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LEGAL DISCRIMINATION AGAINST HOMOSEXUALS IN AMERICA, AND A COMPARISON WITH MORE TOLERANT SOCIETIES

INTRODUCTION

Since its founding, the United States of America has been regarded as a bastion of freedom in the world. Yet, in spite of the fact that this country was founded on the ideological concept of equality among human beings, discrimination has existed since the writing of our Constitution, and persists in a myriad of forms today. One minority which has undergone persecution, both in this country and abroad, is homosexuals.¹ This note will examine the current legal position of homosexuals in America, in an attempt to enlighten individuals about the oppressed status of this minority group. Part One surveys the various forms of discrimination that gay people face at the hands of America's legal system. Part Two examines the social ramifications of this discrimination, and discusses the current legal and social situation for gay people in countries which have officially embraced greater tolerance toward gays. Finally, it will be demonstrated that by adopting such a tolerant ideology, gay people can become an integrated and even more productive part of American society.

1. A homosexual or gay person is one "who is motivated in adult life by a definite preferential erotic attraction to members of the same sex." Marmor, *Overview: The Multiple Roots of Homosexual Behavior*, in *HOMOSEXUAL BEHAVIOR* 3, 5 (J. Marmor, ed. 1980). Homosexual and gay are used synonymously and inclusively for men and women throughout this note.

The Kinsey report found that 10% of the male American population is primarily homosexual, and a much larger number have had a homosexual experience at some point in their lives. A.C. Kinsey, W. Pomeroy & C. Martin, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 651 (1948). This concept of sexual orientation is usually perceived as a spectrum (denoted on a seven point scale) ranging from exclusive homosexuality to exclusive heterosexuality. *Id.* at 638-41.

A more recent four-year national research study estimates that 25,000,000 Americans are primarily homosexual. Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* (W. Paul, J. Weinrich, J. Gonsiorek & M. Motvedt eds. 1982).

I. LEGAL DISCRIMINATION AGAINST HOMOSEXUALS IN AMERICA

The United States Constitution affirms, implicitly and explicitly, that all people are entitled to equal protection under the law.² However, as a matter of practice, equality was long withheld from black people and women.³ Similarly, gay people have historically been subject to various forms of pervasive discrimination because of their sexual orientation.⁴

It is important to note that in America, the psychiatric and medical professions originally played a central role in defining homosexuality as an illness, and thus encouraged and justified the various forms of discrimination which have existed.⁵ However, this discrimination has continued in spite of the American Psychiatric Association's complete reversal of opinion on homosexuality.⁶ In 1973 the American Psychiatric Association declared that "homosexuality, per se, implies no impairment in judgement, stability, reliability, or general social or vocational capabilities," and concluded that "[i]n the

2. U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

3. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

4. Miller, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classification Based on Homosexuality*, 57 S. CAL. L. REV. 797, 835 (1984) [hereinafter Miller]. "This discrimination, characterized by first degree prejudice and stigmatizing incorrect stereotypes, continues today." *Id.*

5. Law, *Homosexuality and the Social Meaning of Gender*, 2 WIS. L. REV. 187, 203 (1988) [hereinafter Law].

6. *Resolution of the American Psychiatric Association, Diagnostic and Statistical Manual* (3d ed. 1980). Other major professional organizations have also adopted this view. *Resolution of the Council of Representatives of the American Psychological Association* (1975) and *Resolution No. 7514 of the American Public Health Association* (1975).

reasoned judgement of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease.⁷ Nevertheless, legally sanctioned discrimination still exists in numerous forms, many of which depend upon a definition of homosexuality as a mental illness in order to have any semblance of rationality.

A. Sodomy Statutes

Sodomy statutes are, perhaps, the most blatant form of discrimination against homosexuals. As of this writing, 24 states and the District of Columbia have sodomy statutes which criminalize sexual relations variously defined as "deviate sexual intercourse," and "crimes against nature."⁸ All of these refer to prohibitions against certain sexual acts between consenting adults. Although only six of these states specifically limit their statutes to criminalize sexual relations between two people of the same sex,⁹ all of them directly affect gay people in their sexual relations, and the laws are rarely, if ever, enforced against heterosexuals.¹⁰ The laws vary as to the type

7. *Resolution of the American Psychiatric Association, supra* note 6, at 261-83.

8. ALA. CODE § 13A-6-65 (a) (Michie 1982); ARIZ. REV. STAT. ANN. § 13-1411 (1978); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1990); GA. CODE ANN. § 16-6-2 (1982); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. §§ 510.010(1) (Supp. 1988); LA. REV. STAT. ANN. § 14.89 (West Supp. 1986); MD. ANN. CODE art. 27, § 554 (1957); MICH. STAT. ANN. § 28.355 (Callaghan 9811); MINN. STAT. ANN. § 609.293 (West Supp. 1984); MISS. CODE ANN. § 97-29-59 (West Supp. 1989); MO. REV. STAT. §§ 566.010(1), .090(1) (Supp. 1990); MONT. CODE ANN. §§ 45-2-101 (20), -5, -505 (1989); NEV. REV. STAT. § 201.190 (1987); N.C. GEN. STAT. § 14-177 (Michie 1986); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1989); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1976); TENN. CODE ANN. § 39-2-612 (1988); TEX. PENAL CODE ANN. § 21.06 (Vernon 1990); UTAH CODE ANN. § 76-5-403 (Supp. 1989); VA. CODE § 18.2-361 (1988).

