NOTE: THE CONSTITUTIONAL STATUS OF SEXUAL ORIENTATION: HOMOSEXUALITY AS A SUSPECT CLASSIFICATION

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Abstract

Even within a "nation of minorities,"[1] American gay people[2] constitute a minority group that at once elicits an extraordinarily high degree of fear and contempt from society at[3] and receives an inordinately low degree of state protection from the institutionalization of that antipathy. Gay lobbyists and litigants have found little refuge in legislatures and courts: private gay sexual activity remains a criminal offense in many

[1]Marshall, A Comment on the Nondiscrimination Principle in a "Nation of Minorities," 93 YALE L.J. 1006, 1011 & n.11 (1984) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978) (opinion of Powell, J.)).

[2]This Note uses the adjective "gay" instead of "homosexual" because it is the designation preferred by the gay community. Although "lesbian and gay" is better still, it is too cumbersome for this piece. Except where otherwise distinguished, "gay" and "homosexuality" denote the sexual orientation of both gay men and lesbian women.

[3]The prevailing social censure of homosexuality is illustrated by the common use of derogatory words denoting homosexuality to express general contempt, by the denouncement and disapproval of homosexuality by many religious leaders, and by the incidence of unprovoked violence against gays. Religious leaders often ground their opposition to homosexuality on the Old Testament passages in Leviticus 18:22 and 20:13, which proscribe male homosexuality. Opposition to homosexuality may cut across sectarian lines: for example, the Salvation Army, the Roman Catholic Archdiocese of New York, and Agudath Israel jointly filed suit to challenge Mayor Koch's executive order compelling city contractors to certify that they do not discriminate on the basis of sexual orientation. See Under 21 v. City of New York, No. 15046/1984 (N.Y. Sup. Ct. Sept. 5, 1984) (invalidating the mayor's order). For a discussion of violence against gays, see Harry, Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men, 19 CRIMINOLOGY 546 (1982), which describes the most common forms of victimization of gay men as examples of "derivative deviance" – the general victimization of socially stigmatized individuals.

states,[4] and anti-discrimination legislation rarely encompasses sexual orientation.[5] As a result, gays suffer discrimination in virtually every social sphere. They are denied jobs,[6] housing,[7] custody of their children[8], and the right to marry.[9] They are forced to deny or disguise their identity in order to enjoy rights and benefits routinely accorded heterosexuals.

Recently, in the wake of the black civil rights and women's movements,[10] gays have

[4]Twenty-three states and the District of Columbia still have in force criminal statutes proscribing private, consensual sodomy. Most of the remaining 27 states have abandoned their criminal statutes in the past 15 years, usually be legislative repeal, though occasionally by judicial fiat. See Rivera, Book Review, 132 U. PA. L. REV. 391, 410 (1984) (reviewing J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983)). The Supreme Court has affirmed, albeit ambiguously, the constitutional validity of such statutes. See Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court) (Virginia criminal statute proscribing consensual sodomy does not violate constitutional right of privacy), aff'd mem., 425 U.S. 901 (1976). Because the Court affirmed without opinion, it remains uncertain exactly what aspect of the district court's reasoning was determinative. Compare Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977) (opinion of Brennan, J.) ("[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."), with id. at 718 n.2 (Rehnquist, J., dissenting) ("While we have not ruled on every conceivable regulation affecting [private consensual sexual] conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established.").

[5]Congress did not explicitly include sexual orientation as a protected characteristic in the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.), and courts have refused to interpret the Act to proscribe discrimination agaisnt gays as discrimination on the basis of sex, see, e.g., DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975). Only the state of Wisconsin and approximately 30 cities proscribe discrimination on the basis of sexual preference, see WIS. STAT. ANN. @@ 111.31, 111.32(13m), 942.04 (West Supp. 1984-1985); Taylor, Homosexuals Pursuing Georgetown U. Lawsuit, N.Y. Times Oct. 31, 1984, at B6, col. 3, and only California's "public accommodations" statute has been interpreted to protect gays, see Curran v. Mt. Diablo Council of Boy Scouts of Am., 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), appeal dismissed, 104 S. Ct. 3574 (1984).

[6]See, e.g., Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (private gay sexual activity upheld as ground for discharging naval petty officer); Singer v. United States Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976) (public announcement of homosexual activities held to justify the government's denial of employment), vacated in light of new administrative policy, 429 U.S. 1034 (1977); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (potential public knowledge of teacher's homosexual status held to impair his ability to teach and thus to justify dismissal), cert. denied, 434 U.S. 879 (1977).

[7]See Gomez, The Public Expression of Lesbian/Gay Personhood as Protected Speech, 1 LAW & INEQUALITY 121, 123 & n.17 (1983). Only in Wisconsin and California are gays specifically protected against housing discrimination. See WIS. STAT. ANN. @ 101.22 (West Supp. 1984-1985); Hubert v. Williams, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (App. Dep't Super. Ct. 1982) (interpreting California's Unruh Act to prohibit discrimination against gay tenants in rental housing).

[8]See, e.g., Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975) (denying custody to lesbian mother).

[9]See, e.g., Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (upholding denial of marriage license to two men), appeal dismissed, 409 U.S. 810 (1972).

[10]The 1969 "Stonewall Riots" are frequently cited as the beginning of the gay liberation movement. See

increasingly sought constitutional protection from this pervasive discrimiation.[11] Thus far, however, their efforts have met with little success[12]. This Note argues that courts should recognize homosexuality as a suspect classification under the equal protection clause of the fourteenth amendment[13] and therefore subject laws that discriminate on the basis of sexual preference to heightened scrutiny,[14] beyond the "rational basis" test currently applied.[15] The argument starts from the premise that unequal treatment of gay people is a pervasive

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generally T. MAROTTA, THE POLITICS OF HOMOSEXUALITY (1981) (chronicling the rise of gay and lesbian activism in the 1960s and 1970s).

[11]Such actions have been brought under almost every constitutional rubric imaginable. Gay litigants have relied predominantly on the right of privacy, see, e.g., People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981), and on the first amendment rights of free speech and expression, see, e.g., Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977), but have also based claims on the establishment clause and the eighth amendment's prohibition of cruel and unusual punishment, see Richards, Homosexuality and the Constitutional Right to Privacy, 8 N.Y.U. REV. L. & SOC. CHANGE 311, 311 (1979), on the limitations on the police power reserved to the states under the tenth amendment, see, e.g., Bonadio v. Commonwealth, 490 Pa. 91, 415 A.2d 47 (1980), on the equal protection clause, see, e.g., Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), and on the due process clause, see, e.g., benShalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980).

[12]For examples of the few cases in which gays have prevailed under the federal or state constitutions, see People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981) (New York criminal statute proscribing consensual sodomy invalidated on privacy grounds), Bonadio v. Commonwealth, 490 Pa. 91, 415 A.2d 47 (1980) (Pennsylvania criminal statute proscribing consensual sodomy struck down as violating equal protection and exceeding limits of police power), and Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (public utility's discrimination based on sexual orientation held to violate equal protection clause of the California constitution).

[13]See U.S. CONST. amend. XIV, @ 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[14]The Supreme Court has created a two-tiered scheme of suspect classifications – those that receive "strict" scrutiny and those that receive only "intermediate" scrutiny. Under strict scrutiny, the state must demonstrate that the classifying statute is narrowly tailored to achieve a compelling state interest. See Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classifications "must be shown to be necessary to the accomplishment of some permissible state objective"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (only "[p]ressing public necessity" can justify burdening a suspect class). Under intermediate scrutiny, the state must show only that the legislative means are substantially related to an important state goal. See Craig v. Boren, 429 U.S. 190, 199 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971). See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW @ 16-6, at 1000-02, @ 16-13, at 1012, @@ 16-30 to 32, at 1082-97 (1978) (analyzing "strict scrutiny" as applied to fundamental rights and suspect classifications and describing the development of "intermediate scrutiny"). Because the Supreme Court has not elaborated upon the differences between the two tiers of heightened scrutiny beyond the verbal formulations stated avove, this Note does not attempt to assess the different implications of each tier for the protection of gay rights. Instead, this Note argues that classifications based on sexual orientation should be subject to some form of heightened scrutiny in order to foreclose resort to the argument available under a mere "rational basis" analysis: that the mere existence of widespread discrimination against gays justifies its institutionalization.

