

Essay

Moving Toward Equal Treatment of Homosexuals

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INTRODUCTION

Homosexuals have long been the targets of both government-approved and private discrimination. While it appears that the virulence of the societal disapproval directed at them has diminished somewhat in recent years, there is no doubt that, even today, public identification of an individual as a homosexual is a grave disadvantage.¹ Those who wish to engage in acts of sexual intimacy with members of their own sex are confronted by statutes in many states which make it a crime to engage in almost all of the

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1. The prevalence of statutes making sodomy illegal provides a barometer of public attitudes toward homosexuals. While many statutes outlawing sodomy apply by their terms to sexual activities engaged in by members of opposite sexes, and some prosecutions have been brought for such conduct, the main target of sodomy statutes has always been homosexual activity. *See generally* Note, *The Crimes Against Nature*, 16 J. PUB. L. 159 (1967). The legal boundaries of "sodomy" are notoriously imprecise, and "the exact sexual activity proscribed will vary from jurisdiction to jurisdiction and may include homosexual activity, oral-genital and anal-genital contacts between members of the opposite sex, and sexual contacts with animals (bestiality)." *Id.* at 159 n.1.

Until 1961, all of the states made it illegal to engage in sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986). In 1961, Illinois decriminalized consensual sexual activities carried out by adults in private, *id.* at 193 n.7, and by 1986 twenty-five states had followed suit. *Id.* at 193-94. Even so, in 1986 twenty-four states continued to make sodomy illegal, even if performed in private by consenting adults. *Id.*

There are some other indications that hostility toward homosexuals is somewhat less intense than in the past. It appears that the Federal Bureau of Investigation and the Central Intelligence Agency recently have softened their opposition to the employment of homosexuals. Rubenstein, *Challenging the Military's Antilebian and Antigay Policy*, 1 LAW & SEXUALITY 239, 240 n.5 (1991). Congress also recently repealed the prohibition on immigration by homosexuals. *Id.*; Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978 (1990).

sexual activities that are available to them.² In addition, one known to be a homosexual, or even suspected of that sexual orientation, is likely to face discrimination in employment (especially in the military, national defense, and law enforcement), housing, education, and social acceptance.

Authoritative statistics on the proportion of the population that is homosexual are difficult or impossible to obtain, since many gay men and lesbians strive to conceal their sexual orientation as a way of fending off discrimination.³ Even so, there has been an

2. Sodomy is a crime in twenty-four states and the District of Columbia, *Developments in the Law -- Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1519 & n.2 (1989), and that term is broad enough to encompass the most intimate sexual activities in which homosexuals would choose to engage. The vaginal intercourse considered "normal" for heterosexuals is not possible for two individuals of the same sex who seek sexual intimacy with each other. In general, activities such as kissing, touching, or masturbation, when engaged in by consenting adults of the same sex, are not illegal. *But see* State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (upholding the propriety of a prosecution of a male defendant under a statute proscribing "deviate sexual intercourse," where the defendant had used his hand to touch the genitalia of a police officer through the officer's clothing); *Watkins v. United States Army*, 847 F.2d 1329, 1338 (9th Cir. 1988) ("the regulations barring homosexuals from the Army cover any form of bodily contact between persons of the same sex that gives sexual satisfaction -- from oral and anal intercourse to holding hands, kissing, caressing and any number of other sexual acts"). However, confining sexual expression to such activities would be severely constraining for an individual of any sexual orientation.

This article does not attempt to address the issues raised by bisexuality or by heterosexual activities engaged in by those whose primary sexual orientation is homosexual. To the extent that one who is primarily heterosexual in orientation engages in sexual activity with a member of his or her own sex, many of the legal barriers faced by homosexuals would probably be encountered. Here again, the regulations barring homosexuals from the Army represent an exception to the usual pattern. Although all those of homosexual orientation are excluded from reenlisting, those "who have been involved in homosexual acts in an apparently isolated episode" due solely to immaturity, curiosity, or intoxication will not normally be excluded from reenlistment unless there is other evidence that the person is a homosexual. *Id.* at 1336.

3. See Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 140 n.23 ("A common assumption today is that 10% of the United States population is gay").

Estimates as to the number of lesbians and gay men differ depending on how those terms are defined. Many people who have had same-sex sexual experiences do not label themselves gay or lesbian, and others adopt the label without having had any same-sex sexual experiences. Although equating sexual orientation with sexual activity is both inaccurate and problematic, studies estimating the percentage of the population comprised of gay men and lesbians depend on such definitions. A recent study indicates that 20.3% of men have had at least one sexual encounter to orgasm with another man, and 6.7% have had such an encounter after age 19. . . . Older studies on women report a lower frequency of same-sex sexual activity. . . . The percentage of men and women who acknowledge psychological arousal by members of their gender is much larger.

Developments in the Law, *supra* note 2, at 1511 n.1.

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increased willingness over the past ten or twenty years for at least some homosexuals to identify themselves as such, and for both homosexuals and heterosexuals to support a variety of public policies designed to eliminate or reduce discrimination based on sexual orientation.

To be sure, it is still possible to be told that homosexuality is equally as wrong as slavery, because "[s]odomy is against nature, since it treats men as if they were women."⁴ But statements of that sort are not as common as they used to be. Most Americans probably support the right of homosexuals to participate in the political, economic, and social life of the nation.⁵ Substantial fissures appear, however, as soon as efforts are made to determine what treatment is "just" or "equal" or "fair" for homosexuals. At one extreme, traditionalists argue that the price which homosexuals must pay to be treated "the same" as heterosexuals is to act "the same" -- at a minimum, to eschew sexual intimacy with members of the same sex, and perhaps even to somehow suppress their desire for such intimacies.⁶ At the opposite end of

4. Jaffa, Book Review, 8 CONST. COMMENTARY 313 (Winter 1991) (reviewing MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* (1988)). See also *id.* at 315 ("someone who cannot say that sodomy is unnatural cannot say that incest is unnatural"); *id.* at 317 ("no civilized person should wish to see homosexuality accepted as an equally valid 'alternative lifestyle'").

5. Polling data on the public's attitudes toward homosexuals paint no clear picture. Compare San Francisco Chronicle, June 26, 1992, at A1 (in a new Gallup poll, "three-quarters said they thought that gays should have equal job opportunities, but 57% said they find homosexuality unacceptable"); Atlanta Journal and Constitution, June 19, 1992, at C4 (in a Gallup poll of Catholics, "78 percent said homosexual men and women should have equal access to jobs, up from 58 percent in 1977"); and Chicago Tribune, April 30, 1991, at 1 (a nationwide poll found that 80 percent of Americans favor equal rights for gays and lesbians in the workplace, up from 71 percent in a similar Gallup poll taken two years before) with USA Today, June 2, 1992, at 1D (a 1988 Gallup poll showed 56% believed homosexual relations between consenting adults should not be legal; the percentage was down to 36% in 1989 and back up to 54% in 1991); San Francisco Chronicle, October 9, 1991, at B3 ("Americans have grown less accepting of homosexuals"; 61% "believe the tolerance of gay life in the 1960s and 1970s was a 'bad thing for our society'"); and Horn, *Goings-On Behind Bedroom Doors*, 110 U.S. News & W.R. 64 (June 10, 1991) (there is a "growing intolerance of homosexuality"; 68% expressed disapproval of homosexual activity in 1960, while 75% do so now).

