Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority

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INTRODUCTION

Recently, United States Supreme Court Justice Brennan noted that homosexuals constitute a "significant and insular minority of this country's population." This statement implies that cases involving discrimination on the basis of sexual orientation may require strict or heightened judicial scrutiny under the equal protection clause. By recognizing gay men and lesbians as members of a "discrete and insular minority" under the suspect classification doctrine, courts could exercise the power of judicial review in cases of alleged discrimination because of sexual orientation.

To date, few courts have invoked the equal protection clause in cases involving homosexuals. In fact, advocates of legal reform benefiting gays and lesbians have in the last decade relied more heavily on a constitutional right of privacy as a basis for protecting the decision to engage in gay sexual activity. However, the right to privacy analysis, implying that homosexuality primarily raises problems only of sexual conduct, is insufficient to support a favorable resolution of all the legal problems a gay person may encounter.

While a constitutional right to sexual autonomy and privacy is essential in order to remove the "stamp of criminality" imposed by sodomy statutes, a broader doctrine is needed to improve the overall status of people identified as members of a "gay minority." In light of the Supreme Court's recent opinion in Bowers v. Hardwick, denying a constitutional right to engage in homosexual sodomy, gay rights advocates may encounter in-

2. U.S. Const. amend. XIV, § 1 ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."). See infra text accompanying notes 76-155.
3. Throughout this article I use certain terms with specific meanings. See Part III, A1 and A2 for a detailed explanation of how I use the terms "sexual orientation" and "sexual identity.
4. Sexual orientation synonyms and sexual orientation, See Note, The Constitutional Status of Sexual Orientation, 98 Harv. L. Rev. 1285 (1985) (arguing that sexual orientation is a constitutionally irrelevance trait). I prefer the term sexual identity to highlight the phenomenon of a particular identity, i.e., a social minority, created by a dominant culture in the context of dominant values. Thus, in a heterosexually dominant culture, a group of persons identified on the basis of sexual characteristics (gender, sexual orientation) have a "sexual identity." By analogy, in the context of a white dominant culture, people identified on the basis of race or color have a "racial identity." See infra text accompanying notes 216-264. When I use the term "gay," I am referring to members of a social group that is identified with homosexuality or lesbianism as a lifestyle. I often use the term "gay" to include homosexual men and women, although the preferred term for women is "lesbian." "Gay" is a modern term that I believe should not be imposed when referring to pre-20th century homosexually-oriented persons. A person who sees himself as gay has not only acknowledged a same-sex emotional/sexual orientation but also accepts it as an aspect of his or her personal identity. See infra note 217. "Gay people" refers to men and women who accept having a same-sex orientation and live by the notion that society views a gay man or a lesbian as different from a "straight" (heterosexual) person.
6. See infra text accompanying notes 139-155.
7. See, e.g., Bowers v. Hardwick, 765 F.2d 1123 (11th Cir. 1985) (right to privacy prohibits criminalization of private consensual sodomy between adults occurring within the home).
8. See infra text accompanying notes 216-264. The anti-homosexual legislative activity of the 1970s was encouraged by singer-actress Anita Bryant who, urged by her fundamentalist Christian beliefs, sought to stop the "Baunting" of homosexuality. See Anita, Gays Have Their Say in Separate Capital Events, Oklahoma City Times, Feb. 21, 1978, at 1. Thus, in her home state of Oklahoma the legislature added to the scheme of laws traditionally used against gay people Section 6.103.15, a provision allowing the firing of public teachers who engaged in "public homosexual activity," which included advocating on behalf of rights for homosexual persons. In Board of Education of Oklahoma City v. National Gay Task Force, 729 F.2d 1274 (10th Cir. 1984), af'd by an equally divided court, 470 U.S. 903 (1985), the Tenth Circuit held that the portion of the statute that chilled the speech of teachers who might give sympathetic voice to the plight of homosexual persons violated the First Amendment.
increased obstacles when challenging sodomy statutes in state courts on right to privacy grounds. Vindication of a right to express homosexual orientation under the privacy doctrine protects at best, a right to enjoy in secret what society publicly maintains is "distasteful" and "immoral." A shift in focus—from conduct to identity"—is necessary in order to assure gay people full and equal citizenship.

This article explores Justice Brennan's idea that homosexual persons are a discrete and insular minority. Part I assesses current theories that affect lesbians and gay men and appeals for equal protection for gay people as members of a sexually-identified minority. Part II argues that the Supreme Court's equal protection jurisprudence demands that an individual's right to equal protection under the law not be abridged on the basis of personal traits that have nothing to do with ability or merit. A person's sexual identity is a constitutionally irrelevant personal trait, and therefore, courts must invoke a standard of judicial review more exacting than the rational basis test, in cases involving homosexual persons. Part III argues that the successful claim of equal protection of the gay minority requires a shift of focus from sexual behavior to sexual identity. It examines the relationship between the traditional concern over homosexual behavior and the procreative/patriarchal model of society that fosters and perpetuates discrimination against gay people. It also analyzes the close relationship between gender role stratification in this society and the development of the concept of an unacceptable "other." Part IV provides a hypothetical application of the suspect classification doctrine to potential cures for discrimination against gay people.

I. THE PROBLEM OF PROTECTION FOR A SEXUALLY-IDENTIFIED SOCIAL MINORITY

The aftermath of the "gay liberation movement" of the 1970s has been characterized by efforts at legislative and judicial reforms to improve the status of the homosexual. In the judicial arena, two constitutional theories emerged as the principal litigation strategies used by the proponents of change. The "right to privacy" has been employed principally in challenges directed at the constitutional validity of sodomy statutes. The efforts of the gay civil rights movement to prevent the government from prohibiting the private sexual behavior of consenting adults recently received a severe setback when the Supreme Court upheld the power of the states to constitutionally prohibit homosexual sodomy in Bowers v. Hardwick. A competing perspective, relying on the first amendment's guarantees of freedom of expression, has had as its focus issues of "public homosexuality," and has been used successfully to gain protection for such activities as organizing gay student groups, holding gay dances and protecting the right of public school teachers to speak on reform of anti-homosexual attitudes.

In the light of these varying outcomes, there is obviously a need to improve the overall status of the homosexual. Fifteen years after a national movement to have gay people "come out of the closet," members of this social group—identified on the basis of their sexual orientation—still dread and fear the impact of "homophobia." For example, although "gay pride" is celebrated annually with marches and other events in major American cities, community organizers warn participants of "gay bashers" who view these events as an opportunity to harass and assault the celebrants. Only a tiny minority of cities and states have prohibitions against discrimination in housing, employment and public accommodations on

9. See infra text accompanying notes 156-264.
15. See supra note 3.
16. "Homophobia" is the irrational fear of homosexuality or homosexual persons. "Internalized homophobia" is the fear of one's own homosexual impulses.
17. For example, the New York City Gay and Lesbian Anti-Violence Project ("AVP") reports increases in its docket each summer, particularly around "gay pride" month. Telephone interview with D. Wertheimer, Executive Director of AVP (June 11, 1986); see also Note, Queer Bashing Season: Gay Will Get Hit Harder This Summer, 32 NYC Pride Guide (1985).
The basis of sexual orientation. Even these ordinances do not prevent discrimination by federal military recruiters on university campuses. Finally, since the early 1980s the gay community has been preoccupied by the social and medical crisis caused by Acquired Immune Deficiency Syndrome (AIDS), a disease affecting large numbers of homosexual men. The gay and lesbian communities have had to cope with linkage of AIDS with gay sexuality and the consequent increase in openly anti-gay rhetoric.

The traditional legal perspective on issues of homosexuality has focused on the conduct in question. Thus, under the right to privacy analysis, the question usually turns on where the homosexual behavior takes place. This analysis fails to address the issue of discrimination against homosexuals occurring in a non-sexual context. For many gay people the most important “gay rights” issues are simply human issues—their right to a job, a place to live or custody of a child. Gay legal reformers should have as an ultimate goal the protection of gay men and lesbians from widespread, unjust discrimination, not simply the protection of private consensual sexual acts. Such a result may be procured by developing approaches to litigation under an equal protection analysis. The privacy and speech theories fail to secure an anti-discriminatory application of the law and cannot protect the gay person’s personal and social identity.

A. PRIVACY’S LIMITS

The right to privacy basis for challenging the government’s right to legislate morality has been a useful doctrinal development for the gay rights movement. The privacy theory questions the power of the government to criminalize certain forms of sexual conduct practiced in the privacy of the home and rejects the government’s asserted right to interfere with the intimate relationships of citizens. Had the Supreme Court accepted the validity of this contention it would have been a major step in removing the stigma that has always been attached to homosexuality. Such a decision would have undermined the effort of a “moral majority” to penalize behavior confined to the home.

Underlying the privacy argument is the notion that one’s sexuality is of fundamental importance to one’s individuality and, conversely, that the State’s interest in regulating private sexuality is relatively insignificant. The “right to be let alone” has its roots in the classical notions of liberty and is implicit in the Bill of Rights. Certain protected spheres are presumed within which the individual is autonomous and accountable to no one, not even the government. It is in this vein that Professor Richards has argued that a right of sexual autonomy necessarily flows from the right to personal autonomy.

However, for several reasons, a favorable decision on privacy grounds would ultimately result in only a strictly limited set of rights. A privacy analysis necessarily focuses only on the actions that are not by definition public and fails to extend protection to public expressions of one’s sexual identity and the consequences of such public

18. The NGTF Report, supra note 10, shows 51 cities, twelve counties and eight states as having some form of protection for discrimination on the basis of sexual orientation.
20. “By the end of 1991, an estimated 270,000 cases of AIDS will have occurred with 179,000 deaths within the decade since the disease was first recognized.” U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL’S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 6 (1986) [hereinafter REPORT ON AIDS]. Approximately 70% of those currently diagnosed with AIDS in the United States are gay or bisexual males, although the percentage “probably will decline as the heterosexual transmission increases.” Id. at 15.
22. See supra notes 6-8.
23. Cf., Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (public morality can affect such matters as location of obscene movie theatres or legality of prostitution).
25. “There is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person’s life and conduct which affects only himself or if it also affects others, only with their free, voluntary, and undisclosed consent and participation. . . . [T]he appropriate region of human liberty . . . comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense, liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological.” Mill, Liberty of the Individual, in TREASURY OF PHILOSOPHY 817 (D. Runes ed. 1955) (emphasis added); see also Richards, supra note 6. Note. Griswold Revisited in Light of Uplinger: An Historical and Philosophical Exposition of Implied Autonomy Rights in the Constitution, 13 N.Y.U. REV. L. & SOC. CHANGE 51 (1985).
expression. 27 The right to privacy unrealistically separates the legal issues that affect gay people into public and private spheres. The amorphous character of the right to privacy has allowed the Court to confine its application to rights particularly connected with the family such as "child bearing," "child rearing" or marital decisions. This view prevailed in Bowers and resulted in a denial of the homosexual-oriented person's right to engage in private sexual conduct. The Court held that a fundamental right of homosexuals to engage in sodomy was not among the liberties "deeply rooted in this Nation's history and tradition," 28 and therefore, was not protected by the right to privacy as formulated in its prior cases.

1. The Obstructive Family Rights Model of Constitutional Adjudication

The apparent ambiguities of the privacy right have led to various interpretations of its content, and commentators have been divided as to the propriety of some of the decisions based on this theory. 29 Although not expressly stated in the Constitution, the Court has found that a right to privacy underlies the fourth amendment's protections against unreasonable searches and seizures 30 and is an aspect of "liberty" protected by the fourteenth amendment's due process clause. 31 The due process privacy right has been construed to protect such decisions as how to educate one's child, 32 whether or not to "bear or beget a child," 33 and whether to read and enjoy pornography at home. 34 As applied by the Court, the right to privacy rests on an historical view of personal rights "implicit in the concept of ordered liberty." 35 "Ordered liberty" is interpreted to mean a balance of the rights of individual autonomy and the need for order and stability in society. 36

Such conservative theorists as Professor Hafen have argued that courts should strike a balance between individual and social interests by looking to the "traditional values" underlying our social structure. For, it is argued, if the foundation is weakened the entire structure will collapse, destroying all liberties. The "traditional family" is viewed as the only means of securing the continued existence of an open society, and as the proper basis of constitutional decisions in cases pitting an individual interest (e.g., non-marital sexual relationships) against a social interest. 37 This "procreative model" of family living, which was crucial to the ruling in Bowers, poses a significant hurdle in the struggle for gay civil rights.

The "family rights" view of the privacy doctrine eviscerates the liberty principle by denying the fundamental right of the individual to make certain decisions without the interference of the State. The arguments to restrict constitutional protection to claims that promote the "traditional family" are mere efforts to enforce certain cultural values. Hafen's view of the privacy right would serve but one purpose, the preservation of the procreative heterosexual monogamous model of human relationships. In the extreme, imposing the "family rights" perspective on all right to privacy cases would support refusals to extend constitutional rights to gay people. Hafen argues that such an extension would only foster "gay families," which defy the nuclear family and offer alternative lifestyle choices. Alternatives to the formal family are seen as a rejection of the procreative function and guarantors that such "traditional values" as the "sanctity" of marriage will be lost. 38 Thus, any effort to overturn sodomy statutes in the state courts on right to privacy grounds must overcome the "family rights"

27. The limitation of the privacy right to activity secluded from public view was suggested by Justice Douglas' approach for the majority in Griswold v. Connecticut, 381 U.S. 479, 485 (1965), stressing, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"
37. Hafen, supra note 37, at 479-483.
38. Id. at 538-560.
model and the narrow vision of society it promotes.

