No, *I'll* Categorize *You*

Virtually Normal: An Argument About Homosexuality. By Andrew Sullivan.*
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I

This year marks the tenth anniversary of *Bowers v. Hardwick*,[1] in which the U.S. Supreme Court held that the Federal Constitution does not guarantee a fundamental right to engage in homosexual sodomy.[2] Since *Bowers*, judicial and legislative controversies over society's treatment of gay men and lesbians have intensified.[3] In the context of these often-bitter disputes, Andrew Sullivan's *Virtually Normal* responds to the question of how society should deal with its homosexual minority (p. 18). Sullivan argues that all *public* discrimination against homosexuals should be eliminated, but he rejects the pursuit of laws that would prevent *private* parties from discriminating in areas such as employment and housing (p. 171).[4] He thus articulates what might be termed a "classic" liberal position, in which the state takes a "neutral" position with regard to sexual orientation.

Sullivan develops a series of powerful responses to the most common arguments launched against gay men and lesbians. *Virtually Normal* thus provides valuable ammunition for the battles over lesbian and gay equality, and Sullivan offers an interesting rhetorical model for how lesbians and gay men might best respond to their legal and political challenges. Ultimately however, Sullivan's argument rests on definitional assumptions that do not reflect legal reality. Moreover, his exclusion of antidiscrimination civil rights laws from his

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* Editor, *The New Republic*.

1. 478 U.S. 186 (1986).

2. *Id.* at 191.

3. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 115 S. Ct. 2338 (1995) (excluding gay and lesbian group from Boston's St. Patrick's Day Parade); Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995) (finding military's policy of excluding openly gay and lesbian service personnel to be unconstitutional violation of free speech and equal protection), *appeal docketed*, No. 95-6111 (2d Cir. Jan. 16, 1996); Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (striking down state constitutional amendment eliminating laws prohibiting discrimination on basis of sexual orientation), *cert. granted*, 115 S. Ct. 1092 (1995) (No. 94-1039) (argued Oct. 10, 1995); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (subjecting Hawaii's prohibition of same-sex marriage to strict scrutiny under state equal protection doctrine).

4. Sullivan's argument thus does not support the addition of "sexual orientation" to federal civil rights statutes. *See, e.g.*, 42 U.S.C. §§ 2000e–2000e-17 (1994) (employment discrimination); *id.* § 3604 (1994) (housing discrimination). Legislation to eliminate private employment discrimination on the basis of sexual orientation has been proposed in Congress and formally endorsed by President Clinton. *See* Steven A. Holmes, *Clinton Backs Bill to Protect Homosexuals from Job Bias*, N.Y. TIMES, Oct. 20, 1995, at A1.

politics lacks a principled basis and exposes the weaknesses of his own argument.

II

Sullivan builds his argument about homosexuality by exploring and critiquing what he identifies as four modern theories of how society should handle its gay and lesbian members. He labels these theories "prohibitionist" (p. 19), "liberationist" (p. 56), "conservative" (p. 94), and "liberal" (p. 133). After examining these four viewpoints, Sullivan presents his own "politics of homosexuality" (p. 169) as a reasoned response to the other theories' deficiencies.

Prohibitionists, according to Sullivan, view homosexuality as an aberration (p. 20). They believe that homosexual acts should be punished and that society should structure itself to discourage the "temptation" to engage in such acts (pp. 21–22).[5] They view homosexuality as a choice that should be socially disfavored (p. 25). In response, Sullivan chides those who would rely on the Bible to outlaw homosexual conduct as picking and choosing from the Bible's various prohibitions (pp. 27–28). He then confronts the natural law condemnation of homosexuality by explaining both that homosexual conduct appears throughout history (and thus cannot be properly considered unnatural) (p. 33) and that modern Western societies do not look to the procreative nature of sexual conduct to establish its legality (p. 54).[6]

Moving to the other end of the political spectrum, Sullivan examines the liberationist position. Drawing on Michel Foucault's ideas of social construction,[7] the liberationists argue that majority culture has constructed the term "homosexual" to categorize and control sexual behavior (pp. 63, 66–67). Liberationists thus seek an end to sexual categories and a return to the more amorphous concept of "pleasures."[8] While granting the intellectual appeal of liberationism (pp. 66–67), Sullivan attacks the theory's pessimistic view of dominant power structures by pointing to the advances that lesbians and gay men have made toward equality (pp. 75–76). Sullivan also points out the inherent irony in liberationist politics, in that, while attempting to cast away

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5. Eve Sedgwick characterizes this belief as a minoritizing-universalizing strategy that persecutes the allegedly small minority of people who "really are" homosexual, while simultaneously discouraging the much larger (universalized) group of people who might be tempted to engage in homosexual acts from doing so. *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 85 (1990).

6. Supreme Court precedents establishing the right to obtain contraceptives, *see* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965), and a woman's right to abortion, *see* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973), bolster Sullivan's argument.

7. *See* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1990) (1978).

8. 1 *id.* at 157.

oppressive power structures, liberationists are virtually obligated to play power games themselves (pp. 77, 92).