[15]See, e.g., National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (1984) ("We cannot find that a classification based on the choice of sexual partners is suspect . . . ."), aff'd by an equally divided Court, 53 U.S.L.W. 4408 (U.S. Mar. 26, 1985).

social problem, one we should examine carefully for possible constitutional iniquities. Parts I and II examine in turn two of the most commonly asserted constitutional foundations for gay rights – the right of privacy and the first amendment guarantee of free speech and expression – to demonstrate how these doctrines, whether considered alone or together, fail to confront the persistent problem of gay inequality. Part III explores equal protection analysis as a third possible approach to gay rights. It concludes that such an analysis provides a more accurate description of the nature of sexual orientation and a more comprehensive normative framework for addressing discrimination against gays than does either of the other predominant constitutional approaches. Such an analysis impels a searching inquiry into the legitimacy of state goals and the nature of equality.

1 The Poverty of Privacy

Commentators and litigators seeking constitutional protection for gay rights rely most frequently on the right of privacy.[16] The privacy argument emphasizes the fundamental importance of sexuality to the individual and the relative unimportance of the state's interest in regulating private, self-regarding conduct. It is based on the classical liberal conception that individuals should enjoy autonomy within certain spheres that lie beyond the permissible reach of government.[17] Although the right of privacy is not made explicit in the Constitution, a series of Supreme Court decisions has established its constitutional status. Griswold v. Connecticut[18] held that the right of privacy protects the use of contraceptives by married couples. Eisenstadt v. Baird[19] found that the equal protection clause gives unmarried couples a right of equal access to contraceptives, and Roe v. Wade[20] held that the constitutional right of privacy encompasses a woman's decision to have an abortion. Although some commentators have interpreted these cases to mean that the right of privacy comprehends a general right to sexual autonomy and therefore protects homosexuality,[21] the

[16]For a listing of pertinent commentary, see the bibliography in Grey, Eros, Civilization and the Burger Court, LAW & CONTEMPT. PROBS., Summer 1980, at 83, 99-100. For representative cases, see Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), appeal dismissed, 743 F.2d 236 (5th Cir. 1984); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981).

[17]See J. S. MILL, ON LIBERTY, ch. 4, at 214 (M. Warnock ed. 1962) (1st ed. London 1859) (society should not interfere with "purely personal conduct").

[18]381 U.S. 479 (1965).

[19]405 U.S. 438 (1972).

[20]410 U.S. 113 (1973).

[21]See J. BAER, EQUALITY UNDER THE CONSTITUTION 231 (1983) ("The courts have refused, on nonexistent grounds, to extend this right [of privacy] to homosexuals."); Richards, supra note 11, at 314 ("There is no principled way to defend the earlier right to privacy cases and not extend the right to homosexuality . . . .").

Supreme Court,[22] other federal courts,[23] and most state courts[24] have largely declined to extend privacy doctrine beyond traditional institutional frameworks such as marriage and family.[25]

Although extending the protection of privacy doctrine to consensual gay conduct might help to promote gay equality,[26] privacy analysis suffers from fundamental flaws in its conception of social relations in general and homosexuality in particular. Privacy analysis assumes a dual structure – a division between the home and the outside world – that does not adequately capture the complexity of social life. Most people experience not only two, but at least four overlapping "spheres" – the home, the workplace, voluntary associations, and politics – each manifesting both public and private attributes. An argument for gay rights based on the public/private dichotomy ignores the artificiality of sharply distinguishing the "public" state from such "private" institutions as marriage and family. On closer examination, these seemingly private institutions, whose well-being lies at the heart of the privacy cases, betray a markedly public dimension. The state is a "third party" to every marriage

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[22]See Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976). On the debate over the significance of Commonwealth's Attorney, see note 4.

[23]See, e.g., Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (holding that right of privacy does not extend to private homosexual conduct). But see Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (striking down sodomy statute on privacy and equal protection grounds), appeal dismissed, 743 F.2d 236 (5th Cir. 1984).

[24]See, e.g., State v. McCoy, 337 So. 2d 192 (La. 1976) (holding that criminal statute proscribing consensual sodomy does not violate right of privacy). But see People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (striking down sodomy statute on privacy and equal protection grounds), cert. denied, 451 U.S. 987 (1981).

[25]See Grey, supra note 16, at 87-88 (arguing that the privacy cases were concerned not with autonomy, but with marriage, family, and procreation – institutions designed to promote social control). Grey's analysis is supported by courts that, in distinguishing the privacy precedents, have based their decisions on the belief that homosexuality falls outside of the recognized zones of privacy, not on the ground that a general right to sexual autonomy is outweighed by other social needs. See, e.g., Dronenburg v. Zech, 741 F.2d 1388, 1391-92 (D.C. Cir. 1984). The same reasoning has applied when courts have refused to invalidate laws criminalizing fornication or adultery – the right of privacy has not been held to confer blanket protection on sexual autonomy. See, e.g., Johnson v. San Jacinto Junior College, 498 F. Supp. 555 (S.D. Tex. 1980) (right of privacy does not encompass an extramarital relationship).

[26]Such an extension would decriminalize private, consensual gay conduct in the 24 jurisdictions with criminal sodomy statutes, see supra note 4. Decriminalization might positively affect general social perceptions of gays and would also lay to rest the contention that the free speech and association of gays can be curtailed because they incite unlawful conduct. See Stanley, The Rights of Gay Student Organizations, 10 J. COLL. & UNIV. L. 397, 402-08 (1983).

Theoretically, one could argue that the right of privacy would prohibit other incidences of unequal treatment of gays, such as employment discrimination or the withholding of public benefits, because these practices would impermissibly burden a fundamental right. Yet the right of privacy, at least in the abortion context, has not been read so broadly as to require affirmative government action or even impartiality. See, e.g., Harris v. McRae, 448 U.S. 297, 314-18 (1980) (denial of public funds to Medicaid programs for medically necessary abortions held not to burden impermissibly the right to choose abortion, but simply to encourage childbirth). There is no reason to believe it would be read more broadly in the context of gay rights.

contract: it determines not only who may marry,[27] but also what rights and duties each marital partner bears in relation to the other and to any children they might have.[28] The state creates the private sphere by determining its contours and limits, and protects it by granting it alone the shield of privacy.[29]

The overlap and interaction between family and state suggest at the very least that the relationship between public and private experience is in fact more a subtly shaded continuum than a dichotomy. The four overlapping spheres mentioned above – or perhaps a scheme of even greater detail and fluidity – would capture the complexities of the social and political world more fully than could the rigid dualism of privacy doctrine. This dualism is especially ill-suited to the affirmation of gay rights, because it assumes that homosexuality is merely a form of conduct that can take place in the privacy of the bedroom at a specified time, rather than a continuous aspect of personality or personhood that usually requires expression across the public/private spectrum. As Professor Tribe has argued, "[F]reedom to have impact on others – to make the 'statement' implicit in a public identity – is central to any adequate conception of the self."[30] Such public manifestations may be necessary not only as personal expressions of gay identity, but also as means for heightening public awareness of homosexuality and thus perhaps broadening public acceptance of gay lifestyles.[31] Relegating sexuality to the private sphere revives an element of the old "separate but equal" doctrine – the belief that the separation of one group from the world of more general social interaction is neither unequal nor stigmatizing.[32] Withholding social recognition from the public aspects

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[27]See Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (upholding denial of marriage license to two women); In re State ex rel. Black, 3 Utah 2d 315, 283 P.2d 887 (1955) (declaring polygamy unlawful).

[28]See generally J. AREEN, CASES AND MATERIALS ON FAMILY LAW (1978 & Supp. 1983) (describing and documenting state involvement in marriage, procreation, divorce, adoption, and childrearing).

[29]The number of possible loving relationships that are excluded from the state's conception of family illustrates the degree to which the reality of family is dependent upon the state. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning ordinance limiting the number of unrelated people in a household); cf. Miller, Fair Share? Extending Benefits to Domestic Partners, Boston Phoenix, Oct. 16, 1984, @ 2, at 1, 12 (only unconventional cities like Berkeley, California, extend insurance coverage and other benefits to the domestic partners as well as the spouses of municipal employees). Just as the family depends upon the state for its existence and contours, so the state depends upon the structures of marriage and family. See M. BARRETT & M. McINTOSH, THE ANTI-SOCIAL FAMILY 31 (1982) ("Just as the family has been socially constructed, so society has been familialized."). See generally The Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982) (symposium reviewing the persistence of the public/private dichotomy across different fields of law).

