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*237 SEXUAL ORIENTATION, MORALITY, AND THE LAW: DEVLIN REVISITED

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*238 I. INTRODUCTION

In May 1989, shortly before the introduction of the Americans with Disabilities Act ("ADA"), I sat in the office of Senator Tom Harkin and listened to him deliver a pep talk to a small group of us who had worked on drafting the ADA. "Congress will pass this bill," Senator Harkin told us, "because it is the right thing to do." With his enthusiasm and fervor building, the Senator leaned across the table to us and swore that together we would finally bring civil rights protection to "the last minority" in America in need of such protection.

"The next to the last minority," I said softly to myself. I had no desire to interrupt Senator Harkin's rising enthusiasm for the upcoming fight on the ADA by publicly pointing out that at least one additional minority group in our society -- gay men, lesbians, and bisexuals-- would remain unprotected by federal civil rights law even after passage of the ADA. [FN1] But I noted the omission; I felt with discomfort the Senator's assumption that we shared his view that this was the last civil rights fight to be fought. As a strong disability rights advocate, I had devoted (and would yet devote) many months to the crafting and negotiating of the ADA. [FN2] But as a lesbian, I knew another group in our ***239** society would remain vulnerable to unjust discrimination long after passage of the ADA.

The year 1996 is a short seven years from 1989, and yet the political and social landscape appears to me to have shifted significantly in that brief time span. There is certainly no consensus yet in America that discrimination against gay men, lesbians, and bisexuals should be invalid under federal statutory and constitutional law. But there is certainly an awareness that many people, gay and nongay alike, believe there should be some protection against such discrimination.

Greater awareness of the need for antidiscrimination protection on the basis of sexual orientation has arisen from several sources. President Bill Clinton's promise to lift the ban on the service of gay men, lesbians, and bisexuals in the United States armed services ended, in the minds of many of us, as a great debacle. [FN3] But discussion during 1992 and 1993 regarding lifting the ban raised public awareness of the institutionalized discrimination that exists against gay people in our country's military. [FN4] Moreover, the judicial cases challenging the "old" and the "new" ban helped raise awareness regarding the limits and possibilities of constitutional protection against such discrimination. [FN5]

***240** Similarly, popular initiatives in states and localities to prohibit the passage of antidiscrimination laws on the basis of sexual orientation, such as Amendment 2 in Colorado, have highlighted the division in our society regarding the granting of civil rights protection to gay men, lesbians, and bisexuals. [FN6] At the same time, concerted citizen efforts to defeat these initiatives have resulted in public discussion of the types of discrimination faced by gay men, lesbians, and bisexuals. [FN7] In addition, efforts on

the state and local levels to erect hurdles against the passage of antidiscrimination protection on the basis of sexual orientation highlight the need for a uniform federal civil rights law that would be immune from state and local abrogation.

Thus, I believe we have arrived at a point in American society at which there is, at least, a serious debate on whether "another minority" in our society deserves statutory and constitutional protection against discrimination. The question, of course, is whether such protection will ultimately be granted by our judicial and/or legislative systems. For those who believe, as I do, that our judicial and legislative systems should grant such protection, [FN8] the starting question must be: what conceptual visions of "equality" or "unjust discrimination" must our judicial and legislative systems have if they are to progress effectively towards ***241** the granting of protection against discrimination based on sexual orientation?

This article offers two conceptual visions of equality. The first vision, explicated in part II, is based on a traditional liberal view of equality. Under this view, the role of government is to protect the right of individuals to live freely without undue interference. [FN9] Put most simply, laws and judicial decisions prohibiting discrimination based on sexual orientation are justified under this view because a gay person's sexual orientation "doesn't hurt anyone," and acts of discrimination constitute interference with the right of the gay person to live freely.

The second vision, explicated in part III, is based on a conservative natural view of equality. Under this view, the role of government is to legislate based on a shared social vision of morality. [FN10] Again, put most simply, laws and judicial decisions prohibiting discrimination based on sexual orientation would be justified under this view if society were to accept that it is immoral to force an individual to deny the integrity of his or her sexual orientation, and further, if society would come to believe that homosexual love embodies the same moral goods as does heterosexual love.

I have a dual goal in presenting these two visions. First, I want to strengthen the arguments used within the traditional vision for achieving equality for gay people. To that end, I suggest three "mind-shifts" designed to strengthen argumentation within the traditional, liberal paradigm. Second, I want to explore the limitations of those arguments. In particular, I want to explore the legal and practical limitations of a view that denies any relevance to a society's shared sense of morality and considers discrimination against gay people to stem solely from unwarranted and irrational bigotry.

As an example of how an advocate uses the traditional liberal vision of equality in the judicial arena, I describe in part II arguments I have presented on behalf of several gay rights groups, religious groups, and women's rights groups in amicus briefs challenging the military ban and Colorado's Amendment 2. [FN11] These arguments are somewhat ***242** different in form or presentation from those that have traditionally been made by gay rights lawyers. I argue that for argumentation within the traditional paradigm of equality to be more effective, three "mind-shifts" in the way such arguments are presented need to be made.

First, the argument that classifications based on sexual orientation deserve heightened scrutiny in an equal protection analysis must be presented within a theoretical model of separation of powers. Any argumentation on the issue must avoid presenting a simple checklist of "considerations" historically used by the Supreme Court in deciding whether strict scrutiny is appropriate. [FN12] Second, within an equal protection analysis, the relevance of the immutability of a characteristic targeted by a classification should not be embraced in its entirety. Rather, one definition of immutability (which refers to a lack of responsibility in acquiring a characteristic) may be accepted as relevant to whether strict scrutiny of a classification is appropriate, but a second definition (which refers to a "passive," nonbehavioral characteristic) should be rejected as irrelevant. [FN13]

Finally, the Supreme Court's decision in Bowers v. Hardwick [FN14] should not be viewed as an impediment to applying strict scrutiny to classifications based on sexual orientation. But the relevance of Hardwick should be rejected not by adopting a status/conduct distinction, as has traditionally been done, but rather by adopting a homosexual sodomy/homosexual conduct distinction. [FN15]

My ultimate goal in providing suggestions for ways in which arguments may be refined and made more persuasive within the traditional paradigm of equality is simple: while I believe we should start a conversation about alternative paradigms, I also believe we are foolhardy to trade in one paradigm for another without careful consideration and ***243** deliberation. During that careful process of deliberation, I believe we must shore up, as best we can, the arguments set forth in the traditional paradigm.

Setting forth the best arguments possible within the traditional paradigm of equality serves another purpose as well. It allows for an analysis of those arguments and an exploration of their strengths and weaknesses. One underlying premise in all the arguments is readily apparent. The arguments consistently assume that the fact that society may view homosexuality as immoral is irrelevant to the question of whether gay people should be protected from discrimination.

I wish to engage in a conversation about the limitations of this premise because I believe the insistent assertion (and/or assumption) by gay rights advocates that "private morality" and "government" have nothing to do with each other, an assertion that lies at the core of the traditional liberal paradigm, may ultimately lead to a dead end in achieving equality for gay men and lesbians. This is not a new idea. Michael Sandel has argued that the effort to establish a right to engage in homosexual sodomy under the privacy rubric of the federal constitution will inevitably falter as long as advocates fail to address the morality of homosexual sexual behavior and fail to argue that homosexual couplings embody the same "moral goods" as heterosexual couplings. [FN16] My intention here is to continue the conversation begun by Sandel and others by moving from the issue of privacy rights to the more general issue of achieving societal equality for gay people. [FN17]

My desire to engage in such a conversation stems from two beliefs. First, I believe there are many people in our judicial and legislative systems who feel government appropriately legislates and judges on the basis of morality (whether they articulate it as such or not). And I cannot say I necessarily disagree with that belief. There have been many thinkers through the ages who have set forth a compelling argument for law to be based on some concept of morality. [FN18]

***244** Second, I believe a majority of people who hold this belief feel that the content of morality that the law should incorporate is to be discerned from the prevailing societal conception of the good. [FN19] Again, I cannot say I necessarily disagree with that belief. While I feel a greater affinity with the notion that the morality to shape law should be discerned from the "glimpses, memories, or dreams of a truly good life as experienced by the relatively disempowered: a life lived within the actual conditions of liberty, equality, or freedom," [FN20] for purposes of this article I wish to accept, arguendo, a framework in which it is appropriate for the source of morality to be the community's conventional morality.

Part III of this article thus sets forth an alternative paradigm for achieving protection against discrimination on the basis of sexual orientation. This vision accepts, arguendo, that government properly legislates on the basis of a shared social vision of morality. Once situated in that framework, I argue that legislative and judicial actions that force gay men, lesbians, and bisexuals to forgo the sexual and emotional gratifications that arise naturally from their sexual orientation run counter to our society's shared sense of morality. This is because it is immoral to force people to deny the integrity of their selfhood, including their selfhood as expressed in their sexual orientation, and because same-sex love embodies the same moral goods as does opposite-sex love. At a minimum, I argue that with sufficient resources and energy committed to an educational process, society's shared sense of morality will come to include such beliefs.

I do not believe gay rights advocates should immediately shift to this alternative paradigm. There are good, pragmatic reasons why gay rights advocates have used the traditional paradigm in the judicial and legislative spheres over the years. But I view part III of this article as a call to conversation, a challenge for a shift in our traditional ways of argumentation. I hope to demonstrate how exploring this alternative vision of law - in essence, how revisiting Lord Devlin's speeches in THE ENFORCEMENT OF MORALS [FN21] - may actually serve to advance gay rights in our society.

*245 II. THE LIBERAL PARADIGM OF EQUALITY

The work of gay and gay-friendly legal advocates usually rests on an unstated, but widely shared, premise: that the goal of ensuring that gay men, lesbians, and bisexuals will not be subjected to discrimination because of their sexual orientation in employment opportunities, in the provision of goods and services by public or private parties, or in the opportunity to raise a family, is a valid and good goal. This premise is so widely shared that advocates rarely articulate their reasons for believing this goal to be either

valid or good. If pressed for a reason, however, most advocates today would likely respond with a view of liberty and the role of government reminiscent of John Stuart Mill: that allowing gay people to live their lives free of discrimination hurts no one and, concomitantly, that government should allow people to fulfill their individual needs and desires when such fulfillment does not cause harm to others. [FN22] This is what I term the "traditional paradigm."

The intellectual focus for advocates within this paradigm is to develop effective and persuasive arguments in judicial and legislative arenas which advance their goal of achieving antidiscrimination protection for gay men, lesbians, and bisexuals. In the judicial arena, the intellectual focus of activity is on developing an interpretation of the Equal Protection Clause of the Fourteenth Amendment that will impede governmental discrimination on the basis of sexual orientation. [FN23] This tends to include the construction of two arguments: first, that governmental classifications based on sexual orientation should be strictly scrutinized by the courts; and second, that discriminatory state actions affecting gay men, lesbians, and bisexuals are inevitably the result of the government accommodating and catering to the prejudices and discomfort of nongay people, and thus never constitute a legitimate, important, or compelling governmental interest. [FN24]

***246** In the legislative arena, the focus of activity on the part of advocates is to achieve passage of a federal law similar to existing laws that prohibit discrimination in areas such as employment, public accommodations, housing, and local, state, and federal governmental services on the basis of such characteristics as race, sex, religion, national origin, age, and disability. [FN25] The intellectual endeavor of the "legislative lawyer" in this process lies in finding the exact point on the spectrum that will achieve the most protection against discrimination, while still preserving the necessary votes for passage. [FN26]

A. The Judicial Arena: Equal Protection Challenges

In most cases that invoke the Equal Protection Clause to challenge governmental discrimination against gay people, the challenge is framed as an attack on state actions that classify on the basis of sexual orientation. These cases proceed along the same lines as do cases that challenge state actions that classify on the basis of such characteristics as race, sex, national origin, or mental retardation.

In these cases, the "standard of review" the court chooses to apply in reviewing the challenged classification is of key importance. Under the literal words of the Constitution, of course, all individuals have the right to "equal protection under the law." [FN27] But in practice, whether a governmental action is found to be unconstitutional depends largely on ***247** whether the courts strictly scrutinize the governmental action at issue and require that the action be narrowly drawn to achieve a compelling governmental interest, [FN28] or whether the courts merely require that the governmental action be rationally related to some legitimate governmental purpose.

[FN29]

This section of the article explores approaches that have been developed within the traditional paradigm to persuade courts that classifications based on sexual orientation should be subject to strict scrutiny. [FN30] Before embarking on that endeavor, however, it is worth briefly exploring two alternative arguments that, if successful, would make the entire effort regarding standard of review moot.

The first alternative approach would use the "fundamental rights" prong of the Equal Protection Clause, rather than the "classification" prong. [FN31] Unlike women and African-Americans, and like members of religious and some ethnic groups, gay men, lesbians, and bisexuals usually need to disclose in some way the fact that they are gay. This disclosure may take the form of a statement of identity ("I am a lesbian"); a statement of fact that is subsequently understood as a statement of identity (filling out a form at work or at a doctor's office and listing a person of the same gender as one's "spouse"); an action that is a direct statement of one's sexual orientation (having sex with a person of the same gender); or an action that is subsequently understood as a statement of identity (bringing one's same-sex partner to a ***248** business's annual dinner or having a picture of one's same-sex partner on one's desk at work).

Discrimination against a gay person that arises because the person has disclosed that he or she is gay through any of these forms of expressive activity should be viewed as discrimination based on speech. This argument is made by David Cole and William Eskridge as a suggested approach to challenging same-sex sodomy laws. [FN32] This argument is also at the core of the joint challenge brought by the American Civil Liberties Union ("ACLU") and Lambda Legal Defense Fund in the case of Able v. Perry and by the ACLU in Philips v. Hunger, two cases challenging the "new" military ban. [FN33]

Violations of the First Amendment right of speech automatically trigger the application of strict scrutiny by the courts. [FN34] Thus, if courts accept the argument that discriminatory actions based on a disclosed sexual orientation are violations of the fundamental right of speech, they will strictly scrutinize such actions. [FN35] Under this approach, advocates would no longer need to prove that classifications based on sexual orientation deserve strict scrutiny.

The second alternative approach would adopt the "classification" prong of the Equal Protection Clause, but simply assume, arguendo, that the lowest level of review (rational basis review) applies and move directly to attacking the rationality of the government action. The principle on which this attack is based would be that any governmental action taken to accommodate or cater to the prejudice or discomfort of nongay people is, by definition, an illegitimate government purpose. This principle was invoked and applied by the Supreme Court in cases such as *Palmore v. Sidoti* [FN36] and *City of Cleburne v. Cleburne Living Center*. [FN37] The challenge for the advocate, of course, would be to convince ***249** the court that the particular discriminatory action at issue (denying openly gay people the right to serve in the military, firing a gay person

from a government job, etc.) has been motivated solely by the desire to cater to the prejudices and fears of others. [FN38]

While these alternative approaches have appeal, they certainly have no guarantee of success. Thus, these arguments do not displace the need to argue that classifications based on sexual orientation should receive heightened scrutiny by the courts. An analysis of how to argue most effectively for such heightened scrutiny requires a brief review of Supreme Court jurisprudence in the area of equal protection law.

B. Supreme Court Equal Protection Jurisprudence

The Supreme Court's jurisprudence under the "classification" prong of equal protection bears the mark of case-by-case adjudication, not the mark of a coherently developed theory applied uniformly and systematically to all comers. [FN39] The initial conceptual basis for the idea that courts should strictly scrutinize certain governmental actions stems from one sentence in a footnote penned by Justice Stone in a 1938 Supreme Court case upholding the constitutionality of the Filled Milk Act of 1923. [FN40] Most of the Supreme Court's subsequent cases dealing with strict scrutiny of governmental classifications are noteworthy either for their lack of explanation of the principles justifying the scrutiny applied, or for their tendency to "slide into" or "back down" from strict scrutiny without ever explicitly acknowledging that any movement has taken place in the Court's analysis.

***250** For example, strict scrutiny of classifications based on ethnicity or national origin was introduced without much theoretical fanfare. In 1944, the Court baldly stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," [FN41] but provided no particular elaboration of the principle. Nor was there much more analysis in the Supreme Court's opinion the year before in *Hirabayashi v. United States*, [FN42] in which the Court noted that "distinctions between citizens solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of equality." [FN43]

The Court's stated justification for applying strict scrutiny to governmental classifications based on race (predominantly African-American race) has similarly been short and uncomplicated. The Court has noted that such classifications "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States" and that " [t]his strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose." [FN44]

As compared to the "brevity" approach that marks cases dealing with race and national origin, the "creeping progression/regression" approach is evident in Supreme Court cases analyzing classifications based on illegitimacy and alienage. In early cases challenging governmental discrimination against illegitimate children or their parents, the Supreme Court used the language of "rational basis" review, [FN45] but invalidated

several laws on the grounds that they constituted "invidious discrimination," [FN46] or were "illogical and unjust." [FN47] While the Court explicitly ***251** refused to accord "strict scrutiny" to governmental classifications based on illegitimacy, [FN48] it noted vaguely that its scrutiny was "not a toothless one," [FN49] and that "mere incantation of a proper state purpose" in these cases was not sufficient. [FN50] In 1978, the Supreme Court first used the complete language of "intermediate scrutiny" in a case dealing with illegitimacy, [FN51] and ten years later officially announced that classifications based on illegitimacy do indeed receive intermediate scrutiny review. [FN52]

The Court's cases dealing with alienage reflect the "creeping regression" approach. In *Graham v. Richardson*, [FN53] the Supreme Court announced that classifications based on alienage are "inherently suspect," [FN54] with stated reasons quite similar to the simple, uncomplicated ones found in the Court's cases dealing with classifications based on race or national origin: "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." [FN55] The Supreme Court soon realized, however, that it did not really mean (or want to mean) everything it said in *Graham v. Richardson*. [FN56] Six years later, the Court officially carved out from ***252** strict scrutiny review, and relegated to rational basis review, any challenges based on alienage but involving "matters firmly within a State's constitutional prerogative." [FN57] The reason, according to the Court, was that "the distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." [FN58] Subsequent cases thus turned on whether the challenged exclusion on the basis of alienage was from some "governmental function," [FN59] which was then subject to rational basis review, or from some nongovernmental function, which remained subject to strict scrutiny.

The Court's treatment of classifications based on gender stands in its own unique category. After upholding numerous discriminatory classifications based on gender, [FN60] the Court, in *Reed v. Reed*, [FN61] struck down a state probate law based on gender. While never explicitly departing from traditional "rational basis" review, the unanimous Court (as a later plurality pointed out) clearly rejected the state's "apparently rational explanation of the statutory scheme." [FN62]

In *Frontiero v. Richardson*, [FN63] Justice Brennan made the case for a plurality of the Court for strict scrutiny of classifications based on gender. [FN64] While Justice Brennan devoted more effort to explaining his decision than had any previous Court decision applying strict scrutiny, [FN65] his analysis was still presented in a relative theoretical void.

The case for strict scrutiny, as presented by the plurality in *Frontiero*, rested primarily on three "considerations." [FN66] The first was the history of discrimination suffered by women. Justice Brennan noted that the nation has been marked by a "long and unfortunate history of ***253** sex discrimination," rationalized by an "attitude of 'romantic paternalism,'" [FN67] and that while the position of women has improved in recent decades, they still face "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the

political arena." [FN68] Justice Brennan never specifically explained, however, why a history of discrimination was relevant to establishing a strict scrutiny analysis; he seemed to assume we would understand that on our own. [FN69]

The second consideration for the plurality was that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." [FN70] Quoting from the Court's opinion in *Weber v. Aetna Casualty & Surety Co.*, the plurality observed that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system ***254** that legal burdens should bear some relationship to individual responsibility.'" [FN71]

The absence of a theoretical construct in *Frontiero* is painfully evident in this discussion of immutability. The Court in *Weber* never invoked the truism that children cannot be held responsible for their births as a reason for applying a higher standard of review in judging classifications based on illegitimacy. At the time the Court decided *Weber*, it was still emitting vague and contradictory signals about what standard of review it believed should be applied to these classifications. [FN72] The fact that children could not be held responsible for their births was relevant to the Court in *Weber* but solely as a reason why, when it applied its standard of review (whatever that was), the governmental classification was found wanting. As the Court explained: "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent." [FN73] Thus, according to the Court, the penalty visited upon illegitimate children in the state's workmen's compensation law at issue could not be rationally (or even significantly) related to society's presumed interest in condemning "irresponsible liaisons beyond the bound of marriage." [FN74]

The plurality in *Frontiero* itself recognized that the immutability of a characteristic on which a governmental classification is based could not, by itself, justify a higher standard of review. For example, the plurality was not ready to concede that governmental classifications based on "intelligence or physical disability" (presumably immutable characteristics that are sometimes accidents of birth) should also be subject to strict scrutiny. The plurality's explanation for why sex was different from intelligence or physical disability, and "align[ed] with the recognized suspect criteria," was that "the sex characteristic frequently bears no relation to ability to perform or contribute to society." [FN75]

***255** As a third consideration, the plurality threw in the fact that Congress had "manifested an increased sensitivity to sex-based classifications" through passage of laws such as Title VII of the Civil Rights Act of 1964. [FN76] This "conclusion of a coequal branch of Government" that "classifications based upon sex are inherently invidious," stated the plurality, "is not without significance to the question presently under consideration." [FN77]

Again, the plurality never explained why such action on the part of a coequal branch of government should have any relevance to a court's determination of whether to apply strict scrutiny to a governmental classification. Indeed, when the Court began to

develop a theoretical construct for its strict scrutiny cases, an effort it first undertook in 1982 in *Plyler v. Doe*, [FN78] and then again in 1985 in *City of Cleburne v. Cleburne Living Center*, [FN79] it concluded that positive legislative action on behalf of a group challenging a governmental classification should be grounds for the Court to be less willing to apply strict scrutiny. [FN80]

Ironically, the point appended by the *Frontiero* plurality to its discussion of immutability - the fact that a characteristic on which a governmental classification is made bears no relationship to an individual's ability to perfom a job or to contribute to society - emerged as the key factor in the Court's analysis when it finally presented a theoretical construct to justify heightened scrutiny in *Plyler* and *Cleburne*. By contrast, the factor of immutability - the consideration which had generated the appendage - was explicitly rejected by the Court as having ***256** any relevance to the standard of review that should be applied to challenged classifications. [FN81]

The long-awaited theoretical construct for the application of strict scrutiny first appears in a few pages set forth by Justice Brennan for the Court in *Plyler v. Doe*. [FN82] The construct is explicitly built on the principles of separation of powers. The Court in *Plyler* notes that the Equal Protection Clause directs that "'all persons similarly circumstanced shall be treated alike.'" [FN83] But, concomitantly, "things which are different" do not have to be treated the same. [FN84] And, explains the Court, "the initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States." [FN85] The practical reason for this is clear to the Court: "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." [FN86]

To properly accommodate the role of the legislature, Justice Brennan explains, courts are appropriately deferential when dealing with a constitutional challenge to most forms of state action, requiring merely that "the classification at issue bear [] some fair relationship to a legitimate public purpose." [FN87] But the Equal Protection Clause is also "intended as a restriction on state legislative action inconsistent with elemental constitutional premises," and so the courts' obligations under ***257** the Fourteenth Amendment also require that they not apply "so deferential a standard to every classification." [FN88] An example of a classification that requires a less deferential review is a classification that "disadvantages a 'suspect class.' " [FN89]

In explaining how the Court determines when a classification disadvantages a "suspect class," Justice Brennan first concedes that "[s]everal formulations might explain our treatment of certain classifications as 'suspect.'" [FN90] This is no surprise, given that previous cases had never attempted to set forth any real "formulation" of their treatment of certain classifications as "suspect." But Justice Brennan then proffers two plausible formulations for determining when a classification disadvantages a "suspect class," both of which comport with his separation of powers model.

First, a classification is suspect if it is "more likely than other . . . [classifications] to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." [FN91] Legislation that is predicated on prejudice is clearly "incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law," [FN92] and thus courts have reason to intervene with strict scrutiny in cases of this kind. Another tip-off for the courts is that "classifications treated as suspect tend to be irrelevant to any proper legislative goal." [FN93] Presumably, such classifications are adopted primarily as a result of prejudice, if the classifications are ordinarily irrelevant to proper legislative goals.

This formulation is sufficient to explain why the Court granted strict scrutiny to classifications based on race and national origin in its previous cases. Indeed, the Court cites both *McLaughlin v. Florida* [FN94] (racial classification) and *Hirabayashi v. United States* [FN95] (national origin classification) as examples of this first formulation. This formulation is also sufficient to explain why classifications based on gender deserve strict scrutiny, as a plurality of the Court held in *Frontiero*. [FN96]

***258** This formulation comports with the separation of powers model set forth by Justice Brennan. It is legitimate for courts to apply strict scrutiny to actions of a legislature, a coequal branch of government, if there is reason to believe the legislature is acting out of prejudice rather than legislative rationality. And, although Justice Brennan never acknowledges this explicitly, and indeed, subsequently confuses the issue, a court should be justified in adopting such scrutiny regardless of whether the classification adopted by the legislature operates to the disadvantage of a group that sometimes has some form of political access. [FN97]

The second formulation presented by Justice Brennan to explain the Court's previous applications of strict scrutiny was that "certain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" [FN98] While Justice Brennan asserts that the groups who experience political powerlessness are "largely the same groups" as are accorded strict scrutiny under the first formulation, [FN99] this phrase seems like a careless and unfortunate addition on his part. The only case Justice Brennan cites in support of the second formulation, in which strict scrutiny was actually applied by the Court, is Graham v. Richardson, [FN100] which applied strict scrutiny to classifications based on alienage. Indeed, the only cases in which the Supreme Court has applied strict scrutiny, and has simultaneously invoked the issue of political power, have been in cases dealing with classifications based on alienage. As the Court explained in *Foley v. Connelie*, it is necessary to treat certain restrictions on aliens with heightened judicial solicitude because "aliens - pending their eligibility for citizenship - have no direct voice in the political process." [FN101]

This second formulation, standing independently from the first, would comport as well with a separation of powers model. In some situations, ***259** courts may not be confident as to whether a legislative classification can be said to be based more on prejudice than on legislative rationality. But if the classification targets a group that literally has no real

access to the political system - because, for example, they are denied the right to vote - that in itself should be sufficient to warrant strict scrutiny of such classifications. [FN102]

Justice Brennan's presentation of two formulations to explain the Court's previous applications of strict scrutiny is welcome to a reader in search of a theoretical construct for such applications. The contribution, however, is clouded by the implication that the two formulations are either one and the same, or perhaps interdependent in some way. Justice Brennan's theoretical construct was subsequently taken up by Justice White in City of Cleburne v. Cleburne Living Center , [FN103] where the two formulations were explicitly intertwined.

