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Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy

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Sin, Stigma & Society: A Critique of Morality and Values In Democratic Law and Policy

I.

Oh who is that young sinner
with the handcuffs on his wrists?
And what has he been after
that they groan and shake their fists?
And wherefore is he wearing
such a conscience-stricken air?
Oh they're taking him to prison
for the colour of his hair.[1]

A. *Morality, what crimes shall be committed in thy name?*

H.L.A. Hart

In 1986, the Supreme Court of the United States handed down a decision for the first time on what was then one of the major open constitutional issues facing contemporary American society. Stimulated by Supreme Court opinions expanding the protection of privacy rights under the Constitution, legal scholars had been debating the issue for decades. Coupled with increased public attention, heightened by advocates armed with data from the social and hard sciences, expectations arose concerning the possibility of a major shift in long-established law. After avoiding the issue for years, the Court finally spoke.

In *Bowers v. Hardwick*,[2] the speculation and anticipation were addressed in an opinion which was denounced by civil libertarians as an aberration and an abomination.[3] In 1982, an Atlanta policeman had dis-

1. Housman, *Oh who is that young sinner with the handcuffs on his wrists?, reprinted in* THE PENGUIN BOOK OF HOMOSEXUAL VERSE, at 240 (1983) (A.E. Housman (1859-1936) was the foremost Latin scholar of his generation, a widely respected poet and a gay man).

2. 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986).

3. Commentators have been virtually unanimous in their criticism of *Hardwick*'s reading of the Court's privacy jurisprudence. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-21, at 1422-35 (2d ed. 1988); Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); *The Supreme Court, 1985 Term - Leading Cases*, 100 HARV. L. REV. 210-20 (1986). Significantly, retired Supreme Court Justice Lewis F. Powell, who admits to having cast the deciding vote in the 5-4 decision in *Hardwick*, is recently quoted at a New York University School of Law forum

covered Michael Hardwick in his bedroom, in bed—with another man. Hardwick was arrested and charged with the statutory crime of "sodomy."[4] His arrest, under an otherwise unenforced statute, was the first in some fifty years in the state of Georgia.[5] Even though he and his partner were both consenting adults acting in the privacy of his home, the Court rejected out of hand Hardwick's challenge to the Georgia statute stating that "the Federal Constitution [does not] confer a fundamental right upon homosexuals to engage in sodomy. . . ."[6]

Nearly six decades of privacy precedents which the Court had laboriously fashioned, from *Meyer v. Nebraska*[7] and *Skinner v. Oklahoma*[8] to *Griswold v. Connecticut*[9] and *Roe v. Wade*[10] were summarily disposed of

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on October 18, 1990 as stating that, "I think I made a mistake in that one . . . I do think it was inconsistent in a general way with *Roe* . . . . When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments." *See* The National Law Journal, Nov. 5, 1990, at 3, col. 1.

4. GA. CODE ANN. § 16-6-2 (1984). The statute provides, in pertinent part, as follows:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . . *Id.*

The content of sodomy statutes vary from jurisdiction to jurisdiction, many containing language so broad as to defy precise understanding of what exactly is being prohibited. *See, e.g.*, MISS. CODE ANN. § 97-29-59 (1972) ("Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years").

Most sodomy statutes prohibit oral-genital and some anal-genital contact, although some state courts have construed their statutes not to apply to oral acts. *See, e.g.*, State v. Potts, 75 Ariz. 211, 213, 245 P.2d 1023, 1024 (1953) (holding that oral- genital contact is not an "infamous crime against nature"). However, states with sodomy statutes construed not to apply to oral sex generally also have statutes proscribing "lewd and lascivious acts" or "sexual misconduct" that include oral-genital contact. *See, e.g.*, State v. Pickett, 121 Ariz. 142, 146, 589 P.2d 16, 20 (1978); ARIZ. REV. STAT. ANN. § 13-1412 (Supp. 1988).

Because many of the statutes do have language prohibiting "unnatural and lascivious acts" or "crimes against nature," rather than naming the specific acts themselves, judicial construction often determines what acts are specifically prohibited. Yet, despite sodomy statutes' use of such open-ended terms, courts have almost uniformly upheld the statutes against vagueness challenges. *See* Rose v. Locke, 423 U.S. 48 (1975) (per curiam) (upholding TENN. CODE ANN. § 39-2-612 (1980), which prohibits "crimes against nature"); Wainwright v. Stone, 414 U.S. 21 (1973) (per curiam) (upholding FLA. STAT. § 800.02 (1987), which prohibits "the abominable and detestable crime against nature"). *But see* Balthazar v. Superior Court, 573 F.2d 698 (1st Cir. 1978) (finding Massachusetts statute prohibiting "unnatural and lascivious acts" unconstitutionally vague as applied to acts of fellatio and oral-anal contact).

5. *Hardwick*, 478 U.S. at 198 (Powell, J., concurring).

6. *Id.* at 190. *See also id.* at 191.

7. 262 U.S. 390 (1923) (one has a right to educate one's own children as one wishes).

8. 316 U.S. 535 (1942) (right to procreate is "one of the basic civil rights of man").

9. 381 U.S. 479 (1965) (right to privacy is a "penumbra" or "emanation" of various provisions of the Bill of Rights).

in two paragraphs as having no relation whatsoever to Hardwick's right to privacy since, as the Court reasoned, those cases involved rights to "family, marriage, or procreation."[11] This crabbed rationale was severely criticized by the dissenting Justices, who pointed out that Hardwick's case,

> is no more about a "fundamental right to engage in homosexual sodomy" . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men' namely, 'the right to be let alone.'[12]

The only justification which the Court could put forward for allowing the State of Georgia to intrude upon Hardwick's privacy was that the state's legislature had concluded that acts of oral and anal sex offended the morals of the majority of the people in Georgia. For the Court, this was sufficient since "[p]roscriptions against that conduct have ancient roots."[13] By acquiescing in majority sentiment, the Court legitimized the moral value system of the majority against the right of individuals to choose how to conduct their private lives. The impetus for this legitimization was made clear by Chief Justice Burger in his concurring opinion. Citing "millennia of moral teaching," the Chief Justice characterized sodomy "as an offense of 'deeper malignity' than rape, an heinous act 'the very mention of which is a disgrace to human nature. . . .' "[14]

This harsh rhetoric was the basis upon which the dissent insisted that "the length of time a majority has held its convictions or the passions with which it defends them [cannot] withdraw legislation from this Court's scrutiny."[15] Moreover, "the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live differently."[16] It follows that "before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named

10. 410 U.S. 113 (1973) (right of privacy is implicit in the concept of "liberty").

11. *Hardwick*, 478 U.S. at 191.

12. *Id.* at 199, 207 (Blackmun, J., dissenting) (quoting Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (citations omitted)).

13. *Hardwick*, 478 U.S. at 192.

14. *Id.* at 197 (quoting 4 W. BLACKSTONE COMMENTARIES 215).

15. *Id.* at 210 (Blackmun, J., dissenting).

16. *Id.* at 213.

among Christians.' "[17]

The majority's opinion is not based on principled grounds. Prejudice, rather than sound legal argument, seems to be the basis for the result in *Hardwick*. This fact is highlighted given what the dissenting Justices called the majority's "almost obsessive focus on homosexual activity."[18] The Court repeatedly drew the issue as an alleged "fundamental right to engage in homosexual sodomy,"[19] even though Georgia's statute criminalized all oral and anal sex, whether homosexual or heterosexual.

Unwittingly, the *Hardwick* majority left themselves open to the accusation of "distort[ing]" the case.[20] Whether or not this distortion was a conscious effort or not, the motivation may be inferred from a subsequent sodomy case which the Court refused to review. In *Post v. State*,[21] the Court denied a grant of certiorari even though a state appellate court, prior to *Hardwick*, had overturned a heterosexual sodomy conviction on the ground that the federal Constitution guaranteed a right of privacy "to matters of sexual gratification," at least with respect to heterosexuals.[22] Clearly, the Court is not so much concerned with the actions of persons, but with their status.

The central concern for the majority in *Hardwick* was not standards of morality and their enforcement, but disapproval of, and revulsion toward, gay people. Richard D. Mohr, Associate Professor of Philosophy at the University of Illinois-Urbana, commented on this aspect of the Court's decision:

> [T]he Supreme Court, by upholding Georgia's unenforced sodomy law, allowed the state to use law as an invective against gays.
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> [It] reached its conclusion . . . without addressing, entertaining, or considering any gay issues. It reached its conclusion that the state may bar gays from having any sex life at all without even discussing gays, or privacy, or sex. Concerns of gays simply did not merit any attention from the Court. . . . In one sentence—with no analysis—it dismissed past privacy precedents as irrelevant and in one more sentence—again with no analysis—it assimilated gay sex to incest, child molestation, and drug use. The Court, in its rush to let the state insult gays, could not be bothered with

17. *Id.* at 199 (quoting Herring v. State, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904)).

18. *Id.* at 200.

19. *Id.* at 190-91.

20. *Id.* at 200.

21. 715 P.2d 1105 (Okl. Cr. 1986), *reh'g denied*, 717 P.2d 1151 (1986), *cert. denied*, 107 S. Ct. 290 (1986).

22. *Post*, 715 P.2d at 1109. *See also* 717 P.2d at 1152.

argumentation and ideas.[23]

B. *Sodomy Legislation in the United States of America*

Until 1966, all fifty states had sodomy laws such as Georgia's. Today, despite the efforts of the gay rights movement to obtain reforms,[24] twenty-four states and the District of Columbia still have such laws on the books.[25] Seven states specifically prohibit same-sex sexual activity,[26] with the remaining applying equally to heterosexuals as to homosexuals. At least one state distinguishes between married and unmarried persons.[27]

Although rarely enforced against gay men and lesbians,[28] the poten-

23. R.D. MOHR, GAYS/JUSTICE, A STUDY OF ETHICS, SOCIETY, AND LAW 315-16 (1988).

24. *See generally* J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-70 (1983) (documenting the history of the gay and lesbian legal rights movement).

25. *See* ALA. CODE § 13A-6-65(a) (3) (1982); ARIZ. REV. STAT. ANN. §§ 13-1411 to 13-1412 (Supp. 1988); ARK. STAT. ANN. § 5-14-122 (1987); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. § 800.02 (1987); GA. CODE ANN. § 16-6-2 (1988); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (Supp. 1987); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CODE ANN. art. 27, §§ 553-554 (1987); MICH. COMP. LAWS §§ 750.158, 750.338, 750.338(b) (1979); MINN. STAT. § 609.293 (1988); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1986); MONT. CODE ANN. § 45-2-101, 45-5-505 (1987); NEV. REV. STAT. § 201.190 (1987); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. tit. 21, § 886 (1981); R.I. GEN. LAWS § 11-10-1 (1986); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (Vernon 1989); UTAH CODE ANN. § 76-5-403 (Supp. 1988); VA. CODE ANN. § 18.2-361 (1988). Massachusetts also has a sodomy statute criminalizing anal sex. *See* MASS. GEN. L. ch. 272, § 34 (1986) (prohibiting "the abominable and detestable crime against nature"), but the statute was arguably invalidated as applied to private consensual conduct by Commonwealth v. Balthazar, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974), which found a companion statute criminalizing "unnatural and lascivious act(s)" unconstitutional as applied to private, consensual adult behavior.

26. *See* ARK. STAT. ANN. § 5-14-122 (1982); KAN. STAT. ANN. § 21-3505 (Supp. 1987); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1985); MO. REV. STAT. § 566.090(3) (1986); MONT. CODE ANN. § 45-2-101 (1987); NEV. REV. STAT. § 201.190(2) (1987); TEX. PENAL CODE ANN. § 21.06 (Vernon 1987). Sodomy statutes in other states may prohibit only same-sex sodomy due to judicial invalidation of the statutes as applied to opposite-sex, but not to same-sex sodomy. *See, e.g.*, Post v. State *supra* notes 21 and 22.

27. *See* ALA. CODE § 13A-6-60 (1982).

28. *See* R.D. MOHR, *supra* note 23, at 52-53. However, these statutes are frequently invoked to justify other types of discrimination against lesbians and gay men on the ground that they are presumed to violate these statutes. *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075-76 (5th Cir. 1976) (invoking state sodomy statute and newspaper's right to choose not to be involved in criminal activity to justify newspaper's refusal to print advertisement for gay counseling and legal aid), *cert. denied*, 430 U.S. 982 (1977); *In re* Appeal in Pima County Juvenile Action B-10489, 151 Ariz. 335, 340, 727 P.2d 830, 835 (Ct. App. 1986) (invoking sodomy statute as pertinent to finding bisexual man "nonacceptable to adopt children").

