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Life After Hardwick

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LIFE AFTER *HARDWICK*

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Unless or until it is narrowed or overruled, *Bowers v. Hardwick*[1] will dominate the law concerning government regulation of sexuality. In *Hardwick* the Supreme Court upheld as constitutional a Georgia sodomy statute that made oral or anal intercourse a felony punishable by up to twenty years in prison.[2] The Court ended its long reluctance to assess the constitutionality of limitations on sexuality as distinct from contraception[3] by ruling that the protected zone created by the privacy right stops short of covering private consensual sexual relations between adults. In so ruling, the Court left in place a patchwork of prohibitory laws in which identical acts are immunized or criminalized as one traverses state borders.[4]

Although *Hardwick* was litigated as a sexual privacy case, and despite the fact that the Georgia statute drew no distinctions based on sexual orientation, the case has been interpreted primarily as a ruling on homosexuality. The Court explicitly limited its holding to the legitimacy of laws criminalizing sexual acts between persons of the same sex, refusing to indicate whether the same standard of deference to legislative determinations of morality would apply if pairs of the opposite sex engaged in the prohibited behavior.[5] Since *Hardwick* was decided, the threshold question in

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

[2] *Id.*

[3] A majority of the Supreme Court in 1977 stated, "'[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' n.17, *infra*, and we do not purport to answer that question now." Carey v. Population Services, 431 U.S. 678, 688 n.5 (1977) (citing *Id.* at 695 n.17 [referring to a statement made later in the same decision]) (brackets in the original).

[4] *See Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1519–21 (1989).

[5] *Hardwick*, 478 U.S. at 188 n.2.

the litigation of lesbian and gay rights cases has become whether *Hardwick* only extinguishes the claim to a substantive due process privacy right, or whether it also predetermines challenges under the Equal Protection Clause. The courts must still decide whether the decision in *Hardwick* was a ruling on conduct or a ruling on a class of people.

The result is an extraordinary new judicial discourse about the social meaning of homosexuality and the determinants of sexual behavior and sexual identity. It is driven by the needs both of those who seek repressive measures and of those who seek group-based civil rights. Both interests require a reliable definitional structure on which to ground their arguments and a coherent system for identifying homosexuality. Both camps accept the idea of sexual identity as a central aspect of the human condition, but sharply dispute the definition, expression and regulation of such identity. Implicit in each adjudication is the threat of reinforcing or increasing the social penalty accruing to disfavored sexualities, yet at the same time the very debate itself creates opportunities to contest hegemonic categories.

The context for the post-*Hardwick* debate is deeply paradoxical. The law is dominated by the emergence of the Rehnquist Court, well advanced in what has become a liberty demolition project. At the same time, the investigation of homosexuality has blossomed in scientific and academic circles.[6] Popular movements seeking greater political and social freedom for lesbians and gay men have also mushroomed.[7] These factors ensure that the issues raised in the post-*Hardwick* litigation are not transitory.

This Article argues that the term sodomy is a cultural chameleon, which has shifted in meaning from its original delineations

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[6] *See, e.g.*, JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988) [hereinafter INTIMATE MATTERS]; EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990); DAVID HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY (1990); MARTIN DUBERMAN, MARTHA VICINUS & GEORGE CHAUNCEY, JR., HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (1990) [hereinafter HIDDEN FROM HISTORY]; JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA (1991). A lesbian, gay and bisexual studies conference has become an annual event, held to date at Yale, Harvard and Rutgers Universities. *See* INSIDE/OUT (Diana Fuss ed., 1991), a collection of papers presented at the Yale conference in 1989. *See also* the discussion of homosexuality as biologically different from heterosexuality, *infra* note 74.

[7] *See, e.g.*, Robert Reinhold, *Veto of California Job-Bias Bill Unites Gay-Rights Forces Against Governor*, N.Y. TIMES, Nov. 12, 1991, at A16; Alessandra Stanley, *Militants Back "Queer," Shoving "Gay" the Way of "Negro,"* N.Y. TIMES, Apr. 6, 1991, at A23.

based primarily on non-procreative sex to a contemporary view that reflects social anxiety over sexual orientation. Despite its ideals of constancy and clarity, the law has collaborated in that shift, as the Supreme Court did, *sub silentio*, in *Hardwick*, and as the majority of the federal judiciary continues to do. This phenomenon is now confusing Equal Protection doctrine, and it necessitates a gay-friendly deconstruction of the new sexual orientation categories.

I. The "Utterly Confused Category"[8]

The core of the debate over the ramifications of *Hardwick* grows out of the disjuncture between the legal definition of sodomy and its social and cultural meanings. The crime of sodomy originated in ecclesiastical regulation of a range of nonmarital, nonprocreative sexual practices. Nonprocreation was the central offense and the core of the crime.[9] Homosexual conduct fell within the cluster of activities that were regulated, but most early American statutes defined sodomy in terms of anal intercourse, whether between men or between a man and a woman.[10] The "crime against nature" to which that phrase refers was not, as is often assumed today, a crime against heterosexuality, but a crime against procreation.

Confusion as to the meaning of sodomy is not new. It was evident in perhaps the first debate in American law over the scope of its definition: in the winter of 1641–1642, a sodomy case arose in the Massachusetts Bay Colony. Three men were discovered to have had sexual contact with two female children. John Winthrop's account of the case described the act as "agitation and effusion of seed." Vaginal penetration was also alleged, but was denied by

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[8] The phrase is Foucault's description of sodomy. MICHEL FOUCAULT, A HISTORY OF SEXUALITY 101 (Robert Hurley trans., 1978).

[9] INTIMATE MATTERS, *supra* note 6, at 16, 30. As one court later stated, "[A]ll unnatural acts of carnal copulation between man with man or man with woman, where a penetration is effected into any opening of the body other than those provided by nature for the reproduction of the species, are sufficiently contemplated and embraced within the term 'infamous crime against nature . . . .'" In Ex parte Benites, 140 P. 436, 437 (Nev. 1914) (citing WILLIAM HAWKINS, PLEAS OF THE CROWN (1787)).