6. Government-sanctioned discrimination against homosexuals is often aimed at sexual conduct rather than at sexual orientation or preference as such. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court held that there is no fundamental right protected by the due process clause of the fourteenth amendment which prevents a state from making it a crime for two consenting adults of the same sex to engage in oral intercourse. 478 U.S. at 194-96. While *Hardwick*

the scale, advocates for the homosexual community assert that true equality for gay men and lesbians requires not only such basic reforms as revision of criminal laws dealing with sexual activity and assurances against overt discrimination in housing, employment, and education, but also dramatic changes in myriad other social institutions, including those dealing with marriage, child custody, child-rearing, and adoption.⁷

The purpose of this Essay is to describe the framework within which steps toward accommodating the claims of homosexuals will be resolved. Plainly, any discussion of this bundle of issues must devote substantial attention to whatever "floor" is established by the United States Constitution. The Supreme Court's 1986 decision in *Bowers v. Hardwick*⁸ is obviously of great significance, though a number of other Supreme Court cases are pertinent, as are the lower-court decisions interpreting and applying *Hardwick*. In addition, a complex web of state law, both statutory and decisional, is implicated, since the states have substantial latitude in deciding how homosexuals should be treated.

The immediate impetus for the preparation of this Essay was the controversy generated in California in 1991 by the state legislature's passage, and Governor Pete Wilson's veto, of Assembly Bill 101.⁹ AB 101 would have enhanced the protection given homosexuals under state law against discrimination in employment.¹⁰ The gist of the Governor's veto message was that the protection given homosexuals with regard to employment is

does not authorize the prosecution of those who have not engaged in homosexual conduct, the armed forces endeavor to exclude all those who are homosexual in their sexual orientation, whether or not they have actually engaged in sexual activities with members of their own sex. *See, e.g., Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *opinions withdrawn and plaintiff's claim upheld on another ground*, 875 F.2d 699 (en banc 1989), *cert. denied*, 111 S. Ct. 384 (1990); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991).

7. A number of these issues are surveyed in *Developments in the Law*, *supra* note 2, at 1603-71.

8. 478 U.S. 186.

9. A. B. 101, 1991-92 Calif. Leg. Reg. Sess. [hereinafter AB 101].

10. In general, the bill amended a number of California statutes to add "sexual orientation" to the list of personal characteristics which it is illegal for an employer to use as a basis for refusing to hire a person or discriminating in terms, conditions or privileges of employment. *See, e.g.,* § 7.2 of AB 101 (proposing an amendment to § 12940 of the Government Code).

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already adequate, or at least close enough to being adequate, to militate against imposing additional costs on businesses which would have to defend against potentially unmeritorious discrimination claims.¹¹

For the reasons that will be given in greater detail below, the proposition that homosexuals are already adequately shielded against discrimination, whether in employment, housing, or in any other sector worth noting, is indefensible. Wherever the proper end point should be on the path from a past of egregious homophobia, through the present to a future in which lesbians and gay men are treated justly and welcomed as full members of our society, we are nowhere near it yet.

This Essay will proceed as follows: First, it will describe *Hardwick* and the significance of its holding that the right of privacy protected by the federal constitution does not provide any shield for those who engaged in homosexual acts which are prohibited by statute. Second, an effort will be made to determine whether the refusal by the *Hardwick* Court to recognize constitutional privacy for homosexuals can reasonably be taken as also exposing to prosecution heterosexuals who engage in oral or anal sex. This inquiry is important because much of the impact of *Hardwick* turns on whether it singles out homosexuals for disfavor, or whether alternatively it would also provide a basis for upholding strict limits on the nonmarital sexual activities of both homosexuals and heterosexuals. Third, the consequences of *Hardwick* for the status of homosexuals under equal protection law will be explored, since it is at least theoretically possible that the protection which homosexuals were denied in *Hardwick* when a claim was raised under the privacy doctrine might be granted as an application of equal protection law.

11. See Veto Message of Governor Pete Wilson Concerning Assembly Bill 101, September 29, 1991, at 4 ("The test of fairness to be applied to AB 101 is whether there is evidence of discrimination so pervasive as to warrant state government imposing so widely a burden so oppressive to potentially numerous innocent employers . . . Fairness demands that where other protections exist in the law, anecdotal evidence of even invidious discrimination -- if it has not been shown to be pervasive -- does not warrant imposing that burden").

The conclusions reached below on these questions are (1) that *Hardwick* incorrectly interpreted and applied the Supreme Court's prior privacy cases in rejecting Hardwick's claim for constitutional protection; (2) that the Court's ruling almost certainly does not limit the sexual freedom to engage in heterosexual activities; and (3) that the approach taken by the Court in *Hardwick* leaves no realistic basis for predicting that homosexuals will be found to be protected by any heightened form of equal protection review. The fourth section of this Essay looks to the future in light of these conclusions. Given the Supreme Court's *Hardwick* decision and the devastating consequences which that opinion has for efforts to obtain federal constitutional protection for homosexual activity, progress in guaranteeing equality for homosexuals will depend in large measure on institutions other than the federal courts.

The immediate tragedy of the *Hardwick* decision was to give the Supreme Court's imprimatur to discrimination against homosexuals, a form of discrimination which remains both intense and widespread. The harm done by the decision will be greater and more long-lasting, however, if those supporting true equality of treatment hold out false hopes for salvation from the federal constitutional sphere. Certain forms of egregious discrimination against homosexuals have been and will continue to be invalidated under the rubric of rational basis equal protection review, but the strong anti-homosexual message delivered by *Hardwick* severely limits what can be done as a matter of federal constitutional law to obtain redress. Substantial progress toward equality will depend for the most part on the willingness of legislators, state judges, and private individuals to do what Governor Wilson was not willing to do -- to recognize both the continuing injustice inflicted on homosexuals and the necessity for all available legislative, litigative, and political approaches to be brought to bear. Only in that way can the baneful influence of the *Hardwick* decision be diluted and ultimately dissolved.

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I. HARDWICK AND THE RIGHT OF PRIVACY

Due to a series of extremely unlucky coincidences, a police officer entered Michael Hardwick's bedroom in Atlanta in 1982 while Hardwick was engaged in oral sex with another man.¹² Hardwick was arrested and charged with a violation of Georgia Code section 16-6-2, which provides in part: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."¹³ State law made a violation of the statute punishable by up to twenty years in prison.¹⁴ Apparently Georgia had not made any effort in decades to enforce its sodomy statute against those engaging in consensual homosexual activities in private, and consistent with that policy the charge against Hardwick was promptly dropped.¹⁵ Hardwick then became the vehicle for test-case litigation which had been planned for years, but which had previously lacked an appropriate plaintiff.¹⁶ The

12. Michael Hardwick has prepared a detailed first-person narrative of the events that led up to the case which was heard and decided by the Supreme Court as *Bowers v. Hardwick*. P. IRONS, *THE COURAGE OF THEIR CONVICTIONS* 392-403 (1988). Hardwick had received a ticket for drinking in public, and he missed his scheduled court appearance due to a discrepancy on the ticket as to what day he was obligated to appear. *Id.* at 394. When Hardwick did not appear in court, the arresting officer immediately processed a warrant for Hardwick's arrest and went to his house to arrest him. *Id.* Hardwick was not there, but when he heard of the officer's visit he became aware that he should have appeared in court a day earlier than he thought he was scheduled. *Id.* Hardwick immediately went to court and paid the \$50 fine he was assessed. *Id.* Apparently without realizing that the arrest warrant was no longer valid due to Hardwick's court appearance and his payment of the fine, the police officer who had arrested him on the original charge of drinking in public returned to his house three weeks later. *Id.* at 395. The front door of Hardwick's house had been left open, and a friend of Hardwick's was on a couch in the living room, sleeping off a drinking binge. *Id.* When awakened by the officer, Hardwick's friend did not even know that Hardwick was home, but allowed the officer to go looking for him. *Id.* The officer found Hardwick in his bedroom engaged in "mutual oral sex" with another man. *Id.*

13. GA. CODE ANN. § 16-6-2 (1988).

14. *Id.*

15. See *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986) ("After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed").

16. Perhaps with a bit of exaggeration, Hardwick reports that after being released from jail following his arrest, he was contacted "by a man named Clint Sumrall who was working in and out of the ACLU. For the last five years, he would go to the courts every day and find sodomy cases and try to get a test case." IRONS, *supra* note 12, at 396.

