people used contract law—and even took advantage of some of its racist doctrines—to engage in credit transactions during the Jim Crow era).

century.¹⁰⁵ This section begins by describing the methods and sources employed in Part II to surface the important connections between private law and homophile legal strategy that are the subject of this Note. It then identifies the blind spots arising from its approach and relays the resulting limits in its findings.

1. *Methods and Sources.* — On the broadest level, this Note analyzes queer people’s use of contract law during the homophile movement. Because of the nature of where queer people formed, expressed, and manifested their legal strategy, this Note relies heavily on archival sources not typically considered formal legal documents. For example, engagement with contract law may appear in magazines and newsletters, as evidenced by ONE’s response to the canceled Europe tour.¹⁰⁶ This Note relies heavily on homophile magazines such as *ONE* and *The Ladder*¹⁰⁷ and other archival documents from the Gale Archives of Sexuality and Gender¹⁰⁸ and the ONE Archives at the USC Libraries.¹⁰⁹ By highlighting events and sources absent from previous studies,¹¹⁰ this Note serves to recover stories about queer people that had been previously lost to history.

When reading sources that hint at the role of contract law in the homophile movement, I focus not only on doctrine but also on the motivations, intentions, and social implications lurking in the background. This approach hopes to provide a deeper understanding of how contract law fit into homophile legal strategy.

105. See, e.g., Richard R.W. Brooks & Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* 168–210 (2013) (describing how, after the Supreme Court prohibited enforcement of racially restrictive covenants in 1948, white people still attempted to find substitutes to keep their neighborhoods all white); Hendrik Hartog, *Nobody’s Boy and His Pals: The Story of Jack Robbins and the Boys’ Brotherhood Republic* (forthcoming 2024) (manuscript at 6–7) (on file with the *Columbia Law Review*) (discussing how one man, Jack Robbins, created a will that benefitted the children of Black activists who resisted McCarthyism and were convicted of political crimes); Penningroth, *supra* note 83, at 316–20 (discussing how civil rights movement activism heavily “relied on the ordinary tools of property and contract and the law of associations”); Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 *Colum. L. Rev.* 363, 382–85 (2024) (discussing how sit-ins and other activism against public accommodation segregation appealed to private corporate interests).

106. See *supra* notes 11–19 and accompanying text.

107. *The Ladder* was a magazine published by the Daughters of Bilitis. D’Emilio, *supra* note 6, at 101–04.

108. This archive has combined and digitized various collections related to sexuality and gender from around the world. See *supra* note 8.

109. See *supra* note 8.

110. See, e.g., Marcia M. Gallo, *Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement* 112 (2007) (telling the story of the 1964 ECHO Conference, which this Note discusses, without focusing on the contract dispute that emerged while planning the conference).

2. *What These Methods and Sources Miss.* — This Note’s approach results in some blind spots that limit what it can say about queer people’s relationship to law. First, focusing on contracts may preclude capturing the stories of people who were excluded from systems of contract law that tend to appear in the archive. Forming and contesting formal contracts (especially those appearing in the archive¹¹¹) requires social and economic capital,¹¹² which many queer people—especially queer women and queer people of color—did not have.¹¹³ Even if they could engage with formal contract law, working-class queer people may have avoided it because they perceived contract law as an ineffective redistribution tool.¹¹⁴

Additionally, some queer people used their agency to avoid engaging with formal law altogether.¹¹⁵ Their actions (and inactions) are difficult to discern, but the archive provides subtle hints. In a May 1959 interview, for example, a teacher pridefully called the ability of queer couples to stay together with “no legal ties” “a merit badge.”¹¹⁶ Decisions to avoid interacting with contract law were an important assertion of agency that said something about queer people’s relationship to law, but these decisions are difficult to detect in the archive.

Even if queer people did openly engage with contract law, it is still challenging to detect these interactions in the archive. This is because, while public law interactions were often directly tied to a person’s queer activity or identity,¹¹⁷ queer people could—and presumably did¹¹⁸—interact with private law without explicitly mentioning their sexuality. As a result, many private law claims involving queer people are hiding in plain sight—queerness obscured

111. Many queer people’s interactions with contract law might not appear in the archive because they were likely often discussed in private correspondence, much of which is not saved in archives at all.

112. See Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 *Iowa L. Rev.* 1485, 1537 (2022) (“[R]elying on contract law to achieve distributive objectives presupposes a minimum degree of access to formal markets and courts.”).

113. See Eskridge, *Gaylaw*, *supra* note 37, at 135 (pointing out that contracting to create “rights of spousehood” was often “not available for working-class gays” because of the money required to create the contracts); cf. Keeanga-Yamahtta Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* 22–23, 30–37 (2019) (discussing Black people’s difficulty in securing housing in the mid-twentieth century and the government and private sector’s efforts to undermine it when they did secure it).

114. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472, 474 (1980) (critiquing contract law’s ability to operate as a system of distributive justice).

115. See *infra* section II.A.

116. Chuck Taylor, *The Successful Homosexual*, ONE, May 1959, at 5, 6.

117. See *supra* section I.B.1.

118. There is evidence that queer people received legal help in all areas of law. See *Dir. of Soc. Serv., Case History*, ONE, Feb. 1961, at 27, 27 (describing the creation of ONE’s Social Service Division, which helped queer people deal with their daily concerns, including when they were “in trouble with the law”); *Do You Know an Attorney?*, ONE, Sept. 1955, at 7, 7 [hereinafter *Sept. 1955 Do You Know an Attorney?*] (“We often have inquiries from those needing legal services, and would like to have names in ALL areas.”).

from detection. This is less of a problem when examining the 1960s, when queer people and homophile groups often publicly acknowledged their queer identity in their activism.¹¹⁹ During the 1950s, however, homophile activism was not as assertive,¹²⁰ so many instances of queer people engaging with private law likely go undetected.¹²¹

Finally, any history of the homophile movement will struggle to tell the stories of nonwhite queer people and trans and gender-nonconforming people. Membership in homophile organizations was largely cisgender,¹²² middle-class, and white.¹²³ Cleo Bonner, Daughters of Bilitis president from 1963 to 1966, was one of the homophile movement's few Black leaders.¹²⁴ Unfortunately, Bonner was out of town when her organization became involved in a 1964 contract dispute that is central to this Note.¹²⁵ The racial makeup of homophile organizations, paired with the happenstance of Bonner's travel, means that homophile groups' interactions with contract law (and thus the events in this Note) centered middle-class, white, cisgender people.¹²⁶

119. See *supra* notes 48–51 and accompanying text.

120. D'Emilio, *supra* note 6, at 57–91; see also *supra* notes 36–42 and accompanying text.

121. For a discussion of a related problem in a different context, see Penningroth, *supra* note 83, at xix–xx (describing the difficulty of uncovering sources revealing Black people's interactions with law in their daily lives).

122. For background on the exclusion of trans and gender-nonconforming people from the mainstream homophile movement, see Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 *N.Y.L. Sch. J. Hum. Rts.* 589, 601–03 (2000) (describing the splintering between middle-class, gender-conforming homophiles and other working-class gender-nonconforming people); Redburn, *Before Equal Protection*, *supra* note 30, at 682–85 (describing the distinct development of a “trans legal subject” during the 1960s who was separate from their gay male and lesbian counterparts who “believed that social inclusion and legal recognition required a more respectable image”). But see Susan Stryker, *Transgender History* 94 (2008) (noting that while “transgender politics” and the homophile movement were distinct, they “r[a]n alongside one another and sometimes intersected throughout the 1950s and '60s”).

123. See D'Emilio, *supra* note 6, at 106–07 (describing class prejudice and the policing of gender identity within the Daughters of Bilitis); Allen Drexel, *Before Paris Burned: Race, Class, and Male Homosexuality on the Chicago South Side, 1935–1960*, in *Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Community Histories* 119, 119–21 (Brett Beemyn ed., 1997) (pointing out that “bourgeois homophile organizations” were “small, overwhelmingly white, [and] middle-class”); Kent W. Peacock, *Race, the Homosexual, and the Mattachine Society of Washington, 1961–1970*, 25 *J. Hist. Sexuality* 267, 268 (2016) (calling the homophile movement “almost completely white”); *supra* note 1.

124. Gallo, *supra* note 110, at xxii.

125. See Letter from Del Martin to Governing Bd. Members, Daughters of Bilitis (Aug. 26, 1964) (on file with the *Columbia Law Review*) (“In the absence of Cleo [Bonner], president of DOB, who is out of town for a week, Phyllis and I agreed with Marge that some such action should be taken . . .”); *infra* notes 160–191 and accompanying text (discussing ECHO's efforts to find accommodations for its second annual conference).

126. Another group of queer people whose interactions with contract law do not appear in the archive are those who may have been blackmailed or feared extralegal repercussions, such as being outed or fired. For a discussion of blackmail against queer

In sum, the sources this Note relies on capture only some queer people's interactions with contract law. One way this Note deals with these blind spots in the archive is to make a narrow claim about homophile legal strategy, recognizing that the subset of queer contract claims legible in the archive are likely closely related to the larger queer rights movement and the organizations leading it. Another way, especially when dealing with sparse evidence of legal strategy in the 1950s, is to remember Saidiya Hartman's teachings from *Venus in Two Acts*.¹²⁷ This Note aims to do a "critical reading of the archive" that reads meaning into its silences and honors queer people's agency in the stories that do appear.¹²⁸

II. CONTRACT LAW'S CENTRAL ROLE IN HOMOPHILE LEGAL STRATEGY

This Part turns to the meat of the study, examining how the homophile movement of the 1950s and 1960s used contract law. Section II.A begins in the 1950s, finding that homophile groups at the time saw contract law as a way to avoid legal disputes—a sort of "preventative law." Section II.B shows how this changed in the 1960s when queer organizations began making affirmative claims based in contract law that even found some success. During this later era, contract law transformed from a defensive tactic that kept the outside world removed from queer people's private lives to an offensive tool that helped queer people bring their activism to the outside world. Section II.C recognizes the limits of relying too much on contracts. But despite these limits, this Part's overall story reveals the immense importance of contract law to homophile legal strategy.