9. ARK. STAT. ANN. § 41-1813 (1977); KAN. STAT. ANN. § 21-3505 (Supp. 1986); MONT. CODE ANN. § 45-5-505 (1989); MO. REV. STAT. § 566.090 (1990); NEV. REV. STAT. § 201.190 (1989); TEX. PENAL CODE ANN. § 21.06 (Vernon 1990).

10. For example, police do not patrol singles bars in search of adults willing to engage in heterosexual sodomy; however, undercover officers have been used to trap and arrest gay people. See, e.g., *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986); *Beard v. Stahr*, 200 F. Supp. 766, 768 (D.D.C. 1961); *Corstvet v. Boger*, 757 F.2d 223, 225 (10th Cir. 1985) (Use of undercover officers to investigate sexual solicitation in mens' lavatories); *Guero v. United States*, 237 F.2d 578, 581-82 (D.C. Cir. 1956) (use of undercover officers of the "morals

of behavior prohibited, and although most of them limit their prohibition to contact between the mouth, anus, and genitals,¹¹ some have gone even further to prohibiting contact between the hands and genitals of persons of the same sex.¹²

The sodomy statutes, by their very nature, criminalize virtually all forms of homosexual sexual expressions, and, as viewed in conjunction with their selective enforcement against homosexuals, demonstrate discrimination against gays which is so severe and disproportionate that these statutes are virtually forms of *de jure* discrimination.¹³ The central effect of sodomy statutes is to sanction and encourage other, more pervasive, forms of state disapprobation of homosexuals, rather than to deter one or another form of sexual behavior.¹⁴ In addition, the sodomy statutes stigmatize homosexuals, and perpetuate the "sexual deviant" stereotype of gays.¹⁵

Perhaps the most important, and notorious, Supreme Court case dealing with sodomy statutes, and homosexuality in general, is *Bowers v. Hardwick*.¹⁶ Michael Hardwick, an adult homosexual, was charged with violating the Georgia statute which made sodomy a criminal offense, punishable by up to 20 years imprisonment.¹⁷ Sodomy was defined as "performing or submitting to any sexual act involving the sex organs of one person, and the mouth or anus of another."¹⁸ Hardwick was arrested while engaging in sodomy with a consenting male

division" to police movie theatres); *State v. Trombley*, 3 Conn. Cir. Ct. 28, 29-30, 206 A.2d 482, 483 (1964) (defendant arrested by plainclothes detective in a neighborhood frequented by homosexual men).

11. See text accompanying note 8.

12. See, e.g., MO. REV. STAT. § 566.090 (1986) and MONT. CODE ANN. § 45-5-505 (1987). The Missouri Supreme Court recently approved such a statute as applied to a defendant who touched an undercover officer through several layers of clothing. *Walsh*, 713 S.W.2d. at 508. No state has ever made such contact by two people of the opposite sex a criminal act.

13. Miller, *supra* note 4, at 802.

14. Law, *supra* note 5, at 190 n.11. See also *infra* notes 15-39 and accompanying text.

15. Miller, *supra* note 4, at 802.

16. 478 U.S. 186 (1986).

17. GA. CODE ANN. § 16-6-2 (1989).

18. *Id.*

adult in the bedroom of Hardwick's home. After the District Attorney decided not to prosecute until further evidence developed, Hardwick brought suit in the United States District Court for the Northern District of Georgia, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.¹⁹ The District Court dismissed the claim,²⁰ but the Eleventh Circuit Court of Appeals reversed, holding that the Georgia statute violated Hardwick's fundamental rights, because his activities were a private and intimate association beyond the reach of state regulation.²¹ On *certiorari*, the Supreme Court, in an opinion written by Justice White, reversed the judgement of the Eleventh Circuit Court of Appeals.²²

As the majority viewed the case, the issue presented was whether the federal Constitution confers a fundamental right upon homosexuals to engage in homosexual sodomy.²³ As Justice White stated in his opinion, "this we are quite unwilling to do."²⁴ However, as Justice Blackmun asserted in his dissenting opinion (joined by Justices Brennan, Marshall, and Stevens):

This case is [not] about 'a fundamental right to engage in homosexual sodomy' as the Court purports to declare. . . . 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'. . . . The Court claims that its decision . . . merely refuses to recognize a

19. *Bowers*, 478 U.S. at 188.

20. *Id.*

21. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986). The Eleventh Circuit Court of Appeals found that the activities prohibited by the Georgia statute were protected by the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. *Id.* at 1212.

22. *Bowers*, 478 U.S. at 190.