United States Court of Appeals for the Eleventh Circuit ruled in favor of the plaintiff's claim that his sexual activities were protected by the privacy principles developed by the Supreme Court in cases such as *Griswold v. Connecticut*¹⁷ and *Eisenstadt v. Baird*,¹⁸ involving access to contraception, and *Roe v. Wade*,¹⁹ the 1973 abortion ruling.²⁰

In *Hardwick*, the Supreme Court reversed the Eleventh Circuit and rejected the plaintiff's privacy claim by a vote of 5-4.²¹ The majority acknowledged that "the cases are legion" in which the due process clauses of the fifth and fourteenth amendments "have been interpreted to have substantive content," but it declared that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."²² The *Hardwick* Court held that the reach of substantive due process is limited to fundamental liberties which are "implicit in the concept of ordered liberty"²³ or "deeply rooted in this Nation's history and tradition,"²⁴ and that it is "obvious" that the right of homosexuals to engage in acts of consensual sodomy is not properly included within either category.²⁵

The Court discussed at some length the fact that proscriptions against homosexual sodomy have "ancient roots,"²⁶ and it refused to recognize any constitutional protection for such conduct because 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."²⁷ Having thus rejected the sole theory upon which

17. 381 U.S. 479 (1965).

18. 405 U.S. 438 (1972).

19. 410 U.S. 113 (1973).

20. 760 F.2d 1202 (11th Cir. 1985).

21. 478 U.S. 186, 187 (1986).

22. *Id.* at 190-91.

23. *Id.* at 191, (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

24. *Id.* at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.)).

25. *Id.* at 192.

26. *Id.* at 192-94.

27. *Id.* at 194.

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the plaintiff based his claim for heightened constitutional scrutiny,²⁸ the Court looked only to whether there was a rational basis for the sodomy law.²⁹ The Court found a constitutionally adequate justification in "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable," since "if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."³⁰ The Court noted that twenty-four states and the District of Columbia had statutes similar to the Georgia statute.³¹

As argued vigorously by the four dissenters in *Hardwick* and as has been recognized by many commentators, the analysis of the privacy doctrine offered up by Justice White gives an indefensibly narrow and wooden reading to the pre-*Hardwick* precedents.³² Justice White carefully listed the precise facts of each prior case -- for example, that *Griswold* and *Eisenstadt* dealt with access to contraception, and that *Roe v. Wade* addressed a woman's right to choose to have an abortion -- and concluded that none of the prior cases established a "constitutional right of homosexuals to engage in acts of sodomy."³³ The Court's statement is indisputable, since none of the prior cases involved any claim by homosexuals of a constitutional right to do anything. However, in choosing to characterize the dispute in *Hardwick* in this way, Justice White extracts and discards the essence of the earlier cases.³⁴

28. The Court noted that plaintiff *Hardwick* did not defend the Eleventh Circuit's judgment on the basis of the ninth amendment, the equal protection clause, or the eighth amendment. *Id.* at 196 n.8.

29. *Id.* at 196.

30. *Id.*

31. *Id.*

32. See, e.g., *id.* at 199-214 (Blackmun, J., dissenting); *id.* at 214-20 (Stevens, J., dissenting); *Developments in the Law*, *supra* note 2, at 1523 n.30 ("Commentators have been virtually unanimous in their criticism of *Hardwick*'s reading of the Court's privacy jurisprudence"); Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181, 1181 (1988) ("*Hardwick* is fundamentally at odds with the philosophy that prevailed in earlier cases involving the right of privacy").

33. 478 U.S. at 190-91.

34. "The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey v. Population Services International*, 431 U.S. 678 (1977) surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." *Bowers v. Hardwick*, 478 U.S. at 218 (Stevens, J., dissenting).

The fatal flaw in Justice White's opinion for the Court in *Hardwick* is that it reduces constitutional analysis of an asserted substantive due process or privacy claim to a simple matter of checking the "list" of prior circumstances in which such claims have been accepted. If there is no prior recognition of the precise protection sought by the claimant, the claim is rejected, unless the claimant can add a new item to the "list" by showing that it is "implicit in the concept of ordered liberty"³⁵ or "deeply rooted in this Nation's history and tradition."³⁶

The basic issues upon which *Hardwick* is properly seen to turn, but with which the majority never confronted, are the interrelated questions of the level of generality with which the prior cases should be characterized, and the significance which should be given to the fact that the activity for which *Hardwick* sought protection had been a crime for many years and remained a crime in half the states. It is true that *Griswold* presented the question of whether Connecticut could constitutionally prohibit all use of contraceptives by married couples.³⁷ However, if that is *all* that was decided by the case, then it is difficult to have confidence that the Supreme Court's subsequent decision in *Eisenstadt* was correct, since that case involved the access of unmarried persons to birth control.³⁸ While the *Eisenstadt* Court concluded that the Massachusetts statute in dispute was unconstitutional in prescribing "dissimilar treatment for married and unmarried persons who are similarly situated,"³⁹ the approach taken in *Hardwick* would have counseled the opposite result, based on the simple observation that the unmarried couples whose rights were at stake in *Eisenstadt* were not and could not be similarly situated to the married couples whose rights were discussed in *Griswold*. Justice Douglas's opinion for the Court in *Griswold* is focused entirely on the institution of marriage and its unique status in our society, with nary a word

35. *Id.* at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

36. 478 U.S. at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.)).

37. 381 U.S. 479 (1965).

38. 405 U.S. 438 (1972).

39. *Id.* at 454.

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about the similar intimacies and mutual support that may be enjoyed by an unmarried couple.⁴⁰

To take another example, the narrow reading of precedents called for by *Hardwick*, which limits each case to the precise matters presented for decision, would strip the Court's abortion opinion in *Roe v. Wade* of any support to be derived from the Court's prior decisions. Justice Blackmun, in *Roe*, discussed the earlier decisions and concluded that the right of privacy they implicated "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁴¹ His conclusion may or may not be correct, but it is indisputable that no case *prior* to *Roe* had recognized a woman's constitutionally-protected right to choose to have an abortion.

The core issue upon which *Hardwick* turned -- which might be isolated by asking: "Are *Griswold*, *Eisenstadt*, and *Roe* merely about contraception and abortion, or do they limit the government's ability to interfere with our intimate sexual relationships and reproductive processes, absent a very strong justification?" -- was addressed by Justices Scalia and Brennan three years later in *Michael H. v. Gerald D.*⁴² *Michael H.* involved a claim to parental rights by the apparent biological father (Michael) of a girl who was born while the mother was married to another man. The mother was cohabiting with her husband when the child was conceived and born.⁴³ Under these circumstances, the governing California law established a conclusive presumption that the husband was the father of the child.⁴⁴ Michael asserted that substantive due process principles gave him a protected liberty interest in continuing his relationship with his biological

40. 381 U.S. 479, 486 (1965) ("[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred").

41. 410 U.S. 113, 153 (1973).

42. 491 U.S. 110 (1989).

43. *Id.* at 115.

44. *Id.* The statute would not have applied if the husband were sterile or impotent, but he was not. And, while it is possible to apply for blood tests to challenge the statutory presumption of paternity by the husband, no such challenge was filed during the time permitted by the statute. *Id.*

daughter.⁴⁵ Just as *Hardwick* turned on the boundaries of the constitutional protection available for intimate sexual relations, so *Michael H.* turned on the scope of the protection recognized for the relationship between a father and a child who has been born to a woman married to another. The Supreme Court rejected the claim of the alleged natural father, holding that it "is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."⁴⁶

Justice Scalia wrote as follows in footnote six of his opinion:

Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally "whether parenthood is an interest that historically has received our attention and protection." . . . We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general -- perhaps "family relationships;" or "personal relationships;" or even "emotional attachments in general?" Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.⁴⁷

Plainly, Justice Scalia accepts the approach to constitutional interpretation taken in *Hardwick*, and, for the reasons discussed above, his reliance in *Michael H.* on *Hardwick* to support his analysis is appropriate. The critical error was made in *Hardwick* itself.⁴⁸ Justice Brennan was plainly correct in *Michael H.* when

45. The mother and her husband had reconciled, and were living together with the girl and two other children born into the marriage. *Id.*

46. *Id.* at 129-30.