A. *Contract Law as "Preventative Law" in the 1950s*

Before the homophile movement's radicalization in the early 1960s,¹²⁹ homophile groups and their members tried to avoid legal disputes whenever possible. For example, a January 1960 letter in *ONE* identified

people in the 1950s and 1960s, see D'Emilio, *supra* note 6, at 51 & n.19 ("Blackmail became a profitable racket, sometimes engaged in by nationwide rings . . ."). In a different context, Farr has recounted how formerly enslaved people who brought contract claims faced the threat of violence. Farr, *supra* note 60, at 718–23.

127. Saidiya Hartman reminds us that the archive is a "scene of loss" for marginalized, and especially enslaved, populations. Saidiya Hartman, *Venus in Two Acts*, *Small Axe*, June 2008, at 1, 11 (internal quotation marks omitted) (quoting Lisa Lowe, *The Intimacies of Four Continents*, in *Haunted by Empire: Geographies of Intimacy in North American History* 190, 208 (Ann Laura Stoler ed., 2006)). She also suggests that—both to call attention to the archive's silence and to honor those who have been silenced—scholars should create stories "to amplify the impossibility of [their] telling." *Id.*

128. See *id.* at 10–11.

129. See D'Emilio, *supra* note 6, at 150 ("By 1962 the relatively quiescent, privatized mood of the 1950s was already rapidly yielding to a spirit of active, militant engagement . . ."); Eskridge, *Gaylegal Equality Arguments*, *supra* note 49, at 98–100 (identifying 1961 as a key turning point).

the magazine's "first duty" as avoiding "legal entanglements."¹³⁰ A January 1954 article in *ONE* reported that someone at the Mattachine Society's convention advocated for the organization to establish a private space where members could "let down hair after hair . . . and commit unconventional, if not unlawful acts."¹³¹ Queer people just wanted to live their lives in relative peace, free from constant intervention and surveillance. This goal was not surprising given the targeting they faced from the outside world.¹³² Thus while public law created the closet and shut its door,¹³³ this section explains how 1950s homophile groups deployed contract law to help queer people create space within that closet to shield their private lives from the outside world's scrutiny.¹³⁴

Homophile groups recognized contract law's role in helping queer people avoid legal disputes with the outside world. This appreciation for contract law is illustrated in a speech that attorney Herb Selwyn gave at the Los Angeles Mattachine Society's monthly dinner in February 1957. The talk was a part of a series on "Preventative Law"¹³⁵—a title suggesting that Selwyn hoped to teach attendees how to use law to prevent disputes. In the discussion, Selwyn provided an overview of contract law and talked about the importance of the "fine print."¹³⁶ He then urged Mattachine members to "consult an attorney when entering into a business or deal,"¹³⁷ presumably to ensure a fair transaction and prevent future disputes.

The preventative law strategy in contract law protected queer people from legal disputes on two levels. Directly, preventative law called on queer people to form ironclad contractual relationships that shielded them from potential liability and prevented nonqueer parties from breaching if they realized they contracted with a queer person. Unfortunately, reactionary breaches were likely common.¹³⁸ But in those cases, the deliberate approach to contracting hopefully kept disputes straightforward and out

130. Letter from Edward Denison to *ONE*, in *Readers on Writers*, *ONE*, Jan. 1960, at 6, 6.

131. Jeff Winters, *A Frank Look at the Mattachine: Can Homosexuals Organize?*, *ONE*, Jan. 1954, at 4, 6–7. Letting one's hair down was a common euphemism queer men used to describe being able to express their queer identity in certain spaces. Chauncey, *supra* note 35, at 6.

132. See *supra* notes 36–42 and accompanying text.

133. See *supra* note 101 and accompanying text; see also Canaday, *The Straight State*, *supra* note 30, at 170–72 (describing how the GI Bill "create[d] a closet" and "institutionalized heterosexuality").

134. For a discussion of the closet as an organizing feature of queer life, see Eve Kosofsky Sedgwick, *Epistemology of the Closet* 67–69 (2d ed. 2008) (calling the closet "a shaping presence" in nearly all queer people's lives even today).

135. Bob Bishop, *Selwyn Speaks Again at Our Monthly Dinner*, *March Newsl.* (Mattachine Soc'y, Inc., Los Angeles, Cal.), Mar. 1957, at 15 (on file with the *Columbia Law Review*).

136. *Id.*

137. *Id.*

138. For examples of this happening in the 1960s, see *infra* section II.B; see also William Parker, *Homosexuals and Employment* 14 (around 1970) (on file with the *Columbia Law Review*) (unpublished manuscript) ("[M]any employers . . . remove employees discovered to be homosexual . . . even from anonymous accusations."); *supra* note 81.

of the public eye. In this way, the preventative law approach placed queer people in a strong bargaining position and kept outside parties from having incentives to prod into queer parties' private lives. The result was hopefully that queer people could live more freely.

But the preventative law strategy had a secondary function that extended beyond the four corners of the contract. Contracts could secure physical space for queer people to retreat from the public eye.¹³⁹ The simple act of contracting for living or gathering spaces unlocked other rights, including property law's right to exclude.¹⁴⁰ These contracts thus provided queer people with physical space that separated them from the outside world, likely preventing run-ins with the police (and homophobic private citizens) that were so common for queer people in public.¹⁴¹ Thus, preventative law not only protected queer people from potential contract disputes but also shielded them from public policing.

While it is difficult to detect when queer people explicitly implemented the preventative law strategy, Hartman teaches us that something's absence in the archive does not mean it didn't exist, especially when searching for stories of marginalized subjects.¹⁴² In fact, the lack of evidence in the archive may demonstrate that the preventative law approach had some success.

The preventative law approach called for careful contracting, and the archive does present evidence that queer people in the 1950s received careful legal help in all areas of law. This likely included contracts. In 1955, *ONE* twice solicited the names of lawyers "in ALL areas" because the magazine "often ha[d] inquiries from those needing legal services."¹⁴³ Additionally, throughout the 1950s, *ONE* ran a Social Service Division that helped queer people deal with their living concerns, including through providing "legal assistance."¹⁴⁴ Many homophile organizations established employment bureaus that not only helped queer people find employment but also served as useful intermediaries that acted with discretion while

139. See *infra* section II.B.2.

140. See Thomas W. Merrill, Property and the Right to Exclude, 77 *Neb. L. Rev.* 730, 734 (1998) (noting that a person with property "will have at least some right to exclude others from using or interfering with that resource" but acknowledging disagreement about what that right to exclude entails).

141. See Goluboff, *supra* note 6, at 46–52 (describing the police's targeting of queer people in public spaces). For a discussion of how police have historically targeted all marginalized groups in public, see Jamelia N. Morgan, Policing Marginality in Public Space, 81 *Ohio St. L.J.* 1045, 1047–55 (2020).

142. See Hartman, *supra* note 127, at 10–11 (noting the importance of "straining against the limits of the archive").

143. Sept. 1955 *Do You Know an Attorney?*, *supra* note 118, at 7; *Do You Know an Attorney?*, *ONE*, Nov. 1955, at 11, 11 (reprinting the same solicitation two months later).

144. *Dir. of Soc. Serv.*, *supra* note 118, at 27.

facilitating a connection—likely often a contractual one—between potential employee and employer.¹⁴⁵ During the 1950s, some queer people must have received contract assistance through these homophile programs. And this assistance likely enabled queer people to avoid disputes that otherwise would have arisen.

While the lack of explicit applications of the preventative law approach in the archive may actually indicate the strategy's effectiveness, this conclusion isn't foolproof. The silence in the archive may also reflect that queer people were too scared to raise disputes and were routinely exploited in their bargaining.¹⁴⁶ If the preventative law approach worked, however, it would have made queer people's daily lives easier. In fact, the Social Service Division reported helping many queer people "liv[e] busy, useful lives"¹⁴⁷—perhaps some of them through assistance they received forming or negotiating a contract.

In sum, contract law had a key role in 1950s homophile legal strategy. Through the preventative law approach, contract law likely helped at least some avoid humiliating and harmful run-ins with both bargaining partners and the police, increasing the ease with which queer people could live their lives.

B. *Contract Law as an Affirmative Tool in the 1960s*

The use of contract law as solely a preventative law tool made sense when the overall goal of the homophile movement was to avoid legal disputes. In the 1960s, however, when the movement adopted a more militant approach,¹⁴⁸ queer organizations leaned into contract disputes and made contract claims as part of their more confrontational legal strategy, even winning some victories. This shift built on the strategy of the 1950s: Learning to form airtight contracts made it easier for queer people and organizations to frame and argue their claims when they were ready.¹⁴⁹

Affirmative contract claims in the 1960s served two related purposes. On one hand, they provided a practical way for queer people to create space to assert and defend their public law rights. But asserting contract rights was not just a means to an end; it was a goal itself. Queer people conceptualized and claimed contract rights themselves as part of their toolbox of legal rights, positioning contract law as a key part of their developing rights consciousness.¹⁵⁰ This section begins by highlighting

145. Canaday, *Queer Career*, *supra* note 81, at 47–48.

146. See *id.* at 64–65 (discussing how queer workers' "vulnerability and their low expectations" made it easy to take advantage of them).

147. *Dir. of Soc. Serv.*, *supra* note 118, at 28.

148. See *supra* notes 48–51 and accompanying text.

149. See *supra* section II.A.

150. Scholars have demonstrated the growth in queer people's rights consciousness at the time but have only considered public law rights. See *supra* notes 25, 66–79 and

interactions with contract law that began to crop up in the 1960s. It then explains how these claims, when successful, created space for queer people to assert and defend their public law rights. It closes by showing how queer people intentionally claimed these contract rights as part of their growing rights consciousness.