[30]L. TRIBE, supra note 14, @ 15-1, at 888.

[31]See Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32-33 (1979) ("[O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights."); J. ELY, DEMOCRACY AND DISTRUST 163-64 (1980). Indeed, the general public, as well as the gay individual, may have an interest in the free public expression of gay sexuality in order to create a "sexually pluralistic environment." See Klare, The Public/Private Distinction in Labor Law, 130 U. PA. L. REV., 1358, 1386-88 (1982).

[32]Cf. Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (arguing that racial segregation is stigmatizing only in the sense that "the colored race chooses to put that construction upon it").

of gay personhood while "[h]eterosexual society revolves around its sexual orientation"[33] is inherently unequal not only in its substantive restriction of gay liberties, but also in its imputation of stigma: homosexuality, like obscenity, may be tolerated only if quarantined.[34]

By misconceiving the nature of "private" institutions and of "private" sexuality, privacy analysis not only presents an unconvincing portrait of the social world, but also fails to provide an adequate remedy for unequal treatment of gays. Privacy analysis assumes that the problem to be solved is unwarranted intrusion into a protected sphere and that the right to be vindicated is, in Judge Cooley's famous words, "the right to be let alone."[35] Yet if the real problem is one of pervasive discrimination against gays, the withdrawal of the state from the bedroom will not greatly alleviate it and indeed may exacerbate it by subtly sanctioning the continued stigmatization of the private activity. The social world, where most discrimination against gays occurs, is left untouched by the seemingly neutral abstention of the state.[36]

A hypothetical example of the theoretical and practical limitations of privacy analysis is the anticipated reversal by the Supreme Court of the holding in People v. Uplinger.[37] In People v. Onofre,[38] the New York Court of Appeals invalidated on federal constitutional grounds a statute that made private, consensual gay conduct a criminal offense.[39] A statute that proscribed loitering for the purpose of performing consensual sodomy, however, remained on the books. In Uplinger, the court of appeals summarily invalidated this statute as well, reasoning that it could not be criminal to loiter for the purpose of committing a legal act when there was no requirement that the loitering itself be offensive.[40] The Supreme Court granted certiorari and heard oral argument on the case. It eventually dismissed certio-

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[33]Gomez, supra note 7, at 133.

[34]Cf. Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that criminal law may not proscribe private possession of obscene materials for personal use); United States v. Reidel, 402 U.S. 351, 354 (1971) (limiting Stanley's protection to possession at home).

[35]T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888), cited in Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890).

[36]As Professor Catherine MacKinnon has noted in the context of abortion rights: "Freedom from public intervention coexists uneasily with any right which requires social preconditions to be meaningfully delivered. If inequality, for example, is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful." C. MacKinnon, Roe v. Wade: A Study in Male Ideology 12-13 (Jan. 1983) (paper presented at Hampshire College as part of a retrospective discussion of Roe v. Wade).

The inability of government abstention to remedy inequality is illustrated by the fact that the workplace falls outside of the spheres traditionally recognized as private. Thus, employment discrimination, one of the major barriers that gays face in the social world, would remain undeterred by the recognition of a right of privacy for gay people. Indeed, in New York, one of the few states in which courts have recognized gay privacy rights, Mayor Koch faced fierce opposition to his executive order requiring contractors with the City of New York to certify that they do not discriminate on the basis of sexual orientation. See supra note 3.

[37]58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), cert. dismissed, 104 S. Ct. 2332 (1984).

[38]51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981).

[39]See id. at 485, 415 N.E.2d at 938-39, 434 N.Y.S.2d at 949.

[40]See People v. Uplinger, 58 N.Y.2d 936, 938, 447 N.E.2d 62, 63, 460 N.Y.S.2d 514, 515 (1983).

rari as improvidently granted,[41] apparently because it had declined to review Onofre, upon which the decision of the court of appeals in Uplinger was based. Had the Supreme Court decided Uplinger, however, it might well have drawn a distinction like the one suggested in the following hypothetical opinion:

Although this Court has declined to extend the right of privacy to protect deviant sexual behavior, even such an extension would have no applicability to this case. The right of privacy extends only to certain "zones" in which individual behavior is entirely self-contained. Once such behavior appears on the streets and affects the lives of other citizens without their consent, such behavior can no longer claim the shield of "privacy." Regulating public behavior that may be offensive to other citizens falls within the proper province of the police power of the State.[42]

Where the right of privacy gives way – in the case of homosexuality, outside the bedroom door – social consensus takes over in the guise of the "police power." Under this power, the state not only delimits the physical space in which gays may engage in sexual activity, but also restricts their ability to participate freely in the social world as gays, openly acknowledging their lifestyles without fear of legal reprisal. Even if homosexuality were accorded the full protection of privacy doctrine, majoritarian norms would still govern the expression of gay personhood outside the bedroom.

2 The Mirror Image: Gay Rights Under The First Amendment

Advocates of gay equality have developed the first amendment rights to speech, expression, and association[43] as an additional ground for the affirmation of gay rights, although this approach has been invoked less frequently than the privacy rationale. The protection provided by the first amendment is the mirror image of that afforded by privacy doctrine: whereas the latter would serve to protect only private gay conduct, the former would shelter only public activities – a gay person's public acknowledgment of her homosexuality, the advocacy of a gay lifestyle or of gay rights, the public assembly of groups of gay people, and gay political

[41] New York v. Uplinger, 104 S. Ct. 2332 (1984).

[42] The facts of Uplinger may not constitute the best example of the artificiality of the privacy dichotomy because the case implicates the state's interest in prohibiting prostitution. But Uplinger exemplifies only one of many possible uses of the public/private distinction to limit gay rights. Other examples might include restrictions on public socializing or displays of affection, or denial of state licenses on the basis of sexual preference. Cf. Inman v. City of Miami, 197 So. 2d 50 (Fla.) (upholding Miami ordinance proscribing employment or service of gays by liquor licensee), cert. denied, 389 U.S. 1048 (1967).

[43] The Supreme Court, by dividing association into the two components of intimate and expressive association, has in effect subsumed the right of association into the rights of privacy and expression. See Roberts v. United States Jaycees, 104 S. Ct. 3244, 3249 (1984); The Supreme Court, 1983 Term, 98 HARV. L. REV. 87, 197 & n.18 (1984). Consequently, no independent basis for gay rights has been developed under the rubric of freedom of association.

activity.[44] A number of courts have recognized extensive first amendment protection of gay activity, including the right to associate freely,[45] to advocate gay rights with impunity,[46] and to engage in symbolic speech.[47] Other courts, however, have declined to protect these rights, finding a rational basis for discrimination either in gay advocacy itself[48] or in gay status revealed through the exercise of first amendment freedoms.[49]

All of these courts, however, no matter how broadly they might read the first amendment, have drawn a distinction between the words spoken and the reality they represent – the expression is protected, the lifestyle is not. This distinction can be defended by reference to a vision of the first amendment that protects homosexuality only as a competitor in a necessary free marketplace of ideas. Under this view, the importance of free speech lies in its powerful political role of encouraging the cross-fertilization of ideas and stimulating

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[44]A wide gap remains, however, between the spheres protected by privacy and the first amendment. See infra p. 1296.

[45]See, e.g., Gay Lib v. University of Mo., 558 F.2d 848, 857 (8th Cir. 1977) (holding that state university's refusal to recognize a gay students' organization violates the first amendment), cert. denied, 434 U.S. 1080 (1978).

[46]See, e.g., Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977) (holding that lecturer's first amendment rights were violated when state university refused to renew his contract because of his statements about homosexuality reported in newspaper).

[47]See, e.g., Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) (first amendment protects the right of male high school student to bring a male date to the prom).

[48]See, e.g., National Gay Task Force v. Board of Educ., 33 Fair Empl. Prac. Cas. (BNA) 1009 (W.D. Okla. 1982) (upholding the facial validity of an Oklahoma statute authorizing the dismissal of a school teacher for "advocating, soliciting, imposing, encouraging, or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees"), rev'd, 729 F.2d 1270 (1984), aff'd by an equally divided Court, 53 U.S.L.W. 4408 (U.S. Mar. 26, 1985).

