SAMESEX MARRIAGE AND MORALITY :
The Human Rights Vision of the Constitution

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Ours is a sexualist[1] society, drawing distinctions among people based on the kind of person whom they love, and the manner in which they do it. In particular, we have come to believe in constraints on the love which can exist between women and women, and men and men. Unlike other cultures and other times[2], we have made the gender of our beloved, and not the quality of the love, the overriding issue.

This sexualism is pervasive and insidious, both subtle and crude, in American culture;[3] it harms everybody.[4] "The attempt to categorize all humanity into two mutually exclusive and contrasting groups of homosexuals and heterosexuals, a form of 'them' and 'us', besides being ethically and politically dubious, produces misleading oversimplifications."[5] Empirically, such arbitrary confines on the free human personality treat individuals as less diverse and less infinite in their capacities than they are, in sexuality as in all other human potential. They deny the needs and aspirations of all of us to shape our lives as fully and as richly as we can, in freedom and respect.

Sexualist prejudices have affected legal decisions and commentary as well. This is most clearly apparent in an examination of what has misleadingly been called the "privacy"right, the definition and origin of which the Supreme Court has been unable to articulate.[6] The judicial attempt to puzzle out a "privacy" right began, unsurprisingly, with an issue of sex and human sexuality.[7] The fundamental nature of sexuality,[8] and its signficance to all individuals,[9] accounts for this prominent compelling role in the evolution of the modern "privacy" doctrine.[10] Unfortunately, the sexualist impulse to regulate people's sexual behavior and enforce conformity to parochial standards viewed as uniquely "moral" and "natural" has prevented a comprehensive and correct conception of privacy. In particular, courts have generally failed to recognize the public dimension of privacy, its application to human rights to expressive conduct having an impact on others.

Although all are harmed by sexualism and an inappropriately restrictive understanding of privacy, certain individuals bear the brunt of prejudice and oppression. Those who are willing to live out the freedom that is their human right, in defiance of socially imposed norms and stigmas, are targeted for discrimination and abuse. By expressing their refusal to be limited arbitrarily, they identify themselves as different, and are treated accordingly. In our society, we distinguish these people as gay,[11] and the majority who conform as nongay. Our legal and social treatment of them is a most glaring violation of the human rights moral vision which underlies the Constitution.[12]

Human rights illuminate and radiate from the Constitution, shedding light on the central human values of freedom and equality. People, as individuals, possess a transcendent personality of capacity to choose, to make themselves, and to shape somewhat their lives.[13] This freedom, this autonomy, is our most precious human attribute.[14] The diversity such individual freedom engenders is accordingly valuable as well. To ensure out individual rights to free choice, we must respect equally the rights of others.[15] Our Constitution was written with the intent of protecting these valuable human rights to equal freedom.[16] It specifically provides limits on the ability of government and majorities to restrain the rights of other individuals to their own "moral" visions within the constitutional scheme.[17] Without such an understanding of the Constitution and human rights, we cannot make sense of the increasing liberation of individuals in their opportunities[18] and of the great social movements for equality[19]--the epochal events of our time, let alone of our national system in history.[20]

The human rights of expression, self-fulfillment, and diversity, of privacy properly understood, clash head on with the narrow parochial visions of "morality" arising from sexualism. A prime instance of such illicit government "moral" imposition is the continuing refusal to legitimate gay life choices. "Affirmation through law and governmental acts expresses the public worth of one's subculture norms relative to those of others, demonstrating which cultures have legitimacy

and public dominance."[21] Our Constitution strikes against domination in favor of individual rights. In that government owes equal respect to all such personal choices within the protection of the Constitution, any action which treats samesex[22] relationships as shameful, rather than, at most, different, is unacceptable.[23] We see this most clearly in the unconstitutional sexualist restriction on access to the institution of marriage.[24]

Marriage, especially samesex marriage,[25] is a useful example of human rights issues, not only because of sexuality's central importance to all individuals,[26] but also in that "for most people, marriage is not merely a bureaucratic hurdle, but primarily a symbolic statement of commitment and self-identification."[27] In our constitutional system, the formal associational status of marriage is not the granting of permission by the state. It is, rather, a recognition and social acknowledgment of the choice and expression of self made by loving individuals. The contractual aspect of the formal marriage laws follows this personal public choice. The state, like society, is not an equal party; it is an audience.[28]

Any attempt to restrict access to marriage, or to give it undue meaning beyond the limited purview of the state's legitimate power,[29] both transgresses the core values of human rights and hurts the protected real life ambitions of the targeted individuals. By way of analogy, the marital association shares in the First Amendment freedom accorded to religious organizations, both as such and in their internal dealings.[30] Our human-rights-oriented constitution requires that the state give the widest possible latitude to the autonomous choices of individuals in such critical life structurings and self-definitions.[31] It also insists that the state grant the range of choices which result equal respect and equal protection.

Admitting gay individuals who so desire to the social institution of marriage, itself subject to human rights standards, is an essential step toward the fulfillment of those individuals' rights and the achievement of social interests. Samesex marriage is a message of freedom and equality, not to mention love, from the self-identifying

participants as well as from society to them and to itself. Such an institution will further change sexualist attitudes and increase the quantum of liberation for all citizens. It is no coincidence that social attitudes toward minorities have long been understood as both a reflection and a result of varying commitments to human freedom.[33] As Plato put it in his Symposium, "Wherever...it has been established that it is shameful to [be involved in samesex relations], this is due to evil on the part of the legislators, to despotism on the part of the rulers, and to cowardice on the part of the governed."[34] Add in ignorance, bigotry, socialization, and fear, and the correlation still stands.

This article will explore these issues in four parts. Part I will examine the traditional arguments made for samesex marriage as well as the commentary they have engendered. Part II evaluates empirical changes in marriage and the family in America. It analyzes the diversity in which we actually live, often despite the law and contrary to our self-image. It focuses, in part, on gender expectations and the law's response to the egalitarian trends of the postwar period.

Part III looks at gay experience, with particular attention to scientific theory, history, and current attitudes toward and among gay people. The demonstrated diversity compels a rejection of sexualist sterotypes and prejudices regarding people leading gay lives, and contributes to a deeper understanding of sexuality in general.

Part IV elaborates the moral vision of the Constitution and its reflection of human rights values. It discusses the background of human rights, their roots in human nature and the requirements of justice, and their place in the Constitution. Further, it presents the implications of this broader grounding of the privacy right, specifically, the impermissibility of governmental imposition of parochial "moral" visions.

This article argues for such a true appreciation of the sources of the privacy right and its sweep. Without it, courts and commentators treating samesex marriage have failed to give adequate weight to the protected human rights values at stake. They have been unable to defend as fully as they should the rightness of a substantive

choice in favor of those values which support samesex marriage. By abolishing sexualist discrimination and permitting full and equal self-expression on the part of all lovers for all beloveds, in keeping with the Constitution's human rights spirit, we will create a society more safely and richly founded on our individual freedom and equality. Such a society, where people are equally free to love and choose according to the dictates of their heart, best promotes the just and moral pursuit of happiness.

I. TRADITIONAL APPROACHES TO SAMESEX MARRIAGE

When gay lovers first went to court in the 1970's seeking to identify their commitment as that defined by the state in the institution of marriage, they were in the tradition of the great movements against racism, sexism, and bigotry.[35] Courts routinely denied them access[36] on a variety of grounds: gender,[37] traditional semantic positions,[38] thinly disguised stereotypes and sexualist prejudices, the duty of the state to promote and regulate morality, and a purported distinguishing away of privacy cases such as Griswold v. Connecticut[39] and Loving v. Virginia.[40] One court justified its refusal, saying "appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."[41] Another declared the state's obligation to defend the "historical institution [of marriage]...more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend."[42]

These early judicial pronouncements were wrong. The "societal interests" put forward in the petitions for samesex marriage represented basic human rights protected by, and animating, the Constitution. They had roots in the most fundamental truths of human personality and cultural diversity. The courts involved failed to give adequate attention to the constitutional arguments. More important, they relied on impermissible sexualist prejudices and incorrect assmptions as

to the role of the state regarding public morality. The traditional arguments brought to the bench in the samesex marriage cases, and then analyzed and elaborated by commentators throughout the 1970's, should have been enough to sustain the petitioners' rights. The persistent narrow vision of the courts, however, led them to give insufficient weight to these powerful arguments, through a total disregard or misunderstanding of the rights involved. The Supreme Court's incoherent explanation of the privacy right, always present in these discussions, contributed to this blindspot.

These traditional analyses fell largely into two camps, oriented toward either equal protection or claims of substantive due process values, for reasons explored below.[43] As such, they, too, failed to go far enough in revealing the clear and essential way in which the petitions of the gay lovers were grounded in the Constitution. Commentators as well as the courts generally lacked a profound enough empirical understanding of the issues and life realities involved; they understated the values at stake and the harms due to the statist implementation of a sexualist "moral" code.[44] Similarly, their theoretical cases, while strong, suffered from an insufficient valuation of certain rights on the one hand, and an inability to justify their well-meant substantive social value choices, on the other.[45]

This Part examines the traditional discussions of samesex marriage. Section A analyzes the equal protection and due process cases made in the courts and legal writings. Part B explores the limited solutions and theories these schools produced. Part C discusses the need for a better understanding of the power of equal protection and the way in which human rights are affirmatively established in our constitutional system.

A. Traditional Legal Approaches: The Equal Protection Balancing Test and Due Process Values

In analyzing demands for constitutional treatment under the Equal Protection Clause of the Fourteenth Amendment, the courts usually follow a balancing approach,

evaluating (1) the character of the classification in question, (2) the relative importance of government benefits not received or the interests at stake for the individuals or class discriminated against, and (3) the asserted state interests in support of the classification.[46] A sliding scale of review has emerged by which the "suspect" nature of the classification plus the importance of the right involved determines how "compelling" the state's reason must be for differential treatment.[47] The lack of a coherent constitutional theory of human rights leaves the Supreme Court with little guidance in assuring the correct balance of interests; the result is shifting standards of care for different groups and an inconstant characterization of various rights and their importance.[48] Equal protection review thus often undervalues the importance of the interests at stake.[49] The attempt to give these values greater weight through "substantive due process",[50] however, has not included a convincing explanation for the consitutional supremacy of their asserted values.