Justice White begins his discussion in Cleburne with the same separation of powers model set forth in Plyler. He notes the general rule that a court will sustain a legislative classification as long as it is "rationally related to a legitimate state interest," and notes the rule gives way when a statute classifies by race, alienage, or national origin. [FN104] Justice White then explains why: "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy a view that those in the burdened class are not as worthy or deserving as others." [FN105] This is a fair rendition of the first formulation presented in Plyler, and it logically should have been sufficient to justify granting strict scrutiny. Justice White continues, however: "For these reasons ***260** and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." [FN106]

Thus, in Cleburne, Justice White equates the issue of a group's political powerlessness with the issue of whether the legislative action adopting the classification is more likely the result of prejudice than legislative rationality. In actually applying the theoretical construct, however, Justice White's conclusion that rational basis review is appropriate for classifications based on mental retardation appears to be shaped primarily by his conclusion that "those who are mentally retarded have a reduced ability to cope with and function in the everyday world" and that " [t]hey are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one." [FN107]

To Justice White, the fact that a group's characteristic is one a legislature may legitimately need to take into account in various circumstances is of key importance within his separation of powers model:

> The lesson of Murgia is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end. [FN108]

Once Justice White determines that mental retardation is a type of characteristic "relevant to interests the State has the authority to implement," other factors the Court has looked at in previous cases either fall into place or fall by the wayside. Whether a characteristic is immutable or not is clearly irrelevant to the separation of powers question; what is relevant is whether the characteristic (immutable or not) ***261** " 'often [is] relevant to legitimate purposes.' " [FN109] The fact that Congress had passed several laws dealing with people with mental retardation (an antidiscrimination law; a vocational rehabilitation law; a special education law) simply reinforces for the Court the appropriateness of its deference based on separation of powers: clearly, people with mental retardation "have unique problems" [FN110] (thus requiring several different types of laws), and, clearly, "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." [FN111]

On the issue of political powerlessness, Justice White devotes one sentence: " [This] legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers." [FN112] It is difficult to treat this sentence as a thoughtful explication of the relevance of political powerlessness. [FN113] Indeed, it seems to be a simple reiteration of the ***262** point made previously by the Court that it sees no reason to suspect that legislative classifications based on mental retardation are the result of prejudice, rather than legislative rationality.

To my mind, the Court in Cleburne inappropriately conflated, perhaps inadvertently, the two formulations first presented in Plyler. There is no way of knowing if the Cleburne majority would have agreed that the second formulation in Plyler could have stood legitimately on its own; that is, if they would have agreed that a group absolutely precluded from participating in the political process, for example, by denial of the right to vote, would automatically warrant heightened scrutiny. [FN114] But absolute, or even relative, political powerlessness does not appear to have been a critical point for the Cleburne majority. What was important was that the characteristic at issue, mental retardation, was one likely to demand various and nuanced responses from the legislature in a range of settings, and there was no reason for the Court to assume the legislative response to this characteristic was driven more by prejudice than by legislative rationality.

Aside from its brief forays into theoretical constructs for strict scrutiny presented in Plyler and Cleburne, the Court's opinions denying strict scrutiny to other challenged classifications are marked as are most of its opinions granting strict scrutiny primarily by a brevity of analysis. For example, in San Antonio Independent School District v. Rodriguez , [FN115] the Court considered and rejected three different approaches that might have warranted application of strict scrutiny in that case. The third approach was dependent upon viewing the challenged statute as constituting a classification scheme based on district wealth discrimination. The Court's complete analysis rejecting that

approach was as follows:

***263** [A]ppellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. [FN116]

While this "checklist" of factors is notable for the fact that it describes each factor as standing on its own in the strict scrutiny analysis (saddled with disabilities or subjected to history of discrimination or politically powerless), there is no accompanying analysis as to why any of these factors (standing alone or together) should justify the application of heightened scrutiny by the courts. And in four subsequent cases in which the Court refused to apply strict scrutiny to a challenged classification, it simply quoted portions of this paragraph from Rodriguez and announced that the challenged classification did not meet any of the listed factors. [FN117]

***264** C. Application to Sexual Orientation

I do not describe the Supreme Court's cases regarding strict scrutiny to make the unexceptional point that judicial decisions are often rendered prior to, and in the absence of, a theoretical construct. [FN118] Nor do I recount the evolution of the Supreme Court's theoretical construct for strict scrutiny to make the equally unexceptional point that once a theoretical construct is offered, it may include some confusing and misleading language.

I describe these cases, and recount this evolution, because it seems to me that courts that have been deciding, over the past two decades, whether governmental classifications based on sexual orientation should be accorded strict scrutiny have consistently been getting the answer wrong. These courts present one of three, or some combination of three, reasons to justify denying strict scrutiny to such classifications. Two of these reasons appear to me to stem directly from the lack of, or a misunderstanding of, a theoretical construct for heightened scrutiny. The third reason is faulty as well, not because of the lack of a theoretical construct, but for other reasons which I describe in part II.C.3 below.

1. Political Powerlessness

Two federal courts of appeals, and one state trial court, have concluded that governmental classifications based on sexual orientation should not be accorded strict scrutiny because gay people have political power. In Ben-Shalom v. Marsh , [FN119]

the first case in which this conclusion was reached, the Seventh Circuit noted that "homosexuals are proving they are not without growing political power." [FN120] The court's evidence of this fact was that " Time magazine reports that one congressman is an avowed homosexual and that there is a charge that five other top officials are known to be homosexual" [FN121] and that the Chicago ***265** Tribune reports the mayor of Chicago participated in a gay rights parade that year. [FN122] In High Tech Gays v. Defense Industrial Security Clearance Office , [FN123] the Ninth Circuit's evidence consisted of the fact that various states and municipalities had passed laws prohibiting discrimination on the basis of sexual orientation in various areas. [FN124]

The argument that gay people have political power and, therefore, that classifications based on sexual orientation should not be subject to strict scrutiny, is alive and well today. In 1993, a state trial court in Denver invalidated, on federal constitutional grounds, a state constitutional amendment (Amendment 2) that Colorado voters had passed the previous year. [FN125] In a separate part of the opinion, the court held that classifications based on sexual orientation deserved neither strict nor intermediate scrutiny, stating that it " could not conclude . . . that homosexuals and bisexuals remain vulnerable or politically powerless and in need of 'extraordinary protection from the majoritarian political process' in today's society." [FN126] The court's evidence was derived from the battle over Amendment 2 itself. The court noted that, based on the testimony before it, it assumed that gay people constituted four percent of American society. [FN127] The testimony before the court also indicated that more than forty- six percent of people in Colorado had voted against Amendment 2. [FN128] "If 4% of the population gathers the support of an additional 42% of the population," reasoned the court, "that is a demonstration of power, not powerlessness." [FN129] The coalition effort that had formed to defeat Amendment 2, albeit unsuccessful in the end, was also a factor for the court. "What was established to the satisfaction of this court is that gays and bisexuals though small in number are skilled at building coalitions which is a key to political power." [FN130]

***266** Nor is the Clinton Department of Justice ("DOJ") above making a similar argument based on political power. In the case of Thomasson v. Perry , [FN131] the DOJ noted that although gay people constitute a minority in this country, "the test of political powerlessness is whether the particular group at issue has 'no ability to attract the attention of the lawmakers .' " [FN132] Without "addressing the issue of political powerlessness as a general matter," says the DOJ, "the evolution of the particular statute challenged here the statute codifying the ban announced by the President clearly shows that homosexuals were able to attract the attention of both the Executive and Legislative Branches." [FN133]

The various circuit and district court decisions, the brief submitted by the DOJ to the Fourth Circuit in the Thomasson case, and indeed, the brief submitted by Thomasson himself to the Fourth Circuit (in which Thomasson argues for strict scrutiny for sexual orientation only), [FN134] all display a remarkably similar trait: none present a theoretical construct for determining when heightened scrutiny is appropriate. Instead, each brief or opinion simply marches through the list of factors or considerations the

Supreme Court has used in applying strict scrutiny, and then argues (in the briefs) or concludes (in the opinions) that one or more of these factors have or have not been met. In this "checklist-jackpot" approach, if a court decides one or more boxes lack a necessary "check-off," the "jackpot" of strict scrutiny is yanked away.

The brief submitted by Thomasson represents an excellent example of how plaintiffs play into this game. Thomasson opens his argument for strict scrutiny with the following statement: " [T]he conclusion that sexual orientation is a suspect classification is inescapable under the five factual considerations that the Supreme Court has articulated over the years to determine whether a particular class constitutes a 'discrete and insular minorit [y].' " [FN135] These five considerations, according to Thomasson, are that the group members at issue: (1) have suffered ***267** a history of purposeful, unequal treatment; (2) are defined by a characteristic that bears no relation to their ability to perform; (3) are defined by an immutable characteristic; (4) are saddled with disabilities and disadvantaged purely on the basis of prejudice; [FN136] and (5) are relegated to a position of political powerlessness. [FN137]

Thomasson's brief further observes that the Supreme Court has never required a finding of all five of these factors to justify application of strict scrutiny, and has typically "considered only a few of these factors when deciding what level of scrutiny to apply." [FN138] However, rather than exploring why that might be the case, based on some theoretical construct of strict scrutiny, Thomasson simply and confidently asserts that "all five considerations support the conclusion that classifications based on sexual orientation are inherently suspect." [FN139]

Not surprisingly, the DOJ answers in kind. In its brief, the DOJ notes:

> Thomasson and amicus UAHC . . . argue that the district court erred in declining to create a new protected class because, they contend, the class (1) has suffered a history of discrimination and (2) is politically powerless, and the classification (3) bears no relation to ability to perform military duties and is based (4) on an immutable characteristic and (5) on prejudice and stereotypes. [FN140]

The DOJ brief then proceeds through each of these descriptions, explaining how they either do not accurately characterize gay people as a class or do not accurately characterize the type of gay people the military is seeking to discharge. [FN141] Under the "checklist-jackpot" approach, DOJ correctly assumes that if the Fourth Circuit agrees gay people do not match one or more of these descriptions, Thomasson will lose the jackpot of "strict scrutiny."

This must be one of the most absurd ways to decide the question of whether "strict scrutiny" is appropriate in any given case. Indeed, it is an approach that would ordinarily be hard to take seriously, except for the fact that judges and lawyers do so on a continuing basis. But when the Supreme Court listed these factors in a group - as, for example, ***268** it did in Rodriguez - it is hard to believe it did so in order to establish a "checklist- jackpot" approach. Rather, one assumes the list was intended to reflect the

breadth of Supreme Court precedent in the area of equal protection and the theoretical construct lurking in that precedent (as finally explicated by the Court's opinions in Plyler and Cleburne). Indeed, were the Court to believe the "checklist-jackpot" approach to be appropriate, one may ask why the Court has never felt that intellectual integrity requires it to revisit at some point whether strict or intermediate scrutiny is still appropriate for women or members of racial and ethnic groups. [FN142]

The most appropriate way to view the question of political powerlessness, therefore, is to view it within some theoretical construct that explains the application of strict scrutiny and explains how the factor of political power fits into that construct. Within a construct built on a separation of powers model, [FN143] there are two options for dealing with political power - one radical, the other moderate.

The radical option is to argue that political powerlessness has no relevance at all once a court has concluded that a governmental classification is more likely based on prejudice than on legislative rationality. This would comport with the first formulation set forth in Plyler for the application of strict scrutiny. [FN144] Under this approach, answers to the following two questions would be essential and sufficient: (1) is the characteristic at issue one a legislature might often legitimately need to use in deciding questions of policy?; and (2) if the characteristic is not of this kind, is there a history of discrimination against people marked by that characteristic?

If the answer to the first question is "no," and the answer to the ***269** second question is "yes," sufficient grounds should exist, under a separation of powers model, for the exercise of strict scrutiny by the courts. If a characteristic is ordinarily irrelevant to most determinations of policy (as, for example, are race, gender, illegitimacy, and ethnicity), but the legislature has nonetheless used that characteristic as the grounds for some discriminatory classification, that should serve as a warning sign to the courts that the legislative action may be motivated more by prejudice than by legislative rationality. If there is a history of discrimination against those marked by that characteristic (as there is, for example, with regard to women, African-Americans, members of most ethnic groups, and illegitimate children), that should serve as a second, and sufficient, warning sign that the courts need to apply heightened scrutiny to the legislative action. [FN145]

If these two warning signs are present, it should not matter whether the group at issue has amassed some political access and control in the days since discrimination against the group was rampant. The fact that African-Americans or women or ethnic minorities are more politically powerful now than they used to be does not mean that prejudice and stereotypes regarding these groups have magically disappeared from the minds of legislators across the country. Thus, if a legislature enacts a policy using any of these characteristics as grounds for a classification, courts should strictly scrutinize those laws regardless of the political access of these groups. [FN146]

While this approach makes sense from a separation of powers perspective, it is a radical option because no Court opinion has ever explicitly adopted it. Although the first formulation in Plyler reflects this approach, that formulation has never been explicitly

presented in a Court opinion as justifying strict scrutiny on its own. Indeed, Justice Brennan's language implied that political powerlessness would also characterize the groups that fit the first formulation. And, in Cleburne, ***270** Justice White explicitly added political powerlessness to the formulation for applying strict scrutiny. [FN147] While Justice White may not have actually believed political powerlessness to be a separate, necessary component of the theoretical construct underlying this formulation, the bottom line is he wrote in the conjunctive, not in the alternative. [FN148]

In light of that pragmatic reality, there is a more moderate approach for dealing with the factor of political powerlessness. [FN149] The key to this approach is to refrain from listing various "considerations" noted by the Supreme Court ina manner that suggests all these considerations are equally relevant and that provides no explanation as to why courts should care about any of these factors. This approach, as does the first, starts with setting forth an explicit model of separation of powers to justify the application of strict scrutiny. The argument then sets forth for the courts the one underlying question the model demands to be answered: Is there reason for the court to believe the ordinary processes of governmental decision making, with regard to the classification at issue, are not working, such that separation of powers requires judicial intervention?

Once the key question is framed in this way, the various considerations noted in Supreme Court precedent make sense as warning signs, or "red flags," for the lower courts to use in answering this essential, underlying question. [FN150] As in the radical approach, two warning signs are key: (1) is the characteristic at issue ordinarily relevant to legislative decision making because the characteristic affects a person's ability to perform a job or contribute to society?; and (2) is there a history of discrimination against the group marked by the characteristic?

Under the moderate approach, whether the group at issue is politically ***271** powerless will not be presented as completely irrelevant, but it will take second place to these first two warning signs. If those signs are present, then evidence that the group at issue was once politically powerless and/or continues to face significant obstacles in the political system will be appropriate for a court to consider as reinforcing its conclusion that strict scrutiny is warranted. But the fact that the group, although still facing obstacles in the political system, has achieved some additional political access will not logically outweigh the two key warning signs. The only scenario in which political power could outweigh those warning signs, and would justify removing strict scrutiny from governmental classifications targeting the group, would be if group members had achieved such a position of political power that they effectively controlled the legislative process and legislative outcomes. [FN151]

Under this approach, classifications based on sexual orientation deserve strict scrutiny. First, an individual's sexual orientation, be it homosexual, heterosexual, or bisexual, is not relevant to a person's ability to perform and contribute to society. While for a number of years homosexuality was viewed as a mental illness that caused its "sufferers" to be unstable emotionally and therefore unsuited in areas such as employment and immigration, [FN152] that view has long been rejected by the medical

and scientific communities. [FN153] Indeed, even the U.S. armed services, which began its first systematic exclusion of homosexuals in the 1930s based on the premise that homosexuals were unstable and therefore unfit for service, [FN154] now concedes that gay men and lesbians are as capable as heterosexual service members in the actual performance of military duties. [FN155]

***272** Second, like women and like racial and ethnic minorities, gay men, lesbians, and bisexuals have experienced a history of discrimination. Overt and systematic discrimination against gay men and lesbians began in earnest only after changes in our economic and social culture, at the turn of the century, allowed for the development of a "homosexual identity." [FN156] These changes resulted in the development of gay communities in some urban centers and some increased public visibility of gay people. [FN157] Even this limited public visibility of gay people, however, resulted in a crackdown on the ability of gay people to congregate. Police raids on gay bars and the arrest of patrons were common; patrons afraid of publicity rarely challenged any charges. [FN158]

Discrimination against gay men and lesbians by the government intensified in the 1950s, setting a norm for private actors. [FN159] In 1950, the Senate directed a Senate Investigations Subcommittee "to make an investigation into the employment by the Government of homosexuals and other sex perverts." [FN160] The Subcommittee concluded that homosexuals were unfit for employment because they "lack the emotional stability of normal persons" and recommended that all homosexuals be dismissed from government employment. [FN161] In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were "sex perverts." [FN162] From 1947 through mid-1950, 1700 individuals were denied employment by the federal government because of their alleged homosexuality. [FN163]

The 1950s witnessed the development of organizations that were precursors to the modern gay civil rights movement. [FN164] The late 1960s witnessed the birth of this movement, with its growth aided by the ***273** women's movement. [FN165] And in the mid-1970s, the psychiatric profession officially confirmed that homosexuals were not emotionally unstable. [FN166]

Discrimination against gay people continued through the years and up to the present, albeit in different forms. In the mid-1950s, almost all gay people assumed survival required that they hide their sexual orientation completely - from friends, family, and coworkers. Thus, discrimination primarily took the form of affirmatively ferreting out, harassing and/or purging gay people from public areas such as bars and government employment. Over the last forty years, as more gay people have refused to hide their orientation, honesty has brought targeted discrimination in its wake. In an outstanding example, Lambda Legal Defense and Education Fund, the first gay legal organization, was able to incorporate only by virtue of a court injunction; [FN167] other advocacy groups were not as fortunate. [FN168]

Most gay men, lesbians, and bisexuals today choose to hide their sexual identity because they fear discrimination or because they have actually experienced discrimination. [FN169] Even when gay people attempt to hide their sexual identity (and particularly when they are honest about their identity) gay people remain vulnerable to discrimination and, in the most extreme form of that discrimination, physical violence. [FN170]

***274** Gay men and lesbians, like Jews or members of some ethnic groups, and unlike women or racial minorities, are sometimes able to hide their distinguishing characteristic by disguising or lying about their personal interests, relationships, and activities. But this socially imposed pressure to "pass" is itself a form of discrimination. Indeed, constantly keeping secret an important part of one's identity can create shame, undermine self-respect, and increase stress levels. [FN171]

The history of discrimination against gay men and lesbians, coupled with the fact that sexual orientation bears no relation to ability, are sufficient to justify strict scrutiny of classifications based on sexual orientation. These two essential warning signs are sufficient for courts to conclude the ordinary processes of governmental decision making are suspect when applied to classifications based on sexual orientation.

The relative political powerlessness of gay people serves merely as a reinforcement of the conclusion that governmental processes that result in classifications based on sexual orientation are suspect. There is no need to claim that gay people today do not have any ability to "attract the attention of lawmakers," just as there is no need to make that claim with regard to women or racial and ethnic minorities. Rather, the historic exclusion of openly gay people from the political system, [FN172] and the continuing obstacles gay people face in the political system, has some relevance as a reinforcing warning sign to the courts. The ongoing political obstacles faced by gay people stem partly from the fact that it is difficult to convince a significant number of gay people to become involved in political efforts because they are afraid doing so may result in a disclosure of their homosexuality, [FN173] partly because other groups ***275** may refrain from joining in a coalition with gay groups because they face opposition from within their own constituencies, [FN174] and most significantly because a majority of elected officials are still afraid of casting any vote, or taking any action, that may possibly portray them as being sympathetic to a gay rights cause. [FN175]

Of course, the fact that one establishes a theoretical construct for the application of strict scrutiny, and explains why some considerations are more relevant than others, is no assurance the argument will be met on its own terms by the opposition. For example, the DOJ brief in Thomasson erroneously characterizes the brief submitted on behalf of UAHC and others, and the brief submitted by Thomasson, as making the same argument for strict scrutiny. [FN176] The only hope for an advocate, of course, is that a court will be able to discern the difference in the argumentation and will meet the argument on its own terms.

A salient point to note, however, is that this analysis never addresses the argument

that a legislature might indeed have a "rational" policy reason for allowing discrimination against gay and bisexual people to occur: that is, to advance the moral view of society that homosexuality is wrong. Instead of acknowledging and rebutting such an argument directly, the analysis I set forth above transforms the question of whether there is any legitimate legislative purpose to classify on the basis of sexual orientation (including a moral purpose) into the narrower question of whether an individual's sexual orientation has any relevance to that individual's ability to perform in a job or contribute to society. While this latter formulation was indeed used in Frontiero , [FN177] the escape from the broader question of legislative purpose is emblematic of the general flight from the question of morality in traditional argumentation.

2. Immutability

A number of lower courts have ruled that classifications based on sexual orientation do not deserve heightened scrutiny because of the ***276** following, apparently decisive, distinction: "Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage which define existing suspect or quasi-suspect classes. The behavior or conduct of such already recognized classes is irrelevant to their identification." [FN178]

The Clinton Department of Justice is, again, not above making the same claim when it argues that classifications based on sexual orientation in the military deserve only rational basis review. As the DOJ explained in its Memorandum Regarding Standard of Review, in the case of Able v. Perry :

> The fact that the [military's] policy is directed at homosexual acts rather than orientation distinguishes this case from all cases in which heightened scrutiny has been applied. Suspect status has been accorded only to race, national ancestry and ethnic origin, and alienage. Quasi-suspect status has been accorded only to gender and illegitimacy. Classifications warranting heightened scrutiny have thus been defined by passive personal characteristics, not by the class's behavior. [FN179]

The same argument was made by the DOJ in the Thomasson case. [FN180]

Like the DOJ's and the courts' use of political powerlessness, the focus by these entities on the immutability of a characteristic reflects the absence of a theoretical construct for the application of strict scrutiny. The plurality in Frontiero referred to the immutability of gender as one of the "considerations" militating in favor of applying strict scrutiny to gender- based classifications. But even that opinion, which made no pretense of being based on a strong theoretical construct, quickly qualified its consideration of immutability with the important fact that gender, unlike other immutable characteristics, frequently ***277** bore no relationship to the ability to perform or contribute to society. [FN181] And when the Court, in Cleburne v. Cleburne Living Center , presented a serious theoretical construct for the application of strict scrutiny, it rejected the relevance of the immutability of the characteristic at issue for the

application of strict scrutiny. [FN182]

Thus, one possible response to the argument that homosexuality is different from characteristics such as race, gender, or alienage, because homosexuality is "behavioral" and not "immutable," is simply to argue that the immutability of a characteristic is completely irrelevant to the analysis at hand. [FN183] But there are pragmatic problems with this approach. Some groups who have achieved, or who would like to achieve strict scrutiny for classifications based on their distinguishing characteristic, have a characteristic that is usually considered "immutable." Thus, such groups may not be pleased with an equal protection approach that considers the factor of immutability completely irrelevant. Women's groups seeking strict scrutiny for classifications based on gender are a prime example of such an "interest group." [FN184]

Moreover, there is an aspect of immutability that has been deemed relevant by the Court in several of its equal protection cases (other than Cleburne). [FN185] This aspect concerns the "unfairness" of subjecting members of a class to discriminatory actions because of a characteristic they have had no responsibility in acquiring. As a logical matter, this aspect should be relevant solely to the application of the standard i.e., in assessing the rationality or the close relationship between a purported state interest and the classification chosen and not in determining what standard of review to apply. Indeed, unfairness was relevant in this manner when the Court concluded that governmental action discriminating against illegitimate children and children of illegal aliens was illogical or unjust. [FN186]

But the Court has never made it clear that "unfairness" should be relevant solely to the application of the standard rather than to the ***278** determination of the standard itself. To the contrary, the Court has sprinkled its opinions with language that implies that the unfairness in punishing groups for immutable characteristics is relevant in determining the standard of review. So, advocates are back in the game of dancing in a room with an orchestra that is slightly off-key. [FN187] If an advocate wishes to establish strict scrutiny for a classification that has not yet been granted such scrutiny (such as gender or sexual orientation), and the classification is based on a characteristic that is immutable (in the sense that the person lacks responsibility for acquiring the characteristic), the pragmatic approach is to argue that the immutability of a characteristic is relevant to the question of the standard of review and thus militates in favor of strict scrutiny.

One can understand how advocates in favor of strict scrutiny for gender- based classifications might take the step of vigorously arguing the immutability of gender is of key relevance in determining whether strict scrutiny should be applied. [FN188] But I believe advocates in favor of strict scrutiny for classifications based on sexual orientation must present a more thoughtful elaboration of the role the factor of immutability should play in a strict scrutiny analysis. [FN189]

In such an analysis, two potential meanings of the term "immutability" that the lower

courts have conflated should be clearly separated. The first meaning involves the concept of "lack of responsibility" and relates to the premise that it is unfair to penalize an individual for a characteristic which the individual has had no responsibility in acquiring. This meaning may be accepted as relevant to the determination of strict scrutiny and an individual's sexual orientation can be demonstrated to meet that meaning. The second meaning involves the concept ***279** of "passivity," in the sense of referring to a "passive" characteristic that has no behavioral aspects. Acting on one's sexual orientation does require engaging in behaviors, but this meaning of immutability should be rejected as logically irrelevant to the question of the standard of review.

With regard to the first meaning of immutability, there is broad consensus today in the scientific, medical, and psychological communities that a person's sexual orientation, be it homosexual, heterosexual, or bisexual, cannot be changed through a simple decision-making process undertaken by an adult or through medical or psychological intervention. [FN190] While there is no consensus as to whether an individual's sexual orientation is determined by an individual's genetic makeup, hormonal factors, social environment, or a combination of any of the above, [FN191] there is consensus that whichever factor (or factors) ultimately is found to be of the most import in establishing a person's orientation, none of those factors are ones ordinarily considered to be under an individual's control. [FN192] Thus, sexual orientation per se is not a characteristic which an individual may be said to have had responsibility in acquiring.

While an individual has no responsibility in acquiring his or her sexual orientation, each individual must decide how to respond to that innate orientation. The medical and psychological evidence suggests that a person who is heterosexual neither deliberately chooses that orientation nor may easily change that orientation through a simple decision-making process or through medical intervention. But that says nothing about the ability of such an individual to refrain from acting upon his or her heterosexual orientation by refraining from achieving sexual gratification with persons of the opposite gender, and perhaps even by learning how to suppress the desire for such gratification.

The same is true with regard to homosexual or bisexual orientation. An individual following the teachings of some religious groups may believe his or her homosexual orientation is a challenge given by God to overcome and may direct all energies to refraining from engaging ***280** in sexual activity with someone of the same gender. Conversely, individuals who believe there is nothing wrong with following through on their given sexual orientation, and who wish to be sexual in their lives, will engage in the behaviors natural to their orientation, i.e., sexual and emotional gratification with a person of the same gender. Thus, there is a behavioral, and mutable, component to following through on one's sexual orientation, although the sexual orientation itself is non-behavioral and immutable.

Several lower courts and the Department of Justice, engaging in an ex ante analysis of Supreme Court cases, have concluded a characteristic must necessarily be "passive" in order to warrant strict scrutiny. But the fact that following through on one's sexual orientation involves behavioral components should have no relevance to strict scrutiny

when examined within a separation- of-powers construct. There is nothing in the logic of that construct that would accord any relevance to whether a characteristic carries with it certain behaviors. For example, while classifications based on religion are strictly scrutinized because they implicate a fundamental constitutional right, [FN193] such classifications would presumably also raise the two essential warning signs discussed above. [FN194] It would be irrelevant, in that analysis, that the practices of various religions were inextricably intertwined with various behaviors, such as prayer, fasting, saying blessings, and eating certain foods. The same may be said of the characteristic of gender. Although women, because of their gender, may exhibit certain unique behaviors related to their reproductive systems, [FN195] that fact has never been seen ***281** as a justification for denying heightened scrutiny to classifications based on gender.