47. *Id.* at 127 n.6.

48. The introduction to Justice Scalia's opinion indicates that Justices O'Connor and Kennedy joined "in all but note 6" of the opinion. *Id.* at 113. Chief Justice Rehnquist joined in the entire opinion.

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he stated that, had the Court in *Griswold*, *Eisenstadt*, and other cases "asked . . . itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding 'no.'"⁴⁹

Likewise, if substantive due process had only been applied by the Court where most or all states had historically recognized the right in question, *Griswold*, *Eisenstadt*, and *Roe* would all appear to be on shaky ground, perhaps even more so than the right claimed in *Hardwick*. It is hard to imagine that the Court in *Griswold* could have found a sufficiently specific and broadly-accepted recognition of a married couple's right to have access to birth control devices. By no stretch of the imagination could such a tradition of protection have been found as to unmarried couples seeking access to birth control, especially given the statutes in many states making fornication itself a crime. Nor could Justice Blackmun's opinion in *Roe* have withstood the inquiry called for by *Hardwick*, despite Justice Blackmun's efforts to undercut the significance of the sweeping restrictions on abortion by stating that they were "of relatively recent vintage" since they were adopted for the most part "in the latter half of the 19th century."⁵⁰ Not only did *Roe* sweep aside criminal prohibitions that had been in effect, even by Justice Blackmun's account, for nearly a century, but the decision established a right to choose to have an abortion which was broader than that recognized by *any* state at the time the Supreme Court rendered its decision.⁵¹ *Hardwick* itself recognized that fully half of the states had decriminalized the homosexual conduct at issue. Thus, to the extent that general acceptance of an activity among the states as being protected is a prerequisite to the successful invocation of the constitutional privacy doctrine, it is

49. *Id.* at 139-40.

50. *Roe v. Wade*, 410 U.S. 113, 129 (1973).

51. M. A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 48-49 (1987) (although abortion laws in the United States were "in ferment" in 1973, only a few states had repealed their criminal penalties for abortions performed in early pregnancy, and most states "had not yet revised their criminal laws, which typically permitted abortion only to save the life of the mother"). *Roe* prohibited states from regulating abortions prior to the time of viability (near the end of the second trimester of pregnancy), except for regulation after the beginning of the second trimester in order to assure the safety of the medical procedures being used. 410 U.S. at 162-64.

clear that a much stronger case could be made for the protected status of homosexual conduct in 1986 than could have been made for abortion in 1973 when *Roe* was decided.

Hardwick brought about a severe break in the line of development represented by the Supreme Court's earlier decisions in such cases as *Griswold*, *Eisenstadt*, and *Roe*. The narrow reading given to the earlier cases in *Hardwick* led Justice White to ask no more than whether the Georgia statute was rational, and to conclude that the asserted judgment of the people of Georgia that "homosexual sodomy is immoral and unacceptable" provided a rational foundation for the criminal provision at issue.⁵² There is nothing in Justice White's opinion for the Court that suggests, nor are there are other pertinent authorities which establish, that the asserted moral judgment of the state's electorate provides a sufficient justification for upholding a statute that is subject to heightened scrutiny, whether of the strict or the intermediate variety.⁵³

Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit has rendered a judgment on the correctness of the Supreme Court's decision in *Hardwick* which is fully justified:

I believe that the Supreme Court egregiously misinterpreted the Constitution in *Hardwick*. In my view, *Hardwick* improperly condones official bias and prejudice against homosexuals, and authorizes the criminalization of conduct that is an essential part of the intimate sexual life of our many homosexual citizens, a group that has historically been the victim of unfair and irrational treatment. I believe that history will view *Hardwick* much as it views *Plessy v. Ferguson* And I am confident that, in the long run, *Hardwick*, like *Plessy*, will be overruled by a wiser and more enlightened Court.⁵⁴

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

53. *Roe* is instructive on this point, since in that case the Supreme Court upheld a very broad right of women to choose to have an abortion, even though the opposing interest of the state in protecting the potential life of the fetus is surely a weighty one.

54. *Watkins v. United States Army*, 847 F.2d 1329, 1358 (1988) (dissenting opinion), *opinions withdrawn and plaintiff's claim upheld on another ground*, 875 F.2d 699 (en banc 1989), *cert. denied*, 111 S. Ct. 384 (1990). The panel opinion, from which Judge Reinhardt dissented, held that the Army regulations excluding all homosexuals from the service violated equal protection. 847 F.2d at 1339-53. On rehearing en banc, the Ninth Circuit held that the Army was estopped, under the

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II. *HARDWICK* AND HETEROSEXUALS

The discussion so far has proceeded as if the Georgia statute involved in *Hardwick* prohibited "homosexual sodomy." Most of the Court's discussion is framed using that term, and there is certainly nothing in Justice White's opinion for the Court which in any way establishes that Georgia could constitutionally make it a crime for a heterosexual couple to commit sodomy. However, the Georgia statute itself made no distinction among the various classes of individuals who might engage in the activities prohibited by the statute; the law did not even exempt married couples from its reach.⁵⁵ Thus, under the terms of the statute, a "person" commits the offense of sodomy "when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another," whether or not the two participants are of the same sex, and even if they are a man and a woman who are married to one another.⁵⁶ The "he" referred to in the statute, which was drafted before linguistic sensibilities became as refined as they are now, plainly means "he or she."⁵⁷

Obviously the Georgia statute would be unconstitutional, at least in part, if enforced literally against all persons, including married couples. At oral argument before the Supreme Court, the attorney representing the state conceded that the statute could not constitutionally be enforced against married couples in light of *Griswold*.⁵⁸ More intriguing, but less directly addressed at the

circumstances presented, from relying on Watkins' homosexuality as a basis for denying him reenlistment. 875 F.2d at 705-11.

55. GA. CODE ANN. § 16-6-2 (1988).

56. *Id.*

57. An earlier version of the Georgia statute had been interpreted by the Georgia Supreme Court not to apply to lesbian activity. *Thompson v. Aldredge*, 187 Ga. 467, 200 S.E. 799 (1939). The statute at issue in *Hardwick*, which was adopted in 1968, substantially broadened the definition of sodomy to include cunnilingus by females, overturning *Thompson v. Aldredge*. See Note, *supra* note 1, at 167 n.47.

58. At oral argument, Michael E. Hobbs, the Assistant Attorney General representing petitioner Michael J. Bowers, was asked: "Do you think it would be constitutional or unconstitutional to apply it to a married couple?" Hobbs responded: "I believe it would be unconstitutional." 164 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 633, 636 (transcript of oral argument of *Bowers v. Hardwick*, held on March 31, 1986).

argument, was the question of whether Georgia could constitutionally enforce the statute against an unmarried heterosexual couple.⁵⁹ So far as appears, there was no history of enforcement against heterosexual sodomy, but then again there had not been a reported case involving private *homosexual* sodomy since 1939.⁶⁰

At least on the surface of the Court's opinion in *Hardwick*, the possibility exists that the Court's decision upholding the statute is based on the unstated assumption that the statute will be applied evenhandedly to homosexuals and heterosexuals alike. The Court does note in footnote eight of its opinion that it had no need to address any equal protection argument, since respondent *Hardwick* did not present one.⁶¹ However, in light of the opinion as a whole, it is unlikely that the Court's decision upholding the Georgia statute in any way depends on the assumption that Georgia will prosecute both heterosexuals and homosexuals for the acts proscribed by the statute. Thus, in footnote two the Court stated: "The only claim properly before the Court . . . is *Hardwick's* challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."⁶²

In addition, the Court's discussion is laced with references to "homosexual sodomy" as the evil against which the state was acting.⁶³ There is no discussion whatsoever of the constitutional

59. Assistant Attorney General Hobbs stated that "there is no precedential support in the decisions of this Court for the proposition that there is a fundamental right to engage in sexual relationships outside of the bonds of marriage." *Id.* at 635. The Court did not question Hobbs about whether the State took the position that it could constitutionally apply the statute to unmarried heterosexuals.