23. *Id.*

24. *Id.* at 191.

fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.²⁵

As Justice Blackmun noted, if the Georgia sodomy law is not invalid, "then the police can invade the home to enforce it . . . [p]ermitting the kinds of searches that might be necessary to obtain evidence of the *sexual activity banned* . . . [a]re . . . intrusive [and] repugnant."²⁶

The statute upheld in *Bowers* was a gender-neutral statute which did not differentiate between heterosexual and homosexual sodomy.²⁷ Nonetheless, the Supreme Court limited its opinion, stating that "[t]he only claim properly before the Court is Hardwick's challenge to the Georgia statute as applied to consensual, homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."²⁸ This functionally singles out homosexuals as a separate class meriting special, disfavored treatment.²⁹ "[Such] a policy of selective application must be supported by a neutral and legitimate interest--something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case."³⁰

Upholding sodomy laws, such as the Georgia statute approved in *Bowers*, unfairly isolates, and discriminates, against homosexuals. These statutes outlaw certain forms of sexual

25. *Id.* at 199, 206 (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting)). As Justice Blackmun noted, if the Georgia sodomy "[l]aw is not invalid, then the police can invade the home to enforce it . . . [p]ermitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned . . . [which are] . . . intrusive [and] repugnant." See *id.* at 213 n.7.

26. *Id.* at 213, n.7.

27. *Id.* at 188 n.1.

28. *Id.* at 188 n.2.

29. *Id.* at 219 (Stevens, J., dissenting).

30. *Id.*

behavior regardless of the gender of the participants. However, the Supreme Court recast the neutral statute, limiting it to homosexual sodomy.³¹

Justice White's analysis accurately reflects the dominant cultural view that the significance attached to the proscribed conduct depends on whether the prohibited acts are done by two people of the same sex, or by a man and a woman. The criminal law punishes homosexual conduct more severely than similar heterosexual behavior.³²

The rationale of the majority in *Bowers* was based on the fact that "[p]roscriptions against that conduct have ancient roots,"³³ and that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best facetious."³⁴ The rationale behind using the history of oppression of gay people as evidence of its current legitimacy, and offering that same history as its own justification for continuation, is illogical.³⁵ Similarly, slavery was deeply rooted in our nation's history and tradition, and for over 100 years was considered acceptable within the concept of ordered liberty.³⁶ Justice Blackmun noted:

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the

31. *Id.* at 188 n.1.

32. *Law, supra* note 5, at 189.

33. *Bowers*, 478 U.S. at 192.

34. *Id.* at 194.

35. "Obviously, the laws concerning sodomy have a very different meaning in contemporary America than they did 200 years ago. Thus, the fact that such laws have ancient roots does not, without more, justify or explain their existence today." *Law, supra*, note 5, at 200.

36. See generally S. Presser & J. Zainaldin, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 369-439.

time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.³⁷

Additionally, Chief Justice Burger, concurring with the majority,³⁸ found strong proscriptions against sodomy in "the very ancient roots of Judeo-Christian morals and standards."³⁹ However, "the assertion that 'traditional Judeo-Christian values proscribe' the conduct involved . . . cannot provide adequate justification for [sodomy statutes]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgement on the entire citizenry."⁴⁰ In fact, the current dominant attitude towards homosexuality in mainstream Protestant and Jewish doctrines is one of pluralistic tolerance,⁴¹ and a broad range of Protestant and Jewish Churches, Temples, organizations, and leaders filed an amicus brief in *Bowers* arguing that Sodomy laws should be declared unconstitutional.⁴²

The results of the Supreme Court's decision in *Bowers* extend far beyond criminalization of homosexual sex. It encourages diverse forms of legal and social discrimination

37. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

38. *See id.* at 196.

39. *Id.*

40. *Id.* at 211 (Blackmun, J., dissenting).

41. *Law, supra* note 5, at n.133.

42. This brief stated that:

[t]o the extent that there is any consensus concerning alternative forms of sexual expression, heterosexual or homosexual, it is that private sexual conduct is a matter fundamentally committed to individual moral choice. Because we do not understand the full mystery of human sexuality, and because we are unwilling to condemn that which we do not understand, we believe as a matter of ethics that characterizing consensual sodomy as immoral is unwise.

Brief Amici Curiae for The Presbyterian Church (U.S.A.), The Philadelphia Yearly meeting of Friends, The American Friends of Service Committee, The Unitarian Universalist Association, The Office for Church Society of the United Church of Christ, and The Rt. Rev. Paul Moore, Jr., *Bowers*, 478 U.S. at 186 (No. 85-140).

against, and ostracism of, homosexuals;⁴³ it implicitly approves other forms of State discrimination against gay people, and it reinforces negative social stereotypes.⁴⁴ As Justice Blackmun stated in his dissent in *Bowers*:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. . . . I can only hope that . . . the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.⁴⁵

B. Other Forms of Legal Discrimination

There are numerous other areas in which homosexuals face discrimination; perhaps the most pervasive of these is the area of family law. At the present time, no state recognizes a marital relationship between members of the same sex, or makes provisions for some form of comparable legal recognition for gay couples, whatever the depth or duration of

43. See Law, *supra* note 5, at 194.

44. "The legal penalties imposed upon homosexual people are deep and cruel, and they enforce a pervasive social censure. The Court's decision in [*Bowers*] both reflects and enforces these negative social attitudes toward homosexuals." *Id.* at 192.