[10] Prohibitions against oral sex were added later. Sodomy also sometimes referred to intercourse between a human and an animal. The fullest exposition of the history of sodomy law can be found in Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1081–87 (1988).

the defendants.[11] The Massachusetts Bay Colony at that time had not yet adopted a formal body of laws, and the colony's leadership was unsure with which violation of criminal law to charge these men and whether their offense merited capital punishment.[12] As a result, the governor asked jurists and church elders in that colony and in Plymouth whether the defendants' behavior constituted a "sodomitical act," punishable by death.[13]

As these colonists understood sodomy and rape,[14] the primary legal question at issue was whether proof of penetration was necessary to sustain an offense meriting the death penalty. Bradford and one of the Plymouth clergymen contended that proof of penetration was required. The two others argued that non-penetrative acts which led to ejaculation and the "spilling of seed" were comparable in infamy to penetrative crimes and should be equally punished. As one minister put it, the spilling of seed "is equivalent to killing the man who could have been born out of it."[15]

Apparently, none of the disputants suggested that the same-sex phrasing of the Biblical injunction that a "man shall not lie with a man as with a woman" precluded a sodomy charge in a case involving male-female conduct, even though that command was cited repeatedly as the original source of the law and as the basis for an analogy to the case before them.[16] As Jonathan Ned Katz notes in his summary of the incident, "[t]hat this discussion of 'sodomy' was motivated by a crime of male against female illustrates the colonists' relative lack of preoccupation with gender in their categorizing of sexual acts and their relative emphasis on other characteristics of those acts."[17] The willingness to consider

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[11] JOHN WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649: VOLUME II 54–55 (1853).

[12] The case is described most fully in JONATHAN NED KATZ, GAY/LESBIAN ALMANAC 78–82 (1983).

[13] *See* WILLIAM BRADFORD, OF PLYMOUTH PLANTATION 1620–1647, 318–19 (Samuel Eliot Morison ed., 1966).

[14] The colonists concluded that the men could not be punished with the death sentence for rape because there was neither a statute nor "express law in the word of God" that justified such a sentence for rape of an "unripe" girl, and because there was not sufficient proof of penetration. *See* WINTHROP, *supra* note 11, at 56. Additionally, the colonists believed there was an issue of consent, since at least one of the girls was reported to have "grown capable of man's fellowship, and took pleasure in it." *Id.* at 55.

[15] KATZ, *supra*, note 12, at 79–82; BRADFORD, *supra* note 13, at 404–13.

[16] BRADFORD, *supra* note 13, at 404–13. Presumably because of the disagreement over which elements were necessary to the crime, the men were eventually charged with "carnal knowledge . . . in a most vile & abominal manner" and with "abusing" the girls in an "unclean & wicked manner." KATZ, *supra* note 12, at 78.

[17] KATZ, *supra* note 12, at 78. At least one commentator has read the meaning of this

sodomy as meaning something more than same-sex conduct in this instance is all the more notable since it was only the New England states—including Massachusetts—which later used a same-sex definition in their early statutes.[18]

This seventeenth-century debate illustrates fundamental problems that continue to muddle the law of sexuality. First, the Massachusetts Bay Colony debate exemplifies the indeterminacy at the very core of the concept of sodomy. Lacking a statutory definition, the Massachusetts Colony elites drew on their understanding of English law and Biblical prohibitions in an attempt to reach a jointly acceptable interpretation. Their difficulty in doing so signified that then, as now, the term sodomy lacked a fixed cultural or social meaning. Although same-sex conduct was included as part of the meaning of sodomy, its boundaries were drawn by the requirements of penetration and nonprocreative acts.

Most colonial sodomy laws regulated sexual acts solely by men, whether with other men or with women. Proof of phallic penetration was needed to sustain a conviction for sodomy not because the crime focused on same-sex conduct, but because its prohibitions were directed at men. Official acknowledgment of sexual acts between women within the statutory text was rare, although enforcement of some statutes against women was initiated under colonial laws.[19] Later codifications of or amendments to sodomy laws encompassed sexual acts between women.[20]

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debate differently, as "the exception that proves the rule" that "the Puritans nearly always meant homosexuality when they used the term sodomy." Robert F. Oaks, *"Things Fearful to Name": Sodomy and Buggery in Seventeenth Century New England*, 12 J. Soc. Hist. 268, 273 (1978). However, D'Emilio and Freedman reject the Oaks interpretation of sodomy in their book which is the leading synthesis of the historical research. Intimate Matters, *supra* note 6, at 30. If nothing else, these different readings demonstrate the enduring contestability of the term.

[18] Goldstein, *supra* note 10, at 1083 n.60.

[19] Katz, *supra* note 12, at 54–60; Intimate Matters, *supra* note 6, at 30–31.

[20] The Georgia statute before the Supreme Court in *Hardwick* illustrates this pattern. In 1939 the state supreme court overturned the conviction of a woman charged with sodomy for oral sex with another woman on the ground that phallic penetration was a required element of the crime. Thompson v. Aldridge, 200 S.E.2d 799 (Ga. 1939). In *Riley v. Garret*, 133 S.E.2d 367 (Ga. 1963), the same court held that heterosexual cunnilingus also was not covered. In 1968 the legislature amended the statute to include cunnilingus. Justice Blackmun incorrectly characterized this amendment as a relatively recent decision by the legislature to include heterosexual conduct within the scope of the statue. Bowers v. Hardwick, 478 U.S. 186, 200 n.1 (1986) (Blackmun, J., dissenting). At the time of the amendment, heterosexual conduct was already included; it was the possibility of non-phallic conduct that constituted the modern intervention.

If the direct prohibitory effect was on men, however, the indirect and obligatory effect fell heavily on women because the law sought to force all sexual activities to be at least potentially procreative. The repulsion expressed by the two Plymouth clergymen for the "spilling of seed" was triggered by the nonprocreative nature of the defendants' acts. This same aim of the law—discouragement of nonprocreative sex—underlay the statutes prohibiting the use of birth control devices which were stricken as unconstitutional by the Supreme Court in the 1960s.[21] Ironically, in *Hardwick*, the Court concluded that a privacy claim on behalf of "homosexual sodomy" bore no relationship to those earlier decisions: "[n]o connection between . . . procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."[22] In fact, the exact opposite was the case. Michael Hardwick, as a person engaged in sodomy, had the same relationship to procreation as persons using birth control during heterosexual intercourse: none, which was precisely the point. The issue in *Hardwick* should have been controlled by *Griswold* and *Eisenstadt*.

Illustrated by a comparison of the Massachusetts Bay Colony debate to *Hardwick*, the second major shift in the law of sexuality is the role ascribed to "identity." The debate 350 years ago was clearly a dispute about acts and about which acts, in some specific detail, constituted a particular crime. It could easily be analogized to a debate about the elements necessary for burglary or robbery; about, for example, what the charge should be if property is stolen from a person or removed from a home. It is not a debate about a type of person, any more than one discusses theft in terms of two distinct types of human beings—the robbers and the burglars. The law does not assume that a certain personality type will commit theft one way, and another personality type, another way. Anyone could be guilty of either kind of conduct, depending on the facts of the particular incident.