Thus, the argument by lower courts and the Department of Justice that classifications based on sexual orientation fail to warrant strict scrutiny because sexual orientation is not a "passive characteristic" must necessarily speak to a different point. The only possible point is that the decision to respond to one's natural sexual orientation (assuming it is a homosexual one) by engaging in the behaviors that are normal to that orientation (i.e., having a physical and emotional involvement with a person of the same gender, as opposed to someone of the opposite gender) is wrong and automatically removes the possibility of heightened scrutiny.

But neither the lower courts nor the DOJ ever explicitly explain what is "wrong" with physical and emotional involvement between people of the same gender. Indeed, in this country, the only relevant activity that is criminalized in half of the states and in the military is the act of sodomy. [FN196] Thus, under the logic of an argument that "wrong" behavior does not deserve strict scrutiny, to the extent an individual desires to engage in sodomy as a means of expressing his or her sexual orientation (be it homosexual or heterosexual), this behavior may be prohibited by the state and may be grounds for denying heightened scrutiny to the class of people defined by the act of sodomy. But governmental classifications based on homosexuality or bisexuality are not classifications based on sodomy. Rather, they are classifications based on an individual's orientation and an individual's decision to respond to that orientation with a range of behaviors - many of which do not include sodomy. [FN197]

The reader should note, however, that while this rebuttal is presumably correct as a matter of logic, it depends on a formalistic, legal divide between "sodomy," as an activity criminalized and considered "wrong" by society, and non-sodomy gay sexual activity (e.g., kissing and cuddling between people of the same sex), as an activity which is not formally criminalized in any state. But this legal distinction avoids the underlying question of whether society may believe that two people ***282** of the same gender loving each other, in a physical and emotional way, is morally wrong - regardless of whether actual acts of sodomy ever take place.

The rebuttal provided in this section may be the best an advocate may muster under the traditional paradigm. But the potential fault lines in this argument should lead us to

question whether an alternative paradigm that would allow the issue of morality to be addressed more directly might not be more useful in the long run. The best rebuttal that may be mustered to the application of the Supreme Court's opinion in Bowers v. Hardwick, presented in the next section, similarly suffers from a failure to directly confront the issue of morality.

3. The Relevance of Bowers v. Hardwick

The reason most often relied on by courts to conclude governmental classifications based on sexual orientation do not warrant heightened scrutiny is based on logic derived from the Supreme Court's decision in Bowers v. Hardwick . [FN198] The Courts of Appeals in the District of Columbia, [FN199] the Seventh Circuit, [FN200] the Ninth Circuit, [FN201] the Federal Circuit, [FN202] and the Sixth Circuit [FN203] have all concluded that the Supreme Court's decision in Hardwick compels them to arrive at the conclusion that classifications based on sexual orientation must be granted no more than rational basis review.

The logic of this compulsion is explicated in two cases, one authored by Judge Bork in Dronenburg v. Zech [FN204] prior to the Supreme Court's opinion in Hardwick , and one authored by Judge Silberman (joined by Judge Bork) in Padula v. Webster , [FN205] a case subsequent to Hardwick . Every court that has invoked the argument that Hardwick precludes a finding that classifications based on sexual orientation warrant ***283** heightened scrutiny has simply parroted the conclusions of the Dronenberg and Padula courts. [FN206]

The Dronenburg/Padula reasoning is based on one essential premise: acts of homosexual sodomy are equivalent to, and interchangeable with, all homosexual conduct. In Dronenburg v. Zech , a Navy officer was discharged for engaging in homosexual conduct. According to Judge Bork, writing for the court, the officer "admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on a Navy Base." [FN207] In support of his claim that the discharge was unconstitutional, the officer advanced an argument based on a constitutional right of privacy and an argument based on a right to equal protection.

Judge Bork reasoned that resolution of the plaintiff's equal protection claim was "to some extent dependent" upon the resolution of his privacy claim. [FN208] As Judge Bork put it: " I f no such right of privacy exists, then appellant's right to equal protection is not infringed unless the Navy's policy is not rationally related to a permissible end." [FN209] Judge Bork then reasoned, in an opinion eerily similar to one Justice White would author a few years later in Hardwick , that " w hatever thread of principle may be discerned in the right-of-privacy cases," that right has never been defined "so broadly as to encompass homosexual conduct ." [FN210]

As support for his conclusion, Judge Bork relied on the Supreme Court's summary affirmance of a district court ruling in Doe v. Commonwealth's Attorney for Richmond

[FN211] that Virginia's sodomy law was constitutional. As Judge Bork explained: "If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context." [FN212] Judge Bork never explained, however, why a court ruling upholding a law criminalizing homosexual (and heterosexual) sodomy , as did the Virginia law ***284** at issue in Doe , was equivalent to a ruling upholding a law criminalizing all homosexual conduct .

In Padula v. Webster , [FN213] a D.C. Court of Appeals panel repeated the Dronenburg reasoning, with an added Hardwick twist. Margaret Padula, who alleged that she had been denied a job with the FBI because she acknowledged during the interview process that she was a "practicing homosexual," claimed her right to equal protection had been violated. [FN214] The panel rejected her initial claim that homosexuality should be recognized as "a suspect or quasi-suspect classification" on the grounds that Dronenburg and Hardwick presented "insurmountable barriers" to such a claim. [FN215] The court pointed out that the Supreme Court in Hardwick had "concluded that a right to engage in consensual sodomy is not constitutionally protected as a fundamental right," and that "the presumed beliefs of the Georgia electorate that sodomy is immoral provide an adequate rationale for criminalizing such conduct." [FN216] And, the court continued, although the Supreme Court did not "explicitly consider whether homosexuals should be treated as a suspect class, it seemed to regard that question settled by its conclusion that the Constitution does not afford a privacy right to engage in homosexual conduct ." [FN217]

The logic of this result is spelled out by the court for those of us who miss the connections. "It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize, as deserving of strict scrutiny under the equal protection clause." [FN218] The Court went on to state that in all cases in which the Supreme Court has held that a class should be accorded suspect, or quasi-suspect status, there has been an "unarticulated, but necessarily implicit, notion" on the part of the Court that it was not justifiable to "discriminate invidiously against the particular class." [FN219] Given this fact,

> [i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class , it is hardly open to a lower court to conclude that state ***285** sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal . [FN220]

Thus, the court in Padula , as did the court in Dronenburg , moves easily between the terms "homosexual sodomy" and "homosexual conduct," as if the two terms are identical. But neither court ever gives an explanation as to why these terms are identical. While the Padula court, and every court that has subsequently parroted Padula's reasoning, asserts, with no sense of self- consciousness or doubt, that the "conduct that defines the class" of homosexuals may be criminalized, [FN221] none of the courts explain why oral or anal sex (which is the actual conduct criminalized in most states and which was the subject of analysis in Hardwick) "defines" the class of homosexuals.

Indeed, statistics derived over the years from studies of sexual behavior belie the assertion that sodomy "defines" the class of homosexuals. These studies indicate that over twenty percent of heterosexuals engage in anal sex and that seventy-five to eighty percent of heterosexuals engage in oral sex, with the highest rates of those regularly engaging in oral sex present among well-educated, nonminority heterosexuals. [FN222] Even assuming, arguendo, that ninety percent of homosexuals engage in oral or anal sex, it is hard to understand how this small difference can mean that sodomy defines the class of homosexuals but not the class of heterosexuals.

The Padula and Dronenburg courts are not unique in equating sodomy with homosexuality. In today's popular parlance, "sodomy" is presumed to be synonomous with "homosexuality," and "homosexual sodomy" is subsequently presumed to be synonomous with "homosexual conduct." One of the lighter moments during the Senate hearings ***286** on the ban on military service by gay individuals (during which light moments were rare) was ocassioned by Senator Strom Thurmond's adamant and loud assertions to Senator John Kerry of Nebraska that "Heterosexuals don't practice sodomy" and Senator Kerry's attempt to illuminate the Senator from South Carolina to the fact that, indeed, some heterosexuals do commit sodomy. [FN223]

A more sobering example was presented in the case of Bottoms v. Bottoms , [FN224] in which the Supreme Court of Virginia upheld a trial court's determination to remove a child from his lesbian mother and to grant custody of the child to his maternal grandmother. The court noted that " c onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code ß 18.2-361; thus that conduct is another important consideration in determining custody." [FN225] The Virginia code cited by the court criminalizes oral or anal sex, whether committed by homosexuals or heterosexuals. [FN226] The grandmother had lived with her boyfriend for many years, the two of them raising the daughter; the daughter had lived with her lesbian lover for approximately two years by the time her mother filed for custody of the grandson. [FN227] There was no evidence before the trial court as to the specific sexual practices engaged in by either the daughter or the mother during these years. It was only the lesbian mother, however, for whom oral sex was presumed to be "inherent in lesbianism," thereby establishing in the court's opinion a critical factor justifying removal of the child from her custody. [FN228]

While people (and judges) often automatically equate sodomy with homosexuality, surely some reflection and consideration of the statistics regarding the frequency of oral and anal sex among heterosexuals should result in a more precise understanding of the group actually "defined" by the conduct of sodomy. Perhaps an example of a group truly defined by such conduct would help further. Assume the state legislature in Virginia, under the leadership of Governor George Allen, passes a law prohibiting the University of Virginia ("U. Va.") School ***287** of Law from admitting any student who has violated section 18.2-361 of the Virginia code. Borrowing a page from the medical examinations section of the Americans with Disabilities Act, [FN229] U. Va. School of Law establishes a two-stage process for all new applicants. In the first stage, applicants follow the

regular routine for admission to the law school. Upon receipt of a conditional acceptance letter, applicants receive a separate form which inquires whether they have engaged in oral or anal sex with a man or a woman during the previous five years. The school asks applicants to answer the question and to have the form notarized.

Assume that 100 applicants return the form and answer that they have not engaged in oral or anal sex in the specified time period. The remaining two hundred applicants (approximately ninety percent heterosexual individuals and ten percent lesbian, gay, and bisexual individuals) return the form with an affirmative answer. The members of the latter group promptly receive letters withdrawing their conditional acceptance letters to U. Va. School of Law.

To no one's surprise, the group of "wanna-be" lawyers files suit, claiming their right to equal protection has been violated. The "behavior that defines the class" in this case is, indeed, the behavior of sodomy. Thus, in this case, the logic of the court in Padulathat a classification on the part of the Virginia legislature on the basis of sodomy should be accorded only rational reviewwould make sense: "If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious." [FN230] This group of rejected applicants would thus have to resort to the argument that the classification at issue was not even rationally related to some legitimate governmental purpose.

While sodomy would be fundamental to the definition of this group of rejected applicants, it is not what is "fundamental to [the] nature" of homosexuals. [FN231] Without doubt, acts of oral and anal sex provide sexual pleasure and gratification to homosexuals, just as they do to heterosexuals. And while heterosexuals, and not homosexuals, always ***288** have available to them the option of vaginal intercourse, [FN232] gay men and lesbians are able to achieve sexual gratification without oral and anal sex and without vaginal intercourse. [FN233] Thus, what is fundamental to the nature of gay men and lesbians, and what makes them different from heterosexuals, is not any unique form of sexual activity, but rather that they desire a sexual and emotional attachment to a person of the same gender, rather than the opposite gender. [FN234]

The fundamentally wrong premise that sodomy defines the class of homosexuals, which is the basis for the lower courts' interpretation and application of Hardwick , is actually an integral aspect of the Hardwick decision itself. From the beginning of the opinion, in which Justice White first described the question on which the Court granted certiorari, the conflation between "engaging in sodomy" and "being a homosexual" is apparent.

Justice White noted the Court granted certiorari in response to the Georgia Attorney General's petition "questioning the holding [of the Eleventh Circuit] that the sodomy statute violates the fundamental rights of homosexuals ." [FN235] The issue thus presented to the Court, explained Justice White, "is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence

invalidates the laws of many States that still make such conduct illegal and have done so for a . . . long time." [FN236]

As many have pointed out, a more precise framing of the issue before the Court would have been whether the Georgia statute, which criminalized both homosexual and heterosexual oral and anal sex, violated ***289** the fundamental privacy right of any individual (homosexual or heterosexual) to engage in acts of sodomy. [FN237] And indeed, as these same commentators have also pointed out, some of the historical sodomy laws on which the Court relied to arrive at its conclusionthat it would be "facetious" to conclude that a right to engage in such conduct is " 'deeply rooted in this Nation's history and tradition' " [FN238]applied equally to homosexual and heterosexual acts that were not procreative in nature. [FN239]

For the same reason, Justice White's framing of the question presentedwhether the sodomy statute "violates the fundamental rights of homosexuals"was imprecise. The real question was whether the Georgia statute violated the privacy right of people who wish to engage in sodomy (i.e., in oral or anal sex). The only way in which that question could be viewed as equivalent to the question of whether the statute violates the rights of "homosexuals" is by assuming a group described as "people who engage in sodomy" is identical to a group described as "homosexual."

Nor was Justice White alone in treating the Hardwick case as if it concerned the rights of "homosexuals," as opposed to the rights of people who engage in sodomy. There are sections in Justice Blackmun's dissent that appear to make sense only if one substitutes the term "homosexuals" for the term "people who engage in sodomy" as the subject of the analysis. For example, Justice Blackmun states:

> Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." 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. [FN240]

This may well have been intended as a passionate statement regarding***290** the right of people to engage in "different" sexual practices, such as oral and anal sex. But it sounds to me more like a passionate eloquent statement of the moral values implicated in denying gay men, lesbians, and bisexuals the right to choose their intimate sexual associations freely and honestly. A persuasive argument can be made that a federal constitutional right of privacy protects the rights of individuals (homosexual or heterosexual) to engage in private, consensual sexual practices such as oral and anal sex because autonomy in the area of sexual intimacy is consistent with our society's sense of "ordered liberty." But to claim that a law that criminalizes sodomy precludes certain individuals from "defin [ing] themselves in a significant way through their intimate sexual relationships" that are different from the Nation's norm appears to be based on a

false premise that a law that infringes on the right of "people to engage in sodomy" is equivalent to a law that infringes on the rights "of homosexuals" to engage in any sexually fulfilling same-sex relationship. [FN241]

One of the reasons courts have been able to consistently invoke the false premise that homosexual sodomy is equivalent to homosexual conduct is that gay legal advocates have not explicitly rejected this false premise in the wake of Hardwick . Instead of countering the ramifications of Hardwick by decoupling sodomy and homosexual conduct, many gay rights attorneys have implicitly accepted the equivalence between homosexual conduct and homosexual sodomy and have instead sought to decouple homosexual orientation from homosexual conduct . This approach has produced victories in court for a few individual gay and lesbian plaintiffs, but at a cost to equal protection for gay people generally, and at a potential cost to the development of a more effective paradigm for equal rights for gay people.

In the Padula case, the FBI first advanced a potential distinction between homosexual status (or homosexual orientation) and homosexual conduct. The government insisted "the FBI's hiring policy focuses only on homosexual conduct, not homosexual status." [FN242] The court understood the government to be saying by this assertion "that it would not consider relevant for employment purposes homosexual orientation ***291** that did not result in homosexual conduct." [FN243] Although Padula rejected this distinction as untenable, [FN244] the court ultimately decided the parties' definitional disagreement was irrelevant because Padula had admitted to being a "practicing homosexual." [FN245] The only issue before the court, then, was "whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification." [FN246]

As a matter of logic and practice, it would seem odd to define a homosexual as anything other than a person who engages in homosexual conduct. Yet the distinction between homosexual status and homosexual conduct was subsequently adopted with much vigor by several courts, and by several gay rights attorneys, in equal protection cases. [FN247] For example, in one of the first cases following Padula , Miriam BenShalom, a lesbian sergeant who challenged the Army's refusal to allow her to reenlist after she had publicly acknowledged she was a lesbian, received a favorable district court decision based on a status/conduct distinction. [FN248] The court noted the military's regulation defined a homosexual as an individual who "desires bodily contact between persons of the same sex . . . with the intent of obtaining or giving sexual gratification." [FN249] Thus, observed the court, " i f a person, such as Sergeant BenShalom, has the status of having a homosexual orientation and that person engages in speech which discloses or otherwise acknowledges that status," then that person may not reenlist in the Army "regardless of whether that person has engaged in or intends to engage in actual homosexual conduct." [FN250]

This fact, concluded the district court, rendered the military regulation unconstitutional, both under a First Amendment right of speech ***292** and under a Fifth Amendment right of equal protection. The First Amendment violation arose because the military's

regulation swept more broadly than necessary to protect the asserted government interests. [FN251] Even if the government had a valid interest in excluding from the military people who actually engaged in homosexual conduct, or had a propensity to engage in such conduct, the court saw "no basis to support the Army's contention that acknowledgment of status equals reliable evidence of propensity." [FN252]

A similar logic underlay the court's equal protection analysis. The question, explained the court, was "whether homosexuals, defined by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect or quasi-suspect class." [FN253] If no allegations of sexual misconduct were present, concluded the court, a group defined by the status of homosexuality did constitute a suspect or quasi- suspect group. [FN254] Of course, "sexual misconduct" under the military policy included any physical contact between people of the same gender that resulted in sexual gratification. [FN255]

The district court in Padula concluded the military's regulation could "survive deferential scrutiny only if the Secretary [of the Army] is correct in the assertion that the status-conduct distinction is bogus." [FN256] To the court, the distinction was absolutely not bogus. It observed that it " 'can take notice of the logical distinction between gay individuals who simply prefer the companionship of members of their own sex and homosexual individuals who actively practice homosexual conduct.' " [FN257]

***293** On appeal, the Seventh Circuit rejected every premise on which the district court had proceeded. There was no First Amendment violation, noted the appellate court, because Ben-Shalom was not denied admittance to the Army for any "speech per se" but because " [w]hat Ben-Shalom cannot do, and remain in the Army, is to declare herself to be a homosexual." [FN258] And there was also no equal protection violation. Although the district court had "viewed the regulation as creating a classification based entirely on sexual orientation, mere status, and not conduct," the Fifth Circuit rejected that analysis with the following observations:

> It is true that actual lesbian conduct has not been admitted by plaintiff on any particular occassion, and the army has offered no evidence of such conduct. [The district court judge] found no reason to believe that the lesbian admission meant that plaintiff was likely to commit homosexual acts. We see it differently. Plaintiff's lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. . . . To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future. [FN259]

Not much has changed in gay rights litigation strategy between 1989 and 1996, except for some twists and nuances added by advocates or by courts to the basic status/conduct distinction. Numerous gay rights lawyers have advanced the status/conduct distinction as a way of winning a victory for their individual clients. Particularly in 1994 and 1995, several lesbian and gay plaintiffs won reinstatement in the military on the basis of the status/conduct distinction in high profile cases

challenging the "old" military ban. For example, the Ninth Circuit has affirmed the reinstatement of Keith Meinhold, a naval officer who stated on national television "I am in fact gay," by twisting the status/conduct distinction and holding that the Navy's regulation, which required discharge of persons who stated they were homosexual, could reasonably be construed "to reach only statements that show a concrete, ***294** fixed, or expressed desire to commit homosexual acts despite their being prohibited." [FN260] Meinhold's statement, concluded the court, in the circumstances under which he made it, "manifests no concrete, expressed desire to commit homosexual acts." [FN261]

A California district court similarly ordered the reinstatement of Greta Cammermeyer, a colonel in the Washington State National Guard, who had been discharged for stating during a security clearance that she was a lesbian. [FN262] The undisputed evidence, according to the court, was that Cammermeyer had been discharged "solely because she admitted her homosexual orientation," and the government's argument was that "Cammermeyer's admission that she is a lesbian is reliable evidence of her propensity to engage in homosexual conduct." [FN263] The court rejected that argument, noting that Cammermeyer had "provided the Court with substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact." [FN264] As the court paraphrased the conclusion of one of Cammermeyer's expert witnesses: " A person's public identification of his or her sexual orientation does not necessarily imply sexual conduct, past or present, or a future desire for sexual behavior." [FN265] Thus, the court concluded, "plaintiff's acknowledgment of her lesbian orientation itself is not reliable evidence of her desire or propensity to engage in homosexual conduct." [FN266]

The intense effort on the part of some gay legal advocates to avoid the Hardwick trap by decoupling sexual orientation from sexual conduct leads to some Alice-in-Wonderland type claims, which might be amusing if the outcome of the effort were not so potentially destructive. For example, Greta Cammermeyer's story was portrayed in an NBC ***295** movie, Serving in Silence , which aired while Cammermeyer's case while still in litigation. In a scene that was surely heavily edited by Cammermeyer's lawyers, Glenn Close, playing Greta Cammermeyer, engages in the following fateful dialogue with the security clearance officer:

> Cammermeyer ("C"): I'm a lesbian.
> Investigator ("I"): You're an active lesbian?
> C: I have an emotional . . . I connect emotionally to women.
> I: Sexually?
> C: It doesn't have anything to do with sexual activity.
> I: Then what makes you a lesbian?
> C: My feelings.
> I: About women.
> C: More about myself. It's about who I am.
> * * *
> C: Being a homosexual is not illegal according to the Uniform Code of Military Justice. Only homosexual acts are and that's not what I'm talking about.

* * *

I: So how many women have you had sex with?

C: I never said I did.

I: But you have had relationships. I'm trying to understand. Help me out.

C: This is who I am. How many ways can I explain it to you?

I: So if you don't engage in conduct, how do you know you're a lesbian? Maybe you're celibate.

C: You're not listening.

I: Oh, I am.

C: Being a lesbian is part of someone's identity. Nothing more, nothing less. [FN267]

At best, this exchange is curious; at worst, it is absurd. But in the world of the status/conduct distinction, this exchange not only makes sense, it is essential to a successful outcome. [FN268]

Some courts, of course, have rejected the "logic" of the status/conduct distinction. Although a panel of the D.C. Court of Appeals ordered that Joe Steffan, who had merely acknowledged to his superiors that he was gay, be granted his Naval Academy diploma, the D.C. Court of Appeals, sitting en banc, reversed. [FN269] Highlighting concessions made by Steffan's attorney in the brief and in oral argument that the ***296** government could constitutionally discharge individuals who engage in homosexual conduct or who intend to engage in such conduct, the court rejected Steffan's argument that it should view "homosexual status - which is all that he should be thought to have acknowledged - as conceptually unrelated to homosexual conduct." [FN270] As the court reasoned: "Although there may well be individuals who could, in some sense, be described as homosexuals based strictly on an inchoate orientation, certainly in the great majority of cases those terms are coterminous. Homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct." [FN271]

It appears to me that a litigation strategy relying on a status/conduct distinction suffers from three essential faults. First, the success of the argument depends on finding judges who are willing to accept that the statement "I am gay" or "I am a lesbian" carries with it no inherent implication that the individual intends to, or desires to, engage in gay or lesbian conduct. Moreover, in considering the plausibility of this argument, one must remember that under both the "old" and the "new" military ban, homosexual conduct means more than homosexual sodomy; it encompasses any bodily contact undertaken with someone of the same sex for the purpose of achieving sexual gratification. [FN272] The compelling logic of this argument may fail to convince even the most intelligent among us.

Second, a victory premised on the status/conduct distinction may be akin to "winning the battle and losing the war." While there may be some solace in the knowledge that a gay man, lesbian, or bisexual has achieved the right to make a statement of some inchoate orientation in the armed services (or in the course of a custody fight), and to avoid discharge (or loss of custody) as long as that identity never coalesces into actual

sexual gratification, surely gay people want more than that. Indeed, even the legal advocates who proffer the status/conduct distinction must view this argument as the first strategic and incremental step ***297** towards real nondiscrimination on the basis of sexual conduct, as well as sexual orientation. But, at least in the form this argument has been made thus far, courts that have ruled in favor of gay plaintiffs on the grounds of this distinction have tended, at the same time, to nail the door shut on future claims that discrimination based on homosexual conduct is also unconstitutional. [FN273]

Finally, of key importance is the fact that the necessary implication when a gay legal advocate advances a status/conduct distinction is that the advocate believes there is (or, at least, believes there may be) some legally significant distinction between having a gay sexual orientation and acting on that orientation by engaging in the behaviors normal to that orientation. This distinction is at the core of the belief that it is no sin (or, in nonreligious terms, no moral failing) to be a homosexual, but it is a sin (or morally wrong) to act on that orientation by achieving sexual gratification with a person of the same gender. [FN274]

The adoption of the status/conduct distinction thus appears driven by the same fear of society's presumed moral consensus that casts its shadow over other arguments in the equal protection arena. In this case, however, advocates appear to have conceded the immorality, and hence appropriately unprotected status, of all homosexual conduct, and receded to the safe shores of simple homosexual "orientation" or "identity."

An alternative argument would make the claim that it is morally wrong for a society to force its members to repress the natural outcomes of their sexual orientations, be they homosexual, heterosexual, or bisexual. But the force of such an argument is diminished in a legal world dominated by a status/conduct distinction, because such a distinction is based on the premise that society may have some reason, and some right, to suppress the sexual conduct flowing naturally from an individual's homosexual orientation, even if society has neither reason nor right to suppress the homosexual orientation itself.

Beginning in 1994 and 1995, some gay legal advocates affirmatively decided to reject the status/conduct distinction in their challenges ***298** to the "new" military ban. In Able v. Perry , a case brought jointly by the ACLU and Lambda Legal Defense Fund, the attorneys actively sought to avoid making a status/conduct distinction, only to be thwarted at the last moment by a motion submitted by the Department of Justice. [FN275] In a separate case also being litigated by the ACLU, the conduct issue is squarely presented and the status/conduct distinction is not invoked by the lawyers. [FN276]

The amicus briefs I submitted in the military ban cases of Thomasson , Able , and Perry , on behalf of various gay rights and civil rights groups, similarly do not rely on a status/conduct distinction in arguing for heightened scrutiny of classifications based on sexual orientation. [FN277] Rather, the briefs affirmatively decouple homosexual sodomy (the subject of the Supreme Court's decision in Hardwick) from the range of homosexual conduct (the subject of the military ban) and argue the decision in Hardwick

is irrelevant because gay people are defined by more than acts of sodomy. [FN278]

The distinction between acts of homosexual sodomy and acts of non-sodomy homosexual conduct does not, however, address the issue of society's perceived view of the morality of either group of actions. While the homosexual sodomy/conduct distinction is correct as a matter of logic and law, it failsas does the status/conduct distinctionto engage the underlying issue of society's moral views of any gay sexual activity.