Discrimination occurs despite the fact that not all gay men and lesbians engage in sodomy, by

tial penalties can be draconian. According to the Privacy Project of the National Gay and Lesbian Task Force, gay adults in Idaho, who engage in consensual sexual activity with another of the same sex, must be imprisoned for a minimum of five years. In Maryland, Mississippi, Montana and North Carolina, imprisonment can range up to ten years; in Michigan and Tennessee, up to fifteen; and in Georgia and Rhode Island, up to twenty. Repeat offenders in Michigan can be imprisoned for life.[29]

Because most of these statutes apply equally to heterosexuals as to homosexuals, it has been argued that equal protection attacks brought by lesbian and gay defendants against such statutes are without merit. However, this argument ignores the social context in which these laws are legislated:

> It can not be claimed that sodomy laws . . . which fail to distinguish between heterosexual and homosexual sodomy, do not stigmatize gays any more than they stigmatize nongays. . . . [I]n *Bowers* . . . Justice Stevens errs along this line. He accepts Georgia's position . . . that it is legitimate for laws to have a "merely symbolic" function . . . but seems to claim that Georgia's law obviously fails to be rationally related to this legitimate state function because it does not distinguish between homosexual and heterosexual acts. This view fails to understand symbols. The meaning and force of a *mere* symbol cannot be derived independently of the social behavior in which it is embedded. Whether black cats are taken as symbols of life or death has nothing to do with the nature of cats. . . . While this should be obvious, one example will clear any doubt: People who call for the retention of immigration discrimination against gays use as their main rationale that gays have to be kept out of the country lest they break state sodomy laws. Would anyone ever think of mounting the same argument for keeping heterosexuals out of the country? So sodomy laws stigmatize gays even if

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defining gay people as persons who commit sodomy. *See, e.g.*, Gay Activists v. Lomenzo, 66 Misc. 2d 456, 458, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971) (noting that "in order to be a homosexual, the prohibited act must at some time been committed, or at least presently contemplated"), *rev'd sub nom.* Owles v. Lomenzo, 38 A.D.2d 981, 329 N.Y.S.2d 181 (App. Div. 1972), *aff'd sub nom.* Gay Activists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (Ct. App. 1973); Head v. Newton, 596 S.W.2d 209, 210 (Tex. Ct. App. 1980) (finding the statement that someone is "queer" slanderous per se because it imputes the crime of sodomy), courts overemphasize the importance of certain types of homosexual sex and devalue love and companionship in a homosexual relationship. The assumption that sodomy is more essential to homosexuality than it is to heterosexuality ignores the fact that a gay man or lesbian need not be celibate to avoid violating the statutes, as most statutes do not prohibit genital-hand contact. *But see* MO. REV. STAT. § 566.010(2) (1989); MONT. CODE ANN. § 45-2-101 (1989). Sodomy statutes also provide a basis for the enforcement of laws against the solicitation of same-sex activity. *See* R.D. MOHR, *supra* note 23, at 54-55.

29. As reported in M. KIRK & H. MADSEN, AFTER THE BALL, HOW AMERICA WILL CONQUER ITS FEAR & HATRED OF GAYS IN THE 90S 656 (1989). *See also Hardwick*, 478 U.S. at 192 (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 n.9 (1986)).

they do not specifically draw attention to the similarity in gender of the offending parties.[30]

Sodomy statutes have been severely criticized for decades as being notoriously unenforceable.[31] In addition to being impractical, serious questions regarding the legitimacy of the state's interest in criminalizing private, consensual sexual activity prompted many states to initiate reforms.[32] By the 1970s, more than half of the states had decriminalized their statutes so as to permit private, consensual sexual acts. However, these reforms were achieved only after contentious battles over morality had been fought with religious leaders. For example, when in the mid-1960s the New York State legislature sought to repeal the state's sodomy law, the Roman Catholic hierarchy mounted an effective campaign that resulted in the reform movement's defeat.[33] When, finally in 1980, the New York Court of Appeals struck down the state's sodomy statute as an unconstitutional violation of privacy,[34] the church "urged that consensual sodomy must remain a crime because: 'We must take every reasonable step to inhibit [homosexuality's] spread and to eradicate it.' "[35]

Even though sodomy laws have had little practical consequences, their emotive force for large sections of society perpetuate their existence.

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30. R.D. MOHR, *supra* note 23, at 108-09 (citations omitted) (emphasis in original).

Since the 1960s, a number of states have reformed their sodomy statutes to the extent that they allow oral and anal sex between heterosexuals, but not between members of the same sex. *See, e.g.*, TEX. PENAL CODE ANN. § 21.06 (Vernon 1989). Such a distinction has given rise to equal protection arguments. *See, e.g.*, Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

For arguments used by the Immigration and Naturalization Service prohibiting the admission of gays see, e.g., Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 314-22 (1984); Fowler & Graff, *Gay Aliens and Immigration: Resolving the Conflict Between Hill and Longstaff*, 10 U. DAYTON L. REV. 621 (1985).

31. *See* R.D. MOHR, *supra* note 23, at 51 n.9. Although rare, arrests and prosecutions for sodomy are not unheard of, as *Bowers v. Hardwick* demonstrates. Even without further prosecution, the mere arrest for same-sex sodomy may result in publicity. *See, e.g.*, Comment, *The Louisiana Constitution's Declaration of Rights: Post-Hardwick Protection for Sexual Privacy?*, 62 TUL. L. REV. 767, 804 n.208 (1988) (citing testimony by John Anthony D'Emilio).

32. For law review articles which discuss the decriminalization of sodomy statutes see Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962); Schwartz, *Morals, Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581 (1967); Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W.L. REV. 115 (1968); Ford, *Homosexuals and the Law: Why the Status Quo?*, 5 CAL. W.L. REV. 232 (1969).

33. *See* N.Y. Times, Mar. 17, 1964, at 1; Nov. 25, 1964, at 43; Nov. 26, 1964, at 1; March 17, 1965 at 1; Jun. 4, 1965, at 1; Jul. 23, 1965, at 1.

34. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

35. *See* Robinson, *People v. Onofre: Can the State Peek Into Your Bedroom?*, 2 IN THE PUBLIC INTEREST 6, 6-7 (1980).

That they stigmatize gays does not seem to be, in and of itself, an adequate explanation for their continuing defense by anti-gay polemicists. After all, in a society that already holds a deep antipathy toward gay men and lesbians to begin with, it hardly seems justifiable to have a law act as a mere symbol; for when laws go unenforced, and everyone knows that they go unenforced, the legal system risks encouraging disrespect and cynicism toward law in general. Some other purpose, then, may be seen to be at work:

> When a state has unenforced sodomy laws on its books—not by oversight but even after the failure of law reform has drawn attention to their existence, and yet no attempt is made to enforce them though their frequent violation is a secret to no one—then insult is their main purpose. If the law is virtually never enforced, the law exists not out of a concern with the *actions* of gay people, but with their *status*. . . . [S]odomy laws afford an opportunity for the citizenry to express its raw hatred of gays *systematically* and *officially* without even having publicly to discuss and so justify that hatred. . . . [U]nenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum.[36]

In *Bowers v. Hardwick*, the majority of the Supreme Court of the United States upheld as constitutional the right of the states to enact statutes which have the effect of stigmatizing a whole class of American citizens.[37] Wrapped in a cloak of moral sentiment, without consideration for their dignity as persons worthy of fair treatment and equal respect under the law, the Court allows the states to attack and insult persons as persons, focusing on irrelevant behavior characteristics, without regard for their right to privacy, liberty or dignity as autonomous moral actors. There are complex psychosocial dynamics involved in such a mentality. In order to determine whether or not law and policies formulated within such a context are truly moral and democratic, it is necessary to review the history of sodomy laws as they developed over the course of millennia in Western civilization, "for these attitudes lie deep within the Judeo-

36. R.D. MOHR, *supra* note 23, at 59-60 (citations omitted) (emphasis in original).

37. Since *Hardwick* was decided by the Court, at least two states' highest courts, citing *Hardwick*, have upheld their sodomy statutes as constitutional. *See* Missouri v. Walsh, 713 S.W.2d 508, 511 (en banc) (Mo. 1986); Louisiana v. Neal, 500 So.2d 374, 378 (La. 1987). *Hardwick* was cited by the Arizona Court of Appeals holding that the state's sodomy statute justified the denial of the adoption of an elementary school child by a bisexual man because possible past, present or future violations of the statute made him an immoral role model. *See In re* Appeal in Pima County Juvenile Action B-10489, 151 Ariz. 335, 340, 727 P.2d 830, 835 (Ct. App. 1986) ("It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model, in effect approving that standard, inimical to the natural family, as head of a state created family.").

Christian tradition."[38]

II.

'Tis a shame to human nature,
such a head of hair as his;
In the good old time 'twas hanging
for the colour that it is;
Though hanging isn't bad enough
and flaying would be fair
For the nameless and abominable
colour of his hair.[39]

A. *A Queer History: Homosexuality in the Judeo-Christian Moral Tradition*

1. *Religion—Homosexuality as Sin.*

> Perhaps nowhere in the history of morals has biblical literature played a more explicit, although negative, role than in the case of the Sodom narrative. . . . [R]eferences to Sodom in writing and speaking, in law and religion, are . . . grim reminders of unredeemable degradation matched by a divine, relentless retribution. "Sodomy" is a code word that encapsulates the moral heritage of those fierce verses that have branded on human remembrance across the centuries the fire and brimstone rained by God on the disobedient. . . .[40]

The Old Testament biblical story of Sodom is, of course, where we derive the terms sodomy and sodomite. However, what is unknown by most people is that the story of Sodom never had any uniform tradition as to the nature of the offense that was committed at Sodom until the first century of the Christian era. Its exclusively homosexual interpretation was a relatively late development and one which, for that matter, was premised on faulty scriptural exegesis. The majority of contemporary biblical scholars have now concluded that the narrative is not a condemnation of gay sexuality. Rather, the offense committed by the Sodomites was inhospitality.[41]

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38. HUMAN SEXUALITY: NEW DIRECTIONS IN AMERICAN CATHOLIC THOUGHT, A STUDY COMMISSIONED BY THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA 212 [hereinafter HUMAN SEXUALITY](A. Kosnik ed. 1979).

39. Housman, *supra* note 1.

40. G.R. EDWARDS, GAY/LESBIAN LIBERATION: A BIBLICAL PERSPECTIVE 24 (1984).

41. The application of modern principles of biblical exegesis and scholarship to the oft-quoted scriptural references, which contemporary translators render as being about homosexuality, reveal that some of these passages do not involve homosexual activity between consulting adults (*Genesis*

In addition to the Sodom story, there are some dozen or so scriptural references scattered throughout both the Old and New Testaments that either do refer to, or have been held to be applicable to, homosexuality. Again, the majority of contemporary biblical exegetes have seriously questioned the nature and interpretation of these texts. Scholars have determined that they are more about Hebraic cult practices, including notions of ritual purity and nationalism, than they are about gay sexuality.[42] More importantly, none of them understands homosexuality as an immutable *orientation*,[43] something which prior to the advent of modern psychology would have been unimaginable. It must be remembered that before the nineteenth century, the concept of "homosexual" did not exist. Words that are consistently translated in the biblical texts as "homosexual" or "homosexuality" do not accurately reflect either the sense of the original language or the intent of the authors. In most instances, these words have nothing to do with individuals who today we would identify

18-19, *Judges* 19, 2 *Peter* 2:6-10, *Jude* 1:7), and that others involve sexual abuses in cultic practice, but most probably not of a homosexual type (*Deut.* 23:17-18, 1 *Kings* 14:24, 15:12, 22:46 and 2 *Kings* 23:7). Two Old Testament references (*Lev.* 18:22 and 20:13) do condemn consenting homosexual acts which is true also of St. Paul in two passages (1 *Cor.* 5-6 and *Romans* 1:18-32 and maybe 1 *Tim.* 1:1-11). However, exegetes have pointed out that none of these understood homosexuality as an "orientation." (For more on this crucial distinction, see *infra* note 43). Rather, the authors *assume* heterosexual orientation with the actors behaving contrary to their innate, "natural" predisposition.

For in-depth exegetical interpretations of biblical references to homosexuality and analysis of the Judeo-Christian sexual traditions concerning the same see generally HUMAN SEXUALITY, *supra* note 38; G.R. EDWARDS, *supra* note 40; J. BOSWELL, *infra* note 46 (especially chapters 4-6); D.S. BAILEY, *infra* note 47; N. PITTENGER, TIME FOR CONSENT: A CHRISTIAN'S APPROACH TO HOMOSEXUALITY (1970); J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL (1976); R. SCROGGS, THE NEW TESTAMENT AND HOMOSEXUALITY (1983).

42. *See supra* note 41.

43. Alfred Kinsey demonstrated that homosexual and heterosexual responsiveness to arousal in human beings is not always clearly differentiated. Kinsey's research suggested level of responsiveness as points on a continuum that ranges from exclusive heterosexual reactivity to exclusive homosexual reactivity with various gradations in between. On his seven point scale, Kinsey and his co-workers developed this continuum based on both overt sexual experience and inner psychological reactions by his subjects: 0 on the scale denotes exclusive heterosexuality; 1, predominately heterosexual, only incidentally homosexual; 2, predominantly heterosexual, but more than incidentally homosexual; 3, equally heterosexual and homosexual; 4, predominantly homosexual, but more than incidentally heterosexual; 5, predominantly homosexual, only incidentally heterosexual; and 6, exclusively homosexual. People who fall in categories 5 or 6 are referred to as having a homosexual "orientation" that is integral and obligatory to the individual's psychosexual make-up.

