University of Tennessee, Knoxville
TRACE: Tennessee Research and Creative Exchange

Senior Thesis Projects, 1993-2002 College Scholars

1999

Sodomy Laws, Status and Suspect Classification: A Sexual Orientation Issue

Jason Beach

Follow this and additional works at: https://trace.tennessee.edu/utk_interstp2

Recommended Citation

Beach, Jason, "Sodomy Laws, Status and Suspect Classification: A Sexual Orientation Issue" (1999). *Senior Thesis Projects, 1993-2002.*
https://trace.tennessee.edu/utk_interstp2/36

This Project is brought to you for free and open access by the College Scholars at TRACE: Tennessee Research and Creative Exchange. It has been accepted for inclusion in Senior Thesis Projects, 1993-2002 by an authorized administrator of TRACE: Tennessee Research and Creative Exchange. For more information, please contact trace@utk.edu.

Jason Michel Beach

College Scholars/Whittle Senior Project

Fawbush, Davis, Tandy

12 December 1999

Sodomy laws, Status, and Suspect Classification:

A Sexual Orientation Issue

Table of Contents

I. Forward

II. Introduction

III. Terms and Definitions

IV. *Bowers v. Hardwick*

- **A. Logic of the Opinion**
- **B. Use of Special Tests**
- **C. Use of Precedent**
- **D. Creation of New Tests, Rules, and Precedents**
- **E. Professional Opinions**
- **F. Ruling as a Coherent Guide for the Lower Courts**
- **G. Impact on Public Policy**

V. Sodomy is not a Fundamental Right: So what?

VI. Rational Basis: Or Rationally Moral?

VII. Equal Protection Adjudication: Development

VIII. Suspect Classification: Applied

IX. Straight to Hell in a Hand Basket

X. Conclusion—Bringing it all Together

I. Forward

Of all my college classes, postmodern black literature was the one with which I identified and connected the most. This might at first seem a little odd, as I am white man. After all, how much can I really know of the disparate and tragic treatment that African-Americans have suffered in this country? What is it to be black and American? What experiences could I have had that could turn my sympathy into true *empathy*? Honestly, I have come to understand that I will never be able to fully comprehend the answers to the previous questions. I did, however, try to come as close to understanding these issues as I could. Literature was my link. I was able to see myself in Nella Larson's *Passing*, a book about light skinned blacks "passing" as Italians or even whites in order to live life free of the societal shackles of the 1920's. Having lived most of my life "passing" for something that I am not, I felt a connection with the novel. Yet I'm not sure if that my connection was a direct identification. No, it was more of an indirect relation.

Another work that I could indirectly relate to was Patricia J. Williams' book, the *Alchemy of Race and Rights*. She opens the first chapter by saying, "Since subject position is everything in my analysis of the law, you deserve to know it is a very bad morning" (1). This sentence, when taken with the fact that she is a black, female lawyer reviewing an 1835 case about redhibitory vices concerning a slave, is quite revealing. In the case a slave named Kate is found to be worthless because she is crazy; thus, the buyer can demand reimbursement for this worthless "property." In essence Ms. Williams' "subject position" statement is about identifications, and in her review of the 19th-century case, an inversion of sorts takes place. She identifies not with the judge rendering the

decision but rather with the slave. Indeed much of her legal thinking is in constant flux between object and subject positions.

In this project, I too am in constant flux between my object and subject positions. While trying to examine whether gays and lesbians are deserving of a protected class status, I often project myself into the cases and professional analyses. Since I am a gay man, this is a natural response. Thus, maintaining cold academic objectivity will not be my solitary goal in this paper. Make no mistake; such a deviation from a dry legalistic examination will not jeopardize the integrity of this project. Rather, it will infuse it in a manner that should add to its value. Object and subject shall be one.

II. Introduction

Broadly speaking, this work is about gay rights. In this general framework of gay rights and liberties, I will focus specifically on arguing that homosexuals should be viewed by the American judiciary as a suspect class. This goal will be achieved by examining several factors, that when seen with their aggregate effect, will show that elevating gays and lesbians to this class is just, reasonable, and most of all, logical. This analysis will proceed by first defining the terms of the discussion. Next, the case of *Bowers v. Hardwick* will be examined thoroughly, as it is key to an examination of homosexual's suspectness—even thought the opinion never mentions it! Then, keeping in mind the *Hardwick* case, the undeniable applicability of sodomy laws as a barrier to establish homosexuals as a suspect class will be shown. After that, the Court's use of a rational basis test, with its various facets, will be examined. Then, I will move into the discussion of suspect classification by defining what constitutes this designation and examining each qualification in terms of homosexuality. I will then continue to show the possible effects that elevating gays and lesbians to this status would have on society. Finally, I will sum up the work, bringing all the previously mentioned aspects together.

A work such as this could possibly take hundreds of pages, yet this one in particular will not. In advocating a suspect classification for gay Americans, I will proceed by following the foregoing structural outline. Yet it is key that you, as the reader, understand the interplay of sodomy laws, status versus conduct arguments, and suspect classification. The main thrust of this project is seen in the undercurrent that sodomy laws have upon the juridical analysis of gay rights and liberties issues. It is equally important that by the time you reach the conclusion of this paper, you understand

that while status versus conduct arguments seem to help gays, lesbians, and bisexuals, they are an implicit barrier to obtaining civil privileges. Indeed, the theoretical underpinnings of theses three subjects have an interconnectedness that must not go unnoticed. For when sodomy prohibitions are viewed in tandem with status/conduct distinctions and are then applied to suspect classification, the result is disastrous for homosexuals. As you will soon see . . .

III. Terms and Definitions

First of all, gay rights have to been seen for what they actually are and not what their opponents would assert. Thus, it is essential to this argument to understand what gay rights are not; *they are not special rights*. Gay rights do not seek to obtain rights that other Americans do not posses. Rather, they seek to secure the rights that other Americans already have and assert on a daily basis. In short, gay rights seek to win the "same personal, social, economic, political, and legal rights guaranteed to and taken for granted by nearly all nongay Americans" (Newton 6). Achieving the aforementioned goals will hopefully bring gays and lesbians to plane where they can live without fear that their sexual orientation will be a "strike" against them in American society.

In addition, you will not find the term "sexual preference" in this analysis. In short, it is offensive, and an affront to the situation of gay Americans. It inherently implies a choice in the direction of one's sexual attraction. While a person can choose to physically engage in whatever type of sexual activity he/she desires, the direction of one's sexual attraction cannot be altered. "It [sexual orientation] can be stifled, sublimated, beaten down, condemned, and hated, but it cannot be changed" (White 72). I choose to

be gay no more than any other person can choose to be attracted to members of the opposite sex. While I can master my reactions to my attraction, the particular characteristics that fit my sensual grid are not objects of my own choice or preference. So, sexual orientation will be the wording that embodies the general term encompassing its various subsets, which include, but are not limited to: heterosexuality, homosexuality, and bisexuality.

Asking exactly what constitutes the term homosexual is a rather strait-forward question, but the answer is profoundly complex. It is necessary, however, to have a working definition of this particular orientation. Contrary to popular belief, identification as a gay man or a lesbian woman does not have to involve any kind of sexual act, however closely connected status and conduct might be. Indeed, many gays and lesbians understand that they are different, that they are homosexual, at an early age—long before any kind of same-sex experience actually takes place. Yet as one progresses with experience and age, status and conduct almost invariably fuse. The distinction between the two ceases to exist, as they become almost indivisible.

But with regards to establishing if someone is or is not gay, the most basic way to make a determination is to discover the person's sexual identification. If a person identifies him/herself as homosexual, then establishing status in order to claim civil rights entitlements is somewhat easier. Obviously, there is always the possibility that a person that is not same-sex oriented could claim homosexual status in order to claim some kind of liberty for whatever purpose. A Court could dispose of this fairly quickly, I think, by way of witnesses that know the person, sworn affidavits, and quite possibly, psychological evaluations. However by pursuing this form of status establishment, some

gays and lesbians could be hurt by being in the closet; thus, they would have no witnesses to testify to their sexual orientation. A psychological exam would have to suffice in this case. But like any other claim of status, that of homosexuality would have to be proven.