In reality, in contemporary America the traditional family is a social myth. The nuclear family consisting of husband, wife and 2.3 children has become the exception rather than the rule. The rise in divorce rates\(^{39}\) and the proportion of female-headed American households is evidence of this widespread change.\(^{30}\) Non-marriage intimate partnerships are on the rise, and are in no sense an exclusively homosexual phenomenon.\(^{41}\) Even the Court does not seem to know what is meant by the word "family." In Village of Belle Terre v. Boraas,\(^ {42}\) it held that several single people living in a house do not share the same level of constitutional protection from nuclear family-based zoning ordinances, though in Moore v. City of East Cleveland,\(^ {43}\) it recognized that not all families conform to a traditional model. No case other than Skinner v. Oklahoma\(^ {44}\) has ever explicitly promoted "procreative sexuality." Moreover, since married couples are permitted the choice not to procreate in Griswold v. Connecticut,\(^ {45}\) women are allowed in Roe v. Wade\(^ {46}\) to choose an abortion and unmarried couples in Eisenstadt v. Baird\(^ {47}\) are similarly allowed non-procreative rights, the catalogue of positive "rights" attaching to the traditional family paradigm is much reduced. Further, non-traditional forms of domestic association have been implicitly recognized in decisions that uphold the rights of single parents,\(^ {48}\) and in official support given to single parent households.\(^ {49}\) In this context, the "traditional" family is in some sense undermined when artificial insemination is permitted and encouraged as a blessing for childless individuals.\(^ {50}\)

Unless confronted, the family rights model will swallow up the individual's right of decision inherent in the liberty principle.\(^ {51}\) It is not clear that the formal family should merit constitutional protection, while claims by unrelated persons or groups should not, assumes that only the nuclear-based social unit will produce individuals of high talent and worth. This view fosters a notion of social control and risks the most basic of our democratic values, the right to individual liberty, which means freedom of thought, choice and decision. The proponents of the "family rights" model would in the end destroy the foundations of democracy in a vain attempt to preserve their vision of it.

In Eisenstadt v. Baird,\(^ {52}\) the Court stated that an individual has a constitutional right to decide whether or not to bear or beget a child. In so deciding, it upheld the individual's right to decide how one's sexuality is experienced. Further implied is the freedom to experience one's sexuality without a concern for the social expectation to use sex for procreation. The protection of that decision suggests that the individual is also freed from having to answer to any inquiry by the State as to who or how one chooses to experience his or her sexual powers. Homosexuality in the privacy of the home is no different in effect and should have been found protected under the right to privacy.

Contrary to Justice White's reasoning in


\(^{41}\) Marital Status and Living Arrangements, supra note 40. There was a 117% increase between 1970 and 1978 in the number of unmarried, cohabitating couples.

\(^{42}\) 416 U.S. 1 (1974).

\(^{43}\) 431 U.S. 494, 506 (1977) ("...the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

\(^{44}\) 316 U.S. 535 (1942) (invalidating state statutes allowing for sterilization of individuals convicted more than once for violation of moral turpitude laws).

\(^{45}\) 381 U.S. 479 (1965).

\(^{46}\) 410 U.S. 113 (1973).

\(^{47}\) 405 U.S. 438 (1972).

\(^{48}\) Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father has no less parental right over children he has raised and raised than mother). But cf., Quillen v. Walcott, 434 U.S. 246 (1978) (law denying unwed father right to veto adoption of his child does not violate equal protection clause).

\(^{49}\) For example, tax rates for heads of household are lower than the rates for single individuals or for married couples filing a separate return. See any recent IRS "Form 1040" (Individual Income Tax Return).

\(^{50}\) Artificial insemination is now such a common event that discussion about the topic has penetrated popular culture. A few examples given here illustrate its acceptance in the mass media: One Answer to Childlessness: Artificial Insemination, Science Digest, Babies for Infertile Couples, Saturday Evening Post, April 1982, at 72; New Frontiers in Conception, New York Times Magazine, July 1980, at 14; Aid to Childless Couples, Saturday Evening Post, December 1978, at 130.

\(^{51}\) See supra note 25.

\(^{52}\) 405 U.S. at 453.
Bowers, the common thread in the privacy cases is not the right to form and maintain a traditional family. It is the protection of an individual's right to find his or her own personal fulfillment in domestic arrangements. The households founded on long-term homosexual relationships demonstrate a high degree of mutual bonding and constitute a partnership akin to marriage, in that the parties enter into the partnership with the aim of securing their sexual and personal satisfaction. Such relationships promote as much social cohesion and reflect as high a degree of social and psychological adjustment as do heterosexual domestic relationships.

The ruling of the Supreme Court in Bowers and its focus on the matter of sexual conduct obscured the social reality that there is a substantial segment of American society calling itself "gay," living and loving in "non-traditional" domestic arrangements. The controversial issue of consensual sodomy implicates notions of public and private morality and promotes conflict between the values of the traditional majority and the legitimate interests of a controversial minority in pursuing their domestic happiness. In this light, the right to privacy presents a separate difficulty apart from the obstructive family rights model. Gay legal reformers must also confront the issue of public and private morality, for in focusing only on private sexual conduct the issue of a right to a public identity and the ability to organize their domestic lives in a satisfactory and fulfilling way is neglected and compromised.

2. The Public/Private Dilemma

The right of personal autonomy conflicts to some extent with arbitrary public/private distinctions, for it is essentially a right to make decisions. Characterized as a comprehensive right of decision rooted in the right of personal autonomy, the privacy doctrine once appeared to hold significant promise to gay rights advocates. If choices in sexual intimacy were considered inseparable from personal autonomy, a victory under the right to privacy could have been a major advance. Since sodomy statutes have played a significant role in perpetuating discrimination, the highly emotional response this form of sexual activity provokes in the majority of Americans allowed the Supreme Court to blur the lines between public and private morality, despite the presence of perfect facts for a test case. As a result, the limitations of the privacy theory were made evident by the decision in Bowers.

Plaintiff Hardwick, a gay man, was arrested by the Atlanta police because he had committed the crime of sodomy with another consenting adult in the bedroom of his home. The Eleventh Circuit recognized the limits of imposing public moral views on private moral behavior, and held that Georgia should present a "compelling state interest" to justify interference with Hardwick's right to engage privately in sexual activity. The court of appeals specifically stated that it was significant that the plaintiff's sexual activity was conducted in the privacy of his own home. It noted carefully that its ruling did not apply to state efforts to regulate certain public activities through sexual morality laws.

Even if the Supreme Court had ruled in Bowers that the right to privacy protects consensual sodomy within the home, that decision would not have foreclosed litigation focusing on "public" gay sexual activity. The possibility of state and local efforts to regulate public behavior leading to private consensual sodomy would remain and require further challenges under the right to privacy. A similar situation arose after the New

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53. 478 U.S. —, 106 S. Ct. at 2844 ("No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated. . .") (White, J., writing for a 5-4 majority).


55. This is not to say that public/private distinctions do not serve a useful purpose in constitutional adjudication. In fact, the public/private dichotomy embodies the legitimate governmental concern for limits on exercises of individual liberty in order to have a well-ordered society. Essentially, it encompasses the Millian principle of "absolute" freedom except when there is a "harm to others." Mill, supra note 25, at 818. However, when the social harm is at best speculative and based on mere difference in cultural and political values, then the balance between individual and social interests should be struck in favor of individual liberty. A rigid application of the public/private dichotomy will only invite the arbitrariness engendered by subjective moral and political opinions if courts are freely allowed to collapse into it all individual conduct viewed as "public," without regard for the principle that individual liberty is "liberty of conscience in its most comprehensive sense." Id. at 817 (emphasis added).

56. See infra text accompanying notes 181-206.

57. Bowers, 760 F.2d 1202.

58. Id. at 1207-1211.


60. Arguably, by beginning the process of defining implicit rights we also risk their erosion. Consider the developments
York Court of Appeals invalidated the New York sodomy statute on privacy grounds in People v. O'Nofre.³¹ Three years later in People v. Uplinger,³² the New York Court of Appeals was faced with litigation involving a public loitering statute used to prosecute individuals for soliciting private consensual sodomy. The Court of Appeals, in light of O'Nofre, held that the State cannot prohibit conduct anticipatory to protected consensual sodomy. The decision, however, clearly highlighted the public/private dichotomy. The angry and lone dissenter argued that such statutes protect the public from "unwanted harassment."³³

It is clear that once conduct moves beyond the confines of the home, the individual's right to engage in it is confronted by the societal interest in regulating "offensive" public behavior. The separation of conduct into public and private realms does not solve the problem of discrimination. Thus, even if gay sexuality in the privacy of one's home had been deemed protected by the Supreme Court, gay sexuality in "non-private" settings would still be troublesome. "Immoral" public behavior would still be defined according to majoritarian standards. What one state court might see as a preliminary to protected private conduct, and consequently protected conduct itself, another might hold to be lewdness and "public harassment".

Because gay people have been historically condemned as immoral, any public manifestation of their sexual identity might lead to attempts at suppression, as evidenced in the case of consensual solicitation. Even the most innocent public behavior such as holding hands and other gestures of affection, might be labelled "indecent."

Because of the inherent ambiguity of the public/private dichotomy and the distinctly traditional view of the domestic rights that the Court has adopted, the right to privacy is a very limited theoretical basis for securing the rights of gay people. Ultimately, the right to privacy is unpromising because the analysis allows the most narrow interpretation of what is protected. Public behavior that might lead to unfair discrimination obviously encompasses not just attempted solicitations or purported public "lewdness," but other kinds of behavior as well. At some point the issue is a "public" one, although it may or may not be specifically one of sexual conduct.

B. The Limits of Free Speech

The expressive³⁴ and associative³⁵ rights guaranteed by the first amendment do not necessarily provide the broad or theoretical basis that is lacking in the privacy doctrine. As with the right of privacy, freedom of expression has been splintered into public and private schemes posing similar difficulties for the prospect of a successful outcome in constitutional litigation.

Traditional constitutional theory and practice presumes a violation of the equal protection clause when a classification interferes with such fundamental rights or interests as "privacy" or "speech." In such cases a discrimination claim automatically invokes a "strict" form of judicial scrutiny; the classification becomes "suspect" and presumptively invalid absent a "compelling state interest."³⁶ For example, in City of Chicago Police Dept. v. Mosley,³⁷ a case involving efforts to prohibit picketing against racially discriminatory policies, the Court invoked strict review of the ordinance, which permitted labor picketing, because

since the Court announced the broad "right to choose an abortion" in Roe v. Wade, 410 U.S. 113. Subsequent decisions record the conflicts aroused by Roe which have culminated in legal battles to restrict exercises of this right. Today, the right to choose an abortion is not a wholly unrestrained right for all women. See, e.g., Harris v. McCree, 448 U.S. 297 (1980) (constitutional rights of indigent women seeking funding for abortions are not limited by the Hyde amendment of the Social Security Act which restricts federal funding for abortions); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (State can require a woman's "informed consent" and reporting and recording of data relating to female citizens who choose abortions).

63. 58 N.Y.2d at 938, 460 N.Y.S.2d at 515, 447 N.E.2d at 63 (Jasen, J., dissenting).
65. Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) (gay student who wanted to bring male date to high school prom was protected by the freedom of association).
it appeared to interfere with the first amendment interest in freedom of expression. Similarly, in Shapiro v. Thompson, the Supreme Court held that a classification that interferes with such fundamental constitutional rights as the freedom to travel, must be shown to be necessary to promote a compelling interest.

Speech about homosexuality may find protection under the first amendment as one more voice in the "marketplace of ideas." It is another matter, however, to try to use the first amendment to protect assertions of an individual homosexual preference. Such speech in certain circumstances often loses the character of "public expression." This paradox is illustrated in Rowland v. Mad River Local School District, where the Sixth Circuit reversed an award of damages to a high school counselor, who, according to jury findings, was fired for talking about her bisexuality to a co-worker and not for "other reasons." The court rejected the argument that conversations about her lifestyle were akin to speech having social or political significance. The court affirmed the School Board's firing, ruling that disciplinary action against public employees whose speech does not touch on matters of "public concern" does not violate the Constitution.

Similarly, recognition and public affirmation of a gay orientation several years after military enlistment was characterized in Rich v. Secretary of the Army as evidence that the plaintiff had "fraudulently enlisted," and that his asserting his gay identity violated the military's prohibition against the practice of homosexuality. Plaintiff Rich had first enlisted in 1968 and actively served until 1971, during which time he married and had a son. In 1976, shortly after the tragic death of his wife and son in an automobile accident, plaintiff re-enlisted as a practical nurse. Months after his second re-enlistment he had a "sexual identity crisis," which led him to seek psychotherapy. A few months later he revealed his homosexuality to his supervisor and was told he would be discharged. He made it clear that he would oppose the military's dismissal, maintaining that he had not lied at the time of enlistment. The Tenth Circuit rejected Rich's first amendment claim, stating that the admission of his homosexual orientation could not be characterized as either advocating the idea of homosexuality or attempting to exercise a freedom of association with homosexual persons.

The Rowland case illustrates the difficulty posed by retribution directed against "speech" that is simply an assertion or affirmation of a sexual preference for the same sex. Ms. Rowland's "talking about" falling in love with a man would not have led to her dismissal. Similarly, the Rich case illustrates that the first amendment does not guarantee free speech about one's sexual orientation. If the public statement reveals or implies conduct that society believes should be kept private, the protective shield of the first amendment gives way. It is ironic in light of Bowers that notions of privacy should be used to suppress expressions of personal identity. The chilling effect resulting from such clear identification of speech with prohibited conduct should invoke the doctrine of "suspectness." Searching judicial inquiry would seem to be called for when persons are penalized for actions which affirm their sexual identity.