60. *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (Powell, J., concurring). See 164 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 633, 634 (transcript of oral argument in *Bowers v. Hardwick*, held on March 31, 1986).

61. *Bowers*, 478 U.S. at 196 n.8.

62. *Id.* at 188 n.2.

63. See, e.g., *id.* at 191 ("claimed constitutional right of homosexuals to engage in acts of sodomy"); *id.* at 192 ("neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy"); *id.* at 196 ("the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable").

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status of sodomy practiced by heterosexuals. Despite the all-inclusive language of the statute, Georgia never directly asserted any interest in enforcing it against anyone other than homosexuals and the Supreme Court never suggested that enforcing the statute against homosexual activity, yet not against sodomy practiced by heterosexuals, would raise any constitutional difficulty.⁶⁴

At this point it is appropriate to raise a linguistic quibble about the "homosexual sodomy" language utilized by Justice White for the *Hardwick* majority. There is no denying that "sodomy" sounds like a highly antisocial activity. The dictionary definition bears out that instinct: sodomy is "any sexual intercourse held to be abnormal, esp. bestiality or anal intercourse between two male persons."⁶⁵ In reality, however, several of the practices prohibited by the Georgia statute are in no sense "abnormal" or "unnatural" or even unusual among heterosexual couples.

The American Psychological Association and the American Public Health Association filed an amicus curiae brief in *Hardwick*, and in it they surveyed the literature describing the sexual practices which are prevalent in the United States. According to the brief, a "major study of couples in the United States published in 1983 found that 90% of the married and unmarried heterosexual couples studied had engaged in fellatio and that 93% of these couples had engaged in cunnilingus. Other recent surveys similarly report that 80-90% of all married couples engage in oral sex."⁶⁶ Thus, contrary to the suggestion of perversity created by the *Hardwick* Court's repeated references to "homosexual sodomy," the categories of "sodomy" prohibited by the statute are so broad that most Americans routinely engage in at least some of them.⁶⁷

64. See *id.* at 200 (Blackmun, J., dissenting) ("Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens"). The *Hardwick* litigation originally included a heterosexual couple as plaintiffs, but they were held to lack standing because of the history of nonenforcement of the statute against heterosexuals. *Hardwick v. Bowers*, 760 F.2d 1202, 1205-06 (11th Cir. 1985).

65. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1274 (3d Coll. Ed. 1988).

66. Brief of Amici Curiae American Psychological Association and American Public Health Association at 5-6, *Bowers v. Hardwick*, 478 U.S. 186 (1986) [hereinafter Brief of Amici Curiae].

67. *Developments in the Law*, *supra* note 2, at 1569 n.98.

The recognition that the Georgia statute on its face prohibits heterosexual activities which are so commonly practiced, albeit rarely prosecuted, suggests that it is worthwhile to address the question of what would happen if Georgia or some other state attempted to prosecute an unmarried, heterosexual couple who had engaged in oral or anal sex in private.⁶⁸ After *Eisenstadt*, which prescribed equal treatment for the married and the unmarried at least with respect to access to contraceptives, it is not surprising that these cases are almost never prosecuted. Moreover, in the rare instances where they are pursued by prosecutors, the real reason for the prosecution is usually an allegation that the sexual activity was coerced. For example, in *Schochet v. State*⁶⁹ the Court of Special Appeals of Maryland held that a charge for consensual fellatio could be sustained because *Eisenstadt* involved the "right to use contraception to avoid unwanted pregnancy," not "a right to engage in unmarried sodomy."⁷⁰ However, the male defendant in *Schochet* was not really being prosecuted for consensual oral sex. The consensual sodomy charge tagged along after six charges of rape and coerced oral and anal intercourse, and remained after defendant was acquitted of all of the charges involving allegations of force.⁷¹ The jury convicted the defendant only on the consensual sodomy charge.⁷² On appeal, the Court of Appeals of Maryland overturned the conviction, but avoided the constitutional question.⁷³ Instead of undertaking the analysis required to assess the constitutional protection, if any, available after *Hardwick* for consensual sodomy practiced by an unmarried heterosexual couple, the *Schochet* court interpreted Maryland's statute "to exclude consensual, noncommercial, heterosexual activity between adults in private."⁷⁴ The court's purported statutory interpretation is

68. Although anal intercourse is less common than oral sex among heterosexual couples, Brief of Amici Curiae, *supra* note 66, at 6, there is no reason to believe that the constitutional analysis would be any different than that advanced in the text with respect to oral sex.

69. 75 Md. App. 314, 541 A.2d 183 (1988).

70. *Id.* at 192.

71. *Id.* at 184.

72. *Id.*

73. 320 Md. 714, 580 A.2d 176 (1990).

74. *Id.* at 184, 186.

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remarkable in light of the wording of the statute, which prescribes a prison term of up to ten years for every person "who shall be convicted of placing his or her sexual organ in the mouth of any other person."⁷⁵

With the reversal of the conviction in *Schochet*, post-*Hardwick* judicial acceptance of prosecution of consensual heterosexual oral intercourse in private has been limited to the United States Court of Military Appeals.⁷⁶ Barring future constitutional developments which appear unlikely,⁷⁷ *Hardwick* will not lead to the successful prosecution of adults who engage in consensual oral sex with a member of the opposite sex.⁷⁸ Thus, despite the sweeping terms in which the Georgia sodomy statute involved in *Hardwick* was written, and the failure of the statute to distinguish in any way between homosexual and heterosexual acts, *Hardwick* is about homosexuals, not about sodomy.⁷⁹

75. MD. CODE ANN., CRIMES & PUNISH. § 554 (1992).

76. The Court of Military Appeals recently affirmed the conviction of a male soldier who engaged in fellatio with a woman in violation of Article 125 of the Uniform Code of Military Justice. Article 125 prohibits "unnatural carnal copulation with another person of the same or opposite sex," and the Court of Military Appeals relied principally on *Hardwick* in upholding its constitutionality. *United States v. Henderson*, 34 M.J. 174 (1992). *Accord*, *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992), *rev'g* 33 M.J. 618 (A.F.C.M.R. 1991).

77. Prosecutions of heterosexuals for consensual, private oral or anal sex are so rare that there are few occasions for the courts even to consider extending the logic of *Hardwick* to such cases. If and when such cases are litigated, it appears overwhelmingly likely, for the reasons discussed in the text, that *Hardwick* will be interpreted in the spirit in which it was written, as a holding aimed at homosexual activity rather than at oral or anal sex as such. As indicated in the text and in note 76 *supra*, the United States Court of Military Appeals has concluded, contrary to the argument advanced here, that *Hardwick* does authorize the prosecution of consensual heterosexual oral intercourse carried out in private.

78. An exhaustive analysis of statutes forbidding fornication and adultery concludes that, even after *Hardwick*, such activities enjoy substantial constitutional protection. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660 (1991).

79. "The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear." *Watkins v. United States Army*, 847 F.2d 1329, 1355 (9th Cir. 1988) (Reinhardt, J., dissenting), *opinions withdrawn and plaintiff's claim upheld on another ground*, 875 F.2d 699 (en banc 1989), *cert. denied*, 111 S. Ct. 384 (1990).