The Supreme Court has denied certiorari in cases involving teacher dismissals based on the teacher's known gay status. See Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, cert. denied, 434 U.S. 879 (1977); cf. Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984) (dismissal of guidance counselor because of her revealed bisexual status held not to violate her rights to free speech and equal protection), cert. denied, 53 U.S.L.W. 3614 (U.S. Feb. 25, 1985); Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974) (upholding dismissal of teacher based on his failure to disclose in his employment application that he had belonged to a gay organization while in college), cert. denied, 419 U.S. 836 (1975); Gish v. Board of Educ., 145 N.J. Super. 96, 366 A.2d 1337 (1976) (per curiam) (upholding school's requirement that teacher undergo psychiatric examination because of his public activities in support of gay rights), cert. denied, 74 N.J. 252, 377 A.2d 658, cert. denied, 434 U.S. 879 (1977). Yet the Court has never gone so far as to tolerate dismissal for mere advocacy of gay rights, as its affirmance of the circuit court's invalidation of the Oklahoma statute in National Gay Task Force illustrates. Its decision in the Oklahoma case, however, does not resolve the difficult cases involving teacher dismissals and other forms of discrimination based on publicly known gay status or private conduct – cases that can properly be addressed only by an equal protection analysis.

[49]See, e.g., Singer v. United States Civil Serv. Comm'n, 530 F.2d 247 (9th Cir.) (plaintiff's public flaunting of his gay lifestyle justified the government's termination of his employment), vacated in light of new administrative policy, 429 U.S. 1034 (1976); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (discharge of teacher upheld because his reputation as gay would impair his ability to teach), cert. denied, 434 U.S. 879 (1977).

dissent.[50] Nonconforming lifestyles are not themselves protected; rather, the right to be gay openly and freely must attend the ascendance of the idea of gay rights. Thus, in enforcing social consensus, the state can legitimately outlaw gay conduct and discriminate on the basis of gay status as long as it gives the "concept" of homosexuality its due.

A different, though related first amendment justification for protecting speech about homosexuality – but not homosexuality itself – relies on the perceived harmlessness of speech, on the belief that "'our people, adequately informed, may be trusted to distinguish between the true and the false.'"[51]

This conception of the first amendment allows unpopular speech not because it is powerful, but because it is ineffectual. Such a view invites the counterargument that speech is far from innocuous, an argument vigorously made by Justice Rehnquist in his dissent from the Court's refusal to grant certiorari in Gay Lib v. University of Missouri,[52] The university had refused to recognize a gay students' organization on the ground that such recognition would encourage violation of Missouri's anti-sodomy statute. In support of the university's position, Justice Rehnquist argued that permitting the exercise of first amendment rights of speech and association in this instance would undercut a legitimate state interest, just as permitting people with the measles to associate freely with others would undercut the state's interest in imposing a quarantine.[53]

Two possible arguments, however, avoid the limitations of defending gay rights under the first amendment either as purely political rights or as rights recognized only by virtue of their impotence, and thus protect gay lifestyles as well as gay speech. The first argument maintains that to penalize the reality of being gay serves to "chill" the exercise of free speech asserting gay identity. The second suggests that all gay speech and conduct are means of self-expression and therefore are protected under the first amendment. Both of these arguments, however, collapse the distinction between speech and conduct. Courts can and have distinguished gay conduct from gay status, speech, and association.[54] An individual could advocate gay rights and associate with gay organizations – or simply be gay – without engaging in gay sexual activity. However unappealing[55] and impractical[56] these distinctions

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[50]See J.S. MILL, supra note 17, ch. 2, at 173-74; L. TRIBE, supra note 14, @ 12-1, at 576.

[51]Student Coalition for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267, 1274 (M.D. Tenn. 1979) (quoting Viereck v. United States, 318 U.S. 236, 251 (1942) (Black, J., dissenting)).

[52]558 F.2d 848 (8th Cir. 1977) (finding university's refusal to recognize gay student group a violation of the first amendment), cert. denied, 434 U.S. 1080 (1978).

[53]See Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting).

[54]See, e.g., Matthews v. Marsh, No. 82-0216 (D. Me. Apr. 3, 1984), vacated, No. 84-1482 (1st Cir. Feb. 22, 1985). Matthews is discussed on pp. 1295-96.

[55]See L. TRIBE, supra note 14, @ 12-7, at 599 ("The trouble with the distinction between speech and conduct is that it has no real content."); Klare, supra note 31, at 1387 ("How can this distinction between identity and conduct be tenable?").

[56]Although there is perhaps a metaphysical distinction between status and conduct, one is rarely found without the other. In responding to the majority's distinction in Robinson v. California, 370 U.S. 660 (1962), between the status of drug addiction and the act of drug use, Justice White noted, "[A]ddiction is the regular use of narcotics and can be proved only by evidence of such use." Id. at 686 (White, J.,

may be, they are embedded in first amendment jurisprudence,[57] as well as in other areas of law.[58] Moreover, if taken to its logical extreme, the complete collapse of conduct into speech is as likely to weaken first amendment protection as it is to strengthen it: the "speech" in question might receive only the ordinary due process protection that personal liberty receives under the fourteenth amendment. Thus, unless the argument is that all conduct accompanied by speech merits first amendment protection, or that all conduct is self-expression, the first amendment alone cannot serve as an adequate vehicle for the affirmation of gay rights.

The shortcomings of first amendment analysis are demonstrated by a case that draws the speech/conduct distinction and creates a result that illustrates, as did the hypothetical Uplinger opinion in the privacy context,[59] that a wide terrian of social interaction is left untouched by the protection of gay rights under a rationale that focuses exclusively on either the private or the public aspects of homosexuality. In Matthews v. Marsh,[60] the court ordered the reenrollment of an ROTC cadet who had been discharged pursuant to Army regulations for her statement to a superior officer: "I am a lesbian." The court held that a statement of mere intent or desire, with no showing of actual lesbian conduct, was protected by the first amendment and therefore could not be the basis for her disenrollment.[61] But a showing of lesbian activity, the opinion suggested, would be a different matter.[62] The court left unanswered how much expression beyond "pure" speech would be protected by the first amendment. Participation in gay politics, appearance at a gay club or bar, or the public expression of affection for a member of the same sex might yet be valid grounds for disenrollment, even though such activities may be as fundamental to expressing one's identity as was the statement at issue in Matthews. Such distinctions suggest why first amendment jurisprudence cannot accurately conceptualize or adequately protect all aspects of gay identity.

Analyzed together, the Matthews decision and the hypothetical opinion reversing Uplinger portray the wide range of gay activity that would remain vulnerable even if homosexuality were protected by both the first amendment and the right of privacy. Any gay

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dissenting).

[57]See Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 654 (1980) (the first amendment should not "be stretched to cover all our constitutional freedoms"); Schauer, Must Speech Be Special?, 78 NW. U.L. REV. 1284, 1289-93 (1983) (rejecting the "self-development" theory of the first amendment because it fails to distinguish speech from all other human activity and thus expands the first amendment into a general protection of liberty).

[58]See Powell v. Texas, 392 U.S. 514, 532-34 (1968) (distinguishing act of public drunkenness from status as chronic alcoholic); Robinson v. California, 370 U.S. 660, 665-67 (1962) (distinguishing status of drug addiction from act of using drugs).

[59]See supra pp. 1291-92.

[60]No. 82-0216 (D. Me. Apr. 3, 1984), vacated, No. 84-1482 (1st Cir. Feb. 22, 1985).

[61]Id., slip op. at 3-4.