1. *Contract Claims in the 1960s Homophile Movement.* — Before explaining the role of contract claims in homophile legal strategy, it is necessary to recount what those claims were and how they came to be. Contract law emerged as an affirmative tool in homophile legal strategy because parties often breached the conditions of an agreement after discovering they had contracted with a queer person or organization. These breaches created embarrassment, hardship, harassment, and inconvenience for the queer people involved. Nearly all the contract claims queer people or organizations made in the 1960s are versions of this common story.

a. *ONE v. Continental Travel Service.* — The first contract claim, ONE's against Continental Travel Service, was partially recounted in the Introduction,¹⁵¹ so it calls only for a reminder and brief extension. After having planned to take ONE's readers to Europe for almost a year,¹⁵² Continental Travel Service abruptly canceled the trip four days before departure.¹⁵³ In response, ONE alleged that Continental Travel Service violated a signed statement confirming "that the tour would take place in any event, even should registrations fall below the hoped-for quota."¹⁵⁴ ONE's actions here evidence the success of the 1950s "Preventative Law" approach. The magazine had focused on the "fine print" as attorney Selwyn had recommended¹⁵⁵ by including in the contract a provision protecting against insufficient registration numbers. Leaning into the dispute, ONE pledged to "prosecute . . . to the fullest possible extent" the alleged statement as a valid "contract."¹⁵⁶ Selwyn—the same attorney who spoke on using contract law as "preventative law"¹⁵⁷—served as the Board's attorney.¹⁵⁸

b. *ECHO v. Gramercy Inn and Manger Hamilton.* — The second and third contract claims, both related, stem from ECHO's attempts to find

accompanying text. At the time, however, people across society were expanding their idea of what constituted a private right. See, e.g., Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 785–86 (1964) (arguing that government largess should be considered private property).

151. See *supra* notes 9–13 and accompanying text.

152. *Cruise Through Europe*, *supra* note 2, at 32.

153. *Bd. of Dirs.*, *supra* note 9, at 32.

154. ONE Board Letter, *supra* note 4, at 4.

155. See *supra* note 136 and accompanying text.

156. ONE Board Letter, *supra* note 4, at 4.

157. See *supra* notes 135–137 and accompanying text.

158. See Letter from William Lambert to Herbert Selwyn (Apr. 26, 1962) (on file with the *Columbia Law Review*) (asking Selwyn for advice about the dispute with Continental Travel Service).

accommodations for its second annual conference, set for October 1964.¹⁵⁹ ECHO claimed that both the Gramercy Inn and Manger Hamilton hotels in Washington, D.C. breached a condition of their contracts by refusing to host ECHO's conference that year.

ECHO, an affiliation of four homophile organizations,¹⁶⁰ was created in 1962 to increase cooperation in the movement's attempts to militarize.¹⁶¹ One of its main functions was sponsoring a yearly conference.¹⁶² In just its second year, however, the groundbreaking conference became "beset by an almost unbelievable set of external adversities" in its attempts to secure accommodations.¹⁶³ In February 1964, eight months before the conference, ECHO found accommodations at the International Inn.¹⁶⁴ ECHO secured the space with a verbal agreement and by sending a reservation deposit.¹⁶⁵ In June, about four months before the conference, the International Inn canceled.¹⁶⁶ ECHO decided not to assert a contract claim against the International Inn, which sources attribute to (1) ECHO being pressed for time,¹⁶⁷ (2) the fact that "a formal contract was never obtained,"¹⁶⁸ or (3) the lack of damages due to the presence of alternative options at another hotel.¹⁶⁹

That other hotel was the Gramercy Inn, which quickly signed a written contract granting ECHO space to host the conference after the International Inn canceled.¹⁷⁰ But in late August—about six weeks before

159. See Joan Frazer, A History of ECHO, in *East Coast Homophile Organization Conference '64*, at 5, 5 (1964) (on file with the *Columbia Law Review*) (noting the conference's date).

160. The four organizations that formed ECHO were the Daughters of Bilitis, the Mattachine Society of Washington, the Mattachine Society of New York, and Janus. *Id.*

161. *Id.*; see also D'Emilio, *supra* note 6, at 161 ("ECHO played a critical role in solidifying a militant wing of the [homophile] movement.").

162. Frazer, *supra* note 159, at 5.

163. C.P., ECHO, *Drum*, Nov. 1964, at 14, 14 (on file with the *Columbia Law Review*); see also *East Coast Homophile Organizations, Daughters of Bilitis, Inc. Newsl.* (Daughters of Bilitis, New York, N.Y.), Oct. 1964 (on file with the *Columbia Law Review*) ("The main problem experienced in the planning of this year's Conference has been that of accommodation.").

164. Renée Cafiero, E.C.H.O. '64, *N.Y. Mattachine Newsl.* (Mattachine Soc'y, New York, N.Y.), Nov. 1964, at 19, 19 (on file with the *Columbia Law Review*).

165. *Id.*

166. *East Coast Homophile Organizations, supra* note 163. Another source claims that the International Inn's cancellation occurred six weeks before the conference. C.P., *supra* note 163, at 14. This, however, is less likely given the cancellation timeline of the Gramercy Inn discussed later. See *infra* notes 170–172 and accompanying text.

167. C.P., *supra* note 163, at 14.

168. *East Coast Homophile Organizations, supra* note 163.

169. Franklin E. Kameny, *Hamilton Hotel Settles, Homosexual Citizen*, June 1966, at 3, 3 (on file with the *Columbia Law Review*).

170. *East Coast Homophile Organizations, supra* note 163; see also Kameny, *supra* note 169, at 3 (identifying the Gramercy Inn as the hotel that provided alternative arrangements when the International Inn canceled).

the conference—the Gramercy Inn canceled as well.¹⁷¹ Del Martin, a leader of the Daughters of Bilitis, intuited that the cancellation was due to “the nature of the conference.”¹⁷² She was proven right when the Gramercy Inn justified its cancellation on the grounds that “unpopular ideas” discussed at the conference “would injure business.”¹⁷³ After the Gramercy Inn’s cancellation, unlike the International Inn’s, ECHO contacted a lawyer with expertise in contract law¹⁷⁴ to determine whether it had a strong claim that the Gramercy Inn breached.¹⁷⁵ The organizations dedicated \$500 to the endeavor.¹⁷⁶

Just days later, and about a month before the conference, ECHO secured accommodations at another hotel, the Manger Hamilton.¹⁷⁷ Informed by its experiences with the International Inn and Gramercy Inn, ECHO provided the Manger Hamilton with “full and complete details” about the organization and the plan for the conference.¹⁷⁸ The Manger Hamilton had a “warm reception”¹⁷⁹ to this information and “accepted unconditionally,” both orally and in writing.¹⁸⁰

Unbelievably, three weeks later—and less than two weeks from the start of the conference—the Manger Hamilton returned ECHO’s deposit and revoked its offer to host.¹⁸¹ A third hotel had canceled, leaving ECHO without accommodations.¹⁸² ECHO immediately alleged that the Manger

171. Cafiero, *supra* note 164, at 19; Letter from Del Martin to Governing Bd. Members, *supra* note 125.

172. Letter from Del Martin to Governing Bd. Members, *supra* note 125.

173. Cafiero, *supra* note 164, at 19 (internal quotation marks omitted) (quoting the Gramercy Inn).

174. C.P., *supra* note 163, at 14; see also Letter from Del Martin to Governing Bd. Members, *supra* note 125 (noting that “Dr. Kameny of Washington Mattachine had recommended that the matter be turned over to their attorney for action against such discrimination”).

175. East Coast Homophile Organizations, *supra* note 163; see also Letter from Marjorie McCann, Corresponding Sec’y, Daughters of Bilitis, to Governing Bd., Daughters of Bilitis (Aug. 26, 1964) (on file with the *Columbia Law Review*) (asking Del Martin for “written confirmation of authorization to proceed with litigation against the Gramercy Inn in Washington, D.C., if such litigation is deemed advisable by Washington Mattachine’s attorney, Monroe H. Freedman”).

176. East Coast Homophile Organizations, *supra* note 163; see also Letter from Del Martin to Governing Bd. Members, *supra* note 125 (noting that Del Martin had committed the Daughters of Bilitis “to pick up [its] portion of the tab for any costs incurred”).

177. East Coast Homophile Organizations, *supra* note 163; see also C.P., *supra* note 163, at 14 (“In the interim, the Manger Hamilton was contacted and they agreed to permit the conference.”).

178. Cafiero, *supra* note 164, at 19.

179. C.P., *supra* note 163, at 14.

180. Cafiero, *supra* note 164, at 19.

181. *Id.*; see also C.P., *supra* note 163, at 14 (“Ten days before the Conference, the Manger Hamilton also cancelled, again leaving ECHO homeless.”); East Coast Homophile Organizations, *supra* note 163 (reporting that “less than two weeks before the Conference, the [Manger Hamilton] cancelled [its] agreement”).

182. Cafiero, *supra* note 164, at 19.

Hamilton had breached a condition of its contract¹⁸³ and sought compensatory damages.¹⁸⁴ In the meantime, Frank Kameny reported to the Daughters of Bilitis secretary that Monroe Freedman,¹⁸⁵ the attorney consulted on the Gramercy Inn case, “feels we have [an] excellent case & could very easily win.”¹⁸⁶ Freedman told the Gramercy Inn that ECHO planned to sue for \$50,000.¹⁸⁷ ECHO now had two pending claims for breach.

While ECHO raised its breach of contract claims against the Gramercy Inn and Manger Hamilton, it secured accommodation at the Sheraton-Park Hotel, “the largest, and probably the best hotel in the District of Columbia.”¹⁸⁸ Attendees and organizers braced for another cancellation until days before the conference,¹⁸⁹ but the Sheraton-Park honored its commitment and “was gracious and cooperative.”¹⁹⁰ The conference was a “success.”¹⁹¹

ECHO’s trouble finding a hotel, though outrageous, was not entirely surprising. *ONE* reported that “East Coast hostelrys seem to be singularly inhospitable to the local homophile organizations.”¹⁹² Remarkably, the 1964 conference, only ECHO’s second, was also ECHO’s second time struggling to secure accommodations. Just one day before the 1963 conference, the Drake Hotel in Philadelphia, the conference’s planned location, “insisted that the whole affair be cancelled” when it discovered the “taboo” topic of the conference.¹⁹³ But when ECHO “scrounge[d] up the payment for the entire bill in advance[,] [t]he conference was on.”¹⁹⁴

This two-year saga culminating in ECHO’s assertion of contract claims against the Gramercy Inn and Manger Hamilton hotels illustrates the

183. *Id.*

184. East Coast Homophile Organizations, *supra* note 163.

185. Monroe Freedman was a notable civil rights and civil liberties lawyer who was a consultant to the United States Commission on Civil Rights in addition to working with the Mattachine Society; he ended up becoming dean of Hofstra Law School. Margalit Fox, Monroe Freedman, Influential Voice on Legal Ethics, Dies at 86, *N.Y. Times* (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/nyregion/monroe-freedman-expert-on-legal-ethics-dies-at-86.html> (on file with the *Columbia Law Review*). Freedman’s role in this case as an expert on contract law is further evidence of the interconnectedness of public and private law at the time.