As I said, defining the term "homosexual" is an intricate and delicate matter. For instance, Robert Wintemute of London's King College states in his book that there are essentially four ways to look at the term sexual orientation. When a person says that he/she is gay—bisexual or heterosexual for that matter—it could refer to:

> "(a) the direction of the person's attraction, (b) the direction of their conduct (taken as a whole), (c) the direction of a specific instance of their conduct, or (d) their 'identity' (i.e. whether they consider that the direction of their emotional—sexual attraction or conduct serves in part to define them both as a unique individual as a part of a group or community of similar individuals)" (Wintemute 8).

Looking at homosexuality in these parameters, one can easily see that homosexuality can be quite a convoluted matter, as there is no consistency to the four senses of sexuality outlined above. For example, "a married man who has just engaged in sexual activity with another man, does so frequently, and is primarily attracted to men, but considers himself heterosexual and frequently engages in sexual activity with his wife" (8) might logically be gay, bisexual, *and* heterosexual by the distinctions offered by Wintemute. But, I would assert that rather than seeing where our esteemed friend Robert places this poor soul, we should instead look to where this man placed himself and where those who can affect his life (i.e. a landlord, employer, etc.) would place him.

I would assert that self-identification as a homosexual is indeed important to status establishment. Yet, a self-identification of this sort is usually not known by a potential employer in an interview situation. Instead, a perception of this person's sexual

orientation is used, whether it is consistent with the person's self-identified orientation or not. While Mr. Wintemute does little more than confuse our efforts to establish a working definition of a homosexual, looking to definitions of what legally constitutes an African-American provides some insight.

"Colored" is defined in a myriad of contradictory and obtuse ways. While an African-American can be one who posses "a distinct and visible admixture of negro blood" (7A: 294), the term can also apply to persons having only "one-sixteenth negro blood" (293), whether they appear to be of African descent or not. While obviously fiction, Mark Twain's novel *Puddinhead Wilson* illustrates the two ends of this discriminatory spectrum perfectly, as does Nella Larson's *Passing* in that they both have characters that are by definition black, but by all accounts appear white. When reading through the various definitions that were used to legally identify African-Americans, it is clear that they had been drawn with such wide variability in order to discriminate as the situation saw fit. They were used in segregation laws, separate and *un*equal schools mandates, interracial marriages, and laws to invalidate African American jurors, because they were *ipso facto* "unqualified electors" (294). The discriminatory means was used to justify the discriminatory ends.

However, the most useful contribution of these definitions to our effort is one that states that a person's color is not only compromised of individual characteristics but is also one of status, one of perception. The *Words and Phrases* legal reference book cites the case of *White v. Tax Collector of Kershaw District*:

> "The question whether a person is colored a person, in cases involving the status of colored persons, partakes more of a political than of a legal character, and belongs almost entirely to the

> jury, and should be determined, not solely by the admixture of negro blood, but by reputation, by reception in society, and by the exercise of privileges of a white man (294)."

This statement is a powerful assertion and will certainly help to define homosexuality. For not only the immutable racial identity of a person is basis for a status argument but also the societal perception of that person. This can, in part, apply to establishing homosexuality a definable status. For if someone is perceived to be gay or lesbian, then this can be a powerful tool wielded by a discriminatory agenda.

With the previous assertions in mind, homosexuals will be defined in this paper as persons who identify themselves as gay or lesbian, and as people who are perceived as gay or lesbian. This is a rather simple definition given the complexity of the above examinations. In addition, this paper will focus primarily on homosexuality, seeing that it is what concerns me the most, but make no mistake that the arguments presented on behalf of gays certainly can include bisexual people.

Finally it is necessary to understand that this work will not immediately jump into the discussion of the whether or not homosexuals should be incorporated into the list of classes that receive the strict scrutiny analysis. Instead, I will start with an extended analysis of the decision in the case of *Bowers v. Hardwick.* The question posed in this case asks: does a person have a fundamental constitutional right to engage in private, consensual, homosexual sodomy? In the eyes of many judges, gays and lesbians are defined by their sexual acts, yet this issue isn't touched upon in the case. These assertions are correct only to a point, for it is possible to be gay and not have sex, just as it is possible to be heterosexual and not have sex. However, this is a rarity that defies the real workings of human relations—people have sex. Thus, if sodomy laws can be examined

extensively as inherent barriers to gay rights, then the argument for suspect classification flows more easily.

IV. *Bowers v. Hardwick*: A. Logic of the Opinion

The Supreme Court finds in *Bowers v. Hardwick*, 478 U.S. 186 (1989), that the Georgia statute which proscribed sodomy was in fact constitutional. The logic which supported this decision is buttressed by five key points which are as follows: (a) the federal Constitution does not confer a fundamental fight upon homosexuals to engage in sodomy (478 U.S. at 190); (b) such behavior is not "'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty'" (478 U.S. at 195); (c) the Court should be wary of "[expanding] the reach of the Due Process Clause" (478 U.S. at 194) for fear of illegitimatizing itself [referencing the Court]; (d) just because the act took place in the privacy of the home "does not affect the result" (478 U.S. at 195); (e) and that it is inadequate to invalidate anti-sodomy laws on the basis that "majority belief that sodomy is immoral" (478 U.S. at 196).

This analysis shall proceed by examining logic of each of the aforementioned key issues using a two-tiered method of inspection. The first shall trace the logic by which the majority reasons, and the second shall examine whether that logic by way of the dissents.

Key issue (a), which declares homosexual sodomy as an act which can be proscribed by the states, is found to be so by the majority because it runs afoul to the "right of privacy" string of cases. Said cases, they reason, have common characteristics which include "family, marriage, [and] procreation" (478 U.S. at 191) that warrant

judicial protection. These characteristics are not applicable to homosexual activity; thus, sodomy can be proscribed by the state. However, the second tier of examination finds an unsettling flaw in this argument.

Justice Blackmun retorts that homosexuality is merely a façade for the main thrust of the case, which is "namely 'the right to be left alone'" (478 U.S. at 199). First of all, he finds that the Court has misconstrued the issue. For the persistent targeting of homosexual sodomy as opposed to heterosexual sodomy, or rather sodomy in general, is unwarranted. This is because the Georgia statute was designed to "reach heterosexual as well as homosexual activities" (478 U.S. at 200); thus, the issue at hand has nothing to do with the sexual orientation of the respondent. Perhaps the focus of the Supreme Court on only homosexuals raises questions regarding the Equal Protection Clause. Furthermore Blackmun finds that while the line of "right to privacy" cases do pertain to the matters stated above, they do not necessarily lend themselves to preclude homosexual sodomy. He states that the reasoning behind protecting the privacy issues raised in the other cases was that "we protect those rights not because they contribute, in some direct material way, to the general public welfare, but because they form so central a part of an individual's life" (478 U.S. at 204). Thus, he shows that using the "right to privacy" string of cases as an argument for the proscription of sodomy is open to legal attack.

Key issue (b), which stated that homosexual sodomy does not lend itself to heightened judicial protection because it is not part of the Nation's tradition of fundamental liberties, is supported with myriad examples by the majority which date back all the way to the Roman Empire up until the present day. They illustrate that with such a plethora of citations which condemn homosexual sodomy, that any attempt to

define it as a fundamental right are "at best, facetious" (478 U.S. at 194). Once again, the second tier of examination renders the above argument susceptible to attack. Justice Stevens cites many cases and examples that support his argument that "the fact that the governing majority on a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" (478 U.S. at 216). Justice Blackmun also tears holes in the majority's logic by quoting Justice Holmes in the *Lochner v. New York*, 198 U.S. 45, 76 (1905) case, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Thus, one can clearly see that the logic employed by the Court in key issue (b) is open to debate.

The next key issue, (c), which resists expanding the Due Process Clause of the Fourteenth Amendment for fear of overstepping its constitutional authority, is supported with the battle between the Judiciary and Executive branches in the 1930's and the belief that the "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution" (478 U.S. at 194). Yet again the second tier of analysis poses very serious questions in regards to the aforementioned assertion. Blackmun claims that the Court has erred in key issue (c) not only because of the Court's unwillingness to expand the protection offered by the Due Process Clause but also by the fact that it refused to examine the case with the full weight afforded by the Constitution. This simply means that it refused to examine the possible roles that the Eighth, Ninth, or Fourteenth Amendments could play in the case. Blackmun states that it is a "well-settled

principle of law that" (478 U.S. at 201) even if certain arguments are not advanced by a party involved, it is the duty of the court to use any "possible theory [to grant relief]" (478 U.S. at 201). Moreover, the dissenters assert that the real issue at stake, that of privacy, is quite fundamental. Thus, the Due Process Clause is indeed encompassing to the dissenters, despite the claim of the majority.