For further discussion see A.C. KINSEY & C.E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); A.C. KINSEY, W.B. POMEROY, C.E. MARTIN & P.H. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); *see also* A.P. BELL & M.S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978); A.P. BELL, M.S. WEINBERG & S.K. HAMMERSMITH, SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN (1981).

as lesbians or gay men.[44]

It is both bad theology and bad scholarship to wrench scriptural texts out of context selectively from various sources to construct a programmatic interpretation of their meaning. The Bible is a collection of a multitude of various books written by different authors over a period of some six thousand years in differing cultural and historical settings. One can no more look to the Bible as an authoritative guide on human sexuality than one can as an infallible text on science. Besides the fact that the Bible itself does not presume to be either, to require people to believe otherwise demands an act of faith that one should not be compelled to make.[45]

It is not only the Bible which does not speak clearly about gay sexuality. The post-biblical Christian tradition itself is remarkably inconsistent, at least from the earliest days of the church to the twelfth to fourteenth centuries. During this period of time, more than half of the Christian era, uniform legislation and enforcement of ecclesiastical or civil proscriptions against homosexuality barely existed. John Boswell, Professor and Chairman of the History Department at Yale University, has written a probing account of the complex dynamics which formed Western cultural attitudes toward homosexuality:

> The early Christian church does not appear to have opposed homosexual behavior. . . . Hostility to gay people and their sexuality became noticeable in the West during the period of the dissolution of the Roman state—i.e., from the third through the sixth centuries. . . . [Although n]either Christian society nor Christian theology as a whole evinced or supported any particular hostility to homosexuality, . . . both reflected and in the end retained positions adopted by some governments and theologians which could be used to derogate homosexual acts.
>
> Moral theology through the twelfth century treated homosexuality as at worst comparable to heterosexual fornication but more often remained silent on the issue. Legal enactments were rare and of dubious efficacy.

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44. *See supra* note 43; *see also* J. BOSWELL, *infra* note 46, at 41-59, 335-53; D'Emilio, *Making and Unmasking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. 915, 917 (1986); 1 M. FOUCAULT, THE HISTORY OF SEXUALITY 43 (R. Hurley trans. 1978) (placing the birth of the "psychological, psychiatric, medical category of homosexuality" in 1870); V. BULLOUGH, HOMOSEXUALITY: A HISTORY 7 (1979).

45. *See* HUMAN SEXUALITY, *supra* note 38, at 23-49.

> [O]ne should not look to the Bible for a systematic presentation on sex. The Scriptures are not a textbook of ethics. Only a few general lines or directions can be abstracted, and these must be interpreted historically, combined with more adequate scientific knowledge of our times. Simply lining up a catalogue of texts does violence to biblical theology and accomplishes little of value.

Id. at 27.

> The . . . eleventh century was accompanied by the reappearance of . . . a substantial gay minority. Gay people were prominent, influential, and respected. . . . Opposition to gay sexuality appeared rarely and more as aesthetic partisanship than as moral censure. . . .
>
> [However, in] the twelfth century . . . virulent hostility appeared in popular literature [which] . . . spread to theological and legal writings. . . . [T]his change [was]. . . . probably closely related to the . . . increase in intolerance of minority groups apparent in ecclesiastical and secular institutions throughout the thirteenth and fourteenth centuries. . . . This intolerance was both reflected in and perpetuated by its incorporation into theological, moral, and legal compilations of the later Middle Ages, many of which continued to influence European society for centuries.[46]

2. *Law—Homosexuality as Crime.* Anglican biblical scholar Derrick Sherwin Bailey traced the legal antecedents which served as a justification for the severe proscriptions against homosexual acts in the thirteenth and fourteenth centuries to Christian emperor Justinian's Code. Contained within the Code there is recorded probably the most influential civil sodomy statute in Western civilization. Dating from the sixth-century, when the Roman Empire in the West was on the verge of collapse and Justinian, as emperor in the East, was attempting to insure survival of what remained, the logic of the statute relies on what was by then the conventional understanding of the biblical Sodom narrative. Promulgated in A.D. 538, Justinian's 77th Novella reads:

> [S]ince certain men, seized by diabolical incitement, practise among themselves the most disgraceful lusts, and act contrary to nature: we enjoin them to take to heart the fear of God and the judgment to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities perish with all their inhabitants. For we are taught by the Holy Scriptures that because of like impious conduct cities have indeed perished, together with the men in them.[47]

For violations of the statute, homosexuals were to be tortured, mutilated, paraded in public, and executed.[48] In spite of its moral tone, Boswell points out that Justinian's motive in criminalizing gay sexuality was

46. J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 333-34 (1980). *See also* Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1080-1091 (1988). Moreover, the tradition relied upon by the majority in *Hardwick* does not justify singling out same-sex sodomy for special treatment. *See* J. D'EMILIO & E. FREEDMAN, INTIMATE MATTERS 30 (1988). Nor do the historical prohibitions apply to oral sex. *See* Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181, 1184 (1988).

47. D.S. BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 73 (1955).

48. *See* 6 PROCOPIUS, WORKS 141 (1935).

not to turn contemporary understandings of Christian morality into civil law. For example, in Novella 140, on the basis of common consent, marriages could be dissolved in complete contradiction of both the New Testament and the early church fathers.[49] Moreover, "not in all cases . . . was this punishment inflicted . . . but only upon those reputed to be Greens [a political faction] or to be possessed of great wealth or those who in some way chanced to have offended the rulers."[50]

From history, it appears that Novella 77 was not concerned with the legislation and enforcement of morality. Although clothed in religious garb, the statute's enforcement seems to have been based on purely political considerations, facilitating dominance and control over groups which the power structure either feared or could not tolerate. It is a political truism that "accusing a person of any major deviance has long been a good way to get him in trouble for other deviances. . . ."[51]

In Western civilization, whenever the social structure has been faced with a major crisis, whether of a political, religious or cultural nature, the majority has consistently treated its minorities with suspicion and censure. This has been demonstrably true for lesbians and gay men. "The ancient Hebrews equated homosexuality with idolatry and treason; Roman law demanded the death penalty for treason, sacrilege and sodomy; the church fathers associated sexual deviance with paganism. In the recent past, we saw a national obsession with the homosexual as a security risk, loyal to godless communism."[52] Throughout Western history, "homosexuality has remained a common charge against people whose social, class, or political characteristics arouse antagonism."[53]

Sexuality immediately sets the gay man or lesbian apart from the heterosexual majority and, in periods of societal stress, gays have often been cast in the role of sexual heretic and traitor. Nowhere has this combination been more clearly illustrated than in that period which Boswell describes as taking place during the High Middle Ages. Using the Bible, religion and morality as a means to solidify its hold on power, the church, along with the state, used "sodomy" as a vehicle to suppress and persecute minorities whose differences from the majority they could

49. J. BOSWELL, *supra* note 46, at 172. *See also* GIBBONS, 4 THE DECLINE AND FALL OF THE ROMAN EMPIRE 439 (1910) (Gibbons states that Justinian's law on homosexual acts was a ruse for charging those with a crime "to whom no crime could be imputed.").

50. PROCOPIUS, *supra* note 48, at 144 (parenthetical added).

51. Karlen, *Homosexuality in History*, in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 75, 89 (J. Marmor ed. 1980) (citations omitted).

52. *Id.* at 88 (citations omitted).

53. *Id.* at 89 (citations omitted).

either not tolerate or perceived to be a threat to their dominance and control.

In the eleventh and twelfth centuries, many religious splinter groups began to appear in parts of Europe. One of the most important and influential of these groups were the Cathars, or Albigensians. They advocated nonviolence, the end of private property, and "spiritual," *i.e.*, chaste marriages. As the movement grew in size and influence, especially in southern France, it attracted the angry attention of the Inquisition.

> Opponents claimed that in order to maintain chastity, the Cathars sodomized their wives; in this they were said to be like the heretical Bogomile sect of Bulgaria. The French word *bougre* came into use for sodomite, a corruption of the Latin *bulgaris*. It passed into English as "bugger." Today the commonest English word for anal intercourse, used synonymously with homosexuality, is an old word for heretic.
>
> Pope Innocent II launched a crusade of a half million men, who slaughtered the Cathars throughout Provence. Other heretical sects were accused of sexual deviance and destroyed. The Adamites, Hussites, Brethren of the Free Spirit, and Waldensians were variously accused of sodomy, incest, bestiality and orgy. . . .
>
> Philip IV of France and Pope Clement V were . . . ruthless in defaming and destroying the Order of the Knights Templars as sodomites and heretics in the early fourteenth century in order to seize their treasury. Inquisitors got Templars to admit under torture that . . . they had been required to spit on the cross, enter a pact with the Muslims, and commit sodomy with any Templar who demanded it. This formula of charges—heresy, treason, and homosexuality—became routine in heresy and witchcraft trials.[54]

As with Justinian, the medieval ruling authorities appropriated for themselves one politically expedient interpretation of the biblical sources in order to exercise power and control. In the process, they established their use of the texts as the only official, unquestioned and "orthodox" interpretation, erecting precedents both with respect to Western sexual morality and civil law. Since the close of the fourteenth century, both moral theology and jurisprudence have, in no uncertain terms, reflected this understanding:

> [T]here is nothing in the English-American social structure which has had more influence upon present patterns of sexual behavior than the religious backgrounds of that culture. It would require long research and a complete volume to work out the origins of the present-day religious codes which apply to sex, of the present-day sex mores, of the coded sex laws, and to trace the subtle ways in which these have influenced the behavior of individuals. . . . Ancient religious codes are still the prime source of the attitudes,

54. *Id.* at 88-9 (citations omitted) (emphasis in original).

the ideals, and the rationalizations by which most individuals pattern their sexual lives.[55]

Even as late as the 1950s in the United States, the impact of this heritage was the driving force behind the preservation of sodomy legislation in the fifty states. In his attempt to undertake a comprehensive revaluation of homosexuality in Christian theology, Bailey closed his 1955 book with the thirteenth century because, in his words, "it does not appear that the tradition has undergone any significant alteration since that time."[56] John D'Emilio, a well-known historian of sexual history, has written that Bailey "found the antihomosexual interpretation of the Sodom episode 'accepted without question' and at the base of 'the thought and imagination of the West on the matter of homosexual practices.' "[57]

D'Emilio's writings shed a great deal of light on the transplantation of Western Europe's moral terror of gay sexual practices to America:

> Biblical condemnations of homosexual behavior suffused American culture from its origin. . . . Colonial ministers railed against sodomy in their sermons. . . .
>
> The law stipulated harsh punishments for homosexual acts. Colonial legal codes . . . prescribed death for sodomy, and in several instances the courts directed the execution of men found guilty of this act. . . . Although . . . states abolished the death penalty . . . all but two in 1950 still classified it as a felony. Only murder, kidnapping, and rape elicited heavier sentences.
>
> Although comparatively few . . . suffered the full punishment permitted under these laws, the statutes imposed the stigma of criminality upon same-sex eroticism. The severity with which the legislature and magistrates viewed homosexual behavior . . . buttressed the enforcement of a wide range of other penal code provisions against homosexuals and lesbians. . . . Court proceedings seemed designed to instill feelings of shame and obliterate self-esteem. . . . [J]udges commonly directed gratuitous, abusive language at defendants.[58]

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55. A.C. KINSEY, *supra* note 43, SEXUAL BEHAVIOR IN THE HUMAN MALE, at 465.

56. D.S. BAILEY, *supra* note 47, at viii; *cf.* 27, 152.

57. J. D'EMILIO, *supra* note 24, at 13-14 (quoting D.S. BAILEY, *supra* note 56).

58. *Id.* at 13-15 (citations omitted). D'Emilio notes that,

> Through penal code revisions and court rulings, statutes had also become more inclusive in the course of the nineteenth and twentieth centuries. State legislatures rewrote laws and judges reinterpreted them, so that erotic activity between women and oral sex between men fell within the domain of the sodomy and "crime against nature" statutes. . . .
>
> As a gay subculture took root in twentieth - century American cities, police invoked laws against disorderly conduct, vagrancy, public lewdness, assault, and solicitation in order to haul in their victims. Gay men who made assignations in public places, lesbians and homosexuals who patronized gay bars, and occasionally even guests at gay parties in

3. *Psychiatry—Homosexuality as Illness.* Reinforcing the prohibitions against homosexuality which now suffused Western law and morality, a new, third influence did much to confirm and justify in the minds of many the legitimacy of their condemnation. Increasingly, gay men and lesbians found themselves the object of intense medical attention. "Besides facing the moral condemnation of the churches and the punishments imposed by law, gay men and women found themselves scrutinized by a medical profession that diagnosed homosexuality as a disease."[59]

Hidden within another ironic fold of history, it is often forgotten that Sigmund Freud, the founder of psychoanalysis, did not himself consider homosexuality to be a psychopathology. Yet, the strongest proponents of homosexuality as a mental illness have been psychoanalysts. In his *Three Essays on the Theory of Sexuality*, Freud had written that homosexuality "is found in people who exhibit no other serious deviations from the normal . . . whose efficiency is unimpaired, and who are indeed distinguished by specially high intellectual development and ethical culture."[60] Again, in an interview reported in a Vienna newspaper, Freud is quoted as saying that he was of the firm conviction that "homosexuals must not be treated as sick people. . . . Wouldn't that oblige us to characterize as sick many great thinkers and scholars of all time, who's . . . orientation we know for a fact and whom we admire precisely because of their mental health? Homosexual persons are not sick."[61]

Freud was adamantly consistent in this matter throughout his entire

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private homes risked arrest. Vice squad officers, confident that their targets did not dare to challenge their authority, were free to engage in entrapment. Anxious to avoid additional notoriety, gay women and men often pleaded guilty even when police lacked sufficient evidence to secure convictions.