The difference illustrates one of the central arguments of French philosopher Michel Foucault, who wrote that social regu-

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[21] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). In an earlier case in which the Court found lack of standing and thus never reached the merits, Justice Harlan in dissent noted that Connecticut asserted in defense of its ban on contraceptives that "it considers the practice of contraception immoral in itself." Poe v. Ullman, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

[22] 478 U.S. at 191.

lation of sexuality was transformed during the eighteenth and nineteenth centuries in part by

> a new *specification of individuals*. As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology.[23]

Sex between two women or between two men has been recorded for centuries, but the understanding of what those acts signifies about the persons participating in them has shifted radically. "[I]t never occurred to pre-modern cultures to ascribe a person's sexual tastes to some positive, structural, or constitutive feature of his or her personality."[24]

A rich new vein of historical analysis has begun to trace the evolutionary changes in the social meaning of sexual practices, including sodomy.[25] One British historian has argued that the shift in popular meaning of the term "sodomite"—from that of a libertine male sexually active with both women and men to that of an effeminate male interested only in other men—can be pinpointed to the first half of the eighteenth century.[26] The word "homosexual" and the idea that the homosexual was a different kind of person were developed by late-nineteenth-century sexologists proposing medicalized causation theories for sexual behavior.[27]

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[23] FOUCAULT, *supra* note 8, at 42–43 (emphasis in original).

[24] HALPERIN, *supra* note 6, at 27.

[25] In addition to the works cited in notes 6 and 12, see PASSION AND POWER: SEXUALITY IN HISTORY (Kathy Peiss & Christina Simmons eds., 1989); JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 (1983); LILLIAN FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT (1981); JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. (1976). This list does not purport to be exhaustive and specifically does not include works focused solely on non-U.S. history.

[26] Randolph Trumbach, *The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660–1750, in* HIDDEN FROM HISTORY, *supra* note 6, at 129–40; *see also* DAVID GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 309, 333–34 (1988).

[27] *See, e.g.*, JEFFREY WEEKS, COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN 23–32 (1977); George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58–59 SALMAGUNDI 114 (1982–83).

Both the indeterminacy of sodomy's meaning and Foucault's theory on the specification of individuals are borne out in the modern history of sodomy law. Indeed, one of the first bases on which such laws were challenged was the very question of confusion. A number of statutes that prohibited the "crime against nature" without defining it were challenged on grounds of vagueness, although most were upheld with limiting constructions.[28]

In the last twenty years, however, the dominant legislative trend has been specification. The first state to decriminalize sodomy was Illinois in 1961; in the next twenty years, nearly half the states decriminalized all sodomy, usually by adoption of Model Penal Code recommendations that included repeal of sodomy statutes.[29] The last repeal of a sodomy law occurred in Wisconsin in 1983. Starting in the 1970s, however, a countertrend began in which specification has replaced repeal. Since 1973, eight states have amended their laws to specify that oral or anal sex is prohibited only between persons of the same sex.[30] In one state, Okla-

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[28] Some state statutes still use phrases like "crime against nature." *See, e.g.*, ARIZ. REV. STAT. § 13-1411 (1989); IDAHO CODE § 18-6605 (1989); LA. REV. STAT. ANN. 14:89 (West 1986); MASS. GEN. LAWS ANN. 272:34 (West 1990); MICH. COMP. LAWS Ann. § 750.158 (West 1991); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. tit. 21, § 886 (1991); R.I. GEN. LAWS 11-10-1 (1981); and VA. CODE § 18.2-361 (1988). A Florida statute, FLA. STAT. § 800.01 (Supp. 1973), prohibiting "the abominable and detestable crime against nature" was upheld against a vagueness attack in *Wainwright v. Stone*, 414 U.S. 21 (1973) (per curiam). In a non-retroactive ruling that occurred after the conviction in *Wainwright*, the Florida Supreme Court found the same statute to be unconstitutionally vague. Franklin v. State, 257 So.2d 21 (Fla. 1971). The Florida court suggested that the application of the crime against nature statute to oral sex "could entrap unsuspecting citizens and subject them to 20-year sentences . . . [which] would no doubt be a shocking revelation to persons who do not have an understanding of the meaning of the statute." *Id.* at 23. Decisions holding that phrases similar to "crime against nature" provide sufficient notice of what acts are penalized include Hogan v. State, 441 P.2d 620 (Nev. 1968) ("infamous crime against nature"); State v. Crawford, 478 S.W.2d 314 (Mo. 1972) ("abominable and detestable crime against nature"); Dixon v. State, 268 N.E.2d 84 (Ind. 1971) (same); State v. White, 217 A.2d 212 (Me. 1966) ("crime against nature"); and Warner v. State, 489 P.2d 526 (Okl. Crim. App. 1971) (same). *Cf.* Balthazar v. Superior Court, 573 F.2d 698 (1st Cir. 1978) (Massachusetts statute prohibiting "unnatural and lascivious acts" unconstitutionally vague as applied to acts of fellatio and oral-anal contact).

[29] NAN D. HUNTER, SHERYL L. MICHAELSON & THOMAS B. STODDARD, THE RIGHTS OF LESBIANS AND GAY MEN 120 (1992).

[30] ARK. CODE § 5-14-122 (1987); KAN. CRIM. CODE ANN. § 21-3505 (Vernon 1992); KY. REV. STAT. ANN. § 510.100 (Michie 1990); MO. REV. STAT. 566.090 (1986); MONT. CODE § 45-5-505 (1991); NEV. REV. STAT. ANN. § 201.190 (Michie 1986); TENN. CODE ANN. § 39-13-510 (West 1991); and TEX. PENAL CODE ANN. § 21.06 (West 1989). Two of these statutes have been ruled unconstitutional on state constitutional grounds. The Kentucky statute was stricken in *Commonwealth v. Wasson* (Fayette Cir. Ct., Ky. 1989) (appeal pending). Two Texas state courts have ruled the Texas statute unconstitutional: *Morales v. State*, (Dist. Ct. 1990), *aff'd*, 1992 Tex. App. LEXIS 643 (Tex. App. 1992) (reported in ARTHUR LEONARD, LESBIAN/GAY LAW NOTES 5 (1992)) and *England v. State*, (Travis Cty.