The fourth key issue, (d), which states that the ruling in *Stanley v. Georgia*, 394 U.S. 557 (1969), isn't applicable to the case at hand, is advanced because the majority feels that *Stanley* was a First Amendment issue. The Court illustrates that even in *Stanley* "otherwise illegal conduct is not always immunized whenever it occurs in the home" (478 U.S. at 195). They continue to show that "if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road" (478 U.S. 195-196). In sum, the Court feels that the protection afforded in the Stanley case is wholly and undeniably inapplicable to *Hardwick.*

However the use of the second tier of analysis employs the arguments of the dissenters. Namely, Blackmun asserts that the ruling in *Stanley* "rested as much on the Court's understanding of the Fourth Amendment as it did on the First" (478 U.S. at 207). He quotes passages from *Paris Adult Theatre I v. Slaton*, 413 U.S.195 (1973) and says, "The right of the people to be secure in their . . . houses, 'expressly guaranteed by the Fourth Amendment, is perhaps the most 'textual' of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the

Court's statement that '[t]he right pressed upon us here has no . . . support in the text of the Constitution" (478 U.S. at 208). Again the soundness of the majority's logic can be called into question.

Finally, key issue (e), which finds the majority's belief that an act is immoral is not sufficient for invalidating a law that proscribes it, is based on the fact that many laws of this Nation find their origins on morals. The Court says succinctly, "The law…is constantly based in notions of morality" (478 U.S. at 196). Thus, commonly held morals and laws that relate to them are not mutually exclusive. In contrast, the dissenters add that that "the fact that the acts described in 16-6-2 'for hundreds of years, if not thousands, have been uniformly condemned as immoral' is [not] a sufficient reason to permit a State to ban them today." (478 U.S. at 210). Moreover, Blackmun says that "religious groups [that] condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry" (478 U.S. at 212). So the issue of morals is one that is not one of clear-cut legal determination.

In short, all five of the key issues raised by the majority in this case can be subject to criticism and attack. It is at best an argument that is thinly wrapped in constitutionality and perhaps will be reversed in time, as were others that were supported by a narrow majority and weak logic.

B. Use of Special Tests

The use of special tests in this case gives rise to interesting and perhaps enigmatic questions. One such question is that of the level of scrutiny, the general theme of this project. Usually when the rights of a group, especially one that is pervasively and systematically discriminated against, are in question, the Court will use a heightened

level of scrutiny (either strict scrutiny or heightened scrutiny) to make the government justify its proscription. At first glance, homosexuals would appear to be a part of one such group, yet the Court employs the lowest level of scrutiny in this case, that of a "rational basis test." This test asserts that discrimination must be rationally related to a legitimate state interest.

One of the legitimate state interests of the purported by Georgia is that of "the general public health and welfare" (Brief for the Petitioner). Yet the core of the Petitioner's defense is the exercise of the "'right of the Nation and of the States to maintain a decent society,'" *(Paris Adult Theater I v. Slaton*, 413 U.S., at 59-60) a state police power argument, quoting *Jacobellis v. Ohio*, (378 U.S. 184, 199 [1964], Warren, C. J., dissenting). Finally, a state interest is articulated in support of the statute 16-6-2 because it "can be justified as a 'morally neutral' exercise of Georgia's power to "'protect the public environment'" (478 U.S. at 211). This seems to me to be entirely untenable especially with regards to the homosexual focus of the Court. Although the dissenters attack these assertions, they are the arguments of the petitioner which were affirmed.

Finally, the other process applied to this case was that of a principle first coined by Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1932). This principle "was designed to incorporate some provisions of the Bill of Rights [termed fundamental rights] into the Fourteenth Amendment" (Khan 969). But, as mentioned earlier in this work, the Court determined that homosexual sodomy was not a protected right, and certainly not a fundamental one. Thus, incorporation was seen as a non-issue.

C. Use of Precedent

The use of precedent was strong in parts of this case, yet at times it was ridiculously far reaching. The majority affirms the precedent that was set in the cases of *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (ED Va. 1975) and *Dronenburg v. Zech*, 746 F.2d 1579 (1984), both of which were staggering blows to homosexual rights and liberties. But as stated previously, the Court cited evidence all the way back to the Roman Empire up to the present day. While it is true that the American judiciary is based on English Common Law and many Judeo-Christian values, when said models contain provisions that are a mere habit of custom rather than practical use, they ought to be reexamined in terms of functionality and utility. Also, when the use of precedent is seriously examined in terms of comparison and rebuttal by that of the dissenters, it is rendered somewhat weak and unconvincing.

For instance, the string of "right to privacy cases" which include: *Carey v. Population Services International*, 431 U.S. 678, 685 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S.479 (1965); *Eisenstadt v. Baird*, 405 U.S. 479 (1972); and *Roe v. Wade*, 410 U.S. 113 (1973); are rendered somewhat invalid with Blackmun's assertion that they have a common thread which articulates that the privacy issue originates from protected rights stemming from the "'moral fact that a person belongs to himself and not others nor to society as a whole'" (478 U.S. at 204).

Moreover, the majority opinion with the concurrences, when compared with the dissents, falls short in regards to quality and quantity of its use of precedent. While the quantity of the citations in the dissents was great, it does not necessarily, as with anything, confer a definite assurance of quality. In this matter, however, the quality and quantity of the citations are in concordance. As previously, stated the dissents go strait to the heart of the "right to privacy" cases, an issue in which the majority is remiss. Furthermore, it quotes several cases that serve to bolster the supposition that just because a majority does not value a freedom, it is no less of a freedom. One such case is that of *Wisconsin v. Yoder*, 406 U.S. 205, 223-224 (1972), in which it was held that one cannot make the assumption that a majority is necessarily right and that minority is necessarily wrong based on their numbers.

Summarily, the quality and quantity of citations and use of precedent by the dissenters is much more convincing than the shallowly interpreted cases and antiquated codes of dead Roman Emperors and haughty English Kings used by the majority.

D. Creation of new tests, rules, and precedents

This section should prove to be rather short, due to the fact no new tests or rules were created. But a new precedent was in fact set. And the ruling in this case is the benchmark for several precedents. First of all, the right to engage in homosexual sodomy is not protected by the Constitution. Second, "[states] may criminalize homosexual sodomy, even if it is practiced among consenting adults in the privacy of a home" (Khan 957). And finally the decision says, which bleeds together with the first point, that "the right of privacy pronounced in Prior Court cases does not extend to homosexual sodomy

(958). These clarifications on the legality of anti-sodomy laws are a precedent, however unfortunate it may be, to legally deprive homosexuals of protection under the law for such activity. Yet, by not addressing key issues, like that of equal protection, lower courts can fashion various arguments from the decision. It leaves an open, constitutional interpretive door of sorts.

E. Professional Opinions

The professional legal opinions of experts examined in this work each severely criticize the Court for weak if not faulty logic. One point on which each critique agrees is the distortion of the Georgia Statute by the Court, which is also pointed out by Justices Stevens and Blackmun. Vlahos asserts in her article that "although the prohibitions of the statute undoubtedly affect homosexuals to a greater extent than heterosexuals, the statute's terms do not single out homosexuals. However, the majority does. This raises equal protection concerns about selective enforcement and seriously undercuts the force of the majority's argument" (191). In focusing so pointedly on homosexuals, many see the majority opinion as "an expression of politically motivated homophobia" (Vlahos 192). Thus, the supposedly blind, unbiased nature of justice may have been tainted, the more political nature of the Court is seen instead. Vlahos believes in sum that the Court's decision was somewhat disappointing regardless of the side favored because "many issues were left unresolved, and neither the majority nor the dissent provided particularly convincing supporting arguments" (194). So the case is seen not to be grounded in the most firm and sound logic.