III. AN EYE TOWARDS A NEW PARADIGM

A. The Avoidance of Morality in the Traditional Paradigm

The argumentation proposed in part II reflects three changes from the manner in which equal protection challenges to classifications based on sexual orientation have been framed in the past. First, the argument for heightened scrutiny is presented within a theoretical model of separation ***299** of powers, and the "checklist-jackpot" approach is explicitly avoided. Second, the relevance of the immutability of a characteristic targeted by the classification is neither rejected completely nor embraced in its entirety. Rather, one definition of immutability (lack of responsibility) is accepted as relevant, while a second definition (non-behavioral) is rejected as irrelevant. Third, the Supreme Court's decision in Hardwick is addressed not by adopting a status/conduct distinction, but rather by adopting a homosexual sodomy/homosexual conduct distinction.

But these changes represent mind-shifts within the existing traditional paradigm, rather than any radical shift from the principles of that paradigm. A common denominator underlying each argument is avoidance of any discussion of morality. This is consistent with a basic premise of the traditional paradigm: government has no role enforcing private morality through edicts of law. Thus, even in places where one might imagine a conversation about morality to have been relevant, such a conversation is noticeably absent.

For example, the theoretical construct presented for equal protection analysis does depend, at bottom, on whether the characteristic at issue is one which would be relevant to a rational legislature in its development of public policy. While most legislators would probably agree that an individual's sexual orientation does not affect that person's ability to perform a job, some legislators might argue that it is still appropriate to classify on the basis of sexual orientation and to sanction discrimination against gay people if doing so would be effective in stopping "moral decay" in society. A counterargument could be made that gay relationships do not result in moral decay, and further, that sanctioning discrimination against gay people is itself an immoral act. But such a conversation about morality appears neither in part II of this article nor in the briefs part II is designed to explicate.

Similarly, the homosexual sodomy/homosexual conduct distinction skirts an implicit

conversation about societal views of morality. The distinction is presented in part II as the basis for rejecting the argument that sexual orientation classifications do not warrant heightened scrutiny because they are "behavioral" and for rejecting the relevance of the Hardwick decision. It is noteworthy, however, that the argument never challenges the Supreme Court's underlying judgment in Hardwick that it is legitimate for the people of Georgia to manifest their moral views regarding sodomy through the criminalization of sodomy ***300** by their state legislature. [FN279] Nor does the argument ever directly challenge the jurisprudential view that government appropriately legislates on the basis of private morality. [FN280] Rather, the argument implicitly accepts that acts of sodomy may be criminalized and left unprotected by the privacy guarantees of the federal Constitution, and simply argues that sodomy can be distinguished from a range of other homosexual conduct.

It is true that no state currently criminalizes all forms of love and sexual gratification between people of the same sex. Rather, most states criminalize homosexual and heterosexual sodomy , which is usually defined statutorily or through case law as oral or anal sex. [FN281] Even those states that criminalize sodomy solely between same-sex couples do not criminalize the entire range of sexual conduct and activities of love that bring emotional and physical gratification to same-sex partners. [FN282] So, because society has not criminalized all such activity, a legal argument may avoid the issue of whether it would be legitimate for society to legislate based on private morality by successfully decoupling what has been criminalized by society (homosexual sodomy) from what has not (the rest of gay conduct).

The avoidance of the issue of morality is not unique to the judicial arena. The same quality characterizes political efforts to develop support for the Employment Non-Discrimination Act ("ENDA"), a bill to prohibit discrimination in private employment based on sexual orientation. Rather than using a homosexual sodomy/homosexual conduct distinction as the means of avoidance, however, these political efforts simply use the "unfairness" of discriminating against people for a characteristic that has no relevance to their job performance as the justification for legislative action, and explicitly reject the issue of behavior as irrelevant.

For example, in July 1994, the Senate Committee on Labor and ***301** Human Resources held a hearing on ENDA. [FN283] The witnesses who spoke on behalf of the bill included veteran civil rights supporters, members of the business community, and individuals who had directly experienced discrimination because they were gay. [FN284] The testimony of these witnesses barely discussed the issue of the morality or immorality of homosexuality. Rather, the themes characterizing the testimony were that it is "un-American" to allow employers to discriminate based on sexual orientation, a characteristic that has no relevance to job performance and merit; that ending discrimination against gay men, lesbians, and bisexuals is part of the historic civil rights struggle in this country to prohibit unjustified discrimination; and finally, that good business practices support the eradication of such unjustified discrimination. [FN285]

Two of the invited witnesses testified against ENDA. In stark contrast to the testimony

that preceded them, both of these witnesses explicitly invoked concerns about the character and morality of gay people. Joseph Broadus, a professor at George Mason University, noted that "it cannot be said that sexual behavior is not relevant to conclusions about character," [FN286] and that an essential problem with ENDA was "answering the basic question of whether or not engaging in various kinds of sexual acts, or having a propensity to do that, reflects upon character." [FN287]

Broadus' copanelist, Robert Knight from the Family Research Council, dwelled at length on the character and morality of gay people. Knight began his prepared statement with the following remarks:

> As a pro-family organization, we see the Employment Non-Discrimination Act as less about tolerance than about the government forcing acceptance of homosexuality on tens of millions of unwilling Americans. The bill essentially takes away the rights of employers to decline to hire or promote someone who openly acknowledges indulging in behavior that the employer or his customers find immoral, unhealthy and destructive to individuals, families and societies. Employers would lose the right to include character in their assessment of a prospective ***302** employee, and that would be tyranny. Martin Luther King, Jr. said that a just society would judge people not by their skin color but by the content of their character, and character involves behavior. Many employers believe that homosexual behavior is immoral and they recognize that it has been discouraged in every successful culture in the world. The issue here is not job discrimination. It is whether private businesses will be forced by law to accommodate homosexual activists' attempts to legitimize homosexual behavior. [FN288]

Mr. Knight clearly set forth his sense of the societal consensus regarding homosexuality and his sense of the direct relevance of that consensus for ENDA. Neither Broadus nor Knight were ever challenged directly by any of the witnesses, as they could have been, on this issue of morality. Indeed, as the third witness on the panel with Broadus and Knight, I used my oral testimony to systematically rebut a series of objections to the bill that had been presented by Broadus, Knight, and other opponents of ENDA; none of my rebuttal points, however, directly challenged their purported societal consensus view. [FN289]

The principle tenor of my testimony was similar to that of witnesses who had preceded me, albeit with additional legal and policy overtones. I stressed that "Congress appropriately passes anti-discrimination laws when there is a problem of discrimination against an identifiable group" and that " [e]vidence of such discrimination on the basis of sexual orientation is present today." [FN290] In response to the argument that gay people do not require antidiscrimination protection because studies demonstrate that gay people are wealthier and better educated than average Americans, I pointed out the methodological flaws in those studies. [FN291] In response to the argument that gay people are not like other minorities, I argued that " t o try to create a hierarchy of oppression misses the point entirely" [FN292] and that " t he relevant question ***303** is not who has suffered more among minorities," but simply whether unjustified discrimination against a minority group exists. [FN293]

Finally, in response to the claim that "real minority groups" who deserve protection have "immutable, benign, and nonbehavioral characteristics," as compared to gay people who do not deserve minority status because homosexuality is "behavioral," [FN294] I pointed out that " t he ability to suppress, to change, or to hide a particular characteristic such as one's religion has never been grounds for denying protection under civil rights laws to that person based on that characteristic." [FN295] For example, although a Jew or a Muslim could convert to Christianity and thereby avoid discrimination from an employer who wishes to hire only Christians, Title VII of the Civil Rights Act of 1964 still prohibits discrimination on the basis of religion. [FN296]

I also addressed only one meaning of immutabilitythe meaning referring to the lack of responsibility for acquiring a characteristic. In that regard, I observed that while it is not known whether sexual orientation is caused by biology, environmental circumstances, or both, it has been well accepted that one's orientation is fixed at an early age and thus is not "a conscious choice made by an adult." [FN297]

None of these rebuttal points, however, addressed the purported consensus societal view advanced by the opponents of ENDA that many employers consider homosexual behavior "immoral, unhealthy and destructive to individuals, families and societies." [FN298] This is because such a view had no real relevance in the paradigm in which my testimony was situated. The relevant points for my paradigm were: a person's sexual orientation does not harm anyone else; sexual orientation is irrelevant to a person's capacity to perform a job; a problem of employment discrimination against gay people exists in this country; and ENDA represents "a reasoned and balanced approach to the problem of employment discrimination." [FN299]

Because the first factor was presumed in my testimony, and the three latter factors were supported by my prepared testimony and several appendices, [FN300] there was no need for me to go further within the ***304** traditional paradigm. The fact that many members of the public dislike or are uncomfortable with gay people was, in this paradigm, no more a reason not to pass ENDA than it was a reason not to pass the Civil Rights Acts in 1964 and 1968 when many white people disliked and were uncomfortable with African- Americans.

Thus, in both judicial and legislative arenas, arguments within the traditional paradigm avoid discussion of societal morality because such morality is deemed necessarily irrelevant to the legal outcome. And when opponents to the prohibition of discrimination on the basis of sexual orientation invoke societal views of morality as support for their opposition, that invocation is ignored rather than challenged. [FN301]

B. The Pitfalls in Avoiding Morality

In equal protection cases, the avoidance of morality can be achieved by decoupling homosexual sodomy from the range of homosexual conduct and relying on the fact that society has not criminalized the latter set of activities. [FN302] In the legislative arena,

the avoidance of morality is achieved by drawing on the classic civil rights struggle in this country, where public dislike of a group is seen as further justification for the need for civil rights legislation, rather than a reason not to pass legislation.

Both of these approaches reflect a realistic understanding of the current state of law and politics in this country, and I do not advocate a sharp, immediate departure from such approaches in either the judicial or legislative arena. I believe there is some utility, however, in exploring the limits of these approaches for purposes of a long-term vision of where to proceed.

The limit in the judicial arena is two-fold: a problem of perception and a problem of policy. It is true, as a strict matter of law, that Hardwick deals solely with the issue of homosexual sodomy. Further, it is ***305** true that gay people engage in many activities that bring them sexual and emotional gratification other than sodomy, and therefore, as a matter of logic, what characterizes the class of homosexuals is not the act of sodomy (which heterosexuals engage in as well), but rather the gender of the person with whom one engages in acts of sodomy as well as in other acts that bring sexual and emotional gratification.

One must concede, however, a problem with public perception. It is doubtful many members of the public intuitively distinguish between gay sodomy and the range of activities that bring sexual and emotional gratification to gay people. For example, if a random group of the American public were asked how they viewed "homosexuality," and a percentage of that group responded that "homosexuality is immoral," it is doubtful most of those respondents would have been distinguishing between acts of homosexual oral or anal sex (sodomy) as immoral and other physical activities that bring gay people sexual pleasure (genital manipulation, kissing, cuddling, etc.) as moral. Presumably, members of that group would simply equate "sodomy" with the range of possible "homosexual conduct," and thus their sense of moral reprobation would presumably extend to the range of such conduct as well.

The fact that there is not a widespread awareness of the distinction between gay sodomy and gay conduct does not mean this problem could not be overcome in the courts. If advocates can convince courts (or, most importantly, the Supreme Court) to accept that sodomy does not define the class of gay people, the fact that the general public may still perceive sodomy as equivalent to all homosexual conduct would be irrelevant.

But it is also possible that the public perception that homosexual sodomy is equivalent to homosexual conduct will make it impossible for an advocate ever to succeed in convincing courts to decouple the two. For equal protection purposes, truth and reality is ultimately what five Justices of the Supreme Court decide it is. Thus, despite the most detailed reality, and despite the most eloquent logic and law to the contrary, five Justices could simply pronounce that "sodomy defines the class of homosexuals," based on their perception that homosexual sodomy is equivalent to homosexual conduct, and that heightened scrutiny thus cannot logically apply to classifications

based on sexual orientation.

Moreover, as a matter of policy, if an advocate never contests the legitimacy of the premise that society's sense of morality may determine the law, or never accepts this premise and turns it to her advantage, ***306** she may win the first battle of decoupling homosexual sodomy from homosexual conduct, only to lose the final war. If a societal sense of morality exists to criminalize homosexual sodomy, a similar societal sense of morality may exist to criminalize all activities that bring gay people physical and emotional gratification. If society ever chose to take the step of criminalizing that range of conduct, the advocate's initial success in decoupling homosexual sodomy from the range of homosexual conduct would mean little.

There are similar pitfalls in avoiding the issue of morality in the legislative arena. There are good, pragmatic reasons for advocates to refuse to respond to the claims of opponents that homosexual behavior is unhealthy, immoral, and disliked by many Americans. Similar sentiments were expressed by many white Americans during passage of the Civil Rights Acts of 1964 and 1968 regarding African-Americans, and advocates of those laws never stooped to responding to those charges directly. Rather, advocates maintained the high (moral) ground that discrimination on the basis of a characteristic (race) that has no relevance to performance of a job was unfair, unjust, and essentially un-American. [FN303]

But consider the following exchange between Senator Nancy Kassebaum, a Republican from Kansas, and myself during the July 1994 hearing on ENDA. Senator Kassebaum posed only two questions regarding the legislation, and the issue of behavior was the subject of her first question:

Senator Kassebaum : You [Mr. Broadus] mentioned that the legislation prohibits discrimination based on behavior and that that is unique. I believe it is unique under civil rights law as far as making behavior a discriminatory practice. . . . Ms. Feldblum, let me ask you, what do you see as the potential consequences of discrimination legislation based on behavior?

Ms. Feldblum : I actually do not think it is unique in Federal civil rights law.

Senator Kassebaum : What else?

Ms. Feldblum : I will tell you and it is actually very much because of my experience growing up. I grew up as an Orthodox Jew. . . . [W]hen I would say, "I am an Orthodox Jew," that meant that I did various things. It meant that I prayed three times a day. It meant that I kept kosher.

Senator Kassebaum : That is religion.

Ms. Feldblum : There were behaviors that were connected to my being an Orthodox Jew such that the statement [I am a Jew] actually had no meaning apart from that [performing those behaviors] . . . It does not quite make sense to . . . say, we will protect you if you say you are a Jew, but if you need to leave early ***307** on Friday afternoon, or [do whatever] behaviors [are] manifested by being a Jew, we cannot protect you. It has never been that way in civil rights laws.

So this would not be unique and unusual. What civil rights laws have usually done is ask is there a characteristic that people as a group are being discriminated

against for, and does that characteristic in fact have no relationship to their ability, in this case, let us say, to do a job. [B]ecause if that does exist, then it is appropriate for Congress to act. It is appropriate to have a remedy that says that would be illegal.

So I think it is not quite right to say that it is completely unique.

Is that responsive to your question?

Senator Kassebaum : Well somewhat. I think when you get into characteristics of the Orthodox Jew, it is Judaism, though, as a religion that is protected. There are behavior practices of one kind or anotherlike a born-again Christian, I suppose, Christianity. There are certain behavioral characteristics that one could associate there. But this is a total discriminatory practice based on behavior. And I do believe that is unique. That is what I was asking you, and what you think the consequences of that may be.

Ms. Feldblum : I think it is important to look at whether it makes sense to allow employers to fire people because they are gay. I think that has to be the essential question. There are clearly people . . . who believe that it is entirely appropriate for employers to be able to fire someone just because he or she is gay. [But] you know, 70 percent of the American public when they are surveyed say they do not think so. They do not like gay people particularly, a lot of people in America; they do not really want their sons and daughters to be gay. A lot of them do not like their behaviors. But they think it is a wrong thing for people to be fired from their jobs. And that is really all that we are saying with this piece of legislation. [FN304]

This exchange is a classic example of the avoidance of moral issues that occurs in the political arena and the positive and negative ramifications of such avoidance for advocates of gay rights. Senator Kassebaum cast her concern with ENDA as discomfort with the fact that a federal civil rights law would take the "unique" step of providing protection based on "behavior." My first response was to point out that it could not really be protection of behavior per se that Senator Kassebaum was uncomfortable with because various religions, such as Orthodox Judaism, have behaviors inextricably intertwined with religion.

In response to that, Senator Kassebaum conceded that some religions may have "certain behavioral characteristics that one could associate there." Yet she still clearly felt intuitively that there must be some difference between religion and sexual orientation. The difference she came up with was that a civil rights law like ENDA "is a total discriminatory practice based on behavior." Presumably, she intended by that statement to mean that religion is primarily a nonbehavioral ***308** status, with some behavioral characteristics tangentially associated with it, while sexual orientation is totally behavioral.

But that also is not true. Orthodox Jews and born-again Christians would presumably agree there is an identity of being Jewish or being born-again Christian that is distinct from the behaviors that flow from those identities. Indeed, for many centuries in Spain, Marrano Jews maintained a private identity of being Jewish, but repressed all behaviors that would have normally characterized them as Jewish. [FN305] But both Orthodox Jews and born-again Christians would also probably argue their identity would have

little meaning or fullness to them if all behaviors that flowed from that identity were forbidden and only the bare statement of identity remained allowable.

The same is true of a gay man, a lesbian, or a bisexual. Gay people would presumably agree there is an identity of being gay that is distinct from the sexual behaviors that flow naturally from that identity. Indeed, some religious people who believe God gave them their gay orientation, but expects them to repress the behaviors that flow naturally from that orientation, have an identity of being gay that is distinct from engaging in any gay sexual behavior. But most gay people would probably argue that their identity of being gay would have little meaning or fullness to them if the behaviors that flowed naturally from that identity were forbidden and only the bare statement of identity remained allowable.

Thus, Senator Kassebaum's distinction between religion and sexual orientation does not hold up in light of practical reality. The real difference Senator Kassebaum probably feels, although she did not articulate it as such, is that the type of behavior that flows from a religious identity is somehow more acceptable than the type of behavior that flows from a gay identity. Religious behavior is certainly seen as more acceptable because such practices do not carry the stigma of moral and social disapproval. Some Christians may believe Jews, Muslims, and others err grievously by not believing in the Holy Trinity, but the majority of Americans today probably do not view the practice of Jewish, Muslim, or other religious rituals as immoral, unhealthy, or indecent.

It is noteworthy, however, that my response to Senator Kassebaum included none of this analysis. Instead of challenging the Senator's proposed***309** distinction between religion and sexual orientation and explaining that she was erroneously believing behaviors that flow from sexual orientation are more reprehensible than religious behaviors, I simply withdrew from the battlefield, conceded partial defeat, and attempted to win on a different front. That is, I conceded "a lot of people in America" do "not like [the] behaviors" of gay people, but that the only relevant question for whether Congress should pass ENDA was whether it was "fair" to allow people to be fired from their jobs just because they are gay. The implication of my response was that the answer to that question must be "no," regardless of how distasteful or discomforting, or how immoral or destructive to society, the employer believes the underlying gay sexual behavior to be. And, indeed, as noted above, employer views of this kind would essentially be irrelevant within the traditional paradigm. [FN306]

The question I pose here, however, for both the judicial and legislative arenas, is whether there are harmful results in avoiding the issue of morality so completely. For example, in the legislative arena, is it preferable for advocates to retreat from the battlefield of morality, concede partial defeat, and attempt to win on a front that renders societal morality irrelevant? Or is it preferable for advocates to engage directly the issue of morality and to argue that the answer to the question "is it fair to fire people because they are gay?" actually differs depending on whether the general societal consensus is that gay sexual behavior is "distasteful or discomforting" or "immoral or destructive?" Moreover, is it preferable for advocates to argue more affirmatively about the moral

good embodied in the love between two people, regardless of their gender?

Similarly, in the judicial arena, is it preferable for advocates to avoid the question of whether law should reflect societal morality and simply focus on decoupling homosexual sodomy from homosexual conduct? Or should advocates engage directly the issue of morality and argue that while societal views of morality might justify criminalizing homosexual and heterosexual oral and anal sex, such views could not justify criminalizing the entire range of sexual and emotional activities that bring gay people gratification?

I believe we must consider the advantages and disadvantages of engaging directly the issue of morality. Some advantages of not engaging the issue are readily apparent. For example, advocates for gay ***310** rights tend to assume they will lose the entire war if they condition victory on a societal belief that homosexuality is not immoral. This assumption is based on public opinion polls indicating that while more than seventy percent of respondents believe homosexuality is immoral, [FN307] a clear majority support equal rights for homosexuals or believe that people should not be discriminated against for being gay.[FN308] Thus, instead of trying to change Americans' views regarding the morality of homosexuality, advocates intelligently decide to take what they apparently have - a strong majority belief that gay people should not be fired just because they are gay - and press forward with that.

Some disadvantages in this approach, however, are apparent as well, at least upon reflection. One might well posit that ENDA would not garner majority approval in Congress in 1996. Some members of Congress would presumably explain their vote against ENDA as explicitly reflecting societal morality which disapproves of homosexuality. Other members, who may not be as comfortable directly invoking morality, might explain their votes as reflecting their belief that government should not intervene with employer prerogatives, except when discrimination exists to such an egregious degree that voluntary nondiscrimination is not realistic. [FN309] Or, they might explain that ENDA is a radical and "unique" civil rights law because it provides protection based solely on "behavior," and it is inappropriate to pass such a radical law.

Although these latter two explanations would not explicitly invoke morality, they make sense only if society's sense of morality has been deemed relevant by the legislatorwhether the legislator has articulated that factor or not. It is only if the legislator intuitively believes that many members of society legitimately view homosexual behavior as immoral that it makes sense for the legislator to consider it inappropriate for government to mandate an employer to hire an individual ***311** who engages in gay behavior. The legislator must assess these employer views as somewhat legitimate in order to distinguish nonpassage of ENDA from passage of Title VII of the Civil Rights Act of 1964. That is, the legislator must assume that many heterosexual employers actually have a legitimate belief that homosexual people are immoral and are lacking in character, not simply a disapproval of, or discomfort with, gay people, the way white employers were uncomfortable with and disliked black people in 1964. Similarly, only if the legislator believes society has a moral view of behaviors that characterize religion

significantly different from its view of behaviors that characterize sexual orientation can a law such as ENDA be viewed as radical or unique within federal civil rights law.

The same is true in the judicial arena. Some judges who deny heightened scrutiny to classifications based on sexual orientation would explain such denial explicitly on the basis of their view of societal morality with regard to homosexuality. Other judges, however, would explain their denial as compelled by Hardwick , even after advocates have pointed out that homosexual sodomy and homosexual conduct are not equivalent. The most logical reason for a denial in such a case would be the judge's intuitive sense that although Hardwick relied literally only on the moral sense of the Georgia electorate regarding homosexual sodomy , in truth homosexual sodomy was intended as a stand-in for all homosexual conduct .

The same use of societal morality by a judge, even without an explicit articulation of morality, could occur when judges apply the standard of review, be it heightened or rational scrutiny. Catering to the prejudices of others, or acting out of a bare desire to harm an unpopular group, are not legitimate governmental goals even under the lowest standard of review. [FN310] A court, however, might rule that a law prohibiting marriage between persons of the same gender, or a law prohibiting gay people from serving in the military, are not laws that cater solely to the (unacceptable) prejudices of others, but rather serve legitimate governmental goals such as enhancing stable family structures or promoting unit cohesion. The only justification for such rulings would be the belief that forcing people not to act on their prejudices against gay people would be contrary to society's shared sense of morality and thus ***312** could somehow harm society itself and society's sense of "family" and "cohesion."

Upon reflection, then, there are some real disadvantages in ignoring the question of society's moral view of homosexuality. Ignoring the issue deprives an advocate of the opportunity to argue that societal morality does not compel the negative results reached; it allows the uncontested view of morality to shape the final result, often under the guise of other explanations; it allows members of the public to hide behind their general statement that homosexuality is "immoral" without forcing them to unpack what they really mean by that statement; and finally, it deprives an advocate of the critically important opportunity to change society's moral view of homosexuality.

A decision about whether it makes sense to engage directly the issue of morality, however, requires an assessment not only of the advantages and disadvantages of the current paradigm, but also the advantages and disadvantages of adopting an alternative paradigm that would engage the issue of societal morality directly. To undertake such an assessment, we need to describe a framework in which societal morality would be deemed relevant to the making of law and then play out how the effort to prohibit discrimination based on sexual orientation would fare under such a framework.

C. Devlin Revisited

Philosophers, lawyers, judges, and others have argued for years whether it is appropriate for society to legislate on the basis of private morality and, if so, what the source of that private morality should be. One of the most famous debates on the issue occurred in the 1960's between Lord Patrick Devlin and Professor H.L.A. Hart. Lord Devlin delivered a speech in which he considered the principle presented in the Wolfenden Report [FN311] that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." [FN312] Devlin concluded that this principle was not correct and that, in certain circumstances, law appropriately criminalizes actions simply on the basis that such actions threaten the "common morality." [FN313] Professor Hart responded with a series of lectures in which, drawing on principles enunciated by John Stuart Mill a century before, he argued that while "there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others," the simple "enforcement of morality" was never one of those grounds. [FN314]

In recent years, this debate has been invigorated on different fronts. [FN315] A key front has been that of the judiciary, with cases such as Hardwick resting on the premise that "the liberty we enjoy is the liberty to live a moral life as defined by the community's moral convictions," [FN316] and judges such as Judge Bork and Justice Scalia articulating the basis for that premise. [FN317] For example, in Barnes v. Glen Theatre , [FN318] a case dealing with the constitutionality of a state law prohibiting nude dancing in entertainment clubs, Justice Scalia clearly set ***314** forth his view of the role of the state in legislating on the basis of a community's positive conventional morality:

> The dissent confidently asserts . . . that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long- as-it-does-not-injure-someone- else" beau ideal - much less for thinking that it was written into the Constitution. . . . Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "contra bonos mores," i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of views on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. [FN319]

I do not necessarily disagree with the position that the state may legislate on the basis

of a community's positive conventional morality. For purposes of this exercise, I want to imagine a framework in which we accept arguendo the principles of moral conservatism and then explore how prohibiting discrimination on the basis of sexual orientation might fare under such a framework.

To set forth this framework, I believe we should revisit Lord Devlin's speech on "Morals and the Criminal Law" and unpack more systematically the background of that speech. Many people tend to think of Devlin as opposing the Wolfenden Report's recommendation to decriminalize homosexual sodomy and thus as the author of the legal reasoning necessary to reject such a recommendation. By contrast, many people view Professor Hart as the prime supporter of the Wolfenden Report's recommendation and thus, as the author of the legal reasoning necessary to defend such a recommendation.