homa, a state appellate court ruled on constitutional grounds that the sodomy statute's gender neutral prohibition could not be enforced against opposite-sex partners.[31] Even in the majority of states that retain gender neutral language, the ancillary effects of the sodomy prohibition are directed against lesbian and gay citizens.[32]

It is intriguing to speculate about why state legislatures stopped repealing sodomy statutes and began to single out homosexual acts as crimes. The specification trend coincided with the emergence of the contemporary versions of both the lesbian and gay rights movement and a renewed movement for religious fundamentalism in American politics. In 1973, the year in which specification amendments began, two critical events occurred: The American Psychiatric Association removed homosexuality from its list of mental diseases[33] and the United States Civil Service Commission forbade federal personnel supervisers from finding a person unsuitable for a federal government job based solely on homosexuality.[34] By 1975, anti-discrimination laws had been adopted by the District of Columbia, San Francisco, Los Angeles, Minneapolis, Philadelphia and several smaller cities.[35] Anti-equality forces mobilized during the 1970s also, however, securing repeal of a civil rights law in Dade County, Florida, and conducting two electoral campaigns to enact laws mandating the firing of state school system employees who advocated homosexuality: one unsuccessfully (California), the other successfully (Oklahoma).[36] For states revising their criminal codes, the specification of homosex-

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Dist. Ct. Feb. 3, 1992) (reported in LEONARD, LESBIAN/GAY LAW NOTES 18, *supra*). The amendments that constitute this specification trend were enacted in 1973 (Montana and Texas); 1974 (Kentucky); 1977 (Arkansas, Missouri and Nevada); 1983 (Kansas); and 1989 (Tennessee).

[31] Oklahoma v. Post, 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986).

[32] *See, e.g.*, Roe v. Roe, 324 S.E.2d 691 (Va. 1985) (finding that a gay father who had been awarded custody of his daughter by the trial court was unfit, presumably because of his sexual orientation).

[33] RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981).

[34] *See* Ashton v. Civiletti, 613 F.2d 923, 927 (D.C. Cir. 1979).

[35] THOMAS B. STODDARD, E. CARRINGTON BOGGAN, MARILYN G. HAFT, CHARLES LISTER & JOHN P. RUPP, THE RIGHTS OF GAY PEOPLE 17 (1983). The authors also note, regretfully, that the protective ordinances adopted by Miami and St. Paul were subsequently modified or repealed.

[36] INTIMATE MATTERS, *supra* note 6, at 346–47. The Oklahoma statute was declared, in part, unconstitutional in *National Gay Task Force v. Board of Educ. of City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), *aff'd per curiam*, 470 U.S. 903 (1985).

ual acts as a crime marked both the greater visibility of homosexuality in a positive sense and the tremendous social anxiety that visibility generated.

The *Hardwick* litigation was an attempt to complete the repeal process, but it ran headlong into the shift toward specification. The case was based at the outset primarily on a sexual privacy theory, encompassing the full scope of Georgia's law, which prohibits oral and anal sex between any two partners, heterosexual or homosexual, married or unmarried. Along with Michael Hardwick, a husband and wife couple joined as plaintiffs. They were dismissed for lack of standing, however, in part because the district and appellate courts concluded that because they were heterosexual, they had less at stake.[37]

John and Mary Doe asserted that they desired to engage in sodomy but had been "chilled" and "deterred" by the statute. Hardwick, by contrast, asserted that he regularly engaged in sodomy. The Court of Appeals viewed each of them as claiming "that their normal course of activity will lead them to violate the statute, completely apart from their desire to invalidate it."[38] Yet, the court ruled

> Hardwick's status as a homosexual adds special credence to his claim . . . . While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.[39]

This contributed to what the court referred to as "the authenticity of Hardwick's desire to engage in the proscribed activity in the future,"[40] necessarily imputing less authenticity or desire to the married couple.

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[37] Hardwick v. Bowers, 760 F.2d 1202, 1204–06 (11th Cir. 1985). Standing to challenge a statute on its face, absent an actual prosecution, necessitates a showing both that the plaintiff is likely to engage in conduct that runs afoul of the statute and that the government is likely to enforce the statute. Virginia v. American Booksellers Ass'n., 484 U.S. 383, 392–93 (1988). In *Hardwick*, both aspects were found to be missing for the husband-wife couple.

[38] *Hardwick*, 760 F.2d at 1205.

[39] *Id.*

[40] *Id.* at 1206.

The Court of Appeals' application of standing doctrine prefigured the Supreme Court's conflation of homosexuality with sodomy. The Court of Appeals could have limited its rationale for the standing ruling only to incidents of past enforcement or to claims of current illegal activity. Instead, however, it suggested that only a homosexual could be genuinely interested in engaging in oral sex, the act for which Michael Hardwick was arrested. The language of the standing ruling reflects a belief that the categories "homosexual" and "heterosexual" denote radically different experiences of the same behavior.

The denial of standing to the husband and wife plaintiffs so undermined a general theory of sexual privacy that in some respects, the whole story of *Hardwick* is revealed in the ruling on standing. It removed the two plaintiffs who represented the full scope of the sodomy law from the litigation, and set up a factual context in which the Supreme Court could adjudicate the statute's constitutionality solely "as applied to consensual homosexual sodomy."[41]

From there, the Court's opinion embarks on a series of slippery substitutions between generally prohibited conduct and the civic status of a class of people. The Court moves back and forth from discussion of "homosexual sodomy"[42] to "the fundamental rights of homosexuals"[43] to "the claimed constitutional right of homosexuals to engage in acts of sodomy"[44] to "the morality of homosexuality."[45] The Court equates a subset of acts with the rights of a class.

In so doing, the Court rewrote history to reflect a contemporary preoccupation with homosexuality. The majority ignored what Justice Stevens in dissent accurately described as "the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it."[46] Instead, having framed the scope of the case as "homosexual sodomy," the Court recapitulated the history of sodomy law as though it, too, were limited to homosexuality.

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[41] Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986).
[42] *Id.* at 189, 190.
[43] *Id.* at 189, 190.
[44] *Id.* at 190–91.
[45] *Id.* at 196.
[46] *Id.* at 216 (Stevens, J., dissenting).

The difference here is important for reasons of more than historical accuracy. The Court used its version of history to claim a kind of moral authority as much as, or more than, to discern the views of the framers. Although homosexual sexual conduct had been the subject of legal proscription under colonial statutes, it was no more prohibited than some consensual heterosexual sexual behaviors often subject to the same penalties.[47] The majority used its misreading of history to justify the condemnation of homosexuality, a condemnation that has been transformed by subsequent courts into the holding of the case.