[62]See id. at 18-19. Indeed, the First Circuit vacated and remanded the case for reconsideration in light of additional evidence presented on appeal – a signed statement by Ms. Matthews that she had "engaged in homosexual acts numerous times, last one being recently." See Matthews v. Marsh, No. 84-1482, slip op. at 4-5 (1st Cir. Feb. 22, 1985).

conduct found neither entirely private nor expressive in nature would fall in the unprotected area. Similarly, gay status in certain "public" contexts – such as employment, housing, and public accommodations – would remain unprotected. Public employment, an area in which gays have traditionally suffered severe discrimination, lies squarely within this unprotected zone. Although the government as employer is bound by constitutional restraints on state action, the right of privacy and the right to free speech have rarely been held to protect gays employed in the civil service, the military, or the public schools. Most courts have held that the special state interests implicated in these settings override any such constitutional liberties of gay employees.[63]

One commentator has maintained that the constitutional protection of expression can be interpreted to cover these vulnerable areas: a general first amendment right to sexual expression protects the choice of a gay lifestyle as a "fundamental right" under the equal protection clause of the fourteenth amendment.[64] Such an argument, although vulnerable to the general critique leveled at expansive applications of the first amendment to sexual orientation,[65] does recognize the crucial role of the equal protection clause in protecting homosexuality as an aspect of personhood. This insight invites examination of the other significant branch of equal protection doctrine – the judicial creation of inherently suspect classifications.[66]

3 Homosexuality as a Suspect Classification

The "suspect class" branch of equal protection theory bridges the gap in the protection of gay rights between privacy doctrine and the first amendment. Whereas privacy doctrine can protect only private gay conduct rather than the choice of a publicly gay lifestyle, and the first amendment encompasses the political arena rather than the social world, an equal protection analysis seeks to unify the private and the political by protecting gay personhood as a whole. Whereas arguments for privacy and first amendment rights ultimately give way to social consensus, equal protection theory rejects social consensus and the democratic process as the final arbiters of the rightful status of social groups. Judicial designation of homosexuality as a suspect classification, even though it could not automatically eradicate all

[63]See cases cited supra note 6.

[64]That commentator argued:

Because the public expression of lesbian/gay personhood is a fundamental right, founded in the first amendment, courts must heighten their scrutiny of practices against lesbians and gays when challenged under the equal protection or due process clauses of the fourteenth amendment. This level of scrutiny will safeguard many of the rights of lesbians and gays now set aside in deference to state interests.

Gomez, supra note 7, at 153.

[65]Such a view of first amendment protection blurs the distinction between speech and conduct, see supra p. 1295, and fails to address the wide range of social discrimination against gays based not on their speech or association, but on the lifestyle revealed through their public activities, see supra p. 1293 & notes 48-49.

[66]Courts subject a law to strict scrutiny when it either burdens a fundamental right or discriminates against a specially protected group. See L. TRIBE, supra note 14, @ 16-7, at 1002, @ 16-13, at 1012; see also supra note 14 (discussing heightened scrutiny generally).

forms of discrimination against gays,[67] could provide a comprehensive doctrinal framework for addressing the problem of gay inequality.

Although it is clearly in the interest of gay people to be deemed a suspect class, it remains to be considered whether such a designation comports with current equal protection jurisprudence. The creation of special standards of review is a particularly controversial area of the law, not only because courts have articulated no coherent set of principles, but also because special scrutiny raises the troubling issue of the legitimacy of judicial review in a democratic society.[68] To avoid or at least to mitigate these difficulties, courts have generally based their analyses of suspect or quasi-suspect classes[69] on the model of race, the only criterion that uncontestedly entails a suspect classification. Other criteria considered for suspectness must resemble race to some largely unelucidated degree. What judicial elucidation there is has developed sporadically in the context of particular cases,[70] and has given rise to an ambiguous catalogue of characteristics of suspectness that yields no obvious or coherent theory of suspect classifications.[71]

Many courts and commentators treat the issue of suspectness as if equal protection analysis ended there; yet it is clear that such an analysis has two parts: the determination of the standard of scrutiny to be applied and the consideration of possible state interests in the application of the standard. The second part has often been treated summarily because "strict" scrutiny has generally been fatal to legislation, while "minimal" scrutiny has generally been toothless.[72] When the choice was limited to these extremes, courts seemed in effect to collapse the two steps into one, simultaneously determining the level of protection to be afforded the group and considering the legitimacy of the asserted state interest. Courts determined whether a class was suspect by examining not specific characteristics of

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[67]Although the inclusion of sexual orientation as a protected characteristic in the federal civil rights laws, for example, is a task that only Congress can undertake, the term "strict scrutiny" (or "heightened scrutiny") represents an overt warning to the legislature, not merely a description of the quality of judicial revies. See L. TRIBE, supra note 14, @ 16-6, at 1000. Even without the passage of anti-discrimination legislation to remedy private acts of discrimination, heightened scrutiny would lead courts to strike down a broad array of discriminatory practices against gays – including criminal statutes, exclusion of gays from teaching positions and the military, and denial to gays of access to public accommodations. This range of judicial activity would undoubtedly have an impact on the legislature and, more broadly, on social attitudes.

[68]See Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1013-16 (1984) (discussing Alexander Bickel's description of the "countermajoritarian difficulty" with judicial review).

[69]"Quasi-suspect" classifications trigger "intermediate" scrutiny. See supra note 14.

[70]See, e.g., Lalli v. Lalli, 439 U.S. 259 (1978) (subjecting law discriminating on the basis of illegitimacy to intermediate review); Craig v. Boren, 429 U.S. 190 (1976) (formulating intermediate standard of review for gender classifications); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (finding that old age is not a suspect classfication); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that discrimination on the basis of wealth alone does not trigger heightened scrutiny); Graham v. Richardson, 403 U.S. 365 (1971) (finding alienage to be a suspect classification).

[71]The prerequisites of stigma, unequal treatment, immutability, and discreteness and insularity are discussed on pp. 1299-1305.

[72]See Gunther, The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972).

the class itself, but the state interests at stake. The advent of intermediate scrutiny,[73] however, has highlighted the existence and importance of the two separate investigations. The often neglected second step is crucial to the debate about suspectness because it directly confronts the question implicit in that debate: what collective goals are permissible under the fourteenth amendment?

This Part proposes a theory of suspectness consistent with the concerns underlying the piecemeal judicial development of suspect class doctrine, and then applies it to homosexuality within the framework of a two-step equal protection analysis. Section A develops a model of suspectness that encompasses sexual orientation. Section B assesses the state interests involved in the particular and especially difficult case of the rights of gay teachers in the public schools.

3.1 The Boundary of Suspectness

The predominant way of understanding the development of suspect classifications has been to see this branch of equal protection theory as protecting individuals from unequal treatment on the basis of "irrelevant" characteristics.[74] Such an analysis treats criteria such as race and gender as essentially insignificant for legitimate regulatory purposes. The problem with this explanation of suspectness is that it is conclusory; it provides no guidelines for distinguishing between relevant and irrelevant characteristics. Even a determination that a characteristic is irrelevant to the achievement of a specified purpose can only invalidate a particular piece of legislation rather than define a suspect class. There are many groups that share generally irrelevant characteristics (baldness, for example) yet do not receive the benefit of heightened scrutiny. This Note offers an alternative account of suspectness that emphasizes the importance rather than the irrelevance of the protected characteristics. This alternative vision defines suspect classifications as those based on characteristics that are essential elements of personhood[75] and yet focal points of discrimination. Although this alternative perspective does not create a rule by which suspectness can be absolutely determined in every case, it does suggest the ways in which the issue may be framed, thereby creating an articulable boundary of suspectness.[76]

In determining whether a particular classification is suspect, courts and commentators have focused most often on the "stigma" and "opprobrium" attached to membership in the

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[73] See supra note 14.

[74] See, e.g., Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1065 (1979) ("[T]he Supreme Court has moved beyond the original understanding of the equal protection clause in . . . distilling from the principle of the moral irrelevance of ract the more general principle of the moral irrelevance of any trait that reveals nothing about the moral worth or desert of a person.").

[75] The concept of personhood is elaborated on p. 1300.

[76] The breadth or narrowness of the range of groups that the proposed theory of suspectness would encompass is not only an equal protection issue, but a separation of powers issue as well. Given that most theories of suspectness can be construed either broadly or narrowly, the choice of construction is determined by our trust in the legitimacy of the political as compared to the judicial process.

relevant group and that group's concomitant unequal treatment.[77] These considerations are universally accepted as reliable means of determining a group's need for judicial intervention. In contrast, however, two of the other generally accepted criteria of suspectness – the "immutability" of the group's defining quality[78] and the group's status as a "discrete and insular minority"[79] – are more abstract and controversial. Theorists argue bitterly over the relative significance of these two qualities;[80] one has argued that they represent separate and conflicting "tests" for suspectness.[81] Although it is possible to make a case for gay equality within any one theorist's version of the meaning of these abstract criteria,[82] this Section will look behind the abstractions to formulate a new understanding of their significance that is consonant with many of the broad concerns that seem to underlie them.