In fact, as Devlin made clear in his preface to The Enforcement of Morals , a book collecting his speeches on the topic, he agreed substantively***315** with the Wolfenden Committee's recommendation regarding the decriminalization of homosexual sodomy. [FN320] Of greater importance, he did not believe the collective societal judgment regarding homosexuality rose to the level of public indignation and disgust he believed was necessary for societal morality to be given the force of law. [FN321] Thus, Devlin's analysis of when collective social judgment is appropriately given the force of criminal law should be read with the background knowledge that he did not believe such a collective social judgment existed with regard to homosexuality in England at the time. [FN322]

Some background on what led to Devlin's 1959 speech is illuminating. In 1954, the Wolfenden Committee began considering potential reforms to the law criminalizing homosexual sodomy and prostitution. [FN323] The Lord Chief Justice asked two judges to provide evidence to the Committee, one in favor of reform and the other against reform. Lord Devlin was the judge who testified in favor of reform. As he explained in his preface, he agreed with "everyone who has written or spoken on the subject that homosexuality is usually a miserable way of life and that it is the duty of society, if it can, to save any youth from being led into it." [FN324] But in cases where there was no danger of an older man corrupting a younger boy, [FN325] Devlin did not believe there was "any good the law can do that outweighs the misery that exposure and imprisonment causes to addicts who cannot find satisfaction in any other way of life." [FN326] As Devlin observed: "Punishment will not cure and because it is haphazard in its incidence I doubt if it deters." [FN327]

To Devlin, the only powerful argument against reforming the law ***316** criminalizing private, consensual homosexuality was that there was no effective way to distinguish between those homosexuals who will corrupt youth and those who will not. [FN328] The Wolfenden Committee, Devlin observed, felt that such a distinction could be made, while judges for whom Devlin had great respect felt the opposite. [FN329] As to his own view, Devlin observed merely that "a more comprehensive study of case histories on this point" would be useful. [FN330]

Devlin, in classic legislative lawyering style, proposed to the Committee what he called "one of those illogical compromises that would be rejected out of hand in any system of law that was not English." [FN331] Devlin's compromise was to retain the "full offence of buggery" while abolishing the "lesser offences of indecent assault and gross indecency," unless the acts were committed on youths. [FN332] Devlin felt this compromise would address the public's fear that complete decriminalization "would be an admission that buggery should be tolerated;" that it would provide time to see whether offenses against youth did increase after partial reform of the law (and if such offenses increased, "the way back would be less difficult than if the Act had been totally repealed"); and that partial reform would result in prosecutions for buggery being brought "only in clear and flagrant cases, since the alternative of a conviction for the lesser offence would no longer be available." [FN333]

Devlin's compromise was, as he put it, as much as he thought "public opinion would be at all likely to support." Nevertheless, " [t]he proposal was not favored by the Committee," and, as Devlin noted "I dare say they were quite right." [FN334] In 1957, the Wolfenden Committee released their report calling for the full decriminalization of private, consensual homosexual acts between adults. [FN335]

A year later, in 1958, Devlin was asked to deliver the second Maccabaean ***317** Lecture in Jurisprudence of the British Academy. [FN336] Devlin decided there was a subject that was both "topical" and "within his powers to handle." [FN337] The Wolfenden Report had not dealt with jurisprudence, but it did include a statement of principle, on which its recommendations were based: "that there was a realm of private morality which was not the law's business." [FN338] Since Devlin "completely approved" of that principle, [FN339] he decided his lecture would consist of considering other examples of private immorality the Committee had not reached, applying the principle to them, and discussing the further amendments to the criminal law that would be necessary to have the law conform with the principle. [FN340] The problem was that Devlin's "study destroyed instead of confirming the simple faith" he had in the principle and the lecture turned into a statement of the reasons that had persuaded him the principle was wrong. [FN341]

Devlin's analysis brought him to the conclusion that " [w]hat makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals." [FN342] And the continued existence of a society depends on the continuity of these ideas. As Devlin put it:

> If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price. [FN343]

***318** Given this understanding of society, Devlin no longer believed it appropriate to conclude, as an absolute and blanket matter, that the law should not legislate on the basis of private morality. As Devlin explained it:

> I think, therefore, it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible . . . to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether from within or without. . . . There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. [FN344]

The final area Devlin set to explore, then, is " [i]n what circumstances the State should exercise its power" in the area of morality. [FN345] But to answer that question, he first answered the question: " How are the moral judgements of society to be ascertained?" [FN346] Devlin's recommendation on the latter question was to use a version of the jury system. If twelve randomly picked individuals from the community, said Devlin, would unanimously agree a particular activity is immoral, that would count as the moral judgment of society. As Devlin put it: "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral." [FN347]

Such views of immorality, however, would not necessarily be the ones the state should enforce through criminal law. As Devlin observes, "the individual has a locus standi too; he cannot be expected to surrender to the judgement of society the whole conduct of his life." [FN348] It was, as Devlin pointed out, "the old and familiar question of striking a balance between the rights and interests of society and those of the individual." [FN349] In striking this balance, Devlin proposed several principles, ***319** the chief of which was "there must be toleration of the maximum individual freedom that is consistent with the integrity of society." [FN350] Thus, "nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation." [FN351]

Devlin's example of homosexuality, both in his lecture and in his preface, is a useful guide to how Devlin expected his theory to work in practice. In his lecture, Devlin pointed out that " [t]hose who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust." [FN352] To that Devlin responded: "If that were so it would be wrong." [FN353] However, Devlin continued: "I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached." [FN354]

Devlin then repeated his key point: " [B]efore a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society." [FN355] For example, while there is a "general abhorrence of homosexuality,"

the essential question is "whether, looking at it calmly and dispassionately, we regard it a vice so abominable that its mere presence is an offence." [FN356] If that is the genuine feeling of society, says Devlin, "I do not see how society can be denied the right to eradicate it." [FN357] But, in Devlin's continuing game of cat and mouse regarding society's actual views on the subject of homosexuality, he concludes:

> Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious . . . . It becomes then a question of balance . . . . On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusions is manifest. [FN358]

In his preface, Devlin finally states that he does not believe society's view of homosexuality rises to the level of disgust necessary to ***320** justify intervention by the law and uses the example of homosexuality as a means of clarifying his theory:

> The phrase ["intolerance, indignation, and disgust"] is not used in that part of the argument which discusses how the common morality should be ascertained but in that part of it which enumerates the factors which should restrict the use of the criminal law. It comes into the discussion of the first factor which is that there must be toleration of the maximum individual freedom that is consistent with the integrity of society. It must be read in subjection to the statement that the judgement which the community passes on a practice which it dislikes must be calm and dispassionate and that mere disapproval is not enough to justify interference. . . . At least there can be no doubt that the number of those who strongly disapprove of a practice such as homosexuality would be far greater than the number of those who view it with disgust or indignation; and that is the point of the paragraph. [FN359]

Devlin's analysis thus resulted in his conclusion that a state should not criminalize consensual sodomy between adults, although the criminal law could legitimately punish sodomy between a man and a youth.

The question I pose here is not whether homosexual (or heterosexual) sodomy should be criminalized -- the question Devlin was primarily addressing. Rather, my question is whether a society's shared sense of morality should result in the enactment of laws that protect people from discrimination on the basis of sexual orientation. But I believe we may borrow Devlin's view of the relationship between the state and morality to determine how an effort to prohibit such discrimination would fare under such a jurisprudential system.

D. Application to Prohibiting Discrimination on the Basis of Sexual Orientation

1. The Immorality of Compelled Deceit

In deciding whether a societal sense of morality should require that discrimination against a particular group be prohibited, I would like to posit three moral principles I

believe could enjoy broad support in our community. The first principle is presumably a basic and noncontroversial one: Actions that physically or emotionally harm another individual are morally wrong and should be criminalized. Using Devlin's jury standard, I believe a randomly selected jury would unanimously feel rape and assault harm other individuals both physically and emotionally and should be criminalized. I believe such a jury ***321** would also unanimously believe child molestation and incest harm others emotionally, and sometimes physically, and hence are appropriately criminalized as well. Applying this analysis to the morality of discrimination against selected groups of individuals, I believe a randomly selected jury would also believe it appropriate to discriminate against such individuals in certain circumstances - for example, by denying a convicted child molester the right to work in a day care center or by denying unsupervised visitation rights to a parent convicted of incest.

The second principle may not enjoy broad support from self-aware liberals, but might enjoy broad support in the general populace. There are certain actions that might not directly harm other people, either physically or emotionally, but which society feels it should have the right to prohibit. For example, individuals who have sexual intercourse on a park bench or a subway train may not directly harm other people physically or emotionally, and yet a majority of society may feel such activities should be prohibited by law. [FN360] Similarly, people who walk around nude may not harm others physically or emotionally, and yet a majority of the populace may believe such behavior should be prohibited. Again, applying the principle to discrimination, a randomly selected jury might also agree that a person who consistently walks around nude in public may legitimately be denied a job as a mailperson, a police officer, or a bank teller.

The desire to prohibit such actions may derive from what Devlin describes as a society's need to have a "community of ideas," to feel held together "by the invisible bonds of common thought." [FN361] Accepting such a need as a legitimate societal need, I would posit the following second moral principle: If twelve randomly picked "right-minded" jurors unanimously agree that an activity, although not causing physical or emotional harm to others, does cause significant discomfort or unease among the public, then that activity may be prohibited by lawand may be used as the basis for discriminating against such individuals in relevant circumstances as long as forbidding the activity does not subsequently cause real physical or emotional harm in the individuals in whom the activity is repressed. [FN362]

***322** For example, forbidding sexual intercourse in public, or forbidding people to walk around in public in the nude, may remove from some individuals a type of sexual or physical activity that brings them real pleasure and enjoyment. But, under this principle, it would be legitimate for society to forbid such activities, and to allow selected discrimination against such individuals, if twelve right-minded jurors would agree that such activities cause the general public significant discomfort, and if the individuals whose outside activities are subsequently repressed are not likely to suffer severe emotional harm by that societal rule. Such individuals may well experience severe disappointment, but disappointment is different from severe emotional harm.

The second moral principle, however, implicates a third moral principle -- one which is essentially the flip side of the second. If individuals engage in an activity that does not physically or emotionally harm others, but rather solely causes discomfort and unease among others, it is not legitimate for society to prohibit such actions and allow subsequent discrimination against such individuals if doing so would cause real physical or emotional harm to the individuals whose activities are being repressed.

Assume these three principles are applied to legislative and judicial pronouncements that prohibit gay people from living in open, honest relationships with their partners, such as exists with the current ban on the service of gay people in the military. Or assume these principles are applied to the absence of legislative and judicial pronouncements that enable gay people to live in open, honest relationships more easily, which is the current state of law in most localities in the United States. The fact that gay couples may live together in a fashion that openly states their love and commitment to their partners does not, on its face, appear to physically or emotionally harm other individuals in society. But that meets only the first moral principle. If twelve randomly selected right-minded jurors would unanimously agree that gay couples living openly and honestly would cause significant feelings of discomfort and unease among the public, we must move to the second and third moral principles.

I believe we should assume, for purposes of discussion, that twelve randomly selected individuals in our society in 1996 would unanimously agree that it would cause them significant discomfort and unease if gay people acted in the workplace and in public areas just like heterosexual people do - i.e., holding hands, bringing their partners to office functions, having pictures of their partners on their desks. I ***323** think this is what heterosexual people mean when they say they don't "mind" if people are gay, as long as they don't "flaunt it." I doubt, however, that twelve randomly selected individuals in our society would unanimously agree that homosexuality is so evil that society must eradicate every practice of private homosexual behavior so as to protect itself from moral disintegration. [FN363]

But if the societal concern with homosexuality is experienced as a matter of discomfort, rather than experienced as a significant moral evil destructive to society, the third moral principle comes into play. In order to apply that principle, we need to determine whether gay people suffer real physical or emotional harm in response to society's message that manifestations of gay "couplehood" should not be made public.

The psychological and social science research that has been done to date indicates that significant harm does result when gay people repress the sexual behaviors that would normally flow from their orientation, or when gay people express their normal sexual behavior in private, but lie about their identity and behavior in public. [FN364] These are the two most common actions gay people take in response to the societal message that clearly prefers manifestations of a gay orientation to remain invisible.

The harm suffered by individuals who attempt to completely repress their natural gay orientation, and who force themselves to engage instead in heterosexual activity, is

necessarily more intuitive and anectodal than it is scientific. By definition, it is difficult to create a sample study group of people who are "really" gay but who are pretending to be straight. But the emotional havoc wreaked by and on such individuals is understood instinctively by many within the gay community -- either because they attempted to play that role for years before accepting their natural sexual orientation, or because they have witnessed the effect of such repression among acquaintances. [FN365]

Bruce Bawer, a conservative literary critic who makes the case for gay equality in his book A Place at the Table , [FN366] invokes this emotional ***324** havoc as a key component of his argument. Bawer notes that E.L. Pattullo, a retired Harvard psychology professor, argued in a 1992 Commentary article that denial of gay equal rights is a good thing because "the perpetuation of 'legal and social distinctions between straights and gays' . . . serve to check waverers' temptations and to drive them firmly into the heterosexual camp." [FN367] After noting the psychological consensus that sexual orientation is fixed by an early age, "long before Pattullo's 'legal and social distinctions' could have the coercive effect he desires," [FN368] Bawer observes:

> What is most offensive about Pattullo's argument is not what he says but what he does not say. For there is a borderland between the straightforwardly gay and the unequivocally straight with which we should be concerned but which Pattullo doesn't even take into account. Homosexuals often encounter inhabitants of this borderland. Any reasonably attractive gay man knows what it is like to be stared at with anxious longing by a dubious young daddy pushing a pram, or to drop into a gay bar after work and find himself the object of lewd, desperate overtures by a weepy, bibulous middle-aged husband. Are these men "waverers"? No; they're homosexuals who have been driven by "legal and social distinctions" into playing it straight. Is this a good thing, for them or anybody? No. They're living a lie, condemning themselves to remorse, frustration, and loneliness, and (in pathetic attempts to conform to legally and socially sanctioned notions of "family") creating households that are perched on the edge of disaster. [FN369]

The psychological work that has been done to date bears out Bawer's anecdotal and intuitive sense. Various studies conclude that "people with a homosexual orientation who have not yet come out, who feel compelled to suppress their homoerotic urges, who wish that they could become heterosexual, or who are isolated from the gay community may experience significant psychological distress." [FN370]

Of course, if one believes being sexual with a person of the same ***325** gender is inherently a bad and evil thing, then the psychological harms attendant on repressing such natural urges will not appear problematic. But the framework I postulate here, for the moment, is that a significant segment of the public does not believe it is inherently evil or bad for people of the same gender to be sexual with each other, but rather simply prefers not to hear about such sexual practices and not to see any outward manifestations of gay couplehood.

The practical import of these views on the part of the public, however, may be that

many gay people will attempt desperately to repress their natural sexual orientation, even in private, and to maintain both a private and public heterosexual identity. The tragedy of that result is expressed by Bawer:

> Pattullo concludes his comments by saying that "the spectacle of a child growing up gay when he might have been straight is little short of tragic." Tragic? The "tragedy" here, of course, exists entirely in Patullo's mind, just as the "tragedy" of a racial intermarriage exists entirely in the mind of the third-party observer who opposes miscegenation; the actual lives and feelings of the parties involved don't influence the verdict. To Pattullo, in short, the important thing about the miserable, profoundly neurotic closeted gay man with a wife and children is that as far as the world is concerned he's straight , thank goodness; and the important thing about the happy, well-adjusted openly gay man with a loving, fulfilling relationship is that he's gay , poor thing. Tragic? The real tragedy is that men who, but for the Pattullos of the world, might have been happy, well-adjusted homosexuals grow instead into tormented, closeted husbands and fathers. [FN371]

Of course today, many gay men, lesbians, and bisexuals do not attempt to completely repress their natural sexual desires. Rather, thousands of gay people date same-sex partners, experience "first love" and have various serious relationships with a boyfriend or girlfriend. Many find partners with whom they settle down to establish family homes. And, like their heterosexual counterparts, many break up with a long-term partner (divorce) and settle down with another (second marriage). These gay people are not denying their natural sexual orientation; they are engaging in the sexual and emotional intimacy with a person of the same gender that brings them fulfillment.

What many of these gay people are not doing, however, is being honest about their intimate relationships. They are hiding the fact they are gay from people such as employers, coworkers, landlords, doctors, or family members. Thus, unlike their heterosexual counterparts, many of these people do not celebrate, or even acknowledge, the existence of ***326** their intimate relationships: they do not have pictures of their long-term partners on their desk, they do not have big parties to celebrate their commitments to their partners (weddings); they do not bring their partners to business events; and they do not attempt to gain spousal benefits for their partners. Nor do these people share the hardships of intimate relationships with others: they do not confide in coworkers about the strains of their "marriages;" they do not explain that the reason they need to leave promptly at the end of the day is because a partner is home sick; and they do not explain to doctors that the reason they are so concerned about a "friend" is that the friend is a spouse.

Gay people engage in these actions of hiding, lying, and denying because they are afraid of the ramifications of honesty. They are afraid that disclosure of their personal, fulfilling relationships may result in an employer firing them or denying them a promotion, in coworkers shunning or harassing them, in landlords evicting them, and in doctors refusing to treat them. With no hope of legal redress for such actions, and indeed with no societal statement that such discriminatory actions are wrong , honesty

about sexual identity has little appeal for many gay people.

But psychological studies to date document tangible emotional harm that results when gay people opt for such dishonesty. Gregory Herek, a psychologist who has published several studies on the impact of stigma and prejudice on gay people, notes: "Hiding one's sexual orientation creates a painful discrepancy between public and private identities. Because they face unwitting acceptance of themselves by prejudiced heterosexuals, gay people who are passing may feel inauthentic, that they are living a lie, and that others would not accept them if they knew the truth." [FN372] Herek also points out that the need to pass can disrupt long-standing family relationships as lesbians and gay men "create distance from others in order to avoid revealing their sexual orientation," and "keep their interactions at a superficial level as a self-protective strategy" if contact cannot be avoided. [FN373] Finally, passing creates strain on the gay relationship itself because "the problems and stresses common to any relationship must be faced without the social ***327** supports typically available to heterosexual lovers or spouses." [FN374] Thus, it should perhaps not be surprising that " p sychological adjustment appears to be highest among men and women who are committed to their gay identity and do not attempt to hide their homosexuality from others." [FN375]

While it is always a dangerous task to compare the oppression of one group to another, I believe the emotional harm wrought on Jews in Spain from the 1300s to the present may serve as an important comparative lesson to the emotional harm wrought on gay men, lesbians, and bisexuals today. Of course, the comparison must be undertaken with an understanding that the physical harms experienced by the two groups were of completely different dimensions, and thus the emotional harms attendant on maintaining the false identities will obviously differ as well. Nevertheless, the comparison is illuminating.

Trudi Alexy, in her book The Mezuzah in the Madonna's Foot , paints a compelling portrait of the history of Secret Jews (Marranos) in Spain. [FN376] In the late 1300s, mass killings of Jews began in Spain and thousands of Jews converted to avoid persecution. [FN377] The families who converted "learned to keep the law of Moses in secret" and created a ***328** "whole underground system of Judaism" to get around civil laws intended to oppress them. [FN378]

In 1478, one hundred years after the mass conversions of 1391, the Holy Inquisition stepped up its surveillance of baptized Jews after a prominent baptized family was caught celebrating a Seder. [FN379] Alexy details the extraordinary surveillance methods used by the Inquisition to unmask Secret Jews, including interrogations that have echoes of witch hunts used to uncover gay people in the military. [FN380] The Spanish monarchy finally concluded "the one sure way to absorb the baptized Jews was to get rid of the unbaptized ones" and in 1492, all unbaptized Jews were expelled from Spain. [FN381]

Alexy details the determination of the Jews who remained in Spain "to hold onto their commitment to tradition and law as Secret Jews," and the concomitant complicated

"Marrano-hunting efforts" engaged in by the Inquisition. [FN382] The torture and killings of Secret Jews during this time period is, of course, what sets this example apart from any persecution experienced by gay people. [FN383]

But the emotional effects of Spanish history on Secret Jews today , when being "outed" as a Jew would not result in death, is striking. Alexy asked Mathew, a historian who was a Marrano himself and was detailing for her the history of the Secret Jews, when "the descendants ***329** of the Marranos who fled the Inquisition finally felt safe enough to come out of hiding and cast off their Catholic cover." [FN384] Alexy was unprepared for the answer:

> What makes you think they have? Most people don't realize that Secret Jewish, or Marrano, families exist in many places throughout the world, yes, even today. There are secret synagogues where secret rites are being performed. Secret Jews meet, carry on their Jewish traditions, intermarry only among their own. And they go to church. They are afraid to give up the front of being Catholic. They may not be active Catholics, but they don't feel safe without their Catholic cover.
>
> People keep asking Marranos why we stay hidden, today. . . . They don't understand that Marranos never feel it is safe to come out. [FN385]

As Alexy dug deeper into Mathew's own background, she discovered he was a Marrano who had only recently "come out" as a Jew, after years of serving as a priest in a prestigious position. [FN386] Mathew was experiencing employment difficulties because his educational and work history was limited to the Catholic Church and "could not be supported by references." [FN387] An excellent job offer, working in the Sephardic Jewish community, was finally made but was contingent on Mathew providing proof that he "was descended from a pure and uninterrupted line of Jews, hidden or otherwise," including all "pertinent records and information to verify his claim as a bona fide Marrano." [FN388] Mathew agonized for weeks, and finally turned down the position with the following explanation:

> Marranos, by definition, are Secret Jews. The main reason we have survived all these centuries is because we have refused to 'come out' into the open. . . .
>
> [R]evealing my Marrano background in depth, exposing my family's customs to the scrutiny of others, even though they may be well-intentioned individuals and sincerely interested, is something I am unwilling to do. To reveal family secrets goes against my Marrano soul. I cannot be the one to expose my ancestors or in any way unmask my living relatives.
>
> If your Sephardic community wants my involvement with your project, good. . . . But my Marranism, other than a passing fact about me, should not ***330** play any role in the performance of my duties or affect my relationship to anyone. [FN389]

The legacy of fear, emotional denial, and shame that affects many descendants of Marranos today sounds familiar to many gay people who feel the same fear, emotional denial, and shame. [FN390] And the same difficulties gay people face today, as they attempt to change the attitudes of the community around them, is reflected to some extent in present-day efforts of Jews in Spain to change long-standing anti-Semitic

attitudes. As Carlos Benarroch, a prominent seventy-five-year-old Jewish activist in Spain, explained to Alexy:

> [A]nti-Semitism differs from place to place. In the USA, for example, Jews are part of society, and have been for a long time. Lies and distortions can be told, but not believed so easily, because there are many people to see for themselves and speak up for the truth. . . . Here, the Jew must constantly explain himself and prove that the negative assumptions about him are untrue. When someone meets me and says, 'But you don't act like a Jew!' I have to say, 'But I am a Jew, and this is how Jews really act!' It is not easy, but, little by little, Spanish consciousness about Jews will change. [FN391]

And, Benarroch continued, "it is beginning to be different now. At least the law is on our side now, the government treats us as equals, and we are free to be Jews, to practice our religion openly. But much remains to be done." [FN392]

Much remains to be done by gay people as well, if society is to acknowledge and believe it is immoral to force individuals to suppress the integrity of their selfhood - including their sexuality - by condoning discrimination based on sexual orientation. But to achieve that end, a second aspect of morality must be engaged as well - the affirmative moral good inherent in the possibilities of love between two people, regardless of their gender.

***331** 2. The Morality of Love

Part III of this article attempts to seriously consider the principle that government may appropriately legislate on the basis of private morality. The prior section dealing with the immorality of compelled deceit seeks to explicate three moral principles that would support the enactment of laws prohibiting discrimination on the basis of sexual orientation.

But the analysis thus far can be legitimately faulted for being a "liberal's talk in conservative clothing." After all, I have nowhere asserted that there is some substantive good in the love between two people of the same gender. Rather, I have accepted the relevance of psychic harm that comes to a community when it believes some rule of order has been violated (which I describe as deriving from the "moral" views of society), and I have sought to balance that psychic harm against the emotional harm that results from a forced life of deceit for some individuals as a result of those moral views. But despite the acknowledgment that the psychic harm may be viewed as deriving from the legitimate moral views of society, this analysis may be faulted as simply an extension of liberalism, with the concept of "harm" - the basis on which liberals believe government may appropriately legislate - merely extended to include the concept of "psychic" harm.

To take this enterprise seriously, therefore, and to place it on a firmer footing, I must also make the affirmative argument that "gay love is good." Ironically, I perceive this argument to be the easiest and the hardest one to make. It is the easiest from the standpoint of an individual-- from the standpoint of a person who lives in a loving

relationship with someone of the same sex. It is not an argument I would derive from books and support with footnotes; it is an argument I would derive from the daily actions of caring for and loving another human being of the same gender and being loved and cared for in return by that person. But it is the hardest argument to make in a world shaped by liberalism, where the safest arguments seem to be those that appeal to the public's desire to be tolerant (even of deviance) and to the public's apparent acceptance of the principle that unnecessary harm should be minimized.

Michael Sandel has eloquently pointed out the tensions, difficulties, and importance inherent in making the simple assertion that gay love is good. [FN393] He observes that the Supreme Court rested its decision ***332** in Griswold v. Connecticut [FN394] on "unabashedly" theological grounds, vindicating privacy merely for the sake of preserving the substantive goods inherent in the institution of marriage: [FN395]

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty. . . . [I]t is an association for as noble a purpose as any involved in our prior decisions. [FN396]

Sandel notes that the Court of Appeals for the Eleventh Circuit invoked this spirit when it concluded Hardwick had a privacy interest in engaging in sexual activity with another consenting adult, observing that " [f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage." [FN397]

Yet, upon review by the Supreme Court, any connection between homosexual sodomy and the sacred institution of marriage was cavalierly rejected by the majority, with a self-confident assertion: "No connection between family, marriage, and procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent." [FN398] And as Sandel points out, neither Justice Blackmun nor Justice Stevens ever takes issue with the majority on this point. [FN399] Neither Justice rests his dissent on the argument that homosexual love embodies the same moral goods as heterosexual love, and therefore is deserving of protection through a simple application of the line of cases dealing with family, child rearing, and procreation. Rather, as Sandel observes, the dissenters adopt a "voluntarist" argument, stating that people should be free to choose their intimate associations for themselves, regardless of the virtue or popularity of the practices they choose so long as they do not harm others." [FN400]

But to many gay people, the connection between "family [and] marriage" on the one hand, and "homosexual activity" on the other, is apparent in a hundred acts of daily living. [FN401] If gay people are lucky ***333** enough to escape the web of self-deception touted by society as preferable, they allow themselves the opportunity to experience a relationship that captures the fullness of what the human experience has to offer: a connection with another human being that is fulfilling on an emotional, intellectual, and sexual level. For many gay people, these relationships replicate the institution society has come to denote and value as marriage. It means a relationship that is "for better or

for worse, in sickness and in health." It means a relationship in which each partner "loves and cherishes" the other. It means a relationship in which each person is primary for the other; in which one partner paces the floor if and when the other is in surgery; in which two people nurse each other when they are sick and celebrate with each other when good fortune strikes. And for many gay people, this relationship means raising children of choice in a family marked by love and commitment.