The result is an extremely paradoxical configuration of opinions. Because the dissenters endorse a more liberal or tolerant interpretation of the meaning of privacy, they may be thought also to represent a more progressive, more forward-looking, less history-bound approach than the majority. The majority builds on a history of censure as the primary foundation for continuing that censure. Yet, it was the dissents, especially that of Justice Stevens, which got the history right, refusing to distort previous meanings of sodomy by reading into them a contemporary obsession with homosexuality. The irony is that the dissent, rather than the majority, has history on its side.

Concomitantly, however, the conservative majority could claim modernity in support of its focus on homosexuality. Contemporary social norms—as distinct from the history of sodomy laws—do include a remaking of the understanding of which sexual practices are condemned. New social understandings have converted sodomy into a code word for homosexuality, regardless of the statutory definition.[48] Thus, ironically, the world view of a majority that believed its decision to be anchored in "millennia of moral teaching"[49] was actually quite contemporary in its fundamental approach, as well as dependent on recent social trends. The source of authority that the majority claimed most fervently,

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[47] INTIMATE MATTERS, *supra* note 6, at 28–30; GREENBERG, *supra* note 26, at 304; KATZ, *supra* note 12, at 68, 74, 76, 85, 101.

[48] Judges Canby and Norris of the Ninth Circuit are on solid legal ground when they argue that *Hardwick* is not "a state license to pass 'homosexual laws.'" Watkins v. U.S. Army, 847 F.2d 1329, 1354 (9th Cir. 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990). The problem with this view is not legal but cultural—sodomy statutes are socially understood as "homosexual laws," even if in fact or in origin they are not.

[49] Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

however—a strict adherence to the world view of the framers—was an historical forgery.

II. The Current Debate

The decision in *Hardwick* now bedevils virtually all litigation concerning lesbian and gay rights claims. A series of federal court decisions have concluded that *Hardwick* precludes any heightened review under the Equal Protection Clause of the Fifth and Fourteenth Amendments for classifications based on sexual orientation. A minority of judges have written that the Equal Protection question is still open. In effect, American jurists are still asking, 350 years after the Massachusetts Bay Colony debate, what does sodomy *mean*? As Judge Stephen Reinhardt of the Ninth Circuit has written, "either *Hardwick* is about 'sodomy' . . . or it is about 'homosexuality.'"[50]

The emerging majority position, adopted by the Seventh, Ninth, D.C. and Federal Circuits, is that *Hardwick* is about homosexuality. The opinions constituting this position share in common a conclusion that because homosexual sodomy can be made criminal and because that "conduct defines the class," homosexuals as a group can be regulated by the state with no greater justification than is required under the traditional rational basis test.[51]

This conduct-centered view is premised on a radical imbalance. The act of homosexual sodomy "defines the class" of gay men and lesbians, but the same act of sodomy between opposite sex partners does not "define the class" of heterosexuals. Heterosexuality discreetly disappears as a category of persons defined by sex. Homosexual sodomy, on the other hand, not only becomes the totality of sodomy, it also becomes the totality of homosexuality.

Only Judge Reinhardt among the proponents of the conduct-centered approach has sought fully to engage with this contradiction. He acknowledges that the behavior in question, oral or anal

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[50] *Watkins*, 847 F.2d at 1354 (Reinhardt, J., dissenting).

[51] *See* High-Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990); 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 (D.C. Cir. 1987).

sex, is practiced by "a substantial majority" of both heterosexual and homosexual persons. Indeed, the frequency of this conduct is quite similar for the two groups.[52] Reinhardt justifies the differential that he reads *Hardwick* to establish (but which he does not endorse) as based on the difference that, for homosexuals alone, such behavior "is fundamental to their very nature."[53]

The illogic of the Reinhardt view, and also of the rationale for the standing decision in *Hardwick*, inheres in the effort to base a finding of intrinsic difference on precisely that which is similar. The acts at issue in *Hardwick*—i.e., sodomy as defined by the Georgia statute—are the very acts that the two groups share in common. If there are specific sexual practices that explain the difference between the two groups, it must be those practices that are missing from one group and present for the other. *That* conduct is procreative sexuality.

Although the distinction based on procreation has been ignored in the sodomy cases, where its recognition would lead to an extension of the *Griswold–Eisenstadt* principle to homosexual acts, it has been relied on in other contexts to defeat lesbian and gay rights claims. In *Singer v. Hara*, gay plaintiffs invoked a state equal rights amendment that prohibited any differential treatment based on sex, arguing that the marriage law could not bar a man from marrying a man if he could marry a woman. The Washington Court of Appeals rejected this argument, reasoning that the controlling difference was the "impossibility of reproduction," a distinction sufficient to constitute a unique physical characteristic of the sexes, and thus a defense to an ERA claim.[54]

The status-centered view has the better legal argument; it is truer to the holding of *Hardwick*. It insists that the power of the state to prohibit certain conduct must be applied evenhandedly.[55] It is more intellectually honest. If one imagines, for example, that

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[52] Data indicate that 96–99% of gay and lesbian persons have engaged in oral sex and a smaller proportion in anal sex. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236, 242 (1983). From 90 to 93% of heterosexual persons have engaged in oral sex and a smaller proportion in anal sex. *Id.*

[53] *Watkins*, 847 F.2d at 1357 (Reinhardt, J., dissenting).

[54] Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974).

[55] *Watkins*, 847 F.2d at 1340–41. *High-Tech Gays*, 909 F.2d at 379 (dissent from rehearing en banc). *Cf.* Ciechon v. City of Chicago, 686 F.2d 511, 522–24 (7th Cir. 1982) (even under rational basis standard of review, Chicago Fire Department could not discharge only one of two paramedics who were equally involved in and equally responsible for an incident involving the death of an elderly man).