The proposed theory of suspectness begins with the identification of two basic prerequisites to heightened judicial scrutiny: the group's defining characteristic must be one essential to personhood, and the group must have a history of stigmatization and remain subject to pervasive discrimination. A trait essential to personhood has three separate components: it must be essential to individual identity, essential to group identity, and essential to society's perception of those identities. Individuals within the group must themselves view the trait as important to their individual identities; the group defined by the trait must have some sort of internal sense of group identity; and society must treat the individual group members differently for having that characteristic – their social experience must be to some degree defined by the trait. Although the proposed theory does not pretend to close the ranks of the suspect classifications or to draw a clear line between strict and intermediate scrutiny,[83] it reflects the common concerns behind the traditional criteria of suspectness and provides

[77]See Developments in the Law – Equal Protection, 82 HARV. L. REV. 1065, 1127 (1969).

[78]See Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . .").

[79]See United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (prejudice against discrete and insular minorities may be a special condition calling for heightened judicial solicitude).

[80]Compare J. ELY, supra note 31, at 148-53 (arguing that suspect classification doctrine should protect those who cannot protect themselves politically), with Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1072-77 (1980) (arguing that substantive values rather than concern for the political process should inform suspect classification doctrine).

[81]See J. BAER, supra note 21, at 119-20 ("[The cases] have told us that some classifications are suspect and some are not; what they do not do is tell us why. Or, rather, they offer two alternative explanations [immutability, and discreteness and insularity] that compound the confusion.").

[82]See Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797 (1984) (arguing that gays meet all of the usual prerequisites for suspectness and should be considered a suspect class under a variety of different theories of equal protection).

[83]In the years since race was first held to be an inherently suspect basis for classification, numerous other characteristics have been proposed and evaluated for their suspectness – among them gender, illegitimacy, alienage, physical or mental disability, age, and poverty. Any theory of suspectness must provide some means of distinguishing groups that are in need of special judicial protection. The theory offered here provides a framework, albeit a fluid one, for determining suspectness, one that is based upon the necessarily elusive concepts of discrimination and personhood. Gender would meet the criteria for suspectness because of the history of unequal treatment of women and because of the central defining role of gender in self-identification

a framework for discussing them. A closer examination of these criteria will illuminate the link between them and the proposed theory of suspectness, and establish the applicability of the theory to homosexuality.

All cases and commentators agree that stigma is the first and most fundamental criterion of suspectness.[84] The inevitable corollary of group stigmatization is unequal treatment. Thus, the frequently invoked idea of stigma is closely tied to the criterion of historical unequal treatment. These two criteria are the least controversial among competing theorists and the easiest to justify. Stigmatization and discrimination have been hallmarks of the historical subjugation of American blacks.[85] The continuing presence of such discrimination is evidence of a concrete harm that needs to be remedied; heightened scrutiny both compensates for past suffering and corrects an imbalance that the persistent prejudice creates in the present. Whether this imbalance is disturbing because it suggests that the pluralist democratic process is malfunctioning[86] or because it indicates that substantive constitutional values are being ignored,[87] it is universally considered a warning signal that plays an

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and group affiliation. Physical or mental disability, age, and poverty are all difficult cases for any theory of suspectness. The decision to find any one of them suspect under the proposed theory would depend on the resolution of some fundamentally contested issues: for example, whether physical or mentally handicapped individuals have a sufficient group identity to meet the group affiliation branch of the personhood triad, whether children or the elderly suffer sufficient stigma and unequal treatment, or whether social class is truly determinative of individual and group consciousness. The proposed theory is useful not because it answers these questions, but because it asks them.

Although the Supreme Court has treated both illegitimacy and alienage as "suspect" classifications, see Lalli v. Lalli, 439 U.S. 259 (1978) (finding law classifying on the basis of illegitimacy to be substantially related to important state interests under an intermediate standard of review); Graham v. Richardson, 403 U.S. 365, 372 (1971) (declaring classifications based on alienage to be "inherently suspect and subject to close judicial scrutiny"), neither of these characteristics would be considered determinative of personhood under the proposed theory of suspectness. Illegitimate children may not find the fact that their biological parents are unmarried to have a great effect on their sense of personal identity, and noncitizens may feel no sense of group affiliation with other noncitizens of different ethnic origins. But heightened scrutiny for illegitimacy and alienage can be justified on the ground that the law itself creates the defining characteristic. In cases in which an individual, otherwise indistinguishable from other individuals, is stigmatized and treated differently because of a characteristic created and imposed by the state, the state should have a burden of adequately articulating and justifying its interest in creating the characteristic. Of course, the state's discrimination generally has its origins in social intolerance, and thus legal and social discrimination are related, even if not identical. The theory of suspectness proposed in this Note, however, deals only with the wide range of socially created differences and social discrimination; a parallel theory is necessary to encompass instances of legally created differences and stigma.

[84]See, e.g., Matthews v. Lucas, 427 U.S. 495, 506 (1976) (finding illegitimacy not to be subject to strict scrutiny in part because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes"); Developments in the Law – Equal Protection, supra note 77, at 1127 ("[T]he question whether opprobrium readily attaches to a particular classification may be the touchstone to predicting what other congenital and unalterable traits will be viewed as suspect in the future.").

[85]See Strauder v. West Va., 100 U.S. 303, 308 (1880) (noting that the fourteenth amendment protects blacks against "legal discrimination, [which] impl[ies] inferiority in civil society").

[86]See J. ELY, supra note 31, at 135-79.

[87]See Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 741 (1985) ("[T]here are certain

important role in triggering judicial intervention. It is equally uncontroversial that gays as a group suffer from stigmatization in all spheres of life.[88] The stigma has persisted throughout history, across cultures,[89] and in the United States.[90] Under the criterion of historical and continuing discrimination, then, gays qualify for consideration as a class deserving of heightened scrutiny.

Immutability is a cloudier issue, especially in the case of homosexuality, because the origins and mutability of sexual preference are currently the subjects of vigorous debate.[91] Describing a trait as immutable in an equal protection analysis often implies that it is unchosen as well as unalterable. This dual sense of immutability may be thought significant for any of several usually unarticulated reasons. Immutability may be considered important because it would be pointless to try to deter membership in the immutable group, or because individual group members cannot be blamed for their status, or because immutability heightens the sense of stigma associated with membership, since no one would choose to be a member if she did not have to be one. All of these rationales rely upon the perceived irrelevance of the immutable characteristic: unchosen, the trait merely coexists with the individual and is irrelevant to the realization of any legitimate state interest. These rationales, however, are called into question by instances in which the individual, by exercising control over a supposedly immutable characteristic, refutes the doctrinal implication that the trait is unwanted or insignificant.[92] Such instances evoke abhorrence not because the state is burdening the individual for an "immutable" characteristic, but rather because it is

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substantive principles . . . that pluralist politicians are simply not allowed to bargain over in normal American politics.").

[88]See supra pp. 1285-86.

[89]See generally HISTORICAL PERSPECTIVES ON HOMOSEXUALITY (S. Licata & R. Petersen eds. 1981) (a collection of essays and book reviews on homosexuality from medieval times to the present in both Europe and the United States). But see J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 243-66 (1980) (describing the 11th and 12th centuries as a time of relative tolerance of Europe's gay subculture and a flowering of its artistic expression).

[90]See, e.g., J. KATZ, GAY AMERICAN HISTORY (1976).