45. *Bowers*, 478 U.S. at 205, 214 (emphasis in original text).

their relationship.⁴⁶ Thus, gay people involved in long-term, monogamous relationships are denied the legal benefits contingent upon marital relationships which include property and inheritance rights, social security, pensions, work-related health benefits, standing to sue, immigration rights, and any other rights that require a legal marriage or family tie.⁴⁷ In addition, refusing gay people the right to marry deprives them of the larger social and community support inherent in an institution which is recognized as a lifetime bond of emotional and legal commitment. As the appellants argued in *Singer v. Hara*,⁴⁸ "to permit a man to marry a woman but at the same time to deny him the right to marry another man, is to construct an unconstitutional classification 'on account of sex.'⁴⁹ Gay couples are not recognized by Federal Tax Law, nor by various public benefit laws such as Social Security and Medicare.⁵⁰ Thus far, the courts have refused to articulate the "important governmental objectives" served by denying gay couples the right to marry.⁵¹

Homosexuals are also discriminated against in the area of family law with regard to their legal parenting rights.⁵² With few exceptions, courts generally deny homosexuals

46. *E.g.*, *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971) (upholding denial of marriage license to two men), *cert. denied*, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wash. App. 247; 522 P.2d 1187 (1974) (rejecting a sex discrimination claim under the state Equal Rights Amendment). See generally Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979).

47. Law, *supra* note 5, at 192.

48. 11 Wash. App. 247, 522 P. 2d 1187 (Wash. App. 1974).

49. *Id.* at 1190. (Washington State does not authorize people of the same sex to marry and this does not offend due process or equal protection rights because the public policy behind marriage is the procreation and rearing of children). *Id.*

50. Leonard, *The Legal Position of Lesbian and Gay Men in the United States*, in SECOND IGLA PINK BOOK 99, 103-04 (International Lesbian and Gay Association 1988) [hereinafter PINK BOOK].

51. Law, *supra* note 5, at 231 n.211.

52. Leonard, *supra* note 50, at 106.

custody of their children in divorce proceedings,⁵³ the right to adopt children, and the right to care for foster children, no matter what their qualifications.⁵⁴ There are other situations where courts will allow custody, but only under outrageous, highly discriminating conditions.⁵⁵ It is both shocking and inconsistent for our country's highest court to state that there is "no connection between family, marriage, or procreation . . . and homosexual activity,"⁵⁶ and, at the same time, deny homosexuals that protected status; it is impossible for those connections to exist where they have been expressly outlawed.

Other areas of discrimination against gay people include

53. See, e.g., *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E.2d 849 (1979); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980), cert. denied, 451 U.S. 911 (1981). On the other hand, in recent years some gay parents have won custody battles. *In re J.S. and C.*, 129 N.J. Super. 486, 489, 324 A.2d 90, 92 (1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (1976), in which the lower court stated:

The parental rights of a homosexual, like those of a heterosexual, are constitutionally protected. Fundamental rights of parents may not be denied, limited, or restricted on the basis of sexual orientation *per se* . . . [these] rights may not be restricted without a showing that the parents activities may tend to impair the emotional or physical health of the child.

Id. at 92. The court then, in fact, did limit the father's visitation rights because of his involvement in the gay right's movement. See also *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256 (1979) (lesbian mother's custody rights restored after trial judge granted custody to the father solely on the basis of her homosexuality). New York state regulations also forbid discrimination against homosexuals by social service agencies dealing with foster placement and adoption.

54. New Hampshire is currently considering a bill that would establish "an irrebuttable presumption that homosexuals are unfit to serve as foster parents, adoptive parents, and to be licensed to operate day care centers." Opinion of the Justices, 525 A.2d 1095 (1987). In an advisory opinion, the New Hampshire Supreme Court held that such a law would be constitutional, except with regard to day care centers. *Id.* Massachusetts instituted a policy in 1985 that essentially prohibits the placement of foster children in the care of homosexuals. *Curbs Imposed on Homosexuals as Foster Parents*, N.Y. Times, May 25, 1985, §1 at 24, col. 1. Gays are treated as foster parents of last resort, giving priority even to single heterosexuals over gay couples, regardless of their economic and living conditions. Leonard, *supra* note 50, at 107. Florida also discriminates by prohibiting gays from adopting. *Id.*

55. Courts have ordered the gay custodial parent to end the relationship with his or her partner. *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980). Others have prohibited the couple from living together. *Schuster v. Schuster*, 90 Wash. 2d 626, 585 P.2d 130 (1978). Others have required the partner to leave when the child is present. *L. v. D.*, 630 S.W.2d 240 (Mo. Ct. App. 1982); *Woodruff v. Woodruff*, 44 N.C. App. 350, 260 S.E.2d 775 (1979). Others prohibit overnight visits. *In re Jane B.*, 85 Misc.2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976); *J.L.P. v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982).

56. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

the Immigration and Naturalization Service (INS), which continues to treat homosexuals as mentally ill, and therefore excludable from the United States,⁵⁷ despite the fact that the American Psychiatric Association has concluded that homosexuality is not an illness.⁵⁸ Attempts to challenge the INS policy have met with little success.⁵⁹ In addition, a gay partner may not immigrate to the United States; the Federal Courts refuse to recognize gay couples as married for purposes of immigration and naturalization rights.⁶⁰

Gays also face discrimination in military service, which routinely discriminates in selection and enforces dismissals on the basis of sexual orientation.⁶¹ According to the Department of Defense, "Homosexuality is incompatible with military service,"⁶² and this directive has been implemented by the Army,⁶³ the Air Force,⁶⁴ the Navy,⁶⁵ and the Marines.⁶⁶ These

57. 8 U.S.C. § 1182 (a)(4) (1988) provided that "[e]xcept as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . . [A]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect." *Id.*

58. See *supra* notes 6-7 and accompanying text.

59. *E.g.*, *Boutillier v. Immigration and Naturalization Serv.*, 387 U.S. 118 (1967) (psychopathic personality includes homosexuality under 8 U.S.C. § 1182 (a)(4) (1988)); *In re Longstaff*, 538 F. Supp. 589 (N.D. Tex. 1982), *aff'd*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984) (naturalization petition denied to gay alien because he fell not only into the category of excludable aliens with a psychopathic personality, but also was excludable because he committed sodomy abroad before his entry, a crime involving moral turpitude). *But see In re Nemetz*, 485 F. Supp. 470, 470-71 (E.D. Va. 1980) (INS can deny naturalization petition solely on the basis of private, non-harmful homosexual activity), *rev'd*, 647 F.2d 432 (4th Cir. 1981) (circuit judge held the alien's homosexual activity could not serve as the basis for a denial of the finding of "good moral character" necessary to naturalization, where the conduct had been purely private, consensual, and without harm to the public). For a general discussion of INS policies toward homosexuals, see *Hill v. INS*, 714 F.2d 1470, 1472-73 (9th Cir. 1983) and Note: *The Immigration and Nationality Act and the Exclusion of Homosexuals: Boutillier v. INS Revisited*, 2 CARDOZO L. REV. 359 (1981).

60. *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Ca. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

61. Note, *Homosexuality and Equal Protection*, 57 S. CAL. L. REV. 797, 803 (1984).

62. Dept. of Defense Directive § 1332.14 (October 1, 1982).

63. Department of Army Regulations No. 635-100, 635-212 (July 5, 1984).

64. Air Force Regulations No. 39-12 (Oct. 21, 1970).

65. The Secretary of the Navy Instruction 1900-9C (Jan. 20, 1978).

66. The Marine Corps Separation and Retirement Manual § 6106-6081 (1982).

regulations have often been applied to dishonorably discharge members of the military, although the manner in which homosexuality and military service are incompatible is never elucidated. In addition to these areas, governmentally-sanctioned discrimination against homosexuals continues to exist in the areas of employment,⁶⁷ housing,⁶⁸ and education.⁶⁹

Gay people face discrimination in a wide array of legal fields, but no rational basis is ever given for this censure, and those who condemn homosexuals are not forced to defend the bases for their positions. At most, their arguments are based in ignorance and stereotyping, supported only by weak, unsubstantiated references to promiscuity, support of traditional family values, and, more recently, AIDS. However, the fact that society has put an indelible label on gay peoples' sex-lives has only managed to bring their private lives into the public eye; this in no way supports the contention that gay people are any more or less promiscuous than similarly situated heterosexuals. Because gay couples are not afforded the legal rights to marriage and family, there is no logical way to expect their relationships to reflect traditional family values. Finally, discriminating against homosexuals because of AIDS is as acceptable as discriminating against blacks because of Sick-cell anaemia, or against Jews because of Tay-Sachs disease. It is the responsibility of society to give assistance and compassion to people who are sick, not to discriminate against them. "Because neither Congress nor the courts protect gays against discrimination as they protect other minority groups, they tacitly approve of that discrimination."⁷⁰

Although treating sexual orientation as a suspect

67. *E.g.*, *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (discrimination against lesbian seeking employment by the FBI; in spite of her high qualifications, the FBI specifically declined to hire a lesbian).

68. *E.g.*, *De Santis v. Pac. Tel. and Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (Title VII does not bar discrimination in employment and housing on the basis of sexual preference).

69. *See generally* Newton, *Representations of Homosexuality in Health Science Textbooks*, 4 J. OF HOMOSEXUALITY 247 (1979) (failure to address homosexuality in sex education programs).

70. Miller, *supra* note 4, at 806.

classification under the Equal Protection Clause of the 14th Amendment has received considerable attention in American law journals, the courts have been unreceptive in most cases.⁷¹ The problem is largely a matter of perspective: homosexuals are a minority which should be protected as such; instead, they are usually treated as merely an aggregate of individuals with a particular sexual preference.⁷²

The overwhelmingly pejorative attitude toward homosexuals in the legal fields, government, education, and, consequently, in society as a whole, forces gay people to hide or deny their sexual orientation, making it even more difficult for them to engage in rational, open-minded discussion with those who oppose their views. The fear and hatred of homosexuals, often called homophobia,⁷³ is pervasive in American society. These social attitudes both effect, and are affected by, the discrimination which our legal system not only tolerates, but fosters. One explanation for the cause of this fear and hatred is the fact that gay people force the vast majority of heterosexual people to question their beliefs about society, themselves, and even their own sexuality.⁷⁴

71. Leonard, *supra* note 50, at 101. See generally Miller, *supra* note 4. (discussion of why the courts should apply the heightened scrutiny of the Equal Protection Clause to classifications based on homosexuality). See also *Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir. 1988) (Army regulation which discriminates against homosexuals should receive heightened scrutiny since sexual orientation has no relevance to a person's ability to perform or contribute to society).