Hardwick had been decided the other way, such that the privacy right covered acts including homosexual sodomy, there would not be automatic invalidation of sexual orientation classifications under an Equal Protection test. If we had won *Hardwick*, we would not automatically, *ipso facto*, win a challenge to the military's exclusion of lesbian and gay service members. The government would still be able to argue (I believe incorrectly) that it should be entitled to create a sexual orientation classification based on factors unrelated to whether particular conduct was criminal.[56] The same distinction between privacy and equality holds in the opposite direction: Although we lost *Hardwick*, our claims under the Equal Protection Clause should not, *ipso facto*, be foreclosed.[57]

The weakness of the status-centered view is its erasure of all conduct and its focus solely on identity. Judges Canby and Norris insist that the class of persons who consider themselves homosexual is not "virtually identical" to those who engage in homosexual sodomy.[58] They are boxed into this position by a need to distinguish both *Hardwick* and Ninth Circuit precedent that held that there was no Equal Protection violation from the government selecting homosexual sodomy charges for heightened prosecution, even under a neutral sodomy law.[59] Although lesbian and gay sexual expression does encompass many more acts than oral or anal sex alone, the Canby-Norris argument is unpersuasive in its refusal to acknowledge the substantial overlap.

What the status-centered view substitutes for sexual acts as the core meaning of homosexuality is a concept of identity that is just as "fundamental" and essentializing as conduct is in the Reinhardt approach. Under the status-centered view, sexual orientation

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[56] The government's primary argument in justification of its exclusionary policy is that other service members and the public would react negatively to the presence of openly gay men and lesbian women in the military and that barracks life would be made uncomfortable. *See, e.g., Watkins*, 847 F.2d at 1350–52. Whether this rationale amounts to more than the invocation of prejudice may be tested in *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991), in which the court reversed the dismissal of a lesbian plaintiff's Equal Protection claim against the policy, and directed the district court to determine whether the policy had a rational basis under the strict rational basis analysis of *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432 (1985).

[57] Cass Sunstein has analyzed in detail the difference in function between the Equal Protection Clause and the Due Process Clause, and argued that *Hardwick* should not be read to determine the Equal Protection question in cases such as *Watkins*. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

[58] *Watkins*, 847 F.2d at 1339 n.14.

[59] Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981).

is "a central character of individual and group identity,"[60] "a central and defining aspect" of every individual's personality.[61] Citing the amicus brief filed by a gay rights advocacy group, Judges Canby and Norris assert that "one is a homosexual or a heterosexual while playing bridge just as much as while engaging in sexual activity."[62]

Both the conduct-centered and the status-centered views illustrate the ascendancy of an identity definition in the debate over the parameters of constitutional rights. The conduct-centered view holds that what a person does determines what she is; the status-centered view argues that her sexuality is so central to her identity that what she is exists independently of what she does. Both approaches would have the law institutionalize the category of sexual orientation, albeit with radically different rationales and opposite outcomes. The former would permit the state to use homosexual identity as the newest bullseye at which to aim repressive measures, while the latter would legitimate the same identity as the basis for an egalitarian demand.

III. Problems for the Future

In lesbian and gay rights litigation that lies in the immediate future, correcting the misreading of *Hardwick* is only the first barrier to be overcome. Successfully distinguishing the question of governmental power to penalize sexual acts from the independent question of whether classifications based on sexuality are impermissibly invidious merely sets the stage for further complex questions. Many of the thorniest challenges will come in trying to subvert categorical modes of thinking about sexuality and sexual orientation, while still taking advantage of a civil rights heritage that is grounded on identity politics.

Breaking the gridlock of identity politics is no easy task. The civil rights claim remains the most powerful device for securing equality in American society, yet it is premised on recognition of a coherent group identity. What often goes unspoken in the assertion of such a claim is the tension between the desire to deconstruct

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[60] Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc).

[61] Jantz v. Muci, 759 F.Supp. 1543, 1548, 1551 (D. Kan. 1991) (appeal pending).

[62] High-Tech Gays v. Defense Industrial Security Clearance Office, 909 F.2d 375, 380 (9th Cir. 1990).

the imprisoning category itself and the need to defend those persons who are disadvantaged because they bear the group label.[63]

This tension is particularly acute for lesbian and gay rights advocates, and will grow more so, for two reasons. First, the constructionist-essentialist dispute currently dominates intellectual debates on issues of sexuality.[64] These debates have only begun to surface in the discourse of law, but they will inevitably spread from the non-legal activists and academics now most engaged in them to the courts. Second, much future litigation in this area will be grounded on Equal Protection doctrine, which directs judicial attention to a history of group discrimination, a status of relative political disempowerment and the indicia of identifiable group status itself.[65] Each of these criteria raises problems that are unique to lesbian and gay rights claims and that exemplify the strategic questions inherent in those claims.

Although a history of discrimination is perhaps the least contested of these criteria,[66] the view among lesbian and gay historians that homosexuality did not exist as a concept distinct in kind from other sexual behaviors until near the end of the last century calls into question at least some of the more sweeping invocations of oppression found in decisions that grant Equal Protection claims.[67] The district judge in *Jantz v. Muci*, for example, wrote that "stigmatization of homosexuals has 'persisted throughout history, across cultures.'"[68] Hyperbole should not be necessary, however. A century of animosity has in fact created the kind of failure in the political system that "footnote four" principles[69] are permitted to remedy.

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[63] Carole S. Vance posed the dilemma as deconstruction versus defense in her examination of the development of a social constructionist theory of sexuality. Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, *in* DENNIS ALTMAN, CAROLE VANCE, MARTHA VICINUS & JEFFREY WEEKS, HOMOSEXUALITY, WHICH HOMOSEXUALITY? INTERNATIONAL CONFERENCE ON GAY AND LESBIAN STUDIES 13, 29 (1988).

[64] *See, e.g.*, HALPERIN, *supra* note 6, at 41–53.

[65] *See* Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987).

[66] In *High-Tech Gays*, 895 F.2d 563, 573 (9th Cir. 1990), for example, the Ninth Circuit panel acknowledged that this requirement for heightened scrutiny had been met, but found the plaintiffs' claim deficient on other grounds.

[67] For a gay historian's views of the problems posed by wishing to use historical research in the effort to secure equality, see John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915 (1986).

[68] Jantz v. Muci, 759 F. Supp. 1543, 1549 (D. Kan. 1991) (quoting 98 HARV. L. REV. 1302 (1985)). Goldstein, *supra* note 10, succinctly summarizes the historical evidence indicating a much more nuanced history than simply "ancient prohibitions." *Id.* at 1087.