Id. at 14-15 (citations omitted).

For more detailed documentation of gay life in American history see J. KATZ, GAY AMERICAN HISTORY (1976); J. KATZ, GAY LESBIAN ALMANAC (1982); A. BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990). For documentation of homosexual activity in colonial America see Oaks, *Things Fearful to Name: Sodomy and Buggery in Seventeenth-Century New England*, 12 J. OF SOC. HIST. 268 (1978); V.L. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY 504 (1980).

59. J. D'EMILIO, *supra* note 24, at 15. For an analysis of the development of sexuality as a field of medical science and research see M. FOUCAULT, *supra* note 44; J.S. HALLER & R.M. HALLER, THE PHYSICIAN AND SEXUALITY IN VICTORIAN AMERICA (1974); J. KATZ, *supra* note 58, GAY AMERICAN HISTORY, at 129-207; J. D'EMILIO & E. FREEDMAN, *supra* note 46.

60. Freud, *Three Essays on the Theory of Sexuality*, in 7 THE STANDARD EDITION OF THE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 135, 138-39 (J. Strachey trans. 1933). For a critique of the moral repercussions of Freudian analysis see Murphy, *Freud Reconsidered: Bisexuality, Homosexuality, and Moral Judgment*, 9 J. OF HOMOSEXUALITY 65 (1984).

61. Die Zeit (Vienna) Oct. 27, 1903, at 5.

life. In his now famous "Letter to an American Mother," Freud wrote: "Homosexuality . . . is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness."[62] In a similar correspondence with Ernest Jones in 1921, in which Jones had expressed his contention that it was improper to admit a doctor widely known to be a gay man into membership in the psychoanalytic association, Freud and Otto Rank jointly replied that: "[W]e cannot exclude such persons without other sufficient reasons, as we cannot agree with their legal prosecution. We feel that a decision in such cases should depend upon a thorough examination of the other qualities of the candidate. . . ."[63]

In spite of Freud's clear position on homosexuality, his followers used psychoanalysis as a "scientific" justification for keeping both moral and legal sanctions firmly in place.

> Medical views bore a complex relation to the older perspectives of religion and law. In important ways they reinforced the cultural matrix that condemned and punished persons who engaged in homosexual activity. Whether seen as sin, crime, or sickness, homosexuality stigmatized an individual. Doctors did not ply their trade in a vacuum . . . and the language of the moralist permeated the scientific literature.[64]

In analyzing the "scientific" arguments concerning the abnormality of gay sexuality, Judd Marmor, Adjunct Professor of Psychiatry at the University of California Los Angeles School of Medicine, Professor of Psychiatry Emeritus at the University of Southern California School of Medicine, and past president of the American Psychiatric Association, has concluded that psychoanalytic theories concerning homosexuality, many of which are mutually contradictory and none of which are pathognomonic for all homosexuals, are based on therapeutic experiences with neurotic homosexual patients. To attribute these theories to all gay people is as unwarranted as similar generalizations about heterosexuals would be based only on experiences with neurotic heterosexuals.

> Countless objective psychological tests have been done by now on nonpatient groups of homosexuals with matched groups of heterosexuals. . . . With surprising uniformity, the vast majority of these studies have shown few, if any, significant differences in personality structure between the two groups and no greater psychopathology among nonpatient homosexuals than among matched heterosexual controls. . . .

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62. Freud, *Letter to an American Mother*, 102 AM. J. OF PSYCHIATRY 786 (1951).

63. Letter from Sigmund Freud and Otto Rank to Ernest Jones (December 11, 1921) (The correspondence between Freud, Rank and Jones was discovered in the course of research by J.D. Steakley and was subsequently published in *Body Politic*, May 1977, at 9).

64. J. D'EMILIO, *supra* note 24, at 17-18.

> It is manifestly unwarranted and inaccurate . . . to attribute . . . neuroticism . . . to intrinsic aspects of homosexuality itself. . . . In actual fact many homosexuals, both male and female, function responsibly and honorably in positions of the highest trust and live emotionally stable, mature, and well-adjusted lives that are indistinguishable from those of well-adjusted heterosexuals, except for their different sexual preferences.[65]

Similar conclusions, having been reached by eminent and well-respected mental health professionals from years of objective research, prompted the Board of Trustees of the American Psychiatric Association, in December 1973, to remove homosexuality as a mental illness from the second edition of the APA's Diagnostic and Statistical Manual for Mental Disorders (DMS-II). In reflecting upon the cultural dynamics which formed the psychosocial structure of Western society's treatment of its gay members, Marmor confirms that,

> [t]he legal, moral and stigmatizing aspects of the issue of homosexuality are so closely intertwined as to be almost inseparable. The laws of a society, in matters such as these, are simply encoded reflections of its moral values. In Western culture in general, the prevailing attitudes toward homosexuality derive from Judeo-Christian tradition. . . .
>
> [P]rimarily on the basis of these religious teachings, homosexuals have been subjected to legal discrimination and persecution throughout Western culture . . . at times in proportions bordering on genocide. . . .
>
> Clearly, behind this selective focus on the "unnatural sin" of homosexuality lie deep-seated fears and anxieties—fears that have [been] . . . subsumed under the concept of *homophobia*. . . .
>
> [T]he etiology of homosexuality is affected by many factors, some possibly genetic or constitutional. . . . People do not "choose" to be homosexual any more than they "choose" to be heterosexual. . . .
>
> The vast majority of homosexual men and women ask only to be accepted as human beings and allowed to live their lives free of persecution or discrimination. . . .
>
> [T]he legalization of homosexual behavior between consenting adults and the outlawing of discriminatory practices against homosexuals is a first and necessary step in making it possible for the millions of men and women [who] . . . through no fault of their own, have [been] rendered . . . erotically responsive to their own sex to live lives of dignity and self-respect.[66]

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65. Marmor, *Epilogue: Homosexuality and the Issue of Mental Illness*, in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 400 (J. Marmor ed. 1980) (citations omitted).

66. Marmor, *Overview: The Multiple Roots of Homosexual Behavior*, in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 18-21 (J. Marmor ed. 1980) (citations omitted) (emphasis in original). Kinsey supports Marmor's assertion that psychoanalytic and legal doctrines merely reflect encoded religious teachings. According to Kinsey, "[S]cientific classifications . . . [are] nearly identical with theologic classifications and with moral pronouncements of the fifteenth century." A.C. KINSEY, *supra* note 43, SEXUAL BEHAVIOR IN THE HUMAN MALE, at 202. Marmor notes that,

B. *Conclusion*

Religion, law and science are the three great pillars of Western civilization. Yet, individually and combined, their invocation has been used to excoriate the West's minorities. One only has to reflect on the plight of Europe's Jews or America's Native Americans and Blacks to understand the degree to which intolerance and oppression have found force in their perversion.

Gay people, no less, have had their identity and history shaped by the majority's perceptions of them. Religion manipulated Scripture to accuse them of sin, the law used religion to judge them as felons, and science rationalized the results by diagnosing them as diseased. Together, the three labeled gay men and lesbians as immoral, criminal and

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> Genocidal laws against homosexuals remained in the criminal codes in France until 1791, in England until 1861, and in Scotland as late as 1889. . . . [H]omosexuals were subject to capital punishment in a number of American colonies. . . . [I]n Hitler's Germany estimates . . . of the number of homosexuals who died . . . range . . . to more than 400,000.

Marmor, *supra*, at 18-19.

For biographical accounts of Nazi persecution of homosexuals see H. HEGER, THE MEN WITH THE PINK TRIANGLE (D. Ferribach trans. 1980); R. PLANT, THE PINK TRIANGLE, THE NAZI WAR AGAINST HOMOSEXUALS (1986).

"Homophobia" is defined by Marmor as "a pathological fear of homosexuality usually based on one or more of the following factors: (1) a deep-seated insecurity concerning one's own sexuality and gender identity, (2) a strong religious indoctrination, or (3) simple ignorance about homosexuals." Marmor, *supra*, at 19. *See also* G. WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL (1973) (the work which coined the term 'homophobia'). In analyzing the role of homophobia in law and legislation, Marmor comments that,

> There is no doubt that ultimately an enlightened and civilized society must rid itself of its homophobic fears and prejudices . . . . [L]egal sanctions against homosexual behavior, . . . have no effect on the incidence of homosexuality; there is no evidence that its frequency is any higher in countries like France, Sweden and the Netherlands, where it has been decriminalized, than in the United States, where it has not. . . .
>
> [T]here is an increasing trend in the Western world . . . to legalize homosexual behavior between consenting adults in private, and to also outlaw discrimination against homosexuals in employment, housing, public accommodation and licensing. It should be emphasized that, contrary to homophobic propaganda, such legislation does not mean the condoning of the seduction of minors or the violation of reasonable standards of public decency. . . .

Marmor, *supra*, at 20.

For a discussion of possible biological and genetic links in homosexual development see J. MONEY, GAY, STRAIGHT, AND IN-BETWEEN: THE SEXOLOGY OF EROTIC ORIENTATION (1988); Money, *Genetic and Chromosomal Aspects of Homosexual Etiology*, in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 59 (1980); M. RUSE, HOMOSEXUALITY (1988); Tourney, *Hormones and Homosexuality*, in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 41 (1980); F. WHITMAN & R. MATHY, MALE HOMOSEXUALITY IN FOUR SOCIETIES (1986) (chapter 7); R.C. Pillard & J.D. Weinrich, *Evidence of Familial Nature of Male Homosexuality*, in 43 ARCHIVES OF GENERAL PSYCHIATRY 808 (1986); *see also* A.P. BELL, M.S. WEINBERG & S.K. HAMMERSMITH, *supra* note 43.

sick. But as research and scholarship make clear, the sources from which justifications for this moral stigmatization are alleged to arise seem not so much to condemn homosexuality as much as society's intolerance of homosexuality is being used to interpret the sources.

The West's religiously-based moral heritage with respect to lesbians and gay men is, at best, disingenuous and, at worst, corrupt. It represents and perpetuates a legacy of intolerance, oppression and hatred which cannot legitimately be invoked against gay people with any consistency and still be characterized as moral. The extent to which our constitutional democracy allows sectarian elements to establish this tradition as the official state morality, with the imprimatur of the government and courts, is to seriously call into question whether or not a violation of the First Amendment's establishment clause is taking place. Its continuing and pervasive influence over law, policy and politics in this nation subjugates millions to a hegemonic system of religiously-based morality while disenfranchising them from democratic entitlements which others take for granted.

III.

Oh a deal of pains he's taken
and a pretty price he's paid
To hide his poll or dye it
of a mentionable shade;
But they've pulled the beggar's hat off
for the world to see and stare,
And they're hauling him to justice
for the colour of his hair.[67]

What is shocking and wrong is not the idea that the community's morality counts, but what counts for the community's morality.
H.L.A. Hart

A. *Moral Decision-Making in Democratic Law and Policy*

1. *Descriptive and Normative Morality.* In their opinion in *Hardwick*, the majority justified their refusal to entertain an equal protection challenge to Georgia's sodomy statute under the Fourteenth Amendment's due process clause with the simplistic rationalization that the law

67. Housman, *supra* note 1.

expressed a legitimate state purpose in promoting "morality."[68] Moreover, the Court defined morality to mean "the majority sentiments about morality."[69] However, what if ten years from today the majority changes its mind, and what was previously immoral is now deemed to be moral? Such has been the case with issues ranging from contraception to divorce in the past thirty years. Surely morality as a concept must stand for more than what the latest opinion poll indicates is the mood of the majority, and certainly law must be based on more than majoritarian whimsy and arbitrary caprice.