186. Letter from Marjorie McCann to Governing Bd., *supra* note 175. The note about Freedman was written on the paper of the initially typed letter and was labeled “P.S. Later.” *Id.*

187. *Id.*

188. Cafiero, *supra* note 164, at 19.

189. See C.P., *supra* note 163, at 14 (“At this writing (six days before the Conference), it is scheduled for the Sheraton-Park Hotel . . .”).

190. Cafiero, *supra* note 164, at 19.

191. *Id.*

192. Tangents, *ONE*, Dec. 1965, at 18, 25.

193. John P. LeRoy, ECHOs of ECHO, *Mattachine Newsl.* (Mattachine Soc’y, New York, N.Y.), Oct. 1963, at 3, 3.

194. *Id.*

importance of contract law to 1960s homophile legal strategy. Because parties were so resistant to contract with queer people, it became especially important for them to be explicit in negotiating and drafting contracts, furthering their learnings from the 1950s.¹⁹⁵ In many cases, opposing parties still breached, and contract law was the only possible redress.

c. *Haight Theater v. KMPX-FM*. — The next contract dispute is the Haight Theater's¹⁹⁶ claim that KMPX-FM breached a condition of its contract by cutting off the broadcast to the Theater's nightly radio show, "The Gay Hour," in July 1964. The Haight opened on July 17, 1964, as the first theater unabashedly catered to queer people in the country.¹⁹⁷ In addition to showing queer-themed movies and hosting drag contests,¹⁹⁸ the theater began broadcasting a late-night radio show, "The Gay Hour," on the night of August 4 using the station KMPX-FM.¹⁹⁹ Immediately the broadcast brought "[f]uror" to the neighborhood and "pickets to the theater."²⁰⁰ When KMPX-FM received "beefs from listeners" and "threats to bring in the FCC," the station "cut 'em off the air."²⁰¹ The "Haighters" responded by threatening to "sue the station on a \$250,000 breach-of-contract suit."²⁰²

d. *Odorizzi v. Bloomfield School District*. — The final contract claim is the only one that resulted in a published court opinion.²⁰³ It involved a schoolteacher, Donald Odorizzi, who was arrested for same-sex sexual activity in June 1964.²⁰⁴ Immediately after Odorizzi returned home after his arrest, the district superintendent and school principal visited his apartment and demanded his resignation, threatening to fire him and "publicize the proceedings" if he refused to quit.²⁰⁵ Odorizzi signed the resignation letter.²⁰⁶ After signing, however, the criminal charges were

195. See *supra* section II.A.

196. While the Haight Theater isn't traditionally recognized as a homophile organization, this Note analyzes it as such because it was an organization fighting on behalf of queer people during the 1960s.

197. Cross-Currents, *The Ladder*, Oct. 1964, at 21, 21; see also Unidentified News Clipping, *S.F. Chron.*, Aug. 4, 1964 (on file with the *Columbia Law Review*) [hereinafter Aug. 4 Clipping] ("The town's homosexuals . . . now have a theater of their very own (the Haight) . . .").

198. Cross-Currents, *supra* note 197, at 21.

199. Aug. 4 Clipping, *supra* note 197.

200. Cross-Currents, *supra* note 197, at 21.

201. Unidentified News Clipping, *S.F. Chron.*, July 7, 1964 (on file with the *Columbia Law Review*) [hereinafter July 7 Clipping].

202. *Id.*

203. See *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533 (Cal. Dist. Ct. App. 1966).

204. *Id.* at 537.

205. *Id.* at 537–38.

206. *Id.* at 538.

dismissed, and Odorizzi sought reinstatement at his former school.²⁰⁷ When the school district declined, he brought suit.²⁰⁸

Odorizzi alleged that because the district superintendent and school principal requested his resignation after a long night of police questioning (he hadn't slept for forty hours), his initial "resignation was invalid"—"obtained through duress, fraud, mistake, and undue influence."²⁰⁹ Ultimately, the California District Court of Appeal sided with Odorizzi, rejecting his claims of duress, menace, fraud, and mistake but finding that he alleged facts sufficient to support a claim of undue influence.²¹⁰ Odorizzi's case has been frequently cited²¹¹ and even appears in foundational textbooks.²¹²

But reading the published opinion does not reveal any connection between the case and homophile legal strategy at the time. The court makes no mention of homophile organizations and declines to connect the plaintiff's case to a larger queer rights discussion.²¹³ Behind the scenes, however, homophile groups guided Odorizzi. Odorizzi's friend worked for the homophile publication *Tangents*, and he urged Odorizzi to press his case "to advance the rights" of queer teachers.²¹⁴ *Tangents* became heavily involved in the case, finding Odorizzi both a criminal attorney who helped get his charges dropped²¹⁵ and a contracts attorney who represented him against his former employer.²¹⁶ The magazine even paid some of the legal fees.²¹⁷ This confirms that homophile groups played a key role in helping queer people secure legal services, including for contract disputes.²¹⁸ The ACLU of Southern California then joined Odorizzi's case, marking an

207. *Id.* at 537.

208. *Id.*

209. *Id.* at 537–38.

210. *Id.* at 538.

211. See Westlaw, <https://westlaw.com/> (last visited Feb. 4, 2024) (open the case *Odorizzi*, 54 Cal. Rptr. 533 and select "Citing References"; then select "Cases" within the "Content types" tab).

212. See, e.g., *Odorizzi*, 54 Cal. Rptr. 533, reprinted in *Contracts: Cases and Doctrine* 1012 (Randy E. Barnett ed., 4th ed., 2008).

213. *Odorizzi*, 54 Cal. Rptr. at 543 ("We express no opinion on the merits of plaintiff's case, or the propriety of his continuing to teach school . . .").

214. Kellye Y. Testy, Relational Background: Donald Odorizzi's Story, in *Contracts: Cases and Doctrine*, supra note 212, at 1018, 1020.

215. Editorial, *Tangents*, Jan. 1966, at 2, 2.

216. See Justin Wm. Moyer, Forgotten Court Case Shows How a California Schoolteacher Was Persecuted for Being Gay, *Wash. Post* (Dec. 29, 2020), <https://www.washingtonpost.com/history/2020/12/29/donald-odorizzi-gay-rights/> (on file with the *Columbia Law Review*) (noting that "a local homosexual organization" reached out to attorney Stuart Simke to take Odorizzi's contracts case (internal quotation marks omitted) (quoting Simke)).

217. See *id.* (noting that the homophile group "w[as] going to pay [the lawyer]" (internal quotation marks omitted) (quoting Simke)).

218. See supra notes 143–145 and accompanying text.

initial step in the organization's implementation of its 1965 policy supporting queer legal reform.²¹⁹ Odorizzi then won his case before the California appellate court.²²⁰

This case reflects how important contract law had become to homophile legal strategy. *Tangents* called Odorizzi's case so "significan[t] that no retrospective of 1965 would be complete without it."²²¹ And *Odorizzi* wasn't singular. Each dispute and resulting claim from this section illustrates the changing role of contract law in 1960s homophile legal strategy—it was an affirmative, offensive tool, not just a preventative measure.

2. *Contract Law as a Space-Creating Tool.* — At the beginning of the 1960s, the homophile movement left its nonconfrontational approach behind and adopted one focused on widespread vocal activism.²²² With this change in the movement, contract claims became key tools to facilitate the homophile project of asserting and demonstrating public law rights. These claims did so by seeking to protect the space homophile groups needed for their activities. In a way, homophile groups taught their members how to use contract law to protect private spaces in the 1950s²²³ and then applied these learnings in the 1960s to protect their own public activities.

a. *ONE v. Continental Travel Service.* — First, ONE's private law claim against Continental Travel Service attempted to enable queer people to assert their public law association rights. The proposed "CRUISE THROUGH EUROPE"²²⁴ cannot be understood outside the context of queer people's association rights at the time. Queer people had just won the right from the Supreme Court of California to associate with each other in queer bars.²²⁵ But this right was nonexistent in other states, where liquor authorities closed establishments just because they served queer clientele.²²⁶ Even the right secured in California—ONE's home state—was

219. Editorial, *supra* note 215, at 2.

220. See *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 543 (Cal. Dist. Ct. App. 1966) (holding that Odorizzi "states a cause of action for rescission of a transaction to which his apparent consent had been obtained through the use of undue influence").

221. Editorial, *supra* note 215, at 2.

222. See *supra* notes 48–51 and accompanying text.

223. See *supra* notes 139–141 and accompanying text.

224. *Cruise Through Europe*, *supra* note 2, at 32.

225. *Vallerga v. Dep't of Alcoholic Beverage Control*, 347 P.2d 909, 912 (Cal. 1959) (holding that the state's Department of Alcoholic Beverage Control could not suspend a bar's liquor license just because it catered to queer patrons); see also Cain, *supra* note 6, at 1567–71 (discussing the leadup to and decision in *Vallerga*). A few other states joined California but not until later in the 1960s. *Id.* at 1571–72 (citing *One Eleven Wine & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 18 (N.J. 1967); *Kerma Rest. Corp. v. State Liquor Auth.*, 233 N.E.2d 833, 834–35 (N.Y. 1967)).

226. Eskridge, Gaylaw, *supra* note 37, at 93–94 (explaining that most states permitted the closing of bars "that became regular resorts of homosexuals" and that California was an outlier).

heavily limited. Catering to queer patrons wasn't enough to shut down a bar, but allowing queer conduct was.²²⁷

In this context, a trip to Europe was an appealing way for queer people to assert their association rights despite widespread attacks on them at home. Unsurprisingly, excitement for the tour was palpable; over 300 people inquired.²²⁸ ONE recognized the importance of the tour for queer people's ability to associate. While there is no evidence of specific plans for the 1961 tour, an announcement for the 1972 tour demonstrates this point. The announcement made clear that, while the tour would involve visiting "prime tourist attractions," "a Gay Tour is not just another tour."²²⁹ Instead, this tour included plans to meet with overseas *ONE* readers, visit European homophile groups, and explore cities' queer establishments.²³⁰ The sparse evidence about the 1961 tour suggests a similar program: Queer people representing homophile groups from all over Europe wrote to *ONE* to offer to host the tour group in their cities.²³¹ Associating with a "cross-section of the Gay Community" was the trip's primary goal, and contract law could help facilitate that.²³²

When Continental Travel Service canceled the trip, then, it was about more than just missing out on fun; it was a threat to queer people's right to associate with each other and their European counterparts. *ONE*, in its response, accused Continental Travel Service of "prey[ing] upon the loyalty of *ONE*'s world-wide readership" and noted the "offers of hospitality" from European groups.²³³ These statements indicate a worry that Continental Travel Service was depriving *ONE*'s readers of the ability to associate with others like them.

