

THE TRADITION OF PREJUDICE VERSUS THE PRINCIPLE OF EQUALITY: HOMOSEXUALS AND HEIGHTENED EQUAL PROTECTION SCRUTINY AFTER *BOWERS V.* *HARDWICK*

We believed in the Constitution. Guess what? It doesn't mean us.
Lesbian activist Pat Norman after *Bowers v. Hardwick*.¹

Pervasive prejudice, unfounded stereotypes, and invidious public and private discrimination severely victimize gay males and lesbians in the United States.² Through violence and discrimination, society robs those it perceives to be homosexual of the liberty to pursue a meaningful and happy life without fear.³ State and federal institutions, in the executive, legislative, and judicial branches, are prime instigators and facilitators of this invidious discrimination.⁴ This governmental discrimination impairs homosexuals' ability to be employed, to raise children, to live together as couples, and to engage in consensual, private, sexual activity.⁵

The courts have generally rebuffed attempts by homosexuals to seek redress through statutory and constitutional claims.⁶ In

¹ Press, *A Government in the Bedroom*, NEWSWEEK, July 14, 1986, at 36.

² See R. MOHR, *GAYS/JUSTICE* 27-30 (1988). This note will generally use the term homosexual, though with reluctance. Most persons within the homosexual community refer to themselves as gay men and lesbians. Unfortunately, these terms are not only awkward, but also only refer to those persons who identify themselves as homosexually-oriented. Many persons who do not consider themselves gay or lesbian, such as persons who engage in occasional same-gender sexual activity, are nonetheless injured by prejudice and discrimination. Although the exact meaning and scope of the term homosexual in this note will often depend on the context, it will generally refer to either those persons who engage in some homosexual conduct, or to those persons victimized because of society's perception of them as homosexually-oriented.

³ See *id.* at 22-31.

⁴ See *id.* at 30.

⁵ See *id.*

⁶ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (no privacy right to engage in homosexual sodomy); *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120 (1967) (homosexual aliens seeking to enter country can be excluded); *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 856-57 (D. Md. 1973) (homosexual activism may be grounds for dismissal of public school teacher without violating first amendment); *Singer v. Hara*, 11 Wash. App. 247, 254-60, 522 P.2d 1187, 1195 (1974) (state could deny marriage license to same-sex couple).

1986, the United States Supreme Court, reasoning that the ability to engage in homosexual conduct was not an interest protected by the federal constitutional right of privacy, held in *Bowers v. Hardwick* that states could criminalize same-sex sodomy.⁷ As a result of the apparent exclusion of homosexuals from substantive due process protections, homosexuals increasingly are challenging government-sponsored discrimination through the equal protection principles contained in the fifth and fourteenth amendments of the United States Constitution.⁸

The principle of equal protection of the laws requires that the government treat all persons equally and fairly, and not invidiously or arbitrarily.⁹ Although the courts usually only require the government to provide a rational justification for classifications, the courts subject certain classifications to heightened scrutiny because of a presumption that the government classified invidiously.¹⁰ The courts establish this presumption when a class faces pervasive socie-

⁷ *Hardwick*, 478 U.S. at 196.

⁸ See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344); *Watkins v. United States Army*, 847 F.2d 1329, 1349, 1352 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368, 1373 (N.D. Cal. 1987). Section one of the fourteenth amendment states that:

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

U.S. CONST. amend. XIV, § 1 (emphasis added). Section five states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* at § 5.

The fifth amendment provides that:

No person shall be held to answer for a capital crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

According to the United States Supreme Court, the fifth amendment contains an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁹ See W. NELSON, *THE FOURTEENTH AMENDMENT* 13-18 (1988).

¹⁰ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

tal antipathy and political powerlessness because of traits that do not relate to individual responsibility or capabilities.¹¹

This note examines whether, consistent with equal protection precedent, and in light of *Hardwick*, the courts should presume that the government classifies homosexuals for invidious or arbitrary reasons that the constitutional principle of equal protection prohibits. Section I examines the prejudice, stereotypes, and discrimination that homosexuals in the United States face, with particular attention to government-sponsored discrimination and its consequences for the lives of homosexuals.¹² Section II discusses the principle of equal protection as it has developed since the ratification of the fourteenth amendment, concentrating on the criteria that the Supreme Court has articulated for determining whether a class requires heightened protection because the government presumably disadvantages it invidiously.¹³ Section III first discusses *Hardwick*,¹⁴ followed by recent federal court decisions that have considered whether homosexuals constitute a class needing heightened judicial protection.¹⁵ Section IV then argues that homosexuals fulfill the criteria for status as a protected class under equal protection precedent, and that those courts that have relied on *Hardwick* to hold that the courts should not protect them have used reasoning that is superfluous and even antithetical to equal protection jurisprudence.¹⁶

I. THE STATE OF AMERICA FOR GAY MEN AND LESBIANS

Homosexuals face a vast array of official and unofficial forms of discrimination that, argue observers of the homosexual community, affect every aspect of a homosexual's life.¹⁷ Although homosexuals constitute a sizeable minority of the population, commentators argue that the risks attendant to identification as a homosexual are so severe and pervasive that homosexuals are often forced to hide their identities as homosexuals.¹⁸ Discrimination and prejudice against homosexuals have a long history, scholars note,

¹¹ See *id.*; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹² See *infra* notes 17-154 and accompanying text.

¹³ See *infra* notes 155-293 and accompanying text.

¹⁴ See *infra* notes 294-347 and accompanying text.

¹⁵ See *infra* notes 348-526 and accompanying text.

¹⁶ See *infra* notes 527-618 and accompanying text.

¹⁷ See R. MOHR, *supra* note 2, at 27-30.

¹⁸ See *id.*

and remain pervasive and destructive features of homosexuals' lives.¹⁹ Much of this discrimination is not only condoned but actively promoted and implemented by state and federal governments in such areas as public employment, the military, family law, and criminal law, while the courts have mostly allowed this discrimination in the face of various legal attacks.²⁰ As a result of this state-condoned and pervasive discrimination, commentators argue, homosexuals not only hide their homosexuality, but also are unable politically to prevent discrimination or counter popular but factually unsupported stereotypes about homosexuals.²¹ According to these commentators, society justifies this discrimination through notions of morality, tradition, and the protection of the family, as well as the stereotypes of homosexuals as psychologically ill or sexually criminal.²² Homosexuals therefore find themselves the victims of state-condoned and state-enforced discrimination in many aspects of their lives.²³

Studies of sexuality indicate that a substantial minority of persons in the United States are exclusively homosexual in experience or orientation, and that as many as half of males and a quarter of females have been sexually aroused by persons of the same gender.²⁴

¹⁹ See *id.*

²⁰ See *id.*; *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²¹ See R. MOHR, *supra* note 2, at 22-23.

²² See *id.* at 23, 31-34; J. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 228 (1983).

²³ See R. MOHR, *supra* note 2, at 30.

²⁴ *Id.* at 21; *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1511 n.1 (1989) [hereinafter *Developments*]; see Note, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 LAW AND INEQUALITY 441, 441 (1989) [hereinafter *Repealable Rights*] (Twenty million homosexuals in United States). Alfred Kinsey's 1948 study of male sexuality found that as many as half of the white male population had experienced some form of overt or fantasized homosexual stimulation during their adult lives, and that 50 percent of the white male population that remained single until age 35, and 37 percent of the total white male population, had at least one overt homosexual experience to the point of orgasm between adolescence and old age. A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650 (1948) [hereinafter *MALE SEXUAL BEHAVIOR*]. Kinsey also found that 25 percent of the white male population had more than incidental homosexual experience or reactions, and 18 percent had at least as many homosexual experiences or reactions as heterosexual, for at least a three-year period between ages 16 and 55. Eight percent were exclusively homosexual for at least three years, and four percent throughout their adult lives. *Id.* at 650-51. Kinsey's study group was composed of 5300 white males. *Id.* at ix. A 1988 survey of male sexuality by the National Academy of Sciences also found that at least 20 percent of males have had a homosexual experience, and that at least six percent had homosexual encounters at least occasionally. Fay, Turner, Klassen, & Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 SCIENCE 338-48 (1989); see also Knox, *Gay contacts seen in 20% of US men*, Boston Globe, Jan. 20, 1989, at 1, col. 5.

These studies suggest that the population cannot statistically be separated into mutually exclusive groups of homosexuals and heterosexuals, because individual sexual experiences and responses range across a continuum from exclusively heterosexual to exclusively homosexual.²⁵ Commentators note that equating sexual orientation with sexual conduct is inaccurate, because many who have engaged in sexual activity with persons of the same gender do not consider themselves homosexual, while others who consider them-

Kinsey's 1953 study of female sexuality correspondingly found that between one and three percent of unmarried women were exclusively lesbian, and that between three and eight percent were more homosexually than heterosexually oriented. A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 473-74 (1953) [hereinafter *FEMALE SEXUAL BEHAVIOR*]. Kinsey also found that 13 percent of women had experienced sexual contact to orgasm with other females. *Id.* at 454. He found that 19 percent of females had experienced some physical, sexual contact with another female, and that 28 percent had been erotically aroused by another female. *Id.* at 453. His female study group involved 5940 white females. *Id.* at 22. Studies suggest that primarily homosexual women are less likely to be exclusively homosexual than are homosexual men. D. WEST, *HOMOSEXUALITY RE-EXAMINED* 168-69 (1977). Researchers also report that lesbians experience their first homoerotic feelings later than do gay males, and that most lesbians have experienced heterosexual intercourse. *Id.* at 172. Like gay males, a lesbian's first homosexual experience usually occurs in the context of prior emotional or erotic attachments, and so lesbian seductions do not apparently cause a lesbian orientation. *Id.* Unsatisfactory heterosexual experiences, however, often confirm a pre-existing lesbian orientation and may direct some females away from heterosexual development. *Id.*

Kinsey's findings, however, have been questioned, because his subjects were not randomly chosen, and disproportionately represented certain groups, such as college professors. See Booth, *Asking America About Its Sex Life*, 243 *SCIENCE* 304 (1989).

Research indicates that same-gender sexual activity occurs in nearly every species of mammal. *FEMALE SEXUAL BEHAVIOR*, *supra*, at 448-51. Kinsey reasoned that mammals were capable of responding to any sexual stimulus, and that exclusive heterosexuality or homosexuality only arose because of experience. *Id.* at 450.

²⁵ *MALE SEXUAL BEHAVIOR*, *supra* note 24, at 636-55; *FEMALE SEXUAL BEHAVIOR*, *supra* note 24, at 468-69. Kinsey concluded that a considerable portion of the male population had a combined history of both homosexual and heterosexual experiences or psychic responses, that some males have an exclusively homosexual history, while half of all males have neither overt nor psychic homosexual experiences after the beginning of adolescence. *MALE SEXUAL BEHAVIOR*, *supra* note 24, at 639, 650. Similarly, between eleven and twenty percent of unmarried females, and eight to ten of married females, had experienced at least incidental homosexual contacts or responses over a period of years. *FEMALE SEXUAL BEHAVIOR*, *supra* note 24, at 472. Kinsey further argued that his findings suggest that the ability to respond erotically to any sort of stimulus, whether from the same or opposite sex, is basic in the human species. *Id.* at 660. Some have similarly questioned the prevalent conception in the United States of homosexuality as an orientation distinct from heterosexuality, noting that other societies do not distinguish persons or conduct by the gender of the sexual partner. *Developments*, *supra* note 24, at 1517-18. They reason that the distinction between heterosexual and homosexual orientation is a social construct originating in institutional heterosexuality. *Id.*

selves homosexual have not engaged in homosexual conduct.²⁶ Homosexuals, according to studies, can be consistently found across all social categories, including geographic areas, race, religion, educational background, and social and economic class.²⁷

Research into the potential causes of sexual orientation suggest that genetics, early family or other childhood conditions, or a mix of those factors primarily determine a person's sexual orientation, although factors later in childhood or in adult life may also have an impact.²⁸ Most persons, commentators note, become aware of

²⁶ *Developments*, *supra* note 24, at 1511 n.1; SEX RESEARCH: STUDIES FROM THE KINSEY INSTITUTE 203-04 (M. Weinberg ed. 1976) [hereinafter SEX RESEARCH].

²⁷ See *Developments*, *supra* note 24, at 1511 n.1; MALE SEXUAL BEHAVIOR, *supra* note 24, at 625-31. With slight variations, Kinsey found that, concerning males, these statistics were generally constant across social categories, including geographic and educational background. *Id.* at 625-31. Kinsey did note some variations, including somewhat lower incidence figures for males with college educations, as well as males who were more active in religion, much higher figures for males who reached puberty at an early age, and lower figures for married or older males. *Id.*

Concerning females, however, Kinsey did find a considerable difference based on education levels, with greater percentages of more educated women having experienced homosexual arousal and conduct. FEMALE SEXUAL BEHAVIOR, *supra* note 24, at 459-61. Higher degrees of religious activity also lessened the percentage of females with homosexual experiences. *Id.* at 463-66. Single women were much more likely to have experienced homosexual arousal or activity. *Id.* at 453-54. Nonetheless, Kinsey noted that women who had experienced homosexual contact and intended to do so again were represented on all economic and social levels. *Id.* at 478.

²⁸ R. MOHR, *supra* note 2, at 39; E. Hooker, *Homosexuality*, in NATIONAL INSTITUTE OF MENTAL HEALTH, TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS 12-14 (J. Livingood ed. 1976) [hereinafter TASK FORCE]; Money, *Sexual Dimorphism and Homosexual Gender Identity*, in TASK FORCE, *supra*, at 42.

As one medical psychologist noted, a person's homosexuality "may be a product of the confluence of heredity and environment, constitution and learning, biology and sociology." Money, *supra*, at 42. Research on whether biology or genetics determine sexual orientation have concentrated on possible differences in hormones and genetics, with inconclusive results. See D. WEST, SEXUAL CRIMES AND CONFRONTATION: A STUDY OF VICTIMS AND OFFENDERS 97-119 (1987); Money, *supra*, at 42-52. West noted intriguing evidence that homosexuality ran in families, and particularly that identical twins were likely to have the same sexual orientation. D. WEST, *supra*, at 109-10. Research involving the effects of doses of estrogen on hormone levels, according to West, also suggested that homosexual males experienced hormone changes similar to females given the same doses, but other research reached conflicting conclusions. *Id.* at 107-09. Other research has concentrated on possible sociological or environmental bases for sexual orientation, such as the effects of family relationships, or the degree of sexual repression and rejection during childhood and early puberty, with equally uncertain results. *Id.* at 111-19. In analyzing the early life histories of homosexual men and women, West observed, researchers found that many homosexuals showed signs of developing homosexuality in early childhood, including early homosexual encounters with friends of the same age, inability to meet social expectations for their gender, and unsatisfactory heterosexual encounters. *Id.* at 112-13. West suggested that biological factors might be more relevant to "primary" homosexuals, those who never had been aroused by members of the opposite sex, whereas sociological and psychological factors might be more important for

their sexual orientation even before they reach puberty, while others remain unsure of their orientation even into adult life.²⁹ Therapists and others have attempted to treat homosexuals who have sought conversion to heterosexuality through persuasive or authoritarian instruction, behavioral modification involving aversive or reinforcing techniques, psychotherapy, and physical treatments such as hormones or even castrations.³⁰ Observers disagree on the success rates of these methods, but some of the methods appear to have some success for persons with some heterosexual experience, whereas

those homosexuals with significant heterosexual experiences. *Id.* at 102; see Schur, *Sociocultural Factors in Homosexual Behavior*, in TASK FORCE, *supra*, at 32-33 (arguing that the development of homosexual orientation may represent a deflection of early childhood sexual-object choice from the usual pattern).

Kinsey, in his study of male sexuality, noted that male homosexuals tended to have reached adolescence at a relatively early age. MALE SEXUAL BEHAVIOR, *supra* note 24, at 315, 630. Kinsey, and later his Institute for Sex Research, found a relation between early adolescence and greater sex drive, and the Institute also suggested that homosexuality could arise in these males because their heterosexual drives were blocked by societal sanctions of sexual activities at younger ages. *Id.* at 630; P. GEMHARD, J. GAGNON, W. POMEROY, & C. CHRISTENSON, *SEX OFFENDERS: AN ANALYSIS OF TYPES 444* (1965) [hereinafter *SEX OFFENDERS*].

Although not minimizing the importance of biological and early childhood factors, others argue that the sociological development and interactions of a person through the entire life cycle also were factors in a person's sexual self-identification. Schur, *supra*, at 31-35. They contend that the unavailability of heterosexual outlets, or poor heterosexual experiences that result in feelings of inadequacy or of fear of the opposite sex, could be factors in a person turning toward homosexuality. *Id.* at 34-35. They nonetheless recognize a distinction between persons who engage in homosexual activities but who are predominantly heterosexual (such as many prisoners), and those with a strong psychodynamic homosexual orientation, though they argue that sociocultural factors throughout life can also affect the homosexual activities of the latter group. *Id.* at 36-37.

These sociocultural factors may be more important for lesbians than for male homosexuals, because lesbians generally experience their first homosexual feelings and acts later than male homosexuals, and are less likely to be exclusively or permanently homosexual. D. WEST, *supra* note 24, at 177, 189-92. Research into the potential causes of lesbianism is considerably more scant than of male homosexuality. *Id.* at 168.

For a detailed overview of the various theories on the causes and development of homosexuality, see *id.* at 59-118.

²⁹ D. WEST, *supra* note 24, at 247. West also asserts that most homosexuals experience homoerotic feelings long before adolescence, and that they usually identify themselves as homosexuals or at least non-heterosexual before puberty passes. *Id.* at 16. These feelings arise before any homosexual activity, including seduction by an older person, occurs. *Id.*

Adolescent homosexual sex play and other experiences, researchers concluded, are very common among males, and somewhat less so among females. *Id.* These early homosexual experiences, they found, do not predict later homosexual activity. *Id.* at 16-22. The persistence of homosexual interests and the corresponding lack of development in heterosexual interests appear to distinguish those destined to become primarily homosexual from others. *Id.*

³⁰ *Id.* at 247-275; Frank, *Treatment of Homosexuals*, in TASK FORCE, *supra* note 28, at 63-68.

predominantly homosexual persons rarely alter their sexual orientation.³¹ Though these methods may sometimes be successful, even observers who in some circumstances advocate the availability of these treatments for homosexuals who wish to convert argue that the low rate of success, and the often futile disturbances caused to many who undergo these treatments, make large-scale efforts at conversion too costly, uncertain, and risky.³² These observers argue that therapists should instead concentrate on helping disturbed homosexuals to accept their sexual identity, and on reducing their guilt and anxiety.³³

Some commentators also maintain that, regardless of whether or not some homosexuals can successfully convert and cease homosexual activities, one's sexual orientation is not a matter of choice.³⁴ They describe a person's self-identification as a homosexual as the discovery of a material condition and fact of life, not a choice that comes out of a set of alternatives among which a person freely chooses.³⁵ Finally, according to these scholars, even if individuals can alter their sexuality, the general existence of homosexuality

³¹ D. WEST, *supra* note 24, at 247-75; Frank, *supra* note 30, at 66-67. The chances of a conversion depend on the person's degree of homosexual orientation, desire to change, and willingness to cooperate with any procedure to achieve that goal. D. WEST, *supra* note 24, at 265, 269, 275. There are some reports of supposedly exclusive homosexuals converting to heterosexuality. *See id.* at 247-48, 263-64, 267-68, 273. But many who appeared to convert either later reverted or suffered through unhappy and sexually frustrating heterosexual relationships to keep up appearances. *Id.* at 249-50, 264-65, 274-75.

Kinsey noted that some men's sexual orientation may switch from predominantly homosexual to heterosexual, or vice-versa, during their lives, but he also suggested that many homosexual males who consciously attempt to switch to heterosexual relations find the attempt too costly, and renew their homosexual activities. MALE SEXUAL BEHAVIOR, *supra* note 24, at 629-30, 633, 639.

³² D. WEST, *supra* note 24, at 270; Frank, *supra* note 30, at 67.

³³ D. WEST, *supra* note 24, at 270. As one observer pointed out, the suffering of homosexuals would also be more adequately dealt with through the abolishment of legal sanctions and the reduction of social stigma aimed at homosexuals. Frank, *supra* note 30, at 67.

³⁴ R. MOHR, *supra* note 2, at 39-40.

³⁵ *Id.* at 40. Mohr noted that most homosexuals discover themselves having homosexual encounters or desires, and initially strongly resist the idea that they might be homosexual. *Id.* With courage, luck, and effort, Mohr argued, some homosexuals come to accept their orientation and freely act within their sexual identity. *Id.* at 40, 42. Mohr further noted that what sexually arouses someone was not subject to one's will, and that even if someone could choose his or her sexual orientation, few would make a choice that could lead to violence, discrimination, and the disruption of one's life. *Id.* at 39-41. Others argue, however, that a person might choose a homosexual orientation to avoid the pain of failed heterosexual experiences and the responsibility of marriage and parenthood. *See* Schur, *supra* note 28, at 35.

within society appears to be a permanent and constant phenomenon.³⁶

Historical and anthropological records appear to indicate that homosexuality has been present in every society, in various guises and with varying degrees of tolerance and repression by those societies.³⁷ Research into the opinions of persons in the United

³⁶ See *MALE SEXUAL BEHAVIOR*, *supra* note 24, at 665. Sexual orientation appears immutable both on a societal and individual level, Kinsey argued. *Id.* He further noted that society would have to isolate more than a third of all males if it wanted to reach all those with homosexual capacities, or over ten million males (in 1948), even if only those who were predominantly homosexual were "treated" or otherwise isolated. *Id.* Even if eliminated in one generation, Kinsey argued, homosexuality would very likely recur in the next generation, because homosexuality has been a significant and basic part of human activity throughout human history. *Id.* at 666.

³⁷ See *FEMALE SEXUAL BEHAVIOR*, *supra* note 24, at 477 n.22; K. DOVER, *GREEK HOMOSEXUALITY* (1978); I. SLOAN, *HOMOSEXUAL CONDUCT AND THE LAW* 1-4 (1987); D. WEST, *supra* note 24, at 119-36; Hooker, *Homosexuality*, in *TASK FORCE*, *supra* note 28, at 11-21.

"Thou shalt not lie with mankind, as with womankind: it is abomination." *Leviticus* 18:22.

"If a man also lie with mankind, as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be on them." *Leviticus* 20:13.

See *Genesis* 19, *Leviticus* 18:7, *Judges* 19, *I Kings* 22:47, *II Kings* 23:7, *Romans* 1:27, *I Corinthians* 6:9, *I Timothy* 1:9-10, *Talmud passim*. But some scholars argue that Jewish religious ceremonies before the Babylonian Exile included oral sodomy and homosexual activities. *FEMALE SEXUAL BEHAVIOR*, *supra* note 24, at 482. The strong Jewish condemnation of homosexuality, they argue, arose after the Exile, when Jewish leaders tried to distinguish themselves from their neighbors, who also included homosexual activities in their religious ceremonies. *Id.*

Sloan states that the earliest legal argument for outlawing homosexuality is found in Plato's *Laws*. I. SLOAN, *supra*, at 1. Both Plato and the statements in the Old and New Testaments suggest that the most objectionable aspect of homosexuality was that it involved the degradation of a man to the status of a woman. *Id.* Others note that the Jewish condemnation of homosexuality, which carried over into Christian theology, arose because the Jews identified homosexuality with the "idoltrous" religious practices of other ancient Near East cultures. *FEMALE SEXUAL BEHAVIOR*, *supra* note 24, at 482-83. The introduction of Christianity in European cultures brought severe state and ecclesiastical penalties for homosexual offenses, often including death. D. WEST, *supra* note 24, at 126-27. During this millennium, homosexuality in Christendom has been punishable by burning, hanging, or burying alive, though usually the actual penalties were less severe, consisting of exile, castration, corporal punishment, or exclusion from the sacrament of communion. I. SLOAN, *supra*, at 1-2; see D. WEST, *supra* note 28, at 123-24. Despite these penalties, homosexual acts continued to be common, as evidenced by recurring scandals that often included prominent persons and heads of state. D. WEST, *supra* note 24, at 128-32. Islamic theology officially condemns homosexuality, though less vehemently than Judeo-Christian doctrine, while secular Moslem literature often contains strong homoerotic content. *Id.* at 121. More recently, homosexuals were severely persecuted in the Soviet Union under Stalin and in Cuba under Castro, and were often killed in Nazi Germany and Khomeini's Iran. I. SLOAN, *supra*, at 124.

Evidence of the existence and comparative tolerance of homosexuality in ancient cultures may be found in the histories of early Chinese emperors, in Greek mythology and Classical Greek literature, in Roman history and literature until Constantine's conversion to Christianity, and even in one of the most ancient extant poems, the *Epic of Gilgamesh*. See D. WEST, *supra* note 24, at 122-26. Studies of contemporary primitive cultures indicate that many

States about homosexuality indicates that a majority hold strong negative views.³⁸ Among the widely held beliefs researchers found in a comprehensive 1970 study were that homosexuals are mentally ill, are dangerous, especially to children, are effeminate, or are unnatural, vulgar, and obscene.³⁹ Many believed that older homosexuals spread homosexuality to younger persons, and most believed homosexuals wish to seduce children or colleagues.⁴⁰ Most also supported the criminalization of all homosexual contact, as well as their exclusion from occupations involving authority or public responsibility, while many opposed allowing homosexuals to exercise various rights enjoyed by heterosexuals.⁴¹

Very few persons were free of all antihomosexual attitudes, the researchers found, and even those with few negative attitudes often believed that homosexuals are a danger to children.⁴² Although the age, race, religious background, and education of the surveyed individuals each affected the forms of attitudes and stereotypes they held about homosexuals, the belief that homosexuality is abhorrent

permit some form of homosexual behavior for some members, and some require and even ritualize certain homosexual acts. Alternatively, other cultures discourage or punish homosexual acts. *Id.* at 133-36. The degree of permissiveness of homosexual and heterosexual activities did not necessarily coincide in these societies. *Id.* at 136.

These studies, however, indicate much less lesbian than male homosexual activity in these societies. *Id.* at 134. Fewer historical references to lesbianism exist than to male homosexuality, probably because of the greater attention generally paid to masculine affairs. *Id.* at 177. The earliest historical artifacts of lesbianism are the surviving fragments of Sappho's poetry from the sixth century B.C. *Id.* at 178. Literary references, usually negative or scandalous, are also found in romantic literature of the middle ages, and more recent works often display lesbian affairs ending in tragedy. *Id.* at 178-79.

Although all human societies have marital and family institutions, as well as incest taboos, regulation of homosexual and heterosexual activities vary enormously. *Id.* at 136. Although a society's degree of tolerance toward homosexuality may affect the forms and amount of homosexual practices, homosexuality appears to be present in all societies. *See id.* at 119-36. One study, relied on by a court, indicated that two-thirds of the societies studied showed no evidence of homophobia (an exaggerated fear of homosexuals) and permitted some form of homosexuality. *Baker v. Wade*, 553 F. Supp. 1121, 1145 n.59 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc).

For discussions of attitudes toward homosexuality in Judaic and Christian religious law and history, see D. WEST, *supra* note 24, at 119-21, and Katz, *Notes on Religious History, Attitudes, and Laws Pertaining to Homosexuality*, in TASK FORCE, *supra* note 28, at 58-62.

³⁸ A. KLASSEN, C. WILLIAMS, & E. LEVITT, *SEX AND MORALITY IN THE U.S.* 17-18, 166-76 (1989) [hereinafter *SEX AND MORALITY*].

³⁹ *Id.* at 166-68.

⁴⁰ *Id.* at 170-73.

⁴¹ *Id.* at 173-76.

⁴² *Id.* at 178-81.

was consistent across all demographic groups.⁴³ These opinions, according to these researchers, appeared to come from deep fears and antipathy instilled by childhood teaching, and that were related to traditional and authoritarian beliefs about gender roles, the family structure, and sexual variation.⁴⁴

Although recent media polls suggest a substantial softening of negative opinions toward homosexuals, they also indicate that antipathy remains prevalent.⁴⁵ Some analysts of United States society assert that its citizens are uniquely obsessed with homosexuality, and that they generally see homosexuality as a personal threat, and so react not just with distaste but with panic.⁴⁶ They suggest that the panic arises from the fear by males of their own potential homosexuality.⁴⁷ One study also found that heterosexuals experience less discomfort with homosexuals as their exposure to homosexuals increased.⁴⁸

Public and private discrimination against homosexuals continues to prevail in the United States.⁴⁹ One study concluded that

⁴³ *Id.* at 192-97.

⁴⁴ *Id.* at 225-29, 241-44. The researchers concluded that childhood teaching instills antihomosexual attitudes because an individual's early sexual experiences and level of education correlate with the degree of that person's antihomosexual attitudes. *Id.* at 242-43.

⁴⁵ See *Homosexuals Gain More Acceptance*, N.Y. Times, Oct. 25, 1989, at A24, col. 1 (Gallup poll indicated that 47 percent believed consensual, private homosexual relations should be legal, and that 36 percent opposed legalization; although 71 percent supported equal employment rights for homosexuals, less than half believed homosexuals were appropriate teachers or clergy); Alpern, *A Newsweek Poll: Sex Laws*, NEWSWEEK, July 14, 1986, at 36 (fifty-seven percent opposed criminalization of private homosexual conduct, 74 percent opposed criminalization of private heterosexual conduct; 44 percent avoided places where homosexuals might be, 25 percent avoid persons suspected of being homosexual, and 67 percent claimed not to have friends or acquaintances who were homosexual).

⁴⁶ Schur, *supra* note 28, at 33.

⁴⁷ *Id.* at 33-34.

⁴⁸ Lance, *The Effects of Interaction With Gay Persons on Attitudes Toward Homosexuality*, HUMAN RELATIONS, June 1987, at 329.

⁴⁹ See generally *SEXUAL ORIENTATION AND THE LAW* (R. Achtenberg ed. 1987) [hereinafter *SEXUAL ORIENTATION*] (discussing discrimination against homosexuals and providing a guide to attorneys representing homosexual clients); R. MOHR, *supra* note 2, at 22-31 (discussing contemporary discrimination against homosexuals); I. SLOAN, *supra* note 37 (canvassing various areas of legal discrimination); Swisher, *Gays in the 90's: Into the Mainstream?*, Washington Post, July 25, 1989, at C5, col. 1 (painting stark picture of ignorance of and antipathy toward homosexuals, especially outside more progressive urban areas).

The forms of discrimination, however, according to some scholars, have changed with the evolution of the prevalent conceptions of same-sex sexual activity in the United States. *Developments*, *supra* note 24, at 1512-18. They note that the society of the United States through the late nineteenth century did not conceive of persons having different sexual orientations, and instead simply considered all nonprocreative sexual conduct to be immoral

homosexuals are probably victimized more often than any other minority group in the United States.⁵⁰ A 1984 study by the National Gay and Lesbian Task Force indicated that ninety percent of gays and lesbians had been victimized in some manner on the basis of their sexual orientation.⁵¹ According to the survey, twenty percent of gay males and almost ten percent of lesbians reported physical assaults because of their homosexual orientation.⁵² Some violence against homosexuals leads to death.⁵³ Commentators note that this violence injures all homosexuals by perpetuating prejudice against homosexuals, and by intimidating them.⁵⁴ As many as seventy-five percent of those homosexuals attacked did not report the assaults

and criminal. *Id.* at 1512. This society believed that everyone was capable of committing these sins, including homosexual sodomy, and that any transgressor could repent. *Id.* at 1512-13. These scholars argue that this conception of homosexual conduct as a sin explains why lesbian conduct was generally tolerated and not criminalized in nineteenth century society, because religious and moral condemnations of homosexuality generally did not include women, and because society considered women to be asexual. *Id.* at 1512 n.9, 1513 & nn.16-17.

The current prevalent conception, according to scholars, is of homosexuality as part of a person's identity. *Id.* at 1514. The negative version of this concept is of homosexual orientation as an illness that afflicts a distinguishable class, which has led to the criminalization of specific homosexual acts, and of other discrimination against homosexuals. *Id.* at 1514-15.

⁵⁰ *Developments, supra* note 24, at 1541 (citing study commissioned by National Institute for Justice). Violence against homosexuals appears to be increasing. *Id.*

⁵¹ R. MOHR, *supra* note 2, at 27-28 (citing NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION (1984)); *Developments, supra* note 24, at 1541 (also citing Task Force Survey).