Sullivan distinguishes the third group, conservatives, from prohibitionists because conservatives do not believe that homosexual conduct should be criminalized or that homosexuality is necessarily a choice (pp. 96–97). Rather, conservatives maintain that public acceptance of homosexuality undermines heterosexual coupling (p. 104), that heterosexuality leads to a comparatively superior lifestyle (p. 105), and consequently that public policies ought to encourage heterosexuality and discourage homosexuality (pp. 97, 101).[9] Sullivan attacks this argument by exposing the tautology inherent in heterosexuality's claimed superiority (pp. 106–07). He explains, "It is precisely *because* of societal disapproval of homosexuals that careers may be affected and that marriage is an impossibility and that family life is discouraged" (p. 116). Sullivan also disputes the notion that public acceptance of homosexuality undermines heterosexual coupling or the family (p. 104).

Sullivan finally examines liberal politics. He characterizes modern liberals as having begun with the classic position of state neutrality (pp. 138–39) but having later abandoned this philosophy, reasoning that this neutrality in fact amounted to "acquiescence" to preexisting social inequalities (p. 141). Liberals thus seek to provide homosexuals with certain rights, such as privacy, free expression, and equal employment opportunity (p. 136). Sullivan claims that the liberal position, by entangling itself in the value-laden conflict over private-sector gay and lesbian rights, inevitably leads to a degeneration of political discourse into a debate "between 'perverts' and 'bigots'" (p. 160). Finally, Sullivan asserts that liberals' focus on ending private discrimination represents, at best, a misplacement of priorities, since gay men and lesbians do not even possess basic *public* equality (p. 163).

With these critiques in mind, Sullivan advances his own argument. Starting from an assumption of involuntary homosexuality (p. 170), Sullivan proposes "that all *public* (as opposed to private) discrimination against homosexuals be ended and that every right and responsibility that heterosexuals enjoy as public citizens be extended to those who grow up and find themselves emotionally different. *And that is all*" (p. 171). Sullivan states that ending the ban on openly gay and lesbian service personnel and legalizing same-sex marriage are the most critical aspects of his politics, as these two steps would undo the most visible social condemnations of homosexuality (pp. 173, 178). He claims that

9. The U.S. military's policy toward homosexuals represents just such a system that tolerates private homosexuality but provides strong disincentives for those who would publicly reveal their sexual orientation. *See* 10 U.S.C.A. § 654(b)(2) (West Supp. 1995); *see also* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1011 (1985) (Brennan, J., dissenting from denial of certiorari) ("[Petitioner] was discharged merely because she is bisexual and revealed this fact to acquaintances at her workplace."); Singer v. United States Civil Serv. Comm'n, 530 F.2d 247, 255 (9th Cir. 1976) ("[A]ppellant's employment was not terminated because of his status as a homosexual . . . . [T]he discharge was the result of appellant's 'openly and publicly flaunting his homosexual way of life . . . .'"), *vacated*, 429 U.S. 1034 (1977).

his politics evades modern liberals' legitimacy quandary by reshaping the debate from one about protection of individual rights to one about public equality (pp. 176–77). Sullivan thus frames his argument as a rhetorical tool to be used in the political dispute over society's treatment of lesbians and gay men. He rejects the enactment of antidiscrimination laws to prevent private discrimination (p. 171), arguing that these laws entangle the government in a subject that is "too deep, too emotional, too visceral to be resolved by the calm voice of liberal legalism" (p. 158).

III

Sullivan does an exceptional job of reframing the homosexuality debate from a discussion of rights to a discussion of equality. But while his argument has considerable appeal, its force fades in a legal and political world where the very definitions of "homosexual," "public," and "neutrality" upon which Sullivan relies remain deeply controversial. To be fair, Sullivan does not claim to make a legal argument. However, to be effective, his argument must confront the legal obstacles that stand in the way of gay and lesbian equality.

In holding that the Constitution does not protect homosexual sodomy from state prohibitions,[10] the Supreme Court rejected one of Sullivan's most basic prescriptions—eradicating sodomy laws (p. 171). The *Bowers* decision remains one of the most criticized Supreme Court decisions in history[11] and arguably would not come out the same way today.[12] Nevertheless, the decision presents an enormous jurisprudential barrier to Sullivan's argument.[13]

Because *Bowers v. Hardwick* was argued and lost on due process grounds,[14] an equal protection argument may be a logical choice for those seeking to litigate around *Bowers*. But this strategy would likely require convincing the Supreme Court that homosexuality is "immutable," as this factor is key under equal protection doctrine.[15] If society accepted Sullivan's assumption that homosexuality is not a choice (p. 170), equal protection

10. Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

11. For strong critiques of *Bowers*, see generally Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Thomas Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987).

12. *See Nostradamus and Robert Bork*, THE ADVOCATE, Feb. 6, 1996, at 14 (citing Robert Bork's claim that current Supreme Court would not rule same way on *Bowers*).