III. *HARDWICK* AND EQUAL PROTECTION

While *Hardwick* authorizes Georgia to prosecute homosexuals for oral sex while declining to enforce the statute against heterosexuals for the same activity, the Court's failure to address equal protection at all in its opinion has generated substantial uncertainty about how courts should deal with post-*Hardwick* cases in which homosexuals raise equal protection claims outside of the specific context in which *Hardwick* arose. Prior to *Hardwick*, many commentators argued that the equal protection doctrines developed by the Supreme Court called for heightened scrutiny of classifications disadvantaging homosexuals.⁸⁰ While the precise criteria by which groups are determined to be entitled to heightened scrutiny are a bit muddy, it appears that, if *Hardwick* had never been decided, homosexuals would almost certainly be entitled to at least intermediate scrutiny of classifications based on sexual preference, and perhaps to strict scrutiny.

First, homosexuals have undoubtedly been subjected to discrimination as a historical matter.⁸¹ Second, they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."⁸² While homosexual orientation may not be "obvious," it certainly is "distinguishing," and it is "immutable," as a practical matter.

The United States Court of Appeals for the Ninth Circuit has disputed this point, stating: "Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."⁸³ The Ninth Circuit's

80. See, e.g., Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

81. This factor is recognized as significant by the Supreme Court in numerous cases. See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

82. *Id.*

83. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (1990), rehearing denied, 909 F.2d 375 (1990). Accord, *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert denied, 494 U.S. 1003 (1990); *Steffan v. Cheney*, 780 F. Supp. 1, 6-7 (D.D.C.

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casual assertion that individuals are free to choose, as adults, whether they will be attracted to and seek sexual intimacy with members of the opposite sex or those of their own sex is contrary to what both common sense and the available scientific evidence tell us.⁸⁴ It matters little for present purposes how much of our sexual preference is biologically determined, and how much is attributable to the environments in which we are reared. What is significant is that by the time we reach sexual maturity and begin forming intimate sexual relationships with others, we have little ability to choose whether those to whom we will be attracted are of the same or the opposite sex.⁸⁵ Can it seriously be suggested, given the harsh discrimination which homosexuals face, that such a sizable segment of society would freely choose to labor under this disadvantage if a simple change of mind would grant access to the majority group and end the discrimination?⁸⁶

A final factor bearing on the appropriateness, under traditional equal protection analysis, of granting homosexuals as a class the protection of heightened judicial scrutiny, is their political influence. Several courts have found heightened scrutiny

1991).

84. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 152 (1991) (surveying the literature and concluding that "the assertion that homosexuality is a choice that can be changed is erroneous for the vast majority of lesbians and gay men").

85. *Id.*; Jantz v. Muci, 759 F. Supp. 1543, 1547 (D. Kan. 1991) (quoting High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (1990) (Canby, J., dissenting from denial of rehearing en banc): "Sexual orientation becomes fixed during early childhood, 'it is not a matter of conscious or controllable choice.'" Herek's article and the cited opinions rely on numerous scientific studies supporting the conclusion that adults cannot simply choose their sexual orientation. Herek, *supra* note 84, at 152; Jantz, 759 F. Supp. at 1547. The decisions cited in note 83 *supra* do not identify any support for their contrary assertion that homosexuality is a matter on which an individual may simply change his or her mind, and thereby avoid the adverse consequences which flow from being a homosexual in a society that discriminates against them.

86. In any event, the Supreme Court has never required absolute "immutability" of a characteristic for it to qualify as a basis for application of heightened scrutiny. *See, e.g.,* Nyquist v. Mauclet, 432 U.S. 1 (1977) (applying strict scrutiny to a classification based on alienage even though most resident aliens are eligible to become citizens after five years). *See also* J. ELY, DEMOCRACY AND DISTRUST 150-55 (1980). It is possible to change one's sex surgically in some cases, but that does not keep gender classifications from being subjected to intermediate scrutiny. Similarly, heightened scrutiny for classifications based on sexual orientation, if shown to be appropriate in other respects, would not become inapplicable upon a showing that some homosexuals could redirect their sexual preference if they desired to do so.

unavailable for homosexuals because "homosexuals are proving that they are not without growing political power" and therefore have the ability to attract favorable attention from legislators.⁸⁷

Whatever level of political exclusion must be shown in order to qualify for heightened scrutiny under established equal protection doctrine, it is a cruel hoax to suggest that homosexuals are so powerful that they do not need the additional protection against discrimination which heightened scrutiny affords. The long history of discrimination against homosexuals is not disputed. In fact, *Hardwick* revels in the "ancient roots" of the law's harsh treatment of homosexuals who engage in sexual intimacies.⁸⁸ While some states and cities have passed statutes protecting the rights of homosexuals in certain matters, a few isolated instances of political success cannot disqualify a group from being a beneficiary of heightened scrutiny. After all, blacks, the quintessential group benefitting from the use of strict scrutiny under the Supreme Court's equal protection cases, are protected by the thirteenth, fourteenth, and fifteenth amendments, as well as a multitude of federal, state, and local enactments protecting their civil rights and forbidding discrimination on the basis of race.⁸⁹ Women are the direct beneficiaries of the nineteenth amendment and are also protected by an array of statutes that specifically ban discrimination based on gender and prescribe remedies if such discrimination occurs.⁹⁰ It is entirely fanciful to suggest that homosexuals as a group have anything akin to the political power exercised by blacks or women, and therefore it is wrong to deny them heightened equal protection scrutiny on the basis of whatever power they do hold. As is the case for blacks and women, homosexuals do not wield the political power to which their numbers entitle them, justifying stricter judicial scrutiny of

87. *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989); *High Tech Gays*, 895 F.2d at 574; *Steffan*, 780 F. Supp. at 7-9.

88. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). Chief Justice Burger's concurring opinion seems to look back with nostalgia on the days when homosexual activity was a capital crime under Roman law. *See id.* at 196.

89. *See, e.g.*, 42 U.S.C. § 1981 (Supp. 1992); 42 U.S.C. § 2000e-2 (1981 & Supp. 1992).

90. *See, e.g., id.*

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classifications which disadvantage them. Moreover, whatever level of political power could theoretically be exercised by homosexuals, given their numbers, is severely undercut by the fact that well-justified fears of discrimination lead many homosexuals to conceal their status and therefore to limit the effectiveness of their efforts to obtain protection through the political process.⁹¹

But for *Hardwick*, the discussion presented above would lead to the conclusion that classifications based on sexual orientation trigger heightened scrutiny under established equal protection doctrine. However, despite the overwhelming case that can be made for considering homosexuals to be entitled to the application of at least intermediate equal protection scrutiny, it is difficult to see how one can reach that conclusion while *Hardwick* is the law.

Professor Cass Sunstein has made an extremely forceful and creative effort to divorce the substantive due process holding of *Hardwick* from equal protection issues that will come up in the future, but that effort seems to me to be ultimately unsuccessful.⁹² Professor Sunstein focused his discussion on *Hardwick* and on the *Watkins* litigation in the Ninth Circuit,⁹³ in which a soldier raised an equal protection challenge to the Army's categorical exclusion of all those whose sexual preference is homosexual, without regard to any proof of homosexual acts.⁹⁴ Professor Sunstein not only contended that *Hardwick* left open the possibility that heightened scrutiny is appropriate for classifications based on homosexuality, but he went so far as to assert that *Hardwick* has "no bearing" on

91. *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991). See ELY, *supra* note 86, at 162-64. An individual's homosexuality may be such a closely-guarded secret that public revelation of it by others may cause great harm. See Grant, "Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence, 77 CORNELL L. REV. 103 (1991).

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

93. *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *opinions withdrawn and plaintiff's claim upheld on another ground*, 875 F.2d 699 (en banc 1989), *cert. denied*, 111 S. Ct. 384 (1990).