II. THE MODERN PRINCIPLE OF EQUALITY

The proposition that homosexuals constitute a discrete and insular minority requires a new definition that focuses not on behavior but on self-actualization. This proposition must also fit that well-known model of equal protection theory, the suspect class. Besides the paradigm case of racial discrimination, specifically addressed by the fourteenth amendment equal protection clause, no category of cases has perfectly fit the "suspect class" model. However, given the number of categories now deemed capable of review as

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70. Id. at 447.
72. 735 F.2d 1220 (10th Cir. 1984).
73. Id. at 1224-25.
74. Gomez, The Public Expression of Lesbian/Gay Personhood as Protected Speech, 1 LAW AND INEQUALITY 111 (1983) (arguing that first amendment doctrine should be invoked to handle public affirmation cases).
76. See supra note 2.
77. When a government act is regarded as a political choice burdening fundamental rights or suggesting prejudice against racial and other minorities, it is deemed to fall within the "suspect class" model. Such an act is subjected to closer scrutiny than it would receive under the rational basis test.
"quasi-suspect" classes and thus entitled to heightened or intermediate judicial scrutiny, 78 it is reasonable to interpret the Supreme Court's equal protection jurisprudence as broad enough to allow the inclusion of that minority of Americans who express a sexual preference for members of the same sex. To date, the cases in which "strict" or "heightened" judicial review have been considered appropriate include those involving race, 79 sex, 80 national origin, 81 illegitimacy, 82 alienage, 83 poverty 84 and the handicapped. 85 An issue of constant debate—on 86 and off the


78. Aside from the rational basis test, judicial review can fall into one of two categories: the strict scrutiny level reserved for "suspect" categories (and classifications burdening fundamental rights), which requires a "compelling state interest," and the "intermediate" or "heightened" level of scrutiny which requires showing a substantial relation between the classification and a important government objective. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (sex-based classification prohibiting men from entering nursing college requires heightened scrutiny); Craig v. Boren, 429 U.S. 190 (1976) (prohibiting sale of beer to males under age of 21 and females under age of 18 was not substantially related to goal of reducing drunk driving).

80. Hogan, 458 U.S. 718.
84. While the federal Supreme Court has rejected poverty as a suspect classification, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), poverty has been deemed "suspect" on state constitutional grounds. See Serrano v. Priest, 5 Cal. Rptr. 2d 1241 (1971) (educational funding scheme that depends on local property tax violates both federal and state equal protection clauses).
85. The Court's decision in City of Cleburne v. Cleburne Living Center, ___ U.S. ___, 105 S. Ct. 3249 (1985) (denial of zoning permit for a group home for the mentally retarded violates the equal protection clause) is utterly puzzling under established equal protection doctrine. The ruling purportedly holds (i) a rational basis test applies in cases involving classifications that affect the mentally retarded, (ii) mental retardation is not a quasi-suspect classification, (iii) therefore heightened scrutiny does not apply. Nevertheless, the Court rejected at least six different reasons given by the City of Cleburne to support its denial of the zoning permit. Id. at 3257-58. The inquiry in Cleburne is nothing more than heightened scrutiny. The Court tried to have it both ways—to

Court 87—is the limit to be placed on certain constitutional principles such as "due process" and "equal protection." Some commentators claim that the limits of such doctrines are explicit in the text itself and in the history surrounding the Constitution and its amendments.88 Others claim that it is legitimate to reach beyond the text and to discover Constitutional principles based on the current social reality.89 Still others see the Constitution as the textual embodiment of higher moral principles.90 Whether the interpretation of our Constitution remains clause-bound or not, in re-

88. Exemplary of Supreme Court decisions that have been attacking as being unfaithful to the intent of the due process and equal protection clauses are Roe v. Wade, 410 U.S. 113 (1973) and Brown v. Board of Educ., 347 U.S. 483 (1954). Currently, Roe's recognition of a right to privacy that protects the decision to have an abortion is at the center of the controversy over constitutional interpretation and the Court's engaging in substantive due process analysis. See Throshard v. American College of Obst. & Gyn., 476 U.S. ___, 106 S. Ct. 2169 (1986) (invalidating an abortion control statute) (5-4 with separate dissenting opinions filed by Burger, White, and O'Connor joined by Rehnquist); see also Gunther, Some Reflections on the Judicial Role: Roots and Prospects, 1979 WASH. L.Q. 817, 819; J. ELY, supra note 30, at 924. In 1959, the Brown decision came under its first powerful attack by Professor Wechsler. Brown was welcomed in result but "unprincipled" in analysis. See Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 15 (1959).
89. Those who adhere to this form of constitutional interpretation are often referred to as "interpretivists." Interpretivists believe judicial review is legitimate only when constitutionality is determined by reference to a particular value judgment embodied in the Constitution—i.e., either by looking to the text or the overall government structure the Constitution ordains. Professor Ely describes noninterpretivist as going beyond the norms explicit or clearly implicit in the written Constitution to norms that cannot be discovered within the "four corners" of the document. See J.H. Ely, supra note 30, at 12.
91. See, e.g., D. Richards, THE MORAL CRITICISM OF LAW 39-44 (1977) (arguing that available constitutional theory fails to take into account the counter majoritarian nature of, or
cent decades we have had to adjust our notions of the fourteenth amendment's guarantee of equal treatment under the law, as a broader principle of equality evolved. Despite the lack of unifying characteristics among the categories that have expanded the traditional race paradigm, a theme of judicial protection against prejudice unites them all.  

Today, the equal protection clause articulates a principle of equality that limits the government from using certain personal traits, as a means of judgment or classification, when these traits are irrelevant to a person's capabilities to contribute to society.  

This evolved principle emerges from an examination of those concepts that have resulted in our current notions of "suspect class" categories under the equal protection clause. Sexual orientation should qualify as another such personal trait.

A. Carolene's Promise of "Searching Judicial Inquiry"

The rational basis test, which allows many official acts to survive judicial review, reflects the fact that not all forms of legislative discrimination offend the equal protection clause. In contrast, when the legislature enters the realm of "suspectness," a court plays an anti-majoritarian role in questioning the validity of laws passed by democratically elected legislatures. The mere existence of such a radical judicial function intimates the importance of occasionally thwarting the underlying principle of democracy—majoritarian will. That not every law merits judicial rubber-stamping is the message communicated in the oft-cited passage of footnote four of United States v. Carolene Products Co., from which we derive our notions of suspect classes and judicial protection for "discrete and insular minorities."

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . . [S]imilar considerations [may] enter into the review of statutes directed at particular religious, . . . or racial minorities, . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .

Carolene's footnote four articulates a principle of checks and balances as old as the Constitution. It rejects the belief that majoritarian legislators will always be free of prejudice in the performance of their tasks as lawmakers. By appealing to the special condition of prejudice, it secures the protection of the courts for the potentially weak and powerless minority. The "promise of Carolene," is to uphold certain fundamental rights and the right to equal treatment as axiomatic and beyond the reach of government. Further, it represents a realization that the normal democratic processes cannot always be trusted to

the "ideas of moral rights implicit in, constitutional adjudication"). Professor Richards provides a contractarian theory of morality to explain the structural features of constitutional law. Key to applying this theory of constitutional adjudication is the recognition of certain values considered important to rational beings adopting such moral principles as "equality." Those features would include the notion of mutual respect (treat another as you would like to be treated yourself), universalization (judging the applicability of moral principles by their ability to be applied to all), and minimization of fortiugous human differences, such as color, ethnicity and caste, as a basis for unequal treatment. See also J. Rawls, A THEORY OF JUSTICE (1971).

93. See Perry, Modern Egal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023 (1979); but see criticism of Perry's principle in the context of homosexuality in infra text accompanying notes 111-23, 163-69.  

94. Government could not operate if it were required to demonstrate mathematical perfection in all classifications. Instead, the Constitution only prohibits exercises of governmental power that are clearly wrong, arbitrary, and capricious. See, e.g., Matthews v. De Castro, 429 U.S. 181, 185 (1976) (Congress, when enacting the Social Security Act, may reasonably distinguish in granting benefits between wives living with husbands and divorced wives).

95. Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (first embodying the principle of the Court's right to check the excesses of legislatures rendering laws to please overbearing majorities of "factions"); see also THE FEDERALIST No. 78 (A. Hamilton) (Fairfield ed. 1966) ("W)here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.").

96. Compare S. Buchanan, MORALITY, SEX AND THE CONSTITUTION 37 (1985) (arguing in defense of majoritarian will to promote through moral laws "the moral climate that the majority believes best facilitates the achievement of its own moral aspirations").


98. Id. (emphasis added).

99. See THE FEDERALIST No. 10 (J. Madison) (Fairfield ed. 1966); see also supra note 95.

100. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 715 (1985).
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101. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 28 (1973) (holding that poverty is not a suspect classification in cases challenging school financing system: “[T]he class . . . has none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegate to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”); see infra text accompanying notes 271-81.


103. See supra note 101.

104. See Matthews v. Lucas, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting) (“[T]he fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious.”).

105. See, e.g., In re Griffiths, 413 U.S. 717, 718 (1973) (invoking discrimination against a resident alien, who, because of marriage to a U.S. citizen could opt for citizenship by renouncing her Netherlands citizenship); Glona, 391 U.S. 73 (invoking discrimination based against legitimate children absent acknowledgment by parents of the child or legitimation by express legal methods).

106. See Wygant v. Jackson Bd. of Educ., 476 U.S. —, 106 S. Ct. 1842 (1986) (“The court has recognized that the level of scrutiny [under the equal protection clause] does not change merely because the challenged classification operates against a group that historically has not been subject to governmental classification” (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n. 9 (1982) and Regents of the University of California v. Bakke, 438 U.S. 265, 291-99 (1978) (white university applicant challenging use of racial quotas)).

107. See infra text accompanying notes 163-79.

108. See infra text accompanying notes 245-327.
or gender, since in the vast majority of cases it is virtually an immutable trait. 109 Third, although all individuals ultimately develop a particular sexual identity, in our society only the revelation of certain sexual identities results in prejudice and discrimination. The context of an aggressive heterosexual culture produces a sexually-identified social minority—gay men and lesbians. 110

B. Suspect Classification Analysis and Homosexuality

Recent commentary on the role of the Caroleene principle in suspect classification analysis fails to resolve the question of whether discrimination based on sexual orientation merits treatment under the equal protection clause. For example, while Professor Ackerman at least recognizes that “suspect class” inquiries must not be curtailed by rigidly defining such terms as “discrete” and “insular,” he fails to suggest a workable method for moving beyond the “bad political science” that allegedly permeates footnote four. 111 Ackerman notes that it is exactly the condition of anonymity that highlights gay people’s ineffectiveness in Caroleene’s idealized political scheme. 112 To build on Ackerman’s analysis, the stakes involved in revealing one’s sexual orientation in our society without the support of an organized gay community are clear. Even when there is an active gay community, the risks to a range of material or personal benefits are great. Yet the claim that gay people are insular 113 and victims of “processual prejudice” 114 is an incomplete appeal for suspect class inquiries without the further recognition that it is morally unjust to deny them such status because they might, occasionally, be politically effective. Political powerlessness is but one factor for courts to consider in suspect classification analysis. 115

Currently, a fatal disease has been linked to the practice of homosexuality. 116 The pressure for gay people to be “closeted” is increased, as are the political and legal attacks facing them in the wake of the AIDS epidemic. 117 These facts highlight Professor Ely’s “theme of prejudice” as an important justification for the exercise of judicial review in gay rights cases. 118 Ely’s in-depth social-psychological approach to suspect classification analysis links the concept of a gay person’s need for invisibility with the theme of prejudice as a reason to be suspicious of governmental acts that are detrimental because of a person’s sexual identity. 119 In combination, Ackerman’s and Ely’s analyses forcefully suggest that a reinterpretation of Caroleene should favor gay people. However, their arguments are unsupported by the historical and sociological evidence that make it clear that gay people form a discrete and insular minority. Moreover, neither theorist confronts a significant analytical problem that arises from gay people’s discrimination claims. That issue is the tendency to view homosexuality only as an issue of conduct. In order for gay people to benefit from a reassess-

109. I see a major difference between arguing, on the one hand, that sexual orientation is an immutable trait and, on the other, that it may for constitutional purposes only be treated as a fairly fixed trait. I do not believe sexual orientation to be immutable. My attempt to accommodate sexual orientation as a personal trait into the suspect class model, albeit imperfectly, is really no different from the Court’s work in permitting heightened scrutiny in cases involving social groups that have not the faintest similarity to black people (whose black skin is immutable) but who are viewed as identifiable by some characteristic (e.g., alienage). This argument makes perfect sense if one believes, as I do, that the equality principle can only work as an evolving doctrine whether embodied in the Constitution or a statute. See, e.g., St. Francis College v. Al-Khazraji, — U.S. —, 107 S. Ct. 2022 (1987) (expanding coverage of a key federal civil rights law, 42 U.S.C. § 1981, which was primarily aimed at protecting newly-freed black slaves, to protect Caucasian ethnic minorities).
110. See infra text accompanying notes 221-244.
111. See Ackerman, supra note 100, at 722-31.
112. Id. at 730-31.
113. Ackerman defines insularity as “the tendency of group members to interact with great frequency in a variety of social contexts.” Id. at 726. The number of sociological settings where individuals interact indicate the “breadth” of insularity, while the importance attached by group members to the setting is evidence of its “intensity.” Id. at 726 n.24. Ackerman incorrectly suggests that gay people do not have a broad range of sociological settings that are important sources of reaffirming homosexual identity. See id. at 729 n.28. In the 1980s, particularly in major cities, the variety of sources of gay networking clearly surpass the gay bars and restaurants that were once the only public meeting places for gay persons. National publications such as Gayzellow Pages evidence the massive growth of gay-affiliated political organizations, counseling centers, businesses, lawyers, public accommodations, and health care, religious, educational, and entertainment services. They support the concept of “gay minority.” See infra text accompanying notes 265-327.
114. See Ackerman, supra note 100, at 738 (discussing generally problem of procedural prejudice).
115. For commentary on political powerlessness and the Supreme Court’s recent opinion in Cleburne, 105 S. Ct. 3499, see infra text accompanying notes 265-327.
116. See generally infra text accompanying notes 139-55, 287-10.
117. See generally infra text accompanying notes 282-310.
118. See generally J. Ely, supra note 88.
119. Id. at 162-64.
ment of their status in the context of footnote four, greater precision in analysis of this problem is required. Theorists, courts and litigants must understand the nature of human sexuality and grasp the fact that sexual orientation is a made up of both personal traits and individual actions.\footnote{See generally infra text accompanying notes 158-174 (discussion of limits of privacy doctrine).}

Notions of justice and equality require an accommodation of suspect classification analysis to this fact.