⁵² *Developments, supra* note 24, at 1541; R. MOHR, *supra* note 2, at 27-28. Twenty-five percent also reported incidents of objects being thrown at them. A third reported being chased, and another third being sexually harassed. Fourteen percent reported being spit on. *Id.* A survey of homosexual men in Great Britain found that 49 percent of gay men had been physically attacked at least once because of their homosexuality, usually by an unknown assailant or assailants. D. WEST, *supra* note 28, at 127 (citing Thompson, West, & Woodhouse, *Socio-Legal Problems of Male Homosexuals in Britain*, in *SEXUAL VICTIMIZATION* 127 (D. West ed. 1985)).

⁵³ R. MOHR, *supra* note 2, at 28-29. Groups of young men targeting another man perceived to be gay and beating him unconscious, sometimes to death, is a common form of violence against homosexuals. *See id.* at 28-29; *Repealable Rights, supra* note 24, at 442 n.10 (young gay male in Maine thrown off bridge and killed, while going home from church, by youths yelling "Hey, let's kick the shit out of this fag."); *Some say antigay bias led to fatal Dorchester beating*, Boston Globe, Feb. 8, 1990, at 1, col. 3 (residents and friends say gay male's beating death likely because of his homosexuality; homosexual community leaders report "huge increase" in attacks on homosexuals by teenagers); *Two sentenced in Conn. beating*, Boston Globe, Jan. 6, 1990, at 43, col. 3 (four teenagers arrested during wave of beatings of gay men in Hartford sentenced for several assaults and a homicide).

⁵⁴ *Developments, supra* note 24, at 1541-42.

to law enforcement authorities, because they feared exposure, and because the authorities themselves often victimize homosexuals.⁵⁵

Homosexuals also face discrimination in private employment⁵⁶ and private housing.⁵⁷ Homosexuals, particularly gay males, also experience difficulties in securing health and life insurance, in part because insurers perceive them as having an increased likelihood of contracting Acquired Immune Deficiency Syndrome (AIDS) and related illnesses.⁵⁸ Absent statutory, regulatory or collective bargaining prohibitions of discrimination against homosexuals, there are no legal restraints to these forms of private discrimination.⁵⁹ Only Wisconsin and Massachusetts, along with several counties and municipalities, prohibit private discrimination against homosexuals in such areas as employment, housing, and public accommodations.⁶⁰ In a few states, executive orders or court decisions also prohibit some forms of discrimination against homosexuals.⁶¹

The government also discriminates against homosexuals in a variety of ways.⁶² Although homosexual federal civil servants enjoy

⁵⁵ *Id.* at 1541-42 & n.152.

⁵⁶ See, e.g., *SEXUAL ORIENTATION*, *supra* note 49, § 5, at 5-4; R. MOHR, *supra* note 2, at 30; I. SLOAN, *supra* note 37, at 21-23. Nearly a third of gay men reported being discriminated against in some manner at their employment, and seventeen percent reported losing or being denied employment because of their homosexuality. *Developments*, *supra* note 24, at 1575. Nearly a quarter of lesbians also reported discrimination in the workplace. *Id.* The forms of discrimination included firings, refusals to hire or to promote, and harassment by co-workers and supervisors. *Id.* at 1575 n.141; see also D. WEST, *supra* note 28, at 125 (surveys of male homosexuals suggested that their sexual orientation stood as a barrier to career advancement).

⁵⁷ R. MOHR, *supra* note 2, at 30; *Developments*, *supra* note 24, at 1612-18; see also *SEXUAL ORIENTATION*, *supra* note 49, at Intro-2.

⁵⁸ *Developments*, *supra* note 24, at 1663-66.

⁵⁹ *Id.* at 1575-83, 1667-70.

⁶⁰ See *SEXUAL ORIENTATION*, *supra* note 49, at Intro-2, §§ 5.03[2][c]-[d], at 5-26 to 5-27, § 5.03[2][c] n.36; *Repealable Rights*, *supra* note 24, at 441, 445. Wisconsin prohibits employment discrimination against homosexuals. WIS. STAT. ANN. § 111.31 (West 1988). Massachusetts, as of February 13, 1990, prohibits discrimination on the basis of sexual orientation in employment, insurance, and housing, MASS. GEN. L. ch. 151B, §§ 1-18 (Supp. Dec. 1989), and public accommodations, MASS. GEN. L. ch. 272, §§ 92A, 98 (Supp. Dec. 1989). The statute, however, will likely face a referendum. *Dukakis signs gay rights law; opponents vow to go to voters*, Boston Globe, Nov. 16, 1989, at 39, col. 1. See *Developments*, *supra* note 24, at 1668 n.50, for list of cities and counties with some form of regulation prohibiting discrimination against homosexuals.

⁶¹ *Developments*, *supra* note 24, at 1667-68. See *id.* at 1668-70 for discussion of problems some of these antidiscrimination measures face.

⁶² R. MOHR, *supra* note 2, at 30; Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 803-04 (1984) [hereinafter *Heightened Scrutiny*].

some protection from employment discrimination,⁶³ the federal government explicitly discriminates against homosexuals in the military, the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, and the State Department.⁶⁴ Military contractors are also forced to discriminate against homosexuals because of the federal government's reluctance to give security clearances to homosexuals.⁶⁵ The federal government may, at its discretion, also deny entry to persons applying for immigration status who "admit" to being homosexual, and may deport those aliens whom the government admitted but subsequently discovered were homosexual, if they were admitted when all homosexuals were excludable.⁶⁶

The military has a long tradition of discrimination against homosexuals.⁶⁷ Currently, the military administratively discharges any-

⁶³ SEXUAL ORIENTATION, *supra* note 49, § 5.03[2][a], at 5-18; *Developments*, *supra* note 24, at 1556-59. Achtenberg notes that the Civil Service Reform Act of 1978 requires that a federal agency may only take action against a civil service employee because of that employee's conduct if that conduct is shown to harm the work performance of the employee or other employees. Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(10) (1982). This protection does not apply to non-civil service employees. *Id.*

⁶⁴ R. MOHR, *supra* note 2, at 30; *Developments*, *supra* note 24, at 1556.

⁶⁵ R. MOHR, *supra* note 2, at 30; see SEXUAL ORIENTATION, *supra* note 49, § 5.04[2], at 5-48.

⁶⁶ SEXUAL ORIENTATION, *supra* note 49, § 7.01, at 7-2 to 7-16; *Developments*, *supra* note 24, at 1660-63; see Immigration and Naturalization Act, § 212(a)(4), 8 U.S.C. § 1182(a)(4) (West 1988) (denies entry into United States of persons "afflicted with psychopathic personality, or sexual deviation"); *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120 (1967) (all homosexuals excludable because Congress intended to include them in category of psychopathic personality).

⁶⁷ See SEXUAL ORIENTATION, *supra* note 49, § 6, at 6-1 to 6-52; *Developments*, *supra* note 24, at 1554-55. During the 1970s, the military discharged, less than honorably, 2,000-3,000 individuals annually for reasons involving sexual orientation. Estrich & Kerr, *Sexual Justice*, in *OUR ENDANGERED RIGHTS* 128 (N. Dorsen ed. 1984) (citing C. WILLIAMS & M. WEINBERG, *HOMOSEXUALS IN THE MILITARY* 28 (1971)). More current estimates indicate that the military discharged 15,000 persons between 1975 and 1985, and 4,600 between September, 1984 and September, 1987, on grounds of homosexuality. *Developments*, *supra* note 24, at 1554 n.3. Even so, statistics suggest that over three quarters of homosexuals in the military complete their enlistments without problems. Estrich & Kerr, *supra*, at 128; SEX RESEARCH, *supra* note 26, at 234. Observers note that the military discharges women ten times more frequently than men for same-gender sexual activity, suggesting that the military selectively enforces these policies against women. *Developments*, *supra* note 24, at 1521 n.9, & 1554 n.3. Women in the military have also claimed that male colleagues have used accusations of lesbianism to coerce the women into having sexual relations, or to retaliate if they refused. Keen, *Navy Moves to Oust Three More Female Crew Members*, *Washington Blade*, June 16, 1989, at 1, col. 2. Great Britain has a similar policy concerning homosexuals in the military. D. WEST, *supra* note 28, at 121. See SEX RESEARCH, *supra* note 26, at 233-42, for study of homosexuals in the military.

Historically, homosexuality and the military have not been mutually exclusive. For in-

one who, prior to or during a period of military service, engaged in or attempted to engage in a homosexual act, stated that they were homosexual or bisexual, or married or attempted to marry a person of the same sex.⁶⁸ The military, however, can retain some who commit homosexual sodomy if it concludes that the act was an aberration and that the person was not actually a homosexual.⁶⁹

Commentators note that the government justifies discrimination against homosexuals in the military and other positions requiring security clearances because homosexuals are allegedly susceptible to blackmail, and because they will damage morale and discipline.⁷⁰ The commentators note, however, that no evidence supports the claim that homosexuals are especially susceptible to blackmail.⁷¹ The military's arguments that homosexuals damage military performance, furthermore, are contradicted by studies commissioned by the military that found that homosexuals perform as well, or better, than other personnel, and do not cause problems of morale or discipline.⁷² Two recent studies commissioned by the military but later quashed, in particular, found that homosexuals

stance, the Sacred Battalion of Thebes, composed of pairs of lovers, fought to the death at Chaeronea, and Plato believed that homosexual liaisons between soldiers contributed to martial valor. D. WEST, *supra* note 28, at 111; see V.L. BULLOUGH, *SEXUAL VARIANCE IN THE SOCIETY AND HISTORY* 106 (1976).

⁶⁸ *SEXUAL ORIENTATION*, *supra* note 49, § 6.03 (citing 32 C.F.R. pt. 41, app. A, pt. 1, H.1.c(1)-(3) (1989)). The military regulation gives as a rationale for the restriction of homosexuals in the military that the presence of homosexuals, including those who through statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. *Id.* at pt. 41, app. A, pt. 1, H.1. The military argued, among other things, that the presence of homosexuals harms morale and discipline, military flexibility, the recruitment and retention of military personnel, and the prevention of breaches in security. *Id.* As Great Britain has liberalized its laws concerning homosexuals, surveys of homosexuals indicate less fear of or actual threats of blackmail. D. WEST, *supra* note 28, at 125.

⁶⁹ 32 C.F.R. pt. 41, app. A, pt. 1, H.1.c(1) (1989). The military may retain a person who commits a homosexual act if a strict set of guidelines are met that indicate that the conduct or statement is a departure from the member's usual behavior, is not likely to recur, and is not accomplished by force or intimidation, that the member's continued presence in the military is consistent with the interests of the military, and that the member does not desire to engage in future homosexual acts. *Id.* See also *infra* note 396 for additional information on the Army regulations.

⁷⁰ *Developments*, *supra* note 24, at 1560-61.

⁷¹ *Id.* None of the recent significant espionage cases involved homosexuals who were blackmailed. *Id.* at 1560 (citing SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, *FEDERAL GOVERNMENT'S SECURITY CLEARANCE PROGRAM*, S. HRG. NO. 166, 99th Cong., 1st Sess. 171-87, 913-26 (1985)).

⁷² *Developments*, *supra* note 24, at 1561-62. A 1957 Navy study found that homosexuals displayed superior performance to Navy personnel in general. *Id.*

are as or more suited to military service than the average heterosexual.⁷³

State and local governments commonly practice employment discrimination against homosexuals, especially in the fields of teaching, law enforcement, fire prevention, social work, and other professions that deal with the public.⁷⁴ In addition, some states, through licensing laws, officially bar homosexuals from many professions.⁷⁵ In a few states, organizations promoting the interests of homosexuals have experienced difficulty incorporating.⁷⁶

In the area of family law, many states disadvantage homosexuals through statutory or case law.⁷⁷ No state recognizes as legal the marriage of same-sex couples, and therefore most same-sex couples cannot enjoy many of the benefits that marriage confers.⁷⁸ Similarly,

⁷³ 1989 LESBIAN/GAY LAW NOTES 65-66 (December, 1989). The first of the unclassified reports, *Nonconforming Sexual Orientation and Military Suitability*, noted that leading authorities describe sexual orientation in terms of gradations, not exclusive categories, that homosexual orientation is not a mental illness, and that society treats homosexuals in a manner similar to women and racial minorities. *Id.* The study then found that few homosexuals in the military are separated from the military because of their orientation, and that homosexuals' suitability for, and performance in, the military is satisfactory. *Id.* at 66. Other paramilitary organizations such as the San Francisco Police Department, the report noted, had successfully integrated homosexuals. *Id.* The underlying reason for the military's rejection, according to the first report, is the false stereotype of homosexuals as "polluting the social environment with unrestrained and wanton expressions of deviant sexuality." *Id.* The report concluded that sexual orientation is unrelated to military performance, and that the military assertion of intolerance of homosexuals causing morale problems could rapidly change. *Id.* The second study, *Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability*, applied factors considered predictive of military performance to homosexuals and heterosexuals, and concluded that "homosexuals show preservice suitability-related adjustment that is as good or better than the average heterosexual." *Id.* See Nickel, *Get a Jump on Life—Unless You're Gay*, Daily Free Press (Boston University), Nov. 3, 1989, at 9, col. 1 (discussing several discharges of homosexuals, including a Congressional Medal of Honor winner, and a West Point cadet who was sent to a military prison for a year and dishonorably discharged; also notes that Marines were trying to discharge a woman for "associating with known lesbians"); *Military seeks third study of policy on gays*, Boston Globe, Nov. 2, 1989, at 1, col. 1 (military orders another study after rejecting first two).

⁷⁴ R. MOHR, *supra* note 2, at 30.

⁷⁵ *Id.*; SEXUAL ORIENTATION, *supra* note 49, § 5.04[3], at 5-48.

⁷⁶ *Developments*, *supra* note 24, at 1666.

⁷⁷ See Estrich & Kerr, *supra* note 67, at 124-26; SEXUAL ORIENTATION, *supra* note 49, §§ 1-3, 5.

⁷⁸ Estrich & Kerr, *supra* note 67, at 124-26; see *Developments*, *supra* note 24, at 1605-11; Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988).

In *Singer v. Hara*, the appellate court held that Washington denied marriage licenses to same-sex couples not because of their gender, which would violate the equal protection clause, but because of the impossibility of reproduction from their marriage. 11 Wash. App. 247, 254-60, 522 P.2d 1187, 1195 (1974). Commentators note, however, that many heterosexual couples cannot, or choose not to, have children, while homosexual couples can through

many jurisdictions impose limits on the ability of unrelated persons to live together, which provides a legal basis for discrimination against homosexuals in housing.⁷⁹ The states' refusal to provide legal recognition of same-sex marriages also excludes homosexuals from other benefits that married couples enjoy in such areas as property and inheritance rights, social security and pension entitlements, workers' compensation, standing to sue for wrongful death and other torts, and state and federal taxes.⁸⁰

Some states recognize the homosexuality of one partner in a marriage as grounds for divorce, which can affect the division of marital assets.⁸¹ All states allow homosexuality to be a factor in determining the custody of children or visitation rights, while some states deprive homosexual parents of custody even with no evidence of actual or potential harm to the child.⁸² States often do not allow same-sex couples to adopt, though some allow for adoption by homosexuals who are in a heterosexual marriage.⁸³

Currently, twenty-four states and the District of Columbia continue to impose criminal sanctions for some forms of consensual sodomy.⁸⁴ Seven of these states proscribe only homosexual sodomy.⁸⁵ Commentators argue that even statutes that proscribe all

artificial insemination or surrogacy. *Developments, supra* note 24, at 1608-10. The New York Court of Appeals has held that homosexual couples living together may constitute a family for purposes of rent control regulation. *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, ___, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (1989). A few jurisdictions allow homosexual couples to establish a legally recognized family relationship through the adoption of one partner by the other. *Estrich & Kerr, supra* note 67, at 125; see *Developments, supra* note 24, at 1623-28 for a discussion of contracts and adult adoption as possible legal remedies to these disadvantages.

⁷⁹ *Estrich & Kerr, supra* note 67, at 125; *Developments, supra* note 24, at 1612-18.

⁸⁰ *Estrich & Kerr, supra* note 67, at 125; *SEXUAL ORIENTATION, supra* note 49, at Intro-1; *Developments, supra* note 24, at 1611-23; see Reynolds, *Gay couples redefine family*, *Boston Globe*, Oct. 5, 1989, at 101, col. 4 (some municipalities, businesses, and employers beginning to give homosexuals same benefits that married couples receive).

⁸¹ *SEXUAL ORIENTATION, supra* note 49, §§ 1.02[1]-[2], at 1-4 to 1-6.

⁸² *Estrich & Kerr, supra* note 67, at 126; *SEXUAL ORIENTATION, supra* note 49, § 1.03, at 1-7 to 1-9; *Developments, supra* note 24, at 1629-42; see D. WEST, *supra* note 28, at 149-50; see also GAY AND LESBIAN PARENTS (F. Bozett ed. 1987) (essays discussing various problems and virtues related to homosexual parenting).

⁸³ *SEXUAL ORIENTATION, supra* note 49, § 1.04[2], at 1-74 to 1-76; see *Developments, supra* note 24, at 1642-48. California and several other states allow homosexuals to adopt. Adams, *Gay couples begin a baby boom*, *Boston Globe*, Feb. 6, 1989, at 2, col. 3. Despite the barriers that homosexual couples face in seeking to adopt or to provide foster care, many homosexuals succeed in doing so. *Developments, supra* note 24, at 1645.

⁸⁴ I. SLOAN, *supra* note 37, at 7; *Developments, supra* note 24, at 1519-20 & n.2.

⁸⁵ *Developments, supra* note 24, at 1520 & n.5. The seven states are Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, and Texas. *Id.* Some states may apply neutral sodomy

sodomious activity disproportionately affect gay males, because the statutes prohibit the primary form of sexual activity for them while only affecting a portion of the sexual activities of heterosexuals.⁸⁶ Others note that, although rarely enforced, public officials and private persons often invoke sodomy statutes to justify discrimination because of a presumption that they engage in prohibited sodomy.⁸⁷ In 1986, the United States Supreme Court upheld the constitutionality of statutes criminalizing homosexual sodomy, reasoning that no privacy right exists to engage even in private, consensual, homosexual sodomy.⁸⁸

Commentators further argue that the courts have applied different standards and distorted legal precedents in cases involving homosexuals.⁸⁹ These scholars note, for instance, that courts have held that public employers who fire homosexuals for belonging to homosexual organizations or advocating homosexuals' rights do not violate the first amendment rights of the discharged employees.⁹⁰

statutes only against homosexual sodomy because of judicial invalidation of the statutes as applied to heterosexual sodomy. *Id.*

⁸⁶ *Heightened Scrutiny*, *supra* note 62, at 801-02; *see also* *United States v. Lemon*, 697 F.2d 832, 838 (8th Cir. 1983) (homosexual convicted of sodomy for oral sex in public bathroom; held no violation of equal protection because heterosexual sodomy in public also equally punishable); *People v. Onofre*, 51 N.Y.2d 476, 490-92, 415 N.E.2d 936, 942-43, 434 N.Y.S.2d 947, 952-53 (1980) (state sodomy statute violated right of privacy and equal protection rights of unmarried persons). *But see Developments*, *supra* note 24, at 1521 & n.11 (cautioning against overemphasizing sodomy as form of homosexual conduct because devalues importance of love and companionship for homosexuals, and ignores nonsodomious forms of sexual activity engaged in by homosexuals); *see also id.* at 1525-37 (discussing equal protection and state constitutional challenges to sodomy statutes).

⁸⁷ *Developments*, *supra* note 24, at 1520-21.

⁸⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *see infra* notes 298-347 and accompanying text for discussion of *Hardwick*.

⁸⁹ *See* SEXUAL ORIENTATION, *supra* note 49, § 9, at 9-1 to 9-52; J. BAER, *supra* note 22, at 231, 237-42; R. MOHR, *supra* note 2, at 28-29; Note, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984).

⁹⁰ *See* J. BAER, *supra* note 22, at 243-49; SEXUAL ORIENTATION, *supra* note 49, § 9.02[1][g], at 9-12 to 9-16.2; *see also* *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 856-57 (D. Md. 1973) (homosexual activism may be grounds for dismissal). *But see* *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1275 (10th Cir. 1984) (part of statute prohibiting teacher from advocating or promoting homosexual activity violated first amendment).

The courts have generally, on first amendment grounds, not allowed public universities to deny recognition to homosexual student organizations. *See Gay Student Servs. v. Texas A. & M. Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984); *Gay Lib. v. University of Missouri*, 558 F.2d 848, 854 (8th Cir. 1977), *cert denied*, 434 U.S. 1080, *reh'g denied*, 435 U.S. 981 (1978); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976); *Gay Students Organization of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974); *Developments*, *supra* note 24, at 1587-89. Courts have generally not allowed public schools to restrict homosexual students from politically expressing their sexual orientation. *Id.* at 1586-

Some courts also have held that the solicitation to engage in non-commercial homosexual acts is not protected speech under the first amendment, even when the conduct itself is not illegal.⁹¹

Commentators observe that in criminal cases, the courts often punish crimes against homosexuals less severely,⁹² while the homosexuality of criminal defendants can prejudice their defense.⁹³ Police and juries sometimes discount the witness-statements and testimony of homosexuals.⁹⁴ The police also selectively enforce criminal statutes against homosexuals, frequently through entrapment, and often harass and assault homosexuals.⁹⁵ Thus, commentators

87; see *Fricke v. Lynch*, 491 F. Supp. 381, 384 (D.R.I. 1980) (male student bringing male date to prom constituted protected expression); see generally *Developments*, *supra* note 24, at 1585-95, for a discussion of homosexual students' first amendment rights.

Teachers' first amendment rights, however, are much more restricted, and they have been fired even for private statements of homosexual orientation. *Id.* at 1595-1603; see *Rowland v. Mad River Local School Dist.*, 730 F.2d 444, 446 (6th Cir. 1984) (upholding firing of public school guidance counselor because she expressed that she was homosexual), *cert. denied*, 470 U.S. 1009 (1985).

⁹¹ *Developments*, *supra* note 24, at 1538-40. One rationale for placing homosexual solicitation outside first amendment protections is that the speech is likely to offend the "average" (i.e., heterosexual) person and cause that person to react violently, so that solicitation amounts to fighting words. *Id.* at 1539-40; see *State v. Phipps*, 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979).

⁹² R. MOHR, *supra* note 2, at 28-29; *Developments*, *supra* note 24, at 1542-48. According to Mohr, the courts often construe assaults or murders of gays as justified self-defense or a panicked response to sexual overtures. R. MOHR, *supra* note 2, at 28-29. In December, 1988, a Texas district court judge gave the convicted murderers of two gay men 30 year sentences, instead of the maximum sentence of life imprisonment. *Panel to Examine Remarks by Judge on Homosexuals*, N.Y. Times, Dec. 21, 1988, at A16, col. 5. He explained the sentence by saying that he "put prostitutes and gays on about the same level," and that he would be "hard put to give someone life for killing a prostitute." *Id.* The judge also stated that he did not "much care for queers cruising the street picking up teen-age boys." *Id.* Similarly, a Florida judge, during the trial of two men for killing a homosexual, expressed disbelief when told that beating a homosexual was a crime. *Repealable Rights*, *supra* note 24, at 445 n.22.

⁹³ *Developments*, *supra* note 24, at 1551-53.

⁹⁴ R. MOHR, *supra* note 2, at 28-29.

⁹⁵ *Id.*; see *Developments*, *supra* note 24, at 1533 (sodomy statutes selectively enforced); *id.* at 1537 (solicitation statutes selectively enforced); *id.* at 1542 (police harassment and violence against homosexuals). To avoid vagueness challenges to solicitation statutes, some courts have interpreted those statutes to criminalize only the solicitation of illegal sexual activity, including noncommercial, consensual homosexual activity. *Id.* Even where sodomy is legal, moreover, some courts have nonetheless applied solicitation statutes to solicitations to commit sodomy. *Id.* at 1538.

A 1988 survey indicated that twenty percent of homosexuals suffered police harassment. *Repealable Rights*, *supra* note 24, at 442 n.10. The Institute for Sex Research found in 1965 that roughly twenty percent of males convicted of sexual offenses involving consenting or non-consenting male partners age sixteen or older were arrested by means of plainclothes policemen or other persons who made themselves available for homosexual solicitation, and who usually encouraged the solicitation. SEX OFFENDERS, *supra* note 28, at 354. One-third of

argue, the courts depart from precedent to deny homosexuals the fundamental rights that all other citizens enjoy,⁹⁶ and create a special dogma that devalues the life and liberty of homosexuals.⁹⁷

Commentators, including Professor Tribe, also emphasize that the severe consequences homosexuals face if they publicly identify themselves as homosexuals cause them to conceal their sexual identities from society.⁹⁸ These commentators note that these consequences effectively force homosexuals to become an invisible minority, unable to complain of discrimination without inviting even more discrimination.⁹⁹ Government officials, according to observers, also face political risks if they politically support homosexuals.¹⁰⁰

the arrests were the results of the police viewing the offense, and in nearly one-fifth of the arrests the police discovered the conduct during other investigations. *Id.* Only eleven percent of arrests were reported by the partner, nine percent by friends or relatives of the partner, and five percent by witnesses. *Id.* By comparison, forty-seven percent of arrests of males for offenses involving consenting female partners over age sixteen were reported by friends or relatives of the female, eighteen percent by police as a byproduct of investigation, sixteen percent by the female partner, eleven percent by witnesses, and seven percent by the wife of the offender. *Id.* at 130-31. The Institute noted that the prevalence of the targeting and entrapment of homosexual males by the police had led to extortion scams, in which the extortionist posed as a police officer, "arrested" a homosexual who solicited him, and extorted money from the victim in exchange for releasing him. *Id.* at 354-55. The use of force in homosexual offenses, according to the Institute, was very rare. *Id.* at 11, 324.

⁹⁶ J. BAER, *supra* note 22, at 231.

⁹⁷ See *id.* at 249; R. MOHR, *supra* note 2, at 29; *Developments, supra* note 24, at 1511-12. Commentators also note that legal scholars often are stigmatized by their peers for addressing homosexual issues, and that the legal community often trivializes and ignores legal issues involving homosexuals. *Id.* at 1512 n.4.

⁹⁸ See J. BAER, *supra* note 22, at 226; R. MOHR, *supra* note 2, at 27; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1434 & n.93 (2d ed. 1988); Estrich & Kerr, *supra* note 67, at 102; *Developments, supra* note 24, at 1541-42; see also Alpern, *A Newsweek Poll: Sex Laws*, *NEWSWEEK*, July 14, 1986, at 38 (sixty-seven percent claimed not to have homosexual friends or acquaintances).

⁹⁹ R. MOHR, *supra* note 2, at 27. The fear of society publicly labeling someone a homosexual not only silences homosexuals, but also silences male victims of sexual assaults by other males. R. GEISER, *HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN* 76-77 (1979); S. GOLDSTEIN, *THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION, AND INTERVENTION* 35, 60 (1987). Geiser observes that although adults fear that a young female victim of sexual assault will be repulsed by sex because of the trauma of the assault, they conversely fear that male victims will be turned toward homosexuality, as if the experience had been pleasant. R. GEISER, *supra*, at 76-77. According to Geiser, this phenomenon is indicative of "the American male's excessive dread of anything that smacks of homosexuality," because of his belief that if someone is exposed at all to homosexuality, he will become one. *Id.* at 77. Geiser describes this as the basic tenet of homophobia, "the fear that if you try it, you'll like it," which, in Freudian terms, supports the theory that homophobia is a defense against underlying homosexual wishes and fantasies. *Id.*

¹⁰⁰ See *Homosexuals Are Target of Courter in New Jersey*, *N.Y. Times*, Sept. 15, 1989, at B1, col. 2 (gubernatorial candidate advocates restrictions on homosexuals as teachers, foster parents, or other positions dealing with children; political observers state that candidates

Commentators also assert that the legal sanctions and social opprobrium aimed at homosexuals undermine many homosexuals' morale and psychological health, increase their anxiety, and make them vulnerable to exploitation, while apparently not deterring homosexual acts.¹⁰¹ This intense antipathy, they note, causes many homosexuals to experience guilt, fear, or negative opinions about their own sexuality, with resulting psychological and sexual problems.¹⁰² Professor Tribe observes that the choice of whether to reveal one's homosexual orientation to others is of substantial importance.¹⁰³ Although doing so, he notes, may bring enormous social and economic costs, not doing so may exact a tremendous price in self-esteem and fulfillment.¹⁰⁴

opposing Courter's position risked being associated with outspoken homosexuals); *Watkins v. United States Army*, 847 F.2d 1329, 1348-49 (9th Cir. 1988) (prejudice forced politicians to appear not to be concerned for homosexuals), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc). Public officials are not the only ones who face risks if they appear to support homosexuals. See "Thirtysomething" episode lost ads, *Boston Globe*, Nov. 17, 1989, at 46, col. 6 (half of show sponsors pulled advertisements because of scene showing two homosexuals in bed together).

¹⁰¹ Schur, *supra* note 28, at 38-41; see D. WEST, *supra* note 24, at 192-208. But see SEX RESEARCH, *supra* note 26, at 247-49 (greater rejection of homosexuals in United States than in Europe not found to cause greater impairment to homosexuals' psychological health).

¹⁰² SEX RESEARCH, *supra* note 26, at 207-08.

In our society—which does all it can to drive homosexuals underground and to instill fear in those who seek out sexual partners, which endows furtive, impersonal sexual encounters with survival value, and which attempts to inculcate negative views of homosexual behaviors to which homosexuals themselves are frequently not immune—the kinds of sexual problems many homosexuals report are not at all surprising.

Id.; see Adams, *For many gay teenagers, torment leads to suicide tries*, *Boston Globe*, Jan. 3, 1989, at 1, col. 2.

Other scholars argue that some homosexuals, ashamed of their inclinations, try desperately to suppress and deny them, and often violently condemn other homosexuals. D. WEST, *supra* note 24, at 2. Kinsey notes that the police and judges who enforce laws against homosexuals, and the clergy and members of other groups who condemn homosexuals, are as likely to have homosexual experiences as other groups. MALE SEXUAL BEHAVIOR, *supra* note 24, at 665. These persons, Kinsey argues, are not hypocrites, but instead victims of the mores that society demands they protect, despite the gap between custom and actual societal behavior. *Id.*; see Hitchens, *It Dare Not Speak Its Name: Fear and Loathing on the Gay Right*, *HARPER'S MAGAZINE*, Aug. 1987, at 70 (several leaders of virulent antihomosexual political movement themselves are homosexual).

That many homosexuals suffer psychological harm because of discrimination and prejudice, however, does not mean that homosexuals are more likely to be psychologically ill. See *infra* note 110 and accompanying text for a discussion of the lack of correlation between sexual orientation and psychological health.

¹⁰³ L. TRIBE, *supra* note 98, at 1434.

¹⁰⁴ *Id.*; see D. WEST, *supra* note 24, at 161. For a discussion of the experiences of particular homosexuals in admitting to themselves and others that they were homosexual, see *Baker v. Wade*, 553 F. Supp. 1121, 1126-28 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en

Scholars further observe that the consequent invisibility of homosexuals to the rest of society increases society's ignorance of homosexuals.¹⁰⁵ The void created by that ignorance, these scholars argue, is filled by various stereotypes that in turn serve to justify discrimination.¹⁰⁶ Some of the stereotypes the commentators identify include the perception of homosexuals as child molesters or sex-crazed criminals, as neurotics or psychotics,¹⁰⁷ or as likely to alter the sexual orientation of children with whom they come in contact.¹⁰⁸ Another prevalent stereotype, which commentators observe often justifies discrimination against homosexuals, is that they presumptively engage in criminalized sodomy.¹⁰⁹

These scholars note, however, that the American Psychiatric Association and other professional organizations no longer consider homosexuality to be a psychiatric disorder, and that many homosexuals live happy, well-adjusted lives despite the opprobrium

banc); Deacon, *Tyranny of the Closet*, Boston Phoenix, Sept. 1, 1989, at section 1, p. 7, col. 1 (account of Rep. Barney Frank); R. MOHR, *supra* note 2, at 157-61 (account of Rep. Gerry Studds).