Two recent expositions of the love and commitment capable of being embodied in same-sex love and couplingsjust as they are capable of being embodied in opposite-sex lovecome from two authors steeped in Christian and conservative traditions: Bruce Bawer [FN402] and Andrew Sullivan. [FN403] From their writings, Bawer and Sullivan clearly believe in the substantive moral good of marriage, loyalty, commitment, and love; and they need go no further than their own experiences, and that of their friends, to find indications of those substantive values in myriad same-sex couplings. [FN404]

No one should doubt that arguments, based on religious grounds, may be made against accepting the assertion that substantive moral goods are embodied in same-sex couplings. For example, Paul Baumann presents a thoughtful and clear exposition of the challenge "the full social and moral enfranchisement of homosexuality" poses to "any coherent notion of the meaning of revelation or the authority of [Catholic] tradition." [FN405] Bauman notes the challenge homosexuality presents as follows: "Catholicism teaches that the conjugal act, by its very nature, both unites man and wife and ties sexual love to procreation. Ho- ***334** mosexual acts, by definition and in principle, sever the connection between sexuality and procreation. Can that be reconciled to Catholicism's sacramentalization of sexual love in marriage?" [FN406] Baumann concludes that such a reconciliation is not possible in an "incarnational religion" in which "sexual differentiation actually partakes of the very mystery and wholeness of God," and in which "the mystery of the union between man and woman is a sign of the mystery of Christ's relationship to his church." [FN407]

Of course, there are Catholics, Protestants, Jews, Muslims, and members of other religious groups who do not believe their religious traditions preclude them from recognizing the moral goods inherent in same-sex love and couplings. [FN408] And assuming one is not bound by the moral trump card of religious revelation or mandated sacramentalization of procreation, it should be possible for a thoughtful human being to perceive and accept the substantive moral goods embodied in the love, caring, commitment, and family created by the partnership of two people of the same gender.

Acknowledging the substantive moral goods possible in same-sex love and coupling will require a shift in the moral compass of today's society. It will not require a shift on the moral valuation of such qualities as love, caring, commitment, and loyalty. Those qualities may continue to be rated as a substantive "good" by our society. The shift required is both minor and dramatic: an acknowledgment that those qualities retain their stamp of "substantive good" when they are manifested in an emotional and physical relationship between people of the same gender.

For this shift in society's moral compass to occur, however, there must be an opportunity for people who are not gay to perceive the true relationships that exist between gay people. This will require gay people to refrain from cooperating in society's current preferred mode of deceit and silence about gay relationships. [FN409] Moreover, it will require that gay people be willing to engage in a conversation about the substantive moral goods inherent in their relationships.

***335** A conversation about morality is the only hope for changing the public's view of homosexuality. When seventy percent of the American public respond in a poll that "homosexuality is immoral," [FN410] it is not clear that all respondents mean the same thing. Some respondents might hold a view shaped by religion that homosexuality (because it is necessarily nonprocreative) can never be "moral." A conversation about the reality of gay lives, including the reality of children raised by gay parents, may not necesssarily change those views. But the response of many others may simply reflect discomfort with the unknown, or disgust with the idea of promiscuous sex, or sex without love, which the respondents mistakenly identify as equivalent to homosexual life. A conversation about the real-life experiences of gay partners could, indeed, change these views. But it is only if and when an explicit educational endeavor is undertaken, designed to demonstrate the substantive moral values manifested in thousands of same-sex couplings across the country and the world, that public views on same-sex love and coupling could ever conceivably be expected to change.

IV. CONCLUSION

The goal of this article has been two-fold: to explicate three "mind- shifts" within the traditional paradigm I view as necessary for enhancing success within that paradigm and to begin a conversation about the limits of avoiding the issue of morality and law. While I believe an immediate move to the three mind-shifts would be useful, I do not believe we should necessarily depart immediately from the overall jurisprudential and political approach that has characterized our efforts to achieve protection for gay people in the past.

Here is the picture that illustrates my assessment. I imagine a place where gay people can live openly and honestly, without fear and with full social equality, as a meadow covered with green grass, beautiful flowers and the sun shining down. The goal is to reach that meadow. But how do we get there? There is a trail, snaking through the mountains surrounding the meadow, that we expect based on other peoples' experiences will lead us to the meadow. So we are hiking on that trail. Every now and then we take a wrong turn that could lead us to a dead end, but mostly, we appear to be slowly advancing.

But we harbor some doubts about whether the trail is the best way to get to the meadow. Sometimes the meadow seems like a receding ***336** illusion; each time we take a few steps on the trail, the meadow recedes further. And some of us fear there may be a huge lake at the end of the trail that must be crossed before we can reach the

meadow. And all we have is hiking gear; we have no boats to cross a lake.

There is another potential path to the meadow. The meadow is bounded on one side by mountains, through which some trails have been cut. But there is also a river that flows to the meadow. If one can navigate the river, one can glide right in to the meadow.

Hiking on the trail represents to me the traditional path of seeking civil rights in the manner others have sought them in the past. It means working within the traditional paradigm and demonstrating how the judicial doctrines and legislative politics that have created legal equality for other minorities apply to gay people as well. The trail is arduous, and one must watch out for false dead ends (e.g., the status/conduct distinction), but at least it is familiar.

By contrast, the river path represents the alternative paradigm: accepting that law should reflect a society's positive conventional morality, and "building a boat" to carry gay people down that river to the meadow. This requires working with unfamiliar tools, and it ultimately may not be a successful effort. But building the boat enables us to begin a dialogue with others who travel the river and who may, indeed, hold the key for access to the meadow.

Choosing the river holds some terror. There is no way of knowing if there are undercurrents that will capsize the strongest boat and make it more difficult for any traveler to reach the meadow in the near future. So I do not advocate jumping into the river immediately. Rather, I call for a conversation about what a boat that could navigate the river would look like assuming we might want to travel that path at some point in the future. And, indeed, part of the reason I call for the conversation about how to build the boat is that I have a niggling fear that between the trail and the meadow there may be a body of water we must cross in any event - and so we will need a boat for that final crossing.

[FNa]. Chai Feldblum is an Associate Professor of Law at Georgetown University Law Center and Director of the Georgetown Federal Legislation Clinic. She also serves as Legal Counsel to the Human Rights Campaign, and was Legal Director of the Campaign for Military Service, a group established to help lift the ban on gay people in the military. The author would like to thank several individuals for their insights and contributions to this work. Nan Hunter, Bill Rubenstein, Matt Coles and Ruth Harlow were instrumental in clarifying approaches under equal protection law in the briefs described in part II. Many of my colleagues on the George town faculty provided useful suggestions on a first draft of this article when it was presented at a faculty research workshop, including Mike Seidman, Mark Tushnet, Bill Eskridge, Peter Byrne, and Mitt Regan. In particular, Robin West's comments on this paper, and her numerous writings and conversations with me over the past few years, have enriched me immeasurably, both personally and professionally. I benefited from presenting this paper at the University of Pittsburgh School of Law and from the comments of the participants in the symposium, including Dean Peter Shane and Professor Ruth Colker. Extensive thanks

are due to my research assistants, Howard Rice, Katie Corrigan, and Steve Curran and to my staff, Kristen Fennel and Scott Foster, for their extensive work and unfailing good humor. Special thanks are due my partner, Anne Lewis, for her intellectual insights and her lovedefinite moral goods.

[FN1]. Discrimination against transgendered individuals (individuals who desire to change their gender, are in the process of changing their gender, or have completed the process of changing their gender) is also not explicitly prohibited by any existing federal law or in the current version of the proposed federal bill to prohibit discrimination on the basis of sexual orientation in employment. See Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (discrimination against a transgendered individual not covered under Title VII). But cf. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391 (Sup. Ct. 1995) (discrimination based on gender identity covered under state gender laws). I believe, however (despite the judicial trend to the contrary), that Title VII of the Civil Rights Act of 1964 should be interpreted to prohibit such discrimination. Moreover, discrimination on the basis of poverty is not protected under federal law or state civil rights laws.

[FN2]. See, e.g. , Chai R. Feldblum, Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside , 64 Temp. L.Q. 521 (1991) [hereinafter Feldblum, Medical Examinations] (recounting development of the Americans with Disabilities Act ("ADA")); Chai R. Feldblum, Antidiscrimination Requirements of the ADA , in Implementing the Americans with Disabilities Act 35 (Lawrence O. Gostin et al. eds., 1993) [hereinafter Feldblum, Antidiscrimination] (describing pragmatic considerations in negotiating ADA provisions).

[FN3]. Both during and after his campaign for the presidency, Bill Clinton announced his intention to lift the ban on the service of gay people in the military. See, e.g. , Susan Bennett & Owen Ullma, Clinton Reaffirms Intention to Lift Ban on Gays in Military , Phila. Inquirer , Nov. 12, 1992, at A15; Gwen Ifill, Clinton's Platform Gets Tryouts Before Friends , N.Y. Times , May 20, 1992, at A21; Maralee Schwartz, On the Potomac, Candidates Troll for Activists' Backing , Wash. Post , Jan. 23, 1992, at A14. Ultimately, however, President Clinton announced a policy that was essentially identical to the ban he had promised to eliminate. The policy, released to the public on July 19, 1993, was subsequently codified into law by Congress, thus inscribing into statutory form what had previously been only an administrative directive. See 10 U.S.C. ß 654 (1994). See generally Chandler Burr, Friendly Fire , Cal. Lawyer , June 1994, at 54 (describing six-month effort on the part of advocates to lift the ban).

[FN4]. Debate concerning the pros and cons of excluding gay people from service in the military was widely aired in the print and television media. While the hearings conducted under the auspices of Senator Sam Nunn were carefully choreographed to present support for the ban, see Report of the Senate Armed Services Committee, on

S. 1298, National Defense Authorization Act for Fiscal Year 1994, S. Rep. No. 112, 103d Cong., 1st Sess. (1993) (dissenting views of Sen. Kennedy), available in , LEXIS, Genfed Library, Cmtrpt File, the fact that the Senate hearings were broadcast on C-SPAN probably helped increase discussion of the wisdom or virtue of the ban in both workplace and family settings.

[FN5]. See, e.g. , Walmer v. United States Dep't of Defense, 52 F.3d 851 (10th Cir. 1995) (affirming denial of injunction), petition for cert. filed , 64 U.S.L.W. 3104 (U.S. July 24, 1995) (No. 95-230); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994); Elzie v. Aspin, 897 F. Supp. 1 (D.D.C. 1995); Thomasson v. Perry, 895 F. Supp. 820 (E.D. Va. 1995); Philips v. Perry, 883 F. Supp. 539 (W.D. Wash. 1995); Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995); Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994).

[FN6]. Initiatives to prohibit the passage of antidiscrimination laws on the basis of homosexual orientation or conduct have passed in Colorado and Cincinnati. The wording of Colorado's Amendment 2 and Cincinnati's ordinance, Issue 3, are similar; both provide that homosexuality and bisexuality shall not serve as the basis for any claim of discrimination. See generally Evans v. Romer, 882 P.2d 1335 (Colo. 1994), cert. granted , 115 S. Ct. 1092 (1995); Equality Found. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), petition for cert. filed , 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-335).

[FN7]. See, e.g. , Carl D. Holcombe, Pragmatic Strategy No on One Keeps Focus off Sexuality , Idaho Falls Post Reg. , Nov. 6, 1994, at A1 (relating the opinion of an opponent of the Idaho initiative who stated that "Colorado's anti-gay proposition . . . led to more murders and assaults on gay people, and to job and housing discrimination."); Tom Locke, Companies Creating Policies Protecting Gays , Denver Bus. J. , Dec. 4, 1992, section 1, at 1 (" [S]ome Denver-area businesses aren't waiting for repeal efforts before taking a stand on Amendment 2's prohibition against anti-discrimination laws protecting homosexuals.").

[FN8]. In my civil rights work over the past 10 years, I have operated on the assumption that our judicial and legislative systems should grant protection from discrimination on the basis of sexual orientation. While I began this endeavor with that assumption as well, part of my goal in part III of this article is to present a justification for this assumption different from the traditional liberal justification.

[FN9]. See, e.g. , John Stuart Mill, On Liberty (Gertrude Himmelfarb ed., Penguin Books 1974) (1859); Herbert L. Hart, Law, Liberty and Morality (1963).

[FN10]. See Patrick Devlin, The Enforcement of Morals (1965); Mr. Justice Stephen, Liberty, Equality and Fraternity (1873). See generally Robin L. West, Progressive and Conservative Constitutionalism , 88 Mich. L. Rev. 641, 654 (1990) (describing moralistic conservatives.)

[FN11]. See generally Amici Curiae Brief of the Union of American Hebrew Congregations et al., Thomasson v. Perry (No. 95-2185) (Fourth Cir. appeal filed June 12, 1995) [hereinafter UAHC Brief]. An identical brief was filed in the cases of Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995), and Philips v. Perry, 883 F. Supp. 539 (W.D. Wash. 1995) on behalf of the same groups, joined by the Human Rights Campaign Fund and the National Organization for Women. See Amici Curiae Brief of the Human Right Campaign Fund et al., in Support of Appellees, Able v. United States (No. 95-6111) (2d Cir. 1995); Amici Curiae Brief of the Human Rights Campaign Fund et al., in Support of Plaintiff-Appellant, Philips v. Hunger (No. 95-35293) (9th Cir. 1995). A version of this brief was first filed in support of respondents in Romer v. Evans , the case challenging Colorado's Amendment 2. See Amici Curiae Brief of Human Rights Campaign Fund et al., Romer v. Evans (No. 94-1039) (U.S. 1995) [hereinafter HRCF Brief].

[FN12]. See discussion infra part II.C.1.

[FN13]. See discussion infra part II.C.2.

[FN14]. 478 U.S. 186 (1986).

[FN15]. See discussion infra part II.C.3.

[FN16]. Michael J. Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality , 77 Cal. L. Rev. 521, 533-38 (1989).

[FN17]. Other individuals who have urged such a conversation, or whose work has illuminated my thinking on the conversation, include Nan D. Hunter, Life After Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531 (1992); Jed Rubenfeld, The Right of Privacy , 102 Harv. L. Rev. 737 (1989); and West, supra note 10. See also Ruth Colker, The Sacred Body in Law and Literature: An Embodied Bisexual Perspective , 7 Yale J.L. & Human. 163 (1995); Samuel A. Marcosson, The "Special Rights" Standard in the Debate over Lesbian and Gay Civil Rights , 9 Notre Dame J.L. Ethics & Pub. Pol'y 137 (1995).

[FN18]. See West, supra note 10, at 654-659 (describing conservative and progressive natural lawyers). Robin West clearly articulates how the belief that the state should legislate on the basis of morality does not necessarily preordain either a conservative or a progressive social outcome. Rather, those outcomes will be dependent on the thinker's view of the content and source of the morality to be discerned. See id. at 659.

[FN19]. Id. at 654 (describing moralistic conservatives).

[FN20]. Id. at 686.

[FN21]. See generally Devlin , supra note 10.

[FN22]. See, e.g. , Richard D. Mohr, Gays/Justice: A Study of Ethics, Society, and Law 137-61 (1988); Matthew Parris, How We Won the Debate by Default , The Times (London), Feb. 26, 1994, at 16 (reporting the argument of the "gay lobby" in the context of debate on the age of homosexual consent).

[FN23]. State and local governmental actions would be challenged under the Fourteenth Amendment, while federal governmental actions would be challenged under the incorporated equal protection standard of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[FN24]. I say the equal protection endeavor "tends to include" these two arguments because alternative arguments under the Equal Protection Clause exist as well. See infra text accompanying notes 31-38. However, given the current state of the case law, these two arguments are often viewed as the most important ones on which to prevail. Some leading gay rights advocates, however, have noted that the alternative arguments may ultimately be the ones on which gay people will obtain their rights. Telephone Conversation with Matthew Coles, Director of the Lesbian & Gay Rights Project of the American Civil Liberties Union (Sept. 15, 1995); E-mail Conversation with Bill Rubenstein, Visiting Professor, Stanford Law School (Oct. 2, 1995).

[FN25]. See generally Civil Rights Act of 1964, 42 U.S.C. ß ß 1971, 1975a-1975d, 2000a to 2000h-6 (1988); Fair Housing Act of 1968, 42 U.S.C. ß ß 3601-3619 (1988). The Employment Non-Discrimination Act of 1994 ("ENDA"), initially introduced in the 103d Congress, seeks to prohibit discrimination on the basis of sexual orientation in private and public employment. See 140 Cong. Rec. S7581 (daily ed. June 23, 1994)

(statement of Sen. Kennedy). Since January 1993, I have served as a legal consultant to the Human Rights Campaign, a national gay rights lobbying group. In that role, I have acted as the lead lawyer in drafting the provisions of ENDA on behalf of the advocacy community supporting the bill.

[FN26]. The activities encompassed by "legislative lawyering" include:

analyz [ing] the policies underlying legislative initiatives or attacks, describ [ing] those policies in clear language, [doing] legal research to support one formulation of language or another, [writing] pages of proposed legislative language, engag [ing] in negotiations with a range of parties and work [ing] with coalitions to explain the legal and policy alternatives they face.

Chai R. Feldblum, What D.C. Needs Is 'Legislative Lawyers ,' Nat'l L.J. , Feb. 14, 1994, at 16. I have described this work as "a wonderful, exhilarating job that requires use of solid legal research skills, oral and negotiating skills and an understanding of the use of legislative language and history in the process of statutory interpretation." Id.

[FN27]. U.S. Const. amend. XIV, ß 1.

[FN28]. See, e.g. , City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); see also McLaughlin v. Florida, 379 U.S. 184, 192 (1964). The final result is often the same when courts apply so-called "intermediate scrutiny." See Craig v. Boren, 429 U.S. 190 (1976).

[FN29]. Cleburne , 473 U.S. at 440; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314-15 (1976).

[FN30]. Various commentators, and indeed Supreme Court Justices, have articulated their impatience with the two- and three-tiered standard of review approach to equal protection jurisprudence. See, e.g. , Cleburne , 473 U.S. at 451-52 (Stevens, J., concurring); Craig v. Boren, 429 U.S. at 212 (Stevens, J., concurring). Their impatience seems well grounded, and Justice Stevens' observation that the Supreme Court's tiered analysis "is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion" is probably correct. Cleburne , 473 U.S. at 452 (Stevens, J., concurring) (quoting Craig v. Boren, 429 U.S. at 212 (Stevens, J., concurring)). Nevertheless, given the current state of the Court's jurisprudence in this area, any practical effort to receive the full protection of the Equal Protection Clause requires that advocates make persuasive arguments within the structure of the tiered standard of review approach. Essentially, advocates are required to dance in a room where a nine- person, three-tiered analysis orchestra is playing. The fact that this may be a less than optimal room in which to dance, because the orchestra's musical instruments contain distorted acoustic qualities that skew the notes from the start, is

really just too bad for the dancers.

[FN31]. See, e.g. , Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[FN32]. See David Cole & William N. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct , 29 Harv. C.R.-C.L. L. Rev. 319 (1994).

[FN33]. See Brief of Appellees/Cross-Appellants at 17-18, Able v. United States, 44 F.3d 128 (2d Cir. 1995) (No. 95-6111(L)); Brief for Plaintiff- Appellant, Philips v. Hunger (No. 95-35293) (9th Cir. 1995).

[FN34]. See Cleburne , 473 U.S. at 440; Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982).

[FN35]. See Bobbi Bernstein, Note, Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause , 47 Stan. L. Rev. 269, 276-83 (1995).

[FN36]. 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

[FN37]. 473 U.S. 432, 448 (1985) (" [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like. . . . [T]he city may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic.").

[FN38]. A related principle is that "a bare . . . desire to harm a politically unpopular group" is not a legitimate state interest. SeeUnited States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); see also Zobel v. Williams, 457 U.S. 55, 63 (1982). Again, the challenge for the advocate would be to convince the court that the discriminatory action at issue truly represented a bare desire to harm an unpopular group, and was not designed to achieve some other, legitimate state purpose.

[FN39]. The Court's lack of systematic application of an equal protection theory has been commented upon by various Justices. See, e.g. , City of Cleburne v. Cleburne

Living Ctr., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

[FN40]. Justice Stone stated the principle as follows:

> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) (citations omitted).

[FN41]. Korematsu v. United States, 323 U.S. 214, 216 (1944).

[FN42]. 320 U.S. 81 (1943).

[FN43]. Id. at 100.

[FN44]. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (citations omitted); see also Loving v. Virginia, 388 U.S. 1 (1967).

[FN45]. In Levy v. Louisiana, 391 U.S. 68, 71 (1968), the Court clearly stated a rational basis review standard: "Though the test has been variously stated, the end result is whether the line drawn is a rational one." In Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 172 (1972), the Court again articulated a rational basis standard. However, the Court ultimately invoked the language of what would become intermediate scrutiny: "The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve." Id. at 175 (emphasis added); see also Mathews v. Lucas, 427 U.S. 495, 516 (1976).

[FN46]. Levy , 391 U.S. at 72.

[FN47]. Weber , 406 U.S. at 175.

[FN48]. Lucas , 427 U.S. at 506; Trimble v. Gordon, 430 U.S. 762, 767 (1977).

[FN49]. Lucas , 427 U.S. at 510.

[FN50]. Trimble , 430 U.S. at 769.

[FN51]. Lalli v. Lalli, 439 U.S. 259, 275-76 (1978). The manner in which the Court introduced this full formulation represents a classic example of the Court's "creeping progression" approach without explication. In the beginning of its opinion, the Court stated that classifications based on illegitimacy were invalid under the Fourteenth Amendment "if they are not substantially related to permissible state interests," id. at 265 (emphasis added)a hybrid standard made up of what would soon be termed intermediate scrutiny language ("substantially related") and existing rational basis language ("permissible" state interest). At the end of the opinion, however, the Court summed up by stating: "We conclude that the requirement imposed by [the challenged statute] on illegitimate children . . . is substantially related to important state interests the statute is intended to promote. We therefore find no violation of the Equal Protection Clause." Id. at 275-76 (emphasis added). Thus, in the course of one opinion, the Court progressed from a hybrid rational basis/intermediate scrutiny standard to the intermediate scrutiny standard (as it would be termed in subsequent Court cases)with neither an acknowledgment nor an explanation of the progression.

[FN52]. Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

[FN53]. 403 U.S. 365 (1971).

[FN54]. Id. at 372.

[FN55]. Id. (citations omitted).

[FN56]. Before the Court made any official change to the standard of scrutiny applied to classifications based on alienage, it voiced reservations about invalidating certain of these classifications. See, e.g. , Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (noting that a state could, "in an appropriately defined class of positions," require citizenship as a qualification for office).

[FN57]. Foley v. Connelie, 435 U.S. 291, 296 (1977) (quoting Sugarman , 413 U.S. at 648). The Court also took the occasion to provide a bit more detail as to why "certain"

restrictions on aliens were treated with "heightened judicial solicitude": this was necessary "since alienspending their eligibility for citizenshiphave no direct voice in the political processes." Id. at 294.

[FN58]. Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[FN59]. Id.

[FN60]. The line of cases from Bradwell v. Illinois, 83 U.S. 130 (1873), to Hoyt v. Florida, 368 U.S. 57 (1961), exemplify this era of the Supreme Court's gender jurisprudence.

[FN61]. 404 U.S. 71 (1971).

[FN62]. Frontiero v. Richardson, 411 U.S. 677, 683-84 (1973) (describing decision in Reed).

[FN63]. 411 U.S. 677 (1973).

[FN64]. Id. at 682 (" [A]ppellants contend that classifications based on sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree . . . .") (footnotes omitted).

[FN65]. One presumes Justice Brennan engaged in such an extensive analysis in Frontiero partly in order to catch the elusive fifth vote.

[FN66]. 411 U.S. at 688.

[FN67]. Id. at 684.

[FN68]. Id. at 686 (footnotes omitted). In a footnote to this sentence, Justice Brennan described the extent of discrimination against women in the political arena as follows:

In part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a

female member of this Court. Not a single woman presently sits in the United States Senate and only 14 women hold seats in the House of Representatives.
Id. at 686 n.17. Lower courts, when faced with the question of what standard of review to apply to classifications based on sexual orientation, subsequently separated the factors of "history of discrimination" and "political powerlessness" and seized upon this footnote as a guide to determining political power. See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 n.10 (9th Cir. 1990); see also Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989), cert. denied , 494 U.S. 1004 (1990); Evans v. Romer, 63 Empl. Prac. Dec. (CCH) P 42,719 (Colo. Dist. Ct. Dec. 14, 1993), aff'd , 882 P.2d 1335 (Colo. 1994), cert. granted , 115 S. Ct. 1092 (1995). The difficulty with this, of course, is that the plurality did not write this footnote as a barometer to establish the point of some magical sufficient political power, but rather, as a description of the residual effects of historical discrimination against women as reflected in the political arena. Even if and when women's participation in that arena improves (as it certainly has since 1973), the fact that women suffered a history of discrimination in this country, and continue to suffer residual effects of that discrimination, remains a valid factor in the strict scrutiny analysis under a "history of discrimination" prong. For further discussion of political powerlessness, see discussion infra part II.C.1.

[FN69]. Justice Brennan noted that a unanimous Court in Reed v. Reed, 404 U.S. 71 (1971), had, in practice, departed "from 'traditional' rationalbasis analysis with respect to sex-based classifications," and that this departure was "clearly justified." Frontiero , 411 U.S. at 684. Then, presumably to explain why that departure was justified, Justice Brennan immediately moved to a lengthy description of the history of discrimination suffered by women. Id. The analytical connection between the conclusion that the departure from rational basis review in Reed had been justified, and the description of the history of discrimination, was left for the reader to fill in.

[FN70]. Frontiero , 411 U.S. at 686.

[FN71]. Id.

[FN72]. See supra text accompanying notes 45-50.

[FN73]. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972).

[FN74]. Id. The principle of "lack of responsibility" was invoked as well in the Court's opinion in Plyler v. Doe, 457 U.S. 202 (1982). As in Weber , this principle was not invoked to heighten the standard of review. Rather, it was again used when the Court

applied its standard of review, whatever that actually was in that case. According to the Court, the fact that children of illegal aliens have no responsibility for their parent's illegal entry into the country made it illogical (i.e., irrational) and unjust to punish them for their parents' actions. Plyler , 457 U.S. at 219-20.

[FN75]. Frontiero , 411 U.S. at 686. The plurality thus concluded that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." Id. at 686-87.

[FN76]. Id. at 687.

[FN77]. Id. at 687-88.

[FN78]. 457 U.S. 202 (1982).

[FN79]. 473 U.S. 432 (1985).

[FN80]. Id. at 443-44. This twist on positive legislative action was made by Justice White, writing for the majority in Cleburne , and not by Justice Brennan, writing for the Court in Plyler . See infra text accompanying notes 107-08. It was also in Cleburne , albeit in an opinion dissenting from the majority's analysis, that Justice Marshall, joined by Justices Brennan and Blackmun, finally proffered a theoretical basis for using positive legislative action as grounds to support strict scrutiny:

> Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.

473 U.S. at 466.

[FN81]. Cleburne , 473 U.S. at 445. The final upshot in the Court's standard of review analysis for gender-based classifications was true to form. In Craig v. Boren, 429 U.S. 190, 197 (1976), a Court majority pronounced that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." This standard came to be termed "intermediate scrutiny," and was viewed as somehow different from "strict scrutiny." The Supreme Court, however, has never explicitly rejected strict scrutiny for

gender-based classifications. Various Justices on the Court have pointed out periodically that the question of whether gender-based classifications deserve strict scrutiny is still open. See J.E.B. v. Alabama, 114 S. Ct. 1419, 1426 n.6 (1994) (Blackmun, J.); Harris v. Forklift Sys., 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) (O'Connor, J.). When several women's rights groups, and other civil rights groups, petitioned the Supreme Court to review the Fourth Circuit opinion in United States v. Virginia, 976 F.2d 890 (1992), they took the opportunity to ask the Court to revisit the question whether gender-based classifications deserve strict scrutiny. See United States v. Virginia, 44 F.3d 1229 (4th Cir.), cert. granted , 116 S. Ct. 281 (1995).