The most compelling elaboration of the modern equal protection principle has been provided by Professor Perry. He argues that the principle guards against the official use of certain traits or factors (of which race is a paradigmatic example) which say nothing about a person's "physical or mental capacity—in the form of native talent, acquired skills, temperament or the like..."\footnote{See infra text accompanying notes 136-264 (discussion of sexual identity and sexual behavior).} Unfortunately, in applying this excellent vision of the equality principle to homosexuality, Perry both erroneously concludes that because one can choose to engage in sexual activity, sexual orientation is not morally irrelevant, and apparently assumes that problems related to homosexuality are adequately addressed under the right to privacy.\footnote{Perry, supra note 93, at 1066.} On the first point, sexual orientation is not solely defined by physical bedroom activity;\footnote{Id. at 1067.} a chaste homosexual who nevertheless affirmed a preference might still suffer discrimination. Secondly, under existing right to privacy notions there would appear to be no relief for situations that might not be viewed as "private," but where discrimination clearly takes place.\footnote{See notes 158-174 and accompanying text.} Thus, Perry fails to carry his principle to its logical conclusion: sexual orientation is just one more aspect of a person's individuality and is morally irrelevant. It raises equal protection considerations because a homosexual person's capacity to love sexually and emotionally is discouraged and that of a person who is heterosexually-oriented encouraged. \textit{That is} an equal protection issue.

C. Significant Social and Oppressed Minorities

Courts can and should invoke strict or heightened scrutiny for inequality claims involving gay people, because the issue of sexual discrimination is more than a question of prohibitions against homosexual behavior.\footnote{See infra text accompanying notes 180-215.} Constitutional theorists must grapple with a troubling issue—how to accommodate the doctrine of "suspectness" to a significant 20th century phenomenon.

Gay men and lesbians represent a social minority that is sexually identified. Socially, politically and legally, their situation shows a sufficient parallel to minority groups that are ethnically or racially identified and discriminated against. Obviously, the notion of minorities in \textit{Carolene}'s footnote four differs greatly from that notion of minorities once used to refer to political "factories." However, while the term once carried primarily political significance,\footnote{See Madison, supra note 99; Hamilton, supra note 95, at 16-23.} social and psychological meanings have attached to the definition of minorities since 1938.\footnote{Copp, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287 (1982).} And, at all times, the notion of minorities has been unified by a single phenomenon—prejudice by an overbearing majority. An evolving notion of discrete and insular groups must accommodate social "minorities" that vary widely in historical experience or social description. Racial or ethnic minorities, e.g., Hispanics and Blacks, emerge only in the context of a white dominant culture; religious minorities, e.g., Jews, emerge only in the context of a dominant Christian culture. Similarly, gay people emerge as a social minority only in the context of a heterosexually-dominant culture. \textit{"Gay communities" are the result of people asserting that a homosexual} orientation is an essential part of their individuality. This personal trait should not be used as a basis of judgment and classification, since one's sexual orientation says nothing about one's ability to function as a member of society and is irrelevant to the right to equal treatment under the law.

The principle of constitutional irrelevance of personal traits, such as sexual orientation, is illustrated by some of the equal protection cases that have moved beyond the paradigm of race discrimination. In 1971, the Court's long-held position against using anything but a rational basis approach in gender-based discrimination cases was
rejected.\textsuperscript{128} Gender is no longer viewed as relevant to a person’s moral worth; like race, it has no bearing on one’s talents or skills, or one’s right to be accorded “equal concern and respect.”\textsuperscript{129} On this basis, the Court has invalidated laws that presumed an unwed father to be an unfit parent;\textsuperscript{130} and prohibitions on men entering a woman’s nursing college.\textsuperscript{131} Similarly, equal protection of the law is not dependent on whether one is born in a legitimate marriage,\textsuperscript{132} whether one is wealthy or not,\textsuperscript{133} who one’s ancestors were, or from what country one originates.\textsuperscript{134} All these traits have been deemed constitutionally irrelevant. Such personal characteristics say nothing about an individual’s functional talents or abilities to contribute to society. In each category “searching judicial inquiry” has assisted in dispelling myths and stereotypes, such as the belief that punishing illegitimate children will promote marriage,\textsuperscript{135} that a woman’s managerial capabilities are inferior to a man’s,\textsuperscript{136} that a father is less capable of parenting than a mother,\textsuperscript{137} or that a man is less capable of being a nurse than a woman.\textsuperscript{138} In these situations the government has been denied the presumption of constitutionality afforded by the rational basis test. Because they are “suspect” (they arouse the suspicion of prejudice), such acts cannot, and should not, escape review.

The evolved principle of equality requires us to see the personal traits that characterize certain social groups as neutral, and constitutionally “irrelevant” to the entitlement of equal treatment. When such traits appear to be the basis of judgment, courts are called upon to be wary of prejudice and to reject the test of “reasonableness.” Moreover, as the principle of equality evolves,\textsuperscript{139} so does the meaning of Carolene’s footnote four and its claim of protection for discrete and insular minorities. Under these premises a claim of discrimination on the basis of sexual orientation should be reviewed under the theory that homosexual persons are members of a suspect class.

D. The Suspicion of Prejudice

Due to profound confusion about human sexuality and the relationship of homosexuality to a larger social scheme,\textsuperscript{140} gay people have unjustly been denied their rights to equal citizenship. A glance at recent history reveals pervasive discrimination whenever anyone has been identified as a homosexual person. Being identified with homosexuality has been the basis of refusals to hire,\textsuperscript{141} the ruin of careers,\textsuperscript{142} undesirable military discharges,\textsuperscript{143} denials of occupational licenses,\textsuperscript{144} denials of the right to adopt,\textsuperscript{145} to the custody of children and visitation rights,\textsuperscript{146} denials of national security clearances\textsuperscript{147} and denials of the right to enter the country.\textsuperscript{148} The

\textsuperscript{128} See Reed v. Reed, 404 U.S. 71 (1971); Compare Reed with Goeaert v. Cleary, 335 U.D. 464 (1948) (sustaining Michigan statute prohibiting women from working as bartenders); Hoyt v. Florida, 368 U.S. 57 (1961) (sustaining state statute excluding women from jury duty).

\textsuperscript{129} R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

\textsuperscript{130} Stanley v. Illinois, 405 U.S. 645.

\textsuperscript{131} Hogan, 430 U.S. 718.

\textsuperscript{132} Trimble, 430 U.S. 762.

\textsuperscript{133} See supra note 85.

\textsuperscript{134} Graham v. Richardson, 403 U.S. 365 (1971); see also cases cited supra note 105.

\textsuperscript{135} Trimble, 430 U.S. 762.

\textsuperscript{136} Reed v. Reed, 404 U.S. 645.

\textsuperscript{137} Stanley v. Illinois, 405 U.S. 645.

\textsuperscript{138} Hogan, 430 U.S. 718.

\textsuperscript{139} See supra note 109.

\textsuperscript{140} See infra text accompanying notes 216-264.

\textsuperscript{141} See, e.g., Baker, 553 F. Supp. at 1128 n.9 (noting that a school board member testified that if the school had known that plaintiff had violated the sodomy statute, he would have been fired), rev’d en banc, 769 F.2d 289 (5th Cir. 1985), cert. denied, 92 S. Ct. 3337 (1986); Note, CHALLENGING SEXUAL PREFERENCE DISCRIMINATION IN PRIVATE EMPLOYMENT, 41 OHIO ST. L.J. 501 (1980).


\textsuperscript{143} See supra note 73 and accompanying text; Watkins v. United States Army, 551 F. Supp. 212 (W.D. Wash. 1982) (army stopped from using regulation making homosexuality a non-waivable disqualification for reinstatement to prevent reenlistment of admitted homosexual), rev’d, 721 F.2d 687 (9th Cir. 1983).


\textsuperscript{145} See, e.g., In re Appeal of Doe, 151 Ariz. 333, 727 P.2d 830 (1986) (petitioner seeking approval as adoptive parent was to be married to a heterosexual woman but was denied the right to adopt because he was a bisexual, even though he had not had a relationship with a male in two years and stated his intent not to engage in further homosexuality).

\textsuperscript{146} Rivera, supra note 144 at 883-904; see also Hunter & Polkoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 BUFF L. REV. 691 (1976).

\textsuperscript{147} See Rivera, supra note 144, at 829-837; see Horton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969) (due process requires federal employer to show a “rational basis” between employee’s homosexuality and the efficiency of the service); see also note 155 infra.

\textsuperscript{148} See 8 U.S.C. § 1182(a)(4) (1982); Boutilier v. L.N.S., 387 U.S. 118, 120 (1967) (Congress intended to include homosexuality in regulation that bars entry of aliens who have a
government’s refusal to check the violence,\textsuperscript{149} discrimination and prejudice directed against homosexual persons has made gay people among the most threatened of American minorities.\textsuperscript{150}

Equal protection doctrine is particularly significant now. Unjustified discrimination against gay men and lesbians has been fostered by public hysteria over Acquired Immune Deficiency Syndrome (AIDS), and the relationship of this fatal disease to homosexuality. The mere fact that homosexual men were among those most vulnerable to AIDS\textsuperscript{151} has stigmatized homosexuality as a mark of death. Society’s ignorance about human sexuality\textsuperscript{152} and about gay people, and the complacency of the fear of AIDS with the irrational fear of homosexuality\textsuperscript{153} has resulted in acts of discrimination against gay people in general, whether they have AIDS or not.\textsuperscript{154} AIDS has become a pretext for increased and more violent social discrimination.

In light of these recent developments, there should be concern when, in a case of blatant discrimination against a recognizable social minority, a court denies that suspect class notions should be invoked.\textsuperscript{155} It is often disconcerting to see what ease such legal concepts and terminology as “suspect class” are accepted or discarded. To argue that gay people’s inequality claims merit searching judicial inquiry necessitates reaching beyond traditional legal tools. Relevant sociological research can help assess the impact of our legal principles. It is clear that the misunderstanding that surrounds homosexuality impedes viewing sexual identity as a constitutionally irrelevant personal trait and results in wholesale approval of unwarranted acts of discrimination against homosexual persons. Especially

\begin{footnotesize}
\item[\textsuperscript{149}]

\item[\textsuperscript{150}]
See supra note 17, for a discussion of the phenomenon of violence against gays.

\item[\textsuperscript{151}]
See infra text accompanying notes 157-265.

\item[\textsuperscript{152}]
See REPORT ON AIDS, supra note 20, for a discussion of the scope of vulnerability homosexuals have to the AIDS virus; see also infra text accompanying notes 283-311.

\item[\textsuperscript{153}]
See infra text accompanying notes 157-265.

\item[\textsuperscript{154}]

\item[\textsuperscript{155}]
See supra note 109; see infra text accompanying notes 271-281.

\item[\textsuperscript{156}]
Perry, supra note 93, at 1067.

\item[\textsuperscript{157}]
See supra text accompanying notes 22-64.
\end{footnotesize}

coherent are the historical facts that point to a classification of gay men and lesbians as a discrete and insular minority. The discrimination gay people suffer for revealing their sexual orientation, as well as the flurry of legislative activity in response to the AIDS hysteria, highlight the concerns articulated in Carolene—courts must not presume laws to be constitutional when there is reason to suspect prejudice against a relatively powerless social minority. There are no convincing reasons why an evolving equal protection doctrine\textsuperscript{156} cannot include sexual orientation as a constitutionally irrelevant trait and protect gay men and lesbians as a “discrete and insular” minority. Under the current implications of the equal protection doctrine the claim of discrimination on the basis of sexual identity mandates suspect class inquiries on the part of reviewing courts.

\section*{III. SEXUAL IDENTITY v. SEXUAL BEHAVIOR}

Misconceptions about human sexuality and its development permit the misstatement that discrimination on the basis of sexual orientation does not raise equal protection considerations.\textsuperscript{157} These errors result in undue attention to particular sexual behaviors. Essential to the equal protection claim involving gay people is the awareness that homosexual acts are only one aspect of the expression of a homosexual identity. Questions about the naturalness of homosexual behavior are irrelevant to the issue of protecting a social minority that identifies with non-heterosexual living and loving. More is at stake than the state’s desire to regulate private adult consensual sexual conduct.\textsuperscript{158} At issue in the discrimination claim
is the right of homosexually-identified people, to reveal the sexual component of their personal identities, to call themselves "gays" or "lesbians" without fear of reprisal.

A. Human Sexuality

The claim of discrimination on the basis of sexual identity first requires an understanding of the role of sexuality in an individual's life. Sigmund Freud theorized that human beings are born with an innate sexual capacity, and that this capacity has both emotional and physical aspects. Freud viewed this capacity as a universal bisexual potential. He further distinguished sexual objects from sexual aims, arguing that in early stages of development, human beings do not discriminate among sexual objects on the basis of gender. 159

Recent studies of sexual behavior strengthen the notion that there is a fluidity of sexual response innate to humans, 160 an antithesis to the belief that homosexuality is abnormal or perverse. These studies have also shown that one's sexuality carries both physical and emotional aspects. The personal expression of human sexuality, which is as natural to an individual as the color of his or her eyes, is improperly understood if viewed strictly from its potential for physical expression, e.g., same-sex behavior. One's sexuality can be manifested in sexual behavior and/or emotions. Examples of the non-physical expressions include such emotions as love, affection, tenderness and jealousy, while the physical include both contact and sexual release. 161 The expressions of sexuality, of one's ability to love, 162 reflect perhaps the most highly individualized of all personal traits, one that depends for its physical and emotional forms on factors such as one's social upbringing, cultural values and their interaction with sexual desire. Sexuality, like other voluntary activities, is dependent on the structure of the human brain and its psychological capacities—memory, imagination and organization of life experiences—for its specific development. At some point a specific sexual pattern does develop in each individual, either keyed to specific cues or to whole contexts of associations, but, in any event, diverse among individuals. 163

1. Sexual Orientation

While current theories of human sexuality accept the postulate that a bisexual potential exists in all, studies have shown that only a small percentage of individuals become exclusively homosexual. Whatever the psychological and other factors that produce predominantly gay or lesbian orientations, they seem to account for roughly 10% of the population. 164 Thus, for at least a discrete 10% of the American people, there is a real need to invoke equal protection considerations in order to protect against prejudice rooted in utter confusion about human sexuality and stereotypes about gay people. By viewing sexual orientation as a personal characteristic, it is possible to discuss questions about a social group that is sexu-

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160. See, e.g., A. BELL & M. WEINBERG, supra note 55, at 53-61; MARMOR, supra note 159, at 36.