¹⁰⁵ R. MOHR, *supra* note 2, at 22. West suggests that many of the stereotypes concerning homosexuality arise from its more public manifestation, such as homosexual clubs and steam baths, from the often radical and occasionally outrageous activities of homosexual activist groups, and from the camp mannerisms and dress often found when groups of male homosexuals congregate. D. WEST, *supra* note 24, at 136-157. (See *id.* for a critical discussion of these forms of homosexual activities as observed in the mid-1970s.) West goes on to argue that only a tiny fraction of persons predominantly homosexual participate in homosexual organizations or regularly patronize homosexual gathering places. *Id.* at 157. The vast, silent majority of primarily homosexual persons, West reasons, are as different from each other in terms of beliefs, intelligence, interests, and sexual behavior, as are heterosexuals. *Id.* West concludes that many homosexuals enjoy stable relationships or live happy and fulfilled lives. See *id.* at 157-61.

¹⁰⁶ See R. MOHR, *supra* note 2, at 22-23. Stereotypes of homosexuals and the effects of homosexuality can take outrageous forms, as in a seventeenth-century Lutheran professor's claim that homosexuality results in "earthquakes, famine, pestilence, Saracens, floods, and very fat, voracious field mice." B. CARPZOV, *PRACTICA RERUM CRIMINALIUM*, as quoted in Katz, *supra* note 37, at 61.

Kinsey suggests that, if school officials, prison administrators, judges, police, military officers, and members of the community keep in mind that between a quarter and a third of all males have some homosexual experience, they might begin to view and treat homosexual individuals they encounter in more adequate and positive ways. MALE SEXUAL BEHAVIOR, *supra* note 24, at 663-65; see Lance, *The Effects of Interaction With Gay Persons on Attitudes Toward Homosexuality*, HUMAN RELATIONS, June, 1987, at 329 (1983 research study found that heterosexual discomfort with homosexuals decreased with exposure).

¹⁰⁷ R. MOHR, *supra* note 2, at 23; MALE SEXUAL BEHAVIOR, *supra* note 24, at 659-60. For a discussion of sexual attacks in prisons, and of homosexual prostitution, see D. WEST, *supra* note 28, at 142-46, 150-54.

¹⁰⁸ See D. WEST, *supra* note 28, at 150; J. BAER, *supra* note 22, at 246.

¹⁰⁹ Developments, *supra* note 24, at 1520-21.

caused by their sexual orientation that results in increased anxiety for some.¹¹⁰ They further observe that studies indicate that gay men

¹¹⁰ See D. WEST *supra* note 24, at 241-46; SEX RESEARCH, *supra* note 26, at 211-12, 246-57.

... if homosexuality itself is a pathological condition, then it must be one of the most common psychological disorders known. It would be an illness from which over a million men and probably as many women were suffering, and would constitute a far bigger health problem than cancer, heart conditions or any other disease . . . [T]he increasingly prevalent idea of referring to homosexuality as a sickness is part of a common approach in modern society to regard non-conformity and mental illness as synonymous.

M. SCHOFIELD, *SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY* (1965), as quoted in M. SCHOFIELD, *THE SEXUAL BEHAVIOR OF YOUNG ADULTS* 196 (1973).

Kinsey also argues, given the incidence and frequency of homosexual acts and feelings in the population, that homosexual impulses could not be considered as evidence of psychoses or neuroses, or even as abnormal or unnatural. *MALE SEXUAL BEHAVIOR*, *supra* note 24, at 659-60. Later studies by the Institute for Sex Research found no correlation between sexual orientation and psychological functioning. *SEX RESEARCH*, *supra* note 26, at 211, 249. Although the studies found that some homosexuals develop some psychological problems correlating to fear of disclosure, lack of self-acceptance, or other factors related to societal opinions of homosexuality, they also found that many other homosexuals are better adjusted than the average population. *Id.* at 249-57. Noting that the level of negative societal reactions does not seem to weaken the psychological adjustment of homosexuals as a group, the Institute reasoned that homosexuals are no more likely to be psychologically maladjusted than are heterosexuals. *Id.* at 211, 247, 249-50. Psychological research of lesbians, although widely at variance, provides no evidence of generalized neurotic disturbances among lesbians, and even suggests that lesbians are more independent and aggressive than heterosexual women. D. WEST, *supra* note 24, at 180-89.

Some modern psychiatrists have described homosexuals as mentally ill, miserable, and frustrated, symptoms that they argue arise from an inability to find genuine love or social acceptance, and from the disillusionment with the promiscuity, loneliness, and self-disgust of the homosexual lifestyle. *Id.* at 241-44. Other, more sympathetic psychiatrists, although not maintaining that homosexuality is inherently a mental disorder, believe that homosexuality often leads to feelings of insecurity, inadequacy, and self-rejection because of society's strong condemnation, and that therefore psychiatrists should steer persons toward heterosexuality where feasible. See *id.* at 245-46; Marmor, *Notes on Some Psychodynamic Aspects of Homosexuality*, in TASK FORCE, *supra* note 28, at 55. Psychiatrists who argue that homosexuals show a variation in psychological health similar to heterosexuals criticize these psychiatrists for using non-representative samples, such as their own patients, or persons referred by the courts, to reach their results. See Schur, *supra* note 28, at 30. West notes the quote by Van Den Haag, who, in response to a colleague's remark that "all my homosexual patients are quite sick," retorted "so are all my heterosexual patients." D. WEST, *supra* note 24, at 244-45. They argue that studies with representative samples of homosexuals indicate that homosexuals are not consistently different from heterosexuals in their psychiatric functioning, and that many homosexuals enjoy happy and psychologically healthy lives. See *id.* at 244-45; Hooker, *supra* note 37, at 15-16; Schur, *supra* note 28, at 30; Marmor, *supra*, at 55.

In 1973, the American Psychiatric Association adopted a resolution that:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public

are less likely to be child molesters than are heterosexual men,¹¹¹

accommodation and licensing and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other person. Further, the American Psychiatric Association supports and urges the enactment of civil rights legislation at the local, state, and federal level that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychiatric Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private.

D. WEST, *supra* note 24, at 241-42. At the same time, the Association removed homosexuality from its list of mental disorders, while retaining under "sexual orientation disturbance" those persons who were primarily homosexual and who were disturbed by or wished to change their orientation. *Id.* at 242. The Association therefore no longer advocates the treatment of homosexuality unless a homosexual is disturbed by his or her orientation or wishes to change it. *Id.*

¹¹¹ See A. BURGESS, A. GROTH, L. HOLMSTROM, & S. SGROI, *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 3-5 (1978); V. DEFRANCIS, *PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS* vii, 38, 69-70 (1969) (study shows that the vast majority of sex crimes committed by adults against children are committed by men against girls); Groth, *Adult Sexual Orientation and Attraction to Underage Persons*, in 7 *ARCHIVES OF SEXUAL BEHAVIOR* 175-81 (1978); *Developments*, *supra* note 24, at 1639-40.

Statistics compiled by the Institute for Sex Research in its 1965 study of males charged with various sexual offenses involving both consenting and non-consenting partners suggests that male offenders involving children or minors are more concerned with the age than the sex of the object, and that pedophilia rather than sexual orientation often determines whether a male would attempt sexual contact with a child or minor of either sex. *SEX OFFENDERS*, *supra* note 28, at 294, 297. The Institute found that males convicted of sexual offenses involving either resisting or non-resisting male children (below age 12) and minors (between ages 12 and 15) are less homosexually-oriented than those whose offenses involve consenting male adults (age 16 or older). *Id.* at 624-38. The Institute's findings also indicate that homosexuals are no more likely to have relations with or be attracted to children than are heterosexuals. The findings indicate that males convicted of offenses involving either male or consenting female adults (age 16 or older) are unlikely to commit later offenses against children. *Id.* at 715-16.

Robert Geiser more recently argued that homosexual pedophilia is not synonymous with homosexuality, and that homosexuals attracted to adults are apparently extremely unlikely to engage in sexual acts with children. R. GEISER, *supra* note 99, at 78. He observed that studies indicate that males who sexually abuse male children are more likely to have a heterosexual history and orientation than a homosexual one, and that a quarter of males imprisoned for sexual offenses involving boys also had committed offenses with girls. *Id.* at 75. Geiser cited a study that found that of 27 males who had committed sexual offenses with only male or with male and female children, and who were primarily attracted to adults, nineteen were bisexually oriented, while none were primarily homosexual. *Id.* at 78 (citing Groth & Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 *ARCHIVES OF SEXUAL BEHAVIOR* 178 (1978)). As for those offenders against male or male and female children who were primarily attracted to children, the study indicates that although they were somewhat more likely to choose males, they were mainly attracted to the "feminine" qualities of young boys; the study also noted that these offenders expressed strong aversions to adult homosexuality. *Id.* Geiser also stated that males who were sexually attracted to teenage boys were usually bisexual or heterosexual, and, unlike homosexuals, tended to view the sexual activity not as part of a lifestyle but instead as recreational. *Id.* at 80-81.

and as a group are not prone to crime, including violent crimes and public sexual activity.¹¹² They also argue that the sexual orientation

West also noted recent studies that support the conclusions of the Institute, particularly research that found that homosexual men are less aroused by pictures of male children than are heterosexual men by pictures of female children. D. WEST, *supra* note 28, at 49 (citing Freund, *Assessment of Paedophilia*, in *ADULT SEXUAL INTEREST IN CHILDREN* (M. Cook & K. Howells ed. 1981)). West also observed other studies that indicate that heterosexuals are more likely than homosexuals to sexually involve themselves with children when frustrated in contacts with adults. *Id.* (citing Newton, *Homosexual Behavior and Child Molestation: A Review of the Evidence*, *ADOLESCENCE* 13, 29-54 (1978), and Groth & Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 *ARCHIVES OF SEXUAL BEHAVIOR* 175-81 (1978)). West concluded not only that most pedophiles seek females, but that homosexuals do not pose a greater risk to children than do heterosexuals. *Id.* at 45, 49. For a general discussion of research concerning pedophilia, see generally *id.* at 40-74. See also S. GOLDSTEIN, *supra* note 99, at 30-31 (sexual offenders of children were pedophilic, which was a completely separate issue from gender and sexual preference, though pedophilic offenders did have identifiable age and sex preferences).

¹¹² SEX OFFENDERS, *supra* note 28, at 357, 716. The Institute for Sex Research concluded that males convicted of sexual offenses involving older boys and men pose no criminal threat to society. *Id.* The Institute found that persons convicted of multiple homosexual offenses involving consenting adult males are the most likely of any studied category not to have other convictions for offenses involving force or minors. *Id.* at 706. The Institute reasoned that 85 percent of arrests leading to convictions for homosexual offenses involving adults arose from situations where arrest was improbable or unlikely, indicating that the homosexual offender made efforts to be discrete. *Id.* at 354. A relatively high percentage of these arrests, however, arose from activities outside residences, such as in restrooms and outdoors, as compared to arrests for heterosexual offenses involving consenting adult females. *Id.* at 353, 765-69. The Institute reasoned that prevalent social tolerances, such as the acceptability of heterosexual courtship in the home, and the resulting location of potential sexual partners, cause homosexuals to seek partners in more public places. *Id.* at 765-69. Other factors causing this difference include that twenty percent of homosexual offenses involving males do not involve any physical contact, with most of these instances involving solicitation, suggesting that many arrests occur before the offender could go to a residence. *Id.* at 353, 765. The Institute also found that the use of narcotics during homosexual offenses involving adults was insignificant, while alcohol played a small role in these offenses compared to other sexual offenses. *Id.* at 353.

The Institute also found that of homosexual offenses involving adults, 93 percent involved a male partner who encouraged or was passive to the conduct, while three percent involved physical duress. *Id.* at 354. Homosexual offenses, according to the Institute, have very low relative incidences of force or threat, especially those offenses involving adults. *Id.* at 788, 790-92. Similarly, homosexual offenders in general had the smallest proportion of non-sexual crimes involving violence or threats of harm of any class of sex offenders, according to the Institute, while homosexual offenders also convicted of non-sexual crimes likely were convicted for crimes of vagrancy and disorderly conduct. *Id.* at 703-04. The predominance of arrests of homosexuals for vagrancy and disorderly conduct, the Institute suggested, was because of methods many homosexuals use to meet potential sexual partners, and also because the police use these charges as convenient ways to pick up and hold people. *Id.* at 702-03. These findings indicate that males convicted of homosexual offenses show no greater likelihood of committing non-sexual crimes or any crimes involving force. See D. WEST, *supra* note 28, at 139-42.

of parents¹¹³ and teachers¹¹⁴ has no effect on the sexual orientation of children. Studies further indicate that homosexuals are as capable as heterosexuals of good parenting.¹¹⁵

Commentators also observe that those jurisdictions that have decriminalized homosexual conduct or protected homosexuals from discrimination show no evidence of increased criminal behavior,¹¹⁶ nor an increase in the spread of diseases such as AIDS.¹¹⁷ Although seventy-three percent of known AIDS cases in the United States involve gay and bisexual males, experts argue that new cases of AIDS have ceased to be an epidemic for gay males.¹¹⁸ Commentators also note research that shows that homosexuals are not excessively and stereotypically interested in sexual activity, and that homosexuals also enjoy nonsexual and long-term sexual relations.¹¹⁹

The degree of sexual interest and activity for homosexuals, like heterosexuals, they reason, varies greatly between individuals.¹²⁰ To

¹¹³ *Developments*, *supra* note 24, at 1638-39 & n.76. Approximately three million homosexuals in the United States are parents, and homosexual households raise more than eight million children. *Id.* at 1629. West noted that the courts, although becoming more open to granting custody to a homosexual parent, remain concerned about children in a household with a homosexual couple developing confused gender identities or sexual orientation, or facing embarrassment and social problems. D. WEST, *supra* note 28, at 150. He noted, however, surveys of lesbian households in which the sexual orientation of the single parent or lesbian couple had little apparent affect on the child's sexual identity development or social functioning. *Id.*

¹¹⁴ J. BAER, *supra* note 22, at 246 (arguing that because studies indicate that sexuality is determined no later than the fifth year of life, the sexuality of teachers probably could have no affect on the sexuality of students). Geiser also argued that it was unlikely that simple contact with a homosexual by a boy over six years of age would change an already established sexual preference. R. GEISER, *supra* note 99, at 92. Because male teachers attack more female than male students, and because homosexuals apparently pose no sexual threat to boys, Geiser advocates that pedophiles pose the true risk to children in the classroom. *Id.* at 93. Geiser noted, however, that reports of sexual abuse of male students continue to cause efforts to root out homosexual teachers. *Id.* at 92.

¹¹⁵ *Developments*, *supra* note 24, at 1636 n.57.

¹¹⁶ R. MOHR, *supra* note 2, at 43. Mohr argues that, when a heterosexual commits a crime, society perceives it as a crime, but when a homosexual commits a crime, society perceives it as a homosexual crime, especially if the crime is sexual. *Id.* at 25.

¹¹⁷ *Id.* at 43. Mohr noted that strongly anti-gay cities such as Houston and Miami have been hit heavily by the AIDS crisis. *Id.* Prohibitions of homosexual sodomy to control AIDS ignores that not all sodomous activity is at high-risk of spreading AIDS, and that the act itself, not the gender of the participants, determines the risk. *Developments*, *supra* note 24, at 1529-30. Lesbian sexual conduct, moreover, apparently is at extremely low risk of transmitting AIDS. *Id.* at 1529 & n.75. The government can also deter AIDS transmissions through less intrusive means than criminalizing certain forms of conduct. *Id.* at 1530 & n.77.

¹¹⁸ *Developments*, *supra* note 24, at 1663 & 1666 n.39. Commentators attribute this to gay males themselves modifying their sexual practices. *Id.* at 1529 n.74.

¹¹⁹ See SEX RESEARCH, *supra* note 26, at 140-53; SEX AND MORALITY, *supra* note 38, at 166-73.

¹²⁰ SEX RESEARCH, *supra* note 26, at 205-07.

the extent that researchers have found some gay males to be promiscuous, they attribute this to the common male tendency to seek out sexual opportunities, and to the difficulties homosexuals face in establishing stable relationships because of societal prejudice.¹²¹ Finally, they note that not all homosexuals engage in sodomy, that homosexual sexual activity is not limited to sodomy,¹²² and that a majority of heterosexuals also had engaged in sodomy.¹²³

Researchers into sexuality conclude that the personalities, social adjustments, and sexual functioning of homosexuals are as diverse as those of heterosexuals.¹²⁴ They argue that a person's sexual orientation does not predict anything about the person aside from that he or she becomes sexually aroused by, or engages in sexual behavior with, persons of the same gender.¹²⁵ The label of homosexual, they reason, is essentially arbitrary, because exclusive homosexuality and heterosexuality merely occupy the extremes of a sexual orientation continuum, and meaningless, because the label indicates very little about the individual.¹²⁶ Even the bases upon which individuals self-identify themselves as homosexual, according to these researchers, differ for each individual.¹²⁷

¹²¹ *Id.* at 208-09. These researchers also stress that, like heterosexuals, individual homosexuals exhibit varying degrees of sexual activity. *Id.* at 206, 208-09.

¹²² *Developments*, *supra* note 24, at 1521, 1568-69. This is especially true for lesbians, whose sexual conduct the courts often consider outside the scope of prohibited sodomy. *Id.* at 1525 n.44.

¹²³ *Id.* at 1568-69 & n.98 (citing statistics that 96 percent of males had orally stimulated female partners, that 85 percent of women had at least occasionally orally stimulated their husbands, and that 20 percent of women had engaged in anal intercourse with their husbands more than once); SEX RESEARCH, *supra* note 26, at 72-73 (60 percent of males found to have engaged in heterosexual oral sex); *Sex I.D. Is Poor Predictor of AIDS Risk, Study Shows*, Washington Blade, June 16, 1989, at 10, col. 1 (39 percent of heterosexual women and 27 percent of heterosexual men have engaged in anal sex).

¹²⁴ SEX RESEARCH, *supra* note 26, at 202.

There is no such thing as homosexuality. By this I mean that the homosexual experience is so diverse, the variety of its psychological, social, and sexual correlates so enormous, its originating factors so numerous, that to use the word "homosexuality" or "heterosexuality" as if it meant more than simply the nature of a person's sexual object choice is misleading and imprecise To put it another way, there are as many different kinds of homosexuals as heterosexuals, and thus it is impossible to predict the nature of any patient's personality, social adjustment, or sexual functioning on the basis of his or her sexual orientation.

Id.

¹²⁵ *Id.*

¹²⁶ *Id.* at 202-04, 212.

¹²⁷ *Id.* at 203-04. For instance, some persons engage in sex with persons of the same gender but do not consider themselves homosexual, while others who have engaged in little or no same-gender sexual activity nonetheless define themselves as homosexual. *Id.* at 204.

Another societal stereotype commentators identify is that homosexuals not only do not desire to live within the traditional family structure, but also actually threaten the institution of the family.¹²⁸ Those who believe that homosexuals threaten the family structure, these scholars note, argue that the weakening of the family by homosexuals could lead to a weaker society, because the family in their view serves as a foundation for American society.¹²⁹ They also argue that homosexuality, by weakening the traditional gender roles, also weakens the traditional family structure that is based on those gender roles.¹³⁰

Commentators argue, however, that evidence does not support the claim that homosexual conduct weakens heterosexual marriage.¹³¹ The commentators reason, moreover, that many homosexuals would form families if legally allowed and if a lessening of discrimination made the family endeavor less risky.¹³² They argue that the law artificially prevents homosexuals from forming families by proscribing marriage and restricting the ability of homosexuals to adopt children, live together, or engage in private sexual activity.¹³³ Despite these barriers, observers of the gay community report a large increase in the number of gays parenting or adopting children and raising them within a family setting.¹³⁴

¹²⁸ J. BAER, *supra* note 22, at 228. West noted that, for varying reasons, many homosexuals enter into heterosexual marriages, though the marriages often have problems. D. WEST, *supra* note 28, at 147-50.

¹²⁹ See J. BAER, *supra* note 22, at 228.

¹³⁰ See *Developments*, *supra* note 24, at 1527-28 & nn.61-63.

¹³¹ See *id.* at 1529 (claims that anti-sodomy laws strengthen heterosexual marriage discredited).

¹³² See J. BAER, *supra* note 22, at 236-37; R. MOHR, *supra* note 2, at 43-44; *Developments*, *supra* note 24, at 1610 & n.46. Homosexuals who live as couples face increased disapproval by neighbors and families, and discrimination by landlords and employers. *Id.* at 1610 n.46; see SEX RESEARCH, *supra* note 26, at 208-09 (discusses types of homosexual relationships, and problems that long-term relationships experience). The desire by homosexuals to live in a family setting, however, is by no means universal. Some more radical homosexual activists oppose the family institution and decry those homosexuals who attempt to settle down with a steady partner. D. WEST, *supra* note 24, at 145. West also noted, however, a 1960 English study that indicated that a quarter of homosexual males surveyed had lived together in homosexual couples for at least five years. *Id.* at 164 (citing G. WESTWOOD, A MINORITY (1960)).

¹³³ R. MOHR, *supra* note 2, at 43-44. Some observers question whether the apparent disinclination of homosexual males to have long-term relationships could be wholly explained by these legal and social sanctions, and instead suggest that some homosexual males prefer to retain their sexual and social freedom which a long-term relationship or a family would restrain. D. WEST, *supra* note 24, at 163-65.

¹³⁴ See Adams, *Gay couples begin a baby boom*, Boston Globe, Feb. 6, 1989, at 2, col. 3; Fadiman, *The Double Closet*, LIFE, May 1983, at 76.

Commentators note that many in society justify discrimination against homosexuals on the grounds of the perceived immorality of homosexuality.¹³⁵ In 1957, Great Britain instituted the Wolfenden Committee to study whether Great Britain should extinguish laws proscribing homosexual conduct and prostitution.¹³⁶ The Wolfenden Committee argued that private morality should not influence the criminal law unless that morality endangered public order, the safety of citizens, or caused persons to risk exploitation or corruption by others.¹³⁷ The Committee then concluded that private sexual activity between consenting adults, including homosexuals, should be beyond the state's power.¹³⁸ In the United States, the American Law Institute recognizes a role for morality in the criminal law, but argues that prohibition of conduct solely because it is inconsistent with the majoritarian notion of acceptable behavior sacrifices personal liberty.¹³⁹ Commentators have cited H.L.A. Hart's argument that there is no evidence that those who deviate from conventional sexual morality are in other ways hostile to so-

¹³⁵ R. MOHR, *supra* note 2, at 31.

¹³⁶ REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, GREAT BRITAIN 19 (Amer. ed. 1963) [hereinafter WOLFENDEN REPORT].

¹³⁷ J. BAER, *supra* note 22, at 228 (citing WOLFENDEN REPORT, *supra* note 136, at 48). The decisive factor for the Committee in recommending decriminalization of private homosexual relations was "the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality." AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 213.2, at 372 (1980) [hereinafter MODEL PENAL CODE] (quoting WOLFENDEN REPORT, *supra* note 136, at 52).

¹³⁸ J. BAER, *supra* note 22, at 233 (citing WOLFENDEN REPORT, *supra* note 136, at 23-24). Great Britain decriminalized private consensual homosexual acts between two males over 21 in the Sexual Offenses Act of 1967. D. WEST, *supra* note 28, at 1, 12. Homosexual acts in which one or more males are below 21, and lesbian acts in which one or both females are below sixteen, remain illegal. *Id.* at 11. Britain continues to prosecute adult homosexuals, however, for acts of public indecency involving conduct which heterosexuals may commit without risk, including even public kissing or embracing. *Id.* at 12. The act of soliciting a male for a sexual act, even if the act itself is legal and no payment is involved, also remains criminal in Britain under the Sexual Offenses Act of 1956. *Id.* at 13. Ironically, though anal sex between consenting adult homosexuals is now legal, the same act between a male and female, even if married, remains criminal but no longer prosecuted. *Id.* at 5.

¹³⁹ MODEL PENAL CODE, *supra* note 137, § 213.2, at 369, 372. The Institute argued that homosexuality could be viewed as a biological or psychological disease, which would exempt homosexuals from criminal liability, or as simply a different way of life, which also should be outside the scope of the criminal law, or as a moral failing, which arguably could allow criminal sanctions. *Id.* at 367-69. But the Institute identified several reasons why the "homosexuality as immorality" approach fails to justify the criminalization of homosexual acts, including the practical limits of the criminal law, the costs of enforcement, and the lack of consensus concerning the immorality of homosexuality. *Id.* at 369-72. Given the importance of protecting personal liberty, the Institute decided not to recommend sanctions for private, consensual acts between homosexual adults in its Model Code. *Id.* at 372.

ciety.¹⁴⁰ Hart also argues that a change in morality does not mean society would collapse, but only that society had changed, and that society should not necessarily fear such changes.¹⁴¹

Other scholars further argue that, if the lawmakers base some laws on a concept of morality related to current norms and customs of society, morality provides no guidance.¹⁴² They note that even Nazi society had a morality composed of norms and customs, but that most would find Nazi morality normatively lacking.¹⁴³ Morality as the basis of law, these commentators argue, must somehow be justifiable, and must be consistent, fair, and equally enforced.¹⁴⁴ Moral rules, for these theorists, must apply to all, including the rulemakers, and must avoid prejudice and rationalization.¹⁴⁵ On this basis, they dismiss tradition as a foundation for moral rules, for American society has rejected many traditions, such as slavery, as immoral.¹⁴⁶ These scholars note, moreover, that societal and even Judeo-Christian traditions were not uniformly negative toward homosexuality.¹⁴⁷

¹⁴⁰ J. BAER, *supra* note 22, at 229 (citing H.L.A. HART, *LAW, LIBERTY AND MORALITY* 51 (1963)).

¹⁴¹ *Id.* at 229-30 (citing H.L.A. HART, *LAW, LIBERTY AND MORALITY*, at 51-52); *see also* Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("only a stagnant society remains unchanged").

¹⁴² *See* R. MOHR, *supra* note 2, at 31.

¹⁴³ *Id.*

¹⁴⁴ *Id.*; *see also* J. ELY, *DEMOCRACY AND DISTRUST*, 255-56 n.92 (1980) (laws based on morality not infirm if generated by sincerely held moral view of act, but use of immorality claim cannot justify law motivated merely by desire to injure disfavored class).

¹⁴⁵ R. MOHR, *supra* note 2, at 31.

¹⁴⁶ *Id.* at 32.

¹⁴⁷ *Id.* at 32-34. Mohr argued that the Bible may not be as anti-gay as generally assumed. *Id.* at 32-33. He noted that Jesus never mentioned homosexuality, that the destruction of Sodom was probably due to inhospitality, not homosexual behavior, and that some of the condemnations in the Old Testament appear to be aimed at competing cultures that accepted homosexual practices. *Id.*; *see also* D. WEST, *supra* note 24, at 120. He also noted that those who cite *Leviticus* when condemning homosexuality are likely not following the myriad of other rules, mainly dietary and hygienic, laid out in the Torah. R. MOHR, *supra* note 2, at 33. Mohr therefore argues that those who condemn homosexuality read the Bible very selectively, and use their prejudices to interpret the Bible, not the Bible to guide their moral beliefs. *Id.* West also notes that Biblical rules on fornication, money-lending, circumcision, witchcraft, diet, and Sunday observance are often disregarded, and argues that the Bible's condemnations of homosexuality therefore could not be the entire reason for society's hostility to homosexuality. D. WEST, *supra* note 28, at 123. Kinsey similarly notes that religious literature does not discuss the sinfulness of homosexuality as frequently or openly as the sinfulness of masturbation and of pre-marital intercourse. MALE SEXUAL BEHAVIOR, *supra* note 24, at 483. Some theologians, clergy, and denominations that continue to view homosexuality as unnatural and sinful, and as requiring treatment and repentance, nonetheless oppose the criminalization and societal repression of homosexuals. *See* Katz, *supra* note 37, at 61-62.

Scholars argue that the government's stated moral interest in deterring homosexuality cannot be separated from prejudice against homosexuals.¹⁴⁸ They compare justifications for discrimination against homosexuals based on morality with moral justifications for racial discrimination.¹⁴⁹ This morality, they reason, is the promotion of particularly heterosexual value judgments about homosexuality and gender roles, and is therefore the imposition of a particular group's morality on another, weaker, class because of prejudice.¹⁵⁰

Finally, commentators argue that the massive legal discrimination against homosexuals indicates that, like African-Americans during the period of legally recognized segregation, the government does not consider homosexuals to be entitled to the same respect as others within society.¹⁵¹ These commentators observe that what the law or lack of law recognizes, condones, or requires greatly affects the minds of those governed, for law is the symbol of acceptable attitude and ideology.¹⁵² The current state of the law concerning homosexuals, these commentators argue, reinforces the homophobic attitudes and prejudices that exist in American society, and implies that homosexuals' rights are not worth protecting.¹⁵³ These commentators also note that the legal and private discrimination homosexuals face affects every facet of their lives, including the primary components of a meaningful life such as employment, family, and sexual intimacy.¹⁵⁴

II. THE ENFORCEMENT OF THE PRINCIPLE OF EQUAL PROTECTION

After the Civil War, Congress and the states ratified the fourteenth amendment, which enacted into constitutional law the principle of equal protection of the laws.¹⁵⁵ In enforcing and interpreting the principle of equal protection as contained in the fifth and fourteenth amendments, courts have established a doctrine by which to determine whether a classification is unconstitutional be-

¹⁴⁸ *Developments*, *supra* note 24, at 1528 n.68.

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at 1528-29 & n.69. These commentators argue that homosexuality is viewed as deviating from the traditional roles of males and females in procreating, in the family, and in society. *See id.* at 1527-28.

¹⁵¹ J. BAER, *supra* note 22, at 34.

¹⁵² *SEXUAL ORIENTATION*, *supra* note 49, at Intro 2.

¹⁵³ *Id.*

¹⁵⁴ R. MOHR, *supra* note 2, at 30.

¹⁵⁵ *See W. NELSON*, *supra* note 9, at 58-59 (1988).

cause it is based on invidious intent.¹⁵⁶ In particular, the courts have developed a set of criteria by which they determine whether certain classifications should be presumed invalid and subjected to heightened scrutiny; to rebut such a presumption, the government must show an important goal to be accomplished, and a strong relationship between that goal and the classification.¹⁵⁷

In 1866, the United States Congress passed and submitted the fourteenth amendment to the states, who ratified the amendment in 1868.¹⁵⁸ Section one of the amendment declares that all persons born or naturalized in the United States, and subject to United States law, are citizens of the United States and of the states in which they live.¹⁵⁹ Section one then declares that no state may make or enforce laws that abridge the "privileges and immunities" of citizens, or deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws.¹⁶⁰ Section five gives Congress the power to enforce legislatively the amendment's provisions.¹⁶¹

Historians have observed that Congress and the states ratified the fourteenth amendment primarily in response to slavery, and to the many state laws passed after the Civil War that curtailed the rights and liberties of African-Americans.¹⁶² Some historians and legal commentators thus argue that the fourteenth amendment's framers intended that the amendment only apply to state discrimination against African-Americans.¹⁶³ Some further argue that the framers did not intend to grant voting rights to African-Americans, or to eliminate segregation or miscegenation statutes.¹⁶⁴

Other commentators and historians, however, argue that the framers intended the amendment to have a broad meaning that would not only prohibit all legal discriminations against race, but

¹⁵⁶ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

¹⁵⁷ See *id.*

¹⁵⁸ E.g., W. NELSON, *supra* note 9, at 58-59. For a discussion of the legislative history and ratification process, see generally *id.*; J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); Commager, *Historical Background of the Fourteenth Amendment*, in *THE FOURTEENTH AMENDMENT* 14-28 (B. Schwartz ed. 1970) [hereinafter Commager].

¹⁵⁹ U.S. CONST. amend. XIV, § 1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at § 5.

¹⁶² See, e.g., W. NELSON, *supra* note 9, at 45; see *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1873).

¹⁶³ See, e.g., Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1-65 (1955). For a general discussion of the scholarship in this area, see W. NELSON, *supra* note 9, at 2-8.