[69] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

The second of the criteria for heightened scrutiny, powerlessness in the legislative process, has become, surprisingly, a point of disagreement in judicial assessments of classifications based on sexual orientation. Several courts have found that the election of a handful of openly lesbian and gay officeholders, together with the enactment of primarily municipal anti-discrimination laws, demonstrate that judicial intervention is unnecessary.[70] These decisions raise the threshold for heightened scrutiny to the point that past determinations could not stand if the new standard were applied retroactively.[71]

A more fair-minded approach to the question of political powerlessness, however, will not necessarily be simple. Lesbian and gay Americans present the unique problem of a minority that is both anonymous and diffuse *and* insular and discreet. As a population group, homosexually active persons live throughout the nation, but the combination of social penalty and lack of a visible marker leads to public anonymity. In many urban areas, on the other hand, self-conscious communities have formed that have generated a kind of ethnic politics founded on sexuality. As Bruce Ackerman has described, Equal Protection doctrine to date has not ventured beyond the surface in analyzing whether insular groups are more or less disadvantaged in pluralist negotiations than diffuse groups, or whether pariah status (a minority so stigmatized that others are unwilling to work with them on any terms)[72] or some lesser showing of prejudice is required for judicial intervention.[73] Lesbian and gay rights claims may well be one of the vehicles that forces a closer, more refined examination of these questions.

It is the last of these three criteria, however—often described as an immutability requirement—that poses the most troublesome

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[70] *High-Tech Gays*, 895 F.2d at 574; Steffan v. Cheney, 780 F. Supp. 1, 7–9 (D.D.C. 1991).

[71] Judges Canby and Norris argue that race would never have been ruled a suspect classification under this standard. *High-Tech Gays*, 909 F.2d 378 (9th Cir. 1990) (rehearing en banc denied). That is also true with regard to women, who were granted heightened protection at a time when Congress had already enacted both the Equal Pay Act and broad anti-discrimination laws covering employment and education, numerous states had adopted equal rights amendments to their constitutions and a federal equal rights amendment was under active consideration. *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality).

[72] Judges Canby and Norris concluded that homosexuals in fact do constitute political pariahs. *High-Tech Gays*, 909 F.2d at 378.

[73] Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

challenges. The immutability criterion forces into the forefront the question of what causes differing sexual orientations, a question that is by no means settled. Advocates of a rights claim for lesbians and gay men typically have invoked an essentialist position, arguing that even the most literal interpretation of immutability is satisfied if the origins of sexual orientation lie in genes or genetic codes, hormones or brain structure.[74] Opponents of the rights claim have focused on the volitional nature of sexual conduct.[75] Judges Canby and Norris have framed the issue as one of state coercion, rather than absolute physical inability to change or disguise a trait.[76] Janet Halley argues that it is the very mutability of sexual identity, and its creation by the process of a social and political discourse, which should entitle it to heightened protection; otherwise the political process is skewed and delegitimized by the systematic silencing of one voice in that discussion.[77] Halley's approach helpfully lifts the question out of the realm of physiological determinism, a realm where, at least at present, it is factually unresolvable.

Eschewing an essentialist claim need not be a tactical weakness for equal rights advocates. Biological immutability is not an absolute prerequisite to invalidating classifications on the basis of that trait.[78] Aliens can and do become citizens; persons can and

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[74] The most recent support for this position can be found in two studies, one concluding that there may be a difference in brain structure based on sexual orientation and the second positing a genetic difference. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991); J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991). Both have been sharply criticized on scientific grounds and sociopolitical ones. *See* Letters to the Editor, *The Politics of Finding Homosexuality Genetic*, N.Y. TIMES, Jan. 7, 1992, at A14 (three separate letters to the editor by Seth Manoach, John D'Emilio and Peter Kingsley responding to a Dec. 17, 1991 Op-Ed piece by Michael Bailey and Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21); William Byne & Bruce Parsons, Human Sexual Orientation: The Biological Theories Reappraised (1991) (unpublished manuscript on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

[75] Woodward v. U.S., 871 F.2d 1068, 1076 (Fed. Cir. 1989); High-Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573–74 (9th Cir. 1990); Steffan v. Cheney, 780 F. Supp. 1, 8–10 (D.C. 1991).

[76] Watkins v. U.S., 847 F.2d 1329, 1347 (9th Cir. 1988); High-Tech Gays v. Defense Industrial Security Clearance Office, 909 F.2d 375, 377 (Canby, Norris, JJ., dissenting from denial of rehearing en banc).

[77] Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

[78] The question of whether immutability is required arises in overlapping analyses under both Equal Protection Clause claims and claims under 42 U.S.C. § 1985(3). In some opinions in the former line of cases, the Supreme Court has seemed to require immutability. Lyng v. Castillo, 477 U.S. 635, 638 (1986); Frontiero v. Richardson, 411 U.S. 677, 686

do alter their religious faith group affiliations.[79] Neither group is penalized for the refusal to change, even though change is possible.

Most courts in Equal Protection cases have simply listed immutability as a component of the heightened scrutiny test without considering its ramifications. Implicit and largely unexamined in the immutability doctrine is a political choice about the social value of the trait in question. Here too, lesbian and gay rights claims have a potential to reshape Equal Protection jurisprudence by shifting the focus from whether a particular trait is inherited and/or impossible to alter, to whether individuals are being coerced into conforming to a certain set of behaviors.

Although Equal Protection cases may be the most frequent context for lesbian and gay rights litigants, the conceptual and political problems that lie ahead transcend Equal Protection doctrine. Whichever doctrinal cards advocates play, they will be countered with arguments born of deep cultural anxiety about sexuality. In the hope of furthering the deconstructionist project without torpedoing the necessary work of defense, I offer three general suggestions for framing interventions in this discourse.

First, whatever the history of the meaning of homosexuality, it now cannot be divorced from social conflicts over the meanings of masculinity and femininity. It is not acts alone, but those acts in conjunction with same-gender desire that marks homosexuality.

(1973). *Cf.* Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). On other occasions, the Court has analyzed the criteria for heightened scrutiny without mentioning immutability. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982); Graham v. Richardson, 403 U.S. 365, 372 (1971). As to § 1985(3), "[i]t is a close question" whether its protections will be extended to a group asserting a class-based animus on any ground other than race. United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 836 (1983). Lower court decisions, which the Supreme Court may soon review, have extended such protection to women. National Organization for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *review granted sub nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

Some courts have rejected the search for an immutable trait, even with regard to race. "The notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind, not as a division in the objective universe." Ortiz v. Bank of America, 547 F. Supp. 550, 565 (E.D. Cal. 1982). Professor Halley argues that the Supreme Court has recognized, at least implicitly, that race is socially constructed rather than immutable. *See* Halley, *supra* note 71, at 924–26, discussing Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) and Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987).