161. See supra note 159.

162. Freud's theory of sexuality explained the force that drives the human individual to seek love from the time of childhood (with the mother being the first love object) to adulthood, and influences one's choice of lovers and sexual partners. "For we speak of love when we bring the mental side of the sexual trends into the foreground and want to force back the underlying physical or sexual instinctual demands or to forget them for a moment." S. FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 329 (J. Strachey ed. 1977). In this vein, Professor David Richards has described the right to "sexual love" as incident to a right of "sexual autonomy," where sexuality plays a powerful role as an independent force in the imaginative life of the individual and his or her general development as a free person. See Richards, Sexual Autonomy and the Constituional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957, 1002-05 (1979).

163. C.A. TRIPP, supra note 159, at 19.

164. The estimate by the human sex-researcher and pioneer Alfred Kinsey, that approximately 4% of the adult male population and one-half to one-third of that figure of adult women would be exclusively homosexual throughout their lives, has not been significantly altered. Researchers using the Kinsey scale and including predominantly homosexual persons in their calculations currently estimate an incidence of 3-5% for women and 5-10% for men. See J. MARMOR, supra note 158, at 7. Under the Kinsey scale, homosexual and heterosexual responsiveness in human beings does not fall into clearly differentiated patterns. Kinsey suggested a 7-point scale to describe a sexual continuum and based it on both inner psychological and overt experiential reactions. A "0" represents exclusive heterosexual while a "6" is exclusive homosexuality; a "5" is predominantly homosexual and only incidentally heterosexual; a "1" vice versa; persons falling in the "2," "3," and "4" range could be viewed as "bisexual." See J. MARMOR, supra note 159, at 6.
ally identified and that suffers discrimination when its members' sexual orientation is revealed.

Professor Perry makes the erroneous claim that because sexual orientation can be "cultivated" it cannot be viewed as a constitutionally irrelevant trait. The development of homosexual desire is not always the by-product of a conscious choice. To the best of current knowledge, homosexuality is the result of a confluence of myriad social and psychological factors, which interact with one's innate sexual capacity to produce a particular sexual identity. Some theories place the convergence of factors that lead to a same-sex orientation at the very earliest ages, while others stress the importance of viewing the development of sexual orientation as a life-long process.

Many gay people may start along the path of the dominant culture, unquestioningly adopting a heterosexual lifestyle. Not unusually, a substantial number of people do not recognize their homosexual/lesbian orientation until later in life. For some people, once the "choice" is made to accept a gay identity, there is no turning back. The choice represents the fulfillment of a long-felt need. A common phase in the "coming out" process—the acknowledgment to oneself and to others of a homosexual or lesbian identity—often involves a harmonizing of current liberated feelings with memories of past experiences. Those experiences were often characterized by confusion and frustration, not knowing that there was a word or concept to capture the reality of a same-sex orientation. From this "sexual identity crisis," an individual may emerge feeling so free of past confusion as to be willing to accept, together with a homosexual orientation, a gay identity. This decision is often made despite an awareness of the harsh discrimination against homosexuality. The "choice" becomes the best avenue to personal happiness.

2. Sexual Identity

In the twentieth century, there exists a social group that identifies on the basis of sexual orientation. The concept of "gay and lesbian identities" rejects the traditional theories about homosexuality, which have characterized it as an arrest in psychosexual development and an illness. The concept of a gay identity also rejects those approaches to homosexuality and sexual orientation that focus only on the behavioral aspects of sexuality. The notion of a gay or lesbian identity takes into account emotions, love choices, and identification with homosexuality or lesbianism as a lifestyle. One of the results of the mistaken focus on behavior is the belief that anyone who engages in homosexual acts is gay or lesbian.

165. See supra note 157.

166. See supra notes 162, 163: "In effect, a choice [in the homosexual/heterosexual alternative] must usually be made, but it is seldom one which can be genuinely biased by deliberate intent or by individual decision. It is a choice that stems from... each individual's elaborately evolved sexual value system, a set of values that so often begins to eliminate the weaker alternatives while guiding a person none too gently toward the kinds of partners, the kinds of situations, and sometimes even the kinds of acts that have become the salient imperatives of his highest sexual response." C.A. TRIPP, supra note 159, at 19.

167. Prior to the gay liberation movement, the predominant approach to studies of homosexuality tended to focus on biological or psychodynamic factors, both approaches attempting to show either psychosexual arrest or physiological "abnormalities." See, e.g., Bieber, Clinical Aspects of Male Homosexuality, and Romm, Sexuality and Homosexuality in Women, in SEXUAL INVERSION 248, 282 (J. Marmor ed. 1965).

Most recent studies seriously question the psychodynamic theories. See A. BELL & M. WEINBERG, SEXUAL PREPREFERENCE 183, 184 (1982). Even researchers who once articulated, with the unified voice of the psychiatric profession, that homosexuality was an illness, are beginning to include social and cultural factors (e.g., the feminist movement and its rejection of patriarchy) as relevant to the study of homosexuality and lesbianism. See J. MARMOR, supra note 159, at 14, 18.

168. Two recent theories of homosexuality and lesbianism explain this perspective. The "symbolic interactionist" approach considers the development of sexual orientation and identity as part of the life process involving one's becoming sexual. Considered like other human activities, acquiring a sexual orientation and identity is a learned experience. The feminist approach highlights the theme of choice and challenge to a system of patriarchy that frees men and women from socially imposed norms defining the appropriate roles for men and women. Both theories represent the belief that homosexuality is not deviant, pathological, destructive or dysfunctional. See C. BROWNING, CHANGING THEORIES OF LESBIANISM: CHALLENGING THE STEREOTYPES, in WOMEN IDENTIFIED-WOMEN 11-27 (Potter and Darty eds. 1984).


171. See, e.g., SEXUAL INVERSION (J. Marmor ed. 1965).

172. See, e.g., W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 8-9 (1979) (including people with low incidence of homosexuality in their definition of homosexually oriented individuals); Compare, J. MARMOR, supra note 159, at 5, who defines a homosexual person as "one who is motivated in adult life by a definite preferential erotic attraction to members of the same sex and who usually (but not necessarily) engages in overt sexual relations with them."
Gay men and lesbians are lumped together with those who engage in homosexuality under unusual circumstances, such as prisoners. The most significant result of this focus, however, is its blindness to the non-sexual aspects of a gay person's life. In fact, for many gay people sexual behavior is not the essential aspect of this chosen identity. The emotional and affective expressions of their feelings are more important. Thus, there are many who assert they are gay or lesbian, but who have also chosen celibacy. Current research on homosexuality contends: "Too often homosexuals are viewed simply with reference to their sexual interests and activity...making for a highly constricted image of the persons involved." The failure to separate the question of a gay identity from homosexual behavior is not remarkable given the long history of the State's regulation of homosexuality. An undue focus on the behavioral aspects of homosexuality, however, obscures the 20th century reality that a significant portion of the population acknowledges to themselves and to others a gay identity. Gay people assert the validity of not only being physically attracted to members of their own sex, but also of the right to live and love in intimate association with persons of the same sex. By ascribing personal, moral, or political significance to such terms as "gay" or "lesbian," many homosexually oriented individuals challenge society to reexamine its notions of human sexuality and its traditional insistence on defining sexual orientation only in terms of genital behavior.

B. The Traditional Concern Over Homosexual Behavior

The concern of the heterosexually dominant culture with the sexual behavior of its citizens is expressed by the State's historical regulation of a variety of sexual behaviors. Current problems of discrimination against gay people are a continuation of the traditional hostility to sexual conduct deviating from the only "morally" legitimate expression of human sexuality—heterosexual marriage. This restricted vision of sexuality is rooted in a Judeo-Christian religious orthodoxy, which is reflected in American moral laws.

173. "It is generally agreed by researchers that few inmate rapists and wolves are homosexual in identity and inclination. They engage in aggressive behavior of a homosexual nature not only because it is the only outlet available in an all-male society, but also as a means of asserting their manhood in an environment the system provides for depriving them of it." L. HUMPHREYS, OUT OF THE CLOSETS 27 (1972). See also W. Simon and J. Gagnon, Homosexuality: The Formulation of a Sociological Perspective, in THE SAME SEX 14-24 (1969).


176. The confusion between protecting an individual because of her sexual orientation and promoting homosexual conduct is standard. Thus, for example, religious officials who opposed a bill for New York City prohibiting discrimination in employment and housing on the basis of sexual orientation (Local Law #2 passed on April 11, 1986) argued that passage would promote certain forms of sexual conduct and activity. Berger, O'CONNOR'S WAY: ASPERATIVE AND HEARD. N.Y. Times, Feb. 16, 1986, at B2, col. 2. In the strictest sense of the word, sexual orientation represents only one's sexual identity, whether heterosexual or homosexual. Consistent preferences for genital expression might indicate one's sexual orientation, but the meaning of the term necessarily goes beyond conduct.

177. See infra text accompanying notes 208-16.

178. See, e.g., Baker, 553 F. Supp. at 1127 n.9 "According to [plaintiff] Baker, a 'homosexual' is one who has an emotional erotic attachment to one of the same sex—while a 'gay' is one who is proud of being a homosexual."

179. M. Hunt, Lovingly Lesbian: Toward a Feminist Theology of Friendship, in A CHALLENGE TO LOVE, supra note 174, at 139 ("we are reclaiming the word lesbian for what it has always meant, namely, women loving women without fixating on the presence or absence of genital activity to define it.") 180. See, e.g., C. Bunch, Lesbians in Revolt, in FEMINIST FRAMEWORKS (Rothenberg and Jagger eds. 1984) ("As the question of homosexuality has become public, reformists define it as a private question of who you sleep with in sex."). A. Rich, Compulsory Heterosexuality and Lesbian Existence, in WOMEN IDENTIFIED-WOMEN, supra note 168, at 134.

181. Sexual morality laws have traditionally included adultery, fornication, sodomy, rape and incest in their list of prohibitions. The inclusion of morality in the health and welfare concerns of the state has been viewed as part of a valid concern for the moral "soundness" of the people: "to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." Ullman, 367 U.S. at 546 (Harlan, J., dissenting). The notion of legislating morality obviously invites dispute, for what is viewed as "moral" will ultimately rest on the principles of divergent social philosophies. Some moral laws may border on "legal paternalism," i.e., state interference with an individual's liberty done solely to protect the individual from harming herself even though no third-party interests are involved. Feinberg, Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution?, 58 NOTRE DAME L. REV. 445, 457 (1983). In determining the proper role of the law to promote moral excellence, others are persuaded by the succinct "harm to others" principle of John Stuart Mill. Here the state may interfere only when personal decisions are "other regarding," i.e., affecting the interests of others, as opposed to "self-regarding," i.e., primarily affecting only the decisionmaker. Id.; see also supra note 26.
1. The Role of Sodomy Statutes

By the time America became a nation, American jurisdictions had already enacted their own legislation regulating morality or had adopted English sodomy statutes. The prohibition against sodomy was equally applicable to heterosexual and homosexual acts. Until recent times, sodomy statutes never distinguished homosexual from heterosexual sodomy. Rather, the State’s aim was to punish any person of any sex who might engage in an “immoral” sexual act.182

“Sodomy” had originally been the concern of ecclesiastical authorities.183 The view that only heterosexual sex is proper between men and women and that sodomy was a “crime against nature” was a gloss on the Biblical story of the destruction of Sodom and Gomorrah and an enforcement of prohibitions against a range of conduct today called “homosexual.”184 Early Christian thinkers justified the prohibition against nonprocreative sexual acts which “defied” God’s design for nature.185

Divine purpose thus interdicted particular uses of the body that only gratified the senses but did not further the peopling of the world.186 Saint Thomas Aquinas’ 13th century “rubric of lust,” in his influential Summa Theologica, elaborated on this theory of sexuality and established an order of “unnatural” acts, i.e., those that defied the procreative purpose. Thus, masturbation was labeled a grave and prohibited sin.187 The procreative imperative also influenced the order of penalties for “sodomy.” The “unspakable” sin was to spill seed thereby sacrificing the lives of future generations.188 Given the Augustinian passive, asexual view of the female body, woman was technically incapable of sodomy; her sexual activity was unimportant, since no seed was being wasted. Consequently, the ecclesiastical authorities were confused about how to meet cases of lesbianism.189 Often, it was not punished at all.190 American sodomy laws reflect this view and ignore the existence of lesbianism.191

Although separation of Church and State is a fundamental aspect of our constitutional framework,192 sodomy laws have been an accepted part of the American social and moral scheme.193 However, not all purely moral precepts reflected in a state’s laws have survived constitutional scrutiny. The claim of “tradition” should fail when the “traditional” view no longer comports with social reality.194 For example, although Biblical references to the separation of the races were once used to defend statutes prohibiting interracial marriage, these laws were invalidated because they interfered with the right to marry and were based on illegal race classifications.195 Similarly, the Court erred in Bowers by defending the enforcement of sodomy laws solely on the grounds that the traditional religious prohibition they re-
flect has become a wholly secular moral norm.196 Furthermore, the historical emergence of a gay minority makes these laws constitutionally suspect.197 They cannot be reconciled with any modern understanding of human sexuality, and they serve to inhibit any affirmation of a gay or lesbian identity.198

Views about homosexuality have traversed a path "from sin to crime to sickness."199 The American Psychiatric and Psychological Associations have eliminated the diagnosis of homosexual behavior as a mental illness.200 Half of the jurisdictions of this nation have decriminalized homosexual behavior201 and a significant number of religious organizations have called for a reassessment of homosexuality in terms of Christian doctrine.202 Despite these events, twenty-five jurisdictions still have sodomy laws after the ruling in Bowers.203 These laws perpetuate the view that homosexual feelings are unnatural; they nurture negative self-images; they make acknowledgment of homosexual feelings a difficult experience.204 They are used to justify discrimination,205 to deny freedom of speech and association,206 and they violate the fundamental right to be free from governmental intrusion in the privacy of one's home.207 Where they prohibit private consensual adult homosexuality they communicate the strong message that two individuals of the same sex cannot be allowed to form emotional bonds or communicate their feelings of love through physical intimacy.