72. Altman, *The Peculiarity of the United States*, in PINK BOOK, *supra* note 50, at 95.

73. The term "homophobia" suggests a fear of homosexuals, and an individual, pathological hatred of them. Law, *supra* note 5, at 195. However, the author draws a useful distinction between homophobia and what she terms "heterosexism," which is a more general, cultural and social reflection of individual homophobic attitudes. *Id.* "Although some individuals are indeed homophobic, heterosexism is a much broader phenomenon, structured into basic familial, economic, and political relationships. Heterosexism shapes the lives, choices, beliefs, and attitudes of millions of people . . ." *Id.* See generally Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923 (1986).

74. See generally Law, *supra* note 5, at 210. Contemporary legal and cultural contempt for homosexuals primarily preserves and reinforces the social meaning attached to gender.

[L]esbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality. They do not fit. Such persons, particularly if they are comfortable with their sexuality and are reasonably content and successful in their work and family life, invite

II. A VIEW OF MORE TOLERANT SOCIETIES

Although some progress has been made toward eradicating discrimination against homosexuals in America, both on the state⁷⁵ and federal⁷⁶ levels, the legal system cannot wait for the attitudes of society at large to evolve. In some European countries, particularly the Netherlands and the Scandinavian countries, legal tolerance has led to broad social change in favor of accepting gay people as a normal part of society. An examination of the attitudes and laws in these countries offers a blueprint for change in the United States, as well as in other intolerant societies.

A. The Netherlands

The Dutch homosexual movement is one of the oldest and most influential in the world,⁷⁷ and it has brought about

heterosexual people to explore whether their own sexual orientation is innate, 'freely chosen,' or simply the socially comfortable course of least resistance.

Id.

75. Wisconsin is the only state to have a state-wide civil rights law that protects gays from private discrimination. WIS. STAT. ANN. § 111.36(1)(d) (West Supp. 1988). However, there have been state courts which do protect gay people on various levels. See, e.g., *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982) (illegal to discriminate against gays in housing); *Gay Activist Alliance v. Board of Regents of the Univ. of Okla.*, 638 P.2d 1116, 1122 (Okla. 1981) (freedom of expression for recognized homosexual campus group is protected); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (Boy Scouts cannot dismiss scout solely because he is gay).

76. The regulations of the Civil Service Commission state that the Commission "cannot find a person unsuitable for federal employment solely because that person is a homosexual or has engaged in homosexual acts." 5 C.F.R. § 731.202(b) (1983). See *Norton v. Macy*, 117 F.2d 1161, 1164 (D.C. Cir. 1969) (Civil Service cannot arbitrarily fire gays). See also *Adolf Coors Co. v. Wallace*, 570 F. Supp. 202, 209 n.24 (N.D. Cal. 1983) (membership in organizations promoting gay rights is protected, because gays are a "discreet and insular minority deserving special solicitude." *Id.*).

77. Tielman, *Dutch Gay Emancipation History*, in *GAY LIFE IN DUTCH SOCIETY* 9 (A.X. van Naessen ed. 1987) [hereinafter Tielman]. The first organized group which sought to accomplish political and social equality for homosexual men and women in Holland was the Nederlandsch Wetenschappelijk Humanitair Komitee, founded in 1911. *Id.* at 10-11.

sweeping change in the legal and social laws and attitudes towards homosexuals throughout the Kingdom of the Netherlands. While statistics show that the majority of Americans disapprove of gay people,⁷⁸ in Holland the vast majority of Dutch society is of the opinion that homosexuals should be treated equally;⁷⁹ in fact, less than 10% of the Dutch population holds any form of pejorative attitude towards homosexuals (the majority of which has been identified as members of fundamentalist Christian sects).⁸⁰ This statistic is down from 60% only thirteen years earlier.⁸¹

This change in social attitudes was brought about largely in collaboration with legal reforms. The first clause of the Dutch Constitution, completely revised in 1983, states that no discrimination will be permitted "on any grounds whatsoever."⁸² Sexual orientation was originally going to be expressly mentioned, but the idea was rejected because it would leave other forms of discrimination uncovered.⁸³ Homosexuality is not mentioned in the penal code.⁸⁴

The Netherlands has a national gay and lesbian

78. In 1974, the most recent year for which quantitative, comparative data are available, 78% of Americans believed that sexual relations between members of the same sex were always wrong, even when the two people love one another. Nyberg & Alston, *Analysis of Public Attitudes toward Homosexual Behavior*, 2 J. HOMOSEXUALITY 99, 106 (1976-77).

79. Tielman, *supra* note 77, at 10.

80. Tielman & de Jonge, *Country by Country Survey*, in PINK BOOK, *supra* note 50, at 237; Hoogman, *The Netherlands: A Fifteen Year Fight for Equal Right*, in PINK BOOK *supra* note 50, at 129.