(1) The Standard of Review

The selection of a standard of review rests on the court's evaluation of the rights affected or the character of the group hurt by a state classification.[51] Many of the arguments in samesex marriage cases center on whether discrimination against gay people should be held "suspect", thus triggering "strict scrutiny" of the government's action.[52] Another set of arguments takes off from the rights and interests at stake. An inadequate appreciation of the human rights values and real needs of the petitioners, on the one hand, and ignorance or sexualist prejudice, on the other, have undercut the courts' receptivity to the valid, if limited, arguments made for samesex marriage using these Equal Protection Clause standards and Due Process liberty values.

Thus, for example, despite strong language and a pre-established rigorous standard of review for gender-based classifications in Craig v. Boren,[53] neither the courts nor the legal analysts have applied sex discrimination arguments in

favor of gay lovers seeking marriage. In Miss. U. for Women v. Hogan,[54] the Supreme Court reiterated that Craig v. Boren's equal protection analysis for gender classifications puts the burden on the state to show an "exceedingly persuasive justification" for discrimination.[55] It insisted that "the validity of a classification [must be] determined through reasoned analysis rather than through mechanical applications of traditional, often inaccurate, assumptions about the proper roles of men and women."[56] Despite the right to be free of sexist discrimination, and the tough standard it evokes, however, gay people have not been able to invoke this protection in court.

It would seem clear that if you could choose to love a particular male if you were female, but may not as a male, you are a victim of gender-based discrimination. It is equally apparent that if a female is fired or curtailed in her freedom for behavior permitted and even encouraged of a male, she, too, is a victim of a discrimination which harms all of society. To deprive people, for example, of custody rights to their children because of the gender of their preferred sexual partner when no analogous discrimination is accepted on the basis of the gender of any other of their preferences, is sex discrimination.[57] Yet courts do not recognize the fundamental right to be free of sexist classification as applied to gay lovers. They persist in their restrictive gender expectations and improper government morality regulation, skewing their own balancing test. Commentators who argue for samesex marriage and then reject this sex discrimination approach, too, miss the impact of a denial of a basic right to gay individuals. The values of individual autonomy they are defending must reflect the broader equal protection interest, a correlated limit on the state's right to impose narrow moral codes or expectations.[58]

Another right often submitted to trigger the strict scrutiny standard is the right to marry itself. In Zablocki v. Redhail,[59] the Supreme Court finally acknowledged that "...recent decisions have established that the personal decision to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth

Amendment's Due Process Clause."[60] The Court noted that when the state creates a classification "which significantly interferes with the exercise of the [marriage right], we believe that 'critical examination' of the state interests advanced in support of the classification is required."[61] Zablocki itself struck down a statute on equal protection grounds because some of the affected class would never have been able to meet the requirements laid down for marriage, or would in any case be unduly burdened. Said the Court, "even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental."[62] Yet even this culminating affirmative recognition of the importance of marriage and appreciation of the equal protection issues involved in access to it have not always been seen as sufficiently powerful a "right" to trigger stricter scrutiny where samesex marriages are presented.[63] Similarly, even an acknowledgement of the First Amendment values inherent in the marriage statement[64]--self-expression, association,[65] persuasion--has not brought all commentators to the most rigorous equal protection standard on behalf of gay lovers, despite analogous cases supporting such an approach.[66]

The Supreme Court has never explicitly said why certain classifications or restraints on rights are inherently "suspect". This is part, although not the most harmful manifestation, of its general failure to ground its privacy decisions in a coherent constitutional theory. When the rights at interest are not alone deemed enough for the standard sought, sometimes the character of the discrimination's target will support it. Commentators have suggested certain common denominators or indicia of "suspectness". Those who are victims of impermissible classifications usually share: (a) a long history of discrimination,[67] and (b) political powerlessness,[68] based upon a (c) characteristic which bears no relation to their ability to "perform in or contribute to society",[69] and which (d) constitutes a "badge" of distinction or source of stigma.[70] This characteristic (e) is almost always immutable, either inherent or otherwise beyond the individuals' control.[71]

Based probably on these criteria and an analysis of their application to gay individuals as a class, at least one court[72] and several commentators have recognized openly gay people as "virtually a discrete and insular minority [which seems] eminently to satisfy criteria of 'suspectness'."[73] The traditional analyses view gay people as qualifying for each of these judicial elements:

(a) Sexualist myths, stereotypes, and prejudices abound throughout Western history falling with particular harshness on, among others, those of an emotional, erotic, and physical attraction to others of the same gender.[74] Discrimination of varying kinds persists today, including stigma, material employment problems, associational restrictions,[75] ...

(b) Those opposed to sexualist social strictures and particularly those who are gay are relatively politically powerless in America, although the situation is improving slightly.[76]

(c) Even in a sexualist society, individuals of oppressed or disfavored sexual orientations have demonstrated their ability and the essential irrelevance of sexuality as regards performance in and contribution to society.[77]

(d) Those favoring an acceptance of samesex love and relationships, and those whose sexual orientation or sexuality seems or is different from majoritarian sterotypes have been stigmatized. In particular, those who openly declare themselves gay or act in fulfillment of their sexuality with others bear a "badge" of distinction.[78]

(e) Finally, regardless of their conclusion as to the etiology of sexuality and diverse individual responses, modern expert evidence overwhelmingly indicates that, innate, biological, or environmental, sexual orientation is formed before individuals attain conscious capacity to shape themselves and is highly resistant to change once it is formed.[79] Our choice as individuals is not whom to be attracted to and love, but how to act on it in society.[80]

> ...people can't, unhappily, invent their mooring posts, their lovers, and their friends, anymore than they can invent their parents. Life gives these and also takes

> them away and the great difficulty is to say Yes to life. 81

Thus, these commentators have argued that classifications against samesex relationships are suspect and that strict scrutiny with all its consequences is compelled under the Fourteenth Amendment.[82]

Other advocates for samesex marriage hold that gay individuals as a class lack one or more of these criteria and therefore cannot attain first-rank protection, although their meeting many of the criteria justifies higher judicial solicitude of one form or another.[83] Such a "heightened rationality" test, like that in Craig v. Boren, for example,[84] would, in their view, deal with the problem that "there

> remain rights, not now classified as 'fundamental' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect', that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. 85

Such an approach would turn from evaluation of the gay individuals and their rights to a focus on the state's reasoning.[86] It would require that the state interests be "important" or at very least "permissible" without an attenuated or ill-matched relationship to the measures taken or the harms inflicted.[87] To follow these arguments through, it is necessary to examine the typical interests put forward respectively on behalf of the gay individuals seeking marital status (which trigger the heightened scrutiny), and of the state in denying them access and enforcing its particularized vision of "morality".

(2) The Interests of Gay Individuals in Access to Marital Status

Traditional descriptions of the interests of gay people in marrying their lovers include analyses of the constitutional rights at issue, attention to the material and legal perquisites of marriage, and a growing assertion of the First Amendment and fundamental liberty values inhering in public statements, self-identifications, and conduct expressive of love and worth. It is these intangible benefits which are most often undervalued, unfortunately, in that these human rights values are at once the most important to be served by marriage, and the most irreducible. Ultimately, it is their significance and their connection to the

human rights core of autonomous choice and equal treatment, that makes any resolution short of nonsexualist access to the marriage institution constitutionally intolerable.

This is the traditional summary of the interests of those seeking samesex marriage:

(a) The need for a "formalized legal status that recognizes their union and commitment."[88] This constitutes a value argument; all people regardless of sexual orientation deserve the same opportunity to make a public statement of their self-identification. It places significant weight on the First Amendment right of expression and self-definition,[89] protected by a substantive reading of the Due Process Clause.[90] By this argument, the protected freedom to marry is synonymous with the right to choose the person.

(b) More generally, the right to partake of a status "long...recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men",[91] another substantive due process argument. Unlike other perhaps more permissible limitations on the access on marriage,[92] sexualist barriers to samesex marriage "significantly interfere with an individual's right to marry for that class of people who identify themselves as homosexuals....The failure to recognize samesex marriage is not simply a restriction on the number of spouses, the age of marriage, or on marrying within a relatively small class of people. It is a restriction on marrying which, in effect, means that homosexuals will never be able to marry and enjoy the State's oversight of the parties' rights and obligations to each other. 93

(c) Assorted other constitutional interests such as an Eighth Amendment right not to be punished for a condition people cannot control (a minimalist definition of people's sexuality, to say the least),[94] and the Ninth Amendment right to be protected from government interference in matters of personal choice.[95]

(d) Equal access to a host of material benefits and privileges, including, to name a very few, special tax treatment, dependency deductions, wrongful death recovery, hospital and prison visitation, pension rights, state-enforced support obligations, spousal protection, inheritance rights, etc.[96]

(e) The associated benefit of state and social reinforcement of marital relationships.[97]

In addition to these substantive interest, traditional arguments have relied heavily on (f) equal protection claims. They often have considered these latter fairness interests the strong point in the case for samesex marriage.[98] This predilection is due to a fear of relying on substantive moral claims, despite the ample constitutional, theoretical, and empirical justifications supporting them.[99] Commentators of this school prefer to demonstrate the importance of marriage to gay individuals by showing the harms which follow from unequal treatment. These include perpetuation of social stereotypes and stigma,[100] sexualist constraints on all citizens with particular hardship to those labeled minorities, the transformation of people's children into pariahs,[101] as well as the deprivation of the benefits enumerated above.