227. See, e.g., *Vallerga*, 347 P.2d at 912 (noting that a liquor license could still be revoked due to the presence of queer people "seeking sexual gratification in a public tavern with another of the same sex" because this act "would offend the moral sense of the general public"); see also Eskridge, *Gaylaw*, supra note 37, at 94–95 (noting that queer people "had a theoretical right to congregate but not if they touched or kissed one another"); Cain, supra note 6, at 1569–72 (explaining that queer conduct could still be cause for the revocation of a liquor license).

228. *ONE* Board Letter, supra note 4, at 4.

229. *European Tour 1972: Cruise Through Europe*, *ONE* Letter, Apr. 1972, at 1, 1 (on file with the *Columbia Law Review*).

230. *Id.*

231. See Letters, *ONE*, Sept. 1961, at 29, 30–31 (documenting numerous letter submissions from enthusiastic hosts in Europe); see also *ONE* Board Letter, supra note 4, at 4 (noting that "generous offers of hospitality were received from European homophile groups"). This evinces the transnational nature of the homophile movement. For background on this topic, see generally Leila J. Rupp, *The Persistence of Transnational Organizing: The Case of the Homophile Movement*, 116 *Am. Hist. Rev.* 1014 (2011) (exploring the development of "a transnational homophile identity").

232. *European Tour 1972: Cruise Through Europe*, supra note 229, at 1; see also Tangents, *ONE*, Nov. 1964, at 16, 16 [hereinafter *Tangents* Nov. 1964] (expressing the annual Europe trip's goal of "sharing of homophile viewpoints between friends in different countries").

233. *ONE* Board Letter, supra note 4, at 4.

ONE's contract claim sought to protect queer people's ability to assert this public law right. In the short term, ONE appeared to be unsuccessful in this pursuit, seeing as the 1961 tour never departed.²³⁴ Behind the scenes, however, the story was a bit more complicated. After the public denouncement, the travel agency contacted ONE and offered, instead of canceling the tour, to "merely . . . postpone[]" it to the following summer.²³⁵ This indicated some potential success. Ultimately, however, further challenges derailed the rescheduled tour, and the Board doubled down on its negative assessment of the travel agency.²³⁶ It is unclear if the Board ever received compensation from Continental Travel Service.²³⁷

Even if ONE never received compensation, the 1961 dispute precipitated the creation of a structure that allowed queer people to assert their association rights in the future. In October 1964, three years after Continental Travel Service canceled ONE's initial tour, a group of ONE readers departed on a three-week European adventure²³⁸—"the first all-gay excursion ever to be undertaken."²³⁹ Informed by the contract dispute with Continental Travel Service, ONE organized the trip in-house.²⁴⁰ Asserting association rights was a key component of the trip, of course. ONE reported that "[t]he highlight . . . was [the] opportunity to meet homophile organizations throughout Europe."²⁴¹ The trip was a "tremendous success."²⁴² European tours continued under ONE well into the 1970s, advertising to readers: "A GAY TIME IS IN STORE FOR YOU!"²⁴³

b. *ECHO v. Gramercy Inn and Manger Hamilton*. — The use of affirmative contract claims to create space to assert and discuss public law rights is especially evident in the context of ECHO's 1964 dispute with the Gramercy Inn and Manger Hamilton hotels. First, the contract claims

234. See *Gay Tour Triumphs*, supra note 20, at 21 (indicating that the first tour of Europe occurred in 1964).

235. Letter from ONE to the Readers of ONE (July 1962) (on file with the *Columbia Law Review*).

236. *Id.* (alleging that further "misstatements" have plagued attempts to put on a rescheduled tour).

237. See Letter from William Lambert, Bus. Manager, ONE, to Newton E. Deiter, Tour Coordinator, Cont'l Travel Serv. (May 29, 1962) (on file with the *Columbia Law Review*) (demanding \$1,745 for losses arising out of the mishandling of the rescheduled tour). There was no response to this letter in the archive.

238. *European Tour 1972: Cruise Through Europe*, supra note 229, at 1.

239. *Tangents* Nov. 1964, supra note 232, at 16.

240. See *id.* (indicating the tour was "conducted under the auspices of ONE's Social Service Division").

241. *Gay Tour Triumphs*, supra note 20, at 21.

242. *Id.*

243. ONE World Travel Club, ONE's 1975 12th Annual International Gay Tour I (1975) (on file with the *Columbia Law Review*); see also *European Tour 1972: Cruise Through Europe*, supra note 229, at 1–5 (summarizing the pre-1972 trips and the providing the plan for the 1972 tour).

sought to help queer people assert their association rights, much like ONE's claim against Continental Travel Service. One of the functions of the 1964 ECHO Conference was to give queer people a place to congregate and socialize. A recap of the tour celebrated, in addition to the content of the convention, how "jolly" the community was.²⁴⁴ ECHO's contract claims against the Gramercy Inn and Manger Hamilton hoped to secure the right of queer people to be together as a group.²⁴⁵

Even more directly, ECHO asserted its contract claims so it could host a conference that explicitly discussed public law rights. The theme of the conference was "Homosexuality: Civil Liberties and Social Rights."²⁴⁶ It included speeches on topics like "Official Discrimination," "Politics," "Civil Liberties," "Criminal Sanction," "Civil Rights," and "Government Regulation."²⁴⁷ As one recap described it: "The content of the ECHO '64 conference revolved around ACTION."²⁴⁸ Quite literally, the function of ECHO's contract claims was to secure the space for queer people to assert and debate their public law rights.

In the claim against the Gramercy Inn, Freedman, ECHO's counsel, assessed that ECHO "ha[d] an excellent case & could very easily win."²⁴⁹ He must have been right; the Gramercy Inn immediately "offered to compromise for half the time previously contracted for, then capitulated completely,"²⁵⁰ "recogniz[ing] its original contract."²⁵¹ Obscured by ECHO's ultimate decision to have the conference elsewhere is the fact that this was the best possible result in the case against Gramercy Inn, especially before ECHO secured alternate accommodations.²⁵² While the Sheraton-Park ended up hosting the conference, Gramercy Inn's recognition of the contract provided ECHO at least with a backup space and may have provided bargaining power in negotiations with the Sheraton-Park.

The contract claim against the Manger Hamilton was similarly successful. About eighteen months after the conference, Kameny reported that "[i]n an out-of-court settlement, the Manger Hamilton

244. Adkins & Tobin, *supra* note 48, at 6–7.

245. For a discussion of the significance of this right, see *supra* notes 225–227 and accompanying text.

246. ECHO Report '64, *The Ladder*, Jan. 1965, at 4, 4 (internal quotation marks omitted).

247. Program, ECHO, East Coast Homophile Organizations Presents E.C.H.O. Conference 1964 (Oct. 1964) (on file with the *Columbia Law Review*).

248. Lily Hansen & Barbara Gittings, Part Two: Highlights of ECHO, *The Ladder*, Jan. 1965, at 7, 7.

249. Letter from Marjorie McCann to Governing Bd., *supra* note 175.

250. Cafiero, *supra* note 164, at 19; see also C.P., *supra* note 163, at 14 ("The pressure on the Gramercy Inn was sufficient and they capitulated . . .").

251. Kameny, *supra* note 169, at 3.

252. This remedy looks a lot like specific performance, which wouldn't even be available in formal proceeding against the Gramercy Inn here. See 24 Williston on Contracts § 64:1 (4th ed. 2023) (explaining that specific performance is a remedy when "only equitable relief is available").

Hotel . . . ha[d] paid \$500.00 . . . for damages [that] ar[ose] from their last-minute cancellation of hotel accommodations for the 1964 ECHO Conference.”²⁵³ Kameny heralded this settlement as a “vindicat[ion]” of ECHO.²⁵⁴ While any victory for queer rights was notable, Kameny’s assessment might seem overzealous given the \$500 settlement. But further analysis suggests that this result was, in fact, a substantial victory.

Damages are calculated to put the nonbreacher in the position they would have been in had the promise been performed.²⁵⁵ It is doubtful that ECHO would have been in a better position had Manger Hamilton performed the contract. Based on reports, the Sheraton-Park was “nicer” than the Manger Hamilton, and “the prices were in the same range”²⁵⁶—ECHO had completely mitigated its expectation damages.²⁵⁷ Additionally, damages based on reliance or restitution were unlikely: ECHO doesn’t appear to have had a reliance interest in holding the event at the Manger Hamilton, and the Manger Hamilton received no obvious benefit for its breach.²⁵⁸ In short, ECHO didn’t have a strong argument for substantial damages, especially given that expectation damages net mitigation appeared to be \$0. Receiving any sum at all, perhaps to repay the \$500 that organizations contributed to the legal fight,²⁵⁹ can be described as nothing short of a substantial victory.

Thus, even though the 1964 conference—with a focus on queer people’s legal rights²⁶⁰—did not include contract law as a subject, contract law was integral in providing ECHO with space to put it on. ECHO’s contract disputes thus exemplify the intimate connection between public law and private law in homophile legal strategy.

c. *Haight Theater v. KMPX-FM*. — The Haight Theater’s 1964 contract claim against KMPX-FM had a similar potential to create space for queer people to manifest their public law rights, but it illustrates that not every contract claim led to a legal victory. In the years before the Haight’s claim, the Supreme Court held that queer people had a First Amendment right

253. Kameny, *supra* note 169, at 3.

254. *Id.*

255. 24 Williston on Contracts, *supra* note 252, § 64:2.

256. Cafiero, *supra* note 164, at 19.

257. See 24 Williston on Contracts, *supra* note 252, § 64:31 (noting that a party “cannot recover those damages that it could have avoided”).

258. See *id.* at § 64:2 (noting that, besides expectation interests, parties may be able to recover for “interest in being reimbursed for loss caused by reliance on the contract” or “interest in having restored . . . any benefit that he has conferred on the other party” (internal quotation marks omitted) (quoting Restatement (Second) of Contracts § 344 (Am. L. Inst. 1981))).