[91]We simply do not know enough about biology or psychology to know whether homosexuality is genetic, the product of early childhood experience, the interaction of genetic predisposition and life experience, a matter of free choice, or a combination of these factors across the gay population. See Note, supra note 82, at 817 & nn.134-35 (researchers have not arrived at a generally accepted explanation of the development of homosexuality). We likewise do not know whether, once established, homosexuality is subject to voluntary change or only to disguise. That people may be gay for different reasons demonstrates the inadequacy of an approach using a dictionary sense of immutability: do we protect only those gays who were "born that way"? Such uncertainty as to the origin of homosexuality argues for more rather than less protection. If homosexuality is indeed immutable once established, see id. at 819-21, then the traditional arguments for protecting unchosen traits come into play in addition to the argument presented for the protection of personhood. But this Note's rejection of choice as relevant to suspectness is consistent with the notion that equal protection doctrine should be rooted in a concern for the social status of groups as opposed to that of individuals. See Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107 (1976) (equal protection protects specially disadvantaged social groups). To the extent that this rejection would invite too many new candidates for suspectness, the requirements of stigma and personhood could be intensified to reduce the number of qualifying groups.

[92]Is there a reason to condone discrimination in the case of a man who has a sex-change operation more

burdening the individual's choice to be different.

An alternative view of the importance of immutability might thus focus on the argument that the characteristics of race and sex are important not because they are (usually) determined at birth, but because they are such determinative features of personality. The unchangeability of race and sex may have been merely a coincidental attribute used to link these two suspect groups.[93] We all have a myriad of immutable characteristics (eye color, for example) that would never become the grounds for the creation of a suspect class. It is not the "immutability" of race or sex that is the key to their suspectness, but the important role that these traits play in self-perception, group affiliation, and identification by others. Under this explanation of the significance of immutability, sexual orientation would take its place next to race and sex as one of only a handful of characteristics that have such a pervasive and profound impact on the three aspects of personhood.[94]

The most controversial of the current theories of equal protection is the attempt to discover a test for suspectness in Chief Justice Stone's cryptic footnote in Carolene Products, which singles out "discrete and insular" minorities as candidates for special judicial concern.[95] One such approach views heightened scrutiny for such minorities as necessary to facilitate their participation in pluralist democratic politics, in which for some reason they have not been able to play their fair role.[96] Yet opponents of this process model, focusing on the prohibition of "prejudice" against discrete and insular minorities rather than on discreteness and insularity themselves, argue that a process-oriented theory inevitably requires its adherents to make substantive choices in order to distinguish principled, acceptable distinctions from prejudiced discrimination.[97] These choices must ultimately be made on the basis

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than in the case of woman who was "born" that way? May a black person who can "pass" for white be penalized for consciously refusing to make that choice? The possible elaborations of the significance of immutability cannot adequately address these hard cases.

[93]See Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.) (four Justices agree that sex should be a suspect class because it is immutable like race and national origin).

[94]For a discussion of other possibly suspect bases of classification under this model, see note 83.

[95]See United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[96]See J. ELY, supra note 31, at 145-64. Even within this pure process model, however, one can argue persuasively for heightened judicial protection of homosexuality. Gay people's ability to avoid prejudice by "passing" as straight may lead many to hide in anonymity, rather than reveal their identity in order to participate in political life. See id. at 163-64; Ackerman, supra note 87, at 730-31. And even if gays do choose to participate, they may be so repellent to certain other groups that they will be unable to bargain effectively in the political would. Cf. id. at 732-33 (describing unwillingness of nonminorities to bargain with certain minority "pariahs").

[97]See Ackerman, supra note 87, at 741 (arguing that the Carolene Products footnote conceives of judicial review not only as perfecting the democratic process but also as criticizing it by requiring certain fundamental substantive choices); Baker, Neutrality, Process, and Rationality, 58 TEX. L. REV. 1029 (1980) (criticizing pure process theories of equal protection); Tribe, supra note 80, at 1076 (stating that legislation penalizing homosexuality because of its perceived repugnance "can be rejected only on the basis of a principle that is equally substantive: a view of what it means to be a person, and to have a sexual identity. Process and

of constitutionally enshrined values, such as dignity and individual choice.[98] Under such a model, substantive inequality would demand rigorous judicial scrutiny even if we could be sure that the minority group had attained its "appropriate" share of political power.

Various opponents of the process model focus on either the protection of individual identity or the protection of group identity as the substantive constitutional value implicated by equal protection analysis.[99] Together, then, these theorists support the comprehensive sense of personhood as the confluence of individual, group, and social identities, proposed in this Note as the core of equal protection doctrine. Sexual orientation is essential to all three aspects of personhood and thus falls clearly within the boundary of suspectness. That a gay person's sexuality is fundamental to her personal identity is demonstrated by personal testimonies in gay literature[100] and by the well-known phenomenon of "coming out," or publicly acknowledging one's gay identity. The significance of sexual orientation to group identity, both from within and outside the gay community, is even more evident, manifested by the existence of gay bars, bookstores, newspapers, political lobbies, legal rights committees, and gay neighborhoods – in short, gay communities.

Because homosexuality is a determinative feature of personhood and because gay people have historically been victims of stigmatization and discrimination, courts must subject legislation that classifies on the basis of sexual orientation to a heightened standard of review and must closely scrutinize the state interests embodied in the legislation. If these interests are important or compelling, and if they are implemented by appropriately tailored means, they could survive judicial scrutiny. The acknowledgment of this second step in equal protection analysis is not a weakness, but a strength: in light of the

indeterminacy of any theory of suspectness, the second step becomes the crucial area of debate, because it forces the state and the courts to articulate and assess our collective goals in light of the constitutional mandate of equality.

3.2 Assessing State Goals: Gay Teachers in the Public Schools

The federal government and the governments of most states frequently create classifications on the basis of sexual preference.[101] But because courts have not recognized the suspectness

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prejudice thus seem profoundly beside the point.") (citation omitted).

[98]See L. TRIBE, supra note 14, @ 16-6, at 1000 (strict scrutiny is necessary "to preserve substantive values of equality and liberty"). Although theorists may disagree on what these values imply, see Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. PA. L. REV. 933 (1983) (contrasting "outcome equality" and "equality of respect" models), many do agree that strict scrutiny inevitably involves substantive choices.

[99]Compare Tribe, supra note 80, at 1076 (substantive principle implicated by equal protection is "a view of what it means to be a person"), with Fiss, supra note 91, at 147-55 (equal protection protects social groups that have existences and identities apart from those of their members).

[100]See, e.g., A. BANNON, I AM A WOMAN (1959); R. BROWN, THE RUBYFRUIT JUNGLE (1973); E. WHITE, STATES OF DESIRE: TRAVELS IN GAY AMERICA (1983).

[101]Gay sexual activity is a criminal offense in many states, see supra note 4, and gay partners, unlike their heterosexual counterparts under fornication laws, do not have the opportunity to "legitimize" their sexual relations through marriage, see cases cited supra notes 9 & 27. Government discrimination against

of such classifications, the government has not been required to articulate the state interests underlying such legislation. If the government were required to do so, would the asserted goals withstand the heightened judicial scrutiny proposed above? Although state interests would undoubtedly vary from context to context, an examination of possible justifications for discrimination against gay public school teachers is particularly illuminating, both because public employment falls in the gap left between privacy and first amendment rights and because the state interests implicated in the regulation of the school environment are considered particularly significant.[102]

One common justification for dismissing or refusing to hire gay teachers is that public knowledge of a teacher's homosexuality will disrupt the learning process. That members of the community may hate and fear gays is offered as the nexus between a teacher's homosexuality and her unfitness to teach.[103] The Supreme Court has rejected this circular justification for discrimination in the context of race[104] and has resoundingly affirmed, in upholding the right of a parent to maintain custody of her child despite her subsequent interracial marriage, that the existence of private antipathy cannot validate state discrimination:

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[105]

The purpose of special judicial protection would be undermined if the very circumstance giving rise to heightened scrutiny – widespread discrimination – could be used to withstand that scrutiny.

Although the state would be concerned about community reactions to the employment of gay teachers, it would probably focus primarily on the responses of the schoolchildren themselves, and argue that the students' possible emulation of the teacher's lifestyle is the primary evil to be avoided. The state might argue that because teachers serve as role models for their students and interact with them during adolescence, permitting gays to teach would influence some students to become gay themselves. A common response to this assertion is that it is simply not true: teachers have no influence on the future sexual

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gay military personnel, see, e.g., Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), teachers, see supra note 48, and public employees in general, see Developments in the Law – Public Employment, 97 HARV. L. REV. 1611, 1753-56 (1984), is widespread.

[102]See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs.").

[103]See Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 298-99, 559 P.2d 1340, 1346-47, cert. denied, 434 U.S. 879 (1977).