Although such harms would seemingly indicate the substantive values inherent in marriage, legal commentators who rely on the equal protection argument usually suggest an additional "lifestyle right"[102] or "freedom of intimate association"[103] as an organizing principle or further constitutional weight to tip the balance in favor of the values they wish to equally protect. Occasionally, they acknowledge that such rights are "strikingly similar" to the First Amendment purposes usually at the heart of the substantive due process proponents.[104] Such principles aid the gay "minority" by preserv[ing] dissent from the tastes of the majority."[105] They are seen as affirming "society's faith that a free market in lifestyles, as well as in ideas, best aids the individual in developing his own identity."[106] They are viewed as necessary, somehow apart from the privacy rights in the Constitution, "to discourage, at the outer perimeter, the state's natural inclination to compel its citizens to think and behave in orthodox patterns."[107]

Thus, through a variety of means, the traditional proponents of samesex marriage raise the human rights claims which the "privacy" right should protect--the right of gay individuals to make their fundamental choice to live and love together in the same social structure as those of other sexual orientation. Although the traditional analyses of the substantive due process or equal protection school have their limits, they have made a compelling case for the interests of society in ending tangible forms of sexualist discrimination, and for the right of individuals to be free of sexualist constraints.

(3) The Alleged State Interest in Preventing Samesex Marriage

Even when the affirmative interests of gay lovers in marriage are undervalued, a case can be made for granting them access because of a lack of any legitimate state interest in withholding it. This is the common position of those oriented toward the equal protection approach without emphasis on the substantive values.[108] The state interests articulated by courts[109] and commentators come down to the following:

(a) A paternalistic obligation to "cure" gay individuals, viewed somehow as requiring "treatment and rehabilitation rather than toleration and legalization."[110] This reflects the turn-of-the-century shift in attitude toward samesex eroticism, redefining it from a "sin" to an "illness".[111] It is open to three objections.

First, it is now viewed by almost all experts that samesex attraction like sexuality generally, is neither a disease requiring a cure,[112] nor capable of change in any such sense. For example, the Surgeon-General of the Public Health Service declared in 1979: "Current and generally accepted canons of medical practice with respect to homosexuality" require that it "no longer be considered a mental disease or defect."[113] Indeed, the whole idea of categorizing people by sexual attraction or sexuality has come under severe attack.[114] Expert testimony in Atanfora v. Board of Education[115] reported that sexuality, a person's internal makeup, is determined by the age of five or six.[116] Today's psychiatric treatment

of gay clients evaluates results "not in terms of how many patients

> are converted to heterosexuality, but in terms of how many patients can be helped to accept their homosexuality and learn to live without undue tension and anxiety.[117]

Both the American Psychiatric Association and the American Medical Association, among others, have confirmed the wisdom of this approach.[118]

Second, there is no reason to view denial of marital status as helpful or curative of those whose sexuality leads them to a certain partner.[119] There is no indication that "withholding marital status will lessen the incidence of homosexuality."[120]

Third, acceptance of this argument reflects a blithe acquiescence in a vision of the state antithetical to the one created by the Constitution. Even the generally pro-authority Burger Court,[121] itself responsible for most of the confusion on the "privacy" right issues, has noted, in another context, "The fantasies of a drug addict are his own, and beyond the reach of the state." [122] One commentator has observed that while saving bodies through paternalistic intervention at least has an element of material public benefit to justify it, saving souls, as such, does not.[123] More fundamentally, the Constitution and the human rights conception which underlies it put severe restraints on the kind of government actions justifiable in the name of paternalism. Briefly, such limits on personal freedom and rights to equal respect and treatment in behalf of a person's "own good" are warranted only where the individual's irrationality, narrowly and specifically defined, is serious and persistent, and where an extreme and lasting impairment of his interests is immediately likely.[124] In other words, absent the most unusual factors of irrationality and iminent harm, individuals in our system are equally entitled to make their free choices, including their own mistakes.[125]

(b) The prevention of an increase in samesex attraction and gay relationships to the detriment of conventional family relationships and other nongay sexual orientations. By this, the government is held to have a legitimate interest in keeping gay love from becoming a "viable alternative to heterosexual intimacy."[126] The denial of access to marriage, like criminalization, becomes "a dramatic symbol of social disapprobation"[127] as well as an intentional practical barrier. One commentary posed the issue in this way:

> Should the state be constitutionally required to abandon an ancient sanction when abandonment might in time lead to increasing, though statistically unpredictable, defections from heterosexual behavior and traditional family life? 128

Even assuming that this is a legitimate interest, there are many responses to this contention. First, it is unlikely--both intuitively and as a matter of empirical evidence[129] -- that people choose their sexual orientation on the basis of "comparative legal advantages."[130] In fact, people do not choose their sexual orientation at all.[131]

Second, there is no reason to assume that gay and nongay sexualities and lifestyles are incompatible.[132] The dissent in Doe v. Commonwealth's Attorney[133] noted a pronounced "lack of empirical data on the adverse effects of homosexuals on the social system."[134] Surely the production of such evidence is the least one could require of the state. Further, the same measures putatively adopted to aid marriage or traditional family relationships (or to discourage "immoral" or disfavored sexual relations) often wind up harming them.[135]

Third, little is served by forcing gay individuals, or individuals seeking outlets to express their samesex attraction, into male-female marriages.[136] Studies unanimously show these "apt to be unhappy and shortlived", at least in the exclusive and narrow way we have defined marriage in our traditional social model.[137]

Fourth, it is not clear that a change in the marriage laws will bring about an increase in the number of gay people. Evidence for this contention is that in countries which have removed sexualist legislation from the books, gay people have remained a " relatively small and stable percentage of the population."[138] Psychological studies indicate, however, that virtually all individuals are capapble of greater sexual diversity than they believe.[138A] Presumably, then, the societies which have repealed sexualist legislation are societies in transition: the laws are not sexualist, but prejudice temporarily remains potent in practice.[139] When that prejudice abates, samesex activity may increase. If this is so, perhaps legislation can curtail the number of gay relationships through repression and logistical barriers, at the price of curbing individual freedom, expression, and constitutional rights--not only of openly gay individuals, at the cutting edge, but of all citizens on the demonstrated sexual spectrum.

In the absence of anything more, it is not apparent that the state has any legitimate interest in determining the sexual orientation of citizens.[140]

(c) The protection of marriage as primarily concerned with procreation. This alleged state interest, although often heavily relied on,[141] is increasingly anachronistic and hollow.

First, and most fundamentally, in America today marriage is no longer held to exist "as a protected legal institution primarily because of societal values associated with the propagation of the human race."[142] Marriage is viewed rather as an intimate and secure relationship between lovers, as a pair in society, and as a means of commitment, self-identification, and fulfillment.[143]

Second, even if encouraging procreation were a valid state purpose, the means chosen, barring samesex marriage, is not, as is required, "rationally related" (let alone "substantially"), to the stated objective.[144] Since there is no requirement of male-female couples that they procreate, intend to procreate, or even be able to procreate in order to marry, a denial of marital status allegedly on these grounds to samesex couples just will not wash. The state action is underinclusive. Further, in view of the fact that samesex couples can adopt or use artificial insemination to raise families, the classification is overinclusive.[145] At least the religious strictures and early assumptions upon which the procreational model was based had some consistency; they attacked not nonprocreative love, but sexuality itself.[146]

Nor is there any necessary incompatibility between gay sexuality and having children, with or without the aid of advanced technology. As one eminent historian notes:

> Only in societies like the modern industrial nations which insist that erotic energy be focused on one's permanent legal spouse would most gay people be expected to marry and produce offspring less often.... [147]

In fact, those countries most lenient toward samesex love and practising it most catholically are precisely those with the highest birthrate and serious overpopulation problems.[148]

In any case, despite later judicial obfuscation, Griswold clearly repudiated the procreational model of sexual love and marriage.[149] Lower courts have no business ignoring that message in order to play watchman on the walls of the City of God.[150]

(d) The desire to disparage widespread, "blatant", public behavior giving offense to some. The state seeks to protect the eyes of the public from beholding open expressions of gay love. Commentators, surprisingly, have not responded to this alleged interest with full First Amendment vigor.

The general line seems to be that if it is kissing and holding hands that are at issue, tolerating such activities should be deemed "the minimum concession that the majority must make to the rights and needs of a minority."[151] More advanced public sexual conduct of the kind already prohibited to nongay citizens, then, would be left to the criminal law equally applicable to all.[152] The failure to assert more fully the speech and expression interests is disappointing, especially given strong cases such as Chicago Police Dept. v. Mosley,[153] and Cohen v. Calif.[154] This perhaps makes most evident the need for a coherent constitutional theory to ensure the adequate assertion of the precious freedom interests at stake, interests such as the First Amendment right to engage in "the speech of loving."[155]

(e) Protection of minors. This argument is always thrown in, although it is essentially duplicative of the others. This is not just fortuitous; history teaches that "no charge against a minority seems to be more damaging than the claim that they pose a threat of some sort to the children of the majority."[156] The image conjured up of gay people preying on children or seeking to "proselytize" is wholly fallacious and based on archaic and constitutionally intolerable stereotypes typical of those underlying sexualist attitudes.[157] Further, if anything, samesex marriage and its easing of life for those individuals fearful of exposure would probably reduce the instability of relationships which in part sustains these prejudices.[158] Otherwise, the general criminal law offers appropriate remedies.

(f) The problematic nature of the specific legal consequences of recognizing samesex marriage. The most powerful element of this argument in favor of the status quo is that samesex marriages would appear to send a different legal message than the statutes criminalizing private consensual sex between adults of the same gender.[159] Since the first samesex marriage cases arose in the early 1970's, twenty-five states have eliminated such provisions

from their criminal codes, or have seen them struck down by the courts.[160] In general, such laws are rarely and only selectively enforced,[161] and are unconstitutional in any case.[162]

Another argument is that rewriting all the current laws which assume male-female marriages would be too onerous on the states. The state's interest in avoiding a realignment of laws with the constitutional rights of individuals in order to perpetuate outmoded sexualist and sexist stereotypes and prejudiced "moral" perspectives, however, is obviously invalid.[163]

Finally, the complaint that some uncommitted individuals will form factitious samesex unions solely to obtain legal benefits of marriage leaves open three responses: first, it is unlikely to happen given continuing prejudices and present majority tastes;[164] second, male-female marriage is open to the same charge;[165] third, the state should not be conditioning legal and material benefits solely on the basis of such an important associational choice.[166] This last is true not only for the sexuality issue but for the expression interests of those who do not wish to marry according to the state's limited format.