¹⁶⁴ See Bickel, *supra* note 163, at 58.

would also prevent invidious non-racial discriminations.¹⁶⁵ These historians note that the fourteenth amendment's framers purposely did not limit the terms of the amendment to racial discrimination.¹⁶⁶ These scholars observe that the framers, before the Civil War, had been activity involved in the abolition movement.¹⁶⁷ The abolitionists promoted a natural law theory of equality that held that all humans are naturally equal without regard to abilities, traits, or merit.¹⁶⁸

These historians and commentators therefore argue that the framers intended the equal protection clause to prevent the states from infringing any person's natural entitlement to equality of rights.¹⁶⁹ The framers, these scholars reason, intended the equal protection clause to articulate the moral principle that all persons have a right to be treated fairly and equally by the states without regard to personal characteristics.¹⁷⁰ They further argue that the framers understood that, because the fourteenth amendment was a constitutional provision and therefore part of the nation's organic law, future courts would interpret the equal protection clause according to changing circumstances and beliefs.¹⁷¹ Thus, the framers, according to these scholars, purposely constructed the equal protection clause in broad and prohibitive terms, with enforcement mechanisms given to both Congress and the courts.¹⁷²

The United States Supreme Court has also noted that the primary intent of the fourteenth amendment was to protect African-Americans from state laws that discriminated against them.¹⁷³ The

¹⁶⁵ See, e.g., W. NELSON, *supra* note 9; J. BAER, *supra* note 22; Commager, *supra* note 158.

¹⁶⁶ See, e.g., Commager, *supra* note 158, at 23-24. The earliest version of the equal protection clause stated that "all laws, state and national, shall operate impartially and equally on all persons without regard to race or color." Bickel, *supra* note 163, at 30.

¹⁶⁷ See, e.g., J. BAER, *supra* note 22, at 57-72; Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV., 3-39 (1954), reprinted in H. GRAHAM, *EVERYMAN'S CONSTITUTION* 298-336 (1968) [hereinafter H. GRAHAM]; Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 341 (1949).

¹⁶⁸ See, e.g., J. BAER, *supra* note 22, at 38-56; H. GRAHAM, *supra* note 167, at 298-304.

¹⁶⁹ See, e.g., H. GRAHAM, *supra* note 167, at 157-85; Tussman and tenBroek, *supra* note 167, at 341.

¹⁷⁰ See, e.g., W. NELSON, *supra* note 9, at 13-18.

¹⁷¹ *Id.* at 45-61.

¹⁷² See *id.* Historians note that early drafts of the amendment limited its scope to race, to certain rights, or to enforcement only by Congress, not the courts. *Id.* at 45-61, 145.

¹⁷³ *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-81 (1873). *But see Strauder*, 100 U.S. at 306-08, 310 (Court also stated that if an African-American majority discriminated against whites, or a law discriminated against Celtic Irish, those actions would also fail to provide equal protection).

Court has also observed, however, that Congress worded the amendment in general and comprehensive terms that implicitly protect the equal enjoyment of many unenumerated rights, among them the right to equal legal protection of life, liberty, and property.¹⁷⁴ The equal protection clause's "broader, organic purpose," according to the Court, is the elimination of government-sponsored arbitrary and invidious discrimination.¹⁷⁵

The spirit of the equal protection clause, the Court therefore observed, is that all persons retain a positive immunity, or a right to be exempt, from unfriendly legislation that asserts their inferiority, stimulates prejudice, or impedes equal enjoyment of rights and liberties.¹⁷⁶ The Court has thus held that a bare legislative desire to harm a politically unpopular class violates the principle of equal protection of the laws.¹⁷⁷ The Court has also held that classifications that assert a stigma or a sense of inferiority deprive the stigmatized class of equal protection.¹⁷⁸

Nor, according to the Court, do government classifications based on archaic and stereotypic conceptions about a class fulfill equal protection requirements.¹⁷⁹ The Court also prevents the government from disadvantaging a class because of the negative effects of discrimination on the class, as when a court removes child custody from a parent because of prejudice against the race of the parent's companion.¹⁸⁰ Although the Constitution, the laws, and the courts

¹⁷⁴ *Strauder*, 100 U.S. at 310.

¹⁷⁵ See *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880). Conversely, the Court has held that classifications that disadvantage even a racial class, under some circumstances, may be permissible if the government did not classify with an invidious purpose. See *Korematsu v. United States*, 323 U.S. 214, 217-19, 223 (1944) (military order restricting Japanese-Americans from area not a violation of equal protection clause; order based on legitimate military concerns, not prejudice or hostility); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (classification favoring a gender constitutional if intentionally and directly assists disproportionately burdened gender, and classification counters that disadvantage).

As organic law, the Court has also reasoned that the framers' intent is both difficult to determine, and often immaterial because of changes in society since its ratification. See *Crown v. Board of Educ.*, 347 U.S. 483, 489-90, 492-93 (1954).

¹⁷⁶ *Strauder*, 100 U.S. at 306-08.

¹⁷⁷ *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹⁷⁸ *Loving*, 388 U.S. at 11-12; *Brown*, 347 U.S. at 493-95; see *McLaughlin v. Florida*, 379 U.S. 184, 187 (1964) (statute criminalizing interracial cohabitation, although providing same penalty for each without regard to race, violated equal protection clause).

¹⁷⁹ *Hogan*, 458 U.S. at 724-25, 731; see *Orr v. Orr*, 440 U.S. 268, 283 (1979) (legislative classifications based on gender carry inherent risk of reinforcing stereotypes about women).

¹⁸⁰ *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984); see also *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-49 (1985) (community prejudice against mentally retarded could not justify classification burdening them); *Palmer v. Thompson*, 403 U.S.

cannot control private prejudice, according to the Court, those legal institutions may not directly or indirectly give those prejudices effect.¹⁸¹

The Supreme Court has not restricted the equal protection clause's prohibition of invidious classifications to those based on race,¹⁸² nor only to classifications instituted by state governments.¹⁸³ Classifications that the Court has declared invidious have included classifications disadvantaging women,¹⁸⁴ men,¹⁸⁵ hippies,¹⁸⁶ certain types of felons,¹⁸⁷ alien children,¹⁸⁸ and the mentally retarded.¹⁸⁹ The Court has also declared that classifications by the federal government that invidiously discriminate violate equal protection principles implicitly contained in the due process clause of the fifth amendment.¹⁹⁰

217, 260-61 (1971) (White, J., dissenting) (government cannot avoid constitutional duty by bowing to hypothetical effects of private racial prejudice); *Watson v. Memphis*, 373 U.S. 526, 535 (1963) (African-American access to public parks could be denied because of "hostility to their assertion or exercise."); *Wright v. Georgia*, 373 U.S. 284, 293 (1963) (possibility of disorder by whites could not justify exclusion of African-Americans from public parks, nor their arrest for breach of the peace for using public park); *Taylor v. Louisiana*, 370 U.S. 154, 156 (1962) (breach-of-peace convictions of African-Americans for refusing to use segregated waiting room to buy interstate bus tickets violated equal protection); *Garner v. Louisiana*, 368 U.S. 157, 174 (1961) (breach-of-peace convictions for sitting peacefully at segregated cafe counter violated equal protection clause); *Buchanan v. Warley*, 245 U.S. 60, 80-81 (1917) (residential segregation, which state justified as preventing race conflicts, held to violate equal protection clause).

¹⁸¹ *Palmore*, 466 U.S. at 433-34.

¹⁸² See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion). But see *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), where the Court reasoned that the fourteenth amendment's purpose was to prevent state discrimination because of race and color, and that the amendment's application to other classifications would therefore require a strong justification. The Court refused to hold explicitly, however, whether the amendment might have other purposes. *Id.*

¹⁸³ *Bolling v. Sharpe*, 357 U.S. 497, 499 (1954).

¹⁸⁴ *Id.*

¹⁸⁵ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979).

¹⁸⁶ *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973).

¹⁸⁷ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹⁸⁸ *Plyler v. Doe*, 457 U.S. 202, 223-24, 230 (1982).

¹⁸⁹ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985).

¹⁹⁰ *Bolling v. Sharpe*, 357 U.S. 497, 499 (1954). Court precedent before *Bolling* had held that the fourteenth amendment applied only to the states, while the fifth amendment, which does not include an equal protection clause, applied to the federal government and the District of Columbia. *Id.* at 498-99.

The Court treats fifth amendment equal protection claims identically with claims under the fourteenth amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). But see *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976) (applied different equal protection analysis to federal classification disadvantaging aliens than to similar state classifications invalidated in cases such as *Graham v. Richardson*, 403 U.S. 365 (1971)).

The Court has held government actions that disadvantage a class to be arbitrary or invidious not only when classifications explicit in a statute or regulation are invidious on their face, but also when a classification's administration¹⁹¹ or legislative history¹⁹² reveals invidious motives against a class. The Court has held government application of laws that are fair on their face to be invidious and a denial of equal protection if the application is "with an evil eye and an unequal hand" against a class.¹⁹³ The Court, however, has held that classifications that have a disparate impact on a class will only be invalidated if the Court holds that the adverse impact reflects purposeful invidious discrimination.¹⁹⁴ Legislative history indicating that a legislature instituted a classification because of a desire to harm a politically unpopular group has also caused the Court to invalidate a statutory classification.¹⁹⁵

The equal protection clause, according to the Court, therefore prohibits the government, not from treating different classes in different ways, but instead from treating different classes differently for reasons unrelated to the achievement of a legitimate government objective.¹⁹⁶ The Court presumes the constitutional validity of most governmental classifications, and will sustain those classifications if they are rationally related to a legitimate government interest.¹⁹⁷ This standard, according to the Court, only requires that the Court determine if any possible basis exists for concluding that a classification serves a rational purpose.¹⁹⁸ The Court, when applying this rational-basis standard of review, allows the government

¹⁹¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

¹⁹² *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹⁹³ *Yick Wo*, 118 U.S. at 373-74; see *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985).

¹⁹⁴ *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272-74 (1979); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁹⁵ *Moreno*, 413 U.S. at 534.

¹⁹⁶ *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

¹⁹⁷ *E.g.*, *Cleburne*, 473 U.S. at 440; *Moreno*, 413 U.S. at 533; *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (presumption that legislation affecting commercial transactions rests on rational basis within knowledge and experience of legislators, and so not unconstitutional).

¹⁹⁸ *Loving v. Virginia*, 388 U.S. 1, 8 (1967). The Court gives economic and social classifications particular deference under the rational-basis test. *Cleburne*, 473 U.S. at 440; see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (economic classifications always upheld); *New Orleans v. Duke*, 427 U.S. 297, 306 (1976) (overturning *Morey v. Doud*, 354 U.S. 457 (1957), the only modern case that held an economic classification to violate equal protection principles).

considerable latitude in its choice of how to pursue a legitimate government interest, and will not closely scrutinize the basis or effectiveness of that choice.¹⁹⁹ The Constitution presumes, according to the Court, that democratic processes will eventually rectify even improvident government actions.²⁰⁰

The Court, however, has refused to presume that a government based a classification on rational, not invidious purposes, when the classification affects certain classes or restricts certain liberties, and the Court therefore subjects such classifications to heightened scrutiny.²⁰¹ Certain classifications, according to the Court, themselves provide a reason to infer that the government so classified out of antipathy to a class,²⁰² and that the class thus requires "extraordi-

¹⁹⁹ See *Cleburne*, 473 U.S. at 441, 446; *Murgia*, 427 U.S. at 314; see also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (under rational-basis test, equal protection clause not violated merely because classification imperfect); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (equal protection clause does not require that classification be "made with mathematical nicety").

²⁰⁰ *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Although this rational-basis review is deferential, the Court on some occasions used it to hold that a classification violated the equal protection clause. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) (no rational reason related to legitimate government purpose for city to prevent group home for mentally retarded); *Moreno*, 413 U.S. at 533-38 (government failed to show legitimate government interest that was rationally promoted by excluding certain types of households from food stamp program).

²⁰¹ *Cleburne*, 473 U.S. at 440-41; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The Court has held that it will more closely scrutinize classifications that restrict a class's access to a constitutional right to insure that those classifications are not invidious. See *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969) (law limiting who may vote in school district elections subject to "close and exacting examination"); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (state could not penalize welfare applicants who exercised right to move from state to state); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (sterilization of certain classes of felons not presumed constitutional because marriage and procreation are fundamental rights).

The *Skinner* Court overturned an Oklahoma state court judgment ordering the sterilization of Skinner, pursuant to an Oklahoma statute that provided for the sterilization of two-time felons, except those felons guilty of embezzlement, political offenses, and several other categories of felonies. 316 U.S. at 537, 542 (citing OKLA. STAT. ANN. tit. 57, §§ 171-195 (West 1935)). The *Skinner* Court reasoned that the statute differentiated between types of felonies that were intrinsically similar in quality. *Id.* The Court held that sterilization laws infringed on the right to procreate, and that therefore classifications in a sterilization law must face strict scrutiny. *Id.* at 541. The *Skinner* Court further reasoned that the classification warranted strict scrutiny because a state could use the power to sterilize to discriminate invidiously against certain groups, with devastating effects on that class as well as on the sterilized person. *Id.* Applying strict scrutiny to Oklahoma's classification between felons, the *Skinner* Court held that Oklahoma failed to justify the classification sufficiently, and therefore held that Oklahoma violated the equal protection clause by invidiously discriminating between persons who committed substantially the same type of offense. *Id.*

²⁰² *Cleburne*, 473 U.S. at 440; *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

nary protection from the majoritarian political process."²⁰³ The Court, because of this inference of invidiousness, subjects classifications affecting those classes to more searching scrutiny, and requires the government to show persuasive justification for the classification to insure that the government did not classify out of antipathy to the class.²⁰⁴

The Court has therefore held that government classifications based on the race, gender, national origin, alienage, or illegitimacy of a class must pass a heightened level of scrutiny for the Court to uphold the classification.²⁰⁵ For classifications based on race, national origin, and alienage, which the Court refers to as suspect, the Court utilizes strict scrutiny, requiring that the classification bear a necessary relation to a compelling government interest.²⁰⁶ Gender and illegitimacy classifications, referred to as quasi-suspect classes, receive intermediate scrutiny, with which the Court requires that the classification be substantially related to an important government interest.²⁰⁷

²⁰³ *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

²⁰⁴ *Cleburne*, 473 U.S. at 440-41, 443; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The Court has noted that "heightened scrutiny inevitably involves substantive judgments about legislative decisions. . . ." *Cleburne*, 473 U.S. at 443.

²⁰⁵ *Cleburne*, 473 U.S. at 440-41. Concerning race, see *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu*, 323 U.S. at 223-24; *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

On national origin and ethnicity, see *Oyama v. California*, 332 U.S. 633, 645-46 (1948); *Hirabayashi*, 320 U.S. at 100.

On gender, see *Hogan*, 458 U.S. at 724; *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Feeney*, 442 U.S. at 273; *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-17 (1977); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

On alienage, see *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *Takahashi v. Fish & Game Comm's*, 334 U.S. 410, 420 (1948).

On illegitimacy, see *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Parham v. Hughes*, 441 U.S. 347, 351-53 (1979); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977); *Mathews v. Lucas*, 429 U.S. 495, 506 (1976); *Gomez v. Perez*, 409 U.S. 535, 537-38 (1973); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 172-76 (1972). For discussions of current equal protection and heightened scrutiny jurisprudence, see Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONSTITUTIONAL COMMENTARY 375 (1986); Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority"*, 16 GA. L. REV. 407 (1982); Farrell, *Equal Protection: Overinclusive Classifications and Individual Rights*, 41 ARK. L. REV. 1 (1988); Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184 (1986).

²⁰⁶ *Cleburne*, 473 U.S. at 440.

²⁰⁷ *Id.* at 440-41.

The Court has established several factors that it considers when determining if it should replace the normal presumption of a classification's validity with a presumption of an invidious or arbitrary basis for a classification.²⁰⁸ Among these factors, the Court considers whether a class has experienced a history of pervasive societal discrimination or false stereotypes,²⁰⁹ and the degree to which the defining characteristics of a class are immutable, outside the class members' control, or unrelated to the member's abilities.²¹⁰ The Court also analyzes whether a class constitutes a discrete and insular minority unable to command respect by the government.²¹¹ An additional factor occasionally considered by the Court is whether classifications involving a class often stigmatize the class or relegate it to an inferior legal or social status without regard to the class members' actual abilities.²¹²

One group of factors the Court has identified is evidence that society has subjected a class to a history of intentional and pervasive unequal treatment or unique disabilities because of pervasive antipathy, or because of stereotypes that fail to indicate, with accuracy, individual abilities or class members.²¹³ Pervasive antipathy and stereotypes, according to the Court, require it closely to scrutinize classifications affecting these classes because of the likelihood that the government acted out of prejudice or unreasoned habit.²¹⁴ The Court's consideration of whether a class has experienced a history of discrimination because of antipathy has led, in part, to holdings that women,²¹⁵ but not the elderly²¹⁶ or the mentally

²⁰⁸ *Id.* at 440-46; *Rodriguez*, 411 U.S. at 28.

²⁰⁹ *E.g.*, *Frontiero*, 411 U.S. at 684-86; *Rodriguez*, 411 U.S. at 28.

²¹⁰ *Frontiero*, 411 U.S. at 686.

²¹¹ *Rodriguez*, 411 U.S. at 28; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²¹² *Frontiero*, 411 U.S. at 686-87; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *see Plyler v. Doe*, 457 U.S. 202, 223 (1982) (actual classification being challenged subject to heightened scrutiny because would stigmatize undocumented alien children with illiteracy).

²¹³ *Murgia*, 427 U.S. at 313; *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *see Strauder v. West Virginia*, 100 U.S. 303, 306-09 (1880) (fourteenth amendment to protect African-Americans from pervasive and habitual discrimination and antipathy).

²¹⁴ *See Mathews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting); *Frontiero*, 411 U.S. at 684-86.

²¹⁵ *Frontiero*, 411 U.S. at 684-86, 688.

²¹⁶ *Murgia*, 427 U.S. at 313. In holding that a state statute requiring state police officers to retire at the age of fifty did not deny officers over fifty equal protection of the laws, the *Murgia* Court refused to hold the class of police officers over fifty to be a suspect class. *Id.* at 313, 317. Although acknowledging that the aged have experienced some history of dis-

retarded,²¹⁷ constitute classes requiring judicial protection from the democratic processes.

In holding that women constitute a protected class, the United States Supreme Court in *Frontiero v. Richardson*, decided in 1973, reasoned that the history of discrimination in United States society clearly justifies the Court's heightened scrutiny of gender classifications.²¹⁸ *Frontiero* held that a federal statute providing for increased housing allowances and medical and dental care for members of the uniformed services with dependents violated the equal protection requirements of the fifth amendment, because the statute required female members, but not males, to establish that a spouse depended on the member for over one-half of his support.²¹⁹ *Frontiero*, a female member of the United States Air Force who failed to establish that her husband relied on her for over one-half of his support, sued claiming that the statute unreasonably discriminated on the basis of gender.²²⁰

The *Frontiero* Court agreed, holding that classifications based on sex, like race, alienage, and national origin, are inherently suspect and therefore subject to heightened judicial scrutiny.²²¹ Observing that the government justified the classification based on administrative convenience, the *Frontiero* Court reasoned that this justification for the additional burden placed on female uniformed service members could not sustain the classification under heightened scrutiny.²²² The Court therefore held that the classification was an arbitrary legislative choice prohibited by equal protection principles.²²³

The *Frontiero* Court reasoned that gender-based classifications are suspect by analyzing several factors, among them the extensive history of sex discrimination in the United States.²²⁴ The Court

crimination, the Court reasoned that society had not subjected the aged to purposeful discrimination "on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* at 313.

²¹⁷ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442, 443 (1985). The Court partially based its holding that the mentally retarded were not a suspect class on its observation that positive legislative responses to the plight of the mentally retarded belied continuing antipathy that would justify more intrusive judicial oversight. *Id.* at 443.

²¹⁸ *Frontiero*, 411 U.S. at 684.

²¹⁹ *Id.* at 679-80.

²²⁰ *Id.* at 680.

²²¹ *Id.* at 682.

²²² *Id.* at 690.

²²³ *Id.* at 690-91.

²²⁴ *Id.* at 684.

observed that pervasive notions of "romantic paternalism" resulted in many statutes containing stereotyped gender distinctions that placed women, during the nineteenth century, in a position comparable to that of African-Americans before the Civil War.²²⁵ These classifications, which "put women, not on a pedestal, but in a cage," prevented women from holding public office, voting, serving on juries, bringing judicial suits, or, if married, conveying property or serving as legal guardians of their children.²²⁶ Although, the Court reasoned, women's position in society had markedly improved, the Court observed that women continue to face pervasive discrimination in education, employment, and politics, in part because of the visibility of gender characteristics.²²⁷ The Court therefore held that classifications based on gender are inherently suspect, because of the likelihood of invidious motives for the classification.²²⁸ Thus, the Court subjected the uniformed services' additional gender-based requirement for increased dependent's benefits to heightened scrutiny.²²⁹

In considering whether it should subject a classification to heightened scrutiny, the Court also considers whether the unique characteristics of an affected class are relevant to a class member's ability to perform or contribute to society.²³⁰ If the characteristics are rarely relevant to capabilities, the Court reasons that government classifications based on those characteristics more likely constitute invidious discrimination.²³¹ Additional factors the Court considers when looking at the defining characteristics of a class include not only whether the classification reflects stereotypes about the capabilities of a class, but also whether the defining characteristics are immutable or outside the class member's control.²³²

In holding that a federal classification that placed additional burdens on female members of the uniformed services before they

²²⁵ *Id.* at 684-85.

²²⁶ *Id.* at 685.

²²⁷ *Id.* at 685-86.

²²⁸ *Id.* at 688.

²²⁹ *Id.*

²³⁰ *Mathews v. Lucas*, 427 U.S. 495, 503 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973); see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (aged not burdened because of "stereotyped characteristics not truly indicative of their abilities").

²³¹ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985); *Frontiero*, 411 U.S. at 686-87.

²³² *Cleburne*, 473 U.S. at 441; *Frontiero*, 411 U.S. at 686; see *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (classification imposes hardship on children not accountable for their disabling status as illegal aliens).

could receive additional benefits for dependents denied those females equal protection of the laws, the *Frontiero* Court subjected the classification to heightened scrutiny in part because gender characteristics are immutable accidents of birth usually unrelated to actual capabilities.²³³ The Court noted that gender is similar to race and national origin because, like those classifications, gender is immutable and established randomly.²³⁴ If the government burdens a class because of gender, the Court reasoned, it violates the concept that legal burdens should relate to individual responsibility.²³⁵ The Court also distinguished gender from intelligence, physical disability, and other non-suspect status defined by immutable characteristics outside the control of the class members, by reasoning that gender characteristics frequently bear no relation to individual capabilities to perform or contribute to society.²³⁶ The Court therefore held that gender classifications usually invidiously relegate females as a class to inferior legal status without regard to individual capabilities.²³⁷

The Court conversely has held that the mentally retarded are not a class requiring heightened judicial protection, because they have distinguishing characteristics that impair their abilities and to which the government could legitimately respond.²³⁸ The Court reasoned that the government has a legitimate interest in providing in the law for mental retardation, and that the difficult and technical task of so providing belongs to the legislatures, not the courts.²³⁹ Classifications based on mental retardation, according to the Court,

²³³ *Frontiero*, 411 U.S. at 686.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 686-87.

²³⁸ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442, 444 (1985). The mentally retarded, the Court reasoned, have impaired capabilities that affect, with wide variations between individuals, their ability to function. *Id.* at 442. The city required a special use permit for the construction of hospitals for the insane, "feeble-minded," alcoholic, and drug addicted, and also for prisons, but not for other group homes or health care institutions. *Id.* at 436, 447. The city determined that the Cleburne Living Center constituted a hospital for the "feeble-minded," and subsequently denied the required permit. *Id.* at 436-37. The Court held that, because the government may legitimately take mental retardation into account, it would only subject such classifications to rational-basis scrutiny and presume their constitutional validity. *Id.* at 446. The Court nonetheless found that the city required the permit because of irrational prejudice, not because of any legitimate government interest rationally related to the additional permit requirement, and therefore held that the permit requirement as applied to the Living Center denied to the mentally retarded equal protection of the laws. *Id.* at 448, 450.

²³⁹ *Id.* at 442-43.

reflect the distinctive characteristics and needs of the mentally retarded.²⁴⁰ Reasoning that these classifications are usually not only legitimate but desirable, the Court noted that heightened judicial scrutiny of these classifications might dissuade government bodies from providing for mental retardation at all or restrict the government's flexibility in dealing with the wide variation of needs and abilities of the mentally retarded.²⁴¹ The Court has therefore established that classifications affecting a class with distinguishing characteristics relevant to legitimate state interests should only undergo rational-basis scrutiny.²⁴²

Even when the government has a legitimate interest in penalizing a class's distinguishing characteristics, however, the Court has provided heightened protection if the class is not responsible for, or has no control over, those characteristics. In *Plyler v. Doe*, decided in 1982, the United States Supreme Court subjected Texas's denial of free public education for alien children who illegally entered the United States to heightened scrutiny, and held that Texas violated the children's equal protection rights.²⁴³ *Plyler* concerned Texas statutes that withheld state funds from local school districts for the education of children not legally admitted into the United States, and that authorized the districts to deny public school enrollment to those children.²⁴⁴ After holding that the equal protection clause protects illegal aliens,²⁴⁵ the Court reasoned that the children's lack of responsibility for their illegal status, and the importance of education to the children and society, required that Texas demonstrate that the denial of public education to undocumented alien children furthered some substantial state goal.²⁴⁶ The *Plyler* Court held that Texas failed to show any substantial state goal furthered by denying

²⁴⁰ *Id.* at 444.

²⁴¹ *Id.* at 444-45. The Court also observed that if it held the large and amorphous class of the mentally retarded as a class requiring heightened judicial scrutiny, other classes with perhaps immutable disabilities and other similar indicia of political weakness and prejudice, such as the aged and mentally ill, could also successfully claim heightened protection. *Id.* at 445-46.

²⁴² *See id.* at 441-42.

²⁴³ *Plyler v. Doe*, 457 U.S. 202, 205, 230 (1982).

²⁴⁴ *Id.* at 205.

²⁴⁵ *Id.* at 210. The Court rejected Texas's argument that illegal aliens were not "within its jurisdiction" and therefore had no right to equal protection of the laws. *Id.* The Court reasoned that the fourteenth amendment's requirement that states not deny to "any person within its jurisdiction" equal protection extended to anyone present in a state and therefore subject to its laws. *Id.* at 215.

²⁴⁶ *Id.* at 223-24.

these children an education, and ruled that Texas violated their equal protection rights.²⁴⁷

In reasoning that Texas's classification was subject to heightened judicial scrutiny, the *Plyler* Court nonetheless noted that adult illegal aliens are not a suspect class, because they voluntarily enter into a class defined by its illegality.²⁴⁸ The Court noted that illegal alien status is not constitutionally irrelevant, because the status relates to spheres of authority, such as over foreign policy, constitutionally granted to the federal government.²⁴⁹ Status as an illegal alien, the Court further observed, is not immutable, because the status is a product of a conscious, unlawful act, and because the status could be removed by leaving the United States.²⁵⁰ Adult illegal aliens therefore, according to the Court, although protected from governmental invidious discrimination, are not a suspect class requiring heightened judicial protection, and could be penalized by the government for their voluntary and illegal status, if justified by legitimate government interests.²⁵¹

The *Plyler* Court observed, however, that the minor children of illegal aliens are not responsible, nor could they alter, their status, and that they therefore have little control over their status as undocumented aliens.²⁵² Noting that legal burdens should relate to individual responsibility or wrongdoing, the Court reasoned that Texas likely could not provide a rational justification for discriminatorily burdening undocumented children not responsible for their disabling status.²⁵³ Further observing that Texas's policy denied to those children a basic education, and therefore imposed a lifetime hardship on a class not responsible for their defining, illegal characteristic, the *Plyler* Court held that Texas had to show that the statutes furthered a substantial state goal.²⁵⁴ The *Plyler* Court therefore provided additional protection to undocumented alien children

²⁴⁷ *Id.* at 230.

²⁴⁸ *Id.* at 219-20 & n.19, 223.

²⁴⁹ *Id.* at 219 n.19, 223.

²⁵⁰ *Id.* at 220.

²⁵¹ *Id.* at 210, 219-20, 223; *see Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (fifth amendment protects illegal aliens from invidious discrimination by federal government).

²⁵² *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982).

²⁵³ *Id.* at 220-22 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

²⁵⁴ *Id.* at 223-24. The Court refused to hold that public education is a fundamental right, but reasoned that education plays a fundamental role in the future opportunities of the child and the health of the nation. *Id.* at 221-23 (citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

that it did not provide to undocumented alien adults, because those children were not responsible for, and could not alter, their status as illegal aliens.²⁵⁵

Another factor the Court considers is whether a class has been relegated to a position of political powerlessness that necessitates extraordinary judicial protection from the democratic process.²⁵⁶ In particular, the Court has identified discrete and insular minorities unable because of prejudice to secure, through the democratic process, political protection from invidious government classifications to be classes requiring heightened judicial protection.²⁵⁷ The Court reasons that politically powerless classes that face societal prejudice are unable to counter invidious or arbitrary government actions, or to cause the democratic political system to rectify quickly those classifications.²⁵⁸

In 1938, the United States Supreme Court first suggested in *United States v. Carolene Products Co.* that prejudice against "discrete and insular minorities" might reduce the Court's usual presumption of the constitutionality of state actions.²⁵⁹ Although the Court observed that it usually presumes a rational and legitimate basis for legislation, the Court specified, in footnote four, several areas where the Court might narrow the presumption of rationality and constitutionality.²⁶⁰ The Court in particular reasoned that prejudice

²⁵⁵ *Id.* at 219-24.

²⁵⁶ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

²⁵⁷ *Murgia*, 427 U.S. at 313; see *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁵⁸ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Carolene Prods.*, 304 U.S. at 152 n.4.

²⁵⁹ *Carolene Prods.*, 304 U.S. at 152 n.4. The *Carolene Products* Court upheld the Filled Milk Act, 21 U.S.C. §§ 61-63 (1923), a federal statute that prohibited the shipment in interstate commerce of skimmed milk compounded with fat or oil, in the face of a challenge that the Act violated the equal protection of the law, the due process clause of the fifth amendment, and transcended the power of Congress to regulate interstate commerce. *Carolene Prods.*, 304 U.S. at 145-54. The Court rejected the equal protection claim, which rested on Congress's failure to extend its prohibition to other similarly-adulterated dairy products such as margarines, by noting that the fifth amendment did not contain an equal protection clause, and that even the fourteenth amendment's equal protection clause did not require the government to choose between prohibiting all similar evils or none of them. *Id.* at 151. The *Carolene Products* Court further observed that it did not require the government to show facts supporting its legislative judgment, for the Court presumed the existence of the supporting facts unless the Court became aware of or assumed facts that precluded the presumption of a rational basis for the legislation. *Id.* at 152.

²⁶⁰ *Id.* at 152 & n.4. Some of those areas included when legislation on its face seemed to violate constitutional provisions, or restricted the political processes that could be expected to cause repeal of undesirable legislation.

against religious, national, or racial minorities, as discrete and insular minorities, might seriously hamper and curtail those political processes that normally protect minorities, and therefore might constitute a special condition requiring heightened judicial inquiry into government actions directed at those minorities.²⁶¹ The *Carolene Products* Court therefore suggested that the Court could narrow its presumption that legislation is constitutional when prejudice against a discrete and insular minority existed that could cause the failure of those political processes that usually protect minorities.²⁶²

In determining whether a class is politically powerless, the Court has considered not simply whether a class can exert direct political influence on the government, but also whether the class has the ability to attract the attention of lawmakers.²⁶³ In holding, for instance, that the mentally retarded do not constitute a class requiring increased judicial protection, the Court noted in part that government actions protecting the mentally retarded indicate that they are not politically powerless.²⁶⁴ The Court reasoned that these government actions could only have occurred with public support, and that the mentally retarded are not politically powerless because they could attract the attention of the government.²⁶⁵ Any minority, according to the Court, may be considered powerless to assert direct control over the democratic process, and the Court therefore reasoned that requiring heightened judicial scrutiny simply because a class is a minority would endanger much social and economic legislation.²⁶⁶ The Court therefore held that the mentally retarded, although not able to exert direct control over the government, are politically powerful enough to attract legislative attention, and so are not a class needing heightened judicial protection.²⁶⁷

The Court, however, has also reasoned that legislative efforts to protect a class from invidious discrimination provides a basis for the Court to grant that class heightened judicial protection as well.²⁶⁸ In *Frontiero*, one of the factors the Court considered in holding

²⁶¹ *Id.* at 153 n.4; see also *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (aliens a prime example of discrete and insular minority needing heightened judicial protection).

²⁶² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

²⁶³ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 445 (1985).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*; see also *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (the aged not a discrete and insular group needing heightened judicial protection from democratic processes because most persons will eventually become members of that class).