81. Tielman, *supra* note 77, at 14. "A vast majority, 86% of Dutch society is of the opinion that homosexuals are to be treated with equality, as opposed to 56% who were of that opinion in 1968. In 1968, 60% gave opinions about homosexuality as being dirty, deviant, or abnormal; in 1981, fewer than 10% did." *Id.*

82. "Allen die zich in Nederland bevinden worden in gelijke gevallen gelijk behandeld. Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of welke grond dan ook, is niet toegestaan." ("All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex, or any grounds whatsoever shall not be permitted.") Grondwet van het Koninkrijk der Nederlanden [GRW. NED.] § 1 (Neth.) (emphasis added).

83. Waaldijk, *Constitutional Protection Against Discrimination of Homosexuals*, in GAY LIFE IN DUTCH SOCIETY, *supra* note 77, at 60.

84. Tielman & De Jonge, *Country by Country Survey*, in PINK BOOK, *supra* note 50, at 236.

organization, the Nederlandse Vereniging tot Integratie van Homosexualiteit-COC (The Dutch Organization for Integration of Homosexuality).⁸⁵ The COC, as it is commonly known, one of the oldest gay rights organizations in the world, was given legal status by the government in 1973, and has been governmentally subsidized since that time.⁸⁶ The COC's primary goal is "integration, regarded not as assimilation but as the development of a proper, non-isolated identity, of participation in society on an equal footing."⁸⁷

This governmentally sponsored tolerance has resulted in far-reaching progress for both gay people and society as a whole. Gays in the Netherlands have been allowed to participate in the Armed Forces since 1974, gay couples are afforded all of the same rights as similarly situated heterosexual couples, and open discrimination is not tolerated, socially or legally.⁸⁸ Many well-known gay Dutch artists, politicians (including members of Parliament), officials, teachers, and sports personalities have been free to present themselves as positive images to young gays and to society as a whole.⁸⁹ Additionally, in 1987, the first Dutch monument to commemorate the historical persecution and liberation of homosexual women and men was inaugurated in Amsterdam.⁹⁰ Dutch society is made up of many minorities of various kinds; the Dutch people consider homosexuals to be simply another among them who must be respected on equal footing with every other minority.⁹¹

The interests of homosexuals could only be safeguarded in those countries, e.g. the

85. *Id.* at 238.

86. Tielman, *supra* note 77, at 14.

87. *Id.* at 15.

88. Tielman & De Jonge, *Country by Country Survey*, in PINK BOOK, *supra* note 50, at 237.

89. *Id.*

90. *Id.*

91. *Id.*

Netherlands, where the gay movement had had the opportunity to develop its own identity, and was thus able to act as a collective entity in attempting to gain social recognition and rights, establishing itself in the mainstream of society by alliances with other minority groups.⁹²

B. Scandinavia

Similar to the Netherlands, the Scandinavian countries have adopted a legal and societal tolerance and protection of homosexuals. In Denmark, for example, the anti-discrimination clause of the National Penal Code has been accepted by the Danish parliament (the Folketing) to protect gay people from discrimination based on their sexual orientation.⁹³ It is possible for gays to be drafted or to enlist in the armed forces,⁹⁴ gay couples can inherit from each other,⁹⁵ and, in 1989, a new law has come into force allowing gay couples to marry and have virtually all the same rights as heterosexual, married couples.⁹⁶

Sweden has also adopted an extremely tolerant attitude toward gay people. The age of consent to sexual relations for homosexuals is the same as for heterosexuals (15 years old).⁹⁷ Gays are free to serve in the armed forces.⁹⁸ There was a Parliamentary commission from 1978 until 1986 which recommended a political agenda to eliminate "all remaining discrimination against homosexuals."⁹⁹ As a result of this recommendation two important laws were passed in 1987:

92. Tielman, *supra* note 77, at 16.

93. Tielman & De Jonge, *Country by Country Survey* in PINK BOOK, *supra* note 50, at 228.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 240.

98. *Id.*

99. *Id.*

first, commercial organizations are forbidden to discriminate on the grounds of homosexuality; second, it is a criminal offense to make derogatory remarks about a person's sexual orientation, on par with race, color, national or ethnic origin, and religious belief.¹⁰⁰ Since 1988, gay couples living together are afforded the same rights as heterosexual co-habitees.¹⁰¹ Finally, schools are encouraged to teach about homosexuality, and open discrimination against gays is not tolerated within society.¹⁰²

The final country in the Scandinavian trilogy which has expressed legal tolerance toward homosexuals is Norway, where, since 1981, a law has been in force which prohibits discrimination against gay people.¹⁰³ It is illegal to "publicly threaten, insult, or bear hatred towards, persecute, or hold in contempt a person or group on the ground of homosexual orientation or way of life,"¹⁰⁴ and it is an offense "in the course of professional or similar activities to refuse a person or a group the sale of goods or the provision of facilities on the ground of homosexual orientation or way of life."¹⁰⁵ Like the countries already mentioned, gay people may serve in the armed forces, and social attitudes are equally tolerant.¹⁰⁶

C. *Other Triumphs for Gay Rights*

It is clear that equal rights for gay people is not an irrational dream, only possible in a utopian society. The European Court of Human Rights has recently demonstrated its support for homosexual equality when it struck down the Irish law which forbade homosexuality, declaring that it was in

100. *Id.*

101. *Id.*

102. *Id.* at 241.