94. A panel of the Ninth Circuit upheld *Watkins*' equal protection claim. The panel decision was later vacated and all resolution of the constitutional issue was avoided when *Watkins* was granted the relief he sought on the ground of estoppel, since he had informed the Army of his homosexuality upon induction and on later occasions.

the equal protection issue.⁹⁵ The essence of Professor Sunstein's argument is as follows:

[A] large part of the function of the [Due Process Clause] has been to limit myopic or short-term deviations from social convictions that have been long and widely held. . . . Since its inception, the Equal Protection Clause has served an entirely different set of purposes from the Due Process Clause. The Equal Protection Clause is emphatically not an effort to protect traditionally held values against novel or short-term deviations. . . . The function of the Equal Protection Clause is to protect disadvantaged groups, of which blacks are the most obvious case, against the effects of past and present discrimination by political majorities. . . . The clause does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.⁹⁶

Professor Sunstein's conclusion is that, even after *Hardwick*, courts are free to, and should as a matter of correctly applying equal protection law, subject statutes based on sexual orientation to heightened scrutiny.⁹⁷

The distinction which Professor Sunstein would have us make between the substantive due process and equal protection guarantees seems to have some merit in general, though like everyone else he had trouble fitting the Supreme Court's privacy decisions into a coherent pattern which is consistent with his theory. But whatever may be the merit of Professor Sunstein's observations as applied to other problems, they are of very little relevance to the particular problem to which his article is addressed. While it may be perfectly possible for the Supreme Court to reject a substantive due process claim without fatally injuring or even wounding a closely-related equal protection claim, separation of the two theories is simply not possible in the area of

95. Sunstein, *supra* note 92, at 1170; see also *id.* at 1166 n.26 (*Hardwick* has "no relevance" to equal protection); *id.* at 1168 (*Hardwick* "simply does not bear" on the equal protection challenge raised in *Watkins*).

96. *Id.* at 1174.

97. Professor Sunstein makes much of the distinction between homosexual acts such as those at issue in *Hardwick*, and homosexual orientation itself, which was the sole basis upon which the Army attempted to discharge *Watkins*. *Id.* at 1166 n.26. However, he also states that even those classifications based on homosexual acts should be evaluated under heightened scrutiny. *Id.*

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homosexual rights after *Hardwick*. The insuperable difficulty with which equal protection plaintiffs seeking heightened scrutiny must contend is not *what* the Supreme Court decided in *Hardwick*. The problem, instead, is how the Supreme Court got to its conclusion.

The aspect of *Hardwick* which demolishes a claim for heightened equal protection review for classifications based on sexual orientation is the particular "rational basis" found for the Georgia statute. The Supreme Court held that the statute was a rational one apparently based on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."⁹⁸ This approach boils down to "discrimination for its own sake," which the Supreme Court has rejected in other equal protection contexts.⁹⁹ Especially in light of the fact that the Georgia statute itself made no distinction between homosexuals and heterosexuals, there is no way to make sense out of *Hardwick* except as a holding that societal hostility toward homosexuals is justified, or at least that a rational legislature could conclude that it is justified. The theory upon which blacks, aliens, women, and illegitimate children are granted the benefits of heightened equal protection scrutiny is that they are likely to be disadvantaged by society for reasons having little or nothing to do with their worth.¹⁰⁰ The inescapable message of *Hardwick*, with which I disagree but which I see no way to dodge, is that discrimination against homosexuals is based on an appropriate societal revulsion for their activities.¹⁰¹

The anti-homosexual core of *Hardwick* becomes especially apparent if one considers the practical impact of the Court's

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

99. See, e.g., *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest") (emphasis in original).

100. ELY, *supra* note 86, at 145-70.

101. Professor Ely uses the example of burglars as a group toward which there is widespread societal hostility, but hostility which in no way renders improper the laws which disadvantage burglars. ELY, *supra* note 86, at 154. For the *Hardwick* Court, homosexuals are the equivalent of burglars, since the conduct in which they engage justifies the sanctions which society imposes on them.

readiness to condemn "homosexual sodomy" while apparently accepting the fact that the state has no intention of enforcing the statute in its literal application to oral and anal sex practiced by heterosexual couples. Heterosexual couples, who have the option of enjoying sexual intimacy in the form of vaginal intercourse, are free in addition to choose to engage in oral and anal sex without fearing prosecution. Homosexuals, on the other hand, who do not have the option of engaging in vaginal intercourse within their homosexual relationships, are subject to at least a theoretical risk of prosecution if they take advantage of the only types of sexual intercourse which are available to them.

One possible way in which *Hardwick* can be found to be less sweeping in effect than suggested above is to emphasize, as Professor Sunstein did, that Michael Hardwick admitted to homosexual acts, whereas some homosexuals -- most obviously Watkins and any other homosexual desiring to serve in the armed forces -- are disadvantaged purely on the basis of their sexual orientation. At least with regard to determining the appropriate level of judicial review, this seems to be a false distinction. Given the centrality of sexual relationships and sexual intimacy to our lives, it is meaningless to say that the group is entitled to special protection under the equal protection clause *so long as members of the group refrain from all sexual activities which are considered immoral by the majority of the electorate*. For homosexuals, sodomy is not like jaywalking or stamp collecting, an incidental activity in which an individual may choose to engage or instead choose to refrain from. The only way that the distinction between orientation and acts can help Watkins, or those like him, is on the assumption that homosexuals will join the service and then remain celibate throughout their careers. While it is possible that a few individuals might choose such a course, they would certainly not be large enough in number to justify analyzing the rights of homosexuals as if celibacy were typical or even common. Perhaps worse, if the armed forces were forced through such a strained equal protection analysis to accept homosexuals who claimed to refrain from all sexual activity, the inevitable consequence would be extensive government snooping into the private sex lives of

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soldiers -- precisely the sort of invasion at which the *Griswold* decision was principally aimed.

The bottom line is that the decision in *Hardwick* did more than misapply the substantive due process precedents. *Hardwick* also derailed the equal protection analysis which, properly applied in the absence of the *Hardwick* holding, would have led to the application of heightened scrutiny to classifications based on sexual orientation.

IV. POST-HARDWICK LIMITS ON DISCRIMINATION AGAINST HOMOSEXUALS

If the "rational basis" scrutiny utilized in *Hardwick* is the only tool which constitutional law makes available to those challenging classifications based on sexual orientation, are almost all challenges to discrimination against homosexuals doomed to fail? I do not believe that they are, and in fact they have not been uniformly unsuccessful. In the context of a criminal statute like that involved in *Hardwick*, "rational basis review" has no teeth at all. As the Court itself indicates, our laws are "constantly based on notions of morality,"¹⁰² and those choices by their very nature are not readily susceptible to judicial second-guessing. This is especially true when the statute at issue is not actively enforced by the government, so that a court might take the view that the moral pronouncement made by the statute is the *only* effect of that statute. Perhaps *Hardwick* can be viewed as the Court's statement that if the Georgia legislature wants to pass a statute which declares, in effect, that homosexuality is immoral, and the state is willing to leave the matter at that, then the Court has no proper role in trumping the legislature with a counterdeclaration that homosexuality is entitled to equal treatment.¹⁰³

102. 478 U.S. at 196.