²⁶⁸ *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973).

women to be a class needing increased judicial protection was that Congress had prohibited various forms of public and private discrimination based on gender.²⁶⁹ The Court reasoned that Congress, by manifesting an increased sensitivity to gender classifications, had concluded that those classifications are inherently invidious.²⁷⁰ This conclusion by a coequal government branch, according to the Court, provides some guidance in the Court's own inquiry of whether gender classifications are inherently invidious and therefore subject to heightened judicial scrutiny.²⁷¹

In determining the level of judicial scrutiny the Court will apply, as well as the application of that scrutiny, the Court also on occasion considers the stigmatizing affect of classifications directed at a class.²⁷² The Court reasons that classifications stigmatizing or asserting a class's inferiority impede that class's enjoyment of equal rights and liberties.²⁷³ Classes that often are stigmatized or relegated to an inferior legal status, without regard to individual capabilities, according to the Court, might need heightened judicial protection.²⁷⁴ The Court also has applied heightened scrutiny to specific classifications that themselves would impose a stigma or disabling hardship on a class because of a characteristic outside the class's control.²⁷⁵

By considering each of these factors, the Court determines the degree of judicial scrutiny to which it will subject a classification.²⁷⁶ This determination, the Court notes, does not depend on whether the *particular* government action based on a classification in question might be invidious.²⁷⁷ Instead, the Court first considers whether all

²⁶⁹ *Id.* at 687. The *Frontiero* Court took notice of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), (b), (c) (1982), the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), and the Equal Rights Amendment, which Congress passed in 1972, H.R.J. Res. 208, 92d Cong., 2d Sess. (1972). The states failed to ratify the Equal Rights Amendment after *Frontiero* was decided.

²⁷⁰ *Frontiero*, 411 U.S. at 687.

²⁷¹ *Id.* at 687-88.

²⁷² See *Plyler v. Doe*, 457 U.S. 202, 220, 223 (1982) (denial of education to illegal alien children would stigmatize them, so the denial had to further substantial state goal); *Frontiero*, 411 U.S. at 686-87 (gender classifications often invidiously relegate women to inferior legal status without regard to individual capabilities).

²⁷³ *Brown v. Board of Educ.*, 347 U.S. 483, 493-95 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

²⁷⁴ *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973).

²⁷⁵ *Plyler*, 457 U.S. at 223.

²⁷⁶ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

²⁷⁷ *Cleburne*, 473 U.S. at 446.

classifications that disadvantage a class are likely to be invidious, as a general matter, by analyzing whether the classification has in the past been based on factors the Court believes to be invidious or arbitrary, and whether the characteristics defining a class are likely to be relevant to legitimate government interests.²⁷⁸ These criteria, Justice Marshall argued, do not compose a checklist, each of which must be sufficiently met to establish heightened protection; they instead, he reasoned, along with the Court's experience, guide the analysis of whether a class is likely to be the target of invidious classifications.²⁷⁹ These considerations, according to the Court, then determine the presumption of constitutional validity, and thereby the level of scrutiny, to which the Court will subject the specific classification being challenged.²⁸⁰

Applying these factors, the Court subjects classifications based on race, alienage, and national origin, to strict scrutiny, and requires the government to show that these classifications bear a necessary and suitably tailored relation to a compelling government interest.²⁸¹ The government therefore has the burden of showing that a compelling government interest justifies a challenged, suspect classification, and that the classification is necessary to the accomplishment of that interest.²⁸² The compelling interest, the Court reasons, must be independent of the invidious discrimination prohibited by equal protection principles.²⁸³ The Court also requires that the government show it structured the classification with precision, and that it narrowly tailored the classification and thereby chose the least intrusive means to achieve its compelling objective.²⁸⁴

The Court also subjects classifications based on gender and illegitimacy to an intermediate level of judicial scrutiny, which requires that the government show that a classification is substantially

²⁷⁸ *See id.*

²⁷⁹ *Id.* at 472 n.24 (Marshall, J., dissenting in part).

²⁸⁰ *Id.* at 446; *Rodriguez*, 411 U.S. at 16.

²⁸¹ *Cleburne*, 473 U.S. at 440; *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Rodriguez*, 411 U.S. at 16-17; *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). *See supra* note 205 for cases applying strict scrutiny to classifications involving race, national origin and ethnicity, and alienage.

²⁸² *Palmore*, 466 U.S. at 432-33.

²⁸³ *See id.* at 433-34 (racial prejudice cannot justify classification disadvantaging racial class); *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (government cannot avoid constitutional duty by bowing to effects of racial prejudice); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (no legitimate overriding purpose independent of invidious racial discrimination which justified miscegenation statute).

²⁸⁴ *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

related to an important government interest.²⁸⁵ The Court reasons that characteristics defining these classes rarely relate to an individual's abilities, and instead usually rest on outmoded generalizations that do not comport with fact.²⁸⁶ The government, according to the Court, must provide an "exceedingly persuasive justification" for a classification subjected to intermediate scrutiny.²⁸⁷ The Court requires that the government carefully tailor these classifications to insure that they do not perpetuate stereotypes about the affected classes, and to insure that other non-suspect classifications could not also achieve the pursued government interest.²⁸⁸ The Court has rejected government justifications of these classifications on grounds of administrative convenience; the Court, however, has noted that administrative convenience could conceivably justify a classification when it does predict some class difference related to an important government interest, and a neutral classification would substantially raise inconvenience and cost to the government or to individuals.²⁸⁹

The Court has refused to subject classifications based on gender and illegitimacy to strict scrutiny because several Justices reason that those classifications are not invariably invalid.²⁹⁰ They note that men and women, for instance, are not in some circumstances similarly situated, and that statutory classifications realistically based on those differences do not violate equal protection principles.²⁹¹ Similarly, the Court has reasoned that the irrationality of some classifications based on illegitimacy does not indicate that other classifications based on illegitimacy are inherently irrational.²⁹² Noting that discrimination against illegitimates has never been as severe as discrim-

²⁸⁵ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41. See *supra* note 205 for cases discussing scrutiny to be applied to classifications based on gender or illegitimacy.

²⁸⁶ *Cleburne*, 473 U.S. at 431-32; see *Craig v. Boren*, 429 U.S. 190, 199 (1976) (legislatures must adopt procedures to identify when gender generalizations comport with individual characteristics relevant to government interest).

²⁸⁷ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979).

²⁸⁸ *Hogan*, 458 U.S. at 729-30; *Orr v. Orr*, 440 U.S. 268, 283 (1979).

²⁸⁹ *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980); *Craig*, 429 U.S. at 197-98; *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973).

²⁹⁰ *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting); *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion) (Stewart, J.).

²⁹¹ *Caban*, 441 U.S. at 398 (Stewart, J., dissenting); *Parham*, 441 U.S. at 354; see *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (Stewart, J.) (Navy promotion rule that distinguishes between males and females justified because genders not similarly situated with respect to service opportunities).

²⁹² *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

ination against African-Americans and women, the Court has held that classifications based on illegitimacy are not subject to strict scrutiny.²⁹³

The Court, in enforcing the constitutional principle of equal protection, has therefore established a set of criteria that guides its analysis of whether it should presume that the government disadvantages a class for reasons that violate equal protection. These criteria include whether a class suffers from pervasive societal antipathy and unfounded stereotypic notions, whether the distinguishing characteristics of the class are irrelevant to individual abilities or outside the control of those individuals, and whether the class is politically powerless to prevent government discrimination that stigmatizes the class. In recent cases that have considered whether homosexuals constitute such a protected class, however, several courts have not considered these criteria, and instead have relied on factors extraneous to equal protection jurisprudence.

III. RECENT DEVELOPMENTS IN LITIGATION ASSERTING THAT HOMOSEXUALS WARRANT HEIGHTENED JUDICIAL PROTECTION

In the last few years, several claims have been litigated concerning equal protection issues relating to homosexuals, with widely varying results.²⁹⁴ Two decisions, one of whose reasoning did not survive an en banc rehearing, have held that homosexuals constitute a class requiring judicial protection from pervasive governmental discrimination, because of the strong presumption that state and federal governments invidiously discriminate against homosexuals.²⁹⁵ Most courts, however, have held that discrimination against

²⁹³ *Id.* at 506.

²⁹⁴ See *Watkins v. U.S. Army*, 847 F.2d 1329 (9th Cir. 1988) [hereinafter *Watkins II*], *aff'd on other grounds*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc) [hereinafter *Watkins III*]; *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); see also *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986) (*Hardwick's* holding that homosexual conduct not constitutionally protected did not reach issue of whether government can discriminate because of orientation; case remanded to district court for consideration of that issue), *aff'd in part sub nom. Webster v. Doe*, 108 S. Ct. 2047, 2054 (1988).

²⁹⁵ *Watkins II*, 847 F.2d at 1349, 1352; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368, 1373 (N.D. Cal. 1987); see *Swift v. United States*, 649 F. Supp. 596, 601-02 (D.C. Cir. 1986) ("government may not discriminate against homosexuals for sake of discrimination or for no reason at all;" case remanded for consideration of homosexual's equal protection claim under rational basis test); see also *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014-16 (1985) (Brennan, J., dissenting from denial of cert.). Justice Brennan argued that homosexuals should be accorded heightened judicial protection, noting that homosexuals constitute a large and insular minority, that they lack political power because of prejudice and discrimination inflicted on publicly identified hom-

homosexuals is permissible, and have rejected their equal protection, and particularly suspect class, claims.²⁹⁶ A primary reason for

osexuals, and that discrimination against homosexuals likely reflects embedded hostility and prejudice rather than rationality. *Id.* at 1014. He also observed that sexual preference discrimination infringes upon various fundamental constitutional rights. *Id.* at 1015. The lower court decision is at 730 F.2d 444 (6th Cir. 1984).

²⁹⁶ *Padula*, 822 F.2d at 103-04; *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986), *reh'g denied*, 478 U.S. 1035 (1986). Other courts holding that homosexuals are not a suspect class include *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984); *Todd v. Navarro*, 698 F. Supp. 871, 874 (S.D. Fla. 1988); *Gay and Lesbian Students Ass'n v. Gohn*, 656 F. Supp. 1045, 1056-57 (W.D. Ark. 1987).

The United States District Court for the Northern District of Texas, using reasoning that closely related to the criteria for heightened equal protection scrutiny, held that Texas's statute criminalizing homosexual sodomy, TEX. PENAL CODE ANN. § 21.06, § 12.23 (Vernon 1974), did not rationally further any legitimate state interest. *Baker v. Wade*, 553 F. Supp. 1121, 1148 (N.D. Tex. 1982), *aff'd*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986), *reh'g denied*, 478 U.S. 1035 (1986). In ruling that the statute violated the equal protection clause even under a rational-basis analysis, the court found that sexual orientation is usually determined before age six by either biological or environmental factors, that individuals most likely cannot choose or alter their orientation, and that homosexuality is not a mental disorder or disease. *Id.* at 1129-30, 1143-44. The court further noted that the criminalization of homosexual acts does not deter or eliminate homosexuality, but does cause homosexuals to experience stigma, emotional distress, discrimination, and alienation from society. *Id.* at 1130. The *Baker* court finally noted that homosexuals do not show a higher criminal propensity, and that they do not negatively affect the development of children. *Id.* at 1130-31, 1143. The court therefore reasoned that Texas had not established a rational relation between criminalizing homosexual sodomy and the state's declared interests in decency, morality, public health and safety, or procreation, and that public distaste for homosexuality does not alone constitute a legitimate state interest. *Id.* at 1143, 1145. The court, because the classification could not even pass the lowest level of scrutiny, did not reach the issue of whether homosexuals constitute a suspect class, although the court did state that it would not have held them suspect because the Supreme Court had not even found gender classifications to be suspect. *Id.* at 1144-45 & n.58.

The United States Court of Appeals for the Fifth Circuit, sitting en banc, in 1985 reversed the district court's decision in *Baker v. Wade*. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc). In a brief opinion, the appellate court refused to hold that homosexuals constitute a suspect or quasi-suspect class, and therefore used the rational relation standard of equal protection review. *Id.* at 292. The fifth circuit held that Texas's sodomy statute is rationally related to the permissible state goal of implementing morality, given the strong objection to homosexual conduct that has historically prevailed in Western culture. *Id.* (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954) (implementing morality is a permissible state goal)). The fifth circuit subsequently denied a petition for an en banc rehearing. *Baker v. Wade*, 774 F.2d 1285 (5th Cir. 1985) (en banc). The court again rejected the equal protection claim, reasoning that the statute proscribed certain conduct, not a class, and that those who engaged in the prohibited conduct did so by choice. *Id.* at 1287. The court further reasoned that the government could legitimately decide that certain conduct is wrong and stigmatize that conduct, and that it is not for the courts to resolve moral questions. *Id.*

See also *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984) (under equal protection and due process, Navy's policy of discharging persons for homosexual conduct rationally related to permissible government interest in morale and discipline); *Hatheway v. Secretary*

these courts' refusal to provide additional protections for homosexuals arises from the United States Supreme Court's ruling in *Bowers v. Hardwick* that the states could criminalize homosexual sodomy.²⁹⁷ This section will therefore first discuss *Hardwick*, and subsequently will turn to several post-*Hardwick* federal court decisions concerning equal protection claims by homosexuals.

In 1986, the United States Supreme Court in *Bowers v. Hardwick* held that the United States Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.²⁹⁸ In a case brought by Michael Hardwick, a gay male arrested in his bedroom while allegedly committing sodomy, the *Hardwick* Court upheld the constitutionality of Georgia's sodomy statute, which facially proscribed both heterosexual and homosexual sodomy, but which Georgia apparently enforced only against homosexuals.²⁹⁹ The *Hardwick* Court ruled that homosexual sodomy is outside the scope of activities that the Court had previously protected under the right of privacy provided by the fourteenth amendment's due process clause.³⁰⁰ The *Hardwick* Court limited its previous decisions concerning the right of privacy to activities concerning marriage, family, and procreation, and found no connection between those activities and homosexual activity.³⁰¹ The *Hardwick* Court also denied that its precedents in previous right-to-privacy cases extended protection to any consensual, private sexual conduct between adults.³⁰²

In addition, the *Hardwick* Court refused to consider homosexual sodomy within the category of fundamental liberties "implicit

of Army, 641 F.2d 1376, 1382 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) (because classifications based on sexual preference implicate privacy rights, applied intermediate scrutiny; but because persons who engage in homosexual sodomy compromise military discipline, court-martial only of homosexuals for engaging in sodomy substantially related to compelling government interest); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 332-33 (9th Cir. 1979) (homosexuals not protected by federal civil rights statutes).

²⁹⁷ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344); *Padula v. Webster*, 822 F.2d 97, 103 (1987).

²⁹⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); see *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975) (consensual, private homosexual sodomy not within scope of constitutional privacy).

²⁹⁹ *Id.* at 200-01, (Blackmun, J., dissenting) (discussing GA. CODE ANN. § 16-6-2 (1984)). Georgia explicitly stated in its brief and oral argument that the statute was rarely enforced, and then only against homosexuals. *Id.*

³⁰⁰ *Id.* at 191.

³⁰¹ *Id.* at 190-91.

³⁰² *Id.* at 191.

in the concept of ordered liberty" and necessary to the existence of liberty and justice,³⁰³ nor would the Court characterize homosexual sodomy as one of the liberties "deeply rooted in this Nation's history and tradition."³⁰⁴ The *Hardwick* Court reasoned that proscriptions of sodomy have ancient roots, and that half the states continue to criminalize private consensual sodomy.³⁰⁵ The *Hardwick* Court held that these facts precluded the Court from holding that sodomy is either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."³⁰⁶

The Court also rejected Hardwick's claim that the Court should at least protect homosexual conduct committed in the home, as part of privacy rights within the home.³⁰⁷ The *Hardwick* Court reasoned that if it protected homosexual conduct in the home under the rubric that consensual sexual conduct between adults is a fundamental liberty, the Court would find it difficult to distinguish other sexual crimes, such as adultery or incest, if committed in the home.³⁰⁸ The *Hardwick* Court finally stated that the sentiments of the majority of the electorate, as represented by its elected officials, about the morality of homosexual conduct are a rational basis to support laws criminalizing sodomy.³⁰⁹ The *Hardwick* Court therefore ruled that statutes criminalizing homosexual sodomy do not violate homosexuals' substantive due process rights.³¹⁰

Chief Justice Burger concurred with the *Hardwick* majority.³¹¹ He argued that proscriptions of homosexual conduct have ancient roots in Judeo-Christian, Roman, and English law.³¹² For the Court

³⁰³ *Id.* at 191-92. The Court applied the test established in *Palko v. Connecticut*, 302 U.S. 319, 324-26 (1937), to determine whether the Court should declare certain conduct to be a fundamental right qualifying for heightened judicial scrutiny. *Hardwick*, 478 U.S. at 191.

³⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). The Court applied an alternative description of fundamental liberties found in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). *Hardwick*, 478 U.S. at 192.

³⁰⁵ 478 U.S. at 192-94.

³⁰⁶ *Id.* at 194.

³⁰⁷ *Id.* at 195-96. *Hardwick* relied on *Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Court held that the first amendment prevents conviction for possessing or reading obscene materials "in the privacy of" the home. 478 U.S. at 195 (citing *Stanley*, 394 U.S. at 565). The Court rejected Hardwick's claim, holding *Stanley* to be fundamentally a first amendment, not privacy, case. *Id.* at 195-96. Justice Blackmun differed with this interpretation, arguing that *Stanley* was anchored on the fourth amendment's special protection for the individual in the home. *Id.* at 207 (Blackmun, J., dissenting).

³⁰⁸ *Id.* at 195-96.

³⁰⁹ *Id.* at 196.

³¹⁰ See *id.* at 190-94.

³¹¹ *Id.* at 196-97 (Burger, C.J., concurring).

³¹² *Id.*

to hold that homosexual sodomy is a fundamental right, Chief Justice Burger concluded, "would be to cast aside millennia of moral teaching," and therefore, he reasoned, the states should continue to have the authority to proscribe homosexual sodomy.³¹³

Justices Blackmun and Stevens each wrote dissenting opinions in *Hardwick*.³¹⁴ Justice Blackmun argued that the language of the Georgia sodomy statute purposely included both heterosexual and homosexual sodomy, and criticized the *Hardwick* majority for "almost obsessively" focusing on homosexual activity.³¹⁵ He accused the Court of distorting the issue in dispute in *Hardwick*, because *Hardwick*'s claim that Georgia's sodomy statute intruded on his privacy and his right of intimate association, Justice Blackmun argued, did not depend in any way on his sexual orientation.³¹⁶

Justice Blackmun observed that the Court had not based its prior substantive due process holdings, which specified personal choices with which the government could not interfere, on the general public welfare furthered by those choices.³¹⁷ Instead, Justice Blackmun argued, the Court protected those personal choices because they formed a central part of an individual's life.³¹⁸ Justice Blackmun reasoned that decisions concerning sexual intimacy, which he defined as central to the self-identification of the person, fall within the general principle recognized by the Court that individuals enjoy the fundamental liberty to choose how to conduct

³¹³ *Id.* at 197 (Burger, C.J., concurring).

Justice Powell also concurred, agreeing that there was no fundamental due process right "such as that claimed" by *Hardwick*. *Id.* at 197 (Powell, J., concurring). Justice Powell suggested, however, that if *Hardwick* had been tried, convicted, and sentenced, the Georgia statute, which authorized up to twenty years imprisonment, might raise an eighth amendment issue. *Id.* at 197-98 (Powell, J., concurring).

³¹⁴ *Id.* at 199-214 (Blackmun, J., dissenting); *id.* at 214-20 (Stevens, J., dissenting). Justice Blackmun did not join Justice Stevens's dissent. *See id.* at 214 (Stevens, J., dissenting).

³¹⁵ *Id.* at 200-01 (Blackmun, J., dissenting). Justice Blackmun interpreted the legislative history of Georgia's sodomy statute to suggest that Georgia intended to broaden the coverage of its previous sodomy statute to include heterosexual sodomy. *Id.* at 200 n.1 (Blackmun, J., dissenting).

³¹⁶ *Id.* at 200-01 (Blackmun, J., dissenting).

³¹⁷ *Id.* at 204 (Blackmun, J., dissenting). Some of the personal choices that the Court had recognized, Blackmun argued, include decisions within the marriage, including contraception, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); whether to end a pregnancy, *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 772 (1985); and whether distantly related family members may live together, *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1976). *Hardwick*, 478 U.S. at 204-05.

³¹⁸ *Hardwick*, 478 U.S. at 204 (Blackmun, J., dissenting).

their lives.³¹⁹ Justice Blackmun therefore defined the majority's holding in *Hardwick* as a refusal to recognize the fundamental interest all individuals share in controlling the nature of their intimate associations with others.³²⁰ According to Justice Blackmun, the right of individuals to conduct intimate relationships, particularly in the privacy of the home, is central to the constitutional protection of privacy.³²¹

Justice Blackmun criticized the two general reasons given by the *Hardwick* Court to justify the sodomy statute.³²² He observed no justification for equating private consensual sexual activity in the home with the possession in the home of drugs, firearms or stolen goods, or with the sexual crimes of adultery or incest.³²³ Justice Blackmun argued that each of these crimes, unlike sodomy, was either not victimless, was potentially dangerous, violated the state-recognized civil contract of marriage, or, in the case of incest, was presumptively nonconsensual.³²⁴ Justice Blackmun noted that the *Hardwick* Court made no effort to explain why it grouped private, consensual, homosexual activity with adultery and incest rather than with private, consensual, heterosexual activity by unmarried persons, or with sodomy within marriage.³²⁵

Justice Blackmun also disagreed with the *Hardwick* Court's attempt to justify the sodomy statute on traditional and moral grounds.³²⁶ He argued that the Court must be sensitive to the rights of those whose fundamental personal choices are limited by the government due to majoritarian disapproval.³²⁷ Justice Blackmun especially rebuked the Court's effort to justify the statute on the basis of traditional Judeo-Christian values, because, he argued, secular legislation could not be based solely on religious doctrine, and religious intolerance could not justify the punishment of private behavior.³²⁸ Justice Blackmun further reasoned that public intoler-

³¹⁹ *Id.* at 205-06 (Blackmun, J., dissenting).

³²⁰ *Id.* at 206 (Blackmun, J., dissenting).

³²¹ *Id.* at 208 (Blackmun, J., dissenting). Justice Blackmun also accused the majority of misinterpreting the Court's prior fourth amendment decisions, which he interpreted as stating the principle that persons possess additional protection from government interference in the privacy of the home. *Id.* at 206-08 (Blackmun, J., dissenting).

³²² *Id.* at 208-13 (Blackmun, J., dissenting).

³²³ *Id.* at 208-09 & n.4 (Blackmun, J., dissenting).

³²⁴ *Id.*

³²⁵ *Id.* at 209 n.4 (Blackmun, J., dissenting).

³²⁶ *Id.* at 210-12 (Blackmun, J., dissenting).

³²⁷ *Id.* at 211 (Blackmun, J., dissenting).

³²⁸ *Id.* at 211-12 (Blackmun, J., dissenting).

ance or animosity alone could not constitutionally justify depriving a person of liberty.³²⁹ Nor, he argued, could protection of the public environment justify the proscription of private, intimate activity; Justice Blackmun criticized the Court for failing to distinguish between laws that protect the public sensibilities by proscribing certain conduct in public, and laws that enforce private morality.³³⁰ He thereby concluded that mere disagreement with the value-system of those who choose to live their lives differently, does not pose an interest that could justify interfering with their personal choices or intimate conduct within the home.³³¹

In footnote 2 of his dissenting opinion, Justice Blackmun discussed *Hardwick's* possible impact on equal protection principles.³³² Justice Blackmun suggested that Georgia's selective enforcement of the facially neutral sodomy statute only against homosexuals might constitute a violation of the equal protection clause's prohibition of discriminatory enforcement, whether or not homosexuals constitute a suspect class.³³³ He noted that Georgia's legislature had decided that the gender of the participants in sodomy was irrelevant to its legality, and expressed doubt that the state legitimately could defend the sodomy statute on the grounds of its selective, and arguably discriminatory, enforcement against participants in same-sex sodomy.³³⁴

Justice Stevens, also dissenting in *Hardwick*, argued that the traditional view of sodomy as immoral is not sufficient to uphold sodomy statutes, just as society's traditional view that miscegenation is immoral could not save those laws from constitutional attack.³³⁵ Justice Stevens noted that the Court recognized, within the fourteenth amendment's due process clause, the essential liberty to make

³²⁹ *Id.* at 212 (Blackmun, J., dissenting) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

³³⁰ *Id.* at 212-13 (Blackmun, J., dissenting).

³³¹ *Id.* at 213 (Blackmun, J., dissenting).

³³² *Id.* at 202 n.2 (Blackmun, J., dissenting). Justice Blackmun also discussed eighth amendment issues raised by *Hardwick*. *Id.* He noted that the public health profession no longer views homosexuality as a disease or disorder, and that homosexual orientation is most likely not chosen, but rather forms part of the fiber of an individual's personality. *Id.* He thereby concluded that the eighth amendment might prohibit punishing a person for acting on the attraction resulting from sexual orientation, for the right to make decisions concerning sexual relations, Justice Blackmun reasoned, would be empty if the government provided no real choice but life without sexual intimacy. *Id.*

³³³ *Id.* at 203 n.2 (Blackmun, J., dissenting).

³³⁴ *Id.*

³³⁵ *Id.* at 216 (Stevens, J., dissenting) (citing *Loving v. West Virginia*, 388 U.S. 1, 12 (1967) (striking down miscegenation statute on equal protection and due process grounds)).

personal choices about intimate relationships, and extended that right to both married and unmarried couples.³³⁶ Included within that right, Justice Stevens argued, is the right to engage in such nonreproductive sexual conduct that the majority of Americans might find offensive or immoral.³³⁷ He reasoned, therefore, that Georgia could not completely prohibit sodomy, because Georgia would violate the liberty interests of married and unmarried heterosexual couples if it enforced the statute against them.³³⁸ Justice Stevens then reasoned that homosexuals and heterosexuals share the same liberty interest in deciding how to live their lives and conduct their intimate relations.³³⁹ Selective application of the statute, he further noted, could not be justified merely by a habitual dislike for homosexuals, for Georgia's statute did not, in Justice Stevens's view, indicate that Georgia meant to proscribe only homosexual conduct.³⁴⁰ Justice Stevens concluded that selective enforcement of the statute against homosexuals is probably unconstitutional.³⁴¹

Several commentators have criticized the holding and reasoning of the *Hardwick* Court.³⁴² Professor Tribe, who argued for *Hardwick* before the United States Supreme Court, criticized the Court's reliance on the history of discrimination against homosexuals as justification for not recognizing their right to engage in private consensual acts.³⁴³ Professor Tribe argues that the Court inverted the equal protection principle of greater judicial protection for disliked groups and instead "bootstrap[ped] antipathy toward homosexuality into a tautological rationale for continuing to criminalize

³³⁶ *Id.* (Stevens, J., dissenting).

³³⁷ *Id.* at 216-18 (Stevens, J., dissenting) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965)).

³³⁸ *Id.* at 218 (Stevens, J., dissenting).

³³⁹ *Id.* at 218-19 (Stevens, J., dissenting).

³⁴⁰ *Id.* at 219 (Stevens, J., dissenting).

³⁴¹ *See id.* at 220 (Stevens, J., dissenting).

³⁴² *See, e.g.,* L. TRIBE, *supra* note 98, at 1421-35; Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988) (*Hardwick* result of conceptions and misconceptions of Justices about homosexuality, privacy, and political values); Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987) (*Hardwick* result of judicial self-indulgence and of lawmaking by personal distaste of Justices toward homosexuality); *Developments, supra* note 24, at 1521-25 (cramp reading of privacy doctrine departed from precedent); Note, *Process, Privacy, and the Supreme Court*, 28 B.C.L. REV. 691 (1987). *But see* Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988) (responding to Stoddard, *supra*, argued that *Hardwick* indicated fundamental problem with privacy doctrine itself).

³⁴³ L. TRIBE, *supra* note 98, at 1427.

homosexuality."³⁴⁴ Professor Tribe noted, as did Justice Blackmun, that the Court previously had held that a law's long existence could not ensure its continued constitutional validity if that law invaded the body or the home.³⁴⁵ Professor Tribe also observed that the liberties recognized in the Constitution contain the principle that the law must allow persons to choose different ways to use that liberty and that ways of life that do not affect the rights and interests of others should not be condemned merely because they are different.³⁴⁶ Professor Tribe further argued that the Court had implicitly confirmed that its holding in *Hardwick* only applied to homosexuals by its denial of certiorari, a few months after the *Hardwick* decision, of an Oklahoma appellate court decision that interpreted the right of privacy to extend at least to heterosexual sodomy.³⁴⁷

Since *Hardwick*, several federal courts have considered protected class claims.³⁴⁸ Although homosexuals were at least initially successful in two courts, no federal circuit currently treats homosexuals as a suspect class.³⁴⁹ In refusing to subject classifications disadvantaging homosexuals to heightened scrutiny, these courts have interpreted *Hardwick* as foreclosing protected class status for a class defined by conduct that the Court has held could be criminalized.³⁵⁰

In 1987, the United States Court of Appeals for the District of Columbia Circuit in *Padula v. Webster*, in part relying on *Hardwick* and circuit precedent, held that homosexuals are not a suspect class for the purposes of the equal protection clause, and ruled that the

³⁴⁴ *Id.* at 1427-28.

³⁴⁵ *Id.* at 1427 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting)).

³⁴⁶ *Id.* at 1424 & n.31, 1435 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 223-25 (1972) (Pennsylvania requirement of extended formal schooling could not be enforced against Amish, who believed that such schooling threatened their traditional way of life)).

³⁴⁷ *Id.* at 1431; see *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).

³⁴⁸ *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344); *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1364 (N.D. Cal. 1987).

³⁴⁹ See *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076; *Watkins III*, 875 F.2d at 711; *Padula*, 822 F.2d at 103.

³⁵⁰ See *Ben-Shalom*, 881 F.2d at 464-65; *Woodward*, 871 F.2d at 1076; *Padula*, 822 F.2d at 102-03. But see *Watkins II*, 847 F.2d at 1339-42, 1345 (*Hardwick* did not foreclose protected class status for homosexuals); *High Tech Gays*, 668 F. Supp. at 1370-73 (same).

Federal Bureau of Investigation ("FBI") acted rationally in refusing to employ a woman because of her homosexuality.³⁵¹ The plaintiff, who claimed she was denied employment with the FBI solely because of her homosexuality, argued for recognition of homosexuals as a suspect or quasi-suspect classification.³⁵² Noting that the FBI claimed to discriminate only against persons who engaged in actual homosexual conduct, and observing that the plaintiff had engaged in homosexual conduct, the court defined the class disadvantaged by the FBI's policy to be persons who engaged in homosexual conduct, not merely those with a homosexual status.³⁵³

Although the *Padula* court acknowledged the plaintiff's claim that homosexuals meet the Supreme Court's criteria for suspect or quasi-suspect status, the court did not consider those criteria, and instead relied on *Hardwick* and similar circuit precedent to deny the plaintiff's claim.³⁵⁴ The court reasoned that the Supreme Court and District of Columbia Circuit's refusal to recognize a privacy right to engage in homosexual conduct foreclosed granting protected class status under equal protection doctrine to those engaged in that conduct.³⁵⁵ *Hardwick's* refusal to object to state laws that criminalized homosexual conduct, according to the *Padula* court, also prevented a ruling that discrimination against the class defined by the commission of homosexual sodomy was unjustified and invidious.³⁵⁶

The *Padula* court therefore ruled that the class of persons who engage in homosexual conduct do not constitute a suspect or quasi-suspect class.³⁵⁷ Noting that state actions disadvantaging homosexuals must still bear a rational relation to a legitimate state purpose, the *Padula* court held as rational the FBI's conclusion that homosexual conduct could serve as a detriment to the maintenance of morale and discipline.³⁵⁸ The court observed that many disliked and were morally offended by homosexuality.³⁵⁹ The *Padula* court also held as rational the FBI's argument that employing agents with a propensity to engage in activities considered criminal in many states

³⁵¹ *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987). The court also held that FBI policy statements on the hiring of homosexuals did not limit the FBI's discretion to consider the homosexual conduct of applicants. *Id.* at 101.

³⁵² *Id.* at 102.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 103.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 103-04.