259. See *supra* note 176 and accompanying text.

260. See *supra* notes 246–248 and accompanying text.

to publish queer content,²⁶¹ though these rights were curbed in important ways.²⁶²

The Haight’s \$250,000 claim against KMPX-FM for removing “The Gay Hour” from air²⁶³ intended to secure the space for queer broadcasters to actualize their First Amendment rights. Unfortunately, the “bold experiment . . . ended sadly”: About a month after they opened the Haight, the “co-owners reportedly blew town, leaving behind unpaid debts and a bench warrant for the arrest of one of them.”²⁶⁴

While the Haight’s claim was not successful like ECHO’s, it still affirms the importance of contract law in 1960s homophile legal strategy. Eskridge points out that the First Amendment provided queer people some “breathing room to socialize and organize.”²⁶⁵ Taken together, the disputes recounted in this section reveal that, without contract law, that breathing room would collapse. The First Amendment may have given queer people the right to organize and socialize, but contract law gave them the space to do so.

3. *Contract Law Rights in Queer People’s Growing Rights Consciousness.* — The role of private law in homophile legal strategy was not only to aid in the assertion of public law rights. Asserting private contract law rights was a goal in itself, a key part of queer people’s increasing consciousness of their toolbox of legal rights.

a. *ONE v. Continental Travel Service.* — The central role of contract law in queer people’s growing rights consciousness is evident in ONE’s contract dispute with Continental Travel Service. As discussed in this Note’s Introduction, ONE responded to Continental Travel Service using terms that invoked contract law.²⁶⁶ It first expressed “the utmost contempt for anyone who would attempt to victimize homosexuals or try to reap financial gain at their expense.”²⁶⁷ It then signaled that “[t]he homosexual public will no longer tolerate any lower standards of honesty and fair-dealing than those demanded by other segments of the population.”²⁶⁸ In private notes, the Board lamented not only the lost time in preparing for the trip—“worth thousands of dollars”—but also the lost reliability the

261. *One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958); see also *Manual Enters., Inc. v. Day*, 370 U.S. 478, 491 (1962) (holding that male physique magazines do not qualify as obscene, so the post office could not refuse to mail them on this premise).

262. See Eskridge, *Gaylaw*, supra note 37, at 96 (“[L]ower federal and state courts did not read [*Olesen* and *Day*] liberally . . .”); Frank, supra note 36, at 19 (“Publishers were still vulnerable to obscenity charges and could face prison sentences for publishing magazines deemed obscene. Much depended on the attitudes of local police and prosecutors.”).

263. See supra notes 197–202 and accompanying text.

264. *Cross-Currents*, supra note 197, at 21.

265. Eskridge, *Gaylaw*, supra note 37, at 93.

266. See supra note 19 and accompanying text.

267. ONE Board Letter, supra note 4, at 4.

268. *Id.*

magazine would have with advertisers.²⁶⁹ In these statements, ONE's Board of Directors indicated that its contract claim against Continental Travel Service served to protect and assert the right of queer people not only to associate and travel with each other²⁷⁰ but also to contract as reliable and equal bargaining partners.

In its public proclamation, the Board then explicitly put the goal of securing contract rights in the context of the fight for public law rights: "Our intention further is to make it as clear regarding commercial matters, as ONE has for years been doing concerning civil and legal rights, that homosexuals cannot be trampled under foot with impunity."²⁷¹ This statement is emphatic: Protecting and asserting queer people's contract rights was part of the magazine's overall mission to advance queer rights.

b. *ECHO v. Gramercy Inn and Manger Hamilton*. — Contract rights' position as a part of queer people's rights consciousness is also evident in ECHO's dispute with the Gramercy Inn and Manger Hamilton. The Daughters of Bilitis, one of the four ECHO organizations,²⁷² reported that ECHO hired a lawyer to raise claims against the two hotels because leaders were "tired of being treated in this way."²⁷³ This indicates the group's goal was not just to put on its conference;²⁷⁴ it was to contract more easily with outside parties.

Kameny's account of the disposition with the Manger Hamilton substantiates this view. He remarked that the hotel "apparently felt that a formal contract, entered into with a homophile organization, could be violated with impunity. They have been shown otherwise."²⁷⁵ The goal of the lawsuit was thus to show that queer parties had contract rights and were willing to enforce them. Kameny then tied the assertion of this contract law right to the larger goal of standing up to the "abrogation of [queer people's] rights, or treatment as second-class persons."²⁷⁶ Kameny hoped to upend the structure that made queer people second-class citizens, and he realized that structure operated in private law as much as public law.

c. *Odorizzi v. Bloomfield School District*. — Odorizzi's claim against his former employer also demonstrates the importance of contract rights themselves in the homophile legal movement. The ACLU of Southern California saw the rights at stake in Odorizzi's case as so foundational that the organization chose the case as one of its first forays

269. Memorandum from the Bd. of Dirs., ONE, on The Responsibility of Homosexuals to Homosexuals (on file with the *Columbia Law Review*).

270. See supra notes 224–243 and accompanying text.

271. ONE Board Letter, supra note 4, at 4.

272. See supra note 160.

273. East Coast Homophile Organizations, supra note 163.

274. See supra notes 246–248 and accompanying text.

275. Kameny, supra note 169, at 3.

276. *Id.*

into litigation protecting queer people.²⁷⁷ The ACLU's involvement—lauded at the time as “a giant step in the fight to end discrimination against homosexuals”²⁷⁸—reveals just how central contract law rights were to the broader project of queer people's legal equality.

Odorizzi himself viewed his contract law rights as key to his future as a queer teacher. He wrote to his lawyer: “I am FIGHTING FOR MY LIFE and would never really be satisfied until the Supreme Court has ruled”²⁷⁹ Like other queer people, Odorizzi was a vulnerable bargainer susceptible to duress and undue influence from other parties.²⁸⁰ It was integral for him to ensure that the doctrines of contract law protected him from his former employer's tactics.

Overall, these claims indicate that contract law was more than just a tool to aid in expressing and discussing public law rights. As a letter sent to *ONE* stated, queer people were fighting for “the right to live peacefully and within the law as orderly and useful citizens”²⁸¹—protecting contract rights was essential to that goal.

C. *The Limits of Contract Law*

This Part has shown the importance of contract law during the homophile movement. Contract law was a framework for queer people and the organizations representing them to make arguments about their rights and an avenue to receive some compensation for violations of those rights. But this section explains how contract law's limitations in both its applicability and remedial scope meant it could not completely protect queer people from the immensely homophobic Cold War society.²⁸²

Contract law protects only certain agreements. It declines to enforce contracts that are against public policy.²⁸³ This includes bargains to commit illegal acts²⁸⁴ or even bargains with a probability of promoting illegal acts.²⁸⁵ The Haight Theater's breach claim against KMPX-FM may

277. Editorial, *supra* note 215, at 2.

278. *Id.*

279. Testy, *supra* note 214, at 1022 (internal quotation marks omitted) (quoting Letter from Donald Odorizzi to Stuart Simke (Dec. 1965)).

280. See *supra* note 146 and accompanying text.

281. Letter from H.S. to Blanche M. Baker, M.D., *in* *Toward Understanding, ONE*, Feb. 1960, at 26, 26.

282. Farr also recognized contract law's limits in the context of private lawsuits by Black sharecroppers and tenant farmers in the post-slavery South. Farr, *supra* note 60, at 718–31. Immense anti-Black violence at the time made Black farmers' private lawsuits far riskier than the contract claims discussed in this Note. See *id.* at 722–24 (discussing the racial terrorism that followed Black farmers' contract negotiations and claims).

283. 5 Williston on Contracts § 12:1 (4th ed. 2023).

284. *Id.* § 12:4.

285. 8 Williston on Contracts § 19:10 (4th ed. 2023).

have been defeated by this doctrine.²⁸⁶ The station removed “The Gay Hour” after it was threatened with FCC involvement.²⁸⁷ If broadcasting “The Gay Hour” was illegal, the agreement the radio station made to broadcast it was unenforceable, and the Haight could not recover.²⁸⁸ Given that criminal law targeted queer people’s very existence,²⁸⁹ many agreements queer people wished to make—like the Haight’s—were likely unenforceable on grounds of public policy.

While queer people were limited in what they could bargain for, they could enter into agreements for access to physical space, as ECHO did to plan its yearly conference.²⁹⁰ But contracts for space could not protect queer people from criminal enforcement.²⁹¹ Instead, they could only block outside prejudice and surveillance by providing sheltered rooms somewhat separated from the public.²⁹² At best, contract law created a zone of privacy that the outside world was less likely to breach. But it did not prevent the state from intervening if it wanted. Police repeatedly raided homophile events without mind for whether a contract had properly secured the venue.²⁹³

Even if queer people entered into valid contracts, available remedies for breach are limited in scope and usually cannot compensate for any harms caused by actions motivated by homophobia or prejudice. Punitive damages are generally not available in breach of contract claims.²⁹⁴ And while the law is evolving, mental and emotional suffering is generally not

286. See *supra* notes 196–202, 261–264 and accompanying text.

287. July 7 Clipping, *supra* note 201.

288. See 8 Williston on Contracts, *supra* note 285, § 19:75 (explaining that courts cannot order damages for the breach of a bargain that violates the law).

289. See *supra* note 6 and accompanying text.

290. See *supra* notes 159–195 and accompanying text.

291. This is true because courts refuse to enforce not only bargains to violate criminal laws, see *supra* notes 283–285 and accompanying text, but also bargains with the purpose of concealing a crime, 7 Williston on Contracts § 15:8 (4th ed. 2023). So even when queer groups contracted for space, they had to be careful about what they claimed the purpose of the contract was.

292. See *supra* sections II.A–B.

293. Perhaps the most famous example is the police’s raid of a Mardi Gras ball organized by the Council on Religion and the Homosexual, a San Francisco homophile group, on New Year’s Day 1965. For accounts of the raid, see Kay Tobin, *After the Ball, The Ladder*, Feb.–Mar. 1965, at 4, 4–5. The police raided the ball even though there is no indication that the people were in the space unlawfully. See Tobin, *supra*, at 5 (reporting that the police’s justification for intruding was their (contested) observation that “tickets . . . were being sold at the door”). The raid has been called “San Francisco’s Stonewall.” See, e.g., Nora Neus, *San Francisco’s Stonewall: The New Year’s Ball that Sparked a Queer Power Movement*, *The Guardian* (Dec. 30, 2023), <https://www.theguardian.com/us-news/2023/dec/30/california-hall-ball-police-raid-lgbt-rights-activist-history-san-francisco> [<https://perma.cc/J6FE-GECF>].