103. *Id.* at 238.

104. *Id.* at 238.

105. *Id.*

106. *Id.*

breach of the European Convention on Human Rights.¹⁰⁷ The original law, passed in 1861, made homosexual acts between men illegal, and provided a maximum sentence of life imprisonment for "buggery."¹⁰⁸ "A law legalizing homosexuality would bring Ireland into line with the rest of Western Europe where such freedoms are commonplace."¹⁰⁹

England repealed its sodomy laws in 1967.¹¹⁰ However, that country brought great condemnation upon itself by gay and human rights activists when it passed a new law in 1986 prohibiting the promotion of homosexuality by teaching or by publishing material,¹¹¹ bringing into practice a new and shocking form of censorship. However, it is interesting to note that even in England, where there is an obvious bias against homosexuals, their laws do not specifically criminalize their sexual behavior, and the European Supreme Court has made clear that similar types of discrimination will not be tolerated.¹¹² Nonetheless, the United States Supreme Court has held that in this country such laws are constitutional.¹¹³ In many countries around the world, similar discrimination still exists.¹¹⁴

III. CONCLUSION

"Persons with homosexual histories are to be found in every age group, in every social level, in every conceivable

107. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1982).

108. *Offenses against the Person Act*, §§ 61-62 (Ir. 1861).

109. *Irish to Legalize Homosexuality*, *Irish Voice*, Nov. 5, 1988, at 1, col. 1.

110. *Sexual Offenses Act 1967*, ch. 60.

111. *Local Government Act, 1988*, ch. 9. The statute reads: "(1) A local authority shall not-- (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship." *Id.*

112. *See supra* notes 97-99 and accompanying text.

113. *See supra* notes 6-42 and accompanying text.

114. For a world-wide survey of 182 countries and their legal and social stance on homosexuality, see Tielman & De Jonge, *Country by Country Survey*, in *PINK BOOK*, *supra* note 50, at 185-242.

occupation, in cities and on farms, and in the most remote areas of the country."¹¹⁵ Centuries of governmentally fostered discrimination has yielded laws which oppress gay people, and perpetuate the negative stereotypes prevalent in our society. These laws do not only harm gay people; they injure everyone "who seeks the freedom to experience the full range of human emotions, behavior, and relationships"¹¹⁶

Change must begin with sodomy laws, and the obvious beginning point is the overruling of *Bowers v. Hardwick*.¹¹⁷ Sodomy laws unfairly persecute homosexuals, and the Supreme Court's only justification for their continuation is the history of oppression of gay people. Additionally, they encourage more diverse forms of legal and social discrimination against, and ostracism of, gay people by giving the clear message that such discrimination is to be tolerated. Hopefully, in the near future, *Bowers v. Hardwick*¹¹⁸ will be viewed with the same disgust with which we now view the *Dred Scott v. Sandford*¹¹⁹ decision.

States must also be encouraged to extend the protections of family law to homosexuals. This must begin with the legalization of marriages between same-sex partners, and affording gay people the same parenting rights as similarly situated heterosexuals. This will allow gay people to involve themselves in traditional family units if they so choose, and will offer them the same legal protections given to heterosexual couples who have chosen to make a legal commitment to one another. It will also afford gay couples and families the support of society, and will give a message to society at large that the law encourages relationships founded upon love and commitment.

115. A.C. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 627 (1948).

116. *Law, supra* note 5, at 232.

117. 478 U.S. 186 (1986).

118. *Id.* at 186.

119. 42 U.S. (19 How.) 393 (1857).

Sexual orientation should be included in our laws which protect American citizens in employment, housing, and education.¹²⁰ Obviously, this protection would extend to functions overseen by our government such as immigration and naturalization, and the military. One's sexual preference has no relevance to one's ability to perform in a job, to where one has a right to live, to whether one is entitled to an education, or to whether one can serve his or her country, any more than that person's sex, religion, color, ethnic background, or any other distinction based in prejudice which were enforced in the past. Our government causes irreparable harm to gay people when it punishes them merely for forming intimate, loving relationships, without other reason. Such moralistic judgements and prejudice should not be tolerated in a theoretically free country.

Homosexuals must be seen as a discreet and insular minority, requiring protection; one which has suffered under discrimination and persecution. The path is being paved for both legal and social reform. The greatest tool in the hands of human rights activists is education, for the discrimination and bigotry within our legal system, and society generally, are the products of ignorance. In addition, it is the responsibility of our lawyers, judges, and legislatures to lead the way toward greater understanding by declaring that intolerance and discrimination, in any form, will not be permitted in our society. Through legal reform we can achieve social reform, and a society which helps individuals and ultimately society, to achieve their utmost potential. Until our government shows that our country is free for all people, it is not truly free for any of us.

David Ari Ben-Asher

120. *E.g.*, Title VII of the Civil Rights Act of 1964, § 701, 42 U.S.C.A. §§ 2000e-2000e-17 (1964).