103. Viewed in this way, *Hardwick* would be very similar to the Supreme Court's refusal in *Webster v. Reproductive Health Services*, 492 U.S. 490, 504-07 (1989), to adjudicate the constitutionality of the preamble to Missouri's statute regulating abortions, which declared that human life begins at conception. The Court held that no Article III case or controversy was presented by the challenge raised to the preamble, since the preamble could be read simply to express a value judgment (favoring childbirth over abortion) which the state was entitled to make. The preamble had

Rational basis review has much more force when classifications are actually being used to disadvantage individuals on the basis of their sexual orientation. Thus, in *Pruitt v. Cheney*¹⁰⁴ the United States Court of Appeals considered the claim of an Army Reserve officer challenging her discharge, which was based on her homosexuality.¹⁰⁵ The district court had dismissed the case, but the Ninth Circuit reinstated it and remanded for further proceedings to determine whether the Army's discrimination is rationally related to a permissible governmental purpose.¹⁰⁶ The plaintiff is an ordained minister who serves as a chaplain, and the existence of even a rational basis for excluding all homosexuals from such positions is far from obvious.¹⁰⁷

*Steffan v. Cheney*¹⁰⁸ provides another illustration of a situation in which even rational basis review may well dictate the invalidation of a classification which disadvantages homosexuals. Steffan was within a few months of graduation from the Naval Academy when he was discharged for being a homosexual.¹⁰⁹ He then challenged the blanket exclusion of all gay men and lesbians from the Navy.¹¹⁰ The district court recently upheld the regulations barring homosexuals from the military on the basis of little more than acceptance of the conclusion that "allowing admitted homosexuals to serve alongside heterosexual members and officers in the Armed Forces would jeopardize morale, discipline and the system of rank and command."¹¹¹ The court found that the "quite rational assumption in the Navy is that with no one present who has a homosexual orientation, men and women alike can undress, sleep, bathe, and use the bathroom without fear or

not been applied to restrict the activities of the parties challenging the statute. *Id.* at 506-07.

104. 943 F.2d 989 (1991), *rehearing en banc denied*, 1992 U.S. App. LEXIS 9812.

105. 943 F.2d at 990.

106. *Id.* at 996.

107. Plaintiff's prospects are somewhat enhanced by the Ninth Circuit's indication that rational basis review should constitute a real inquiry into the justifications offered for the discrimination, not merely a rubber-stamp of approval based on the assertion of some government interest. In this regard, the court relied on *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

108. 780 F. Supp. 1 (D.D.C. 1991).

109. *Id.* at 2-3.

110. *Id.* at 2.

111. *Id.* at 12.

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embarrassment that they are being viewed as sexual objects."¹¹² Even rational basis review should be enough to invalidate the total exclusion of gays from the military, as it is based on nothing more than such undifferentiated fears that the mere proximity of heterosexuals and homosexuals will disrupt the operation of the armed forces.¹¹³

While rational basis review, properly applied, may well be enough to end the categorical exclusion of homosexuals from the armed services, and will no doubt be used to invalidate some of the more blatant forms of official discrimination against homosexuals, constitutional litigation cannot reasonably be expected to be the vehicle through which equality is achieved for homosexuals.¹¹⁴ The very issue decided in *Hardwick* -- that homosexuals are vulnerable to criminal sanctions under circumstances where heterosexuals are not -- has a substantial impact, since it often excludes homosexuals from jobs, such as law enforcement, where any pattern of statutory violations may be considered disqualifying.

112. *Id.* at 13.

113. Professor Kenneth L. Karst has argued persuasively that the current exclusion of homosexuals from the armed forces bears a close resemblance to racial segregation of the military, which was enforced for many years. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 U.C.L.A. L. Rev. 499, 554-55 (1991). The fears expressed by the Navy are also substantially undercut by the fact that prior policies had allowed homosexuals to serve, with no discernible impairment of the Navy's efficiency. The district judge also held that, even though the Navy never advanced the AIDS epidemic as a justification for the exclusion of homosexuals, the "power to protect the Armed Forces from venereal disease is ample to sustain the power to protect them from what is now known to be a fatal and incurable virus, the HIV." 780 F. Supp. at 13-16. The court concluded that since a large proportion of those who are infected with HIV are males who have engaged in homosexual or bisexual activity, it is appropriate to exclude all homosexuals from the military in order to reduce the risk of infection. The judge fails to note that the military has already taken strong direct measures to control AIDS, including testing all soldiers for HIV. *Legal Times*, March 16, 1992, at 2. It appears doubtful that excluding all homosexuals from the military yields any additional benefit, especially since lesbians are the group *least* likely to contract AIDS, yet they are also categorically banned from service.

114. Although *Hardwick* was a hotly-contested 5-4 decision, there is no indication that its holding is likely to be reconsidered or overruled any time soon. Two of the dissenters, Justices Brennan and Marshall, have left the Court, and their replacements have not demonstrated any dissatisfaction with *Hardwick*. Justice Powell, who joined in the majority opinion in *Hardwick*, but who also wrote a separate concurrence suggesting that actually imprisoning homosexuals for the conduct involved in *Hardwick* would raise a serious issue under the eighth amendment, might have been regarded as a possible fifth vote for a result contrary to that reached in *Hardwick*, but he has also retired from the Court.

More significantly, the Supreme Court in *Hardwick* was presented with the opportunity to dramatically improve the prospects for equal treatment of homosexuals. That result would have been accomplished if the Court had done no more than follow through on the logic of its prior privacy decisions. When the Court refused to do that, and instead accepted the traditional disapproval of homosexual activities as a proper justification for continued discrimination, the main if not the sole responsibility for achieving equality fell upon other institutions and upon individuals.

Since *Hardwick* allows but does not require the criminalization of homosexual activity, the state legislative process can be used to repeal sodomy statutes and other enactments which overtly discriminate against homosexuals. In addition, Congress, state legislatures, and municipalities can act to outlaw discrimination against homosexuals in employment, housing, education, and government benefits.¹¹⁵ State constitutional law, particularly as it may establish a right of privacy independent of federal constitutional principles, may be used to invalidate certain types of discrimination against homosexuals.¹¹⁶

Against the backdrop of *Hardwick*, however, all efforts to secure the equal treatment of homosexuals face substantial obstacles. The Supreme Court of the United States has limited the role which federal constitutional law can play in bringing about equality, and this form of discrimination remains socially acceptable in a way that racial and gender discrimination have not been for a long time. *Hardwick* even broadens the freedom of action available to those like California's Governor Wilson, who

115. For a useful description of statutory protections granted to homosexuals, as well as a history of the arduous process by which the Massachusetts Gay Civil Rights Bill was enacted in 1989, see Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549 (1991). In February of 1989, the American Bar Association's House of Delegates adopted a resolution urging the federal government, the states, and local governments to legislate against discrimination on the basis of sexual orientation in employment, housing, and public accommodations. Marcotte, *House Affirms Gay Rights*, 75 A.B.A.J. 125 (April 1989).

116. For example, on March 11, 1992, the Texas Third District Court of Appeals held that Penal Code § 21.06, which prohibits homosexual sodomy, violated the Texas Constitution. *State v. Morales*, 826 S.W.2d 201, petition for discretionary review *dism'd*, May 27, 1992.

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express support for the general notion of equality for homosexuals, while taking steps to perpetuate inequality, secure in the knowledge that it is extremely unlikely that federal constitutional law will be brought to bear in the foreseeable future to require that homosexuals be treated equally with heterosexuals.

CONCLUSION

The Supreme Court's 1986 decision in *Bowers v. Hardwick* has helped to perpetuate discrimination against homosexuals. Although such discrimination has long existed and continues to be manifested in many ways, *Hardwick* has at least temporarily chilled efforts to gain recognition for the right of homosexuals to engage in sexual intimacies. Perhaps of even greater significance is *Hardwick's* apparent acceptance of the appropriateness of societal disapproval of homosexuals, thus preventing classifications based on sexual orientation from being measured against a heightened level of review, as would otherwise be appropriate.

Although discrimination against homosexuals remains subject to rational basis review under the federal constitution, both the holding and the tone of *Hardwick* raise substantial doubts about the capacity of federal constitutional law to play a major role in the near future in securing equal treatment for homosexuals. In *Hardwick*, the Supreme Court delivered the message that discrimination against homosexuals has been going on for a long time and that it is not inconsistent with our constitutional principles. The main burden of securing immediate progress in efforts to secure equality for homosexuals now falls upon Congress, state legislatures, and the state courts.