2. Discrimination and the Procreative Model

Sodomy statutes bear a striking resemblance to homosexuality, while they condemn homosexual behavior. Sacred Congregation for the Doctrine of the Faith, Declaration of Sexual Ethics, Wash., D.C.: United States Catholic Conference, 1976, in CHALLENGE TO LOVE, supra note 174, at 279. Other religious organizations and churches that have debated and endorsed resolutions calling for compassion and civil rights changes with respect to homosexual persons include: Lutheran Church of America, Methodist General Conference, United Presbyterian Church; Society of Friends, Episcopal Church, American Baptists, Unitarian Universalist Church, National Council of Churches, The Union of American Rabbis, Hebrew Congregations. See Hilmer, HOMOSEXUALITY AND THE CHURCHES, in HOMOSEXUALITY: A MODERN REAPPRAISAL (1980); Presbyterian Blue Book I and II: Report on the Church and Homosexuality (1978).

202. Sodomy statutes still exist in the following jurisdictions: District of Columbia, Maryland, Virginia, North Carolina, South Carolina, Kentucky, Tennessee, Alabama, Mississippi, Florida, Louisiana, Missouri, Minnesota, Michigan, Oklahoma, Kansas, Arkansas, Texas, Arizona, Montana, Idaho, Nevada, Utah, Rhode Island, and Georgia. In Baker, 769 F.2d 289, the Fifth Circuit en banc reversed itself and held that the Texas statute (which removed the penalty for heterosexual sodomy but not for same-sex sodomy) is constitutional. See TEX. PENAL CODE ANN. § 21.06 (Vernon 1976).

203. "Sensing that he is different or is doing an unusual act is one thing, feeling that his act is strongly disapproved is another, and knowledge that he has become a lawbreaker yet another . . . ." G. Cantor, The Need for Homosexual Reform, in THE SAME SEX, supra note 173, at 91, citing E. Shur, Crimes Without Victims 79 (1965).

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205. See supra notes 141, 203.

206. See, e.g., Mississippi Gay Alliance v. Guodelock, 536 F.2d 1073 (5th Cir. 1976), cert. denied, 430 U.S. 982 (1977) (court invoked existence of sodomy statute as grounds for denying gay student group advertising space for legal aid in student newspaper. The court reasoned that although sodomy statutes do not prohibit having a homosexual status, they do prohibit homosexual acts, and therefore allowing the advertisement would be tantamount to licensing the prohibited acts).

207. See supra text accompanying notes 23-65.
to the miscegenation laws invalidated in Loving v. Virginia, that once prohibited marriage between blacks and whites. In Loving, the Court held that enforcement of anti-miscegenation laws violated the equal protection clause by stigmatizing black and white men and women who refused to conform to the State's model of a white supremacist society. The norms imposed by the procreative model which underlies sodomy statutes raise similar equal protection considerations. The heterosexual/procreative model promotes stertotypical social and sexual roles. These roles, which underly the preservation and enforcement of sodomy statutes against gay people, are also reinforced by official bans on same-sex love (e.g., homosexual marriages). Thus, like the anti-miscegenation laws, official acts reflecting the supremacy of the procreative model penalize men and women who deviate from the heterosexual roles endorsed by the State.

Although Professor Karst has cogently argued that the Constitution mandates that the state recognize same-sex loving commitments on the basis of a principle of “associational choice,” he unduly minimizes the importance of the gender classification issue involved. On the one hand, he sees that a refusal to recognize homosexual marriages parallels the kind of discrimination invalidated in Loving, which both stigmatized race and promoted the doctrine of white supremacy. He then asserts, however, that there is no significant sex discrimination because males benefit from the opposite-sex rule that limits the choice of a man’s marriage to a female, and vice-versa. What Karst fails to recognize is the impact of a system of patriarchy and a procreative model on the love relationships of gay people. These policies enforce a procreative model of living and loving. By indicating that emotional and sexual love is possible only between members of the opposite sex, the State also presumes, incorrectly, to decide that human sexuality only serves a procreative function. Further, it is untrue that male inferiority does not result from such official policies. The procreative model, as previously described, is premised on a system that accords male supremacy only to those men who conform to the dictates of the procreative model. Patriarchy not only demands the inferiority of the woman, it also demands the suppression of men who “degrade” themselves by assuming the “inferior” status of women. What other rationale explains the repugnance with which male homosexuality has been traditionally regarded? Third, by refusing to recognize same-sex loving commitments, the State denies equal benefits to those whose sexual feelings compel them to form lifetime partnerships with others of the same sex. State enforcement and encouragement of stereotypical sexual roles contradicts modern progress in understanding human sexuality, and stigmatizes persons on the basis of their gender.

C. The Historical Emergence of a Gay Minority

Homosexual identity is the result of discrimination. Homosexual behavior as a physical activity has always existed; however, only in the 20th century have we had such a thing as a self-described gay minority. Members of this mi-

208. 388 U.S. 1 (invalidating anti-miscegenation statutes).
209. Although Loving rested principally on equal protection grounds because the statute classified by race, in a concurring opinion the Court also invoked the fundamental “right to marry” as a due process interest. See id. at 12.
210. The Court recognized, but repudiated as a valid justification, the miscegenation statute’s equal application to members of both the white and black races. By drawing a distinction based on race, the statute proscribed generally accepted conduct (marrying someone as a sign of love and commitment) when engaged in by members of different races. See id. at 8-11.
211. See infra text accompanying notes 217-265.
212. See, e.g., Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 183 (1971), appeal dismissed, 409 U.S. 810 (1972) (refusal to grant marriage license to two men because only “common definition” of marriage applies between man and woman).
214. Several commentators have discussed the importance to
noriety accept their sexual and emotional preference for persons of their own sex, and form emotional and sexual relationships with such persons. The emergence of this minority is a significant historical event.

Discrimination against homosexual persons is closely tied to gender-specific social and sexual roles. This discrimination on the basis of sexual orientation involves many deeply held cultural notions about the proper roles of men and women, and about expressions of sexuality deemed appropriately “feminine” or “masculine.” Those who deviate from these prescribed roles, premised on the procreative model, are identified as the unacceptable “other.”

1. Gender Stratification and the Invention of a “Third Sex”

The characterization of certain individuals as “homosexual” began with the dramatic economic and social shifts of the 19th century. Pre-19th century society was agrarian, the domestic hearth forming its fundamental economic unit. With industrialization and urbanization, the character of the home altered, as did the social roles of men and women. The concept of home as a place of shelter from the “degradation of the soul” inflicted by the harsh world gave a sense of order and comfort. Separate social and economic roles for the sexes harmonized with the ideals and needs of the Victorian upper classes. Thus, the masculine character was defined in relation to the world man faced outside of his home—cold, aggressive, competitive, rational, unemotional.

of the “gay is good” slogans that were used in the 1970’s gay liberation movements. Sociologically, the concept of “gay identities” also describes people who have formed communities and adopted a specific terminology that is understood by members of that community. See generally D. Altman, THE AMERICANIZATION OF THE HOMOSEXUAL, THE HOMOSEXUALIZATION OF AMERICA (1983); GAYSPEAK: GAY MALE AND LESBIAN COMMUNICATION (J. Chesbro ed. 1981) [hereinafter GAYSPEAK]; J. D’Emilio, Capitalism and Gay Identity, in POWERS OF DESIRE, supra note 214, at 101. 219. See supra text accompanying notes 159-180. 220. N. F. COTT, THE BONDS OF WOMANHOOD (1979); B. Welser, The Cult of True Womanhood (1979), 18 AMERICAN QUARTERLY 151 (1966). Welser described the popularization in the 19th century of a concept of “true womanhood” that emphasized women’s prominent role in the home. Others, such as Cott, have come to call the phenomenon the “canon of domesticity.” Both expressions are an attempt to describe the changing emphasis on different roles for men and women, and the redefinition of such terms as “woman,” “feminine,” “man” and “masculine.” In short, these words come to have narrower meanings than they had in colonial America when women held a higher status based on their direct relationship to the family social unit as a source of productive labor essential to survival. See Ulrich, Goodwives: Image and Reality in the Lives of Women in Northern New England (1982). 221. For a further discussion of the ideology of “separate spheres” for men and women, see generally N. F. COTT, supra note 220; Baker, The Domestication of Politics: Women and American Political Society, 1780-1920, 89 AMERICAN HISTORICAL REVIEW 620 (1984). 222. See id. 223. Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). 224. See generally GAY/LESBIAN ALMANAC, supra note 181, at 173-284; SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 266 (1985). 225. See, e.g., J.G. Kiernan, Responsibility in Sexual Perversion and I.C. Rose, Perversion of the [Procreative] Instinct, in GAY/LESBIAN ALMANAC, supra note 182, at 231, 235; SMITH-ROSENBERG, supra note 226, at 267. 226. Notably, two Supreme Court decisions document the
2. Social Construction of a Sexual Identity

The early identification of persons on the basis of sexual and emotional behavior that apparently rejected the procreative model allowed the perception of socially unacceptable "others," individuals whose identity was based on their developed human sexual potential.228 This idea, that an "other" should be recognized by sexual orientation laid a foundation for such later concepts as homosexual identity or "gay culture."229 More important for legal theory was that gender stratification produced a conscious awareness that a homosexual orientation is a characteristic or trait owned by specific kinds of people. This socio-historical process made it possible for society's misunderstandings and prejudices about homosexuality to be reflected in legal classifications, and ultimately, in discrimination.

By casting sexual orientation into terms by which some individuals are viewed as different and "abnormal" or unnatural in relation to the heterosexual majority, society spawned a "discrete and insular" sexual minority.230 Similar to the process involving race, where social forces constructed an inferior socio-economic minority on the basis of skin color, the choice of sexual love partners became a potential for social acceptance or stigmatization. Under the dominant procreative model, individuals are expected to choose as sexual love partners only a member of the opposite sex. The rigid norms of behavior imposed by this model have permitted a minority of men and women to be grouped and labelled as inferior, when a universal characteristic—sexual orientation—is perceived in them in an "aberrant form," such as homosexual.

In the 20th century, that a man or a woman might be marked as "gay," lesbian or homosexual, we owe to the dominance of rigid sexual roles and the notions of patriarchy that fostered them. In the patriarchal framework the idea of women as asexual beings relegated lesbianism to non-existence,231 but castigated men who practiced...
homosexuality with death by hanging, drowning or burning at the stake. The man's crime was not only defying his procreative duty but also in equating himself through such conduct with the inferiority of a woman. In the extreme these values have cast the "normal man" into a being who is naturally unemotional and lacking tenderness, while the same attitudes have stereotyped the homosexual man into one who is effeminate and the lesbian into a pseudo-male. Even the derogatory terms we hear today that identify homosexual persons, such as "bull dyke" for women or "fairy" for men reinforce the socially prescribed sexual roles and their attendant values.

The impact of rigid sexual roles, in the context of our sexually repressed culture, was embodied in society's acceptance of overt hostility to anyone identified with the non-heterosexual. Increased awareness of the pervasiveness of homosexuality, for example through the publication of Alfred Kinsey's sex research in the 1950's, influenced a gradual change in social attitudes. Consequently homosexuality could traverse the path from being a sin and crime to becoming an illness. So did the order of penalties. Where it was once punished by death and castration, sodomy statutes now threatened one with life imprisonment while the medical establishment promised cures through electric shock treatment or psychotherapy. Historically, the official views of homosexuality marginally improved but the attitudes that foster discrimination did not.

for the root of the problem, the belief that homosexuality is abnormal and unnatural, persisted.

The varied historical reasons for prohibiting homosexuality were crucial to the emergence of a sexually-identified social minority. Rigid sexual roles dictated by Judeo-Christian values, and the socio-historical phenomenon of gender stratification, produced the belief that "real men" and "real women" were those individuals who conformed to the procreative model. Those who were oriented to same-sex emotional or sexual love became the targets of oppression. In more recent history, the factors that produced an American gay minority were part of the national homophobia found during the McCarthy era.

3. Sexual Identity Established—And Condemned

Homosexuality became embroiled in 1950's Cold War politics after a government officer suggested at a hearing of the House Un-American Activities Committee that most government firings for moral turpitude involved homosexuality. Anti-communist crusader Senator Joseph McCarthy, capitalizing on the publicity such a statement would receive, accused the Truman Administration of allowing the infiltration of "sexual perverts" whose lack of moral fiber and vulnerability to blackmail threatened national security. An investigation into the employment of homosexual persons was undertaken. Making

236. J. Katz, supra note 199, at 14-23; Gay/Lesbian Almanac, supra note 183, at 66-133.
240. See J. Katz, supra note 199, at 14-24; see also Barrett, supra note 182.
241. Thomas Jefferson helped author a revised Virginia sodomy law that penalized sodomy by a man with castration, while a woman was to have the cartilage of her nose cut through at least one-half inch. J. Katz, supra note 199, at 23-24. Castration was in popular usage in the late 19th century as a treatment for homosexuality. See id. at 23-24, 135-37, 140-43. Castration was still being proposed in this country as late as 1933. Id. at 182-83.
242. Under English law, sodomy was punishable by death until 1861 when the penalty could be from ten years to life servitude. In 1957, the Royal Woffenden Committee issued a report suggesting the decriminalization of private consensual homosexuality. Ten years later, the Sexual Offenses Act embodied the Committee's conclusions. J. Weeks, Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present 165-76 (1979).
243. See, e.g., J. Katz, supra note 199, at 170-73 (report of Dr. S. Lehmam regarding the treatment by electroshock of a 23-year-old male in 1944 where no "pathological, physical or neurological findings were noted [except for some peculiar serration of his teeth] and a rather effeminate physical makeup"); id. at 201-07 (anonymous personal testimony describing parental commitment of son in 1964 to a private mental hospital for electroshock treatment to cure homosexuality); id. at 172-181 (report of Drs. J. Friedlander and R. Banay on lobotomy performed in 1948 to cure sex psychopathy); id. at 191-93 (1959 report of Drs. M. Zlotow and A. Pagann on post-lobotomy sexual behavior of 100 males selected at random from a New York state hospital).
245. Id. at 42.
an ironic use of Dr. Kinsey's conclusions that homosexual persons did not fit common stereotypes.\textsuperscript{246} The committee suggested an intensive search for the large numbers of government employees who might have escaped detection.\textsuperscript{247} Throughout the McCarthy era, the "homosexual menace" became the basis for dismissals from private as well as government employment of thousands of homosexuals.\textsuperscript{248} The military purged its bases here and abroad.\textsuperscript{249} The FBI began surveillance of all federal employees and of bars that catered to homosexual persons.\textsuperscript{250} In a spirit of cooperative federalism, local governments followed suit by revoking liquor licenses, arguing that such locales contributed to the "invasion" of sexual perverts, who threatened national security.\textsuperscript{251} Generally, courts upheld local efforts.\textsuperscript{252} Not surprisingly, McCarthy’s attack on homosexuals had enduring effects. In the 1950s and 1960s, the courts continued to uphold efforts to persecute those identified with homosexuality.\textsuperscript{253} Doctors\textsuperscript{254} and lawyers\textsuperscript{255} lost licenses to practice; homosexuality could be a basis for divorce and loss of child custody.\textsuperscript{256} Homosexual
ty was equivalent to "immoral conduct," and removal of homosexually-identified persons from federal employment was thought to promote "the efficiency of the service."\textsuperscript{257} Charges of homosexuality were difficult to overcome. Even a psychiatrist’s claim that a person had returned to "normalcy" was ineffective.\textsuperscript{258} Not until 1969 did a federal court articulate a standard more protective of the rights of homosexual persons by requiring the Civil Service to show a rational nexus between such conduct and the efficiency of the service.\textsuperscript{259}