Also the Court is attacked for its blind reliance on antiquated moral teachings as a valid reason to uphold anti-sodomy laws. Yet, the "long history of restrictions on homosexuals, like the long history of state-sanctioned racial discrimination before it, illustrates the need for judicial intervention" (Cohen 217), a role the Court is quite unwilling to assume. Furthermore the made two value choices it adopted a traditional view of the family which "excludes a homosexual relationship" (218) and closely related that a family is strictly "heterosexual...it need not have done so" (218). This view of the Court is not wholly necessary because a finding in favor of homosexual sodomy "would have been consistent with the decisional focus of the previous privacy cases" (218). Thus, the holding of the Court meets severe approbation from this critic.

Lastly, a more scathing critic, Kahn, finds three major problems with the ruling: (1) "that the majority ignored the issue [that] the case presented (Khan 958), (2) that the decision reached is "analytically indefensible" (958), and (3) "that the reasons advanced by the court are based on "legally unacceptable rhetoric and discarded historical morality" (958). The first argument is one advanced already in this work; it has to do with the focus of the Court on only homosexuals, which is at odds with the seeping language of the statute. In short, the "classifications are unnecessary precisely because the statute focuses upon the act of sodomy, not upon the social identity of sodomites" (959), an assertion that is mirrored in this work as well. The unsound reasoning argument is offered because of the Court's interpretation of the privacy line of cases. Kahn echoes Blackmun's dissent when he says, "the Court's focus upon the specific rights rather than privacy and thus obscures the reason for which these rights are protected. For if the string of privacy is broken, these distinct rights will scatter" (962).

Finally, Khan asserts that the court used legally unacceptable means to arrive at it decision. Here he makes a distinction between thin and thick analysis. He feels that "when the issue presented involves a claimed fundamental liberty, thin analysis can only be used when the court is certain that thick analysis would also yield a similar result (975). Here he invokes the Ashwander Rules, more specifically the narrowness doctrine, which states that the Court should avoid (when possible) sweeping pronouncements of constitutionality. Khan sees this case as an abuse of the Court's self-imposed restrictions relating to judicial review. However, he notes that "it is highly probable that the statute might have been stuck down, if the Court had applied the full weight of the constitution (976). So the ruling in this case seems to be heavily criticized by most critics and every expert in this work on grounds of weak logic.

F. Ruling as a Coherent Guide for the Lower Courts

Although it was stated above that the decision in *Bowers v. Hardwick* helped to clear up some of the discrepancies in the Circuit Courts, it creates an array of other problems for the lower courts. While the Court is "abundantly clear that homosexual sodomy is not a protected right…the equal protection status of homosexuals is unclear" (Rich 788). This arises from two issues: first is the fact that the Court didn't address heterosexual's rights to engage in sodomy which could help to define the status of homosexuals in regards to judicial protection, and the second fact is "although an equal protection claim is implicit in the fact that the *Hardwick* statute was enforced only against homosexuals, the Court provided no holding on the equal protection issue (788), perhaps wisely so! Be that as it may, under careful examination, these two points, which are

understandably important to future cases, pose an interpretive problem for the lower courts. Rich articulates that the "decision allows sexual orientation discrimination…[yet] some courts…have noted that *Hardwick* never addresses an equal protection issue, and some have suggested that homosexuals are a suspect or a quasi-suspect class in spite of *Hardwick*" (788-789). Yet the majority of the courts regard this case as a "sweeping pronouncement against homosexuals" (789).

G. Impact of the ruling on Public Policy

By reading this work, one might assume that this case is a detrimental blow to the rights of homosexuals only. It is true that the decision of the Supreme Court in this case serves as powerful ammunition to deprive the rights of this already weak minority. For example, "the Court's decision and the Chief Justice's concurrence are thus an utter rejection of the homosexual lifestyle. Moreover, such characterizations of homosexuals can only serve to invite or reinforce the existing discriminatory treatment and stigmatization of homosexuals" (Cohen 220). Such treatment of homosexuals could possibly fuel the fire of discriminatory legislation against the group. But also leaves the state and lower district courts free to fashion their own interpretations on the equal protection issue. However, Khan asserts:

> "…even though sodomy statutes are not generally enforced, the Court's ruling legitimizes moral condemnation of homosexuality. This moral condemnation will surely intensify discrimination that already exists against homosexuals in matters of housing and jobs. Indeed it will be ironic if the *Hardwick* rule generates a new wave of discrimination against homosexuals while the sodomy statutes remain unenforced (964).

But the professionals articulate that this decision may mark a "new trend in privacy rights cases" towards a traditional restrictive view (Vlahos 193), a view that could have sweeping consequences for everyone.

V. Sodomy is not a fundamental right—so what?

So why did I subject you to *Hardwick*? The answer lies in part to the flow of its logic, or lack thereof. The majority opinion, on one level, reflects the stereotypes and unfound assertions that pervade American Society. Lamentably, those assertions were given the backing of the most esteemed court in the world. But more importantly, I used its as an illustrative tool to frame the discussion of the suspectness of homosexuals. Sodomy laws, like the one upheld in Georgia by the High Court, are an integral component in the discussion of suspect classification. While it can be argued that for certain legal purposes the status of being a homosexual and engaging in homosexual conduct, sodomy, can be examined independently of one another, it does not dispose of the fact that the two are inexorably linked. But what's all the fuss about? Sodomy laws are hardly ever enforced. They can be viewed as relics of a bygone era, statutory fossils that have little direct impact on any citizen. The problem with sodomy laws, however, lies not in the willingness of authorities to enforce them. No, their real danger is the impact they have on other areas of public policy and American jurisprudence. For these reasons, sodomy laws aimed at prohibiting consensual adults to engage in private, non-commercial same-sex activities are categorically wrong and can/do severely impede homosexuals from becoming a suspect class.

First of all, sodomy laws are the prime vehicles in which people establish that discrimination against gays is permissible. Many current activists assert that sodomy laws are the "bedrock of discrimination against gays" (Mohr 53). The effect of sodomy laws on the populace is a mental one. In effect they help to perpetuate unequal treatment of homosexuals. Mohr states this quite well when he says, "...how after all can one legitimately force people to hire and rent to unapprehended felons" (53). In fact, what sodomy laws do is to help justify what would otherwise be an unsound argument for discrimination against gays and lesbians. Their mere existence, however superficially innocuous, "simply gives those opposed to civil rights something to say that does not sound patently prejudicial in an area where there may not be a lot to say" (53). Sodomy laws are in essence symbolic, a form of governmental propaganda which legitimizes and encourages disparate treatment of Americans based solely on their sexual orientation.

The unfortunate consequences of sodomy laws and the charged societal atmosphere surrounding them do not end, however, with the general populace; they have infiltrated the very system that minorities have historically turned to for equitable treatment, the judiciary. The *Hardwick* decision is, superficially, the most obvious and damning example. Yet, the "marble temple's" preeminence did not ensure that all lower Courts would fall in line, yet this will be discussed at the end of this work. This section is certainly not a uniform condemnation of the judicial system. Many state courts have abolished their sodomy laws by using a right to privacy argument, as federal safeguards for privacy rights are merely a benchmark for rights. States can increase but not decrease a person's rights. For example, the Tennessee Supreme Court said:

> "Both the Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution" (21 TAM 7-4, 614).

Perhaps where the Federal judiciary and legislature have faltered, the states can make some much-needed progress.

Yet even with the states making bold strides in respect to the rescinding of sodomy laws, "the existence of sodomy laws also significantly affects the way in which judges...apply the law in general" (Mohr 55). For example, in the work *Opinion of the Justices*, one finds that "*Hardwick* has been cited as supporting the constitutionality of a New Hampshire law prohibiting homosexuals from adopting or fostering children" (qtd. in Wintemute 45). While this may not have the shock value for others that it does for me, I have another example that is more curious. I quote David E. Newton:

> "In one classic case...a child was awarded custody to his father, who lived 'in basically a one-room cabin with a toilet surrounded by a curtain [where] the child [slept] in a fold-up cot by a woodstove and play[ed] in an area littered with Busch beer cans,' while the father occupied his time leering at 'girly magazines.' The mother, who had a steady job as a nurse and who had provided the child with his own room in her home, was regarded as an unfit parent because she was a lesbian" (18).