The *Hardwick* Court errs in that it employs a merely descriptive notion of morality, which is to say that, for them, morality simply consists of the current belief system accepted by the majority in society. In utilizing this general descriptive approach, "every society has a morality—even Nazi society, which had racism and mob rule as central features of its popular 'morality.' "[70] It follows that simply appealing to "majority sentiment" as a rationale for upholding Georgia's sodomy statute is illegitimate. For "a lot of [people] saying something is good, even over eons, does not make it so. Our rejection of the long history of socially approved and state-enforced slavery is a good example of this principle at work. Slavery would be wrong even if nearly everyone liked it."[71]

In order to prevent morality from being reduced to an entirely relative concept, it is necessary to have a conception of morality which is in some sense normative. A normative morality must be consistent, one to which all citizens can give their assent and, when applied, does not evidence prejudice or intolerance. By virtue of a common humanity, all persons are equal with respect to their dignity as persons. One person cannot be more or less of a person than some other persons. Thus, the equality to which all persons must be entitled to under just and moral laws is a circumstantial equality: an equality which requires that all be accorded equal status of citizenship with suffrage, and equal rights and consideration in the formulation of those laws under which they live. This we call the moral attitude: the acceptance of the equal worth of all.

A law is moral in according a citizen unequal treatment only to the

68. *Hardwick*, 478 U.S. at 196. Although dismissed out of hand by the Court citing "moral" justifications, equal protection arguments against sodomy statutes are far from exhausted. *See, e.g.*, SEXUAL ORIENTATION AND THE LAW 15-24 (Harvard Law Review eds. 1990). *See also infra* notes 106-109 and accompanying text.

69. *Hardwick*, 478 U.S. at 196.

70. R.D. MOHR, *supra* note 23, at 31.

71. *Id.* at 32.

extent that the claims of all to equality require it. For example, assuming an a priori equal claim of all to the right to life, citizens who violate that right may be constrained by law in their liberty to act as they please. One has liberty of action only with respect to the claims of all to circumstantial equality. Thus, when one violates the equality of others, she has acted immorally and may be legitimately constrained for the benefit of all. However, where the equal claim to a right is not at issue, a law which imposes merely arbitrary constraints manifests an immoral attitude by violating a person's right to dignity of personhood as an autonomous moral actor.[72]

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72. My standard of equal rights and equal consideration as a moral standard is influenced by the liberal legal theorist John Rawls. *See* J. RAWLS, A THEORY OF JUSTICE (1971); Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY, AND LAW: SELECTED TANNER LECTURES ON MORAL PHILOSOPHY (S.M. McMurran ed. 1987).

Much has been written concerning Rawls' A THEORY OF JUSTICE. *See, e.g.*, B. BARRY, THE LIBERAL THEORY OF JUSTICE: A CRITICAL EXAMINATION OF THE PRINCIPLE DOCTRINES IN 'A THEORY OF JUSTICE' BY JOHN RAWLS (1973); R. DWORKIN, TAKING RIGHTS SERIOUSLY 248-54 (1977); R.P. WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE (1977). Rawls' theory has held a pre-eminent position in contemporary moral and legal philosophy for nearly a quarter century. Recently, however, his approach has been increasingly challenged for elevating justice as the primary virtue in society over and against any communitarian good. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). *But see* J. REIMAN, JUSTICE & MODERN MORAL PHILOSOPHY (1990) (especially 206-12 critiquing Sandel and reinterpreting Rawls). Communitarians such as Sandel have contended that in order to postulate justice as the primary virtue over any particularized end or good, one must presuppose the nature of the moral subject as separate from his own particular end. Otherwise, one could not conceive of any rules which would be reasonable for the moral subject independent of his own particular end.

The communitarians have taken Rawls to mean that the primacy of justice as conceived in his "original position" posits the moral actor as choosing his end from among a range of possible ends, rather than as discovering his own end within himself as connected to, or constitutive of, who he is. From the communitarian perspective, what Rawls proposes is that, "[w]hat separates us is in some important sense prior to what connects us—epistemologically prior as well as morally prior. We are distinct individuals first, then we form relationships and engage in co-operative arrangements with others. . . ." M. SANDEL, *supra*, at 133.

For communitarians, this cannot conceivably be the case since such a moral actor cannot be shown to exist. According to these critics, the moral subject is inseparable from his end. Thus, Rawls' A THEORY OF JUSTICE is premised on a misconceived philosophical anthropology. Feminist theorists have also criticized Rawls for emphasizing justice over an ethic of care, without which they contend morality lacks a wholeness which an emphasis on rights can never achieve: "While an ethic of justice proceeds from the premise of equality—that everyone should be treated the same—an ethic of care rests on the premise of nonviolence—that no one should be hurt . . . ." C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 174 (1982). *See also* Matsuda, *Liberal Jurisprudence and Abstract Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986). For feminist critiques of communitarian thought see A. MCLNTYRE, AFTER VIRTUE: A STUDY OF MORAL THEORY (1981); Greechner, *Feminist Concerns with the New Communitarians: We Don't Need Another Hero*, in LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? 119 (1989).

Notwithstanding the critics, who's projects seem to be more deconstructionist than alternative,

> [A] comprehensive and defensible morality can be founded on consideration of its effects on the members of a moral society and in no other way. Long-run practical considerations indicate the desirability of certain attitudes. . . . [S]imilarly, long-run considerations of one's relationships with others indicate the desirability of the moral attitude, which is defined as the acceptance of the equal worth of all. . . .
>
> [A] community (or an attitude, a system of laws, etc.) [is] moral insofar as it accepts the principle that every person has equal rights. . . . To "have equal rights" is to have an equal *claim* to consideration, and a society with this commitment can justify divergences of *actual* consideration only when these can be shown to be required in order to serve the claims of all.[73]

Any "morality" which, instead, seeks to impose a merely descriptive morality based on "majority sentiments," no matter how widely or strongly held, should be rejected as normative, for "[t]he voice of the people is not the voice of morality."[74] "[T]he ultimate appeal is to an objective truth and not to our beliefs about it."[75] Similarly, appeals to standards of morality based on religious origins, which have as their premise a divine revelation, cannot legitimately serve as a normative morality. For, even given the existence of God,

we would still need *independent* standards of morality by which to tell if

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Rawls nevertheless re-articulates for contemporary society the Kantian "categorical imperative" that persons are to be treated as an end rather than a means. Every person in society is to be accorded the same rights as every other person, irrespective of position, wealth or status, and no person may gain an advantage at the expense of another. Personal liberty may be curtailed only in the event that not to do so would present a serious infringement on the liberty of another. Moreover, as J. REIMAN, *supra*, points out, "justice limits force to that amount that protects everyone from being subjugated by others, it protects the social space in which individuals can voluntarily embrace a relationship with others." *Id.* at 212.

Although Rawls has not spoken directly to the issue of gay sexual activity, his theory nevertheless implies certain obvious conclusions. If people are "to have an equal right to the most extensive total system of liberty compatible with a similar system of liberty for all," J. RAWLS, A THEORY OF JUSTICE, *supra*, at 302, it follows that if the system of liberty entails a basic right to consensual sexual expression, everyone must have the freedom to pursue that right with whomsoever one pleases. Rawls himself supports this proposition. Even though he does not offer a discussion of sexual freedom in his work, he has nevertheless remarked that principles of justice require that the state tolerate sexual relationships which some members of society might find "degrading and shameful." *Id.* at 331. Thus, as Dworkin has stated,

> We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.

R. DWORKIN, *supra*, at 182.

73. M. SCRIVEN, PRIMARY PHILOSOPHY 299, 240-41 (1966) (parenthetical in original) (emphasis in original).

74. *Id.* at 294.

75. *Id.* at 232.

> God is good. For, if the standards are not independent, it is only a definitional truth that He is good; and it cannot then be a definitional truth that we should do what is good, since neither definition implies the other. In fact, we have to choose between two definitions; and one choice leads to a secular morality, the other to a pointless one.[76]

Likewise, appeals to the Bible for standards of morality are faulty. It is irrational to insist that the Bible is the final arbiter of morality simply because it is claimed that the Bible is the ultimate moral authority, either because of its alleged divine origins or its time-honored status in Western culture. Without an independent and objective criteria against which to measure the morality of the Bible's position on a given issue, the arguments simply become tautological. This type of reasoning may be appropriate for an act of blind faith, but it is a type of reasoning which no one should be compelled to make short of external, independent and objective criteria by which to determine whether or not the Bible's position on a topic is, in fact, a moral one.

A normative morality, then, must be a "secular morality," one which is both "objective" as to principles and "independent" as to standards. Otherwise, we are left only with subjectivity and bias: a free-floating conception of morality propelled under the influence of majoritarian prejudices. The inevitable result is the suppression of equal rights without rational justifications. Participatory and representative democracy, above all other forms of government, is predicated by definition on a conception of normative morality; for when the constitution of a country talks about all the people being equal,

> it does not imply they are equally strong, intelligent or virtuous, and it does not imply they should receive equal incomes; it simply means they have equal rights, i.e., they must be given equal consideration in the formulation and application of the law of the land and the actions of its government and people. . . . [T]he axiom of equal rights, which we have taken to define morality, is often thought of as a definition of democracy.[77]

When it comes to the subject of homosexuality, there is a presumption in America that "millennia of moral teaching" condemns it. This is simplistic as it is inaccurate. To the extent that it is a "moral" evaluation, it is clearly a descriptive morality based on popular sentiment and conviction which have as their ground certain Western Judeo-Christian religious doctrines concerning the morality of gay sexuality. That there are, in fact, many non-Western societies which tolerate, and even en-

76. *Id.* at 233 (emphasis in original).
77. *Id.* at 242.

courage, homosexuality, indicates the extent to which these Western moral assumptions are culturally conditioned and parochial.[78] "Anthropology has shown that each and every society—however much it may differ from the next—thinks that its own central norms are dictated by and conform with nature writ large. That this is so should raise doubts that neutral principles are to be found . . . that will condemn homosexuality."[79] Daniel Maquire, Professor of Ethics at Marquette University, has written that we are ethically obliged to reject cultural principles which have as their foundation erroneously-based assumptions:

> [W]e may have to leave our principles when we discover they have spurious origins. There are bad principles, just as there are bad prophets. Principles are not *ex nihlo*. Their breeding ground is history. . . . [P]eople in evaluating the eroticism of persons who are homosexual, operate out of a principle that bans all homosexual love-making. The roots of that principle are as many as they are suspect . . . bad biology . . . depersonalized views of sexuality . . . bad exegesis of the Judaeo-Christian scriptures . . . those whose own heterosexual identity is unsure. The issue of homosexual love-making cannot be handled by reasonings which simply resonant with tainted origins.[80]

The dissenting Justices in *Hardwick* understood that just laws in a democratic society must be based on a normative morality of equal rights and equal consideration, not "majority sentiments." They criticized the majority for ignoring the Court's own precedents which had struck down as unconstitutional attempts by government to enforce popular biases and prejudices:

> The assertion that 'traditional Judeo-Christian values proscribe' the conduct involved . . . cannot provide an adequate justification. . . . That cer-

78. *See* THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR (E. Blackwood ed. 1986); Carrier, *Homosexual Behavior in Cross-Cultural Perspective,* in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 100-22 (J. Marmor ed. 1980); G. HERDT, GUARDIANS OF THE FLUTE: IDIOMS OF MASCULINITY 232-39; 284-88 (1981); G. HERDT, RITUALIZED HOMOSEXUALITY IN MELANESIA (1984); B. HINSCH, PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA (1990); W. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE (1986) (especially pages 18-22); Roscoe, *A Bibliography of Berdache and Alternative Gender Roles Among North American Indians,* 14 J. OF HOMOSEXUALITY 81 (1987); Whitehead, *The Bow and the Burden Strap: A New Look at Institutionalized Homosexuality in Native North America,* in SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 80 (Ortner and Whitehead eds. 1981). *See generally* C.A. TRIPP, THE HOMOSEXUAL MATRIX (1975); D. WEST, HOMOSEXUALITY RE-EXAMINED 132-36 (1977) (reviewing the anthropological research involving homosexual practices in non-Western societies).

79. R.D. MOHR, *supra* note 23, at 37 (citations omitted).

80. Maquire, *Death and Resurrection of Moral Theology, reprinted in* COMMONWEALTH, Nov. 15, 1974, at 144-45.

tain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgment on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond conformity to religious doctrine. . . . A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. 'The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect.' No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'[81]

2. *The Phenomenology of Stigma: The Spoiled Identity.* Legal language is neither innocent nor accidental. Ostensibly, the intent of the majority's decision to uphold Georgia's sodomy statute was to allow the legislation of "morality." However, if purpose may be inferred from effect, it is demonstrably true that the effect of such legislation has been to promote a religiously-based moral stigma against gay men and lesbians, not enforce standards of "morality."[82] Thus, the Court's purpose in up-

81. *Hardwick*, 478 U.S. at 212 (Blackmun, J., dissenting) (citations omitted) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

82. Moreover, the variously suggested non-moralistic rationales for the legislation and enforcement of sodomy statutes are equally without merit or defensibility. Arguments that gay men disproportionately molest children have been discredited. *See* R. GISSER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 75 (1979). Because no commentators have asserted a correlation between lesbianism and child molestation, no research has been conducted to disprove such a claim.

Sodomy statutes do not encourage or strengthen heterosexual marriage. *Cf.* Geis, *Reported Consequences of Decriminalization of Consenting Adult Homosexuality in Seven States*, 1 J. HOMOSEXUALITY 419 (1976) (noting that the decriminalization of sodomy has had no effect on the amount of private homosexual behavior).