[FN82]. 457 U.S. 202, 216-17 (1982).

[FN83]. Id. at 216 (citation omitted).

[FN84]. Id.

[FN85]. Id.

[FN86]. Id.

[FN87]. Id.

[FN88]. Id.

[FN89]. Id. Another example would be a classification that burdens a fundamental right. Id. at 216-17.

[FN90]. Id. at 216 n.14.

[FN91]. Id.

[FN92]. Id.

[FN93]. Id.

[FN94]. 379 U.S. 184 (1964).

[FN95]. 320 U.S. 81 (1943).

[FN96]. As noted, the Supreme Court has never explicitly rejected strict scrutiny for gender-based classifications. See supra note 81. Under the first theoretical formulation presented in Plyler v. Doe, 457 U.S. 202, 216-17 (1982), gender-based classifications should receive such scrutiny.

[FN97]. This point was made three years later by Justice Marshall in an opinion dissenting from thedecision in Cleburne , joined by Justices Brennan and Blackmun. See 473 U.S. at 472 n.24 (Marshall, J., dissenting).

[FN98]. Plyler , 457 U.S. at 217 n.14 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

[FN99]. Id. (emphasis added).

[FN100]. 403 U.S. 365 (1971).

[FN101]. 435 U.S. 291, 294 (1978).

[FN102]. A majority of the Court has never explicitly accepted this second formulation, standing on its own, as a sufficient justification for the application of strict scrutiny. From a separation of powers perspective, however, it is difficult to see why this formulation should not be sufficient on its own.

Justice Brennan concludes his footnote with the following sentence: "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." Plyler , 457 U.S. at 217 n.14. There are no case citations to this statement and it is unclear whether this sentence is intended to stand as a separate formulation that justifies heightened scrutiny for groups characterized solely by circumstances beyond their control. This is quite unlikely. The Court was clearly aware of the limitations of this "non-responsibility" principle when it invoked it in Frontiero , and it would soon explicitly reject the relevance of that principle in Cleburne .

Given the allusion to prejudice in the sentence, it is probably most appropriate to view the final sentence of the footnote as yet a further illumination of the first formulation.

[FN103]. 473 U.S. 432 (1985).

[FN104]. Id. at 440.

[FN105]. Id.

[FN106]. Id. (emphasis added).

[FN107]. Id. at 442. As Justice White goes on to explain:

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Id. at 442-43.

[FN108]. Id. at 441-42.

[FN109]. Id. at 443 n.10 (quoting John H. Ely, Democracy and Distrust 150 (1980)). This is not to say that Justice White believes the immutability of a characteristic has no relevance to the application of a standard, whether that standard be rational basis review or strict scrutiny. As noted above, the lack of responsibility that characterizes illegitimate children and the children of illegal aliens was of key importance to the Court's conclusions in Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972), and Plyler v. Doe, 457 U.S. 202, 233 (1982), that the statutes at issue were illogical and unjust. See supra text accompanying notes 72-74 and note 74. In other words, even if the standard applied is one of rational basis review, the fact that a characteristic is immutable and/or an accident of birth has significant relevance in determining whether the state's action is even rationally related to some legitimate state interest.

[FN110]. Cleburne , 473 U.S. at 443.

[FN111]. Id. Given this theoretical construct, I do not believe Cleburne necessarily

stands for the proposition that classifications based on any disability receive only rational basis view. This certainly is the prevailing wisdom regarding Cleburne's holding. See, e.g. , Doe v. University of Maryland Medical Sys. Corp., 50 F.3d 1261, 1267 (4th Cir. 1995) ("Classifications involving individuals with disabilities are subject only to rational basis scrutiny."); Spragens v. Shalala, 36 F.3d 947, 950 (10th Cir. 1994) (rational basis standard applies to classification involving blind persons), cert. denied , 115 S. Ct. 1399 (1995)); Contractors Ass'n of E. Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) ("rational basis" correct standard of review for classification of business owners with disabilities; ADA did not overrule Cleburne). But while it is not unreasonable to say that people with mental retardation present a range of "difficult" and "technical" matters for a legislature to respond to, Cleburne , 473 U.S. at 442-43, the same can hardly be said of every physical or mental disability. For most people with disabilities, as for women and for racial minorities, what is primarily needed is the removal of stereotypes and the provision of some reasonable accommodations. See, e.g. , Feldblum, Antidiscrimination , supra note 2. Thus, classifications on the basis of disability in general should not automatically be assumed to warrant only rational basis review.

[FN112]. Cleburne , 473 U.S. at 445.

[FN113]. In this respect, this sentence is similar to the plurality's footnote in Frontiero describing the relative absence of women from the political arenaa description never intended as a barometer for identifying sufficient political power to negate the need for strict scrutiny. See Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973). The unfortunate irony of Supreme Court jurisprudence is that these two sentences constitute the sum total of the Court's descriptive analysis of political powerlessness.

[FN114]. Indeed, I doubt a majority of the current Court, or of the Cleburne Court, would agree with this formulation without some "flavoring" of prejudice thrown in. Under this formulation, legislation affecting minors would be subject to strict scrutiny because minors are completely excluded from the political system. While that result seems correct under a separation of powers model, it was explicitly rejected by Justices Marshall, Brennan, and Blackmun in their dissent in Cleburne . See 473 U.S. at 472 n.24 (Marshall, J., dissenting).

[FN115]. 411 U.S. 1 (1973).

[FN116]. Id. at 28.

[FN117]. In Johnson v. Robison, 415 U.S. 361 (1974), the Court refused to apply

heightened scrutiny to a class of conscientious objectors stating that the class did "not possess an 'immutable characteristic determined solely by the accident of birth.' " Id. at 375 n.14 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)). Further, the class was not " 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " Id. (quoting San Antonio , 411 U.S. at 28).

In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), the Court declined to subject a law mandating retirement for state police over the age of 50 to strict scrutiny. According to the Court, the group did not meet any of the Rodriguez factors: people over 50 had not experienced a history of discrimination; had not been subjected to unique disabilities "on the basis of stereotyped characteristics not truly indicative of their abilities;" and gave no indication of needing " 'extraordinary protection from the majoritarian political process.' " 427 U.S. at 313.

In Lyng v. Castillo, 477 U.S. 635, 638 (1986), the Court refused to apply heightened scrutiny to a "disadvantaged class . . . comprised by parents, children, and siblings." Justice Stevens's one sentence analysis drew on Rodriguez and cited Murgia as support: "As a historical matter, [members of the disadvantaged class] have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." 477 U.S. at 638 (citing Murgia , 427 U.S. at 313). One year later, in Bowen v. Gilliard, 483 U.S. 587, 602 (1987), Justice Stevens repeated the same sentence to deny heightened scrutiny to the same class disadvantaged by a different federal statute. The fact that this claim is dealt with in one brief sentence by Justice Stevens is probably the source of one inaccurate characterization: the parent-child relationship and sibling relationship are usually considered (relatively) immutable.

[FN118]. This fact, of course, is nothing new. See Rubenfeld, supra note 17, at 752: "That a doctrine may have to wait for a principle to 'catch up' with it is nothing new to common lawmaking in general or to constitutional lawmaking in particular."

[FN119]. 881 F.2d 454 (7th Cir. 1989), cert. denied , 494 U.S. 1004 (1990).

[FN120]. Id. at 466.

[FN121]. Id. at 466 n.9. In one of the ironies of this analysis, the headline of the story in Time magazine reliedon by the court was "How to Spread a Smear." Margaret Carlson, How to Spread a Smear , Time , June 19, 1989, at 33. One possible reason gay people still find it difficult to convince elected and appointed officials to advance civil rights for gay people is that such officials may fear they will be "smeared" with the rumor that they themselves are gay. By contrast, officials are not usually afraid of being "smeared" with the rumor that they are Jewish or a member of some ethnic group. And not only are

officials equally not afraid of being "smeared" with the rumor that they are women or African-Americans, those characteristics are, in any event, usually impossible to hide. See infra text accompanying notes 169-71 for discussion of ramifications of fact that gay people can often hide their identity.

[FN122]. Ben-Shalom , 818 F.2d at 466 n.6 (citing Jessica Siegel, Daley's Support is Inspirational to Gay Pride Parade , Chic. Trib. , June 26, 1993, Chicagoland section, at 1).

[FN123]. 895 F.2d 563 (9th Cir. 1990).

[FN124]. Id. at 574.

[FN125]. Evans v. Romer, 63 Empl. Prac. Dec. (CCH) P 42,719 (Colo. Dist. Ct. Dec. 14, 1993), aff'd , 882 P.2d 1335 (Colo. 1994), cert. granted , 115 S. Ct. 1092 (1995).

[FN126]. Id. at 77,939.

[FN127]. Id.

[FN128]. Id.

[FN129]. Id. at 77,939-40. The court also noted that "the President of the United States has taken an active and leading role in support of gays," and that an increasing number of states and localities have adopted gay rights laws. Id. at 77,940.

[FN130]. Id.

[FN131]. Thomasson v. Perry, 895 F. Supp. 820 (E.D. Va. 1995), is one of several cases in which the Department of Justice ("DOJ") in the Clinton Administration is defending the ban on the service of openly gay people in the military.

[FN132]. Brief for the Appellees at 16, Thomasson v. Perry (No. 95- 2185) (4th Cir. appeal filed June 12, 1995) [hereinafter DOJ Brief] (quoting City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 445 (1985)) (emphasis added).

[FN133]. Id.

[FN134]. See Brief for Appellant, Thomasson v. Perry (No. 95-2185) (4th Cir. appeal filed June 12, 1995) [hereinafter Thomasson Brief].

[FN135]. Thomasson Brief, supra note 134, at 34-35.

[FN136]. It is unclear how this consideration is substantially different from a combination of considerations one and two.

[FN137]. Thomasson Brief, supra note 134, at 35.

[FN138]. Id. at 35 n.34.

[FN139]. Id. at 35.

[FN140]. DOJ Brief, supra note 132, at 15-16 (citations omitted). For a discussion of DOJ's mischaracterization of the UAHC brief, see infra text accompanying note 176.

[FN141]. DOJ Brief, supra note 132, at 16-17.

[FN142]. At this point in American society, most racial, ethnic, and religious minority groups and women have representatives of their groups in state and national legislatures, work in coalitions, and enjoy the support of political figures. Moreover, legal redress for discrimination against members of these groups is available through state and federal laws. See authorities cited supra note 25.

[FN143]. The theoretical construct for the application of strict scrutiny need not necessarily be built on a separation of powers model. For example, Justice Marshall's dissent in Cleburne presents a theoretical model for equal protection scrutiny that is based more on evolving notions of equality, see City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., dissenting), than on a strict separation of powers model. Nevertheless, for the time being, the separation of powers model is the one that appears to have the greatest number of adherents on the Court. Moreover, it

does not appear to me to be necessarily wrong as a justification of strict scrutiny. Hence, I choose in this article to dance in the room with the separation of powers motif (with the slightly discordant orchestra in the background).

[FN144]. See Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

[FN145]. One can understand footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), as supporting this formulation. Justice Stone noted the possibility that statutes directed against selected groups might deserve to be closely scrutinized by the courts because prejudice against such groups might seriously curtail the operation of ordinary political processes. This comports with the separation of powers analysis that requires courts to scrutinize closely those governmental actions that are more likely the result of prejudice than legislative rationality.

[FN146]. Strict scrutiny does not necessarily mean that all laws using such classifications will be invalidated. For example, if a characteristic legitimately poses a difference that is relevant for some specific policy purpose, and it is for that specific policy purpose that the classification has been made by the legislature, that law should be upheld even under strict scrutiny. A key trait of the characteristics that deserve strict scrutiny, however, is that in almost all situations, the characteristic would be irrelevant for any legitimate policy purpose.

[FN147]. See Cleburne , 473 U.S. at 440.

[FN148]. See id.

[FN149]. I have taken this approach in the amicus brief submitted to the Fourth Circuit, see UAHC Brief, supra note 11, at 3-6, and in the brief filed in support of the respondents in Romer v. Evans , see HRCF Brief, supra note 11, at 3-5. All these briefs use the phrase "heightened scrutiny" interchangeably with the phrase "strict scrutiny." This is based on the belief that there is no real difference (or should be no real difference) between "intermediate scrutiny" and "strict scrutiny" from a separation of powers perspective, and indeed, that classifications based on gender (and illegitimacy) deserve strict scrutiny.

[FN150]. An amicus brief recently submitted to the Supreme Court by several women's and civil rights groups borrowed this terminology from the amicus brief I submitted a few months earlier in Romer v. Evans . See Amici Curiae Brief of the National Women's Law Center et al. at 15, United States v. Virginia (No. 94-1941) (U.S. June 26, 1995)

[hereinafter NWLC Brief] ("The Court has identified a number of warning signals that indicate that a classification is suspect and therefore warrants strict scrutiny.") (emphasis added).

[FN151]. In an interesting twist, this scenario would probably still require strict scrutiny by the courts of governmental classifications based on the group's distinguishing characteristic. Now the courts would have reason to be suspicious of such classifications if they benefited the previously disadvantaged group members at the expense of others.

[FN152]. See Marcosson, supra note 17; Boutilier v. INS, 387 U.S. 118, 120-23 (1967) (holding that homosexual alien had "psychopathic personality" within the statutory meaning); see also infra text accompanying notes 159-63.

[FN153]. See John C. Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality , in Homosexuality: Research Implications for Public Policy 115-36 (James D. Weinrich & John C. Gonsiorek eds., 1991). The American Psychological Association and the American Psychiatric Association have affirmed for more than two decades that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." John J. Conger, Proceedings of the American Psychological Association, Incorporated, for the Year 1974 , 30 Am. Psychologist 620, 633 (1975).

[FN154]. See Allan Berube, Coming Out Under Fire 12 (1990).

[FN155]. See Thomasson Brief, supra note 134, at 16-17 & n.13

[FN156]. See Sylvia A. Law, Homosexuality and the Social Meaning of Gender , 1988 Wis. L. Rev. 187, 200-02 (1988).

[FN157]. John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 226-27 (1988).

[FN158]. Patricia Cain, Litigating for Lesbian and Gay Rights: A Legal History , 79 Va. L. Rev. 1551, 1565 (1993).

[FN159]. D'Emilio & Freedman , supra note 157, at 292-95.

[FN160]. Cain, supra note 158, at 1565-66 (quoting S. Doc. No. 241, 81st Cong., 2d Sess. 1 (1950)).

[FN161]. Id. at 1566.

[FN162]. Id.

[FN163]. Developments in the LawSexual Orientation and the Law , 102 Harv. L. Rev. 1508, 1556 (1989) (footnote omitted) [hereinafter Developments].

[FN164]. Id. at 1515-16.

[FN165]. See Law, supra note 156, at 206-12.

[FN166]. Ronald Bayer, Homosexuality and American Psychiatry: The Politics of Diagnosis 18-40 (1981).

[FN167]. See In re Thom, 301 N.E.2d 542 (N.Y. 1973).

[FN168]. See State ex rel. Grant v. Brown, 313 N.E.2d 847 (Ohio 1974), cert. denied sub nom. , Duggan v. Brown, 420 U.S. 916 (1975). See generally Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII , 81 Geo. L.J. 1 (1992); Lesbians, Gay Men and the Law 243-334 (William B. Rubenstein ed., 1993).

[FN169]. A 1992 survey of 1,400 gay men and lesbians in Philadelphia showed that 76% of men and 81% of women conceal their sexual orientation at work. Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources , 103d Cong., 2d Sess. 70 (1994) [hereinafter Hearing] (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy). A review of twenty surveys conducted across this country between 1980 and 1991 showed that between 16 and 44% of gay men and lesbians had experienced discrimination in employment. Id. A 1987 Wall Street Journal poll of Fortune 500 executives indicated that 66% of these executives would hesitate to give a management job to a gay person. Id. ; see also id. at 6 (testimony of Cheryl

Summerville) (Summerville's separation notice from Cracker Barrel restaurant read: "This employee is being terminated due to violation of company policy. This employee is gay.").

[FN170]. The National Institute of Justice ("NIJ") sponsored a report in 1987 which found that "the most frequent victims of hate violence today are Blacks, Hispanics, Southeast Asians, Jews, and gays and lesbians. Homosexuals are probably the most frequent victims." Hate Crimes: Confronting Violence Against Lesbians and Gay Men 7 (Gregory M. Herek & Kevin T. Berrill eds., 1992). The Los Angeles County Commission on Human Relations reported that in 1993, gay men had replaced African-Americans as the leading target of hate crimes; gay men were targeted in 27% of the 783 hate crimes documented by law enforcement agencies and community groups. Crimes of Bias , L.A. Times , Mar. 30, 1995, at A1.

[FN171]. See Hearing , supra note 169, at 212 (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy).

[FN172]. In recent years, although some openly gay people have been elected to local councils, state legislatures, and Congress, such representatives are still markedly fewer in number than representatives from other minority groups, primarily because a candidate's open homosexuality is still a significant disadvantage in the political arena. According to the Gay and Lesbian Victory Fund, a group dedicated to assisting the election of openly gay individuals, only 115 of the 511,039 elected officials (less than .02%) currently serving in the United States are openly gay.

[FN173]. As noted, most gay people attempt to avoid prejudice by keeping their sexual orientation secret. See supra notes 169-71 and accompanying text. This poses a particular problem for political organizers who "somehow . . . must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve." Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 718-42 (1985); see also Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay , Lesbian, and Bisexual Identity , 36 U.C.L.A. L. Rev. 915, 970-73 (1989).

[FN174]. See, e.g. , Harlon L. Dalton, AIDS in Blackface , in Daedalus , Summer 1989, at 205 (discussing homophobia in the African-American community).

[FN175]. See Halley, supra note 173, at 973; Wayne King, Texans Battle on TV for Votes and Viewers , N.Y. Times , Sept. 29, 1984, at A1.

[FN176]. See DOJ Brief, supra note 132, at 15-16.

[FN177]. See supra note 75 and accompanying text.

[FN178]. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990); see also Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied , 494 U.S. 103 (1990) (gay people do not deserve strict scrutiny because " [m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied , 494 U.S. 1004 (1990).

[FN179]. Defendant's Memorandum of Law on the Appropriate Standard of Review at 8, Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995).

[FN180]. " [T]he challenged classification is not based on an immutable characteristic that is analogous to any other classification that has been accorded protected status; rather, it is based on validly prohibited homosexual behavior or the likelihood of such behavior. Volitional behavior cannot, of course, be deemed immutable in any commonly understood sense of the word." DOJ Brief, supra note 132, at 17.

[FN181]. Frontiero v. Richardson, 411 U.S. 677, 686 (1973); see also supra text accompanying notes 70-75.

[FN182]. 473 U.S. 432, 445-46 (1985).

[FN183]. Janet Halley has argued that the immutability of a characteristic is irrelevant for equal protection purposes, and further, that claiming homosexuality is immutable is counterproductive to a "pro-gay" result. See Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability , 46 Stan. L. Rev. 503 (1994).

[FN184]. See NWLC Brief, supra note 150, at 3.

[FN185]. See supra notes 70-74 and accompanying text.

[FN186]. See supra text accompanying notes 73-74.

[FN187]. See supra note 30.

[FN188]. As noted, various Supreme Court Justices have pointed out that the Court has never definitively ruled against strict scrutiny for classifications based on gender. See supra note 81. The Supreme Court has granted certiorari in the case of United States v. Virginia, 116 S. Ct. 281 (mem.), granting cert. to 44 F.3d 1229 (4th Cir. 1995), in which it may revisit the question of the appropriate standard of review for gender-based classifications.

[FN189]. I attempt to address immutability in this more thoughtful fashion in the briefs filed in Romer , Thomasson , Able and Perry -an approach suggested to me by Nan Hunter. See supra note 11. In truth, the most logical stance to have adopted, with regard to the first meaning of immutability, is that it is relevant only in the application of the standard, not in the determination of the level of scrutiny required. However, for the pragmatic reasons noted above, I have thus far accepted the first meaning of immutability as having some relevance to the strict scrutiny analysis and that is reflected in the briefs that have been filed. It is possible, however, that the costs attendant on abandoning a separation of powers construct, in order to assert the relevance of this aspect of immutability, may mean the approach is ultimately ill-considered.

[FN190]. See Alan P. Bell et al., Sexual Preference: Its Development in Men and Women 186-87 (1981); Eli Coleman, Changing Approaches to the Treatment of Homosexuality , in Homosexuality: Social, Psychological and Biological Issues 81-88 (W. Paul et al. eds., 1982); Chandler Burr, Genes and Hormones , N.Y. Times , Aug. 2, 1993 at A15 (explaining scientific consensus that sexual orientation is not "chosen").

[FN191]. See Chandler Burr, Homosexuality and Biology , Atlantic Monthly , Mar. 1993, at 47.

[FN192]. Id.

[FN193]. See U.S. Const. amend. I.

[FN194]. A person's religion has no impact on a person's ability to perform a job or

contribute to society, and there is a long and unfortunate history of discrimination in this country against people of certain religions.

[FN195]. With few exceptions, women prior to menopausal ageand not men prior to a similar ageundergo a menstrual cycle every month. This requires behaviors ranging from simple ones, such as buying and toting around tampons and dealing with periodic cramps, to more complex ones dealing with the more intrusive symptoms of premenstrual syndrome (PMS). Similarly, many women choose to follow through on their natural heterosexual orientation by engaging in sexual activity with men. For womenand not for menthis choice also often entails the choice (or the unchosen reality) of becoming pregnant. A range of behaviors will flow from the act of being pregnantfrom simple ones such as sleeping more and/or vomiting in the early months of pregnancy to more complex ones in dealing with pregnancies marked by complications. Some advocates believe these differences should change the analysis of an equal protection challenge to particular classifications, see Sylvia A. Law, Rethinking Sex and the Constitution , 132 U. Pa. L. Rev. 955, 1008-13 (1984), while others do not, see Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate , 13 N.Y.U. Rev. L. & Soc. Change 325, 361- 63 n.144 (1984-85). There is no argument from any advocate, however, that gender should not receive heightened scrutiny simply because there are certain behaviors that flow naturally from the characteristic.

[FN196]. See Jeffrey G. Sherman, Love Speech , 47 Stan. L. Rev. 661, 698 (1995).

[FN197]. This argument thus becomes a variation on the argument that the Supreme Court's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), compels the conclusion that classifications based on sexual orientation must receive rational basis review. See infra part II.C.3.

[FN198]. 478 U.S. 186 (1986).

[FN199]. See Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987).

[FN200]. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied , 494 U.S. 1004 (1990).

[FN201]. See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).

[FN202]. See Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied , 494 U.S. 103 (1990).

[FN203]. See Equality Found. v. City of Cincinnati, 54 F.3d 261, 268 (6th Cir. 1995), petition for cert. filed , 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239).

[FN204]. 741 F.2d 1388 (D.C. Cir. 1984).

[FN205]. 822 F.2d 97 (D.C. Cir. 1987).

[FN206]. See, e.g. , Woodward , 871 F.2d at 1076 & n.10.

[FN207]. 741 F.2d at 1389.

[FN208]. Id. at 1391.

[FN209]. Id.

[FN210]. Id. (emphasis added).

[FN211]. 425 U.S. 901 (1976), aff'g mem. 403 F. Supp. 1199 (E.D. Va. 1975).

[FN212]. 741 F.2d at 1392 (emphasis added). Having concluded there was "no constitutional right to engage in homosexual conduct," id. at 1397, Judge Bork noted the court "need ask, therefore, only whether the Navy's policy is rationally related to a permissible end," id. at 1397-98. Judge Bork then concluded there was a rational basis for the Navy's policy, because the legislation appropriately implemented society's sense of morality. See id. at 1398.

[FN213]. 822 F.2d 97 (D.C. Cir. 1987). The panel consisted of Judges Silberman, Bork, and Markey.

[FN214]. Id. at 99. The FBI claimed that Ms. Padula's application had been rejected

due to "intense competition." See id.

[FN215]. Id. at 102.

[FN216]. Id. at 103 (emphasis added).

[FN217]. Id. (emphasis added).

[FN218]. Id. (emphasis added).

[FN219]. Id.

[FN220]. Id. (emphasis added).

[FN221]. See id. ; see also Equality Found. v. City of Cincinnati, 54 F.3d 261, 266-68 (6th Cir.), petition for cert. filed , 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (quoting Padula , 822 F.2d at 103); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied , 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 & n.10 (Fed. Cir. 1989) (quoting Padula , 822 F.2d at 103), cert. denied , 494 U.S. 1003 (1990); Thomasson v. Perry, 895 F. Supp. 820, 827 (E.D. Va. 1995).

[FN222]. See, e.g. , Robert T. Michael et al., Sex in America 139-41 (1994); see also Philip Blumstein & Pepper Schwartz, American Couples: Money, Work, Sex 236, 242 (1983) (reporting that more than 90% of heterosexual men and 90% of heterosexual women engage in oral sex); Carol Tavris & Susan Sadd, The Redbook Report on Female Sexuality 163 (1977) (85% of women surveyed had performed oral sex on their male partners; 20% had engaged in anal sex).

[FN223]. Senators Loudly Debate Gay Ban , N.Y. Times , May 8, 1993, at A9.

[FN224]. 457 S.E.2d 102 (Va. 1995).

[FN225]. Id. at 108 (emphasis added).

[FN226]. See Va. Code Ann. ß 18.2-361 (Michie 1994) ("If any person shall . . . carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a . . . felony.") (emphasis added).

[FN227]. Bottoms v. Bottoms, 444 S.E.2d. 276, 278-79 (Va. Ct. App. 1994), rev'd , 457 S.E.2d 102 (Va. 1995).

[FN228]. See 457 S.E.2d at 108.

[FN229]. For a description of the two-stage process for medical exams and inquiries under the ADA, see Feldblum, Medical Examinations , supra note 2, at 521.

[FN230]. Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

[FN231]. See Watkins v. United States Army, 847 F.2d 1329, 1357 (1988) (Reinhardt, J., dissenting), withdrawn , 875 F.2d 699 (9th Cir. 1989), cert. denied , 498 U.S. 957 (1990).

[FN232]. Vaginal intercourse is the most common sexual activity engaged in by heterosexuals. See Michael et al. , supra note 222, at 135.

[FN233]. Genital manipulation is a common form of achieving sexual gratification for both gay men and lesbians. See, e.g. , Janet S. St. Lawrence et al., Differences in Gay Men's AIDS Risk Knowledge and Behavior Patterns in High and Low Prevalance Cities , U.S. Dep't of Health and Human Services Public Health Reports , July 1989, available in LEXIS, News Library, Arcnws File.