(g) The promotion of public "morality". This is the formal argument which best reflects the prejudices and unconstitutional impulses underlying the continuing active sexualist discrimination by the government in America. It assumes both the immorality of gay citizens and samesex marriages, and the power of the state to define and enforce its own parochial vision of morality. The first assumption arises from an arrogant ignorance of the realities of gay life and, more broadly, the nature of sexuality itself. It is based on poorly conceived and misunderstood narrow religious interpretations, stigmatizing socialization, and historical contingency.[167] No legitimate moral ground exists: samesex love is not violent,[168] nor

harmful to those who engage in it; indeed it is sexualist restrictions that are oppressive and disfiguring.[169] This alone should be enough to bar these motivations under any "rational relationship" test.

Further, the state has no right to regulate public behavior on any "moral" bases narrower than those which animate the Constitution. Even if an increasing awareness and approval of gay love and fuller sexual freedom would transform public "morality", government has no constitutional interest in preventing the peaceful acceptance of new ideas.[170] One moral theorist writes:

> It is difficult to understand how the state has the right on moral grounds, to protect heterosexual love at the expense of homosexual love. Equal concern and respect for autonomous choice seem precisely to forbid the kind of calculation that this sort of sacrifice contemplates. 171

It is here that a clearer understanding of what constitutional understanding of what constitutional privacy really means would be most valuable, to curb that desire in everyone to censor just one thing, to impose our vision of the good on others.[172]

Finally, "the withdrawal of law from certain areas of moral choice does not inevitably portend a collapse of the social order."[173] The American whole concept of the free market of ideas and faith in the deliberate processes of self-government rest on such confidence in individuals.

Naturally, unlike the courts, the commentators on samesex marriage almost always have concluded that the state's alleged interests have little or no real substantive or permissible constitutional weight. In any case, they could not outweigh the interests of those seeking acccess to the marriage institution.[174] Under the traditional analysis, then, they argued strongly for the right of gay individuals, too, to marry partners of their choosing.

B. The Traditional Limited Theories and Solutions

Unfortunately, traditional analyses such as the above did not overbear the prejudice and unresponsiveness of the courts to their solid constitutional arguments. Existing sexualist biases account only in part for this failure. The traditional analyses themselves lacked a coherent constitutional vision and conception of the personality which might have exploded these prejudices. As a result, the compromise solutions too often suggested by proponents of gay rights do not adequately meet the needs and reflect the values at stake. Furthermore, their theories themselves could not lead the courts to escape the "privacy" confusion and develop a human rights approach that did justice to the rights of individuals and society against sexualism and government "moral" paternalism.

(1) Incomplete Theories

Commentators on samesex marriage invariably begin with a discussion of the "privacy" right, noting that "part of Griswold's mystique is its utter imprecision."[175] Indeed, "imprecision" is a polite characterization of the muddle the courts have made of a doctrine that should lie at the heart of the constitutional values of autonomy and equal respect. Just as the discussions of samesex marriage differed over whether the equal protection or substantive due process argument was stronger,[176] so the analysts have disagreed over the sources of the privacy right, particularly as regards issues of sexuality and marriage. Some see it located in the Equal Protection Clause;[177] others, primarily in substantive values promoted by the Due Process Clause.[178] Although both are correct, the emphasis toward one or the other contributes to an eclipse of the fundamental constitutional vision which truly illuminates the meaning of privacy. In its stead, commentators have been led to propose a variety of theoretical measures to redress the perceived Constitutional deficiencies. By declining to articulate the broader human rights conception that is the significance of the Constitution, the courts and commentators have failed to extend the benefits it means to the individuals in our society whose rights are currently denied.

Wilkinson and White, for example, propose "constitutional protection for personal lifestyles."[179] Seeing the Court's privacy analyses as based on "vague" and "nebulous" doctrines and provisions including substantive due process, the "penumbras" of various Bill of Rights articles, and the Ninth Amendment,[180] these proponents of a freedom of lifestyle right perceive the need for a more explicit framework to strengthen an equal protection case.[181] Wilkinson and White's underlying conception is that human dignity requires protection for "choices that express our uniqueness and individuality."[182]

Unfortunately, the use of a "lifestyle freedom right" as a substitute for a bolder and more forceful reliance on substantive values inherent in the Constitution makes equal protection an unsatisfactory recourse to those left out by the manipulation of its judicial formulas.[183] The very strong rights and interests proponents seem to recognize as at stake--for example, religious choice, advocacy of ideas, the sanctuary of the home, inner sanctity of the mind, freedom from cruel and unusual punishment[184]--are undervalued when pigeonholed into an equal protection makeweight.

Thus, Wilkinson and White go on to speak of "bizarre lifestyle choices" which "would threaten traditional American conceptions of family life."[185] They note that "the stability of the nuclear family in America has been fortified by a conception of marriage as an exclusively heterosexual union."[186] Such a presumed state interest, then, is held to be sufficient to outweigh the minimized interests of gay individuals seeking access to marriage. Equal protection, they contend, does not obliterate the difference between tolerance and approval, which government has the right to withhold.[187] They observe:

> In areas involving traditional morality, society values law as much for its instructional as for its coercive effect. Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegaince to a common set of behavioral goals. Deploying the Constitution to undermine conventional precepts of domestic morality is a step not lightly taken. [188]

The values protected by the "lifestyle freedom" right were not viewed as important enough for gay citizens, and so they lose in any equal protection

calculation. Equal protection alone cannot preserve individuals' rights if there is no greater appreciation of the deep personal and societal interests at issue in human rights claims. Not surprisingly, Wilkinson and White tend to back down from a full defense of and demand for samesex marriage.[189]

Others have analyzed the "privacy" confusion differently, perceiving a "reconstructed doctrine of substantive due process"[190] which a reluctant Court couches in language of "minimum rationality equal protection."[191] Substantive rights represented by such a view of the Due Process Clause of course implicitly call for equal protection, making it harder to separate the two sources when approached from this perspective.[192]

Where these commentators have gone wrong is in failing to offer a satisfactory explanation for why their perceived substantive moral choices should be accepted as constitutionally mandated, and, more broadly, how it is that minorities' value choices are entitled to equal respect. While they have seen the values at stake (and therefore are closer than the more limited equal protection school), they still acquiese in a role for the government in promoting narrow visions of "morality" and public attitudes, which undermines their case.

Thus, Laurence Tribe poses the issue as follows:

> The court must decide, in this society and at this time, whether a person's choice to act or think in a certain way should be fundamentally protected against coercion by law, recognizing that the alternative in some situations may be coercion by economic or peer pressure and, in others, more meaningfully undominated choice. 193

He agrees that it is understandable that critics of the "privacy" right have tried to limit its scope, observing that "a concept in danger of embracing everything is a concept in danger of conveying nothing."[194] He wants a definition of "privacy", however that preserves those attributes of an individual which are "irreducible in his selfhood"--the values of expression and self-identification which constitute the "social dimensions of the self."[195] This is a very rich and true appraisal of the interests at issue for individuals seeking to marry, gay or nongay.

Kenneth Karst suggests that "freedom of intimate association" would be a better way to understand many of the values the Court has called "privacy" rights.[196] To some extent, his proposed "freedom of intimate association" serves the function of an "organizing principle" or values chip for purposes of equal protection balancing.[197] It is intended to help the court decide how much the state's burden of justification should be increased, by focusing on particular associational values at hand.[198] In this sense, it, too, suffers from incomplete awareness of how the real significance of these "irreducible selfhood" values affects all individuals regardless of their sexual orientation.[199] Karst's purpose is legitimate, however, as he tries to make the Equal Protection Clause into an aggressive instrument of vindication for substantive values and choice for all citizens.

The second intention of Karst's "freedom of intimate association" is to ensure that courts give appropriate weight to the values it defends. The author defines these values quite comprehensively:[200] mutual material support,[201] company,[202] caring and commitment ("to be human is to need to love and be loved"),[203] intimacy,[2043] and self-identification.[205] By classing these basic needs and rights of the individual personality into a "freedom of intimate association", however, Karst actually understates his case, for he limits the ways in which his vision is grounded in the Constitution.[206] These values are in fact at the heart of the Constitution,[207] and any confining of the rights because of a fear of drawing lines exposes the equal protection flank of any such argument; it specifically leaves open the danger that if a different "moral" choice is made, it can be imposed on the public, in the name of government promotion of "morality".

Indeed, most proponents of a substantive due process vision agree that the state can "legitimately seek to foster a particular morality."[208] For instance, in Karst's words:

> The critical point in the analysis of a claim of freedom of intimate association, then, is not whether the state is seeking to promote a moral view, but whether the state has offered sufficient justification for a given type of impairment of intimate associational values. 209

The problem, though, is how to define "sufficient justification, having permitted the principle of moral regulation without defining what moral vision is constitutional."[210] To reject "any notion that only 'instrumental', 'utilitarian', or otherwise 'non-moral' appeals may be advanced in support of restraints on fundamental freedoms"[211] is only tolerable with a coherent explanation of why certain substantive moral appeals are constitutional while others are not. Without such a standard, we are back to a majoritarian domination; the substantive values protected today become tomorrow's "immoralities" or "excesses".