[79] Alien status was granted heightened protection under the Equal Protection Clause in *Graham v. Richardson*, 403 U.S. 365 (1971). Religious affiliation, of course, is independently protected under the Free Exercise Clause of the First Amendment. It has also been accepted as a ground that is entitled to protection under § 1985(3) despite its mutability, although "that issue is not free from doubt." Ravenstahl v. Thomas Jefferson Hospital, 37 Empl. Prac. Dec. (CCH) 38,330, 38,332 (E.D.Pa. 1985).

"Homosexuals are physically attracted to members of their own sex. That is the source of the behavior that we notice about them."[80] Gender is central to sexual orientation,[81] and much of the positive social value of homosexuality lies in its creation of a zone of anti-orthodoxy for men and women, of whatever sexual orientation.[82]

Second, to paraphrase the issue of *Hardwick*'s meaning as posed by Judge Reinhardt, sodomy may be about privacy, but homosexuality is not. The primary rationales for discrimination, as well as the arenas in which it occurs and is experienced, concern public perceptions, not private events. The issue that has generated most of the current judicial debate—the military's personnel policy declaring homosexuality to be incompatible with military service—is about secret versus public identity rather than about status versus conduct. The military does not seek to justify its

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[80] High-Tech Gays v. Defense Industrial Security Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, Norris, JJ., dissenting from denial of hearing en banc).

[81] The animus directed toward lesbian and gay Americans as a result of their sexual orientation constitutes discrimination on the basis of gender in two respects. First, and most obviously, discrimination based on sexual orientation is a differentiation based on the gender of one's partner. In *Hardwick* the dissenting justices argued that the Court should have reached the Equal Protection claim that the sodomy statute was selectively enforced against persons committing homosexual acts, and decided it on gender discrimination grounds:

> I do not see why the State can defend [the statute] on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question of whether homosexuals are a suspect class.

Bowers v. Hardwick, 478 U.S. 186, 203 n.2 (1986) (Blackmun, Brennan, Marshall and Stevens, JJ., dissenting). This theory of sex discrimination has been rejected, however, in Title VII cases. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).

Second, and more fundamentally, homosexuality has long been viewed as a deviation from the proper gender norms, and thus lesbian and gay persons are often held in contempt as "queer" specifically in relation to differing codes of behavior for males and females. *See* INTIMATE MATTERS, *supra* note 6, at 226. Several commentators have articulated arguments that the centrality of gender norms and sex-role stereotypes to notions of homosexuality should be the basis for the invalidation of laws that differentiate on grounds of sexual orientation. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991); and Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

[82] I have elaborated this argument with regard to the gay marriage debate in Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, *in* 1 LAW & SEXUALITY 9 (1991).

policy on the ground that private sexual acts render gay and lesbian service members inept, but on the grounds that public opprobrium toward homosexuals would imperil morale, discipline and recruitment if homosexuals were openly part of the armed forces. In numerous other cases, the asserted state interest used to justify discrimination was a fear that equal treatment would be perceived by the public as an endorsement of homosexuality.[83] It is the public process of creation, assignment and use of sexual identity—not the right to keep private conduct secret—on which future litigation will focus.

Lastly, lesbian and gay rights advocates must recast the terms of the debate as to the state's interest in morality—an interest that has been found sufficient to justify both gender neutral[84] and same-sex only[85] sodomy statutes, as well as the military's anti-gay personnel policy.[86] In each of these opinions, the court interpreted "morality" to mean the suppression of homosexuality, a goal accepted as a public good.[87] So long as discouragement of homosexuality is treated as a legitimate state interest, resolving such disputes as the immutability debate is likely to be pointless. Even if a predisposition to homoeroticism is substantially inborn, the government still can determine to seek a cure, or justify laws that impose a social cost on its expression as a means to diminish its public visibility, if not its private manifestations.

Whatever the merits of the argument that the government should not be permitted to enforce a public morality because of principles of limited government, it is likely to be largely unavail-

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[83] Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987); Gay Lib. v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom.*, 434 U.S. 1080 (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Singer v. U.S. Civil Service Commission, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977); Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652, (1st Cir. 1974); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); Endsley v. Naes, 673 F. Supp. 1032 (D. Kan. 1987).

[84] *Hardwick*, 478 U.S. 186.

[85] Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

[86] Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984), *reh'g en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984).

[87] The presumptively shared interest in suppressing homosexuality also underlies a New Hampshire state supreme court decision ruling that a law barring lesbians and gay men from adopting children or serving as foster parents would be constitutional. In Re Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987).

able to litigators—at least in the federal courts—in the immediate post-*Hardwick* era.[88] In addition to arguing that "morality" is impermissibly subjective, lesbian and gay rights advocates must reinvoke the positive moral dimension of equality, a principle that helped inspire the movement for racial civil rights. In 1963, Robert Bork, then a law professor, argued against enactment of a federal civil rights statute on the grounds that the moral view it embodied—that segregation was wrong—should not be enforced by the power of the state.[89] In the *Dronenburg* decision, two decades later, Judge Bork ridiculed the argument made by the gay plaintiff that law was not and should not be based on morality.[90] Whatever change of heart Judge Bork may have had as to the role of government, it is also true that during the interval the rhetoric of morality adopted by those seeking change was appropriated by those defending the status quo. Perhaps the biggest challenge lesbian and gay rights advocates face is the need to shift that rhetoric once again.

IV. Conclusion

The category "homosexuality" embodies the intersection of nonprocreative sexual acts, the basis of sodomy laws, with same-gender desire. Law has contributed massively to the construction of the idea of homosexuality as a significant marker of human identity, never more dramatically than in *Bowers v. Hardwick*, when the Supreme Court's will to distinguish and specify homosexual from heterosexual acts overrode the statutory text before it. The analysis in *Hardwick* and its progeny supplies both sides in the lesbian and gay rights debate with models for a coherent group identity and definition. Although critics of many of the assumptions in this discourse seek to deconstruct the category of homosexuality as a fixed and natural marker, that effort should not be misconstrued as a message that the category is insignificant,

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[88] Indeed, a plurality of the Court has accepted morality as a sufficient state interest for a statute banning nude dancing, despite its admitted restrictive effects on expression. Barnes v. Glen Theaters, 111 S. Ct. 2456 (1991).

[89] Robert Bork, *Civil Rights—A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21.

[90] 741 F.2d at 1397 n.6.

trivial or ephemeral. Many of our most important social and political questions implicate issues of sexuality. The idea of homosexuality is no more demeaned by its status as a cultural invention than is Keynesian economics or the First Amendment. Advocates of rights claims now have the opportunity to reconstruct as political what has been stigmatized as sexual.