³⁵⁹ *Id.* at 104.

would undermine the agency's law enforcement credibility.³⁶⁰ The *Padula* court finally held that the FBI could rationally believe that even "open" homosexuals, because of the criminalization of homosexual conduct and the widespread prejudice against homosexuals, were vulnerable to blackmail to protect themselves or their sexual partners.³⁶¹ According to the *Padula* court, therefore, the FBI's discrimination against homosexuals had a rational relationship to a legitimate state interest, and the court held that the classification did not violate the equal protection clause.³⁶²

In contrast to *Padula*, a federal district court in 1987 reasoned that *Hardwick* did not prevent it from subjecting a classification disadvantaging homosexuals to heightened equal protection scrutiny. In 1987, the United States District Court for the Northern District of California in *High Tech Gays v. Defense Industrial Security Clearance Office* held that homosexuals constitute a quasi-suspect class, and that the Department of Defense policies disadvantaging homosexuals violate the equal protection clause because they did not bear a rational relation to a legitimate state interest.³⁶³ *High Tech Gays* concerned a class action suit challenging a Department of Defense policy of subjecting homosexual applicants for secret and top secret clearances, which the Department required for certain defense-related private employment, to expanded investigation and mandatory adjudication solely because of their sexual orientation.³⁶⁴ The Department of Defense policies subjected applicants who engaged in any homosexual conduct to further investigation and mandatory adjudication, but only instituted these additional procedures against heterosexual applicants if there was evidence of vulnerability to blackmail or coercion, or of reckless conduct or criminal acts.³⁶⁵ The Department, according to the court, considered homosexual

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368, 1373 (N.D. Cal. 1987).

³⁶⁴ *Id.* at 1362-63; see *id.* at 1363-67.

³⁶⁵ *Id.* at 1364. The special policies the Department of Defense forced homosexuals to pass increased the average amount of time to receive clearances by more than two months, and also served as a disincentive for companies seeking contracts with the Department of Defense to hire homosexuals. *Id.* See The Department of Defense Security Program Regulation, DoD 5220.2-R, Jan. 1, 1987, 32 C.F.R. § 154 (1987), and The Department of Defense Industrial Personnel Security Clearance Review Program, DoD 5220.6, Aug. 12, 1985. See also *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989) (reversed summary judgment upholding CIA policy of not granting security clearances to homosexuals and remanded for litigation of constitutional issues).

conduct to include not only sodomous behavior, but also other forms of physical or social behavior, including long-term monogamous relations with a person of the same sex.³⁶⁶

Relying on the principles the Supreme Court had articulated for determining if a classification requires strict or intermediate scrutiny, the *High Tech Gays* court ruled that homosexuals are a quasi-suspect class, and that classifications disadvantaging homosexuals had to pass a standard of review analogous to the standard for gender classifications.³⁶⁷ According to the court, homosexuals are subjected to some of the deepest prejudice and hatred in United States society, and that discrimination against homosexuals therefore likely reflects hostility and prejudice rather than rationality.³⁶⁸ The court also reasoned that wholly unfounded and degrading stereotypes about homosexuals prevail in American society, including the perception that homosexuals molest children, seek to convert persons to homosexuality, engage in promiscuous behavior, do not engage in stable, monogamous relationships, and are mentally and psychologically unstable.³⁶⁹ The court noted that, like the outmoded stereotypes about the relative abilities of the sexes to contribute to society, the contributions of homosexuals to all aspects of American life belie those stereotypes about homosexuals.³⁷⁰ Homosexuals also constitute a discrete and insular minority, according to the court, because hostility and prejudice against homosexuals seriously impairs their political power.³⁷¹ The *High Tech Gays* court therefore held that homosexuals constitute a quasi-suspect class, although the court did not explain why homosexuals are not a fully suspect class.³⁷²

The *High Tech Gays* court further held that, because the Department of Defense's procedures limited homosexuals' fundamental rights to engage in consensual, non-sodomous behavior, the classification also needed to pass strict scrutiny.³⁷³ The *High Tech Gays* court distinguished *Hardwick* by noting that *Hardwick* did not determine whether homosexuals are a suspect or quasi-suspect class,

³⁶⁶ *High Tech Gays*, 668 F. Supp. at 1364.

³⁶⁷ *Id.* at 1369.

³⁶⁸ *Id.* (citing *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1377 (1985) (Brennan, J., dissenting from denial of *cert.*)).

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 1369-70.

³⁷¹ *Id.* at 1370.

³⁷² *Id.* at 1368.

³⁷³ *Id.* at 1370.

and that the *Hardwick* court limited its holding to homosexual sodomy, not other forms of homosexual conduct.³⁷⁴ The court observed that the *Hardwick* Court did not suggest that heterosexuals have a fundamental right to engage in sodomy, nor that laws restricting other forms of homosexual conduct, but not similar heterosexual conduct, would be constitutional.³⁷⁵ Reasoning that all persons, including homosexuals, have a fundamental right to engage in affectional and sexual activities not traditionally proscribed as sodomy, the court held that the Department's regulations impinged on that fundamental right and therefore had to pass strict scrutiny.³⁷⁶

Having determined that the Department's procedures must pass strict scrutiny, the *High Tech Gays* court examined the various reasons given by the Department to justify subjecting homosexuals to a more extensive clearance procedure, and ruled that the Department's regulations did not pass even the minimum rationality standard.³⁷⁷ The district court discounted the Department's argument that most homosexuals engage in criminal conduct, which called into question their willingness to uphold the law.³⁷⁸ The court observed that sodomy is not a crime in over half the states, that persons who engage in sodomy rarely face prosecution, and that, because most sodomy laws also proscribe heterosexual sodomy, heterosexuals are also likely to ignore those laws.³⁷⁹

The Department also claimed that homosexuals often experience emotional problems or other personal disorders due to the stress their orientation places on them, and that these disorders make homosexuals potential security risks.³⁸⁰ The *High Tech Gays* court dismissed this argument, noting that the medical community in the United States no longer considers homosexuality to be a medical disorder.³⁸¹ The court also asserted that the Department could not justify subjecting all homosexuals to expanded investigation, because, although some homosexuals might face psychiatric problems dealing with their sexual orientation, many others do not.³⁸² In addition, the court noted that many heterosexuals also

³⁷⁴ *Id.* at 1370-73.

³⁷⁵ *Id.* at 1370-71.

³⁷⁶ *Id.* at 1370-72.

³⁷⁷ *Id.* at 1373-76.

³⁷⁸ *Id.* at 1373.

³⁷⁹ *Id.* at 1373-74.

³⁸⁰ *Id.* at 1374.

³⁸¹ *Id.* at 1374-75.

³⁸² *Id.* at 1375.

experience emotional problems for various reasons.³⁸³ The Department also argued that homosexuals who are secretive about their sexual orientation are open to blackmail, but the *High Tech Gays* court found no evidence to support the claim that homosexuals are any more vulnerable to blackmail, or any less trustworthy, than heterosexuals.³⁸⁴ The *High Tech Gays* court therefore found that none of the Department's stated purposes for subjecting all homosexuals to additional investigative procedures was rationally related to a legitimate government interest, and held that the Department's classification violated the equal protection and fundamental liberty rights of homosexuals.³⁸⁵

Subsequent to *High Tech Gays*, a Ninth Circuit appeals panel subjected a classification disadvantaging homosexuals to strict scrutiny, but the circuit en banc, while affirming the panel's decision, withdrew their holding that homosexuals are a suspect class. In 1988, the United States Court of Appeals for the Ninth Circuit in *Watkins v. United States Army*, hereinafter *Watkins II*, held that homosexuals are a suspect class, and declared that the Army's policy of administratively discharging or refusing to re-enlist homosexuals failed to pass strict scrutiny and therefore violated the equal protection rights of homosexuals.³⁸⁶ *Watkins II* involved an openly gay serviceman administratively discharged, pursuant to Army regulations, after fourteen years solely because of his homosexual orientation.³⁸⁷ In 1982, the United States District Court for the Western

³⁸³ *Id.*

³⁸⁴ *Id.* at 1375; see *Federal Government Security Clearance Programs: Hearing Before the Permanent Subcommittee on Governmental Affairs, United States Senate, 99th Cong., 1st Sess.* 171-87, 913-26 (1985) (no evidence of any persons blackmailed because of homosexuality).

³⁸⁵ *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1375-77 (N.D. Cal. 1987). The court also held that the Department's regulations violated the first amendment right of homosexuals to belong to homosexual organizations, but dismissed plaintiffs' claim that the Department violated their due process rights by creating an irrebuttable presumption. *Id.* at 1377-78.

³⁸⁶ *Watkins v. United States Army*, 847 F.2d 1329, 1349, 1352 (9th Cir. 1988).

³⁸⁷ *Id.* at 1330-34. The plaintiff, Perry Watkins, was drafted into the Army in 1968 at the age of 19. In filling out the pre-induction forms, he marked "yes" in response to the question of whether he had homosexual tendencies. Nonetheless, the Army inducted him. Watkins served for fourteen years, reenlisting several times, and his service record was exemplary. *Id.* at 1330. Several times, however, the Army investigated him due to his admission of homosexuality on the induction form and on an affidavit he filled out a year after his induction, on which he also claimed to have engaged in homosexual sodomy on two occasions while in the service. *Id.* at 1331. The investigations each found no evidence for any actual homosexual conduct by Watkins, nor any evidence that Watkins's known homosexuality had a negative affect on his or other servicemen's performances. *Id.* at 1331-32.

Despite his service record, the Army in 1981 discharged Watkins due to his homosex-

District of Washington enjoined the Army from discharging³⁸⁸ or refusing to reenlist³⁸⁹ Watkins because of his homosexuality, holding that the Army was equitably estopped from relying on its regulations that prevented homosexuals from enlisting and that mandated their separation from the service. In 1983, the Court of Appeals for the Ninth Circuit, hereinafter the *Watkins I* court, reversed the district court's injunction, holding that courts could not use their equitable powers to order a military official to violate a military regulation unless the regulation violated a constitutional or statutory provision.³⁹⁰ On remand, the district court held that the Army's regulations did not violate the Constitution or the Army's statutory authority.³⁹¹ In again reversing the District Court, the *Watkins II* court of appeals declared that the regulations violated the equal protection clause because they facially and invidiously discriminated against homosexuals, which the court held to be a suspect class, and because the regulations were not necessary to promote a compelling governmental interest.³⁹² The *Watkins II* court ordered that the Army consider Watkins's reenlistment application without regard to his sexual orientation.³⁹³

The *Watkins II* court followed a three-step inquiry in reaching this holding. The court held first that the regulations discriminated on the basis of sexual orientation, then held that homosexuals constitute a suspect class, and finally ruled that the regulations did not

uality after promulgating new regulations that mandated discharge of all homosexuals regardless of merit unless there were strong extenuating circumstances. *Id.* at 1332-33. Watkins filed suit to prevent his discharge. *Id.* at 1333.

For detailed discussions of the facts of the case, see 847 F.2d at 1330-34, and 541 F. Supp. 249, 251-54 (W.D. Wash. 1982).

For a detailed discussion of the Army's regulations and their application, see Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir. 1989).

³⁸⁸ *Watkins v. United States Army*, 541 F. Supp. 249, 258-59 (W.D. Wash. 1982). The district court held that Watkins's discharge violated the Army's double jeopardy regulation, AR 635-200, ¶ 1-19(b), because the Army had already attempted to discharge Watkins through administrative proceedings in 1975. *Id.* Army regulations instituted in 1981 require the discharge of homosexuals without regard to merit. AR 635-200, chpt. 15.

³⁸⁹ *Watkins v. United States Army*, 551 F. Supp. 212, 223 (W.D. Wash. 1982), *reversed*, 721 F.2d 687, 691 (9th Cir. 1983). Army regulations made homosexuality a nonwaivable disqualification for reenlistment. AR 601-280, ¶ 2-21(c). The Army responded to the district court's injunction of Watkins's discharge by denying Watkins's reenlistment when his tour of duty expired in October, 1982. *Watkins*, 551 F. Supp. at 223.

³⁹⁰ *Watkins v. United States Army*, 721 F.2d 687, 691 (9th Cir. 1983).

³⁹¹ *Watkins II*, 847 F.2d at 1334.

³⁹² *Id.* at 1349, 1352.

³⁹³ *Id.* at 1352-53. The court also remanded the remainder of Watkins's claims, including the loss of his security clearance due to his sexual orientation, to the district court. *Id.* at 1353.

pass strict scrutiny.³⁹⁴ In holding that the regulations actually discriminated on the basis of sexual orientation and not on actual conduct,³⁹⁵ the *Watkins II* court observed that the Army did not need to establish homosexual conduct either before or during service. The court also noted that homosexual conduct does not necessarily establish more than a presumption of homosexual orientation, for evidence of conduct could be rebutted by a showing that the homosexual conduct was an aberration and did not indicate a homosexual orientation.³⁹⁶ The *Watkins II* court reasoned that the Army views homosexual conduct, like statements of homosexual orientation, not as an action mandating separation from the Army, but instead only as presumptive but rebuttable evidence of homosexual orientation.³⁹⁷ The *Watkins II* court further noted that homosexual conduct that creates a rebuttable presumption of homosexual orientation includes not just sodomy but also kissing, holding hands, caressing, and other acts.³⁹⁸ The *Watkins II* court therefore

³⁹⁴ See *infra* notes 395–430 and accompanying text for a discussion of the court's three-step equal protection analysis.

³⁹⁵ *Watkins v. United States Army*, 847 F.2d 1329, 1339 (9th Cir. 1988).

³⁹⁶ *Id.* at 1337–39. For the content of the Army's regulations requiring the discharge of homosexuals, see *id.* at 1336 n.11. The regulations define a homosexual as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." *Id.* A homosexual act, according to the regulation, is "bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction." The regulations mandate discharge if the soldier "engaged in, attempted to engage in, or solicited another to engage in a homosexual act," either before the soldier joined the Army, during a previous tour of duty, or during the soldier's current tour. According to the regulations, however, the soldier can avoid discharge if the homosexual conduct was a departure from the soldier's usual behavior, was unlikely to recur, was not accomplished by force or coercion if done during military service, and if the soldier did not desire or intend to engage in homosexual acts and the soldier's continued military service was consistent with discipline, order, and morale. The regulations state that the intent of these exceptions is only to allow the retention of "non-homosexual" soldiers who, because of unusual circumstances, engage or attempt to engage in homosexual conduct. The regulations also mandate discharge, without recourse to the exceptions, of soldiers who state they are homosexual, and of soldiers who attempt to marry someone of the same sex, unless the Army finds that they are not truly homosexual. *Id.*

The Army's regulations prohibiting the reenlistment of homosexuals include not only those being discharged under the discharge regulation discussed above, but also persons of "questionable moral character and a history of antisocial behavior, sexual perversion or homosexuality." *Id.* at 1336. The reenlistment regulation further states that persons who have committed homosexual acts or have admitted being homosexual cannot reenlist, unless the act was an isolated incident that stemmed from unusual circumstances, such as immaturity or intoxication. *Id.*

³⁹⁷ *Id.* at 1338–39.

³⁹⁸ *Id.* at 1338. The court reasoned that same-sex kissing, holding hands, and caressing constituted bodily contact between persons of the same sex that gave sexual satisfaction. *Id.* The court also noted that, in *Watkins's* discharge hearing, the Army tried but failed to prove

held that the regulations sought to separate from the Army those persons with homosexual orientation, not those who engaged in legal or illegal homosexual acts, and hence burdened the class consisting of persons defined by their sexual orientation, not conduct.³⁹⁹

The second part of the *Watkins II* court's analysis concerned whether classifications defined by sexual orientation are suspect.⁴⁰⁰ Following what it reasoned were the guidelines defined by the United States Supreme Court for judicial inquiries into whether a class is suspect, the *Watkins II* court first held that the group defined by homosexual orientation had suffered a history of purposeful discrimination as "pernicious and intense" as that suffered by any other group established as suspect.⁴⁰¹ The court also considered whether government classifications burdening homosexuals are invidious because they constitute a gross unfairness inconsistent with the ideals of equal protection.⁴⁰² The *Watkins II* court noted that the characteristics that define homosexuals are irrelevant to their ability to perform or contribute to society.⁴⁰³

The *Watkins II* court further observed that discrimination against homosexuals arises from prejudice and inaccurate stereotypes, rather than rational evaluation, and in the Army's case the prejudice actually served as a rationale for their discrimination.⁴⁰⁴ The Army, according to the court, argued that homosexual soldiers would hurt recruitment and damage the Army's image because of pervasive prejudice against them, and also justified its regulations as rationally burdening the class of persons who engage in the criminal act of sodomy.⁴⁰⁵ The court dismissed this argument, noting that the Army's regulations defined the burdened class by its orientation, not by the propensity to commit sodomy, and that the

that *Watkins* squeezed a male soldier's knee. *Id.* The court compared the breadth of these regulations to the only statute, according to the court, that restricted the private consensual sexual activity of military personnel. *Id.* at 1338 n.12. The statute provides for the court marshal of personnel who engage in heterosexual or homosexual sodomy. 10 U.S.C. § 925 (1982).

³⁹⁹ *Watkins II*, 847 F.2d at 1338-39. The court reasoned that if a heterosexual and a homosexual soldier engage in homosexual conduct with each other because of intoxication or curiosity, the Army might retain the heterosexual soldier while automatically discharging the homosexual soldier. *Id.* at 1339.

⁴⁰⁰ *Id.* at 1345-49.

⁴⁰¹ *Id.* at 1345.

⁴⁰² *Id.* at 1345-46.

⁴⁰³ *Id.* at 1346.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

regulation's definition of homosexual conduct reached much more than sodomy.⁴⁰⁶

The *Watkins II* court finally observed, in considering the gross unfairness of government discrimination against homosexuals, that homosexual orientation constitutes an immutable characteristic for the purposes of equal protection analysis.⁴⁰⁷ The court reasoned that the Supreme Court, at a minimum, considers immutable traits to be those that a person could change only with great difficulty, or, more broadly, as characteristics that are so central to a person's identity that government penalization of persons for refusing to alter those characteristics would be abhorrent.⁴⁰⁸ According to the court, a person's sexual orientation is largely unchangeable, with some possible exceptions accomplished through drastic medical treatment, and the government could not require individuals to alter such a central aspect of their identities even if the alteration could be easily done.⁴⁰⁹

The *Watkins II* court finally held that homosexuals are a discrete and insular minority that is unable to seek redress from the political branches of government.⁴¹⁰ The court noted that most persons would never identify themselves as homosexuals, and that most persons would have little exposure to persons whom they knew were homosexuals, which therefore limits their ability to understand or empathize with homosexuals.⁴¹¹ Homosexuals also face barriers to political power, according to the court, because popular prejudice forces homosexuals to remain hidden, and pressures legislators from appearing to be concerned about them.⁴¹²

By applying these factors, the *Watkins II* court held that homosexuals constitute a suspect class.⁴¹³ The court then moved onto the third part of the analysis: whether the Army's regulations and their facially discriminatory impact on homosexuals survived the strict scrutiny test.⁴¹⁴ The court held that the regulations were not necessary to promote a compelling governmental interest, even with

⁴⁰⁶ *Id.* at 1346-47.

⁴⁰⁷ *Id.* at 1347.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 1347-48.

⁴¹⁰ *See id.* at 1348.

⁴¹¹ *Id.*

⁴¹² *Id.* at 1348-49.

⁴¹³ *Id.* at 1349.

⁴¹⁴ *Id.* at 1349-52.

the greater deference given to decisions made in the military sphere.⁴¹⁵

The *Watkins II* court rejected each of the reasons the Army gave for the regulations.⁴¹⁶ The court dismissed the Army's suggestions that homosexuals present problems of morale and discipline, reasoning that the Army's contentions illegitimately cater to private biases that could not justify official discrimination even when the biases create real and legitimate problems.⁴¹⁷ The *Watkins II* court also rejected the Army's claim that its regulations were grounded in moral principles, for the court held that moral principles could not serve as a compelling justification for laws that discriminate against a suspect class, and could not be applied with an evil eye.⁴¹⁸ Although the court acknowledged that society's moral condemnation of certain conduct may justify government restriction of that conduct, the court reasoned that equal protection requires that the government apply those moral principles evenhandedly.⁴¹⁹

The *Watkins II* court also held that other Army reasons for the regulations, including that emotional relationships between persons of different ranks would undermine discipline, or that the Army was concerned about preventing possible security breaches, were legitimate military goals, but ones that could be pursued using classifications that more closely fit those goals.⁴²⁰ The court held that the regulations bore little relation to these legitimate military goals, because they did not limit emotional attachments between

⁴¹⁵ *Id.* at 1349-50. The Court allows Congress and the military greater deference to restrict constitutional rights when setting military policies. See *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (women not required to register for draft); *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (military can restrict speech on bases).

The *Watkins II* court questioned whether the Army's regulations should receive greater deference, because the Supreme Court had only required this deference for congressional actions within Congress's authority to raise and support an Army, and Congress had not regulated homosexual conduct by military personnel. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988); see *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Rostker*, 453 U.S. 57 (1981).

⁴¹⁶ *Watkins II*, 847 F.2d at 1350-52.

⁴¹⁷ *Id.* at 1350-51. The court relied here on *Palmore v. Sidoti*, 466 U.S. 429 (1984). The court also noted that the military had previously justified race segregation as necessary to maintain morale and discipline. *Watkins II*, 847 F.2d at 1350.

⁴¹⁸ *Watkins II*, 847 F.2d at 1351-52.

⁴¹⁹ *Id.* The court based this principle on the Supreme Court's opinion in *Loving v. Virginia*, 388 U.S. 1 (1967). The *Watkins II* court suggested that animus against homosexuals might be based, not on morality, but instead on "prejudice masking as morality." *Watkins II*, 847 F.2d at 1351.

⁴²⁰ See *Watkins II*, 847 F.2d at 1352.

persons of different rank and sex.⁴²¹ The court also reasoned that the regulations only disadvantaged homosexuals of whose orientation the Army had knowledge, and would cause homosexuals to hide their identity, and therefore increase their susceptibility to blackmail.⁴²²

The *Watkins II* court distinguished this case from *Hardwick*, reasoning not only that *Hardwick* did not explicitly reach the issue of whether homosexuals are a suspect class, but also that *Hardwick's* reasoning did not preempt *Watkins's* claim that homosexuals constitute a protected class under equal protection analysis.⁴²³ The court noted that *Hardwick* only considered a substantive due process issue when it rejected the claim of a privacy right to commit consensual homosexual sodomy; the court interpreted the *Hardwick* decision not to suggest that the state could penalize homosexual orientation, or even that the state could make invidious distinctions by penalizing sexual conduct only when done by homosexuals.⁴²⁴ According to the *Watkins II* court, *Hardwick* decided only that a facially neutral sodomy statute was constitutional, and did not address whether heterosexual sodomy would fall within the scope of the right to privacy, or whether states could penalize only homosexual sodomy without violating the equal protection clause.⁴²⁵

The *Watkins II* court instead interpreted *Hardwick* as refusing to expand, by judicial fiat, the scope of the right of privacy, and reasoned that the Court's concerns about such an expansion have little relevance to the enforcement of the clear constitutional guarantee of equal protection of the laws.⁴²⁶ The court, noting *Hardwick's* concern with judicial involvement in "value-based line-drawing" when defining the scope of substantive due process, reasoned that equal protection does not restrict the enactment of laws based on the majority's substantive value choices, but only requires that the majority apply those values fairly.⁴²⁷ The court also criticized the reasoning in *Padula* as resting on the false premise that *Hardwick* approved of discrimination against homosexuals as homosexuals.⁴²⁸ According to the *Watkins II* court, the *Padula* court erred in reason-

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 1339-40, 1345.

⁴²⁴ *Id.* at 1339-40.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 1341.

⁴²⁷ *Id.* at 1341-42.

⁴²⁸ *Id.* at 1345.

ing that *Hardwick's* holding that states could criminalize sexual conduct commonly practiced by homosexuals also would allow states to pass "homosexual laws" only burdening homosexuals because of their orientation.⁴²⁹ Therefore, the *Watkins II* court held that no precedent barred it from finding classifications based on homosexual conduct to be suspect.⁴³⁰

Judge Reinhardt dissented from the *Watkins II* court's decision, arguing that *Hardwick* and previous Ninth Circuit decisions foreclosed the court from holding that homosexuals are a suspect class.⁴³¹ The underlying principle of *Hardwick*, according to Judge Reinhardt, was that the government, acting out of antihomosexual animus, could proscribe homosexuals from engaging in activities in which heterosexuals have a constitutional right to engage.⁴³² The majority misinterpreted *Hardwick*, he argued, to deny due process protection to both heterosexual and homosexual sodomy, because the underlying but crucial fact of *Hardwick* was that *Hardwick* was homosexual.⁴³³ Judge Reinhardt instead argued that the *Hardwick* decision allows the state to regulate sexual conduct by homosexuals while failing to regulate the same conduct by heterosexuals.⁴³⁴

If not for *Hardwick*, Judge Reinhardt stated, he would have agreed with the majority that homosexuals meet all the criteria for, and constitute, a suspect class under equal protection principles.⁴³⁵ Judge Reinhardt reasoned, however, that the Supreme Court had ruled that homosexuality, which he defined as possessing the desire or predisposition to engage in homosexual conduct, could be regulated or criminalized by the state.⁴³⁶ He argued that the court of appeals was not only prevented from describing discriminatory

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at 1353-62 (Reinhardt, J., dissenting). Throughout Judge Reinhardt's dissent, he explicitly criticized *Hardwick*, stressed that without *Hardwick* he would have joined the majority, but argued that the court was not free to contradict *Hardwick's* precedent as he interpreted it. See *id.* at 1353, 1358, 1362.

⁴³² *Id.* at 1354-55 (Reinhardt, J., dissenting).

⁴³³ *Id.* (Reinhardt, J., dissenting). Judge Reinhardt criticized the majority for extending *Hardwick's* reasoning to also erode privacy rights for heterosexuals, in violation, he argued, of the constitutional protection of most consensual, private heterosexual acts. *Id.* at 1355-56. Judge Reinhardt also argued that the majority unduly denigrated privacy rights in relation to equal protection, reasoning that substantive due process-based privacy rights were no less central to the Constitution, nor any less objective in application, than equal protection analysis. *Id.* at 1356.

⁴³⁴ *Id.* at 1354 (Reinhardt, J., dissenting).

⁴³⁵ *Id.* at 1356.

⁴³⁶ *Id.* at 1356-57 (Reinhardt, J., dissenting).

treatment of homosexuals as impermissible or as based on unreasonable prejudice, but also that the class defined by conduct that may be criminalized may not legitimately assert special constitutional protection.⁴³⁷

Judge Reinhardt further argued that, even if *Hardwick* allowed all sodomy to be regulated, sodomy statutes affect homosexuals disproportionately.⁴³⁸ He therefore argued that statutes that restrict all sodomy especially limit the primary form of sexual activity of homosexuals, and so neutral sodomy statutes also would violate equal protection if the class defined by propensity to engage in homosexual conduct were suspect.⁴³⁹ This result, according to Judge Reinhardt, would directly contradict *Hardwick's* holding that the government could prohibit homosexual sodomy.⁴⁴⁰ Judge Reinhardt, however, noted Ninth Circuit precedent that, under the fundamental rights branch of equal protection analysis, had subjected the Army's prosecution of a homosexual for sodomy to intermediate scrutiny.⁴⁴¹ Reasoning that, at most, the Army's regulations had to pass intermediate scrutiny, he argued, consistent with previous Ninth Circuit holdings, that military classifications disadvantaging homosexuals bear a substantial relation to an important government interest.⁴⁴² Arguing that the *Watkins II* majority failed to give the proper deference to the professional judgment of the military, Judge Reinhardt reasoned that *Hardwick* and Ninth Circuit precedent foreclosed the court from substituting its opinion on the suitability of homosexuals in the military for the military's own professional judgment.⁴⁴³

Judge Reinhardt also criticized the *Watkins II* majority's distinction between conduct and orientation as irrelevant, reasoning that the class defined by homosexual orientation is essentially the same as the class defined by homosexual conduct.⁴⁴⁴ Judge Reinhardt pointed out, moreover, that *Watkins* did admit to homosexual acts, so that he could still have been excluded under a narrower regu-

⁴³⁷ *Id.* at 1356-57 (Reinhardt, J., dissenting).

⁴³⁸ *Id.* at 1357-58 (Reinhardt, J., dissenting).

⁴³⁹ *Id.* (Reinhardt, J., dissenting).

⁴⁴⁰ *Id.* at 1358 (Reinhardt, J., dissenting).

⁴⁴¹ *Id.* at 1358-59 (Reinhardt, J., dissenting) (citing *Hatheway v. Secretary of Army*, 641 F.2d 1376 (9th Cir. 1981)).

⁴⁴² *Id.* at 1359 (Reinhardt, J., dissenting) (citing *Hatheway*).

⁴⁴³ *Id.* at 1359-60 (Reinhardt, J., dissenting) (citing *Hatheway* and *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), which both upheld military classifications disadvantaging homosexuals as legitimate and important).

⁴⁴⁴ *Id.* at 1359-62 (Reinhardt, J., dissenting).

lation based on conduct.⁴⁴⁵ He noted, moreover, that the court could reasonably interpret the regulations as an attempt to exclude those who had a propensity to engage in certain conduct detrimental to the military mission, not simply those with a certain orientation.⁴⁴⁶ The Army regulations, according to Judge Reinhardt, were therefore a legitimate attempt to predict and prevent certain future conduct in which Watkins had engaged.⁴⁴⁷

The United States Court of Appeals for the Ninth Circuit ordered *Watkins II* reheard en banc,⁴⁴⁸ and in 1989 the en banc court, hereinafter *Watkins III*, rescinded *Watkins II*, reversed *Watkins I*, and reinstated the district court's 1982 order equitably estopping the Army from refusing to reenlist Watkins because of his homosexuality.⁴⁴⁹ The *Watkins III* court ruled that courts may estop certain military actions even when the action does not violate a constitutional or statutory provision.⁴⁵⁰ The court therefore reasoned that it could decide the case without reaching the broad constitutional issues raised by *Watkins II*.⁴⁵¹ Judge Hall, dissenting, argued that courts should only estop military actions that violate constitutional, statutory, or regulatory provisions.⁴⁵² The dissent accused the majority of distorting precedent to avoid the difficult constitutional issues, but otherwise expressed no opinion concerning Watkins's equal protection claim.⁴⁵³

Judge Norris, the author of the majority opinion in *Watkins II*, concurred in the judgment in *Watkins III*, but agreed with Judge Hall's dissent and instead argued that the Army denied Watkins equal protection of the laws.⁴⁵⁴ Judge Norris's concurring opinion substantially mirrored his opinion in *Watkins II*, except for an ad-

⁴⁴⁵ *Id.* at 1361-62.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 1362 (Reinhardt, J., dissenting).

⁴⁴⁸ *Watkins v. United States Army*, 847 F.2d 1362 (9th Cir. 1988) (en banc).

⁴⁴⁹ *Watkins v. United States Army*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc) [hereinafter *Watkins III*].

⁴⁵⁰ *Id.* at 706. The court held that government agencies could be estopped if the court found affirmative misconduct by the government that would cause a serious injustice, and that estoppel could prevent without harm to the public interest. *Id.* The court ruled that the Army affirmatively misrepresented in its records that Watkins was eligible for reenlistment, and therefore acted in violation of its own regulation. *Id.* at 707-08.

⁴⁵¹ *Id.* at 705, 706. The court did not discuss the issues raised in *Watkins II*, only stating that it was unnecessary to reach those issues. *Id.* at 705.

⁴⁵² *Id.* at 731, 735 (Hall, J., dissenting). Judges Trott and Beazer and Chief Judge Goodwin joined in parts of Judge Hall's dissent. *Id.* at 739 (Hall, J., dissenting).

⁴⁵³ *Id.* at 731, 736, 737 (Hall, J., dissenting).