[104]See Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (declaring racial segregation in the public schools unconstitutional despite its widespread entrenchment).

[105]Palmore v. Sidoti, 104 S. Ct. 1879, 1882 (1984) (footnote omitted); see also M.P. v. S.P., 169 N.J. Super. 425, 404 A.2d 1256 (App. Div. 1979) (upholding lesbian mother's right to custody of children despite the possibility of prejudice).

identity of their students.[106] This view often relies on the belief that sexual orientation is genetically determined or formed in the early years of childhood. But because we have not yet determined the origins of sexual orientation with any certainty,[107] a response to the state's articulation of its goal must assume that the state's fear is to some degree justified – that some students who would not otherwise have done so would engage in gay sexual activity or even identify themselves as gay. Would the prevention of such consequences constitute a goal weighty enough to withstand heightened scrutiny?

The state would probably argue that an increase in the incidence and acceptability of homosexuality would pose a threat to the institutions of marriage and family – institutions protected in many other contexts.[108] The flaw in this argument is not that the goal is invalid, but that the means are unaccountably underinclusive. Spinsters, bachelors, and divorced people are permitted to teach without challenge, and even unwed mothers and single pregnant women have won constitutional protection for their right to teach, despite their possible encouragement of untraditional lifestyles.[109] Moreover, the same arguments about the preservation of marriage and family were made against equality for women. The point is not that these arguments were wholly incorrect; perhaps they were not.[110] The important point is that courts, in subjecting gender classifications to heightened scrutiny, did not feel compelled to balance the possible "harm" to social institutions against the constitutional mandate of equality; they realized in the gender context that sometimes institutions have to change.[111] Finally, homosexuality poses a threat only to the formal definitions of marriage and family, not necessarily to the values of caring and responsibility that lie behind them. Perhaps a broader conception of family is necessary to preserve the intimacy and sharing

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[106]See Reagan, Two Ill-Advised California Trends, L.A. Herald Examiner, Nov. I, 1978, at A-19 (commentary by Ronald Reagan stating that "[a]s to the 'role model' argument, a woman writing to the editor of a Southern California newspaper said it all: 'If teachers had such power over children I would have been a nun years ago'").

[107]See supra note 91.

[108]See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (striking down zoning ordinance that prohibited grandmother from living with her two grandsons); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning ordinance that limited the number of unrelated persons who could form a household); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that marital privacy protects married couple's use of contraceptives).

[109]See Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975) (school district rule barring employment of unwed parents found insufficiently related to legitimate state objective), cert. dismissed, 425 U.S. 559 (1976); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974) (dismissal of unwed pregnant teacher declared unconstitutional on privacy grounds).

[110]See Wall St. J., Oct. 5, 1984, at 35, col. 3 ("Fifty-three percent of all women work outside the home; 36families.").

[111]See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (finding Social Security Act's provision allowing payment of survivor's benefits to a wife but not to a husband of a deceased beneficiary was impermissibly intended to permit women but not men to stay home and care for children); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (opinion of Brennan, J.) (rejecting "'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

that are the central objects of the state's concern.[112]

The underinclusiveness of discrimination against gay teachers for the purpose of protecting marriage and family suggests that perhaps another principle motivates the singling out of gay teachers. The difference between divorced and gay teachers is not that the latter pose a greater threat to the institution of marriage, but that homosexuality is today considered immoral, just as divorce once was. If the prevention of immorality is presented as the state's goal, and homosexuality is deemed to be immoral, then there is a tight fit between legislation prohibiting gay teachers and the legislative goal. Only the legitimacy and importance of the goal itself remain to be questioned.

Gay litigants have argued that discrimination against gays is invalid because morality morality can never be the basis of valid legislation.[113] There is no question, however, that the state can and does legislate on the basis of majoritarian moral values[114] and that it constitutionally prohibits other forms of sexual behavior such as incest and polygamy on the basis of their perceived immorality. As Judge Bork noted in his opinion for the D.C. Circuit denying a rehearing en banc to James Dronenberg, a naval petty officer dismissed for private gay conduct: "[M]oral relativism is hardly a constitutional command . . . ."[115] But when legislation implicates a fundamental right or burdens a specially protected group, the affirmation of majoritarian morals has not been considered important enough to override the constitutional protection of such rights or groups. Because of the special protection accorded racial minorities, a widespread belief that interracial marriage is immoral would not be sufficient to justify anti-miscegenation statutes.[116] Similarly, because of the special protection of speech and expression under the first amendment, the moral offense produced by pornography cannot validate anti-pornography statutes in the absence of evidence of actual harm.[117]

Thus, moral relativism – the recognition that the desire to avert perceived moral harm does not justify discriminatory treatment – sometimes is mandated by the Constitution, as Judge Bork himself acknowledges.[118] It is mandated when the protection of fundamental rights or specially protected groups is at issue. Finding homosexuality to be a suspect classification thus requires not that a court invalidate every law that discriminates on that basis, but that the court make a finding of actual harm rather than perceived immorality before

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[112]Cf. Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 HARV. L. REV. 669, 678-85 (1985) (arguing that the right of privacy in matters of family life should allow unmarried people to use reproductive technology to create their own families and foster the values associated with traditional families).

[113]See Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

[114]See id.

[115]See Dronenburg v. Zech, 746 F.2d 1579, 1583 (D.C. Cir. 1984).

[116]See Loving v. Virginia, 388 U.S. 1 (1967) (invalidating anti-miscegenation statutes).

[117]See Note, Anti-Pornography Laws and First Amendment Values, 98 HARV. L. REV. 460, 462 & nn.9-10 (1984).

[118]See Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) ("[T]his deference to democratic choice does not apply where the Constitution removes the choice from majorities.").

upholding such a classification.[119] Such a finding has never been made and seems highly implausible in the teaching context. Some extraordinary contexts, however, conceivably could permit classification on the basis of sexual preference. For example, a classification based on male homosexuality in the context of battling AIDS might be justified by the possibility of actual harm to citizens' health.[120] The recognition of the suspectness of sexual orientation steers the debate about the legitimacy of regulating gay conduct and lifestyles into the realm of hard data about actual harm, and forces the majority to articulate and defend its moral visions. Thus, although the suspect class branch of equal protection analysis is unabashedly anti-majoritarian in prohibiting certain grounds for legislation, the second step of weighing state interests brings majoritarian visions back into the process; it simply requires these visions to conform to a higher standard of necessity.

4 Conclusion

In choosing a constitutional rubric by which to understand a particular social phenomenon, one both describes that phenomenon by classifying it as a certain sort of problem and prescribes a vision of acceptable social and legal relations. The more common bases of arguments for constitutional protection of homosexuality – the right of privacy and the first amendment – are neither broad enough in their conceptions of sexual orientation nor wide-ranging enough in their remedies to offer an adequate legal response to the problem of gay inequality. An equal protection approach to gay rights recognizes both that personhood is the value to be protected and that pervasive inequality is the evil to be overcome. Despite the unwillingness of most courts to recognize gay rights or to extend the range of suspect classifications, heightened scrutiny in cases involving discrimination against gays is justified by an analysis of the concerns that should and do lie behind our current conceptions of suspectness. Moreover, gay equality is not generally outweighed by any articulable state interest geared to the prevention of actual harm. Recognition of the fit between the theory of suspect classifications and the nature of sexual preference – by the Supreme Court or by state courts under the states' own equal protection clauses – will make good a constitutional promise long empty for the American gay community.

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[119] Given that it is partly the existence of discrimination that gives rise to the imputation of suspectness in the first place, it may seem circular to claim that suspect classifications like homosexuality cannot be the basis of morally based discrimination. Mere legislative discrimination, however, does not automatically turn its object into a group deserving of special judicial solicitude. For instance, laws prohibiting polygamy do not in themselves make polygamy a suspect classification; in addition, the defining trait must be determinative of individual and group personhood to a degree implausible in the case of polygamy.

[120] For example, a regulation imposing a higher burden of care upon doctors treating gay male patients or forbidding gay males from giving blood might withstand heightened scrutiny. But because we know so little about AIDS, its transmission, or its relationship to homosexuality, such regulations would have to be scrutinized for any over- or underinclusiveness that might derive from general social animus toward gays.