The irony of the government’s persecution of persons identified with homosexuality during the McCarthy era is that many homosexual persons felt a new solidarity with those who had suffered because of their sexual orientation.\textsuperscript{260} The first successful homophile organization was formed during this era.\textsuperscript{261} Blatant government discrimination and social disapproval made the emerging minority both discrete and insular. That minority rebelled in 1969 in the middle of a "routine" raid of a gay bar in New York City. The Stonewall Riot\textsuperscript{262} marked the emergence in the 1970s of an

\textsuperscript{246} Id.
\textsuperscript{247} Id. at 43-44.
\textsuperscript{248} Id. at 43-46.
\textsuperscript{249} Id. at 44-45; see also D’Emilio, supra note 214, at 101.
\textsuperscript{250} POWERS OF DESIRE, supra note 214, at 44-49.
\textsuperscript{251} See Rivera, supra note 144, 913-924.
\textsuperscript{252} See, e.g., In re Lynch’s Builders Restaurant, Inc. v. O’Connell, 30 N.Y. 408, 103 N.E.2d 531 (1952) (loss of liquor license because premises had become “disorderly” in that homosexual patronage was permitted).
\textsuperscript{254} But see Lorenzo v. Board of Medical Examiners, 46 Cal. 2d 68, 298 P.2d 537 (1956) (overturning the California Board of Medical Examiners’ revocation of a physician’s medical license because of his homosexuality).
\textsuperscript{255} See, e.g., State ex rel Florida Bar v. Kimball, 96 So. 2d 825 (Fla. 1957) (disbarment for conviction under sodomy law).
\textsuperscript{257} Rivera, supra note 144, at 813-825.
American “gay minority” which organized and defiantly rejected centuries of social, legal and religious condemnation of homosexuality. Gay people chose to assert their sexual identity rather than accept non-existence by staying “in the closet” in the dominant heterosexual culture.

IV. EQUAL PROTECTION FOR LESBIANS AND GAY MEN

Religious intolerance of certain sexual acts was nurtured into moral cultures, finding its expression in the sodomy laws, which once prohibited conduct anyone might commit. Through a process of social construction, such immoral and illegal conduct came to be perceived as a characteristic or trait distinctive of certain people. Gender stratification, the deployment of the sexual in scientific discourse, industrialization and urbanization, all contributed to this social evolution from fear and hatred of homosexual conduct to fear and hatred of the homosexual person. The question of recognizing a gay minority has thus become a question of personified conduct. Not surprisingly, the 1970’s “gay liberation movement” was met with hostility and charged with attempting to “unleash perversion” in a Christian nation. In some states the hostility against the homosexual person had legal manifestations. Laws that once prohibited an act called neither “homosexual” nor “heterosexual” were revised to apply only when engaged in by members of the same sex. These laws themselves presume the existence of a gay minority.

As previously argued, Supreme Court case law reflects a significant move beyond the original “suspect class” model, the race paradigm, to a principle of equality demanding strict scrutiny when a reviewing court “suspects” prejudice. Under this analysis certain traits, like sexual orientation, cannot be made the basis of a judgment without a “compelling” reason or a “substantial” relation between the classification and a legitimate state interest. Because of their long history of condemnation and suppression, gay people have been indelibly stigmatized with a “badge of inferiority.” As Judge Buchmeyer noted in *Baker v. Wade*, while homosexuality may engender strong emotions, controversy, fear and disgust among people, denials of equal protection should not rest on such preferred interests as “widespread public distaste.” But such rationales will be used, and may succeed, if gay discrimination claims are consistently relegated to the test of “reasonableness.”

A. A Theme of “Unreasonableness” in “Real Rationality Review”: *Cleburne City v. Cleburne Living Center*

As discussed in Part II, challenges to governmental classifications that seek to advance social and economic goals under the “police power,” are usually subject to the “rational basis” test. Thus, for example, laws passed to protect public health and safety will only be examined to see if a rational relationship exists between the classification and the state interest; the test is overwhelmingly deferential. The suspect class model, on the other hand, is not deferential to the State. However, because of the Court’s evident hesitation to enlarge the scope of “protected classes,” some have argued that, currently, the test of “reasonableness” promises much more protection for “non-suspect classes,” particularly since the Court’s recent opinion in *Cleburne v. Cleburne Living Center.*

In *Cleburne*, advocates for the handicapped challenged, on equal protection grounds, the denial of a zoning permit to build a group home for mentally retarded persons. The lower court, employing an intermediate level of scrutiny, held that the City’s act in barring the construction of such a home in a residential zone was based on deep-seated prejudice against the mentally retarded. In its analysis, the Court of Appeals rea-

263. Id.
264. See supra text accompanying notes 182-216.
267. See supra text accompanying notes 76-155.
268. 553 F. Supp. 112 (N.D. Tex. 1982).
269. Id. at 1145.
270. See, e.g., Williamson v. Lee Optical, 348 U.S. 483 (1955) (state may distinguish between ophthalmologists and opticians in granting privilege to replace optical lenses on grounds of public health).
271. See infra note 275.
soned that the handicapped could be viewed as members of a "quasi-suspect" class since mental retardation is an immutable condition.\footnote{273} On appeal, the Supreme Court reversed the Fifth Circuit decision, stating that handicapped persons are not members of a quasi-suspect class. Nevertheless, in reviewing the Cleburne city council's actions, purportedly only on rational basis grounds, the Court concluded that the decision had been based on "irrational prejudice" and on fear of the mentally retarded. The Court therefore invalidated the zoning ordinance.\footnote{274}

On first impression, the Cleburne case appears to solve the analytical difficulties of arguing that homosexual persons are members of a suspect class, for it seemingly promises "real" rationality review of a discrimination claim rooted in prejudice against and fear of a social minority. In fact, it does not do this at all. As Justice Marshall stated in his dissent, the inquiry engaged in by the Cleburne majority, something akin to a "second order rational basis test,"\footnote{275} can also be described as a form of "heightened" or "intermediate" scrutiny.\footnote{276} Throughout its review of the several reasons which the city offered in defense, the Court promoted the idea that certain fixed characteristics identify the groups that qualify for suspect or quasi-suspect status. Then the Court went on to reach the same results that would have emerged from simply stating that the handicapped are members of a quasi-suspect class whose discrimination claims invoke heightened scrutiny.

A more troubling aspect of Cleburne, however, is the majority's allusion to the idea that any degree of political power achieved by a socially harmed group (e.g., in the form of some protective legislation) negates the need for judicial protection.\footnote{277} By elevating the significance of "political powerlessness,"\footnote{278} the Court suggested that no socially harmed group could ever achieve suspect class status, if through organized help it gains the attention of a few lawmakers or of a court. What is the cut-off point for this standard factor in suspect class analysis? Is it the presence of one legal aid organization fighting for its interests versus several? Is political power and therefore suspect class status necessarily determined by the influence over one or several elections exerted by the votes of the particular social group? And if so, how widespread must this influence be? Should it hinge on the presence of some organized power in one city? On the East or West Coasts, versus the Midwest? Should it be determined by the presence of some protective legislation at the federal versus the state level? To argue that political powerlessness is or should be a definitive factor in deciding whether to apply "searching judicial inquiry" is to assume, incorrectly, that once some degree of political power is achieved, the problem of discrimination ends. One need only look at the situation of Black Americans today to know that suspect class inquiries do not end in the case of race, simply because Blacks can in some areas affect political elections.

In effect, Cleburne does nothing for litigants in discrimination cases except perpetuate the belief that if a social group evokes enough sympathy, a court can use "searching judicial inquiry," and that otherwise it cannot. There are no guidelines in the decision to indicate when the form of rationally-based inquiry employed by the Court in Cleburne should be used and when not. Homosexuals are hardly likely to evoke the same sympathetic response as the handicapped do, when, for example, certain members of the Supreme Court equate the exercise of First Amendment freedoms by gay men and lesbians with "spreading a social disease."\footnote{279}

The significance of the suspect class model for emergent socially harmed groups should not be neglected simply because there is a lack of clarity in the decisions that purportedly guide the constitutional litigant. The suspect class model is an important judicial mechanism for assuring certain constitutional guarantees to unpopular minorities. Prejudice, political powerlessness, or the existence of "fairly fixed" identifiable characteristics that say nothing about functional talents or skills are aspects of the model that guide, rather than dictate, when a court should step beyond the deferential rational basis test. The model is of particular importance in those cases where the harm perceived against an individual is also part of a broad-based social harm—the oppression of a

\footnotesize{273. Id. at 437-38. 
274. Id. at 446-450. 
275. Id. at 332 (Marshall, J., concurring in part and dissenting in part). 
276. See supra notes 78, 79 and accompanying text. 
277. Cleburne, 473 U.S. at 463-44. 
278. See supra note 114 and accompanying text. 
social minority. The suspect class inquiries are not only appropriate, they are necessary whenever a challenged classification potentially involves discrimination and prejudice against an unpopular social group. The argument for invoking suspect class inquiries in cases involving homosexually-identified persons merely illustrates the expansive meaning of the suspect class model. History explains why.

B. Grounds for the Suspicion of Prejudice: Public Hysteria and AIDS-Related Discrimination

In the 1980’s a clear need to consider the use of a suspect class model emerged in challenges to laws that affect gay people. Prior to this decade, the most common constitutional challenge involved an inquiry into the question of the power of the State to legislate morality, that is, to pass laws, as Justice Harlan noted in Poe v. Ullman, that reflect the traditional values “deeply pressed into the substance of our social life.” Sodomy laws consequently were challenged as an infringement of a fundamental right to privacy mandating a judicial inquiry into the government’s demonstration of a “compelling state interest” effected by a “narrowly drawn means of safeguarding that interest.” In the 1980’s, the social and legal status of homosexuality has drastically changed. The legal questions now involve not only the legislation of morality, but the State’s interest in the protection of public health. The latter issue was raised by Justice O’Connor during oral argument in Bowers when she asked whether the Court should consider health and safety factors in determining the constitutional validity of sodomy laws. A flurry of legislative activity has also resulted from the AIDS crisis.

In 1981, the initial statistics about AIDS revealed that 73% of the victims of this fatal disease were homosexual men. AIDS is a bloodborne disease. The virus is communicated, among other ways, by sexual activity involving intimate contact between the bloodstream and semen. Gay men were considered a high risk group because they were most likely to engage in the kind of sexual practice, anal intercourse, likely to risk transmission of the virus. Other high risk groups were identified as intravenous drug abusers who shared infected needles, and hemophiliacs or other persons requiring regular blood transfusions who were exposed to contaminated blood. Public hysteria is periodically fueled by media reports describing AIDS as an epidemic “killer” disease without a cure, and emphasizing its mysterious aspects.

Undoubtedly, fear of AIDS has increased negative public attitudes about homosexuality in general. Polls have shown that the public links the regulation or closure of homosexual gathering places with prevention of the spread of AIDS; other surveys reveal a total failure to distinguish lesbians from the high risk group. Anti-gay politicians have used fear of AIDS to appeal to the public’s homophobic attitudes. Anti-violence activists report that every increase in public attention paid AIDS is directly correlated with an increase in “gay bashing.”

In another era, amidst the national crisis of a world war, negative and racist public attitudes against an unpopular social minority were allowed to influence legislative and judicial decisions permitting the widespread internment of thousands of Americans of Japanese descent. Their presence near sensitive military areas supposedly posed a threat to national security. The
day after Pearl Harbor was attacked, President Roosevelt issued a proclamation that residents of Japanese nationality were "alien enemies" and restrictions were immediately placed on their conduct. Authorization was given to apprehend persons deemed "dangerous to the public health and safety of the United States."291 Military officials, not satisfied with these restrictions, sought to increase the scope of the geographic exclusion to allow the apprehension of all Japanese-Americans on the West Coast. The most ardent proponent of the internment program, General DeWitt, argued that a "Jap is a Jap," and that not even second- or third-generation Japanese-Americans could be trusted.292 The government established camps and interned over 120,000 persons. Racist attitudes against Japanese on the West Coast became the basis for legally stripping them of their civil rights.