In addition, homosexuality can be used to effectively show poor moral character. But it has also been seen that gays or lesbians can be fired for circumstances that are entirely beyond their control. For example, "workers' reactions to a homosexual coworker might be sufficient grounds for dismissing a homosexual (Rich 780). All of the previously cited examples are only a sampling of the injustices that homosexuals face from the courts.

For an example that deals more with the theme of this work, one must only look to the case of *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). A judge cited *Hardwick*

and asserted that "if homosexual sodomy is not a fundamental right, then homosexuals cannot be a suspect or a quasi-suspect class" (qtd. in Rich 789). This statement illustrates that a narrow reading of the *Hardwick* decision can prostrate efforts to obtain judicial protection for homosexuals.

In addition to the sodomy issue, which is interpreted by many judges to govern suspectness, other issues are affected by the instant situation. Indeed, one can say that this section has thus far dealt mainly with legal abstractions, such as strict scrutiny and suspect classification. What tangible, everyday inequities really arise from the fundamental rights issue? Unfortunately, the legal, political, and societal situations of homosexuals are deplorable. Some of the institutions that Americans hold most dear can be legally taken from homosexuals for the singular reason of the direction of their sexual attraction and sexual-identification. Homosexuals can be legally denied the following in many states and municipalities: housing opportunities, employment, intimate relations, child custody, common law marriage, tax exemptions, hospital visitation rights, inheritance from a deceased partner, equitable judicial access, etc. This staggering list is meant to be illustrative only, for it is by no means exhaustive.

In my opinion, such unjust treatment, especially by the government, is by definition inherently "un-American" (quite unlike Congressman McCarthy's take on the word). If it is really as odd as it seems on paper, we must then analyze how the government, specifically the court system, actually attempts to justify the inequitable treatment of gays and lesbians.

VI. Rational Basis—or rationally moral?

One way that discrimination is perpetrated against gays is the manner in which the courts analyze it. First of all, states assert that their police power is sufficient to allow anti-sodomy laws and in essence, homosexual discrimination policies. The States are granted the power "to legislate to protect public health, safety, welfare, and morality" (Stephens and Scheb D-19). States have asserted time and time again that prohibiting sodomy is based on both morality and public health concerns. We shall dispose of the morality argument first. It is easy to see that the majority opinion is infused with a religious/moral basis. Some would assert that the majority crossed the line with such obvious religious rhetoric. Laws can, however, have a religious element. It is common knowledge that America was first settled for the primary purpose of religious freedom. One only has to look to such colonies as Pennsylvania, Maryland, and Massachusetts to see that religion was a key component in lives of many colonial Americans. While we no longer live in a society where religion is co-equal power with the government, laws can still reflect morals, to a point. For example, just because there is a prohibition against murder in the Ten Commandments clearly does not mean a law against murder is a breach of the separation of church and state.

But to what extent does this example still qualify as being valid? The answer to such a broad question requires a sufficient narrowing of the concept. First of all, we have to divide morally based laws into two categories, those directed at preventing harm to other people (like murder, theft, etc.) and those that are victimless (like anti-miscegenation laws and sodomy laws). Next we will eliminate the first group of laws from the argument because the government has a prima facie reason to uphold this type

of legislation, whether it is based on religion or not. "For instance drugs and weapons are inherently dangerous…and for property to be 'stolen,' someone must have been wrongfully deprived of it" (478 U.S. at 209). However, the other group of victimless offenses is by its nature different. In *Hardwick*, Justice Blackmun says that there is absolutely no record showing "the activity forbidden [sodomy] to be physically dangerous, either to the persons engaged in it or to others" (209). Preventing people from inflicting harm on others is key to having a civilized society; it is difficult to assert though, that anti-miscegenation and sodomy laws play the same role.

Working with the remaining category of victimless crimes, we need to ask: can the moral beliefs and customs of a majority of electorates justify such a law? More directly, can it provide a rational basis for adjudication in the American judicial system? The court has said on numerous occasions that it cannot, but has done so most emphatically in Virginia's landmark anti-miscegenation case, *Loving v. Virginia*. "The invocation of 'morality' in support of Virginia's prohibition of mixed-race marriage in *Loving* was implicitly rejected" (Wintemute 45). With the precedent established that morality cannot be the *sole* basis for legislation, one must necessarily look for other qualifications. In this vein, Justice Blackmun maintained that "[t]he legitimacy of secular legislation depends…on whether the State can advance some justification for its law *beyond* [emphasis added] its conformity to religious doctrine" (qtd. in 45).

Sodomy laws that forbid this form of intimacy occurring between two adults that is private, consensual, and non-commercial in nature is legislation that cannot be based in custom and morality alone. For when it occurs between two adults—of opposite-sex or same-sex—and is consensual, non-commercial, and in private, then it is not inherently

harmful. When one applies the *Hardwick* case to the standards set forth in this section, one can ask whether the presumed belief of the majority of voters in Georgia, that homosexuality is wrong, can be a valid reason for making sodomy illegal? Moreover, can this be extended to fit a rational basis test? Obviously the court says that it can, but this reasoning does not square with the logic set forth in the *Loving* case. "Stripping away the religious beliefs supporting the electoral majority's disapproval, there remains nothing but a prejudice against persons engaging in the 'allegedly' immoral sexual activity, unless the majority could point to specific harmful consequences of the activity (none had been established in *Hardwick*)" (45). So there is a glaring logical gap between the *Loving* and *Hardwick* cases.

Yet one could argue that there is a degree of severity that separates sodomy and miscegenation. I offer this "degree of severity" distinction merely as a straw argument because with more analysis it cannot be substantiated. Looking to the issue of abortion offers the necessary evidence to prove that a severity categorization cannot be rationally used to uphold certain types of moral legislation. Justice O'Connor took part in *Planned Parenthood* (a case about an attempt to restrict abortion) and *Hardwick.* She asserted in the former, "Some of us as individuals find abortion offensive to our basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code" (qtd. in 46). This statement runs in the opposite direction of the *Hardwick* decision. While sodomy, viewed within its definition in this work, is not inherently harmful, abortion does harm an unborn fetus. I am taking no stand on the abortion issue in this paper because it is totally immaterial to my argument, but when examined within the constructs of this work, it does in fact have a greater

degree of severity than does sodomy. And this is the point of contention. If abortion is innately harmful and cannot be restricted because of morality, then how can sodomy be restricted on the same grounds? Thus, with the understanding of judicial precedent and non-importance of severity, a morality argument based on religion alone does not solidly withstand logical examination.

We necessarily move to the States' public health arguments. The assertion that anti-sodomy laws are a matter of public health is perhaps the most compelling point in the rational basis test. For if state governments can argue this line of reasoning successfully, then moral rationalizations are entirely unnecessary. This section argues that while public health assertions may seem to be reasonable, they are indeed quite the opposite. To illustrate this point, we will reexamine the Tennessee case that invalidated the state's sodomy prohibition laws. In this case, (Campbell v. Sundquist, 21 TAM 7-4, 1996), the state advances several state interests that "are allegedly advanced by the Homosexual Practices Act" (21 TAM 7-4, 614)." These interests are reflect the same hollow arguments used time after time by various other states and municipalities, so by examining Tennessee's examples, the police power argument can be dealt with on more of a national scope.

The state said that the Act "discourages activities which cannot lead to procreation" (614). This argument totally flies in the face of a 1972 Supreme Court case, *Eisenstadt v. Baird*. In this case the court considered the constitutionality of a Massachusetts law prohibiting unmarried couples from using contraceptives. The Court found that "because that right of privacy is an individual right, laws forbidding the use of contraceptives by unmarried adults are likewise invalid" (Stephens and Scheb 682). So if

unmarried couples cannot be forbidden to engage in matters that do not involve procreation, then Tennessee's attempt to discourage activities that do not lead to procreation doesn't square with the Supreme Court's precedent.