Commentators of Karst and Tribe's caliber recognize this problem, of course, and propose a variety of hedges. Tribe, for example, writes in defense of minority claims against majority distaste and prejudice: "The necessary premise of all such rights [of personhood and expression] is that being forced by the sovereign to conform is more intrusive than being forced by the unusual to avert one's gaze."[212] This approach maintains that the values implicit in the First Amendment are of supreme worth in and of themselves, "an element of the human."[213]

While this is true,[214] without a more explicit linking of this vision to its grounding in the Constitution, there is no way to reject competing conceptions or to bar the government from enforcing them.[215] The proponents of this position are left arguing that "the power to reinforce one type of relationship must not extend to an authority to stamp out another;"[216] with no further answer to the logical question of a would-be "moral" reformer as to why not, short of something more. The claim to equal respect for the substantive rights of gay individuals is left exposed to the judge's particular moral bent. Although the proponents of this school believe that, in our system, "moral responsibility lives in the only place it can live, the individual conscience;"[217] the judge may not. Absent a fuller appreciation of the human rights involved and a better understanding of what role they play in our constitutional system, the rights of individuals equally to live and love in freedom lie at the mercy of sexualism and government oppression.

(2) Inadequate Solutions

Lacking more comprehesive theories, the commentators have put forward a variety of proposals to match their conceptions of the interests at stake in samesex union and the right to equal protection. These have included the creation of a "quasi-marital status";[218] personal contracts or private conjugal partnership agreements,[219] drawing strength from Marvin v. Marvin;[220] and the equal access to marital benefits regardless of formal marital status,[221] as in Quebec,[222] for example. The theory in settling for such compromise arrangements[223] is that the equal protection analysis may not be compelling enough to induce the Supreme Court to oblige the states to alter their institutionalized versions of marriage, but does support the claim to marital benefits.[224]

Its proponents conceive quasi-marital status as "solemnized" in the same way as male-female marriage, as receiving the same treatment in cases of divorce or or dissolution, and as establishing entitlement to the same financial and other benefits.[225] "The only legal difference between marriage and quasi-marital status is that the former would continue to be a heterosexual institution, whereas the latter would create an option exclusively for homosexual couples."[226]

Quasi-marital status, in other words, is a "separate but equal" marital institution; therein lies its inadequacy.[227] Such a solution, like the other compromises that have been advanced, does not do justice to the rights of self-expression and self-definition cherished in our system.[228] It fails to recognize the inherent stigma in being labeled "separate", in being denied the full associational equality on the basis of an irrelevant and impermissible "moral" classification.[229] Such government imprimaturs and categorizations inevitably constitute badges of distinction, unconstitutional governmental moral judgements, themselves violative of the fundamental human rights principles of equal respect for individual free choice and self-development. Finally, drawing such an unfounded distinction, the government harms all citizens, forcing the kinds of choices and labeling which mar and constrain the sexuality and autonomy of all.

C. Grounding Substantive Human Rights and Equal Protection in the Constitution

Legal developments and analyses such as the ones evaluated above in the argument for samesex marriage contribute to "the redefinition of the moral setting in which constitional doctrine grows."[230] The commentators who have sought to explain the courts' decisions on samesex marriage, on gay sex, and on "privacy" generally have attempted to work within the familiar conepts of the Equal Protection Clause and substantive due process in order to each judges singularly sensitive to personal and societal prejudice on these issues. Their arguments have been sound and persuasive, and constitutionally correct. A Supreme Court that can define privacy so as to deny the right of individuals to enjoy consensual activity in private with adult partners of their choosing, however, clearly needs something more.[231]

The Supreme Court must be shown that privacy arises from a moral theory of the Constitution which primarily emphasizes human rights of freedom and equality.[232] It is based on a personality theory and awareness of cultural diversity which alone can serve the real needs and rights of all individuals within our society. Privacy is not merely a general "individual interest in avoiding disclosure of personal matters."[233] Preeminently, the privacy right is an "interest in making certain kinds of important decisions free of undue government restraint or discriminatory treatment."[234] It is the right to be let alone, like everyone else.

Because the Supreme Court is that part of the government most "institutionally receptive to pleas for national tolerance of those whose domestic arrangements have heretofore received little popular support,"[235] it has a special role to play. Even more important, it has the constitutional obligation as well as the "unique potential to bestow a national benediction upon unconventional domestic lifestyles,"[236] as is required by the fundamental principle of equal respect. The Court, of course, usually hesitates to go far with its persuasive powers,[237] even when it understands its moral, constitutional obligation. Therefore, any full argument for samesex marriage, for example, must discuss not only these moral principles and theoretical

tools, but also the empirical realities of all individuals and institutions in our society.[238]

Doe v. Commonwealth's Attorney[239] is a classic example of how everyone in society loses when the Constitution's moral vision is ignored and human rights are violated. The refusal to perceive private consensual sexual relations as within the protection of privacy was a blow not only to gay lovers, but "a much broader setback for all nonmarital sexual conduct."[240] Ignoring Eisenstadt v. Baird,[241] which made marital status irrelevant to Griswold-like situations, the majority in Doe declared that gay sex is "obviously no portion of marriage, home, or family life" and therefore not protected.[242] Even aside from the issue of just why gay individuals cannot marry in America today, the court is plainly wrong; gay people are part of marriage and family: they sometimes marry nongay people; they often have children;[243] they always are someone's children and have grandparents, siblings, and so on.[244] Denial of these interests any weight indicates the perversity of any reading of Griswold to exclude Doe.[245]

The dissent drove this home forcefully, citing Supreme Court cases which demonstrate that "intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause."[246] They uphold the "right of individuals to make personal choices, unfettered by arbitrary and purposeless restraints, in the private matters of marriage and procreation."[247] Accordingly, the dissent concluded, the "right to select consenting adult sexual partners must be considered within this category... [especially in] the private dwelling of a citizen."[248] The judge reaffirmed the

> principle that every individual has a right to be free from governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate coneern. Private, consensual sex acts between adults are matters, absent evidence that they are harmful, in which the State has no legitimate interest. 249

The Doe dissent thus hit the critical constitutional points: free choice, intimate values, absence of harm, no legitimate state interest in regulation, and, finally, the impermissibility of government promotion of "morality". "The issue centers not around morality or decency, but the constitutional right of privacy."[250]

Doe notwithstanding, the Supreme Court has indicated, over at least one member's vigorous protest, that the issue of constitutional protection for private consensual samesex activities is unsettled.[251] Ideally, the next time the matters comes before it, the Court will have found its way to a clearer understanding of the constitutional vision and true nature of privacy at issue.[252] Perhaps that instance will be another demand for recognition of a samesex marriage.

When that time comes, the individual and social rights at stake warrant a new understanding of the significance of the equal protection and due process values to marriage and sexuality cases. It is not enough to observe that

> The equal citizenship principle serves in the context of intimate association as it serves elsewhere, not as a result-producing formula, but as a substantive guide to the interest balancing that the Supreme Court has recently practised in the name of a variable standard of review. 253

Nor is it sufficient to urge attention to equal protection aspects of discrimination because targeting particular groups makes restriction worse.[254] The core right to autonomous free exercise of one's capacities is what demands equal respect, in and of itself, and not merely as a neutral means of assuring rights or rectifying anomalies.[255] The Equal Protection Clause should be recognized as a moral insistence that no single vision narrower than the Constitution's promise of human rights, whether conventional tastes, religious prejudice, paternalistic stereotypes, arbitrary and oppressive structures, or an "ideology of metaphysical familism",[256] can replace the substantive constitutional choice for human rights. Freedom and equality for all individuals are the American constitutional moral vision.

Similarly, the citizens, courts, and commentators must not undervalue them. The import of "intimate association", for example, "looms [] larger than the values

of freedom of expression in the lives of most of us,"[257] and yet expression itself is often the key to self-definition and self-worth.[258] Marriage, as a commitment and a statement, evokes these core constitutional concerns for every individual, and for society as a whole. For gay lovers, whose very self and social definition involves an expressive act of love,[259] the issue is paramount. A Supreme Court justice once warned of "the dangers that beset us when we lose sight of the First Amendment itself and march forth in blind pursuit of its 'values'."[260] The opposite is perhaps even more dangerous: drawing and redrawing categories, for instance, of "privacy", that lose sight of the human rights vision of the Constitution: freedom and equality. For individuals who wish a public commitment of love and life together with the partner of their choice, this failure is oppressive, in real terms, not just in principle.[261] Because such a denial is also immoral and unconstitutional, it is time to recognize samesex marriage with equal respect and joy.[262]

II. CHANGES IN MARRIAGE AND THE FAMILY IN AMERICA

The growing demand for recognition of samesex marriage and the breakdown of sexualist attitudes and restrictions generally have roots in two historic egalitarian trends. One is the movement for racial equality with its implicit appeal for acceptance of cultural diversity.[263] The other is the "sudden success" of the feminist movement, narrowly viewed as "women's" liberation, but, in fact, a commitment to the elimination of gender-based constraints on all individuals.[264] These "movements" in turn, both reflect and inspire a "cultural revolution"[265] of change in idea and in actual practice of living. The simple fact is that Americans live and love differently than ever before, in a way which belies their own stereotypes and prepossessions.

Unfortunately, the law, and particularly the Supreme Court, have often lagged far behind the changes in society. Although the courts played a cutting edge role

in the fight against racism,[266] they have largely resisted participation in the struggle against sexism and sexualism. In particular, the courts have fought a rearguard action on behalf of the "family as a unit", narrowly, traditionally, and now, inappropriately conceived,[267] against the "atomizing ideals of liberty" required by the Constitution.[268] Aside from being constitutionally intolerable as violative of individual human rights, the law's attempt to shore up a particularized model of family and marriage at almost any cost is not in the best interests of either society at large or individuals as they live today.

In fact, the traditional institution of American marriage as apparently conceived by most courts and current folk-images,[269] is unduly confining to many who seek to structure their lives in their own way.[270] The conventional sterotype strives to enforce the thesis that one man and one woman will find happiness if they commit themselves to live together for life.[271] The message promotes more than merely sexual and social monogamy; it imples a fulfillment in psychological monogamy (not to mention its possibility), and an assumption of happiness for the partners with and through each other.[272] In every way, it makes choices and defines commitments more appropriately left to the individuals involved.