⁴⁵⁴ *Id.* at 711 (Norris, J., concurring).

ditional argument concerning whether *Hardwick* foreclosed a ruling that homosexuals constitute a suspect or quasi-suspect class.⁴⁵⁵ *Hardwick*, according to Judge Norris, did not implicitly extend the zone of privacy to include heterosexual sodomy while excluding homosexual sodomy.⁴⁵⁶ He noted that the Court expressly reserved consideration of the constitutionality of the Georgia statute as applied to heterosexual sodomy, and that the Court never suggested that heterosexual sodomy was "deeply rooted in this Nation's history and tradition" or was otherwise more deserving of due process protection.⁴⁵⁷

Even if *Hardwick* did extend due process protection to heterosexual but not homosexual sodomy, Judge Norris argued, the fundamental differences between equal protection and due process adjudication made the application of due process concepts irrelevant to an equal protection claim.⁴⁵⁸ He noted that the due process clause protects practices "deeply rooted in this Nation's history and tradition," and argued that *Hardwick* held homosexual sodomy not to be such a practice.⁴⁵⁹ He then reasoned that the equal protection clause protects disadvantaged groups from discriminatory practices, even when the groups had traditionally been subject to that discrimination.⁴⁶⁰ Judge Norris observed that homosexual acts might not be considered traditional practices *because* of historic discrimination, but that this engrained discrimination in turn supported heightened scrutiny of laws disadvantaging homosexuals.⁴⁶¹ He concluded that *Hardwick's* refusal to recognize a due process privacy right to practice homosexual sodomy, even if the Court might recognize such a right for heterosexual sodomy, was irrelevant to whether homosexuals constitute a protected class under an equal protection analysis.⁴⁶²

Two other federal appeals courts also considered protected class claims by homosexuals in 1989, and both rejected those claims.

⁴⁵⁵ *Id.* at 717-19 (Norris, J., concurring).

⁴⁵⁶ *Id.* at 717 (Norris, J., concurring).

⁴⁵⁷ *Id.* at 717-18 (Norris, J., concurring).

⁴⁵⁸ *Id.* at 718-19 (Norris, J., concurring).

⁴⁵⁹ *Id.* (Norris, J., concurring).

⁴⁶⁰ *Id.* (Norris, J., concurring).

⁴⁶¹ *Id.* at 719 (Norris, J., concurring).

⁴⁶² *Id.* (Norris, J., concurring). Judge Canby also concurred, agreeing with both the majority opinion and Judge Norris's concurrence. Judge Canby stated that he felt he could reach the constitutional issue even though equitable estoppel could resolve the case, because the court was en banc and the equal protection issue was a recurring one. *Id.* at 731 (Canby, J., concurring).

The United States Court of Appeals for the Federal Circuit, in *Woodward v. United States*, refused to hold that homosexuals constitute a class needing heightened judicial protection.⁴⁶³ The Federal Circuit considered a claim by James Woodward seeking backpay and reinstatement in the United States Naval Reserve, arising from his discharge from the Navy in 1974 for professed homosexuality.⁴⁶⁴ The court held that homosexuals are not a protected class under equal protection principles, and that the Navy's policy of discharging homosexuals bears a rational relation to a legitimate military purpose.⁴⁶⁵

Upon enlistment in the Naval Reserve in 1972, Woodward had stated that he had homosexual attractions but had never engaged in homosexual conduct; the Navy nonetheless accepted him.⁴⁶⁶ In 1974, however, he admitted during questioning by his commanding officer that he had homosexual tendencies and sought the company of homosexual enlisted personnel.⁴⁶⁷ The Navy eventually discharged Woodward.⁴⁶⁸

After relying on *Hardwick*⁴⁶⁹ to deny Woodward's claim of a constitutional privacy right to be homosexual,⁴⁷⁰ the court also relied on *Hardwick* to deny his equal protection claim.⁴⁷¹ The court reasoned that homosexuality fundamentally differs from traits defining other protected classes, because race, gender, illegitimacy, and ethnicity were immutable characteristics, while homosexuality was primarily a behavioral characteristic.⁴⁷² The conduct or behavior of a protected class, according to the court, had no relevance to the identification of those groups.⁴⁷³ The court then, agreeing with *Padula*,⁴⁷⁴ reasoned that *Hardwick* constitutionally allows discrimi-

⁴⁶³ *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344).

⁴⁶⁴ *Id.* at 1170.

⁴⁶⁵ *Id.* at 1176.

⁴⁶⁶ *Id.* at 1069.

⁴⁶⁷ *Id.* There was, however, no evidence of any homosexual conduct by Woodward mentioned in the case discussion. *See id.*

⁴⁶⁸ *Id.* at 1170. The Navy claimed that it discharged Woodward in part because of poor performance, but the court held that the Navy would not have discharged him except for a review of his file caused by the disclosure of his homosexuality. *Id.* at 1174.

⁴⁶⁹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁷⁰ *Woodward v. United States*, 871 F.2d 1068, 1074-75 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344).

⁴⁷¹ *Id.* at 1075-76.

⁴⁷² *Id.* at 1076.

⁴⁷³ *Id.*

⁴⁷⁴ *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

nation against homosexuals, because *Hardwick* allows the criminalization of the conduct that defines the class.⁴⁷⁵ Applying the rational-basis test to the Navy's policy of discharging homosexuals, the *Woodward* court held that the Navy's policy rationally furthered the Navy's interests in discipline, morale, and security, and therefore did not violate Woodward's equal protection rights.⁴⁷⁶

Like the Federal Circuit in *Woodward*, the United States Court of Appeals for the Seventh Circuit in the 1989 case of *Ben-Shalom v. Marsh* held that classifications disadvantaging homosexuals are not subject to heightened equal protection scrutiny.⁴⁷⁷ The appeals court reversed the United States District Court for the Eastern District of Wisconsin, which in 1989 held that homosexuals are a suspect class, and that the Army's regulation barring reenlistment of homosexuals violated homosexuals' equal protection rights.⁴⁷⁸ The appeals court instead ruled that homosexuals are not a suspect class, and that the Army's regulation rationally furthered a legitimate government purpose.⁴⁷⁹

Ben-Shalom concerned the Army's refusal to reenlist Miriam benShalom in the Army Reserves because she had professed to be a lesbian, although the Army did not allege that she had engaged or attempted to engage in any type of homosexual conduct.⁴⁸⁰ The Army acted pursuant to its regulation barring the reenlistment of homosexuals in the Army Reserves that were essentially the same

⁴⁷⁵ *Woodward*, 871 F.2d at 1076.

⁴⁷⁶ *Id.* at 1076-77.

⁴⁷⁷ *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876). The various courts considering this case have spelled Ms. benShalom's name several ways. Case cites will follow the spelling that particular court used.

⁴⁷⁸ *BenShalom v. Marsh*, 703 F. Supp. 1372, 1380 (E.D.Wis. 1989), *rev'd sub nom*, *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876).

⁴⁷⁹ *Ben-Shalom*, 881 F.2d at 464.

⁴⁸⁰ *BenShalom*, 703 F. Supp. at 1374. The Army had in 1976 discharged benShalom because of her public acknowledgment that she was a lesbian. *Id.* at 1373. The United States District Court for the Eastern District of Wisconsin ordered her reinstatement, holding that the Army regulations at issue violated her right to free speech and association and her right to privacy. *benShalom v. Secretary of Army*, 489 F. Supp. 964, 976 (E.D.Wis. 1980). The Army resisted reinstatement, and the United States Court of Appeals for the Seventh Circuit ordered the Army to comply. *Ben Shalom v. Secretary of Army*, 826 F.2d 722, 724 (7th Cir. 1987). The Army reinstated her, but then denied her application to reenlist in April 1988. BenShalom again filed suit, and the United States District Court for the Eastern District of Wisconsin, in August 1988, preliminarily enjoined the Army and ordered it to consider her reenlistment application without regard to her lesbian orientation while the court considered the permanent injunction. *benShalom v. Marsh*, 690 F. Supp. 774, 778 (E.D.Wis. 1988), *rev'd*, 881 F.2d 454 (7th Cir. 1989).

as the regulation considered in *Watkins*.⁴⁸¹ Homosexuals, according to the regulation, included not only those who had engaged in homosexual acts, but also those who desired homosexual contact.⁴⁸² The regulation provided that the Army could consider public or private professions by a person of homosexual desires when determining whether the person was an admitted homosexual.⁴⁸³

The district court found that the regulation violated ben-Shalom's right to freedom of speech and equal protection of the laws.⁴⁸⁴ The court reasoned that the regulations defined homosexuals, not by the commission of, or intent to commit, a homosexual act, but rather by the nature of their sexual desires.⁴⁸⁵ The Army could prevent the reenlistment of a homosexual, the court noted, who simply professed a homosexual identity without ever intending to participate in a homosexual act, while the Army could reenlist a person with a heterosexual orientation who nonetheless participated in a homosexual act.⁴⁸⁶ The court therefore found that the regulation classified on the basis of homosexual status, not conduct, because the sexual orientation of a person determined whether certain speech, or even homosexual acts themselves, would result in a bar to reenlistment.⁴⁸⁷

Having found that the Army regulation classified persons on the basis of homosexual status, not conduct, the district court rea-

⁴⁸¹ *Ben-Shalom*, 703 F. Supp. at 1374. The regulation barring the reenlistment of homosexuals in the Army Reserves is AR 140-111, Table 4-2, Rule E. The regulation listed numerous "nonwaivable moral and administrative disqualifications" to reenlistment, among them homosexuality, which is placed in a category with questionable moral character, anti-social behavior, sexual perversion, and frequent difficulties with law enforcement agencies. *Id.*

⁴⁸² AR 140-111, Table 4-2, note 1.

⁴⁸³ *Id.*

⁴⁸⁴ *BenShalom v. Marsh*, 703 F. Supp. 1372, 1377, 1380 (E.D.Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876). The court held that the regulation violated benShalom's first amendment right to freedom of speech by prohibiting her reenlistment because she professed her homosexual orientation. *Id.* at 1377. The court reasoned that, though the military had a substantial interest in discipline, morale, and other articulated purposes for the regulation, the Army swept more broadly than reasonably necessary by assuming that acknowledgment of homosexual desires indicated a propensity to engage in homosexual conduct. *Id.* at 1376-77. The court rejected this assumption, observing that some homosexuals, like heterosexuals, have foregone sexual activity, and reasoning that the Army's claim that "commonsense" indicated that profession of status equaled propensity to engage in conduct was prejudice, which could not justify a first amendment encroachment. *Id.* at 1377.

⁴⁸⁵ *Id.* at 1374.

⁴⁸⁶ *Id.* at 1374-75.

⁴⁸⁷ *Id.* at 1375.

soned that *Hardwick*,⁴⁸⁸ *Padula*,⁴⁸⁹ and *Baker*⁴⁹⁰ did not foreclose a finding that the class defined by homosexual conduct needed heightened judicial solicitude.⁴⁹¹ The court noted that *Hardwick* did not involve an equal protection claim, and that the *Padula* and *Baker* courts explicitly stressed that the classifications being considered were based on homosexual conduct, not status.⁴⁹² The *BenShalom* court reasoned that *Hardwick* and *Padula* could only be reasonably construed to foreclose strict scrutiny of classifications defined by the commission of criminal sodomy.⁴⁹³

The district court then noted that homosexuals were historically the objects of "pernicious and sustained hostility," and that prejudice rather than rationality likely caused classifications disadvantaging homosexuals.⁴⁹⁴ The court then reasoned that the Army provided no evidence that the class of persons with homosexual orientation shared any compelling desire to engage in criminal sodomy.⁴⁹⁵ The identification of homosexuals with the desire and intent to commit criminal sodomy, the court observed, was precisely the type of stereotyping that mandated heightened judicial scrutiny.⁴⁹⁶ Noting *BenShalom*'s own excellent service record, the district court also reasoned that homosexual orientation bears no relation to an individual's capabilities.⁴⁹⁷ The court also observed that, except in a very few communities, homosexuals do not have sufficient political power to counter invidious political discrimination, and so constitute a discrete and insular class subject to prejudice in the democratic processes.⁴⁹⁸

The court therefore held that classifications defined by the status of homosexual orientation are suspect.⁴⁹⁹ The court then ruled that the Army's regulation does not bear even a rational

⁴⁸⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁸⁹ *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

⁴⁹⁰ *Baker v. Wade*, 769 F.2d 289 (5th Cir.) (en banc), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986), *reh'g denied*, 478 U.S. 1035 (1986).

⁴⁹¹ *BenShalom v. Marsh*, 703 F. Supp. 1372, 1378-79 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876).

⁴⁹² *Id.*

⁴⁹³ *Id.* at 1379.

⁴⁹⁴ *Id.* (quoting *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1114 (1985) (Brennan, J., dissenting from denial of *cert.*)). The court noted that one of the Army's briefs analogized homosexuals to kleptomaniacs and arsonists. *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 1379-80.

⁴⁹⁸ *Id.* at 1380.

⁴⁹⁹ *Id.*

relation to any of the articulated compelling government interests.⁵⁰⁰ Though the court reasoned that the military has a legitimate interest in the sexual conduct of its personnel, the court observed that the regulation of sexual conduct must target that conduct itself and not, because of prejudicial stereotypes, certain classes.⁵⁰¹ The court found that sexual orientation bears no relation to an individual's ability to contribute to the military, and that the regulation aimed at orientation, not conduct.⁵⁰² The district court therefore held that the Army regulation barring the reenlistment of homosexuals violated benShalom's equal protection rights, and ordered the Army to reenlist her without regard to her sexual orientation.⁵⁰³

In 1989, however, the United States Court of Appeals for the Seventh Circuit reversed on both the first amendment and equal protection claims.⁵⁰⁴ The *Ben-Shalom* appeals court first disputed the district court's definition of the class in question, reasoning that the military could view a person's admission of homosexuality as reliable and compelling evidence that the person likely would engage in homosexual conduct.⁵⁰⁵ Although the court noted that some homosexuals might constitute exceptions, it refused to require that the Army fine-tune its regulation to deal with those individual exceptions.⁵⁰⁶

The appeals court then held that homosexuals do not constitute a class requiring either strict or intermediate judicial protection.⁵⁰⁷ *Hardwick*, the court reasoned, precluded a finding that classifications based on homosexuality should face stricter judicial scrutiny, be-

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.* at 1380-81.

⁵⁰⁴ *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876). The court reversed the district court's finding that the Army violated benShalom's first amendment rights, reasoning that the military could limit its personnel's freedom of speech in the interests of discipline and morale. *Id.* at 460. The court observed that the regulation only prohibited the self-admission of homosexuality, not discussions about or with homosexuals, or the advocacy of a change in the military's policies concerning homosexuality. *Id.* Noting that the Army had an interest in preventing homosexual acts, the court rejected the district court's labeling of the "commonsense" presumption that homosexuals commit homosexual acts as prejudice, and reasoned that the judiciary should not interfere with the military and Congress's discretion to set policies in pursuit of military goals. *Id.* at 460-62. The court therefore deferred to the Army's determination that homosexual personnel would impair military interests, and held that the military could exclude someone who admits to being a homosexual. *Id.* at 462.

⁵⁰⁵ *Id.* at 464.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

cause the court could not rationally provide heightened protection to homosexuals when the Supreme Court had upheld the constitutionality of statutes criminalizing homosexual conduct.⁵⁰⁸ The court further observed that Justice Blackmun's dissent in *Hardwick* would not necessarily preclude this regulation, because, unlike Michael Hardwick's conduct, homosexual conduct in the military would affect other military personnel, and would occur in an area with a considerably decreased expectation of privacy than a civilian's bedroom.⁵⁰⁹ The court also disagreed with Judge Norris's concurrence in *Watkins III*, both on his interpretation of *Hardwick* as not applicable to equal protection analysis, and on his rejection of the Army's justifications for the regulation as catering to private biases.⁵¹⁰ The *Ben-Shalom* court reasoned that the Army's regulation promoted a legitimate government interest, not mere prejudice, and declared Judge Norris's equal protection analysis unpersuasive in the military context.⁵¹¹

Homosexuals, the *Ben-Shalom* appeals court noted, continue to suffer from discrimination, but the court refused to hold that the regulation constituted invidious discrimination.⁵¹² The court reasoned that homosexuals are no longer without political power, could attract the attention of lawmakers, and therefore are capable of seeking congressional redress for the Army's regulation.⁵¹³ Observing that the courts should defer to the executive and legislative branches on issues of military policy and judgment, the court reversed the district court and upheld the regulation's constitutionality.⁵¹⁴

In addition to these court decisions, legal scholars have also discussed whether homosexuals require heightened judicial protection, and what affect *Hardwick* might have on that question. Commentators have argued that classifications based on sexual orientation merit strict or heightened scrutiny.⁵¹⁵ Professor Tribe notes the

⁵⁰⁸ *Id.* at 464-65.

⁵⁰⁹ *Id.* at 465.

⁵¹⁰ *Id.*; see *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1988) (en banc).

⁵¹¹ *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989).

⁵¹² *Id.* at 465-66.

⁵¹³ *Id.* at 466 (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 445 (1985)).

⁵¹⁴ *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

⁵¹⁵ See, e.g., L. TRIBE, *supra* note 98, at 1616; J. ELY, *supra* note 144, at 162-64 (classifications disadvantaging homosexuals suspicious because of social prejudice, and because that prejudice forces homosexuals to hide their identities and hence not interact publicly in society in a manner that counters stereotypes); Ackerman, *Beyond Carolene Products*, 98 HARV. L.

centrality of sexual orientation to a person's identity, the history of purposeful unequal treatment homosexuals have experienced, and their resulting status as a discrete and insular minority.⁵¹⁶ Professor Tribe also notes that homosexuals do not choose their orientation, and that sexual orientation, if not immutable, could be changed only with great difficulty.⁵¹⁷ Finally, he observes that homosexuality bears no relation to a homosexual individual's ability to contribute to society.⁵¹⁸ Professor Tribe concludes that homosexuals satisfy all the various tests for suspectness given by the courts, and argues that the courts should therefore add sexual orientation to the list of classifications triggering strict or intermediate scrutiny.⁵¹⁹

Commentators have also reasoned that *Hardwick's* holding that due process privacy rights do not extend to homosexual sodomy has no bearing on whether government discrimination against homosexuals violates equal protection principles.⁵²⁰ Professor Sustain observes that the due process clause protects traditional practices and conventions from attack by current majorities, and thus looks to the past for guidance in determining protected practices.⁵²¹ In contrast, she notes, equal protection principles protect disadvantaged groups from discriminatory government practices, even when those practices are deeply engrained and traditional, and hence allows for the invalidation of practices commonplace at the time of its ratification.⁵²² The due process clause, she argues, can permit discriminatory traditions that the equal protection clause prohibits.⁵²³ *Hardwick's* due process holding, according to Professor Sustain, cannot therefore be interpreted to foreclose equal protection

REV. 713, 742, 745 (1985); *Developments*, *supra* note 24, at 1525-30, 1564-71; *Heightened Scrutiny*, *supra* note 62; Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984). But see J. BAER, *supra* note 22, at 231-32, 252 (though argues that homosexuals denied equal protection because of judicial ignorance and prejudice, doubts that homosexuals would constitute suspect class under equal protection precedent; homosexuals, unlike African-Americans and women, never denied political rights, and unclear whether homosexuality an immutable characteristic).

⁵¹⁶ L. TRIBE, *supra* note 98, at 1616.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ Sustain, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV., 1161, 1163 (1988).

⁵²¹ *Id.* at 1163, 1170-74.

⁵²² *Id.* at 1163, 1174.

⁵²³ *Id.* at 1175-76.

claims by homosexuals.⁵²⁴ Professor Sustain also notes that *Hardwick* considered only homosexual sodomy, which was not at issue in *Watkins II*, because the Army regulations classified on the basis of status, not conduct.⁵²⁵ She notes, however, that equal protection claims would not be foreclosed even if some or all of the class engaged in conduct that could be constitutionally proscribed, because equal protection looks to prevent unjustified government hostility to a class from causing that class to be injured.⁵²⁶

Nonetheless, most of the recent cases that have considered whether homosexuals are a protected class have reasoned that *Hardwick* foreclosed heightened protection for them. These courts have consistently relied on *Hardwick*, and have not applied the criteria for heightened scrutiny that the Supreme Court has established for equal protection analysis, and on which those few courts that have granted homosexuals heightened protection have relied. The next section therefore analyzes these recent cases in the context of *Hardwick* and of established equal protection precedents.

IV. HOMOSEXUALS AS *THE* SUSPECT CLASS: ANALYSIS OF EQUAL PROTECTION JURISPRUDENCE AND THE PLIGHT OF HOMOSEXUALS

The principle of equal protection of the laws requires that the government treat persons fairly and as equals.⁵²⁷ In applying this principle, the courts closely scrutinize government classifications that disadvantage classes that the courts reason need judicial protection because of pervasive and irrational societal prejudice. Although homosexuals fulfill the criteria for such a class, most courts have failed to apply equal protection doctrines established by the Supreme Court, and instead have relied on other considerations, foreign to those equal protection doctrines, to deny equal protection claims by homosexuals.

This section first analyzes the Supreme Court's established criteria for providing additional protections for certain classes, and argues that the courts should accord homosexuals strict protection under these precedents. This section then considers the various rationales used by courts to refuse to provide heightened protection

⁵²⁴ *Id.* at 1162-63 & n.9. She therefore argued that the *Watkins II* majority correctly interpreted *Hardwick*, and that Judge Reinhardt's dissent in *Watkins II*, as well as the majority opinion in *Padula*, misread and misapplied *Hardwick*. *Id.* at 1162-63, 1164-70.

⁵²⁵ *Id.* at 1162 n.9.

⁵²⁶ *Id.*

⁵²⁷ See W. NELSON, *supra* note 9, at 18.

to homosexuals, in particular those rationales based on interpretations of *Hardwick*. Those rationales, this section argues, are foreign to equal protection analysis, and do not preclude subjecting classifications that disadvantage homosexuals to strict scrutiny.

A. *Homosexuals Fulfill Each of the Criteria for Protected Class Status Under Equal Protection Jurisprudence*

In developing the principle of equal protection, the Supreme Court has established a set of criteria by which it first determines the level of scrutiny it will apply to a challenged classification.⁵²⁸ These criteria, however, are not a mechanical check-list that must each be met.⁵²⁹ They instead constitute a series of questions that assist the courts' primary analysis: whether special societal conditions exist that should cause courts to forego their usual presumption that a classification is rational, and that instead should cause them to presume that a classification arises from invidious and non-legitimate government motives.

To determine this, the courts inquire whether a class experiences pervasive societal antipathy and stereotyped notions.⁵³⁰ They further question whether the unique characteristics of the class are outside the control of its members, and whether those characteristics are rarely relevant to any legitimate government interests.⁵³¹ Courts also determine whether the class is politically powerless to protect itself,⁵³² and whether government classifications often stigmatize the class.⁵³³ If a judicial analysis of these criteria indicate that a class is likely to be treated invidiously and irrationally because of societal and governmental antipathy, and is politically powerless to counter invidious classifications resulting from that antipathy, then courts will subject classifications disadvantaging that class to either strict or intermediate scrutiny.⁵³⁴

Homosexuals as a class fulfill each of these criteria for determining if a class requires heightened judicial scrutiny. Homosexuals

⁵²⁸ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-46 (1985); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁵²⁹ See *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., dissenting in part).

⁵³⁰ E.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973); *Rodriguez*, 411 U.S. at 28.

⁵³¹ E.g., *Frontiero*, 411 U.S. at 686.

⁵³² E.g., *Rodriguez*, 411 U.S. at 28; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵³³ E.g., *Frontiero*, 411 U.S. at 686-87.

⁵³⁴ See *supra* notes 281-93 and accompanying text for a discussion of the Court's use of strict and intermediate scrutiny.

continue to experience pervasive societal discrimination and demeaning stereotypes.⁵³⁵ A person's sexual orientation, although sometimes not a fixed trait, is a characteristic outside the person's control or responsibility,⁵³⁶ and is unrelated to the person's abilities, mental health, or likelihood to engage in violent or criminal acts.⁵³⁷ Homosexuals, furthermore, are an insular and politically powerless minority, forced into hiding by societal discrimination, and therefore are unable to command non-invidious attention from the government.⁵³⁸ Finally, state and federal government classifications aimed at homosexuals stigmatize them, serve to justify discrimination against homosexuals, and so relegate them to an inferior legal and social status for reasons unrelated to their actual capabilities.⁵³⁹

Homosexuals therefore continue to experience pervasive societal antipathy and stereotypes that result in governmental discrimination, and which homosexuals, because of their political powerlessness, are unable to prevent. The courts therefore should presume that the government bases classifications disadvantaging homosexuals on invidious or irrational motives. These invidious classifications violate the constitutional principle of equal protection of the laws, for the government thereby fails to treat homosexuals with the fairness and consideration required by their constitutional entitlement to equality of rights.

A truly free and equal society, moreover, cannot tolerate invidious and irrational government actions that unfairly deprive persons of those full and equal rights and liberties necessary for a meaningful and happy life. The government regularly deprives homosexuals of those rights and liberties. The courts should therefore protect the entitlement of homosexuals to equality under the law, by subjecting all government actions that classify on the basis of sexual orientation to strict scrutiny. Under that standard, they should require the government to demonstrate that classifications defined by sexual orientation are necessary and suitably tailored to achieve a compelling government interest.

Homosexuals in the United States experience societal discrimination of such pervasiveness that the courts should presume that

⁵³⁵ See R. MOHR, *supra* note 2, at 27-30.

⁵³⁶ See *id.* at 39-40.

⁵³⁷ See *supra* notes 110-17 and accompanying text for a discussion of the lack of correlation between sexual orientation and socially-important individual characteristics.

⁵³⁸ See R. MOHR, *supra* note 2, at 27.

⁵³⁹ See *id.* at 30; J. BAER, *supra* note 22, at 34; SEXUAL ORIENTATION, *supra* note 49, at Intro 2.

government actions disadvantaging homosexuals arose from those discriminatory impulses. Although the degree of repression aimed at homosexuals varies across extinct and modern societies, government and private discrimination continues to severely victimize homosexuals, probably more than any other minority group.⁵⁴⁰ Prejudice against homosexuals manifests itself in physical attacks and verbal harassment of homosexuals, and in discrimination against homosexuals in private employment and housing. The state and federal government also discriminates against homosexuals in employment, the military, immigration, family law, and child custody. Many states criminalize forms of consensual homosexual conduct, while the courts and law enforcement officials validate these forms of discrimination and establish different legal standards and procedures for homosexuals.⁵⁴¹

Nearly every aspect of homosexuals' lives, from employment and housing to the ability to express themselves sexually or simply to walk in safety, are therefore impaired by a degree of societal discrimination severe enough to render homosexuals a second class.⁵⁴² The pervasive, ingrained prejudice against homosexuals that causes these forms of discrimination affects every governmental action concerning homosexuals. Prejudice against racial, ethnic, and gender classes caused the courts to presume that classifications disadvantaging them arose from that prejudice and not from rational and legitimate reasons.⁵⁴³ The courts should similarly presume that widespread and severe antipathy against homosexuals in United States society causes classifications that injure homosexuals.

The prevalence of commonly-held but inaccurate stereotypes about homosexuals should also cause the courts to closely scrutinize classifications disadvantaging homosexuals. These stereotypes include that homosexuals are mentally ill, or are sexually or criminally dangerous, especially to children.⁵⁴⁴ Other common stereotypes are that homosexuals are unfit parents or teachers because they might seduce or otherwise cause them to become homosexual, and that homosexuals do not desire to live in stable family structures.⁵⁴⁵

⁵⁴⁰ See, e.g., R. MOHR, *supra* note 2, at 22-31; I. SLOAN, *supra* note 37, at 1-4 (1987); *Developments*, *supra* note 24, at 1541.

⁵⁴¹ See *supra* notes 51-97 and accompanying text for a discussion of forms of state and federal government discrimination against homosexuals.

⁵⁴² See R. MOHR, *supra* note 2, at 30.

⁵⁴³ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973).

⁵⁴⁴ See R. MOHR, *supra* note 2, at 23.

⁵⁴⁵ See D. WEST, *supra* note 28, at 150; J. BAER, *supra* note 22, at 228, 246.

Finally, many believe that homosexuals are excessively interested in sexual matters, or that homosexuals invariably engage in sodomous activity.⁵⁴⁶

These stereotypes, which permeate society's conception of homosexuality, come not only from ingrained beliefs, but also from ignorance engendered by the invisibility of homosexuals because of prejudice.⁵⁴⁷ Each of these prevalent stereotypes, however, is factually unsupported, simply because the sexual orientation of a person bears no relation to the person's abilities, personality, or health.⁵⁴⁸ Specifically, no evidence exists that homosexuals are likely to be mentally ill, to molest children, to affect children's sexuality, to engage in crime, or to have any other characteristics, aside from that persons of the same gender sexually arouse them.⁵⁴⁹

Homosexuals constitute a large minority within United States society.⁵⁵⁰ They live in all areas of the nation, subsist on every economic level, and work in all occupations, including the military.⁵⁵¹ They are as different from each other as are heterosexuals.⁵⁵²

Homosexuals and heterosexuals, indeed, do not constitute mutually exclusive classes, for persons occupy all sections of the sexual continuum from exclusively heterosexual, to mixed, to exclusively homosexual.⁵⁵³ The class of homosexuals is itself a creation of social prejudice, and not of any actual distinction beyond the object of their sexual desires. The definition of homosexuality, whether based on a person's sexual desires or sexual practices, on society's labeling of a person, or on a person's self-identification, is itself unresolved. United States society, nonetheless, has separated out a class of individuals and subjected them to prejudice without any reference to actual characteristics of those individuals that affect legitimate government concerns. Aside from the object of their sexual desire, all that differentiates homosexuals from heterosexuals is prejudice and unfounded stereotypes that heterosexuals inflict on homosexuals.

Degrading stereotypes about women that justify and promote discrimination caused the Court in *Frontiero* to presume an invidious

⁵⁴⁶ *SEX AND MORALITY*, *supra* note 38, at 166-68.

⁵⁴⁷ *See id.* at 225-29, 241-44; R. MOHR, *supra* note 2, at 22-23.

⁵⁴⁸ *SEX RESEARCH*, *supra* note 26, at 202.

⁵⁴⁹ *See, e.g.*, R. MOHR, *supra* note 2, at 43-44; D. WEST, *supra* note 24, at 241-46; *supra* notes 111-14 and accompanying text.

⁵⁵⁰ *See* R. MOHR, *supra* note 2, at 21.

⁵⁵¹ *See* MALE SEXUAL BEHAVIOR, *supra* note 24, at 625-31.

⁵⁵² *SEX RESEARCH*, *supra* note 26, at 202.

⁵⁵³ *See* MALE SEXUAL BEHAVIOR, *supra* note 24, at 636-55.

basis for government classifications disadvantaging them.⁵⁵⁴ The courts should similarly presume that government classifications disadvantaging homosexuals are based on false stereotypes that reflect often vicious misconceptions about, and antipathy toward, homosexuals. The false and demeaning stereotypes commonly believed about homosexuality further promote prejudice, and infect government actions concerning homosexuals. The courts should therefore more closely scrutinize classifications disadvantaging homosexuals, to insure that they do not arise from unreasoned reliance on those false stereotypes and their underlying prejudices.

Furthermore, because the only distinguishing characteristic of homosexual orientation is that persons of the same gender sexually arouse homosexuals, sexual orientation rarely, if ever, is relevant to any legitimate government interest. Contrary to commonly-held stereotypes, homosexual orientation bears no relation to an individual's ability to work, to raise children, to obey the law, or otherwise to participate positively in society.⁵⁵⁵ Sexual orientation is as unrelated to individual capabilities as are race or gender.

Sexual orientation, moreover, like race and gender, is a characteristic that is beyond the control of the individual.⁵⁵⁶ Either biology, genetics, or early childhood environment determine sexual orientation, usually before puberty.⁵⁵⁷ Although some persons' sexual orientation may change over their lifetimes, these changes are rarely a matter of choice, but rather occur involuntarily.⁵⁵⁸ Individuals therefore do not choose their sexual orientation, for sexual preference is an inherent aspect of a person's identity, as much as one's race, gender, and ethnicity.⁵⁵⁹

The Court has reasoned concerning other classes that the government acts irrationally by burdening classes for characteristics that are irrelevant to a person's capabilities or other government interests, and over which the person is not responsible. Homosexuality, like race, gender, and the illegal alien status of the children in *Plyler*, is a characteristic that is outside the individual's control.⁵⁶⁰

⁵⁵⁴ *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973).

⁵⁵⁵ See *supra* notes 107-34 and accompanying text for a discussion of the lack of correlation between sexual orientation and individual capabilities.

⁵⁵⁶ R. MOHR, *supra* note 2, at 39-40.

⁵⁵⁷ *Id.* at 39; D. WEST, *supra* note 24, at 247.

⁵⁵⁸ See R. MOHR, *supra* note 2, at 39-40; D. WEST, *supra* note 24, at 247.