Next, the Act "discourages citizens from choosing a lifestyle which is socially stigmatized and leads to higher rates of suicide, depression, and drug and alcohol abuse. Aside from not citing any source for these allegations, this statement relies on the belief that homosexuality is a choice, a mere preference that can be changed, like a hair color or outfit. This argument is rather cyclical in nature because it is laws such as the Homosexual Practices Act that invariably perpetuate the social stigmatization it tries to avoid. The state also asserts that the Act "discourages homosexual relationships which are 'short lived,' shallow, and initiated for the purpose of sexual gratification" (614). The Puritans would be so proud! This argument is flawed because of its designation pointing only to homosexuals. Indeed, directing a law proscribing a particular group's presumed behavior is an instant flag for a Fourteenth Amendment equal protection violation. States are required by the Constitution to provide "equal protection" (Amend, XIV, sec 1) to citizens and not to "abridge [their] privileges and immunities" (sec 1).

The state's fourth point is its strongest. It states that the Act "prevents the spread of infectious disease" (21 TAM 7-4, 614). This can be seen as the most compelling point because something can be said for the prevention of disease, especially AIDS. But, it is general knowledge that AIDS is not a gay disease. The AIDS virus does not respect religion, race, gender, or sexual orientation. Quite simply, it kills heterosexuals in the same manner it kills gays, indiscriminately. Therefore, advancing an argument that the state is prohibiting the spread of AIDS by preventing homosexuals from having sex,

(even when gays are not the main cause of spreading the AIDS virus) is a regulation which is not "narrowly drawn." For instance, the state does not prohibit adults from smoking, although it obviously has deleterious effects on not only the smoker but also people who inhale second hand smoke. The state does not prohibit adults from consuming alcohol in general, but it has narrowly tailored laws to prohibit drinking while driving. A true balance between personal liberty and state interest was struck in this example. Thus, AIDS in and of itself cannot "provide additional justification for the withholding of civil liberties from them [homosexuals]" (Newton 28). Moreover, the aggregate effect of weak arguments, such as the ones presented above, does not make the general assertion of a police power argument any stronger.

VII. Equal Protection adjudication—development

Should homosexuals be elevated to a suspect class? This work will establish that they should indeed be viewed as a suspect class. First, however, we need to examine the history of this classification and then investigate the characteristics required to be a suspect class. It must be understood that the classification system about which this paper deals is grounded in the Equal Protection component of the Fourteenth Amendment. The Constitution mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (Amend. XIV, sec. 1). Originally constructed to protect the rights of African-Americans during and after Reconstruction, the Equal Protection Clause is now considered to be a "broad shield against actions by state and local governments that would infringe on individual rights and liberties" (Stephens and Scheb 346). It has

gone through an impressive interpretive evolution, to become a safeguard for many civil liberties.

The first time that it was used to create a classification system to aid in adjudication of civil liberties cases was in *Korematsu v. United States*, 323 U.S. 214, (1944). Lamentably, the Court upheld the relocation of Japanese-Americans to special containment camps during WWII. While this is considered to be a dark time in the history of the American judicial system, but "it marked the inception of the suspect classification system" (Stephens and Scheb 740). In the majority decision, Justice Hugo Black stated:

> "...all legal restrictions which curtail the civil rights of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can" (qtd. in Stephens and Scheb 740).

Justice Black's original statement has since been developed to encompass various levels of judicial analysis in situations where there is a law or policy that impinges on a right retained by the people.

Today the Court recognizes three standards of review in civil rights and liberty cases: minimal scrutiny, heightened scrutiny, and strict scrutiny. These standards correlate to different tests that determine exactly who is at fault. From the *Hardwick* case, one can remember that minimal scrutiny typically "involves the application of the rational basis test" (354). With this level of review, the burden of proof falls to the party bringing the suit. Thus, the courts begin "with a strong presumption that the challenged law or policy is valid" (354). The next level of review is that of heightened scrutiny, which is usually used in conjunction with "claims of gender-based discrimination" (354).

When moving from the lowest form of review to this one, the presumption of constitutionality—"the doctrine…holding that laws are presumed to be constitutional with the burden of proof resting on the plaintiff to demonstrate otherwise" (D-20)—is in effect reversed. Thus, the burden of proof falls to the government.

The third and final tier of judicial review, the one with which this paper primarily deals, is that of strict scrutiny. Like heightened scrutiny, the presumption of constitutionality in this form of review is not in favor of the government. This is because this level of scrutiny pertains to those instances where there has been an overt breach of civil liberties and fundamental rights. "Included among those laws that are inherently suspect are those that classify persons based on race, religion, or ethnicity, as well as those that encroach upon fundamental rights" (740). As it stands, there is no uniform designation for homosexuals with regards to discrimination issues and fundamental rights breaches, although some courts vigorously use this classification.

VIII. Suspect Classification—Applied

Racial, ethnic, and religious minorities qualify as suspect classes, which fall under the purview of strict scrutiny. Yet, to qualify as a suspect class, all of these groups had to meet certain criteria. I argue that homosexuals meet this criteria, and since gay rights have been denied by the Court using the right to privacy argument, a suspect classification argument is perhaps the best way to bring the rights of gay and lesbian citizens on par with those of heterosexual citizens. Wintemute believes:

> "…the suspect classification argument is seen as capable of protecting both public and private same-sex emotional-sexual conduct, and potentially

> encompassing all aspects of public sector discrimination against gay and lesbian…persons, especially in employment, housing, and services, and with respect to the rights of couples and parents" (61).

This assertion is why it is so important that homosexuals receive a suspect class designation.

But, the qualifications for suspect classification must be examined. They are as follows:

> "…(1) they [the group in question] have suffered a history of intentional unequal treatment; (2) the classification imposes on them a stigma that brands them as inferior; (3) they have been the object of widespread prejudice and hostility; (4) the unequal treatment they have suffered has often resulted from stereotyped assumptions about their abilities; (5) they constitute a 'discrete and insular' minority whose political participation has been seriously curtailed because of prejudice; (6) the basis of the classification is an immutable (and often highly visible) personal characteristic that each such individual possesses; [and] (7) the characteristic is irrelevant to their ability to perform in or contribute to society (and to any legitimate public purpose)" (62-63).

First of all, it must be noted that in its various suspect classification decisions, the Supreme Court "has referred to different combinations of these requirements, but has never provided a coherent theory explaining their purpose and relative importance" (63). So, it is not very easy to ascertain whether all of these are key to a suspect classification designation or whether a combination of just certain criteria is necessary. Thus, "..each writer seeking to apply them to a new classification is left to supply his or her own

framework" (63). This is exactly what I intend to do! I will deal with the first four criteria as a whole because they are generally held to be applicable to homosexuals and not difficult to prove. But the remaining three criteria are somewhat more problematic; thus, they will be dealt with individually.

Again the first four requirements state that if a group is to be seen as suspect they must: have suffered maltreatment, have a social stigma which brands them as inferior, have been the object of pervasive prejudice, and finally have suffered as a result of stereotypes about their abilities. Careful inspection shows that every one of these four criteria apply to homosexuals. Many authors and judges also agree that "...sexual orientation satisfies the first four criteria, because the history of international unequal treatment of, and the imposition of stigma on gay, lesbian, and bisexual persons as well as the prejudice and hostility against them, and stereotyped assumptions about them" (64). To say that homosexuals suffer maltreatment is a gross understatement. One only has to watch the nightly news to find evidence of such abuse—gays being beaten to death and left for dead, a man in Georgia stabbed and then burned to death—caused by only one thing, their sexual orientation. Indeed, the only motive that one needs to discriminate against gays is that the victim is a "faggot" or "dyke." In addition, some courts see homosexuality as a sufficient reason to terminate someone; homosexuality is *ipso facto* detrimental to job performance. The examples are shocking: a state supreme court accepted that a "man's sexual orientation, in and of itself, was evidence that he was unfit to teach" (Newton 10); a gay man was fired in Colorado "simply because he was gay, even [though he was] the best employee in the state" (2). This is clear evidence that applies the first four criteria to homosexuals.

While the first four requirements are easily met, the last three are more arguable. The fifth requirement basically states that gays lack political power. This criterion "is derived from…Justice Stone: '…prejudice against discrete and insular minorities may…curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and…call for a correspondingly more searching judicial inquiry" (Wintemute 65). While many courts recognize gays as discrete and insular, the point of contention surrounds the "political power" aspect of the rule. The Supreme Court fluctuates on their reading of what constitutes political powerlessness. In some cases, the "slightest degree of success in achieving legislative protection disqualifies a minority from seeking constitutional protection through recognition of a suspect classification" (66). This would seem to be a detrimental blow to gay rights.