[FN234]. Thus, logically, what defines the class of homosexuals or heterosexuals is not the act of engaging in oral or anal sexsince both homosexuals and heterosexuals engage in those acts in large numbers. Rather, what defines the class is the gender of one's partner with whom one engages in such sexual activity. See Hunter, supra note 17, at 550-51. The gender of one's partner is the defining factor for sexual orientation whether two people engage in sodomy (oral or anal sex)which is criminalized in somewhat less than half of the states regardless of the gender of the partner with whom one performs the act, see Sherman, supra note 196, at 698or whether two people engage in genital manipulation, kissing, hugging, caressing or simple loveactivities

which are generally not criminalized in any state regardless of the gender of the partner.

[FN235]. Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (emphasis added).

[FN236]. Id. at 190.

[FN237]. See Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 Yale L.J. 1073, 1077 (1988); Hunter, supra note 17, at 531. The dissenting Justices in Hardwick also pointed out this discrepancy between the reality of the Georgia statute and the formulation of the question by the majority. 478 U.S. at 214 (Stevens, J., dissenting).

[FN238]. 478 U.S. at 194.

[FN239]. Goldstein, supra note 237, at 1084-85; see also 478 U.S. at 214-16 (Stevens, J., dissenting).

[FN240]. 478 U.S. at 205 (citations omitted).

[FN241]. Other well-intentioned people have made the same mistake. See Steffan v. Perry, 41 F.3d 677, 690 n.11 (D.C. Cir. 1994) (citing Brief on Behalf of Respondents by Lambda Legal Defense and Education Fund, Inc. at 23 n.28, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-149)); Watkins v. United States Army, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting), withdrawn , 875 F.2d 699 (9th Cir. 1989), cert. denied , 498 U.S. 957 (1990).

[FN242]. Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1989).

[FN243]. Id.

[FN244]. Padula noted that " 'homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status.' " Id.

[FN245]. Id.

[FN246]. Id.

[FN247]. This distinction had been adopted by sympathetic courts prior to the Supreme Court's decision in Hardwick . See, e.g. , benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980); Woodward v. Moore, 451 F. Supp. 346 (D.D.C. 1978). The distinction, however, was propelled to new prominence by the Hardwick decision.

[FN248]. BenShalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989), rev'd , 881 F.2d 454 (7th Cir. 1989).

[FN249]. Id. at 1374. This regulation obviously extends beyond acts of sodomy to include within the definition of prohibited homosexual conduct any act of bodily contact that provides sexual gratification. Kissing, hugging, and genital manipulation would all fall within this category.

[FN250]. Id. at 1374-75.

[FN251]. Id. at 1376 (citing Brown v. Glines, 444 U.S. 348, 353-55 (1979)).

[FN252]. Id. at 1377.

[FN253]. Id. at 1378. The district court (not so) helpfully explained that " [t]he debate over whether sexual orientation constitutes a suspect or quasi-suspect classification has been blurred by the failure adequately to differentiate between classifications based on conduct and those based on status." Id.

[FN254]. Id. at 1380.

[FN255]. See id. at 1374 (quoting Army Reserve Regulation AR 140-111, tbl. 4-2). One of the more frustrating aspects of the district court's opinion is that it appeared to"get it" that the issue in Hardwick was about homosexual sodomy, and not all homosexual conduct. For example, the court distinguished the case before it from cases such as Padula and Hardwick on the grounds that those cases could only reasonably stand for the proposition that "classifications are not subject to strict scrutiny when defined by homosexual conduct that rises to the level of criminal sodomy ." Id. at 1379 (emphasis

added). Unfortunately, in its final distinction between status and conduct, the court did not limit itself to homosexual sodomy, but rather accepted the military's broad definition of homosexual conduct. Id. at 1379-80.

[FN256]. Id. at 1380.

[FN257]. Id. at 1380 (quoting Cyr v. Walls, 439 F. Supp. 697, 702 (N.D. Tex. 1977)).

[FN258]. Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), cert. denied , 494 U.S. 1004 (1990). As the court went on to explain:

> although that is, in some sense speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud. Thus, if the Army's regulation affects speech, it does so only incidentally in the course of pursuing other legitimate goals.

Id.

[FN259]. Id. at 464.

[FN260]. Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1479 (9th Cir. 1994). The court noted that " [t]here is no dispute in this case that the Navy's policy is constitutionally permissible to the extent it relates to homosexual conduct." Id. at 1477. Homosexual conduct (or acts) is defined by the challenged regulation as any "bodily contact. . . between members of the same sex for the purpose of satisfying sexual desires." Id. at 1477.

[FN261]. Id. at 1479. The court further noted that " [t]he Navy's presumption that Meinhold desires or intends to engage in prohibited conduct on the basis of his statement alone therefore arbitrarily goes beyond what DOD's policy seeks to prevent." Id. at 1479-80.

[FN262]. Cammermeyer v. Aspin, 850 F. Supp. 910, 929 (W.D. Wash. 1994).

[FN263]. Id. at 918. The court noted that " [t]his is a critical issue for plaintiff because the parties acknowledge for purposes of this litigation that, under Bowers v. Hardwick . . . the government may exclude individuals from military service on the basis of homosexual conduct." Id. (citations omitted).

[FN264]. Id. at 919.

[FN265]. Id.

[FN266]. Id. at 920.

[FN267]. Serving in Silence: The Margarethe Cammermeyer Story (NBC television broadcast, Feb. 6, 1995).

[FN268]. The formal statement Cammermeyer provided to the security clearance officer, which was subsequently submitted to the court, read: "I am a Lesbian. Lesbianism is an orientation I have, emotional in nature, towards women. It does not imply sexual activity . . . ." Cammermeyer , 850 F. Supp. at 913 n.4.

[FN269]. Steffan v. Perry, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc).

[FN270]. Id. at 689.

[FN271]. Id. The Fourth Circuit Court of Appeals, sitting en banc, rejected Thomasson's equal protection claims on the same basis. See Thomasson v. Perry, No. 95-2185, 1996 U.S. App. LEXIS 6591, at *18-19 (4th Cir. Apr. 5, 1996) (en banc).

[FN272]. DOD Directive No. 1332.30 (Mar. 4, 1994) (eff. Feb. 28, 1994), 32 C.F.R. pt. 41, app. A (1994); DOD Directive 1332.14.H.1.b(3), 32 C.F.R. pt. 41, app. A (1991) (superseded). Indeed, the "new" military ban expands the definition of homosexual conduct to include any physical contact that might be interpreted by another as indicating the person may be interested in homosexual conductincluding, presumably, hugging a person of the same gender, or draping one's arms in a certain way over a person of the same gender.

[FN273]. See, e.g. , Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1477 (9th Cir. 1994) ("There is no dispute in this case that the Navy's policy is constitutionally permissible to the extent that it relates to homosexual conduct. ").

[FN274]. See, e.g. , J.F. Harvey , Homosexuality , in 7 The New Catholic Encyclopedia 116 (1967), reprinted in Lesbians, Gay Men, and the Law 53 (William B. Rubenstein

ed., 1993) (" [A]s long as he resists spontaneous carnal desires, he is not accountable for possession of homosexual drives; but if he . . . cultivates dangerous friendships, and frequents homosexual haunts, he is guilty of placing himself unnecessarily in the proximate occasion of sin.").

[FN275]. Defendant's Memorandum of Law on the Appropriate Standard of Review, Able v. Perry, 880 F. Supp. 968 (E.D.N.Y. 1995) (No. CV94-0974).

[FN276]. See Brief for Plaintiff-Appellant, Philips v. Hunger (9th Cir. 1995) (No. 95-35293).

[FN277]. In contrast, the brief submitted on behalf of the plaintiff in the case of Thomasson v. Perry , and the oral argument in the case, continued to rely on a status/conduct distinction. See Thomasson Brief, supra note 134, at 24-29, 34-36. Thomasson was represented by lawyers from the private law firm of Covington & Burling, in Washington, D.C., not by lawyers from one of the national gay legal groups. Lawyers from the national groups had been grappling, for a number of years, with the adverse ramifications of advocating a status/conduct distinction in the courts and had collectively agreed to stop advancing such a distinction as a means of prevailing in court.

[FN278]. See, e.g. , UAHC Brief, supra note 11, at 16-19.

[FN279]. See Bowers v. Hardwick, 478 U.S. 186 (1986); West, supra note 17, at 646 (noting that Hardwick represents a significant departure from previous argumentation).

[FN280]. See, e.g. , Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Robert H. Bork, The Tempting of America 116-26 (1990).

[FN281]. Seventeen states have sodomy laws that apply regardless of the gender of the person with whom sodomy is performed. See Sherman, supra note 196, at 698 & n.205 (compiling 22 sodomy statutes, not including that of Texas).

[FN282]. One state, Montana, explicitly criminalizes genital manipulation. Mont. Code Ann. ß 45-5-505 (1994). Congress has not criminalized the activities of kissing, hugging, caressing or simple love between persons of the same gender when one of the people is a member of the armed servicesbut does make the first three activities grounds for administrative discharge. See 10 U.S.C.A. ß 654 (West Supp. 1996).

[FN283]. See Hearing , supra note 169. The Senate bill proposing ENOA is S. 2238, 103d Cong., 2d Sess. (1994).

[FN284]. Those who testified included Justin Dart, Chairman of President Bush's Committee on Employment of People with Disabilities; Richard Womack, Director of Civil Rights of the AFL-CIO; Warren Phillips, former CEO and Chairman of Dow Jones & Co., Inc; Cheryl Summerville of Breman, Georgia; and Ernest Dillon of Detroit, Michigan. See id. at 4-49.

[FN285]. See id. at 15 (statement of Justin Dart); see also id. at 20 (statement of Steve Coulter).

[FN286]. Id. at 31 (statement of Joseph Broadus).

[FN287]. Id. at 32.

[FN288]. Id. at 90 (statement of Robert Knight).

[FN289]. Id. at 38-46 (testimony of Chai Feldblum).

[FN290]. Id. at 38-39; id. app. I at 94 (cases involving discrimination on basis of sexual orientation); id. app. II at 106 (local and state action to provide protection against discrimination based on sexual orientation); id. app. III at 112 (stories about employment discrimination in different states).

[FN291]. Id. at 40 (testimony of Chai Feldblum). The studies cited by opponents use as their sample readers of selected gay publications in various large cities. Id. The sample consists of 90% men and 10% women. Id. As the company who prepared the studies noted in a memorandum submitted to the Committee: "The information gathered by the Simmons organization was never intended (and never claimed) to represent the gay and lesbian community at large. . . . Just as a survey of the readers of Newsweek, Forbes, or Redbook are not representative of all Americans, the Simmons survey does not represent all members of the gay and lesbian community." Id. app. III at 115.

[FN292]. Id. at 41 (testimony of Chai Feldblum).

[FN293]. Id.

[FN294]. Id. at 41-42.

[FN295]. Id. at 42.

[FN296]. Id.

[FN297]. Id.

[FN298]. Id. at 90 (statement of Robert H. Knight).

[FN299]. Id. at 42 (testimony of Chai Feldblum).

[FN300]. Id. at 38, 94, 106, 112 (apps.).

[FN301]. As Robin West points out, it often sounds as if liberals are insisting that sexual orientation is as irrelevant as a detached or attached earlobe. Given that fact, the only way to deal with "bigots" who think otherwise is to tell them to "get over it." After all, such feelings of dislike must be irrational and hence irrelevant, because really now, sexual orientation is just like a detached earlobe. Conversation with Robin West, Professor of Law, Georgetown University Law Center (Oct. 1995).

[FN302]. The avoidance of morality can also be achieved by adopting a status/conduct distinction because society has also not yet criminalized the status of being gay. One of the shifts in argumentation I recommend, however, is to use a sodomy/conduct distinction, rather than a status/conduct distinction. Both approaches avoid the issue of morality based on what society has not yet criminalized.

[FN303]. See Charles and Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act (1985).

[FN304]. See Hearing , supra note 169, at 44-45.

[FN305]. See generally Trudi Alexy, The Mezuzah in the Madonna's Foot (1993) (recounting the experiences of Marrano Jews in Spain).

[FN306]. See supra text accompanying notes 298-99, 303.

[FN307]. See Michael Booth & Steven Wilmsen, The Great Divide: Basic Values at Heart of Debate , Denv. Post , Sept. 19, 1993, at D1 (79%). According to another poll, 73% of those polled oppose same-sex marriage, 60% oppose "legal partnerships" for gay couples, and 70% oppose the adoption of children by gay couples. Joseph P. Shapiro et al., Straight Talk About Gays , U.S. News and World Rep., July 5, 1994, at 47, 47.

[FN308]. See Shapiro et al., supra note 307, at 47 (65%); see also Mellman Lazarus Lake, Inc., National Survey on Gay Rights for the Human Rights Campaign Fund 1-2 (Mar. 3, 1994) (on file with author) (over 70% of voters agree that homosexuals should have equal rights in terms of hiring and firing).

[FN309]. In fact, Senator Kassebaum articulated a reluctance to pass a mandatory law, rather than encouraging voluntary nondiscrimination, as one of her concerns with ENDA. See Hearing , supra note 169, at 12, 46.

[FN310]. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985); Palmore v. Sidoti, 466 U.S. 429, 433 (1984); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[FN311]. The Wolfenden Report was issued by a Committee designated by the British government to provide a recommendation on whether sodomy and prostitution should continue to be criminalized. See generally The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963) [hereinafter Wolfenden Report].

[FN312]. Wolfenden Report , supra note 311, para. 62.

[FN313]. Devlin , supra note 10, at 10-11. " [I]f society has the right to make a judgement and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in

the same way as it uses it to safeguard anything else that is essential to its existence." Id. at 11.

[FN314]. See Hart supra note 9, at 5. Hart also pointed out that a similar debate on the role of law in enforcing morality had occurred between John Stuart Mill, in his essay On Liberty , and Mr. Justice Stephen, in his book Liberty, Equality, and Fraternity . See id. at 16.

[FN315]. Among progressives, this debate has metamorphosized into a debate over whether a new form of "republicanism" is appropriate for determining law. See Frank Michelman, Law's Republic , 97 Yale L.J. 1493 (1988); Cass R. Sunstein, Beyond the Republican Revival , 97 Yale L.J. 1539 (1988); cf. Steven G. Gey, The Unfortunate Revival of Civic Republicanism , 141 U. Pa. L. Rev. 801 (1993); Kathleen M. Sullivan, Rainbow Republicanism , 97 Yale L.J. 1713 (1988).

[FN316]. West, supra note 10, at 665 (emphasis in original). West explains how the Court's decision in Hardwick is a classic example of a political theory of moral conservatism and a jurisprudence of conservative natural law. Id. at 663-665.

[FN317]. See Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1994) (opinion of Bork, J.) (upholding naval discharge on basis of homosexual conduct and rejecting appellant's contention that legislation and regulation be founded in moral judgments); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (arguing to uphold state law prohibiting nude dancing because "absent specific constitutional protection for the conduct involved, the Constitution does not prohibit [state imposed prohibitions] simply because they regulate 'morality' "). As Robin West points out, a "substantial and growing number" of judges and theorists "have begun to articulate a profoundly conservative interpretation of the constitutional tradition," with one strand of this "conservative constitutionalism" being "moral conservatism." West, supra note 10, at 641, 654. Adherents of the moral conservatism school believe that

> the state should defer to the accumulated wisdom of a community's positive conventional morality when formulating a vision of the good as a basis for state action. For these conservatives, the political state should legislate on the basis of the vision of the good promulgated by the dominant moral voices in a community's shared life, whether those voices emanate from religious or secular moral traditions.

Id. at 654.

[FN318]. 501 U.S. 560 (1991).

[FN319]. Id. at 574-75 (Scalia, J., concurring) (citations omitted).

[FN320]. See Devlin , supra note 10, at vi.

[FN321]. Id. at ix.

[FN322]. Devlin presumably could have made clear in his 1959 Maccabaean Lecture what he illuminated in his 1965 preface. During the lecture, however, Devlin simply stated that to "express any opinion one way or the other" on the particular recommendations of the Committee would be "outside the scope of a lecture on jurisprudence," and that he was therefore concerning himself only with "general principles." Id. at 2. Such restraint is certainly uncommon in our time and, in any event, may not have been the true reason for Devlin's silence in his lecture.

[FN323]. In April 1954, the British government responded to calls for reform by appointing a committee to assess and report on the criminalization of "homosexual offenses" and prostitution. The Chairman of the Committee was Sir John Wolfenden. See Wolfenden Report , supra note 311.

[FN324]. Devlin , supra note 10, at v.

[FN325]. Lesbians clearly did not figure prominently in anyone's mind at the time. See, e.g. , Goldstein, supra note 237, at 1081-91; Cain, supra note 158, at 1632 ("Consensual lesbian sex was never criminally proscribed in Britain.").

[FN326]. Devlin , supra note 10, at v.

[FN327]. Id.

[FN328]. Id.

[FN329]. Id. at vi.

[FN330]. Id.

[FN331]. Id. The art of legislative lawyering rests on combining politics and law in a manner that will achieve as much of the sought-after goal as possible, while still retaining the votes needed for passage. See Feldblum, supra note 26. Often, good legislative lawyering results in proposed compromises that, on their face, seem quite illogical.

[FN332]. See Devlin , supra note 10, at vi.

[FN333]. Id.

[FN334]. Id.

[FN335]. As it turned out, Devlin was probably a better legislative lawyer than the Committee members, since their recommendation to decriminalize almost all homosexual sodomy was resisted by the English Parliament for a decade. See Tim Newburn, Permission and Regulation: Law and Morals in Post-War Britian 60- 61 (1992).

[FN336]. Devlin , supra note 10, at v.

[FN337]. Id. Devlin described this invitation as "an honour not to be declined but yet to be accepted only with much misgiving." Id. Devlin was a judge who viewed himself as " [a] man who has passed his life in the practice of the law," and thus not a person who was "as a rule well equipped to discourse on questions of jurisprudence." Id. It is no surprise, therefore, that Devlin did not know of the work of Justice Stephen until Hart's lecture alerted him to the existence of that work. See id. at viii. As someone who has decided to focus my intellectual energies more on legislative lawyering than on academic reflection and analysis, I feel some affinity with Devlin in this regard.

[FN338]. Id. at vi.

[FN339]. Id.

[FN340]. Id. at vii.

[FN341]. Id.

[FN342]. Id. at 9.

[FN343]. Id. at 10.

[FN344]. Id. at 12-13. In a footnote added to the published transcript of the lecture, Devlin, in response to Hart's understanding of the lecture, stated:

> I do not assert that any deviation from a society's shared morality threatens its existence any more than I assert that any subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.

Id. at 13 n.1.

[FN345]. Id. at 14.

[FN346]. Id.

[FN347]. Id. at 15.

[FN348]. Id.

[FN349]. Id.

[FN350]. Id. at 16.

[FN351]. Id. at 16-17.

[FN352]. Id. at 17.

[FN353]. Id.

[FN354]. Id.

[FN355]. Id.

[FN356]. Id.

[FN357]. Id.

[FN358]. Id. at 17-18.

[FN359]. Id. at viii-ix.

[FN360]. I assume for these purposes that no children would be present at the time of such activitiesmore for the sake of not complicating the example and not because I believe the presence of children necessarily always changes the equation.

[FN361]. Devlin , supra note 10, at 10.

[FN362]. See Rubenfeld, supra note 17, at 740 (arguing that the right of privacy extends to activities which, if not protected, would adversely change the totality of the person's life).

[FN363]. Certainly, some people in this country do believe this to be the case. See Hearing , supra note 169, at 35 (statement of Robert H. Knight). But, if one accepts Devlin's approach to assessing society's moral consensus, I do not believe that twelve randomly selected individuals (not a group selected with jury consultants and high-paid lawyers) would unanimously adhere to such a view.

[FN364]. See infra note 370 and accompanying text.

[FN365]. See, e.g. , Neil Miller, In Search of Gay America 109 (1989).

[FN366]. Bruce Bawer, A Place at the Table: The Gay Individual in American Society (1993).

[FN367]. Id. at 106 (quoting E.L. Pattulo).

[FN368]. Id.

[FN369]. Id. at 107.

[FN370]. Linda Garnets et al., Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences , in Hate Crimes 207, 211 (Gregory M. Herek & Kevin T. Berrill eds., 1992). The authors cite the following studies for this conclusion: Alan P. Bell & Martin S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women (1979); Erving Goffman, Stigma: Notes on the Management of Spoiled Identity (1963); Laud Humphreys, Out of the Closets: The Sociology of Homosexual Liberation (1972); Edward A. Jones et al., Social Stigma: The Psychology of Marked Relationships (1984); Sue K. Hammersmith & Martin Weinberg, Homosexual Identity: Commitment, Adjustment, and Significant Others , 36 Sociometry 56-79 (1973); Alan K. Malyon, Psychotherapeutic Implications of Internalized Homophobia in Gay Men , 7 J. of Homosexuality 59- 69 (1982).

[FN371]. Bawer , supra note 366, at 109-10.

[FN372]. Gregory M. Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men , in Homosexuality 60, 74 (John C. Gonsiorek & James D. Weinrich eds., 1991); see also Garnets et al., supra note 370, at 583 ("Chronically hiding one's sexual orientation can create a painful discrepancy between public and private identities, feelings of inauthenticity, and social isolation.").

[FN373]. Herek, supra note 372, at 74.

[FN374]. Id.

[FN375]. Garnets et al., supra note 370, at 211. An interesting study was recently performed by Professor Ilan Meyer, in which Meyer set out to study "the effects of minority stress on the mental health of gay men by specializing and testing explicit minority stress processes." Ilan H. Meyer, Minority Stress and Mental Health in Gay Men , 36 J. of Health and Soc. Behav. 38, 51 (1995). "Minority stress" is defined as the "psychosocial stress derived from minority status." Id. at 38. Meyer found that

> [I]internalized homophobia, expectations of rejection and discrimination (stigma), and actual events of discrimination and violence (prejudice)considered independently

and as a grouppredict psychological distress in gay men. Relative risk estimates suggested that minority stress is associated with a two-to-threefold increase in risk for high levels of distressclearly a substantial risk.
Id. at 51.

[FN376]. See Alexy , supra note 305. Marrano is a pejorative name meaning "swine" given to secret Jews by suspicious Christians during the Spanish Inquisition. See id. at 260-61. Alexy notes that she uses the term reluctantly, "only because it is a historical term with which most people are familiar and because it symbolizes the demeaned status and fear suffered by Jews who were forced to convert during that terrible time." Id.

[FN377]. Alexy quotes a historian, whose own family converted during that time:
On Ash Wednesday in 1391, rampaging mobs killed four thousand Jews. . . . For a whole year after that, there were daily persecutions in the Jewish communities throughout the peninsula. . . . One hundred fifty thousand Jews in all, including my own family, succumbed to [the] pressure to convert during that year. Fifty thousand were killed. The rest, in the thousands, either went underground or lived in fear of continued persecution.
Id. at 260.

[FN378]. Id. at 261 (quoting Mathew the historian) (Mathew refused to provide his last name because of fear of exposure). As Mathew put it, "We learned to be very clever. No one caught on for a long time." Id.

[FN379]. Id. at 264.

[FN380]. Id. at 264-65.
They would separate families and question them and tell them the others had confessed, to break down their unity. They turned families against one another, especially children, whom they tricked into thinking they would be helping their parents by cooperating. Many of them fell for the ruse and spilled everything.
Id. at 265; cf. Randy Shilts, Conduct Unbecoming: Lesbians and Gays in the U.S. Military 124-25 (1993). Of course, this comparison has its clear limits, since the Inquisition's interrogations often included torture and the results of exposure were death, not discharge. See Alexy , supra note 305, at 265-66.

[FN381]. Alexy , supra note 305, at 265.

[FN382]. Id. at 268. Alexy reprints a set of guidelines issued by the Catholic Church to help Catholics recognize Jews hiding in their neighborhood. Id. at 268-69. It is also from this period that Alexy derives the title of her book: " [W]hen a Marrano kissed the foot of the Madonna by his front door, who would have guessed that a mezuzah (a small tube containing a parchment scroll of biblical passages) was concealed in the foot?" Id. at 268.

[FN383]. Alexy details some of the cases of torture and death, id . at 269- 72, and provides the following statistics: " [F]rom 1481-1521, 28,540 were burned alive, 16,520 were burned in effigy, and 304,000 were 'penanced' for suspicion of Jewish practices." Id. at 272 (quoting the Encyclopedia of Judaism). The Inquisition was finally disbanded in 1834. Id.

[FN384]. Id. at 273.

[FN385]. Id.

[FN386]. Id. at 275.

[FN387]. Id. at 277. As Alexy put it: " [H]e could hardly ask his bishop for a recommendation once he admitted having been a practicing Jew while pretending to be a Catholic." Id.

[FN388]. Id. at 278.

[FN389]. Id. at 278-79.

[FN390]. Rabbi Alexander Schindler, former President of the Union of American Hebrew Congregations ("UAHC"), has eloquently drawn parallels between the gay and Marrano experiences. As Rabbi Schindler noted in a Biennial Address to the UAHC: "We who were marranos in Madrid, who clung to the closet of assimilation and conversion in order to live without molestation . . . cannot deny the demand for gay and lesbian visibility." Rabbi Alexander Schindler, A Time to Reach Out: Biennial Address to the Union of American Hebrew Congregations (November 1989).

[FN391]. Alexy , supra note 305, at 228-29. This activist also recounted that when he asked Spanish school children if they had ever met a Jewish child, he was not surprised

to hear not one child admit to ever having met a Jew. See id. at 229. This has echoes of the common reaction of nongay people, who often state that they "have never met" a gay person.

[FN392]. Id. at 233.

[FN393]. See Sandel, supra note 16.

[FN394]. 381 U.S. 479 (1965).

[FN395]. Sandel, supra note 16, at 527.

[FN396]. Id. at 527 (quoting Griswold , 381 U.S. at 486).

[FN397]. Id. at 535 (quoting Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), rev'd , 478 U.S. 186 (1986)).

[FN398]. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[FN399]. Sandel, supra note 16, at 534.

[FN400]. Id.

[FN401]. For purposes of this analysis, I accept for the moment the false assumption made by both the Hardwick majority and dissent that homosexual sodomy is equivalent to all homosexual activity and love between two people of the same gender.

[FN402]. Bawer , supra note 366.

[FN403]. Andrew Sullivan, Virtually Normal: An Argument About Homosexuality (1995).

[FN404]. See Bawer , supra note 366, at 135-36, 145-46, 149-52; Sullivan , supra note 403, at 178-185.

[FN405]. Paul Baumann, An Incarnational Ethic: Listening to One Another , Commonweal , Jan. 28, 1994, at 17.

[FN406]. Id. at 18.

[FN407]. Id. at 20. Andrew Sullivan describes a similar moral opposition to homosexuality in his analysis of conservatives such as John Finiss and E.L. Pattullo. Sullivan , supra note 403, at 98-103.

[FN408]. See generally The Churches Speak on Homosexuality: Official Statements From Religious Bodies and Ecumenical Organizations (J. Gordon Melton ed., 1991).

[FN409]. See Sullivan , supra note 403, at 120-30 (describing the more recent refusal of gay people to cooperate with a societal request for invisibility).

[FN410]. See Shapiro et al., supra note 307, at 47.

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