⁵⁵⁹ See R. MOHR, *supra* note 2, at 40.

⁵⁶⁰ See *Plyler v. Doe*, 457 U.S. 202, 220-22 (1982) (undocumented alien children); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (gender and race).

Furthermore, unlike the mentally retarded, homosexuality bears no relation to distinctive capabilities or characteristics relevant to legitimate government interests.⁵⁶¹

As the Court has reasoned, legal burdens should only relate to individual responsibility and individual capabilities relevant to government interests.⁵⁶² These classifications likely reflected invidious rather than rational motives, the Court reasoned, because characteristics not only unrelated to capabilities but also outside an individual's control could not provide a rational justification for burdening the disadvantaged class.⁵⁶³ The courts should therefore presume that classifications disadvantaging homosexuals are irrational, and require the government, through heightened scrutiny, to justify those classifications as legitimate and rational. This additional scrutiny will protect homosexuals from invidious discrimination by requiring the government to establish an actual relation between the unique characteristics of homosexuals and a substantial government interest.

Furthermore, as an invisible minority confronted with severe antipathy, homosexuals also constitute a politically powerless and socially despised class requiring extraordinary judicial protection from the prejudices infecting the democratic process. The Court has elsewhere reasoned that classes politically unable to counter and remedy invidious government discrimination because of the impediments of societal prejudice need heightened judicial protection.⁵⁶⁴ Homosexuals, as a class forced into hiding by prejudice, constitute a class lacking the political ability to attract sufficient non-invidious legislative attention to counter invidious discrimination.

Many homosexuals, moreover, because of severe prejudice, dare not complain about discrimination, or even publicly reveal their identities as homosexuals.⁵⁶⁵ Prejudice effectively silences homosexuals, and renders them unable to counter and remedy invidious government discrimination caused by that prejudice. Public officials sympathetic to the plight of homosexuals, or themselves homosexual, are also silenced by fear of damage to their political futures.⁵⁶⁶ Societal prejudice not only renders homosexuals politi-

⁵⁶¹ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-43 (1985).

⁵⁶² *Id.* at 444; *Plyler*, 457 U.S. at 219-20; *Frontiero*, 411 U.S. at 686.

⁵⁶³ See *Plyler*, 457 U.S. at 220-22; *Frontiero*, 411 U.S. at 686-87.

⁵⁶⁴ See *supra* notes 256-58 and accompanying text for a discussion of classes needing heightened protection because of political powerlessness.

⁵⁶⁵ See, e.g., R. MOHR, *supra* note 2, at 27.

⁵⁶⁶ See *Watkins v. United States Army*, 847 F.2d 1329, 1348-49 (9th Cir. 1988).

cally powerless, but also prevents them from remedying society's ignorance by openly interacting with the heterosexual community.⁵⁶⁷

The Court has previously refused to presume the rationality of classifications when the disadvantaged class, because of prejudice, was politically powerless. The Court generally presumes that a class capable of openly engaging in the political system, or of otherwise attracting non-invidious political attention, can prevent or eventually remedy classifications that irrationally disadvantage it.⁵⁶⁸ This standard does not require that a class be able to exert direct political influence on government actions, but only that government actions concerning a class indicate that the class was able to attract non-invidious governmental consideration.⁵⁶⁹

But this presumption fails to hold when a class, such as homosexuals, cannot exert any political influence, and when government actions indicate that the government does not fairly consider and treat the class. The prejudice that pervades society permeates the government, and deprives homosexuals of those political processes that normally would protect them from invidious government discrimination. Homosexuals therefore need heightened judicial protection to replace those political processes that would usually insure that a classification was rationally based on achieving a legitimate government purpose.

Homosexual political power does exist in a few locales, and has been sufficient in two states and several municipalities to cause the enactment of laws protecting homosexuals from discrimination.⁵⁷⁰ Consistent with *Frontiero's* reasoning, however, these laws indicate not simply growing homosexual political power, but also the recognition by some democratic bodies that discrimination against homosexuals is pervasive and inherently invidious, and that the government must intervene to mitigate the antipathy.⁵⁷¹ Like the statutes cited in *Frontiero*, which provided legal protections for women against discrimination, those laws protecting homosexuals indicate that some officials recognize the pervasive private and pub-

⁵⁶⁷ See R. MOHR, *supra* note 2, at 22-23.

⁵⁶⁸ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 445 (1985); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4.

⁵⁶⁹ *Cleburne*, 473 U.S. at 445.

⁵⁷⁰ See MASS. GEN. L. ch. 151B, §§ 1-18 (Supp. Dec. 1989); WIS. STAT. ANN. § 111.31 (West 1988); SEXUAL ORIENTATION, *supra* note 49, at Intro-2, §§ 5.03[2][c]-[d], at 5-26 to 5-27, § 5.03[2][c] n.36; *Repealable Rights*, *supra* note 24, at 441, 445.

⁵⁷¹ *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1972).

lic discrimination inflicted on homosexuals. This recognition further supports the courts subjecting classifications disadvantaging homosexuals to heightened scrutiny.

Courts should also provide additional judicial protection because of the stigmatizing effects of government classifications disadvantaging homosexuals. The Court on several occasions has reasoned that classes often stigmatized by government classifications might need heightened judicial protection.⁵⁷² Government stigmatization relegates the affected class to an inferior legal status, impedes its equal enjoyment of rights and liberties, and perpetuates and justifies further societal discrimination against the class.⁵⁷³

Through government actions that criminalize sexual activity by homosexuals, that prohibit homosexuals from some types of government and professional employment, that keep homosexuals from immigrating into the United States, and that burden homosexuals seeking to form families, the government asserts the legal inferiority of homosexuals.⁵⁷⁴ These classifications, without regard to individual capabilities, therefore impede homosexuals' enjoyment of equal rights and liberties, weaken them politically, and demoralize them.⁵⁷⁵ The stigmatizing effects of these classifications, which are the result of the invidious motives of the government when it classifies on the basis of sexual orientation, provide an additional justification for heightened scrutiny of those classifications.

Although the Court has not fully explicated the distinction between classes receiving strict and intermediate protection, the Court has reasoned that classes defined by gender and illegitimacy require only intermediate scrutiny because some classifications based on these distinctions are rational.⁵⁷⁶ Unlike race and ethnicity, the government in some circumstances may legitimately act upon differences between males and females, or between legitimate and illegitimate children, because those differences sometimes relate to legitimate government interests.⁵⁷⁷ Another distinction noted by the Court is that illegitimates have been subjected to less societal prejudice than racial minorities or women.⁵⁷⁸

⁵⁷² *Id.*

⁵⁷³ *SEXUAL ORIENTATION*, *supra* note 49, at Intro 2.

⁵⁷⁴ See *supra* notes 62–86 and accompanying text for a discussion of forms of government discrimination that assert the legal inferiority of homosexuals.

⁵⁷⁵ See, e.g., R. MOHR, *supra* note 2, at 30; Schur, *supra* note 28, at 38–41.

⁵⁷⁶ See *supra* notes 290–93 and accompanying text for a discussion of the differences between suspect and quasi-suspect classes.

⁵⁷⁷ See *id.*

⁵⁷⁸ See *Mathews v. Lucas*, 427 U.S. 495, 505–06 (1976).

Homosexuality, however, is as unrelated as a person's race to an individual's ability to perform or contribute to society. The unique characteristic of homosexuals, their sexual arousal by persons of the same gender, has no relation to a person's capabilities or other legitimate government interests. Moreover, homosexuals continue to suffer prejudice and discrimination of at least comparative severity with racial minorities and women. The courts therefore should presume that government classifications disadvantaging homosexuals are as invidious and irrational as classifications disadvantaging racial and ethnic minorities, and subject those classifications to strict, not merely intermediate, scrutiny.

B. Extraneous Rationales Used by Courts that Failed to Provide Heightened Protection to Homosexuals

Although several courts have, since *Hardwick*, considered equal protection claims by homosexuals, all but one decision holding that homosexuals require heightened judicial protections have been overturned or rescinded on appeal. Those courts, however, that have acknowledged and utilized the Supreme Court's criteria for determining if a class should receive heightened scrutiny, have ruled that homosexuals are a protected class. Those courts that have refused to provide heightened protection have, in contrast, almost wholly based their analysis on factors unrelated to, or even antithetical to, equal protection jurisprudence. Usually, those courts have reasoned that *Hardwick's* reasoning precludes them from more closely scrutinizing classifications disadvantaging homosexuals.

Those courts that have properly applied the Supreme Court's criteria for determining protected classes have uniformly found that homosexuals are such a class. They recognize that prejudice and unfounded stereotypes about homosexuals likely cause classifications disadvantaging them, that the distinguishing characteristic of homosexuals do not relate to abilities or personal responsibility, and that homosexuals are politically powerless to prevent those classifications.⁵⁷⁹ These courts therefore ruled that classifications disad-

⁵⁷⁹ See *Watkins v. United States Army*, 847 F.2d 1329, 1345-48 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc); *Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1379-80 (E.D. Wis. 1989), *rev'd sub nom.*, *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369-70 (N.D. Cal. 1987). None of these courts, however, explicitly considered the stigmatizing effect on homosexuals of government classifications that invidiously injure them. *But see Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982), *aff'd*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289

vantaging homosexuals fulfill the Court's criteria for determining whether to apply heightened scrutiny to those classifications, because they presumptively arise from motives that violate homosexuals' constitutional entitlement to equal protection of the laws.

Only one court holding that homosexuals are not such a protected class has even cursorily considered the criteria for establishing protected status. The appeals court for the Seventh Circuit in *Ben-Shalom* reasoned that homosexuals, although still suffering from discrimination, are not politically powerless, and could rely on the democratic process to remedy invidious government discrimination.⁵⁸⁰ That court, however, ignored the finding of the district court that homosexuals do not have sufficient political power to counter invidious discrimination.⁵⁸¹ Except in a very few locales, homosexuals remain hidden, and if revealed, are more likely to attract hostility rather than fair consideration from the political institutions that the appeals court would have homosexuals rely on.⁵⁸² The *Ben-Shalom* court therefore erred in reasoning that homosexuals could seek redress in a political system manifestly hostile to them.

Although the Federal Circuit in *Woodward* did not formally apply the criteria for heightened scrutiny, it did reason that homosexuality differs from the defining traits of protected classes, such as women and African-Americans, because, *Woodward* reasoned, homosexuality is a behavioral, not immutable, characteristic.⁵⁸³ *Woodward*, however, did not cite any legal or scientific support for distinguishing behavioral traits that are inherent aspects of an individual's personality from immutable traits that are unrelated to conduct. Classes defined by a behavioral characteristic have the same entitlement to equal protection of the laws as do classes defined by physical characteristics, ethnic or racial traits, or any other trait. Whatever the basis of a classification, the government cannot injure a class for invidious or irrational reasons.

That homosexuals are distinguishable because persons of the same gender arouse them does not remove their entitlement to

(5th Cir. 1985) (en banc), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986), *reh'g denied*, 478 U.S. 1035 (1986).

⁵⁸⁰ *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876).

⁵⁸¹ *BenShalom*, 703 F. Supp at 1380.

⁵⁸² See *supra* notes 98-99 and accompanying text for a discussion of the risks homosexuals face if publicly revealed.

⁵⁸³ *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344).

equal protection of the laws. The government must still have a rational, non-invidious reason for disadvantaging them. Nor does homosexuals' need for judicial protection diminish because their status relates to an aspect of their sexuality which itself is unrelated to other individual characteristics. The immutability of a defining trait, whether behavioral or completely unrelated to conduct, remains important in evaluating the suspectness of a class, because it suggests that the government irrationally disadvantages them.

Despite *Woodward's* reasoning, therefore, the behavioral characteristic of homosexuality does not diminish the likelihood that the government invidiously injures them. Homosexuality is immutable and unrelated to individual capabilities, and the courts should therefore presume that a person's sexual orientation does not relate to any legitimate government purpose. Because homosexuals also face severe antipathy, the courts should require that the government show exactly how a classification injuring homosexuals relates to allowable government interests.

Moreover, *Woodward* and *Ben-Shalom* both also relied on the same reasoning that *Padula* and the dissent in *Watkins II* used to deny protected status to homosexuals. They reasoned that *Hardwick's* holding that persons do not have a privacy right to engage in same-sex sodomy also precludes heightened judicial protection for homosexuals under equal protection principles.⁵⁸⁴ They not only reasoned that courts could not provide heightened judicial protection to a class defined by conduct that the Court had held that the government could criminalize, but also that *Hardwick* allows the government to discriminate against homosexuals.⁵⁸⁵ The dissent in *Watkins II*, for instance, reasoned that the *Hardwick* Court based its holding on *Hardwick's* homosexuality.⁵⁸⁶ The dissent therefore reasoned that *Hardwick* allows government discrimination against homosexuals, and prevents the courts from holding such discrimination to be invidious.⁵⁸⁷

In contrast, those courts holding homosexuals to be a protected class reason that *Hardwick's* due process holding is irrelevant to equal

⁵⁸⁴ *Ben-Shalom*, 881 F.2d at 464-65; *Woodward*, 871 F.2d at 1076; *Watkins v. United States*, 847 F.2d 1329, 1356-57 (9th Cir. 1988) (Reinhardt J., dissenting); *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

⁵⁸⁵ See *Woodward*, 871 F.2d at 1076; *Watkins II*, 847 F.2d at 1356-57 (Reinhardt, J., dissenting); *Padula*, 822 F.2d at 103.

⁵⁸⁶ *Watkins II*, 847 F.2d at 1354-55 (Reinhardt, J., dissenting).

⁵⁸⁷ *Id.* at 1356-57 (Reinhardt, J., dissenting); see *Padula*, 822 F.2d at 103.

protection claims.⁵⁸⁸ They note that *Hardwick* did not consider whether homosexuals require heightened equal protection, whether heterosexuals have a privacy right to commit sodomy, or whether the government could penalize non-sodomous forms of homosexual conduct.⁵⁸⁹ *Watkins II*, for instance, interpreted *Hardwick* only to hold that substantive due process principles do not protect the commission of homosexual sodomy.⁵⁹⁰

Hardwick is a difficult case from which to draw any meaning, but Judge Reinhardt is correct in arguing that *Hardwick's* homosexuality was a primary reason for the holding. Although the Court did suggest that sodomy itself is not within those traditional liberties protected by substantive due process, the Court also noted that homosexual conduct is outside those traditional liberties.⁵⁹¹ Whether or not the Court would recognize a privacy right to engage in heterosexual sodomy, the Court's reasoning indicates that homosexual sodomy is more divorced from protected traditional liberties than heterosexual sodomy. The homosexual component of *Hardwick's* activity therefore was an important component to the Court's holding. The Court's refusal to hear the appeal of a decision holding that a privacy right existed to engage in heterosexual sodomy further indicates that the homosexual quality of *Hardwick's* act further removed the conduct from constitutional protection.⁵⁹²

To that extent, *Hardwick* does suggest that the Court will allow the government to restrict more extensively the liberties of homosexuals than of heterosexuals. As Justice Blackmun argued in dissent, however, the Court distorted the privacy issue by obsessively focusing on the homosexual component, because all individuals are equally entitled to constitutional liberty interests.⁵⁹³ *Hardwick* therefore is of little precedential value even in due process adjudication, because of its seeming willingness to define liberty interests by the status of the persons wishing to use those interests. As a decision

⁵⁸⁸ *Watkins II*, 847 F.2d at 1341; *Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1378-79 (E.D. Wis. 1989), *rev'd sub nom.* *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370-73 (N.D. Cal. 1987).

⁵⁸⁹ *Watkins II*, 847 F.2d at 1339-40; *High Tech Gays*, 668 F. Supp. at 1370-73; *see Watkins v. United States Army*, 875 F.2d 699, 717-19 (9th Cir. 1989) (en banc) (Norris, J., concurring).

⁵⁹⁰ *Watkins v. United States*, 847 F.2d 1329, 1341 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

⁵⁹¹ *See Bowers v. Hardwick*, 478 U.S. 186, 190-94, 196 (1986).

⁵⁹² *See L. TRIBE, supra note 98*, at 1431.

⁵⁹³ *Hardwick*, 478 U.S. at 200-01 (Blackmun, J., dissenting); *see id.* at 218-19 (Stevens, J., dissenting).

apparently approving of unfriendly discrimination, moreover, *Hardwick* is unprincipled and lawless, because it implicitly contradicts the constitutional principle of equality under the law.⁵⁹⁴

Although *Hardwick* does implicitly allow government discrimination against homosexuals, however, it does not necessarily preclude protected class status for homosexuals. The implicit prejudice of the Court may not substitute for reasoned consideration of constitutional principles as explicitly developed by the Court. *Hardwick* did not concern an equal protection claim, and the Court never considered whether, according to its precedents, homosexuals command heightened judicial protection. Courts considering equal protection claims by homosexuals should therefore apply those equal protection principles developed by the Court, and not rely on the Court's unprincipled prejudice in a due process case to justify equal protection to homosexuals.

Moreover, as Professor Sustain argues, substantive due process and equal protection doctrine rest on fundamentally different considerations.⁵⁹⁵ Substantive due process protects those activities traditionally recognized as liberties, and traditional animosity toward an activity engaged in by a class, according to *Hardwick's* reasoning, mitigates against recognition as a traditional liberty.⁵⁹⁶ But this same traditional animosity toward a class, which would preclude substantive due process protection of conduct by that class, *justifies* heightened judicial protection of that class under equal protection principles. The prejudice and animosity toward homosexuals on which *Hardwick* relies therefore does not preclude, and in fact supports, a judicial finding that homosexuals are vulnerable to invidious and irrational government discrimination in violation of the principle of equal protection of the laws.

Those courts that, subsequent to *Hardwick*, denied protected status to homosexuals further reasoned that *Hardwick* constitutionally allows the government to disadvantage homosexuals, because those classifications are legitimate attempts to prevent certain conduct or to implement morality.⁵⁹⁷ Implicit in this reasoning is that

⁵⁹⁴ See *id.* at 195-96; *id.* at 208-13 (Blackmun, J., dissenting).

⁵⁹⁵ Sustain, *supra* note 520, at 1162-63 & n.9, 1170-76; see *Watkins v. United States Army*, 875 F.2d 699, 718-19 (9th Cir. 1989) (en banc) (Norris, J., concurring) (adopting Sustain's argument).

⁵⁹⁶ *Hardwick*, 478 U.S. at 196.

⁵⁹⁷ See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *Woodward v. United States*, 871 F.2d

Hardwick established that the government has a legitimate interest in regulating or criminalizing homosexual conduct, and that the government may thereby discriminate, not only against those who engage, but also those with a propensity to engage, in that conduct.⁵⁹⁸ This reasoning is inconsistent with the criteria the Court has established for determining if a class should be protected, is irrelevant to equal protection jurisprudence, and is itself conceptually misapplied. *Hardwick*, moreover, does not establish that the government may pursue legitimate government interests by invidiously or irrationally discriminating against a class.

The reasoning used by those courts denying equal protection claims by homosexuals first requires that *Hardwick* mean that the government has a legitimate interest in criminalizing homosexual conduct. *Hardwick* reasoned that majority beliefs about the immorality of homosexual conduct provide a rational basis for laws criminalizing that conduct.⁵⁹⁹ As noted above, however, *Hardwick's* holding only involved consideration of whether homosexual sodomy is a *traditional liberty*, and not whether societal prejudice is a legitimate government purpose for criminalizing homosexual conduct under equal protection principles.

Moreover, this argument requires that the courts equate homosexual orientation with the propensity to engage in homosexual conduct. Several of the courts that refused to provide heightened protection to homosexuals reasoned that homosexual orientation is merely the propensity to engage in conduct that the government constitutionally could prohibit.⁶⁰⁰ In contrast, those courts that granted heightened protection distinguished homosexual orientation from the propensity to, or actual participation in, the conduct that *Hardwick* held the government could proscribe.⁶⁰¹ These courts

1068, 1076 (Fed. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344); *Watkins v. United States Army*, 847 F.2d 1329, 1356-57 (9th Cir. 1988) (Reinhardt, J., dissenting), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

⁵⁹⁸ See *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076; *Watkins II*, 847 F.2d at 1356-57 (Reinhardt, J., dissenting).

⁵⁹⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁶⁰⁰ *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076; see *Watkins II*, 847 F.2d at 1356-57 (Reinhardt, J., dissenting).

⁶⁰¹ *Watkins II*, 847 F.2d at 1338-39; *Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1379 (E.D. Wis. 1989), *rev'd sub nom.*, *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370-73 (N.D. Cal. 1987).

therefore reasoned that *Hardwick* does not foreclose them from holding that the class defined by homosexual orientation is a protected class under an equal protection analysis.⁶⁰²

Whether homosexual orientation is tantamount to a propensity to engage in sodomy or other homosexual conduct is irrelevant to whether homosexuals are a protected class. Homosexuality is not so uniquely related to a propensity to commit sodomy that it should foreclose an equal protection analysis of government classifications that disadvantage only homosexuals. Heterosexuals also commit sodomy, and not all homosexuals, especially lesbians, have such a propensity. Whatever tenuous relation might exist between homosexuals and an increased likelihood to commit sodomy is not sufficient to foreclose an equal protection analysis of whether the government instead based discrimination against homosexuals on invidious or irrational motives.⁶⁰³

If *Hardwick* instead only allows the regulation of homosexual sodomy, or of homosexual conduct, arguments that *Hardwick* justifies discrimination against homosexuals beg the question of whether the regulation only of homosexual sodomy or conduct passes equal protection analysis. The Court only held that there is no privacy right to commit homosexual sodomy, not that the government could discriminate against homosexuals. Even under minimum rationality, the government cannot criminalize homosexual conduct because of invidious or irrational motives. Whether the regulation only of homosexual sodomy or conduct are legitimate government interests depends not just on whether they are traditional liberties, but also on whether the government regulates that conduct for invidious or irrational reasons. *Hardwick* did not reach this equal protection analysis, which includes whether homosexuals are a protected class.

Before a court can therefore reason that the government can regulate homosexual orientation because it indicates a propensity to engage in homosexual conduct, the court must first determine whether the regulation of homosexual conduct is legitimate, or instead is invidious or irrational. Moreover, whether or not regulating homosexual conduct is a legitimate government interest, discrimination against the class with a *propensity* to engage in that

⁶⁰² *Watkins II*, 847 F.2d at 1339-40; *BenShalom*, 703 F. Supp. at 1379; *High Tech Gays*, 668 F. Supp. at 1370-73.

⁶⁰³ See *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 532-38 (1973) (Court rejected government's argument that statute preventing "hippies" from participating in food stamp program rationally related to fraud).

conduct disadvantages them because of a characteristic for which the class is not responsible. In equal protection analysis, the Court has held that government discrimination against a class because of characteristics for which individuals within the class are not responsible increase the presumption that the discrimination is irrational or invidious. Adult undocumented aliens, for instance, are therefore not a protected class, while their children are, even though the government has a strong interest in regulating illegal aliens.⁶⁰⁴

Individuals do not voluntarily become homosexual or heterosexual, and cannot usually alter their orientation.⁶⁰⁵ Discrimination against homosexuals for being members of a class with a propensity to engage in homosexual conduct therefore not only presumes a legitimate government interest in regulating that conduct, but also discriminates because of a characteristic that homosexuals did not choose and cannot alter. Government discrimination against homosexuals therefore stigmatizes and disadvantages them without regard to individual responsibility, and suggests that the government discriminates for invidious rather than rational reasons.

The identification of homosexuals with a propensity to engage in homosexual sodomy or other sexual conduct, finally, relies on a stereotyped notion of homosexuals. Homosexuality is not simply a desire to engage in same-gender sexual activity, for it also can be a desire to seek emotional support and affection from persons of the same sex. Although, moreover, a person's sexual orientation is an important aspect of the person's life, that orientation does not define or predict the person's other characteristics. Homosexuals, like heterosexuals, vary tremendously in their proclivities, desires, goals, health, and abilities. The equation of homosexuality with forms of sexual conduct is part of the stereotype of homosexuality as the sordid pursuit of sexual gratification.⁶⁰⁶ This stereotype serves in turn to deny access to homosexuals of those other meaningful qualities of life that homosexuals, like heterosexuals, pursue, such as to live securely and safely, and to establish both sexual and social relationships.

But although the courts should not equate homosexual orientation with homosexual conduct, neither should they reason that government classifications disadvantaging on the basis of homosexual conduct are less likely to be invidiously-based than those that

⁶⁰⁴ *Plyler v. Doe*, 457 U.S. 202, 219-23 & n.19 (1982).

⁶⁰⁵ See R. MOHR, *supra* note 2, at 39-40.

⁶⁰⁶ See *BenShalom*, 703 F. Supp. at 1329; R. MOHR, *supra* note 2, at 23.

disadvantage on the basis of orientation. The dissent's argument in *Watkins II* that heightened protection for homosexuals would invalidate even neutral sodomy statutes might be valid, because sodomy is a more prevalent form of sexual conduct for gay males than for heterosexuals.⁶⁰⁷ Neutral sodomy statutes that are evenly applied to heterosexuals and homosexuals do impinge on a common form of heterosexual activity, however, and if heterosexuals also found their ability to engage in sodomy restricted, they conceivably would clamor for the repeal of those statutes.

But sodomy laws and other government actions that explicitly target, or that law enforcement disproportionately enforces against, homosexuals must be scrutinized under the same standard used for classifications based on homosexual orientation. These government classifications disadvantage all homosexuals by limiting their freedom to engage in certain conduct, and by stigmatizing them.⁶⁰⁸ This is especially true because alleged government efforts to regulate homosexual conduct so often include discrimination against individuals not just because of homosexual conduct, but also because of a propensity, according to the government, to engage in that conduct.⁶⁰⁹

All individuals with homosexual orientation, therefore, are often discriminated against even if they have not engaged in homosexual conduct, because the government presumes they likely have or will. Even if the government discriminates only on the basis of actual conduct, moreover, the government impairs the sexual freedom of all homosexuals. Arguments that the regulation of homosexual conduct should face a different equal protection standard than the regulation of homosexual orientation are therefore specious. Each form of discrimination against homosexuals arises from prejudice against them, restricts their liberties, and stigmatizes them, because of a characteristic for which they are not responsible.

Similarly, the courts must closely scrutinize government classifications that disadvantage homosexuals because of arguably legitimate government interests. The government, for example, does have legitimate interests in maintaining military discipline and na-

⁶⁰⁷ *Watkins v. United States Army*, 847 F.2d 1329, 1357-58 (9th Cir. 1988) (Reinhardt, J., dissenting), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); see *Heightened Scrutiny*, *supra* note 62, at 801-02 (neutral sodomy statutes disproportionately impact homosexuals because they prohibit primary form of homosexual intimate conduct)."

⁶⁰⁸ See *SEXUAL ORIENTATION*, *supra* note 49, at Intro 2.

⁶⁰⁹ See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876); *Watkins II*, 847 F.2d at 1359-62.

tional security. But when the government pursues those interests through classifications that disadvantage homosexuals, the courts should nonetheless presume that those classifications are invidious. Those classifications, moreover, must not only be closely tailored to achieve the government's interests, but also must not give affect to prejudice.⁶¹⁰ The military's legitimate interest, for instance, in preventing disruptive sexual conduct, or avoiding security breaches, can be less intrusively pursued than by banning homosexuals from the military.⁶¹¹ The military could instead investigate whether the circumstances of an individual homosexual's life might open that individual to threats of blackmail, as the military now does with heterosexuals. The military could also avoid disruptive sexual conduct by prohibiting that conduct, without having to ban a class of individuals that the military presumes might engage in that conduct. That the presence of homosexuals in the military might damage morale because of prejudice by others, however, like race segregation in the military, merely gives legal effect to prejudice.⁶¹²

The implementation of morality also serves as a potential justification for discrimination against homosexuals.⁶¹³ *Hardwick* reasoned that majoritarian notions of the morality of homosexual conduct rationally support the criminalization of that conduct.⁶¹⁴ *Hardwick's* dissenters countered by arguing that majoritarian morality is insufficient to justify laws that interfere with fundamental personal choices and private conduct.⁶¹⁵ *Watkins II* and some commentators also argue that the government must apply moral principles equally and fairly, and that moral principles are not a compelling justification for discrimination against a suspect class.⁶¹⁶

⁶¹⁰ See *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

⁶¹¹ See *Watkins II*, 847 F.2d at 1352.

⁶¹² See *id.* at 1350-51; *Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1380 (E.D. Wis. 1989), *rev'd sub nom.*, *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876).

⁶¹³ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (majority's sentiments about morality of homosexuality a rational basis for sodomy laws); *id.* at 197 (Burger, C.J., concurring) (immorality of homosexuality part of millenia of moral teaching); *Watkins v. United States*, 847 F.2d 1329, 1351-52 (9th Cir. 1988) (court rejected Army's claim that discrimination against homosexuals based on moral principles), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); *Baker v. Wade*, 769 F.2d 282, 292 (5th Cir. 1985) (en banc) (sodomy statute rationally related to moral objection to homosexual conduct).

⁶¹⁴ *Hardwick*, 478 U.S. at 196.

⁶¹⁵ *Id.* at 213 (Blackmun, J., dissenting); *id.* at 216-18 (Stevens, J., dissenting).

⁶¹⁶ *Watkins II*, 847 F.2d at 1341-42, 1351-52; see *supra* notes 135-47 and accompanying text for a discussion of the legal role of morality in relation to homosexuality.

The enactment of moral principles into law, although legitimate, often threatens constitutional principles of equality and liberty.⁶¹⁷ A free society values personal liberty, especially when those liberties do not conflict with the freedoms of others. An equal society should not condone an unequal infringement on a class's liberties when done for unfriendly reasons. Moral rules must therefore be even-handed, and must not mask antipathy to a class.

The Court therefore, for instance, noted that laws against interracial marriage were based on prevailing principles that many considered ordained by God, but which simply masked prejudice.⁶¹⁸ Similarly, the private moral principles supporting discrimination against homosexuals involve private antipathy that cannot justify the public infringement of the equal rights and liberties of homosexuals. Moral justifications for government actions disadvantaging homosexuals therefore do not preclude heightened scrutiny of those actions, because the government must apply those moral beliefs evenhandedly and without invidious intent.

V. CONCLUSION

One of the lessons the citizens of the United States took from the Civil War is that a free society must be equally free for all its people. The constitutional principle of equality under the law, therefore, requires that the government treat all classes fairly and equally. Equal protection of the laws mandates that the government disadvantage a class only to accomplish a legitimate government interest, and not because of unfriendliness to that class. To enforce this principle, the courts presume that certain government classifications result from invidious or irrational motives, and that the disadvantaged class requires additional protection. The courts give this protection when a class faces pervasive antipathy and unfounded stereotypes unrelated to individual abilities or responsibility, and when the class is politically powerless to confront that irrational prejudice within the democratic system.

Homosexuals are not treated fairly and equally by the government, which disadvantages them not because of legitimate government interests, but rather because of pervasive prejudice and irrational stereotypes. Sexual orientation implicates no legitimate

⁶¹⁷ See MODEL PENAL CODE, *supra* note 137, § 213.2, at 369, 372; R. MOHR, *supra* note 2, at 31.

⁶¹⁸ See *Loving v. Virginia*, 388 U.S. 1, 3, 11 (1967) (trial judge stated that miscegenation violated God's intent to keep the races separate)..

government interests, for it is irrelevant to individual capabilities, and is not voluntarily chosen by individuals. Homosexuals, moreover, lack the political ability to redress this discrimination through the political processes. As a result, government discrimination stigmatizes homosexuals, promotes further prejudice, and impairs their ability to live meaningful lives without fear.

Consistent with equal protection doctrine, the courts should therefore strictly scrutinize government classifications disadvantaging homosexuals. Most courts, however, have ignored the principle of equal protection, and instead have applied a special dogma to reject the notion of equal protection for homosexuals. They have refused to recognize that homosexuals have the same liberty interests in deciding how to live their lives, and the same entitlement to equality under the laws, as heterosexuals. They instead have incorrectly reasoned that the Supreme Court's ruling in *Hardwick* precludes heightened protection for homosexuals, and even allows the government to discriminate against homosexuals. In so doing, to borrow Professor Tribe's words, these courts have bootstrapped antipathy against homosexuals into a justification for allowing discrimination—in the one area of the law where antipathy to a class normally invalidates resultant government discrimination.⁶¹⁹

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⁶¹⁹ L. TRIBE, *supra* note 98, at 1427–28.