But in the case of women (a quasi-suspect class) and African-Americans (a suspect class) several strides have been made in the advancement of their respective rights. Judge Spiegel of Ohio believes that "if this standard (existence of anti-discrimination legislation and the other 'indicia of influence' cited above) were applied to women or racial minorities, neither would qualify as lacking political power and neither race nor sex would be suspect or quasi-suspect" (qtd. in Wintemute 66). Wintemute also asserts:

> "[the] difficulty they [homosexuals] face in forming political coalitions, the tenuousness of their political gains (repeal of legal protection against discrimination has been sought in 38 or 125 jurisdictions where it has been obtained in 34 cases), and their virtual absence from 'the Nation's decision making councils,' like women at the time of *Frontiero* [411 U.S. 677 (1973), the case that established that women's equal protection issues must be examined by a higher level of scrutiny than a rational basis test] (73 of 497,155 elected officials in the US were openly gay, lesbian or bisexual in June 1994)" (67).

But, societal opposition to gays is also an impediment to political power. Such organizations such as the Religious Right effectively utilized gays as a rallying point. The social forces at work in American society have a serious impact on gay rights. Even the Supreme Court has recognized that "social, as opposed to legal, forces also might have the result for some groups of effectively excluding their participation in the political life of the nation..." (Mohr169). The homophobic beliefs and actions of many Americans, evinced by hate crimes, gay-bashing, rigidly static religious rhetoric, and mass discrimination is certainly an obstruction to the advancement of gay rights.

Finally, we can look at the judiciary itself as being an impediment to political power, due to the status/conduct doctrine that some courts follow. "Arguably, homosexuals have been deprived of political power, because activities designed to promote homosexual rights have been described by the courts as "flaunting" a homosexual lifestyle, which is adequate grounds for dismissal from a job" (Rich 801). Thus, there seems to be something odd at work in the judiciary and in society that erects a barrier of sorts to gay rights.

This is where the vicious cycle theory is most evident. I would argue that in addition to the impediments to gays' political power as mentioned above, the very nature of certain regulations, like those that forbid sodomy and allow discrimination, indirectly prevent political power and that must necessarily flow from individual empowerment. But most damning is the fact that homosexuals can be terminated from jobs and housing by only the perception of their homosexuality.

For instance, suppose two men leaving a gay establishment were seen by a group of random thugs. Suppose that these thugs decided that it would be fun to "beat the shit

out of some faggots." Suppose that they did indeed do this heinous act, but were caught by two surprisingly vigilant police officers. Some people might applaud the efforts of these all-American boys, and some would certainly see it for the tragic crime that it is. Be that as it may, the wheels of justice will start to creek along at the police station where the victimized men will make their reports. The crucial point of this story comes when the men are asked if they would like to file charges, and they answer with an emphatic, "NO!" You, of course, might be left asking, "WHY?"

During the course of a trial the men's homosexuality would certainly come to light. Such exposure can (and in reality does) give employers legal grounds to fire the *victims* of the gay bashing. The exposure of the men's sexual orientation gives any landlord the basis he/she needs for a legal eviction. Basically, by asserting their legal rights to prosecute these criminals, these gay men have to risk their jobs and homes, indeed, their very security. This is of course only illustrative, not to mention fiction, but it is grounded in fact. "Every day gays are in effect blackmailed by our judicial system" (Mohr 165). How can the constitutional mandates of equal protection under the law apply equally when the system responsible for ensuring this right is one of the main perpetrators of the problem? In sum, the lack of political power by gays is real. We experience roadblocks not only in the form of social opposition but also by the government and its various branches.

The sixth criterion of a suspect classification is in a word "immutability." Although science points to homosexuality as something innate, it is not conclusive. And it must be said that some courts have found that homosexuality is "'immutable' for equal protection purposes [meaning] 'effectively immutable' (change 'would involve great

difficulty'). Thus, sexual orientation is immutable because 'we have little control over our sexual orientation and …, once acquired, [it] is largely impervious to change' ('through extensive therapy, neurosurgery or shock treatment') does not make it 'mutable'" (qtd. in Wintemute 67). The problem of immutability, though, is tough issue for other courts, because they fail to see the fine distinction between homosexual conduct and homosexual status—the main reason that I have dedicated a large portion of this work to sodomy laws.

Indeed, the blurring of homosexual status and homosexual conduct is the primary source of confusion for the courts. For example, in the case of *High Tech Gays v. Defense Industrial Security Clearance Office,* 457 U.S. 216 (1982), the Ninth Circuit Court of Appeals held that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from race, gender, or alienage because 'the behavior or conduct of…already recognized [suspect] classes is irrelevant to their classification" (qtd. in Wintemute 68). Yet, to play the oppositions argument in this case, we must look at the other behavioral aspects of other suspect and quasi-suspect classes. Judge Canby counters the majority in the *High Tech Gays* case by asserting "[o]ne can make 'behavioral' classes out of persons who go to church on Saturday, persons speaking Spanish, or persons who walk with crutches. The question is what causes the behavior?" (qtd in Wintemute 68). The judge poses a good question.

I am neither a scientist, nor an expert legal scholar by any stretch of the word. However, I do have first-hand experience of being a gay American. I must admit that in my experience of interacting in the gay communities of various cities, I have not met one person who chose to be gay, lesbian, or bisexual. I can recall no person who "chose" to

be thrown out of their house because their parents were ashamed of them. I know of no one who willingly "chose" to be part of one of the most widely despised and hated groups in this country. And I have never met a homosexual that "chose" to be ostracized in school, or one that "chose" to live a life that could possibly risk job security. I am not saying that there are no people out there who have not chosen to have a same-sex experience, and as a white male, I can no more be the spokesperson for a such a multifaceted group such as homosexual-Americans than any other person. For it is true that homosexuality is quite possibly the most encompassing minority in the world, including veritably every cross-section of the world's population. But it seems to run afoul to every logical tenet that I have ever encountered to say that someone would risk so much if they could simply change the despised characteristic, their same-sex orientation, thus making all of their problems disappear.

The seventh and final criterion for suspect classification is that of irrelevance. This issue is divisive not because people really feel that being gay, lesbian, or bisexual can in most cases not have anything to do with job performance. Instead, it has to do with the status versus conduct issue. Wintemute states:

> "Those courts that have accepted the distinction between emotional-sexual attraction and emotional-sexual conduct have had no trouble in concluding that sexual orientation (as a direction of attraction) is rarely if ever, relevant to legitimate government purposes. Several judges have agreed that '[s]exual orientation plainly has no relevance to a person's "ability to perform and contribute to society"'(sic)" (68).

But as was stated earlier, the problem arises when one does not see the distinction between status and conduct. "The argument, if one accepts the attraction-conduct distinction, is that the attraction may be immutable but that the conduct to which it gives

rise is 'immoral' or illegal and therefore makes the attraction 'relevant.' (69). Thus, we find ourselves once again entangled with sodomy laws. Finding an answer to the irrelevance question lies first of all in common sense: does being homosexual really affect one's ability to perform at work? But it also brings us back to the interconnectedness that this work establishes between status v. conduct, sodomy laws, and a suspect classification designation.

IX. And if it Works?

What would the possible social ramifications be if sodomy laws were repealed and homosexuals were elevated to a suspect class? Surely it would be the end of civilization as we know it. Society would devolve into a moral cesspool with hardly a chance of recovery or salvation. Fire and brimstone would rain upon the earth in fierce waves of destruction. This is of course sarcasm. Yet some would assert that history illustrates what happens when homosexuality is not kept in check by the government. Professor Richard Mohr addresses this subject:

> "Recommendations to change social policy with regard to gays are invariably met with claims that to do so would invite the destruction of civilization itself: after all isn't that what did Rome in? Actually Rome's decay paralleled not the flourishing of homosexuality but its repression under the later Christianized emperors" (42).