An alleged state interest in the protection of public health also fails. Although the disproportionately high incidence of AIDS among gay men might support a state's argument that an important governmental health interest is at stake, lesbians as a group have almost no risk of contracting the disease through sexual contact. *See* Meuller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 L. MED. & HEALTH CARE 250, 256 (1986) ("At present there is no evidence of [HIV] transmission between lesbians."). Furthermore, members of the gay male community have modified their sexual practices to a remarkable degree to reduce the risk of contracting AIDS. *See* Martin, *The Impact of AIDS on Gay Male Sexual Behavior in New York City*, 77 AM. J. PUB. HEALTH 578, 581 (1987); Winkelstein, Padian, Wiley, Lang, Anderson & Levy, *The San Francisco Men's Health Study III: Reduction in Human Immunodeficiency Virus Transmission Among Homosexual/Bisexual Men*, 1982, 77 AM.J. PUB. HEALTH 685, 687-88 (1987).

Even if sodomy statutes were more narrowly tailored to prohibit only same-sex sodomy between males, they would still be grossly overinclusive, as not all prohibited acts carry a high risk of transmission. *See* Padian, Marquis, Francis, Anderson, Rutherford, O'Malley & Winkelstein, *Male-to-Female Transmission of Human Immunodeficiency Virus*, 258 J. A.M.A. 788, 789 (1987) (noting that oral sex appears not to have accounted for any reported cases of transmission). *But see* Toaani,

holding Georgia's statute, while at the same time rejecting an equal protection challenge, is to intentionally perpetuate the stigmatization of gays as immoral, criminal and sick.

Stigma is a concept employed to describe that process whereby an individual or group of individuals as a whole are characterized as unworthy by the dominant culture[83] and, in particular, a method by which people are labeled and treated by the majority as inferior.[84] This phenomenon has been demonstrated to exemplify the treatment of gay men and lesbians by heterosexuals in the Judeo-Christian West.[85] Specifically, whenever an individual,

> is presented before us, evidence can arise of his possessing an attribute that makes him different from the others . . . in the extreme, a person who is quite thoroughly bad, dangerous, or weak. He is thus reduced in our minds from a whole or usual person to a tainted, discounted one. Such an attribute is a stigma.[86]

In our Western culture, three distinct personal attributes can be discerned which generally form the base from which an individual is stigmatized:

> First, there are abominations of the body—the various physical deformities. Next, there are blemishes of individual character perceived as weak will, domineering or unnatural passions . . . these being inferred from a known record of, for example, mental disorder, imprisonment, addiction, alcoholism, *homosexuality*. . . . Finally, there are the tribal stigma of race, nation and religion.[87]

As a moral stigma, homosexuality has much in common with the stigmas of physical deformities or racial class, as well as significant differ-

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Doubt Cast on 2 Safe-Sex Practices, Philadelphia Inquirer, Nov. 28, 1987, at 1A, col. 1 (describing a European medical study suggesting that persons may be able to contract HIV through oral sex).

In addition to the fact that the risks associated with HIV transmission depend on the acts themselves rather than the gender of the participants, and that sodomy laws are both overinclusive and underinclusive, same-sex sodomy statutes are not the least restrictive means of controlling AIDS. *See, e.g.*, Sullivan & Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 182-89 (1989) (favoring disclosure requirements and precautions over more restrictive alternatives, but ultimately finding any use of the criminal law to deter AIDS overly intrusive). Education and tort suits against persons transmitting AIDS through sexual conduct are other viable alternatives for deterring AIDS transmission. *Id.* at 192-93.

83. *See* E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF A SPOILED IDENTITY (1963).

84. *Id.*

85. *See, e.g.*, L. HUMPHREYS, OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION (1972); S. LYMAN & M. SCOTT, A SOCIOLOGY OF THE ABSURD (1970); SEXUALITY: ENCOUNTERS, IDENTITIES AND RELATIONSHIPS 99 (C.A.B. Warren ed. 1977).

86. E. GOFFMAN, supra note 83, at 3.

87. *Id.* at 5 (emphasis added).

ences. "Like physical handicap or racial group, moral failings are seen as 'tainting' the entire individual."[88] However, whereas Blacks or the handicapped are perceived as inferior due to physical characteristics, homosexuals, although etymologically conceived of in reference to a distinct type of behavior, are generally viewed not as individuals who do a certain type of thing, "but, rather as people who are a certain type of being. This . . . is reflected in the fact that the English language has no verb 'to homosexual' as it does for many other behaviors such as 'to swim' or 'to write.' "[89]

Stigma depends upon the social context within which an individual or group finds itself. As I have maintained above, there are many non-Western societies which tolerate, or even encourage, homosexual behavior within the parameters of socially-constructed institutions and norms.[90] However, in the Judeo-Christian West, certain religious doctrines concerning the morality of homosexuality, through their enforcement in law and their rationalization by science, have contributed to the formation of a religiously-based moral tradition which has stigmatized gay sexuality:

> [H]omosexuals as a group remain stigmatized in the United States. . . . They are forbidden to serve in the armed forces, experience employment and housing discrimination, and suffer rejection by friends and family. The knowledge of the fact that they *might* be rejected and shunned, even if they never experience stigmatization directly, keeps many homosexuals in a state of diffuse anxiety about their relationships with the heterosexual world.[91]

While there are many ways in which lesbians and gay men try to reconcile their sexual orientation with society's stigma against them,[92] "[a]ll these ways involve a considerable investment of emotional energy, and most take a considerable psychic toll. . . . [T]he most common way of dealing with the stigma [is] to remain secret and pass as a heterosexual: to become part of the homosexual invisible minority."[93]

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88. Warren, *Homosexuality and Stigma*, in HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 123, 124 (J. Marmor ed. 1980).

89. *Id.* at 124.

90. *See* sources cited *supra* note 78.

91. Warren, *supra* note 88, at 125 (citations omitted) (emphasis in original).

92. *See, e.g.*, Neuhring & Tyler, *The Gay College Student: Perspectives for Mental Health Professionals*, 4 COUNSELING PSYCHOLOGIST 64-72 (1974); *see also* J.S. DELORA & C.A.B. WARREN, UNDERSTANDING SEXUAL INTERACTION (1977); S. LYMAN & M. SCOTT, *supra* note 85; C.A. TRIPP, *supra* note 78.

93. Warren, *supra* note 88, at 130.

3. *Stigma, Invisibility and Political Powerlessness.* The existence of an "invisible minority" presents a unique dilemma for Americans, both gay and straight. Although Alfred Kinsey's work in 1948 demonstrated that ten percent of the population, both men and women combined, is predominantly homosexual in orientation,[94] according to a recent Gallup poll, only one in five Americans reported knowing a gay person.[95] Kinsey's figure, with slight variations, holds across all social categories, whether they be defined in terms of class, education, income, occupation, political belief, region or religion.[96] However, for most straight Americans, ten percent is a statistic which does not seem to register any real understanding or appreciation of the size of the group which is being represented.

Today in the United States, given current census figures, there are approximately 24 to 25 million gay Americans. This means that there are as many gay people in the United States as there are Blacks, twice as many as Hispanics, and three times as many as Jews. There are as many gay men and lesbians in America as there are people in the entire state of California; as there are people in the countries of Sweden, Denmark, Austria and Ireland—combined.[97]

As a stigmatized, invisible minority, lesbians and gay men are unable to fight for the right to be open about being gay, and effectively lobby for legislation that would enhance their position in society, unless gay people are already open about themselves; but gays cannot be reasonably open about themselves because lesbians and gay men do not have the right to be openly gay.[98]

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94. A.C. KINSEY, *supra* note 43, SEXUAL BEHAVIOR IN HUMAN MALES, at 650-51; SEXUAL BEHAVIOR IN HUMAN FEMALES, at 472-75.

95. Public Fears - And Sympathies, NEWSWEEK, Aug. 12, 1985, at 23 (joint poll conducted by Gallup and Newsweek).

96. A.C. KINSEY, *supra* note 94. *See also* Gonsiorek, *Mental Health: Introduction,* in HOMOSEXUALITY 61 (W. Paul, J. Weinreich, J. Gonsiorek & M. Hotvedt eds. 1982).

97. Figures and comparisons as reported in M. KIRK & H. MADSEN, *supra* note 29, at 14-16.

98. *See* R.D. MOHR, *supra* note 23, at 186. For a discussion of anti-gay discrimination by government see Comment, *Burdens on Gay Litigants and Bias in the Court System,* 19 HARV. C.R.-C.L. L. REV. 497, 498 (1984); Heilman, *The Constitutionality of Discharging Homosexual Military Personnel,* 12 COLUM. HUM. RTS. L. REV. 191, 191-204 (1980-81); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties* (Parts I & II), 10 U. DAYTON L. REV. 483-540 (1985); 11 *U. Dayton L. Rev.* 275-324 (1986); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799 (1979); Rivera, *Recent Developments in Sexual Preference Law,* 30 DRAKE L. REV. 311, 317-19 (1980-81).

For discussion of anti-gay discrimination in the private sector see Huber, *Report of the American Sociological Association's Task Group on Homosexuality,* 17 THE AMERICAN SOCIOLOGIST 164 (1982); M. Levine & R. Leonard, *Discrimination Against Lesbians in the Work Force,* 9 SIGNS - J. OF WOMEN IN CULTURE 700, 700-10 (E. Freedman ed. 1984); Levine, *Employment Discrimination*

> [A] person who is a member of an invisible minority and who must remain invisible, hidden, and secreted in respect to her minority status as a condition for maintaining a livelihood is not free to be public about her minority status or to incur suspicion by publicly associating with others who are open about their similar status. And so she is effectively denied all political power. . . . [S]he will be denied the freedom to express her views in a public forum and to unite with or organize other like-minded individuals in an attempt to compete for votes which would elect persons who will support the policies advocated by her group. She is denied all effective use of legally available means of influencing public opinion before voting and all effective means of lobbying after elections are held.[99]

The gay person in the United States, unless he or she is prepared to risk the security of employment, housing, friends and family, is effectively reduced to the status of a second class citizen. Unable to openly and freely exercise basic democratic rights protected by the First Amendment, including freedoms of speech, press, assembly and petition for the redress of grievances, gay men and lesbians are excluded from the very processes and institutions of democracy which control their lives. "The eclipse of political access is most evident if we look at gays severally."[100]

> [D]oes a gay person who has to laugh at and manufacture fag jokes in workplace elevators and around workplace coffee urns, in order to deflect suspicion from himself in an office which routinely fires gay employees, have freedom to express his views on gay issues? Is it likely that such a person could reasonably risk appearing in public at a gay rights rally? Would such a person be able to participate in a march celebrating the Stonewall Riots and the start of gay activism? Would such a person be able to sign, let alone circulate, a petition protesting the firing of a gay worker? Would such a person likely try to persuade workmates to vote for a gay-positive city-councilman? Would such a person sign a letter to the editor protesting abusive reportage of gay issues and events, or advocating the discussion of gay issues in high schools?. . . [O]bviously not! Such a person is transfixed by fear. . . .[101]

Social intolerance, which has the effect of stigmatizing a whole class

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Against Gay Men, 9 INT'L REV. OF MODERN SOC. 151 (1979); 127 CONG. REC. 23,300 (1981)(remarks of Sen. Tsongas)(daily ed. Oct. 6, 1981) (citing NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS (J. Livingood ed. 1972) ("A study by the National Institute of Mental Health . . . showed that over 16 percent of all gay people in this country have employment problems and over 9 percent lose their jobs solely because of their sexual orientation.").

99. R.D. MOHR, *supra* note 23, at 173. For a discussion of the infringements on First Amendment rights of gays see Gomez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 J. OF LAW AND INEQUALITY 121 (1983); Siegal, *Lesbian and Gay Rights as a Free Speech Issue: A Review of the Relevant Caselaw*, 15 J. OF HOMOSEXUALITY (1988).