In Loving,[273] the Supreme Court acknowledged that the fundamental nature of the choices in marriage required freedom for individuals to arrange their lives together independent of state or social preconceptions and stereotypes. Loving, of course, dealt with race, but the principle applies to the entire issue of autonomous choice equally protected against meaningless restraints based on prejudice or paternalistic "moral" visions.[274] The case has its irony: "Too tightly constricted, that decision becomes the repository for our most provincial mores; too freely expanded, it might make traditional marriage a meaningless concept."[275] To the extent the state uses marriage to promote a particular vision by arranging the lives of lovers, this may be true. Where marriage is a ratification and easing of individual choice, however and the government plays its proper role of protection

and assistance within the Constitutional limits, loving becomes the only important issue, and the meaning of marriage.

For many Americans, the entrenched legal status of the stereotypic nuclear family is both legally and economically burdensome,[276] and a source of stigma and oppression. Those who suffer include people excluded from the institution for reasons beyond their control,[277] as well as individuals whose self-definition and commitments lead them not to sign up on the proffered state terms.[278] The groups denied access, whether explicitly or de facto, tend to be those on the fringes of contemporary constitutional protection and social regard--gay individuals forbidden to express their love, for example, or "members of minority groups for whom economic, social, and cultural pressures cause disproportionate rates of family breakdown."[279] Others, especially women, are harmed by the nature of the particular vision imposed.[280]

Most commentators, if not courts, have begun to admit that the traditional marital and family "model[s] have been with us too briefly and [are] changing too quickly to be the real basis of the state's interest in the area."[281] They see the state as trying to promote the family not because of its particular social manifestations--i.e., its role in procreation or its roots in religious tradition--but from some more general and benign awareness of its unique role as a source of socialization.[282] A survey of cases and statutes shows this view to be overly charitable. In any case, the government's efforts to make the family and marriage in America conform to a certain image are misguided, in light of the changes that have already occurred[283] as well as the human rights always at stake.

A. The Traditional State Conceptions of Marriage, the Family, and Their Benefits

> The family unit does not simply coexist with our constitutional system... it is an integral part of it because our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption more deeply underlies our society. 284

This legal commentator's view of the family is confirmed by anthropologists, who see it as playing a "mediating function in the larger society."[285] As a result,

one reason propounded for protecting family relationships is that the elimination of intermediate groups leaves the individual exposed against society, and society without a useful means of social education.[286] While this may be true and important, it argues only for the protection of some kind of interpersonal relationships, not any particular kind. As overwhelming evidence demonstrates, the "human family is a social relationship, not an entity defined in nature."[287] Further, to the extent family and marital relationships promote other ends, particularly as solutions to the recurrent human problems of loneliness, alienation, and mortality,[288] the restriction of their joys and meaning to only those who fit a narrow conception is even more oppressive.

Accordingly, the cases widening the range of individual choice speak in broad terms. The early and major "privacy" cases involved some nexus between "family" issues such as procreation and individual rights confirming and constituting the values in a marital union. In Griswold itself, the Court held that marriage is

> a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. 289

Marriage is correctly seen as fundamentally a choice about structuring lives together--self-definition, and fulfilling basic needs of love, understanding, and creation. "Above all else, marriage is two people living, working, and loving together. It is the voluntary commitment of one individual to spend a lifetime with another."[290] Marriage is not merely an instrumental means to the procreational and social engineering end, the engendering of another nuclear family. "While it may have been true at one point that the primary purpose of marriage was the rearing of a family, even a casual observer of contemporary mores would have to agree that such is no longer the case."[291] The supreme values in marriage and the family are best served by a faith in those values, letting individuals construct their lives

with the equal protection of a supportive society and state.

Indeed, given the infinite variety of human experience and personality, it is not surprising that both historically and in reality today, traditional definitions of marriage and the family are inaccurate depictions of the ways people share their lives. Although marriage as traditionally defined in the United States is between one woman and one man, "other types of marriage are easily conceivable and often practised in various areas of the world, e.g., polygamy, although illegal in the United States, is within the definitional scope of marriage."[292] Courts often cling to their private moral visions within the refuge of"objective"semantics.[293] The problem with resting decisions about minority rights on "definitions", of course, is that the definitions often lag behind social reality, or, worse, merely reflect prevailing prejudice, not reason.[294]

In ancient societies, for example, the institution was not equivalent to the modern conception.[295] It was at once more informal and more rigid, and involved a different view of sexuality and love.[296] Contrary to current belief, which views the traditional judicial image of marriage as somehow both natural; and "as old as Genesis",[297] early Christian theologians, for example, had explicit difficulty in even deciding who was married.[298] "Western culture has shown a marked ambivalence regarding sexual relations, including sexual intercourse within marriage."[299]

In America today, empirical and sociological data prove that the "trend has been from uniformity to diversity."[300] Not only is the "formal family" no longer the exlusive [socially acceptable] unit for bearing and raising children",[301] but cohabitation has raised the "shadow institution of informal, de facto marriage",[302] beyond mere past analogues such as "common law marriage."[303] The apparent traditional model which the law has labored to promote no longer conforms, if it ever did, to the sexual,"ethnic, racial, religious, and normative diversity characteristic of our pluralistic society."[304] The "typical American family", a married man supporting a wife and children, in fact constitutes only six percent of all contemporary

American families.[305] Arguments to restrict marriage to those who conform to the stereotype not only miss the mark, they have missed the boat.

The law makes choices regarding marriage in three related ways: "ease of entry into formal associational status", ease of "termination", and the legal consequences of the status itself, all in the state's control.[306] The more important the status, the harder it is to justify a "state imposed restriction" on access to it.[307] Because there are significant legal consequences to the marital status in addition to its human rights values,[308] the state's attempt to maintain a narrow definition through limiting access to it has come under challenge, as in the case of gay lovers. In order to preserve its parochial moral vision, the state's general response has been to decouple some of the benefits of marital status, although many still remain (including the intangible ones of approval and equality). That this reduction undercuts the validity of sustaining its moral vision in the first place is readily apparent. A further problem, however, has been the failure to respond to larger social and real individual needs. In fact, the "present laws not only unfairly burden married women [and minorities such as gay lovers], but are also founded in large part on social assumptions which are anachronistic and inappropriate to modern society."[309]

A comprehensive analysis of the traditional legal institution of marriage is beyond the scope of this article. It is clear, however, that certain features of that narrow judicial conception[310] and the stereotypes and prejudices upon which it is based cannot withstand the constitutional scrutiny which the human rights vision suggested here require. Not only are they inconsistent with any meaningful definition of privacy, freedom, and equal protection, but they are also empirically inapposite. These unconstitutional preconceptions not only stand in the way of samesex couples, but block the full freedom and self-discovery of all Americans. Each should be abandoned, and the law should reflect:

(1) No further assumption of permanence

The law has traditionally approached marriage as being, by definition, a permanent commitment,[311] even despite the immense increase in divorce. Such a view impermissibly relies on theological doctrines of "indissoluble holy union".[312] In fact, the 1970's have seen a growing acceptance of divorce as "normal", which it may be in some cosmic sense of human independence.[313] The complementary value of human interdependence, however, is perhaps responsible for assuring that divorce has not lessened the attraction of marriage. People seem to reject their partner not the state of marriage itself.[314] Aside from reworking the divorce laws,[315] the courts should approach marriage itself without a preconception of permanence. Such an attitude would more accurately correspond to the social reality of "serial monogamy."[316] To the extent it increases an appreciation of how samesex marriages can serve marriage ends, such a change would be helpful.

(2) No further assumption that procreation is essential or primarily relevant

In the past and in other types of societies, perhaps, "marriages were devised as means of insuring succession, which was necessary."[317] This assumption that the marital union was principally a device for producing and legitimating children had many consequences, including: the granting of annulments for sterility,[318] the traditional regulation of premarital or extramarital sex, restrictions on contraception, an oppressive sexist priority to women's maternal roles, tax and other incentives for reproduction, and the prohibition of samesex marriage.[319] The major "privacy" cases began by knocking out some of these results as intrusive on more fundamental values.[320] People, too, have ceased to link the two, seeing the decision to marry as one thing, and the decision to have children quite another.[321] Courts should follow through and remove this element altogether; procreation has no necessary connection to marriage and the benefits it brings to those who seek it. People should not be denied access to the marital state because they cannot or choose not to reproduce.

(3) No further assumption of gender-defined roles

The traditional American vision of marriage and family life has relied on a sexist set of gender expectations harmful both to women and men.[322] In the marital context, one of the most detrimental constraints these sex roles have created has been the curbing of female activity outside the home.[323] One expert has concluded "traditional marriage makes women sick--both physically and mentally."[324] Nevertheless, over time, Americans became accustomed to associating certain behavior and roles with women, and others with men.

Major changes have occurred challenging the validity and applicability of these sexist restrictions, particularly an increase in the number and percentage of married women and of mothers (even of young children) working in the paid labor force, and in the importance of these women's wages to the vital support of their families.[325] Together with the growing emphasis on the emotional and personal needs of the married lovers at the expense of past economic or functional conceptions of marriage, these societal forces have brought about an enhanced egalitarianism in family and marriage patterns. Gender-based prejudices are demonstrably false and wasteful, and provide no legitimate basis for the state's insistence on a particular vision of how people of either sex should live.[326]

(4) No further assumption of a monogamous male-female union

American law has institutionalized a particularized version of the Christian ideal of monogamy as formulated by medieval theologians.[327] The consequences of this imposition have included the prohibition of bigamy, polygamy, adultery, extramarital sex, and samesex marriages.[328] Nevertheless, the number of people disregarding these purported social norms is sizable and growing.[329] The Supreme Court concluded in 1972, the law cannot simply refuse "to recognize those family relationships unlegitimized by a marriage ceremony."[330]

Indeed, the available data on extramarital sex make it plain that "we pay lipservice to the monogamy ideal but in fact do maintain a significant variety of other forms of sex life."[331] Monogamy as an independent concept has come under

severe theoretical and empirical attack.[332] Forms of sexual intimacy once branded immoral are no longer so viewed[333] by the mainstream, while the idea that a union with one partner must fulfill all one's needs is less and less accepted.[334] "Marriage-style relationships may be appropriate for child-rearing and some forms of love experience, yet the alternatives are by no means second-rate substitutes. They are valid expressions of love in themselves."[335] That some people may prefer a single partner for all purposes in no way requires that marriage be so conceived for all.