While an interesting point is made, the question concerning the fate of society still lingers. Yet, the question has already been answered in part. Indeed, "one need not now speculate about what changes reforms of gay social policy might bring to society at large. For many reforms have already been tried out here and there, and nothing weird has resulted from them" (43). In fact, the results from empirical studies where sodomy laws

have been stricken from the law books have shown that "there is no increase in any other crimes in [these] states that have decriminalized gay sex (43). Surely, rescinding sodomy laws is not starting down a road of which leads straight to hell.

It is interesting to look at the dynamics of American society over the past 200 years—and also to the Constitution—in regards to social policy and civil rights. While it was once widely held that African-Americans were mere property, women had no place in a voting booth, and people of different races shouldn't marry, America has shown a remarkable flexibility in adapting culture to keep up with the times and to eradicating static social beliefs that operate out of blind custom. America is truly a nation with a history of progressive reform. This is mirrored by our Constitution. The Framers, aware that this document would have to endure for ages, fashioned it with a built-in flexibility that permits it to deal with tribulations and changes of the country.

As cited above, various states and municipalities have tested how gay rights would affect the nation. Again Richard Mohr states what I feel about the effects of gay rights on society rather well:

> "Society currently makes gay coupling very difficult: a life of hiding is a tense and pressured existence not easily shared with another. And society seems to find gay love even more threatening than gay sex. The latter society might excuse as an aberrant compulsion but the former is surely a matter of choice that shows a commitment and indicates that a homosexual does not view her or his condition as some sort of permanent flaw. In turn, this choice shows that more usual couplings are not a matter of destiny but of personal responsibility. And *that* society finds scary: that so-called basic unit of society—the family—turns out not to be a unique immutable atom, but can adopt different parts, be adapted to different needs, and even improved. Gays might even have a thing or two to teach others about divisions of labor, the relation of sensuality to intimacy, and the stages of development in love relations" (44).

While the quote is lengthy, it is appropriate. Society does not suffer when it gives citizens the opportunity to live responsible lives. If a legitimate state interest exists in banning sodomy in order to curtail short-lived relationships initiated solely for the purposes of sexual gratification, that sounds fine to me. Thus, one could imply that the opposite, a long-term, monogamous relationship forged out of love and mutual-respect, would be encouraged. Yet, this is not the case! Gays are prohibited to have legally recognized domestic partners; thus, an avenue for personal and societal responsibility is effectively killed.

X. Conclusion—Bringing it all together

In this work I have endeavored to show the interconnectedness between sodomy law and status versus conduct arguments. While separating homosexual status from homosexual conduct seems like an ingenious way to advance the gay rights struggle, it is in fact a detrimental barrier. By removing the sexual component of homosexuals, or heterosexuals for that matter, an integral human part of a person is severed. By saying that it is *usually* okay to be gay, but it is *never* okay to have sex is ludicrous; it is a mixed message and a state sanctioned form of celibacy advocacy. Religious fundamentalist and conservative scholars assert that homosexual status is defined by homosexual conduct. While their view of the relationship between the two is too rigid, they are correct to a point. Same-sex orientation and a physical expression of that attraction in a non-commercial, private manner between consenting adults is invariably linked to homosexual status. Homosexual sex does not beget homosexual identification though; it merely affirms it.

By making such an innately private act the object of criminal legislation gives oppressors all the fuel they need to discriminate. Sodomy laws are the only semi-logical legal barriers that permit people to perpetuate disparate treatment against gays. Religion has always been an important part of America, but the religious arguments against homosexuals do not withstand analysis because they are grounded in nothing more than fear, misinterpretation, and hollow custom. Alleged legitimate state interests to permit anti-sodomy laws have been found time and time again to be either uncompelling or not narrowly drawn enough to advance that interest.

Gays suffer discrimination, hate crimes, abuse, and various other affronts to their dignity on a daily basis. Even more staggering is the realization that state and local sanctions that label them as immoral, unapprehended felons back this disparate treatment. Such discrimination and unjust treatment in American society is indefensible. But when the hard evidence is examined, all of the pieces seemingly fall into place. Indeed, the argument to ban anti-sodomy laws and to elevate gays to a suspect class seems to look great on paper. They are in theory strong arguments. So, what gives? Why has the theory not been turned into a reality?

While the *Hardwick* decision is seen by some as a substantial blow to gay rights, I see it as more of an enlightened investment in the future. Be warned! This is solely my opinion as a student of constitutional law. No other scholarly opinion exists to back these assertions. But any student of constitutional law know that the Supreme Court is a wise judicial body that sees well into the future. It anticipates change as well as being a catalyst for it. There were too many loopholes in the case for it to be a sound analysis. Looking back to the analysis of the opinion, the Equal Protection issue and suspectness of

gays is absent. This is either due to the narrowness doctrine or to the wisdom of the Court. In leaving these questions unresolved, the Court has struck a chord of federalism. It is allowing the various states to decide on their own how gays will be treated under the law. For the Court comes closest to illegitimacy when its opinions deals with matters it cannot enforce. I believe it is testing the federal waters to see if the country can by its own development and flexibility redress the maltreatment of homosexuals. It is letting the states and their various municipalities pave the way for gay rights. In effect, a momentum is being built by the judicial bodies and by individuals around the country to bring the rights of gay Americans on par with those of other citizens. At least I hope that this assertion is correct. In an age where, the government says that my loving another man is a crime, hope is of no small significance. In the near future, I trust that America will accept its responsibility to all of its citizens to ensure equality and fairness, despite their sexual orientation.

Works Cited

Cohen, Adam S. et al. "Civil Rights Cases.". 10 *Harvard J.L. & Pub. Pol'y* 213-27 (Wint. '97)

Khan, Ali. "The Invasion of Sexual Privacy." 23 *San Diego Law Review* 957-977 1986.

Mohr, Richard D. Gays/Justice: *A Study of Ethics, Society, and Law*. New York: Columbia University Press, 1988.

Newton, David E. *Gay and Lesbian Right: A reference handbook*. Santa Barbara: Instructional Horizons Inc., 1994.

Rich, Tracy. "Sexual Orientation Discrimination: The wake of *Bowers v, Hardwick*." 22 Georgia Law Review 773-803 (1987).

Stephens, Otis and John Scheb II. *American Constitutional Law, Second Ed*. Albany: West/ Wadsworth, 1999

Vlahos, Susan. "Casenote: *Bowers v. Hardwick*." 9:1 *George Mason University Law Review* 185-195 (1987).

Weller, Christopher. "*Bowers v. Hardwick*: Balancing the interests of the moral order and individual liberty." 16 *Cum. L. Rev*.555-92 (85-86).

White, Mel. *Stranger at the Gate: To be gay and Christian in America*. New York: Plume, 1994.

Williams, Patricia J. *The Alchemy of Race and Rights*. Cambridge: Harvard Univ. Press, 1991.

Wintemute, Robert. *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter*. Oxford: Clarendon Press, 1995.

Words and Phrases: Permanent Edition. (Vol 7A) St. Paul: West Publishing, 1990.

Table of Cases

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

Carey v. Population Services International, 431 U.S. 678, 685 (1977)

Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199 (ED Va. 1975)

Eisenstadt v.Baird, 405 U.S. 479 (1972)

Frontiero v. Richardson, 411 U.S. 677 (1973)

Griswold v. Connecticut, 381 U.S.479 (1965)

Jacobellis v. Ohio, 378 U.S. 184, 199 (1964)

Lochner v. New York, 198 U.S. 45, 76 (1905)

Loving v. Virginia, 388 U.S. 1 (1967)

Meyer v. Nebraska, 262 U.S. 390 (1923)

Palko v. Connecticut, 302 U.S. 319 (1932)

Paris Adult Theatre I v. Slaton, 413 U.S.195 (1973)

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Prince v. Massachusetts, 321 U.S. 158 (1944)

Roe v. Wade, 410 U.S. 113 (1973)

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)

Stanley v. Georgia, 394 U.S. 557 (1969)

White v. Tax Collector of Kershaw District, S.C., 3 Rich.Law, 136.

Wisconsin v. Yoder, 406 U.S. 205, 223-224

Dronenburg v. Zech, 746 F.2d 1579 (1984)

High Tech Gays v. Defense Industrial Security Clearance Office, 457 U.S. 216 (1982)

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

Korematsu v. United States, 323 U.S. 214 (1944)