100. R.D. MOHR, *supra* note 23, at 170.

101. *Id.*

of citizens in a democracy, is as corrosive, if not more so, than legal enactments in undermining participatory and representative democracy. John Stuart Mill singled out such nonlegal social forces for particular criticism:

> It is [social] stigma which is really effective [in stopping] the profession of opinions which are under the ban of society. . . . In respect to all persons but those whose pecuniary circumstances make them independent of the good will of people, opinion is as efficacious as law; men might as well be imprisoned as excluded from the means of earning their bread. Our merely social intolerance roots out no opinions, but induces men to disguise them or to abstain from any active effort for their diffusion.[102]

In the United States, society's moral stigma against gay sexuality has pushed lesbians and gay men under the political process. Mohr notes that having been "transfixed by fear," most gay people cannot even bring themselves to write out a check in support of a gay rights organization for fear that they will be discovered:

> Some organizations, like National Gay Rights Advocates, desperately aware of this . . . set up fund-raising account "fronts" with innocuous-sounding names, like "Legal Foundation for Personal Liberties" in an attempt to ease money, if not persons, out of the closet. Many organizations simply dissimulate, lying by omission or vagueness in assuming for themselves closeted names; thus the national gay political action committee baptizes itself "The Human Rights Campaign Fund."[103]

Ultimately, because of their stigmatized and invisible status in American society and politics, gay people as a minority are rendered essentially powerless in bringing about the kinds of substantive changes which democratic policies of participation and representation are intended to afford. The Supreme Court has taken note of this phenomenon as it has applied to other American minorities. In *United States v. Carolene Products Co.*,[104] the Supreme Court stated that, "prejudice 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."[105] The concept of "discrete and insular minorities" has been interpreted by the Court to refer to groups which historically have been "subject to discrimination" and which exhibit "obvious, immutable, or distinguishing characteristics that

102. J.S. MILL, ON LIBERTY 30-31 (E. Rapaport ed. 1978).
103. R.D. Mohr, *supra* note 23, at 170 n.12.
104. 304 U.S. 144 (1938).
105. *Id.* at 152 n.4.

define them as a discrete group" who are "politically powerless."[106]

It is precisely because gay men and lesbians have, as a group, been marginalized, if not totally excluded, from the political process that they too should fall within the ambit of the Court's understanding of political powerlessness. Religion, law and science have at various points in Western history subjected lesbians and gay men to intense discrimination by society. Moreover, as Marmor pointed out above, gay people do not choose to be homosexual: it is an immutable component of their psychosexual make-up.[107] Taken together, discrimination and sexuality

106. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 n.14 (1981) (exclusion from the political process); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (history of discrimination); Frontiero v. Richardson, 411 U.S. 677, 685, 686 (1973) (opinion of Brennan, J.) (stereotypes and "immutable" characteristics).

Under equal protection analysis, laws or regulations that employ suspect classifications—race, national origin, and alienage—are strictly scrutinized. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). Under strict scrutiny, the classification must be necessary to achieve a compelling government interest. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984). Quasi-suspect classifications include gender and illegitimacy. *See Cleburne*, 473 U.S. at 441, and trigger intermediate scrutiny, which requires a substantial relationship between classification and an important governmental interest. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Classifications that are not suspect or quasi-suspect and do not implicate fundamental interests need only serve a legitimate state interest and be reasonably related to the pursuit of such interest. *See* L. TRIBE, *supra* note 3, § 16-2, at 1440-41. *See also infra* notes 107 to 109 and accompanying text.

107. Scientific research has suggested that sexual orientation is largely immutable. *See* Coleman, *Changing Approaches to the Treatment of Homosexuality*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 81-88 (W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt eds. 1982) (discussing the limited success of therapists' attempts to replace their patients' homosexual activity with heterosexual activity and concluding that the "illness model of homosexuality is slowly being put to rest").

Even a change in the gender of an individual's sexual partners will not usually produce a shift in sexual orientation. In prisons, for example, non-gay male inmates frequently engage in homosexual sex without adopting a same-sex sexual orientation. *See* W. WOODEN & J. PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 250 (1982) (reporting that 55.7% of heterosexual inmates had engaged in homosexual acts while in prison).

Once an individual's sexual orientation is established in early life, it is difficult, if not impossible, for him or her to alter it. Even if change is possible for some people, complete immutablility is not a prerequisite to a finding that a classification is suspect. *See* Graham v. Richardson, 403 U.S. 365 (1971) (finding alienage—a mutable characteristic—a suspect classification); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074 n.52 (arguing that "even if race or gender became readily mutable by biomedical means . . . laws burdening those who choose to remain black or female would probably remain constitutionally suspect"). Rather than focusing on whether it is possible for an individual to alter a particular characteristic, courts should ask whether it would be offensive to condition legal protection on the requirement that one change a highly personal, often self-defining, trait. *See* Watkins v. United States Army, 847 F.2d 1329, 1347-48 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1988). *See also* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1304 (1985) (arguing that, rather than basing the application of heightened scrutiny on the immutability of a characteristic, courts should ask whether a characteristic is an aspect of personality fundamental to

constitute gay men and lesbians as a discrete and insular group who, because of their moral stigma, have been forced to remain an invisible minority. Their invisibility, due to the stigma imposed, has rendered them politically powerless as a group.[108]

This being so, gays also should be accorded judicial solicitude in reviewing legislation that has the effect of perpetuating the very forces which keep them second class citizens: "[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [should] be subjected to more exacting scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[109] Although the Supreme Court has never extended this understanding to gay men and lesbians, other courts have understood the unique political dilemma faced by gay Americans.

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individual identity). *But cf.* Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 779-82 (1989) (arguing that legal theories asserting that sexual orientation is a fundamental aspect of personal identity only exacerbates society's erroneous assumption that gay men and lesbians are fundamentally different from non-gay people).

108. For arguments in support of this position see, e.g., Rowland v. Mad River Local School District, 470 U.S. 1009 (1985) (Brennan, J., dissenting); J.H. ELY, DEMOCRACY AND DISTRUST 162-64 (1980); R.D. MOHR, *supra* note 23, at 169 n.10. *See generally*, Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. (Rutger's Univ.) 143, 156 (1988) (arguing that in the United States, the institutionalization of gender values and heterosexuality causes the label "homosexual" to be placed on individuals as a mark of difference).

109. *Carolene Products*, 304 U.S. at 152 n.4. Courts have usually declined to find that classifications based on sexual orientation deserve any form of heightened scrutiny. *See, e.g.*, Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert denied*, 110 S. Ct. 1295 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); Dronenberg v. Zech, 741 F.2d 1388, *reh'g denied*, 746 F.2d 1599 (D.C. Cir. 1984); Childers v. Dallas Police Dept., 513 F. Supp. 134, 147 n.22 (N.D. Tex. 1981); *but see* Watkins v. United States Army, 847 F.2d 1329, 1347-48 (1988); benShalom v. Marsh, 703 F. Supp. 1372, *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990) (E.D. Wis. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987) *rev'd* 895 F.2d 563 (9th Cir. 1990). In reaching this conclusion, some courts have simply relied on the absence of a Supreme Court precedent holding that homosexuality is a suspect classification. *See, e.g., Childers*, 513 F. Supp. at 147 n.22. The Supreme Court, however, has never held that classifications based on sexual orientation are *not* suspect; it has simply never addressed the issue of suspectness in the context of sexual orientation.

Courts which have simply rejected assertions that sexual orientation classifications should be accorded heightened equal protection scrutiny have adopted a narrow view of the values that contemporary equal protection jurisprudence seeks to protect. The requirement of equal protection of the laws implies that government may not "perennially reenforce the subordinate status of any group." *See* L. TRIBE, *supra* note 3, § 16-21, at 1516. Government discrimination on the basis of sexual orientation in state sodomy statutes violates this prohibition, and contravenes the principle that all people have equal worth as human beings. *See supra* note 72 and accompanying text.

In *Gay Law Students Assoc. v. PT&T Co.*,[110] the California Supreme Court declared that the firing of an openly gay employee violated the plaintiff's political freedoms. Prior to the court's decision, Pacific Telephone and Telegraph had an explicit company policy of firing its gay employees. Although there were no systematic procedures, whenever the company became aware of persons who were "manifestly gay," they were immediately fired. The court held that such firings were in violation of California's Labor Code,[111] which forbids employers from preventing employees from engaging or participating in politics. The court reasoned that if gays are to have political rights, they must be free to be open about who they are:

> A principle barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual must conceal. Consequently, one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences and to associate with others in working for equal rights. In light of this factor in the movement for homosexual rights, the allegations of the plaintiffs' complaint assumes a special significance.[112]

The California Supreme Court, like the Supreme Court in *Carolene Products*, understood that the private prejudices and biases perpetuated in a stigma cannot be allowed to eclipse political rights. Rather, equal rights and equal consideration form the normative moral baseline from which legal and policy-making decisions must be drawn. Otherwise, society's claim to be democratic becomes either incoherent or merely a delusion of the majority. "[T]he equality of rights follows as a necessity, for it is the defining property of morality. . . . The role of equality is that of a base line: it determines that standard from which deviations must be justified."[113]

B. *Morality as a Legal Concept*

State sodomy legislation perpetuates a religiously-based moral stigma against gay Americans and effectively contributes to the curtailment of any meaningful political participation for them in democratic

110. 24 Cal.3d 458, 595 P.2d 592, 156 Cal.Rptr. 14 (1979).

111. CAL. LAB. CODE, §§ 1101, 1102 (West 1971).

112. *Gay Law Students Assoc.*, 24 Cal.3d at 488, 595 F.2d at 610-11, 156 Cal. Reptr. at 32-33. For a study of the degree to which negative attitudes in the workplace toward gay employees are overcome in proportion to the gay person's ability to be "out" see DEPARTMENT OF HUMAN RESOURCES, STATE OF OREGON, FINAL REPORT OF THE TASK FORCE ON SEXUAL PREFERENCE 73-87 (1987).

113. M. SCRIVEN, *supra* note 73, at 258.

processes. Because lesbians and gay men can be considered a discrete and insular minority, such legislation should be accorded strict scrutiny by the courts. For if equality is to be the baseline, any statute which curtails equality must be justified morally in terms of an objective standard. If the rationalization for these statutes is the legislation of "morality," then "morality" must mean more than the enforcement of the subjective biases and prejudices given force in a moral stigma. It must mean the enforcement of objective normative morality: equality of rights and "equal consideration in the formulation and application of the law of the land and the actions of its government and people."[114]

As the majority in *Hardwick* made clear, their understanding of "morality," at least with respect to gays and sodomy statues, means simply "the majority sentiments about . . . morality."[115] This is extremely problematical because of the extent to which it violates normative morality, establishes nonlegal social forces as the arbiter of political rights, and subverts the democratic process. If the legislature and courts are going to give legal force to this conception and, in effect, make it the official state morality, serious questions regarding a violation of the First Amendment's establishment clause must be addressed. This is so because of the very nature of the assumptions underlying "majority sentiments about morality" as it applies to the issue of gay sexuality. For as Marmor pointed out above, "The legal, moral and stigmatizing aspects of the issue of homosexuality are so closely intertwined [that t]he laws of a society, in matters such as these, are simply encoded reflections of religious teachings."[116]

114. *Id.* at 242.
115. *Hardwick*, 478 U.S. at 196.
116. Marmor, *supra* note 66.

IV.

The laws of God, the laws of man,
He may keep that will and can;
Not I: let God and man decree
Laws for themselves and not for me;
And if my ways are not as theirs
Let them mind their own affairs.
Their deeds I judge and much condemn,
Yet when did I make laws for them?
Please yourselves, say I, and they
Need only look the other way.
But no, they will not; they must still
Wrest their neighbor to their will,
And make me dance as they desire
With jail and gallows and hell-fire.
And how am I to face the odds
Of man's bedevilment and God's?[117]

A. *Private Acts or Public Consequences?*

Because sodomy legislation has the public consequence of perpetuating the moral stigmatization of gay people and the eclipse of their political participation in democratic processes, an appropriate evaluation of such statutes is not primarily the degree to which they intrude on privacy, but the extent to which they violate the First Amendment's prohibition against government-sponsored religion. For unless it can be demonstrate that traditional Judeo-Christian assessments of gay sexuality are defensible under a standard of normative morality, it is clear that "morality" as understood by the majority in *Hardwick* is, as Marmor observes, "simply encoded reflections of religious teachings."[118] Thus, the democratic public policy issue becomes not one of whether or not government may legitimately legislate morality, but the extent to which government may enforce religiously-based descriptive conceptions of morality without violating the establishment clause of the First Amendment.

The federal Constitution's establishment clause reads in pertinent part that, "Congress shall make no law respecting an establishment of

117. Housman, *The laws of God, the laws of man, reprinted in* THE PENGUIN BOOK OF HOMOSEXUAL VERSE, at 238-39 (1983).

118. Marmor, *supra* note 66.

religion. . . ."[119] Although on its face the clause is directed toward Congress, like the other guarantees of the Bill of Rights, it has been held to be applicable to the states through incorporation under the Fourteenth Amendment's due process clause.[120] In order for legislation to satisfy the establishment clause's prohibition against government-sponsored religion, the Court has traditionally applied a three-pronged test to determine whether or not a government action violates the clause. These three prongs were first enunciated in *Lemon v. Kurtzman*.[121]

B. Lemon v. Kurtzman

Under the *Lemon* test, a statute must satisfy each of the following conditions in order for it withstand establishment clause scrutiny: (1) The statute must have a secular legislative purpose; (2) the statute's principle or primary effect must neither inhibit nor advance religion; and (3) the statute must not foster an excessive government entanglement with religion.[122] Although the *Lemon* test has been increasingly attacked in recent years as inadequate in evaluating questions of the proper relationship between government and religion,[123] it nevertheless remains both the intial and penultimate analysis for establishment clause jurisprudence. Moreover, as discussed below, the opinions of Justice O'Connor, which have been adopted by the Court's current majority in establishment clause cases,[124] are shaping the rationale of the doctrine in a manner which proves to be of significant benefit in clarifying the right of gay Americans to be free from a religiously-based moral stigma.