The traditional restrictive "moral" vision had roots in theological thought which "explicitly rejected eroticism as a positive human experience."[336] Marriage and sex were subordinated to functional ends: "A man who loves his wife too much is an adulteror...the upright man should love his wife with his judgment, not his affections."[337] Sexuality was the enemy, not gay love; male-female relations were viewed as the chief danger to the soul.[338] Just as we have rejected this conception, so should we move beyond unthinking reiteration of irrelevant requirements for married happiness. It is the values marriage represents that are essential, not the presumed prerequisites ungrounded in truth. Individuals should be permitted to partake of those values in the exercise of their constitutional human rights free of the narrow restrictions of others' limited vision.

When the law has ceased to reflect these impermissible prejudices, conditioning benefits upon the status of marriage will be more acceptable. In fact, rather than abandon its power to withhold legitimacy for some unions, the state has tended to reduce the connection between marriage and marital benefits.[339] Indeed, in reponse to the pressures described above, the state has begun to regulate marriage less in general,[340] focusing rather on the individuals involved.[341]

Since marriage has become less significant in terms of the material benefits it determines, then, if follows that the legal consequences of marriage are less

distinguishable from those of other intimate associations.[342] The state's interest, too, is correspondingly lessened. In fact, only one element has remained constant through all these changes: the importance of the human rights values of expression, self-identification, and autonomy--and of love.[343] While all other interests falter or dissolve, these remain alive and urgent, the main goal for lovers of whatever sex and sexuality who seek to build a secure, happy, and creative life together.

B. Changing Attitudes Toward Women, Gender Roles, and Sexual Stereotypes

No discussion of the marriage and the law's response to date would be complete without some special attention to the impact of feminism and the change in sexual stereotypes accelerated in the 1970's. The destruction of those continuing prejudices has an obvious importance to the liberation of the human personality and social richness, for sexuality as for opportunity in general.[344] In legal terms, the discrediting of stereotypes that constitute the "rational" justifications offered for restrictions on marriage and self-expression[345] would impel the overruling of constitutionally baseless laws.[346] Although guilt, fear, and bigotry may remain, as is the situation still confronting religious and racial minorities and women, at least the law will then be on the side of the oppressed, supporting their constitutional and human rights.[347]

"Sexual arrangements" include the "division of responsibility, opportunity, and privilege that prevails between male and female humans, and the patterns of psychological interdependence that are implicit in this division."[348] Analysts have differed over the causes of various sexual arrangements, particularly, those that subjugate one group to the domination of another. Ours is not--yet--an androgynous[349] world, where sex and sexuality cannot be seized upon as differences warranting discrimination.[350] Presumably if anyone could be found in any position (for example, as childbearer or rearer), the sexes would treat each other more equally.[351] A character in a novel which evoked such a world, remarked that on his fictitious planet, sex roles do "not exist. One is respected and

judged only as a human being. It is an appalling experience."[352]

On our planet, women have largely paid the immediate price of subjugation, stigmatization, and repression. One author suggests the image of a mermaid as woman's archetypal theme, the seductive female luring us where life comes from and where we cannot live.[353] Others have concluded that "sexual attraction thrives when and only when the partners are in some sense alienated from each other";[354] accordingly, the sexes have pushed themselves apart through socializing patterns such as "male bonding" and domination.[355] Some commentators locate the problem in biological terms ("anatomy is destiny"),[356] while still others lodge the prejudice in the "universal" tendency to "primary female responsibility for the care of infants and young children."[357] Regardless of its origin, by the end of the sixth century, Christians were formally debating the issue as to whether or not women were human beings.[358] Such sexist discrimination against women found its way into American law and, particularly, the law of marriage.[359]

The negative attitudes toward women familiar in most of Western society had a major role in the development of hostility toward gay love and eroticism.[360] Gender expectations, with their concomitant (and inappropriate) condemnation of men who "play the part" of women, were a prominent historical cause of sexualism.[361] Although these attitudes came into Western law in part through religion, they were in fact based on misreadings and misinterpretations of fundamental Jewish and Christian sources.[362] For a variety of reasons,[363] the sexes found themselves entrenched in a pattern of alienation, apartness, and confinement.

Recently, social scientists have questioned the desirability of such polar sex roles and of stereotyped sex-role models. Sexist role models, indeed, sexualist ones, are increasingly seen as limiting the child and restricting intolerably the personality.[364] Role-modeling and gender-socialization means that by age five children have learned "appropriate" behavior for their sex, perhaps even more extremely than adults.[365] "Every society encourages its members to see particular

modes of behavior and particular bodily features, not others, as sexual."[366] To some extent this is unavoidable; the main problems are avoiding a sense that what society has shaped is somehow "natural" and exclusively "moral, and not restricting individual freedom and creativity more than is necessary. Fortunately, American society has begun to move away from its sexist and sexualist stereotypes, in some ways working from the outside in.[367] The family is at once the main bastion of sexism and the primary place of experimentation and progress.

The trend toward egalitarian patterns is evident in the "growing acceptance of the idea that the man can stay home to raise the children while the woman returns to the labor force."[368] Other indicia include, again, new attitudes toward birth control and sexuality.[369] Perhaps the most intriguing new indicator is the recent wave of androgynous culture enabling "the mass of theatergoers, and not just those with special tastes [to] get a laugh, and quite often a lesson, out of the infinite varieties of sexual experience...an extraordinary revolution in American sexual thinking."[370]

This revolution is due in part to a rethinking of the gender-expectations, and further, of gender itself, caused by "an accidental partnership of feminism and science."[371] Clearly, "today's audiences [are] willing...to entertain the possibilities of real sexual ambiguity."[372] "Men are playing women with the implication that this is an enlargement, and not a diminishment, of their personalities--surely a reflection of changes in our cultural attitudes."[373] In one current film, for example, Americans are treated to "the unnerving sexual pull of the attractively androgynous."[374] The recognition of androgyny and its values "is a real breakthrough and has a lot to do with a perception of the failure of patriarchy."[375] As one commentator on this current cultural wave concluded:

> It is a revolution that has spawned a vastly greater tolerance for unconventional sexual behavior than was imaginable twenty years ago.... The more we know, or can bear to know about ourselves, it seems, the less the old conventional, patriarchal strictures seem to apply. 376

The commentary is almost as revealing as the developments themselves. Actually, it is the revolution in behavior, expectations, and understanding that has produced the cultural recapitulations and elaborations of it. Androgynous values represent a manifestation of the infinite personality and social diversity which demand constitutional protection as human rights. It is time for the law to let people live and love in equality and real freedom. As with racist barriers, and now with sexist restrictions, so sexualist prejudices should fall before the mighty human claim to love and fulfillment.

C. The Law's Response to Date

Modern jurisprudence has seen some improvement in the situation of women, and considerable reduction of the sexist law, although there is far to go.[377] There has also been a growing recognition that the law must take a new look at what has happened and is happening to marriage and the family in America.[378] One case recently presented the question whether one gay lover could adopt another as a means of achieving some legal recognition of their mutual commitment, given the refusal of the state to register their marriage. The judge, granting the petition, held:

> The "nuclear family" arrangement is no longer the only family life in America. The realities of present day urban life allow many different types of non-traditional families. The statutes involved do not permit this court to deny a petition for adoption on the basis of this court's view of what is the nature of a family. In any event, the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person. [379]

Although the right result, samesex marriage remains one goal among many still withheld.

The law has responded to the social revolution in behavior and attitudes in several ways. There has been some activity regarding statutes which affect marriage and sexuality, including some decriminalization of private consensual sex between adults,[380] no-fault divorce, and, for example, the New York Human Rights law defining as "family" members any two people at the same address, even if not married or

related by blood.[381] Numerous cities and one state, Wisconsin, have acted to prohibit discrimination on the basis of sexuality.[382] New administrative regulations have also been adopted; for example, the Federal Civil Service bars disqualification from federal employment because of sexual orientation.[383]

Finally, courts have begun to reinterpret old statutes and cases. In Pryor v. Municipal Court,[384] the court excluded the solicitation for sex acts to be performed in private from the meaning of "lewd or dissolute conduct." Judges have grown increasingly willing to recognize express and implied contractual agreements between samesex couples.[385] In Bezio v. Patenaude,[386] the Massachusetts Supreme Judicial Court held that gay parents are not unfit per se because of their sexuality, rejecting the lower court's opinion. Currently, in Pennsylvania, a lover has gone to court to have his longterm relationship with another man recognized as a "common-law marriage."[387]

For all individuals, whatever their sex or sexuality, marriage and family represent clusters of the most basic values, protected by their human right to choose, to pursue happiness. One individual writes, "if freely chosen, a marriage license is as fine an option as sexual license. All I ask is the right to choose for myself, but that is exactly the right society has never [sic] granted."[388]

He concludes:

> Living outside the law, we gay people have always been free to invent our own relationships according to our own rules. No matter how we arrange to avoid the traditional role playing...the right to choose marriage still remains the ultimate normalization of relations between nongay and gay society. It extends the impact of gay anti-discrimination laws because it not only recognizes the right to be different, it recognizes the right to be equal. It acknowledges not only gay pain, but gay pride and pleasure. It says that our friends not only pity us, they respect us and believe our love is as real as their own. But they do not. 389

It is time to lift that sentence off the heads of gay women and men in America.