294. See 24 Williston on Contracts, *supra* note 252, § 64:1 (“The fundamental principle that underlies the availability of contract damages is that of compensation.”); *id.* § 64:12 (“Punitive damages are not ordinarily recoverable in actions for breach of contract . . .”).

compensable in contract claims.²⁹⁵ Any remedy a plaintiff can receive for a breach corresponds to the contract's monetary value.²⁹⁶ This likely explains the \$500 settlement in ECHO's claim against the Manger Hamilton.²⁹⁷ Queer people likely experienced shame, violence, harassment, and decline in morale when they were victims of a contract breach based in homophobia.²⁹⁸ But damages could not compensate for these dignitary harms.²⁹⁹

Furthermore, as Odorizzi's case illustrates, public law actions can render contract claims valueless, thus negating any claim for damages. Although Odorizzi won his contract law case,³⁰⁰ he never received damages and never got his job back. After his arrest, California revoked his teaching license in an administrative action.³⁰¹ In response, Odorizzi dismissed his suit against the school district³⁰² and never returned to teaching.³⁰³ The administrative action had rendered his contract claim worthless, so he dropped it.³⁰⁴ As scholar Kellye Testy noted: "It seems like in the contracts book that [Odorizzi] won," but "no man who went through this won in any sense that mattered."³⁰⁵ Odorizzi's case warns us that public law reactions can override, reverse, and undermine even a complete victory in the arena of private law. And yet, despite contract law's limits, this Part has shown that homophile groups recognized it as a powerful tool for queer people at a time when their public law rights were under attack.³⁰⁶

III. QUEER PEOPLE AND CONTRACT LAW: LOOKING FORWARD

This Part turns to the implications of Part II's findings, arguing that future scholars and practitioners should pay attention to private law broadly and contract law specifically when researching and advocating for

295. *Id.* § 64:11. Plaintiffs can, however, bring tort claims related to mental and emotional injury in conjunction with their contract claims. *Id.*

296. See *id.* § 64:1 (noting that plaintiffs "should be placed, as nearly as is possible through an award of money damages, in the position [they] would have been in had the defendant-promisor fully performed the contract").

297. See *supra* notes 253–259 and accompanying text.

298. See F. Andrew Hessick, *Standing and Contracts*, 89 *Geo. Wash. L. Rev.* 298, 321–24, 322 n.156 (2021) (noting that broken promises may result in moral, dignitary, and psychological harms). These harms are likely exacerbated when the breach is due to a party's immutable characteristic.

299. Farr uncovered a similar trend. See Farr, *supra* note 60, at 729 ("Without the possibility of punitive damages for breach of contract, damages awarded for violent breaches would be the same as the damages awarded for nonviolent ones.").

300. See *supra* notes 204–210 and accompanying text.

301. Testy, *supra* note 214, at 1022–23.

302. *Id.* at 1023.

303. Moyer, *supra* note 216.

304. Testy, *supra* note 214, at 1023.

305. Moyer, *supra* note 216 (internal quotation marks omitted) (quoting Testy).

306. See *supra* sections II.A–B.

queer rights. This Part begins by providing avenues for potential future academic research that will help further develop our understanding of queer people's relationship to law. It then exits the academy, discussing the importance of this research for on-the-ground movement lawyers.

A. *Private Law and Queer Legal Scholarship*

In looking at the way a specific political movement (the homophile movement) interacted with a specific body of private law (contract law), this Note opens the door to further exploration of private law's role in the development of legal subjects. There are multiple directions scholars can push this research.

First, researchers may focus on different legal acts, turning away from contract law toward another area of private law. Just within the homophile movement, there are hints in the archive (and specifically in *ONE*) of queer people using property law,³⁰⁷ tort law,³⁰⁸ and corporate law³⁰⁹ as part of their legal strategy. Each area of law will imbue our understanding of queer people's relationship to the law with new meaning.

Second, this Note invites researchers to focus on a different set of subjects. They may look at other marginalized groups, as scholars such as Brittany Farr and Dylan Penningroth have done.³¹⁰ Of course, more research remains to be done regarding queer subjects as well. The truth is that relatively few queer people, even during the 1960s, were involved in

307. See, e.g., Alden Kirby, *More Life Among the Dunes*, *ONE*, May 1960, at 26, 27 (discussing how property ownership enabled the "integrat[ion]" of queer people's lives on Fire Island); Dale Mallory, *An Income Tax Guide for Homosexuals*, *ONE*, Feb. 1962, at 6, 7 (informing queer people about the possibilities of joint tenancy and joint ownership); Wilfran Nicols, *The Older Homosexual*, *ONE*, June–July 1957, at 5, 7 (mentioning an older lesbian couple who share property as a symbol of long-term commitment); Charles K. Robinson, *A Home of Your Own*, *ONE*, Mar. 1960, at 5, 5–6 (discussing the process of jointly owning property and the benefits, including privacy, of having "a home of your own"); Charles K. Robinson, *Plan for Financial Freedom*, *ONE*, Sept. 1959, at 22, 23 (urging queer people to invest in real estate, especially to overcome the "punish[ment]" of being forced to identify as single for tax purposes); Letter from C.L.R. to Dr. Blanche M. Baker, *in* *Toward Understanding*, *ONE*, Dec. 1959, at 23, 23 (noting that landlords are reluctant to rent to two single men).

308. See, e.g., *Letters*, *ONE*, Nov. 1962, at 29, 29 (printing a letter that informs queer people that they can sue public health officials if they suffer a tort from the official revealing STI results); James Whitman, *The Answer to Homosexuality*, *ONE*, July 1953, at 14, 16 (identifying the bringing of invasion of privacy tort claims as an "immediate goal[] of the Mattachine [Society]").

309. See Letter from William Lambert to Continent Tour, *supra* note 12 (noting that *ONE*'s attorney is "very watchful that [staff] in no way overstep the proper boundaries of the functions [they] are chartered to perform and so in any way jeopardize [the corporate] charter").

310. See *supra* notes 104–105 and accompanying text.

the homophile movement.³¹¹ Looking at how queer people utilized and shaped private law outside the movement—and outside the 1950s and 1960s—will enrich our view of queer people as legal subjects. Looking outside large-scale movements may also do a better job of highlighting law’s role in subjects’ daily lives,³¹² a task that is difficult when looking at the strategy of large organizations.

Third, researchers may change the questions they ask when looking at queer people’s private law interactions. Instead of looking at how private law contributes to legal strategy—as this Note does—potential future studies may consider how private law contributes to the development of identity.³¹³ This would likely be a fruitful inquiry given the role of private law in shaping people’s everyday interactions with the world around them.³¹⁴

Finally, there is no reason to limit this line of inquiry to the past. Some scholars have begun to study private law’s role in contemporary queer movements.³¹⁵ But further research remains to be done.

B. *Private Law and Queer Movement Lawyering*

The relative lack of focus on private law in queer legal studies mirrors the relative lack of focus on private law as a way of supporting queer people

311. In 1961, the Mattachine Society had 230 members nationwide, while the Daughters of Bilitis had 115. Eskridge, *Dishonorable Passions*, supra note 6, at 131. Readership of *ONE* and *The Ladder* was fewer than 1,000. *Id.* This contrasts with the tens of thousands who “flocked to lesbian and gay bars that year.” *Id.*

312. See supra notes 83–86 and accompanying text.

313. See supra note 30 and accompanying text.

314. See supra notes 83–86 and accompanying text.

315. See, e.g., Allison S. Bohm, Samantha Del Duca, Emma Elliott, Shanna Holako & Alison Tanner, *Challenges Facing LGBT Youth*, 17 *Geo. J. Gender & L.* 125, 139 (2016) (“[P]laintiffs seeking redress for gender identity or sexual orientation-based discrimination in schools have alleged a number of tort law violations with varying levels of success”); Hila Keren, *Beyond Discrimination: Market Humiliation and Private Law*, 95 *U. Colo. L. Rev.* 87, 140, 149–65 (2024) [hereinafter Keren, *Beyond Discrimination*] (arguing that the “market humiliation” that results from discrimination should be remedied through private law); Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 *U.C. Irvine L. Rev.* 911, 958–71 (2022) (discussing ways for queer people to secure participation in the market, including through corporate law and contract law); Rapp, supra note 82, at 1147–48 (raising, but not answering, questions about how tort law should accommodate and adapt to the specific experiences of queer people); Carlos A. Figueroa, Comment, “Oh [Yes], She Betta [Should]!”: *Dolling Up Drag Queens’ Intellectual Property Rights*, 28 *UCLA Ent. L. Rev.* 127, 142–45 (2021) (arguing for alterations to intellectual property laws to better protect drag performers). For a related but distinct line of inquiry, see Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 *Harv. L. Rev.* 1683, 1685–89 (2021) (advocating for a broader application of antidiscrimination laws to “systematically . . . uproot” sex discrimination in housing).

living today.³¹⁶ This Note’s historical findings implore movement lawyers³¹⁷ fighting to advance the rights of queer people to consider the role of contract law, and private law more broadly, in their work. While some have begun to take note of private law’s importance,³¹⁸ this section provides an example of a specific way that contract law can ameliorate challenges that queer people currently face. It closes with a discussion about contract law’s renewed relevance in the wake of the Supreme Court’s decision in *303 Creative LLC v. Elenis*.³¹⁹

1. *Using Contract Law to Support Queer Youths Experiencing Homelessness.* — As an example of contract law’s utility, this section considers the needs of queer youths experiencing homelessness. Queer (and especially trans and gender-nonconforming) youths experience homelessness at alarming rates.³²⁰ And as scholar Libby Adler points out, private law plays a large role in keeping queer youths unhoused.³²¹ Minors have diminished ability to contract. Contracts they enter into are voidable³²² and unenforceable,³²³ making minors undesirable bargaining partners. As a result, queer youths experiencing homelessness are often unable to bargain to improve their economic and social condition.