1. *The Requirement of Secular Purpose.* The requirement of secular purpose has been interpreted to mean that whenever a government action is perceived to "endorse or disapprove of religion,"[125] a violation of the establishment clause has taken place. Justice O'Connor has provided an understanding of establishment principles which proves to be extremely useful in applying the *Lemon* test. In her concurring opinion

119. U.S. CONST. amend. I.

120. *See* Everson v. Board of Education, 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947).

121. 403 U.S. 602 (1971).

122. *Id.* at 612-13.

123. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 33, 110 (1985) (Rehnquist, J., dissenting).

124. *See* County of Allegheney v. A.C.L.U., 109 S. Ct. 3086, 3104-05 (1989) (Blackmun, J.) (adopting for the majority opinion the analysis and rationale of Justice O'Connor's concurring opinion in *Lynch v. Donnelly* and *Wallace v. Jaffree*).

125. Wallace v. Jaffree, 472 U.S. at 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984)) (O'Connor, J., concurring).

in *Wallace v. Jaffree*,[126] Justice O'Connor states that: "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement. . . ."[127]

A hypothetical "objective observer" would perceive that sodomy statutes, given their "text, legislative history, and implementation" are an endorsement of religion; for as Marmor has pointed out, these laws are "simply encoded reflections of . . . religious teachings." Although the Court in *Hardwick* attempted to justify Georgia's sodomy legislation as promoting a legitimate secular state interest in legislating "morality," they defined morality as the "majority sentiments about . . . morality."[128] Those "majority sentiments" are indisputably manifestations of the West's religiously-based moral system. It follows that the extent to which the Court purposefully enforces those "sentiments" over normative standards of morality is the extent to which the government has purposefully endorsed sectarian religious doctrines about morality over secular democratic values expressed as the morality of equal rights and equal consideration.

As I have argued above, the only coherently defensible conception of morality is one which is both normative and secular, objective as to principles and independent as to standards. Without a morality which is both objective and independent, it runs the risk of becoming merely a vehicle of majoritarian prejudice. If morality as a legally enforceable and secular concept is to have any consistency and legitimacy in democratic policy-making, it must mean equal rights.

> 'Equal rights' means fundamentally or ultimately equal consideration, not equal consideration on specific issues in which there are good reasons for all to adopt a procedure that takes greater account in the immediate case of some persons' views than others. . . . The question is always whether the reasons for according *unequal* consideration on a particular occasion are derived from principles which accord *equal* benefits. . . .[129]

The benefits accorded in *Hardwick* were clearly allotted unequally to the adherents of religiously-based descriptive morality at the expense of equal consideration for the political rights of gay men and lesbians to be free from a socially-approved and legally enforced moral stigma. Thus, the Court's decision served to benefit by approval a religiously-

126. *Id.*

127. *Id.* at 76.

128. *Hardwick*, 478 U.S. at 196.

129. M. SCRIVEN, *supra* note 73, at 241 (emphasis in original).

based animus against gays while undermining secular legislation by allowing its conformance with religious doctrine to take precedence over the enforcement of a normative morality appropriate and necessary for a coherent democratic society.

As the Court itself noted in striking down an Arkansas public school curriculum anti-evolution law in *Epperson v. Arkansas*,[130] when there is no "suggestion . . . the . . . law [is] justified by considerations of state policy other than [a desire to support] the religious views of some of its citizens,"[131] the law violates the establishment clause. Similarly, in *Edwards v. Aguillard*,[132] Justice O'Connor wrote that if "it is beyond purview that endorsement of religion or a religious belief, 'was and is the law's reason for existence' "[133] the law must be struck down.

Although the Judeo-Christian tradition may be considered moral, morality is not the Judeo-Christian tradition. The fact that the Court, in the name of morality, failed to even make an attempt at formulating a non-religiously-based moral standard, but preferred rather to uphold "a particular religious doctrine . . . with a particular interpretation . . . by a particular religious group"[134] as to what is moral, demonstrates that, in the absence of any secular policy justifications to the contrary which accord with the application of a normative morality, the Court's upholding sodomy legislation was to simply endorse religious views about morality and thus violate the first prong of *Lemon*.

2. *The Requirement of Secular Effect.* If it is arguable that sodomy legislation may, in fact, have a secular purpose, it is difficult to argue that it does not have the primary effect of advancing religion. In analyzing the effect prong of the *Lemon* test, the insights of Justice O'Connor are again useful. In *Lynch v. Donnelly*,[135] Justice O'Connor, in her concurring opinion, wrote that the effects test may be considered within the framework of an endorsement analysis where "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[136]

Sodomy statutes have as their principle effect a perception in society

130. 393 U.S. 97 (1968).
131. *Id.* at 107.
132. 482 U.S. 578 (1987).
133. *Id.* at 2575 (O'Connor, J., concurring) (quoting Epperson v. Arkansas, 393 U.S. at 108).
134. *Epperson*, 393 U.S. at 103.
135. 465 U.S. 668 (1984) (O'Connor, J., concurring).
136. *Id.* at 688.

that government officially approves of certain religious doctrines concerning the immorality of gay sexuality. Consequently, through the legislation of such laws, the government is seen as advancing the moral standards of the adherents of those religious doctrines over and against the claims of non-adherents to a secular morality of equal rights and equal consideration.

An "objective observer" would thus infer that government has made the determination that religious adherents are "more moral" than non-adherents, and that so they must be better citizens than non-adherents. Thus, the government sends "a message to non-adherents that they are outsiders . . . and an accompanying message to adherents that they are insiders, favored members of the political community." This perception has as its logical terminus an evaluation that the political views of adherents are to be favored over those of non-adherents in the formulation of law and policy, because non-adherents are immoral and can neither be good citizens nor "full members of the political community."

An even more alarming effect is the degree to which being outside the political community compounds the moral stigma in legitimizing violence against gay people. "Queer-bashing" is justified in the minds of its perpetrators because of the socially-imposed stigma and perception that lesbians and gay men are immoral, criminal and sick.[137] Sodomy legislation has the effect of reinforcing and perpetuating this stigmatization of gay people and, consequently, the prejudices and hatred of homophobes and queer-bashers.

In *Palmore v. Sidoti*,[138] the Supreme Court held that such "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or *indirectly*, give them effect."[139] However, this is exactly, in fact, what sodomy legislation does. Anti-gay violence is the indirect effect of the state's direct effect in stigmatizing gay men and lesbians as immoral

137. For an analysis of the complex dynamics of violence perpetrated against gay men and lesbians in contemporary American society see BASHERS, BAITERS AND BIGOTS (J. DeCecco ed. 1985); NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION (1984). *See also* SUBCOMMITTEE ON CRIMINAL JUSTICE, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 99TH CONG., 2ND SESS., ANTI-GAY VIOLENCE, (serial no. 132 1986).

For a discussion of gay self-hatred resulting from internalized societal homophobia see B. ADAMS, THE SURVIVAL OF DOMINATION: INFERIORIZATION IN EVERYDAY LIFE (1978) (chapter 4); A. HODGES & D. HUTTER, WITH DOWNCAST GAYS: ASPECTS OF HOMOSEXUAL SELF-OPPRESSION (1979); Rist, *On Hating Ourselves*, in GAY LIFE (E.E. Rolfs ed. 1986). For an analysis of the role of internalized homophobia in gay suicides see I THOUGHT PEOPLE LIKE THAT KILLED THEMSELVES: LESBIANS, GAY MEN, AND SUICIDE (E.E. Rolfs ed. 1983).

138. 466 U.S. 429 (1984).

139. *Id.* at 433 (emphasis added).

political outsiders. The Supreme Court in *Palmore* sent an unambiguous message to government—the perpetuation of stigma in law is not legitimate: "The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations. . . . We have little difficulty concluding they are not."[140]

Sodomy statutes perpetuate and advance religious biases against gay citizens and serve to create a political division in society between moral "insiders" and immoral "outsiders;" visible members of the "political community" and invisible, politically powerless second class citizens. This political division, drawn along a religiously-formulated test of moral citizenship, is exactly the type of scenario which Justice O'Connor condemns as a violation of the second prong of *Lemon*. Sodomy statutes must fail the effects test on two accounts: they perpetuate and advance a religiously-based stigma and they create political division by establishing religiously-based criteria by which citizens are adjudged as either moral or immoral.

3. *The Requirement of No Excessive Government Entanglement.* The requirement of no excessive government entanglement is a test which reflects the Court's traditional concern that government and church must not interfere with the operation of each other's sphere of influence.[141] Thus, there is an attempt to limit possible conflicts which may tend to compromise either the political system or the autonomy of religion.[142] When either government or religion become so entangled, the third prong of *Lemon* is violated, and the government action must be struck down as an unconstitutional establishment of religion.

As the dissent in *Hardwick* pointed out with respect to the morality of gay sexuality, "certain, but by no means all, religious groups condemn the behavior at issue . . . the state [has] no license to impose their judgment on the entire citizenry."[143] The Judeo-Christian tradition, as well as society at large, holds a wide range of religious, as well as non-religious, opinions concerning the morality of homosexuality.[144] This fact, how-

140. *Id.*

141. *See* Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

142. *See* Aguilar v. Felton, 473 U.S. 402, 409 (1985) (church-state entanglement might compromise liberty of conscience); Waltz v. Tax Commissioner, 397 U.S. 664, 694 (1970) (Harlan, J., concurring in result) (church-state entanglement might strain the political system); Engel v. Vitale, 370 U.S. 421, 431 (1962) (church-state entanglement might "destroy government and degrade religion").

143. *Hardwick*, 478 U.S. at 211 (Blackmun, J., dissenting).

144. *See, e.g.*, HOMOSEXUALITY AND ETHICS (E. Batchelor ed. 1980) (reflecting the wide theo-

ever, was simply ignored by the *Hardwick* majority. Instead, the Court purposefully chose one particular religious doctrine over other equally possible religious doctrines or nonreligious standards.

In making such a policy choice, the Court allowed the government to lend its persuasive influence and coercive power in an advantageous way to the religious doctrines of a particular religious group while concurrently working a disadvantage to those religious groups who's doctrines were not adopted by the state. Government thereby entered into a doctrinal debate appropriate only to the religious sphere and violated the conviction of the Court that religion must succeed or fail "according to the zeal of its adherents and the appeal of its dogma."[145]

Similarly, in the political sphere, the Court allowed a religious doctrine to be elevated to the level of a legal sine qua non of morality, even though it has long held that "only in a theocratic state . . . [may] ecclesiastical doctrines measure legal right or wrong."[146] The Court thereby permitted religion to compromise the political system by compelling the debate on gay sexuality to be conducted within the parameters of a religiously-based conception of what is morally right or wrong.

By allowing government to legislate sodomy statutes, the Court has permitted church and state to operate illegitimately within each other's legitimate sphere of influence. Compromises of both the political system and the autonomy of religion are the result because of the degree to which the prohibitions against sodomy have one foot in religion and the other in government. Thus, entanglement is inevitable because of the religiously-based "moral" nature of the secular "crime" of sodomy. Such statutes violate the third prong of *Lemon* and should be struck down as an unconstitutional establishment of government-sponsored religion.

C. *Conclusions*

Under any or all of the prongs of *Lemon*, sodomy laws could be struck down. Yet, even failing *Lemon*, under a *Carolene* strict scrutiny analysis, they should be declared unconstitutional because of the degree to which they perpetuate a socially-imposed and politically debilitating moral stigma for gays, whose status as a discrete and insular minority

logical divergence in views concerning the morality of homosexuality, from "intrinsically unnatural and evil" to "intrinsically natural and good").

145. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

146. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 654 (1943) (Frankfurter, J., dissenting).

warrant such judicial solicitude. This is especially so when, in considering all of the evils which are perpetrated through sodomy laws, perhaps the most offensive is the assault on dignity which they represent for gay Americans:

> Sodomy laws not only cause unwarranted harms . . . but more importantly are assaults on dignity. Unenforced sodomy laws are invective by government. They violate a person's essential desert for equal respect because they represent a failure of the members of the majority to hold the desires, plans and aspirations of gay people on a par with their own. Further, as aspersions, like racial, religious, or gender slurs, appealing to widely irrelevant characteristics, unenforced sodomy laws fail to respect gays as moral agents, for they judge gays without regard to their individual merits or accomplishments.[147]

In the end, morality should not be simply a set of rules for enforcing the way people think life ought to be lived, but a reflection of the way people find life is. If society will "not recognize that morality has no foundation or justification except as a solution to the problems of social living,"[148] then morality will be reduced to either a myth or the sheer exercise of power to maintain and exploit unjust disparities of treatment between citizens. "Recourse to rational ethics is the only alternative to power struggles, victories and reprisals. . . . [R]ational ethics means the recognition of equality of rights."[149]

TIMOTHY W. REINIG*

147. R.D. Mohr, *supra* note 23, at 123-24.

148. M. SCRIVEN, *supra* note 73, at 286.

149. *Id.* at 257.

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