13. In fact, to the extent that Sullivan defines homosexuality in terms of sexual attraction, the Court arguably rejected *all* of Sullivan's argument. *See* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state-sponsored discrimination against the class is invidious."). *But see* Watkins v. United States Army, 837 F.2d 1428, 1439 (9th Cir.) (refusing to apply *Bowers* by distinguishing between homosexual conduct and sexual orientation), *amended*, 847 F.2d 1329 (9th Cir. 1988), *aff'd on different grounds en banc*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

14. 478 U.S. at 189.

15. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

doctrine would likely provide the very levels of public equality that Sullivan seeks. But the legal reality is that homosexuality is *not* universally accepted as an innate identity trait.[16] His argument is thus weakened to the extent that it rests on an assumption of immutability that has yet to gain widespread acceptance in the courts.

Sullivan rejects laws barring private discrimination against lesbians and gay men, arguing that these laws are too controversial and are unfaithful to the ideals of classic liberalism. This position is both pragmatically questionable and ideologically inconsistent. Sullivan asserts that the bitter controversy surrounding homosexuality makes it an unwise target for civil rights protections (pp. 158, 162–63). However, his proposal to end all forms of *public* discrimination is no less "emotional" or "visceral" than establishing private antidiscrimination laws. In fact, poll data indicate that people are much more likely to oppose same-sex marriage than they are to oppose applying employment nondiscrimination statutes to lesbians and gay men.[17] If Sullivan is correct in his assertion that legalizing same-sex marriage would move lesbians and gay men "ninety percent" of the way toward equality (p. 185), then logically their opponents will fight hardest against this position.

In addition to its practical weaknesses, Sullivan's argument fails to offer a principled explanation of why private civil rights protections ought not be extended to cover sexual orientation. Sullivan accurately points out that homosexuality is a complex social phenomenon (p. 149) and that it differs from other minority characteristics since it can be concealed and is not strictly transgenerational (pp. 151–53).[18] Yet neither of these attributes decreases the sting of discrimination to render homosexuality less worthy of civil rights protections.[19] Sullivan suggests that enforcing antidiscrimination laws to protect sexual orientation in the private employment and housing contexts is particularly problematic because this "trait," unlike other protected characteristics, involves behavior (p. 161). However, the argument that such laws have either the purpose or effect of forcing employers or landlords to observe or even approve of homosexual behavior "is, at best, facetious."[20] Furthermore, if one assumes, as does Sullivan, that homosexuality is

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16. *Compare* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (holding homosexuality not immutable for purposes of equal protection) *with Watkins*, 837 F.2d at 1446 (holding homosexuality immutable characteristic for purposes of equal protection).

17. *See, e.g.*, William A. Henry, III, *Pride and Prejudice*, TIME, June 27, 1994, at 54, 58 (indicating much broader public support for antidiscrimination laws than for legalized same-sex marriage); *Put on Your Helmets for the Culture War*, FORTUNE, Feb. 6, 1995, at 60 ("On gay rights, a clear majority oppose discrimination on the job, but balk at legalizing marriage for homosexual couples.").

18. For further explication of the uniqueness of homosexuality as a minoritizing trait, see SEDGWICK, *supra* note 5, at 75.

19. In fact, Sullivan implies that the experiences of gay and lesbian adolescents may actually be worse than those of ethnic minorities, because homosexual adolescents lack peer support networks and must confront a minoritizing trait that society views as morally nonneutral (pp. 154–55).

20. I borrow here Justice White's infamous language in *Bowers*, 478 U.S. at 194 (characterizing Hardwick's argument that right to engage in consensual homosexual sodomy is fundamental).

involuntary, it would seem that the more bitter the opposition to homosexuals, the more in need of equal protection they would be.

Sullivan's fallback position is that the state should "fully respect liberalism's public-private distinction" (p. 171) and not enmesh itself in the ugly debate over homosexuality. But this very distinction is untenable. Ironically, Sullivan's reliance on same-sex marriage as the pathway to public equality (p. 185) demonstrates his failure to understand the inherent malleability of government "neutrality" and the public-private distinction. Government recognition of any marriage is an inherently nonneutral act, as it encourages binary, exclusive coupling through a variety of economic incentives. Marriage also infuses a variety of public rights and duties into the most private of human relationships. Sullivan's contention that the government should promote both heterosexual and same-sex marriage thus illustrates how easily one can come to view a policy as "neutral" and "public" when the majority favors the values that the policy promotes.

Despite its flaws, *Virtually Normal*'s typology of gay and lesbian political theories does facilitate a clearer understanding of these issues. Whether consciously or not, Sullivan deploys his argument in a manner that would leave Foucault and Sedgwick smiling. Sullivan turns the tables on the adversaries of gay and lesbian equality by defining and categorizing their politics in much the same way that they define and categorize his homosexuality. By dividing homosexual politics into four "camps," he isolates each theory's weak points, rendering it vulnerable to attack. He then develops his own theory that arguably transcends the other positions' weaknesses. Sullivan "minoritizes" his opponents into political boxes, while simultaneously "universalizing" his argument's appeal to liberal democracy and state neutrality. Ironically, then, while rejecting liberationist conclusions about the social labeling and control of homosexuals, Sullivan develops categories of homosexual politics to label and rhetorically control his opponents.

—Bradley P. Smith