This infamous turn of events is depicted in Korematsu v. United States293 which challenged the internment program as an unconstitutional exercise of the power to wage war. The irony of the Court's decision in Korematsu, which upheld the military's actions, is that in ruling against the Japanese-Americans, the Court fully articulated the essence of the suspect classification doctrine, stating that legal restrictions placed on the civil rights of a single social group "are immediately suspect" and courts must subject them to "the most rigid scrutiny."294 The Court held that since military authorities had concluded that loyalty could not be precisely and quickly ascertained, the exclusion of the Japanese-Americans bore a close relationship to the compelling interest in "national defense and safety." History has revealed that public hysteria and racism have often accounted for the perpetration of injustice against an unpopular social minority. In Korematsu, there was never any substantial evidence to support the military's claim of attempted sabotage.295

Often, history reveals facts which can prevent the repetition of grave injustices. In light of the fear over a "killer" disease and the oft-repeated facts that most of the initial AIDS victims were homosexual men,296 it should be clear that AIDs legislation may have a discriminatory impact on the homosexual community. Just as politics, public opinion and prejudices led to the tragic situation in Korematsu, rational judgment could easily succumb to anti-homosexual attitudes and public hysteria.

In response to the public's fear of AIDS, numerous legislative proposals have been made and regulatory actions taken with the ostensible purpose of protecting the public's health and safety. Bills requiring mandatory identification of persons deemed "AIDS carriers,"297 and authorizing the quarantine or isolation of such persons have appeared.298 Many bills would provide no guarantee of confidentiality and would not prevent discriminatory use of the data.299 Others regulate in some manner the conduct of persons deemed to be "carriers" of the disease.300 More broad provisions have proposed that public health officials be allowed to quarantine any facility "deemed" to pose a serious threat to the public health and safety.301 Most of these proposed laws are based on serious misinformation and stereotypical be-

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293. 323 U.S. 214 (1944); See also, Hirabayashi v. United States, 320 U.S. 81 (1943).
294. Korematsu, 323 U.S. at 216.
296. See supra notes 287, 288.
297. See, e.g., House Bill No. 1290, State of Colorado, General Assembly (1985). The bill defines a person infected with AIDS as a person "determined to be infected with a viral infection associated with [AIDS]." See also H.R. 2272 (1987) proposed by Congressional Representative Dannemeyer (R-Cal.) which would make HIV seropositive reportable to public health authorities. Dannemeyer also proposed H.R. 339 (1987) which would require states that receive federal funds for AIDS research or treatment to trace test, and counsel "partners of individuals with AIDS." AIDS Update 10-11 (Lambda Legal Defense and Education Fund, May, 1987) (hereinafter AIDS Update).
298. California voters recently defeated a referendum initiative to amend the State Constitution (the "La Rouche Amendment") which proposed, among other things, quarantine of individuals identified as AIDS carriers. Proposition 64 (Nov. 5, 1986).
299. See, e.g., H.R. No. 1789 (1987) proposed by Congressional Representative Burton (R-Ind.) which would require each state to test all residents for HIV seropositivity. AIDS Update, supra note 299, at 11.
300. See, e.g., H.R. 326 (1987) proposed by Rep. Dannemeyer (R-Cal.) which would make it a federal offense punishable up to 10 years for persons in "risk groups" to donate blood, semen, or organs. Id. at 11.
301. See, e.g., H.R. 343 (1987) proposed by Rep. Dannemeyer (R-Cal.) which prohibits all federal officers, employees and members of the military who are HIV seropositive from transferring bodily fluids. Persons found
lies about homosexual persons. Some proposals define an “AIDS carrier” as anyone “whose blood tests positive for the presence of antibodies to the AIDS virus” while other bills would require automatic reportability of persons “suspected” to be AIDS carriers. Consistently, the medical data show that AIDS is a bloodborne disease and cannot be spread through casual contact. Nevertheless, quarantine provisions appear to operate on the assumption that the disease is much more infectious. The tests developed to show the presence of the HIV antibody do not prove that the person is a carrier, or that the person will ever develop AIDS. If a person were a carrier, his or her isolation would not be required since AIDS is not spread through casual contact. Moreover, there is proof that precautions taken during sexual intimacy are successful in stemming the spread of the disease. The concerted effort of the gay community to promote information on “safe sex” has contributed to the significant drop in reported “gay” AIDS cases from 73% in 1981 to 50% as of 1985.

Finally, although gay activists have proposed measures that would promote safer sexual practices and increase the dissemination of information on preventing the spread of AIDS through sexual contact in public facilities, health officials have moved to close gay bathhouses or gay bars on grounds that they contribute to AIDS by promoting “unsafe” sex. These official actions are the result of the common stereotype that the gay person is uncontrollably sexually active.

C. The Test of Exacting Judicial Scrutiny

Even the most ardent opponent of arbitrary exercises of governmental power would agree that when public health is at stake, “public health and safety” are compelling or at least legitimate state interests. Although measures taken to protect public health and safety are legitimate, hysteria, fear, prejudice and common stereotypes should never become the basis for upholding a governmental act that threatens the civil rights and liberties of an unpopular social group.

It is clear that prejudice and stereotypes against homosexual persons underlie many of the measures proposed during and as a result of the AIDS crisis. The most common and most unfair stereotype confronting the homosexual person is that he or she is obsessed with sex and cannot control his or her sexual urges. This empirically untestable stereotype underlies the belief, for example, that homosexuals should not teach in public schools because they might molest the children, or “recruit” them. Increasing the power of health officials to quarantine or to regulate the sexual conduct of an individual identified as an “AIDS carrier,” (who in all likelihood will be a gay male) under the guise of “public health,” is based on just this stereotype—that all homosexuals are sexually irresponsible and dangerous to public health. Sexual stereotypes pervade the legislative response to the AIDS epidemic. Consequently, there is reason to suspect public hysteria, prejudice and the use of sexual orientation as grounds for marking out a sexually-identified discrete and insular minority. This targeting of an historically victimized social group therefore invokes that level of judicial scrutiny reserved for “suspect classifications.”

1987, three days after thousands marched on Washington, D. C. in support of gay civil rights, Senator Jesse Helms (R.-N.C.) proposed amendment 956 to a federal funding act prohibiting the Centers for Disease Control in Atlanta, Georgia, to provide AIDS education, information, or prevention materials and activities that promote, encourage, or condone homosexual activities. See — CONG. REC. S 14202, (daily ed. Oct. 14, 1987).


309. See, e.g., A. BELL & M. WEINBERG, supra note 175, at 72.

1. The First Prong: A Compelling Interest in Public Health and Safety

In Jacobson v. Massachusetts, the Supreme Court held that a State’s right to pass regulatory laws on health and safety grounds is presumptively valid:

[I]t is a fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. . . .

Moreover, the Supreme Court stated that courts must generally defer to the State in evaluating such statutes passed for the “common good”:

[The legislature] was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease.

Under the first prong of the suspect class test, it seems clear that the need to prevent the spread of AIDS would be viewed as a “compelling” governmental purpose. A defendant State would certainly urge a court that an epidemic suggests a presumptive right of the State to take steps, some of which “may [even] be wrong.”

The answer to the second level of inquiry, however, whether the means chosen to prevent AIDS accomplish this goal, is less clear.

2. The Second Prong: Narrowly Tailored Means to Prevent the Spread of AIDS

For this analysis we can take as an example a regulation that seeks to restrain certain kinds of sexual activity (e.g., homosexual activity) because it purportedly contributes to the spread of AIDS (under “high risk” circumstances). Obviously, such a regulation would distinguish among at least three groups. First, persons who engage in homosexual activity exclusively, second those who occasionally engage in homosexual activity (bisexuals) and third, those who do not engage in homosexual activity at all. Only the last group would not be burdened by such a law. Moreover, unless a distinction is made between male and female homosexuality we must assume that such a law applies to women as well.

Under the suspect class test, the burdening of homosexually-oriented persons must present a closer relationship than under the deferential rational basis test. For example, it might not be found totally “irrational” by a court that evidence of “high risk” sexual conduct, increasing numbers of gay-related AIDS cases, and some medical uncertainty as to the actual means of transmission of AIDS bears a close enough relation for the legislature’s classification to be upheld. Clearly, our exemplary measure creates a significant burden on members of the non-heterosexual group. To interfere with a person’s decision to engage in consensual sexual activity, or to withhold that person’s freedom of movement creates a severe loss of civil liberty. But even assuming that such drastic measures were truly believed to prevent AIDS, the “narrowly tailored” requirement man-

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311. 197 U.S. 11 (1905) (compulsory vaccination upheld against challenge that it interfered with religious freedom).
312. Id. at 19.
313. Id. at 30.
314. Id. at 28; supra note 305.
316. See supra notes 298-310 and accompanying text.
317. See, e.g., supra note 303 in which proposed bill vaguely and overbroadly prohibits the transfer of “bodily fluids.”
318. See supra note 309; any purported uncertainty is outweighed by the overwhelming medical data showing that 1) AIDS is not spread through casual contact and 2) transmission is confined to members of high risk groups. See supra notes 306, 308. In 1986, sensational media reports fostered intense fear of AIDS, which culminated in a legal battle before the Supreme Court involving the U.S. Justice Department and supporters of a decision in favor of a schoolteacher who was fired because of her susceptibility to tuberculosis. Gene Arline claimed that fear of contagion from an infectious disease is not a legitimate basis to refuse to hire an “otherwise qualified” person. See 29 U.S.C. §§ 701-796(i) (1982) (Section 504 of the Federal Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394, as amended, 29 U.S.C. § 794 [hereinafter Section 504] prohibits discrimination by programs receiving federal financial assistance). The case caught the public’s attention because of its implications for AIDS-related employment discrimination. In an amicus brief in Arline v. Nassau County School Board, — U.S. —, 107 S. Ct. 1123, reh’g denied, 107 S. Ct. 1913 (1987), the federal government argued that discrimination based on fear of contagion is not prohibited by Section 504. See Justice Dept. Supports Discrimination Based on Fear of Contagion, N.Y. Times, July 15, 1986, at A19, col. 1. The Supreme Court upheld the lower court’s decision in favor of Arline, although it left open the question whether AIDS-related discrimination is prohibited by Section 504. 107 S. Ct. at 1128 n.7. See Leonard, Employment Discrimination Against Persons with AIDS, 10 U. DAYTON L. REV. 681 (1985) (providing an analysis of Section 504 and other prohibitions against disability-based employment discrimination).
dates that there be a tight fit between the goal and the classification. Here the Constitutional test of overbreadth should be invoked, for it would prevent the inclusion of innocent parties which might result from providing the state with broad discretionary powers.

Even assuming that there were some causal connection between homosexuality and AIDS, a law that facially reaches persons who engage in lesbian sexuality would have to be considered overbroad. There is an overwhelming medical certainty that lesbians are not members of the AIDS high risk groups because lesbianism poses a minimal risk of blood-to-blood contact, the only means of transmitting AIDS. Consequently, there is no rational basis for believing that lesbianism per se contributes to AIDS. What is causally connected is “high risk” sexuality, whether homosexual or heterosexual, i.e., sodomy by two men or a man and a woman accompanied by presence in one party of the HIV virus. Further, if a law targets two men who engage in homosexual sodomy and neither person has the virus then that law is also overbroad and not “narrowly tailored.” And if a law facially reaches those cases of homosexuality where the two partners do have AIDS, engage in sex only with each other, then that law is overbroad.

Finally, it appears that such laws would suffer from underinclusiveness by not addressing the other means by which AIDS can be transmitted. By prohibiting only that conduct identified with an unpopular social group, viz., gay people, a legislature essentially refuses to consider the “least restrictive” alternatives. First, AIDS is also transmitted through contaminated hypodermic needles inserted into the bloodstream; thus, efforts to restrain the “high risk” sexual conduct of gay people without attempting to restrain the high risk conduct of the intravenous drug user is inequitable. Second, there is strong medical evidence to show that heterosexual sex, including sodomy, can also lead to AIDS. But regulations that affect only those places patronized by homosexual persons (e.g., gay bars, bookstores, and bathhouses) do nothing to address the “high risk” sexuality engaged in by members of the heterosexual population in similar locales. Third, given evidence that “safe” sexual practices will reduce AIDS, and that there has been a significant change in the reported cases of AIDS among the two highest risk groups (the number has become lower in gay men, higher in intravenous drug abusers), it seems clear that our exemplary measures are rooted in prejudice and stereotype.

The use of homosexuality as a basis for creating burdensome restraints on the civil liberties of persons for whom homosexuality may lie at the core of their personal identity appears not to survive the test of being “narrowly tailored” to the legitimate goal of preventing AIDS. Gay people, traditionally a politically weak and socially ostracized group, have become the scapegoats for addressing a grave social problem at the cost of the sacrifice of civil liberties and the commitment of government resources to prevent the spread of AIDS through “less onerous alternatives.”

CONCLUSION

The approach suggested in this article is not intended to replace strategies based on the right to privacy. The right to one’s private sexuality is, after all, a linchpin issue in achieving recognition and respect for a gay identity. But, in light of the calamitous ruling in Bowers, it is clear that, in coming years, more attention needs to be paid to strategies based on a discrimination model. This model must not only take into account Dr. Kinsey’s valuable sex research data, but must also incorporate the historical information that helps conceptualize gay men and lesbians as a “significant social minority.” Furthermore, the apparent barriers in the suspect class model must be demystified, in particular the notion of many constitutional litigators that without such a factor as “immutability” there is no room for equal protection for gay people. Existing scholarly opinion sufficiently disputes this point. The next task is one of engaging in a process of redefinition of terms and concepts. The ideas presented here have not been proffered in the naive belief that the
time is ripe for promoting a major equal protection challenge in the federal courts. Rather, the current struggle of gay legal reformers parallels that of the lawyers who were once faced with the enormous task of transforming persons once deemed slaves and beasts of burden into citizens. Much like that struggle, advocates for legal reform on this front must continue to combat deeply ingrained prejudices and irrational fears.

It took decades of social change for the homosexual act to become the special characteristic of a social group and a license for oppression. It may take many more decades to convince members of a culture in which heterosexuality prevails to redefine differences in sexual and emotional love simply as irrelevant differences that say nothing about inherent value.

_basis of homosexual orientation violate the equal protection component of the fifth amendment's due process clause because homosexual persons are members of a suspect class. _Watkins_, slip op. at 15-24. The court further recognized that for the purpose of equal protection analysis, homosexual orientation constitutes a constitutionally irrelevant and immutable trait, i.e., it is a trait that is so central to a person's identity that it is abhorrent for the Government to penalize a person for refusing to change that identity. Id. at 42-47._