But movement lawyers can use contract law to support queer youths experiencing homelessness. Minors’ contracts for necessities—often including housing—are enforceable.³²⁴ Lawyers can help queer youths form contracts to secure some of their needs. Furthermore, voidability is intended as a protection for minors,³²⁵ so it may be a tool that lawyers can help queer youths take advantage of if they do enter contracts.

Lawyers can also argue for a change in the doctrine to allow queer youths broader latitude to make enforceable contracts.³²⁶ In fact, a 1965 *ONE* article

316. See, e.g., Carlos A. Ball, Introduction: The Past and the Future, *in* *After Marriage Equality: The Future of LGBT Rights* 1, 1–13 (Carlos A. Ball ed., 2016) (mentioning only public law areas as future sites for developing queer people’s rights).

317. Movement lawyering is “lawyering in solidarity with social movements.” Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *Stan. L. Rev.* 821, 826 (2021).

318. See *supra* note 315.

319. 143 S. Ct. 2298 (2023).

320. See Jaimie Seaton, *Homeless Rates for LGBT Teens Are Alarming, but Parents Can Make a Difference*, *Wash. Post* (Mar. 29, 2017), <https://www.washingtonpost.com/news/parenting/wp/2017/03/29/homeless-rates-for-lgbt-teens-are-alarming-heres-how-parents-can-change-that/> (on file with the *Columbia Law Review*) (noting the staggering number of queer youths who experience homelessness); see also John Ecker, *Queer, Young, and Homeless: A Review of the Literature*, 37 *Child & Youth Servs.* 325, 325–26 (2016) (compiling studies discussing the disproportionate number of queer youths affected by homelessness).

321. Libby Adler, *The Gay Agenda*, 16 *Mich. J. Gender & L.* 147, 203–04 (2009).

322. 5 *Williston on Contracts*, *supra* note 283, § 9:5.

323. 25 *Williston on Contracts* § 67:47 (4th ed. 2023).

324. 5 *Williston on Contracts*, *supra* note 283, § 9:18–19.

325. *Id.* § 9:5.

326. See Adler, *supra* note 321, at 200 (suggesting a possible future route as “addressing common law limits on a minor’s capacity to contract”). In addition, there are other areas of

by Manuel Boyfrank previously floated this idea.³²⁷ The article advocated for securing the right to contract for boys between fifteen and twenty-one years old.³²⁸ This would give them the chance to work and prepare for adulthood, an especially vital ability for young queer people without supportive families.³²⁹ Boyfrank’s concerns ring true today, and his call to action echoes Adler’s assessment—which this Note also adopts—that movement lawyers can use contract law to “open up some avenues for change.”³³⁰

2. *Contract Law’s Increasing Importance After 303 Creative*. — Contract law is only growing in importance for the queer movement. In 2023, the Supreme Court held in *303 Creative LLC v. Elenis* that the First Amendment permitted a graphic designer to refuse to create wedding websites for same-sex couples despite a Colorado statute that prohibited discrimination on the basis of sexual orientation in public accommodations.³³¹ Public accommodations laws like Colorado’s have proliferated since the 1970s.³³² And before *303 Creative*, they were understood to protect queer people from discrimination such as by a website designer (as in *303 Creative*) or a travel agency/hotel (as discussed in this Note).³³³ It would have been tempting to think that antidiscrimination laws had supplanted contract law in importance because they protected queer people from acts like a hotel’s refusal to rent space to a queer advocacy group.³³⁴ But *303 Creative* has opened the door again for private parties to discriminate in who they allow to access the public accommodations they provide.³³⁵

contract law doctrine that lawyers can advocate to change based on this Note’s lessons. For example, dignitary or emotional harms may be incorporated into damages calculations. See *supra* notes 294–299 and accompanying text.

327. Manuel Boyfrank, *Our Situation Today*, ONE, Aug. 1965, at 16, 20.

328. *Id.*

329. *Id.*

330. Adler, *supra* note 321, at 204.

331. 143 S. Ct. 2298, 2307–08, 2321–22 (2023) (citing Colo. Rev. Stat. § 24-34-601(2)(a) (2022)).

332. See *id.* at 2314 n.2 (listing state statutes like Colorado’s); Eskridge, Gaylaw, *supra* note 37, at app. B2 (listing state and local laws that prohibit discrimination based on sexual orientation).

333. See Kenji Yoshino, *Rights of First Refusal*, 137 Harv. L. Rev. 244, 244, 265–69 (2023) (arguing that *303 Creative* has “cast doubt” on previous jurisprudence that did not allow businesses to use compelled affirmations to circumvent antidiscrimination laws).

334. See *supra* notes 159–195 and accompanying text. Note, however, that not all states provide protections for queer people in public accommodations like Colorado. See *Nondiscrimination Laws, Movement Advancement Project*, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [<https://perma.cc/QWG9-DHFU>] (last visited Feb. 4, 2024) (noting that twenty-two states and four territories do not explicitly prohibit discrimination based on sexual orientation or gender identity in public accommodations).

335. See Yoshino, *supra* note 333, at 244 (“In the wake of *303 Creative*, any business engaged in sufficiently expressive conduct will be able to assert . . . an exemption [to anti-discrimination laws].”). But see Carlos A. Ball, *First Amendment Exemptions for Some*, 137 Harv. L. Rev. Forum 46, 46–47 (2023), <https://harvardlawreview.org/wp-content/uploads/2023/11/137-Harv.-L.-Rev.-F.-46.pdf> [<https://perma.cc/P8L4-7NNH>] (responding to

Thus, the post-*303 Creative* world resembles the world of this Note. In fact, discrimination eerily similar to that which queer groups faced in the 1960s has begun to crop up again.³³⁶ In 2021, just before the Court's decision in *303 Creative*, a Montgomery Marriott asked the Knights & Orchids Society—an Alabama-based health advocacy group founded by Black trans and queer people³³⁷—to abandon its work retreat, which the hotel was hosting, after the queer group reported a transphobic incident instigated by an unaffiliated guest.³³⁸

The parallels between this event and homophile groups' struggles nearly sixty years earlier are obvious.³³⁹ But unlike *ECHO*,³⁴⁰ *ONE*,³⁴¹ the Haight Theater,³⁴² and *Odorizzi*,³⁴³ Knights & Orchids did not mention contract law in its response to the event.³⁴⁴ Perhaps this was a missed opportunity. As *303 Creative* provides cover for establishments like the Montgomery Marriott to discriminate once again, it has become even more important for queer movements to think about contract law.³⁴⁵ Like in the 1960s, contract law may provide tools for queer people to counter society's growing animus toward them³⁴⁶ and public law's increasingly hands-off approach to that animus.

Yoshino by expressing faith that the Supreme Court will be able to distinguish between “sincere and reasonable” requests for exemptions and those that are “grounded in bigoted and prejudiced views”).

336. Hila Keren, Homophobic Business Owners Are Having a Field Day Since Last Month's Supreme Court Decision, *Slate* (July 25, 2023), <https://slate.com/news-and-politics/2023/07/homophobic-business-owners-supreme-court-decision.html> [<https://perma.cc/6CA2-KSZP>] (describing the immediate push to extend *303 Creative* “beyond web designing, outside of the wedding industry, and to more than same-sex couples”).

337. Our Story, Knights & Orchids Soc'y, <https://www.tkosociety.org/about> [<https://perma.cc/W37Y-D5T9>] (last visited Jan. 18, 2024).

338. John Riley, Transgender Group Kicked Out of Marriott Hotel After Reporting Harassment, *Metro Wkly.* (Dec. 28, 2021), <https://www.metroweekly.com/2021/12/transgender-group-kicked-out-of-marriott-hotel-after-reporting-harassment/> [<https://perma.cc/D7S8-MAW3>].

339. Cf. *supra* notes 159–195 and accompanying text.

340. See *supra* notes 174–175, 184–186 and accompanying text.

341. See *supra* note 19 and accompanying text.

342. See *supra* note 202 and accompanying text.

343. See *supra* notes 208–209 and accompanying text.

344. See The Knights & Orchids Inc.—TKO, Facebook (Dec. 19, 2021), <https://www.facebook.com/TKOSociety/posts/1835112473357984> [<https://perma.cc/4MQ3-M4JV>] (discussing the transphobic attack and the hotel's response without mentioning the contractual relationship between the hotel and the group).

345. In a recent article, scholar Hila Keren has argued that discrimination arising from post-*303 Creative* discriminatory practices should be countered with the contract law “principle of good faith.” Keren, *Beyond Discrimination*, *supra* note 315, at 154.

346. See Scott Skinner-Thompson, *Trans Animus*, 65 *B.C. L. Rev.* (forthcoming 2024) (manuscript at 1–6), <https://ssrn.com/abstract=4563643> [<https://perma.cc/X75Z-V2UH>] (describing the recent antitrans agenda as “animus”); Minami Funakoshi & Disha Raychaudhuri, *The Rise of Anti-Trans Bills in the US*, *Reuters* (Aug. 19, 2023), <https://www.>

CONCLUSION

The goal of this Note is to position contract law as an important tool in queer people's fight for equality under the law. Its main method is historical. Focusing on the homophile movement of the 1950s and 1960s, this Note uncovers the key—and previously unrecognized³⁴⁷—role that contract law played in the movement's legal strategy.³⁴⁸ In the 1950s, homophile groups used contract law as “preventative law,” a way to avoid legal disputes and maintain the discretion that defined queer life at the time.³⁴⁹ But a new militancy emerged in the movement in the 1960s, and with it came a more affirmative role for contract law. During that decade, homophile groups repeatedly asserted their contract rights, disputed bargaining partners' breaches, and even secured remedies.³⁵⁰

This history suggests that today's scholars and practitioners should focus more on contract law when contemplating queer people's interactions with the law. The time has come to resuscitate from the past what Penningroth calls “alternative traditions of civil rights, including ones rooted in contract law.”³⁵¹ A future in which queer people have full equality and dignity under the law will be not only free from state-sanctioned discrimination but full of private contracting.

reuters.com/graphics/USA-HEALTHCARE/TRANS-BILLS/zgvorreyapd/ [https://perma.cc/5PPY-X866] (detailing the recent spate of antitrans bills).

347. See *supra* sections I.A–.B.

348. See *supra* Part II.

349. See *supra* section II.A.

350. See *supra* section II.B.

351. Penningroth, *supra* note 83, at 341.