III. TOWARD A BETTER UNDERSTANDING OF SEXUALITY AND SEXUALISM

Among the many distinctions Americans draw as grounds for discrimination against other Americans--for example, religion, race, sex, age--perhaps the most subtle and deepest rooted is sexuality. People believe that certain patterns of sexual and

emotional attraction are "natural" and even "moral", to the exclusion of all others. In particular, our society has become accustomed to a division of people into classifications by sexual orientation: a nongay majority and a gay minority, somehow wholly apart and different. As is typical of prejudice, major definitional problems[390] and substantial evidence[391] are ignored in favor of a condemnation of the character and conduct of other people. Gay individuals[392] are seen as alien, immoral, and even dangerous, as violating fundamental imperatives of religion and biology in a manner wholly divorced from the beliefs, practices, and self-conception of the "majority".

It was not always this way. Ancient cultures, for example, never bothered to class individuals according to the gender of their lovers, friends, or sexual partners.[393] The gay/nongay distinction was a trivial or even incomprehensible one, an irrelevant way of appraising a human personality. John Boswell, a leading historian of the changing social tolerance of gay people in the ancient and medieval worlds, notes that "majorities...create minorities in one very real sense, by deciding to categorize them."[394] Left-handedness, for example, is only important where "manual preference takes on social significance and people make it their business to categorize their countrymen on that basis."[395]

One intriguing question is why societies choose the categories they do.[396] While "neither the Roman religion nor Roman law recognized homosexual eroticism as distinct from--much less inferior to--heterosexual eroticism,"[397] ours does, invidiously. Where "Roman society almost unanimously assumed that adult males would be capable of, if not interested in, sexual relations with both sexes,"[398] ours does not, perhaps erroneously. Finally, where ancient societies recognized and often esteemed formal samesex marriages,[399] ours still will not. In America, "the closer [samesex love] moves toward something that might gain outright acceptability, the more it arouses and alarms the very considerable forces against it--forces that none too patiently await their chance to relabel it as outrageous."[400] Understanding how sexualist distinctions achieved their force and place in our society may be even more difficult than understanding

the nature of our sexualities themselves. Undoing sexualism, however, going beyond mere tolerance to a greater freedom for all individuals,[401] makes the attempt worthwhile.

Sexuality, any sexuality, is hard to analyze. As one writer put it in discussing gay sexual orientation:

> It is largely amorphous--a behavioral category of individuals who are about as diffusely allied with each other as the world's smokers or coffee-drinkers, and who are defined more by social opinion than by any fundamental consistency among themselves. [402]

Studying orientations identified as "minority" ones historically poses serious problems, notably the longevity of prejudice against them, historical falsification, the inward personal nature of the subject, and the difficulty of avoiding anachronistic stereotypes.[403] Researching sexual orientation as a legal issue today encounters similar obstacles.[404] Finally, observing and analyzing the sexuality of diverse individuals, often oppressed and repressed, in scientific efforts to understand our sexual orientation and behavior, have major difficulties all their own.[405] One recent, respected study concluded that "Literally so little is actually known of the physiologic and psychosexual aspects of homosexuality that it is uncertain just how ignorant we are about the subject."[406] Martin Weinberg, perhaps the leading scientific expert on the subject of gay sexuality, has stated that "all previous research should be thrown out, and we should start over."[407]

Despite this latecome caution, however, experts have largely reached consensus on several major conclusions about sexuality and gay sexuality, although they still differ on the question of etiology.[408] Many of the shared expert opinions have begun to find their way into judicial decisions. In 1976, for example, the Fourth Circuit declared that: "Homosexuality is a continuum and...people line up on the continuum with varying degrees of homosexual tendencies, so that there are few people of one-hundred percent either homosexual or heterosexual traits."[409] The court deplored the "erroneous conception that homosexuality is a matter of conscious choice,"[410]

and concluded that "sexual orientation is actually determined in the early years of life."[411] Whatever forms people's individual sexualities, it is society and their personal methods of coping that make people "gay" or "nongay".

The earliest major study suggested that people should not be characterized as "homosexual" or "heterosexual", but as individuals with certain amounts of male-female or samesex experience.[412] This cuts back to the problem of definition: are all of the American men who have had sex with another man (at least one-third of the adult male population)[413] gay? If so, what about sexual experience with and attraction to women? Is it one experience or many that counts? Or is it some element of conscious acceptance of one's sexual orientation? What do we learn when we discover that over half of all the men engaging in impersonal sex with other men in public places are married to women?[414] Perhaps only the danger and weakness of classifying human personalities,[415] and particularly of sexualist categories. Like all individuals, gay people "are best understood when they are seen as whole human beings, not just in terms of that they do sexually,"[416] or whom they are drawn to, need, and love.

All recent major studies confirm that "from a functional point of view, homosexuality and heterosexuality have far more similarities than differences."[417] Not only are the sexual orientations indistinguishable physiologically,[418] but there is "convincing evidence that homosexuality is not a criterion predictor of psychopathology."[419] In other words, gay love, like most pair-bonding, is not inherently socially disadvantageous.[420] It, too, offers a mechanism for social organization, mutual assistance, care of offspring, friendship, self-identification, and so on. Gay and nongay relationships "share a host of commonalities";[421] for example, "the settled-in qualities of the homosexual couple tend to be precisely those which characterize the stable heterosexual relationship."[422] The expert evidence suggests, at a minimum, "an attitude of quiet tolerance for the range of ways individuals express their divergent sexual needs with fellow humans."[423]

The problem for gay individuals, studies confirm, is not in their sexuality, but in our sexualism. In America today, "it takes a fair amount of sophistication to realize that intimate expressions of sex and affection can even occur between partners who are alike in their gender and in their general behavior."[424] Not enough people, certainly too few judges and lawmakers, have shown the perception and respect of Bishop Melvin Wheatley, Jr., who, having appointed an openly gay priest to a major parish, declared:

> Homosexuality, quite like heterosexuality, is neither a virtue nor an accomplishment. Homosexual orientation is a mysterious gift of God's grace communicated through an exceedingly complex set of chemical, biological, chromosomal, hormonal, environmental, developmental factors totally outside my homosexual friends' control. Their homosexuality is a gift, neither a virtue nor a sin. What they do with their homosexuality, however, is definitely their personal, moral, and spiritual responsibility. Their behavior as homosexuals may be very sinful--brutal, exploitative, selfish, promiscuous, superficial. Their behavior as homosexuals, on the other hand, may be beautiful--tender, considerate, loyal, other-centered, profound.
>
> With this interpretation of the mystery that must be attributed to both heterosexual and homosexual orientations, I clearly do not believe that homosexuality is a sin. [425]

Instead, gay individuals, like other minorities and disfavored groups such as women, have suffered in America, bearing the brunt of sexualist confinement and stigma, condemnation as "immoral", and denial of access to love and formal union.

Yet people set apart because of their sexual orientation have a different experience of oppression from that of minorities or social victims, although their fates are often joined.[426] Unlike religious or racial minorities, for example, gay people are not generally born into gay families; they must endure social hostility and alienation individually, alone, often without advice or even emotional support from relatives or friends. In this, they are more like the blind than like Jews, for example, but frequently without the familial support, understanding, or even awareness.[427]

Unlike religious, racial, or cultural minorities, gay individuals are socialized through adulthood as if they were not gay, as if they shared the majority's sexualist

stereotypical sexuality.[428] Gay children often believe they are all alone, unique and unacceptably different, with resulting difficulties and psychological distress. That their family cannot share their perceptions, let alone make a rich and valuing celebration of them with a texture of belonging and community, enhances these problems. Gay youth, unlike young blacks or Jews, for instance, do not even have the flip side of ghetto life, the "solace of solidarity in the face of oppression."[429]

As a result, gay individuals, like society as a whole, tend to have no awareness of the historical changes in attitude toward gay sexuality and sexuality in general.[430] In particular, they do not realize just how historically contingent their present position of disfavor really is. The lack of family identification with the source of their oppression means that gay people have no way of commemorating past crises or preserving a historical memory. As a result, when good times return, no mechanism exists to prevent a recurrence of repression;[431] in bad times, gay children, gay people, have no role models to comfort and guide them.

Unlike other minorities and stigmatized groups, it is only when social attitudes are relatively favorable that gay individuals can form visible subcultures; in hostile societies, they become invisible.[432] This is arguably safer,[433] but has the price of increased alienation and loneliness. Further, it significantly impairs the ability of the group to work for change[434] and contributes to the perpetuation of negative social stereotypes.

Keeping gay sexuality hidden provides no alternative vision of a "good" gay life and no means for the conforming majority to appreciate its values and similar core ambitions. It also means that the majority will be able to define the outlets available to samesex couples. This merely offers a self-fulfilling opportunity to stigmatize anew and repress accordingly;[435] More than most groups, gay lovers are defined by how they are treated socially. Therefore, more than most, gay individuals depend on popular attitudes and human rights protection for freedom, identity, and survival.[436]

Not coincidentally, "the law itself has also been a factor influencing attitudes toward homosexuality."[437] One historian even contends that the imperial legislation of Christian Rome "has most influenced modern Western attitudes."[438] Although samesex affection, attraction, and eroticism have always existed, "some societies...have idealized homosexual love, as did the ancient Greeks, while others have harshly condemned it, as did the ancient Jews."[439] Derogatory myths and stereotypes,[440] as well as the religious carryover, are all sources of our current sexualist law.

At the same time, however, the law contributes to and maintains these prejudices, by defining the ways in which people may present themselves and interact sexually and emotionally. If gay lovers, for instance, cannot marry, not only their individual goals and their relationships suffer, but society also loses the chance to see their arrangements and choices as diverse, capable of happiness, and entitled to equal respect. There is no means to explode the stereotype upon which the repression which sustains it rests.[441] This is one of the ways in which sexualism harms everybody, constraining the choices of all of us. This is true even though the particular impact on gay individuals is more readily apparent:

> We are now beginning to realize that social forces have an influence on all kinds of phenomena which we have hitherto analyzed in individual terms. We are beginning to understand, for example, that even physical illness such as heart disease and cancer may be influenced by sociological factors....If this be the case, as is plainly indicated by recent studies, then it ought to be clear that the relationship of the homosexual to a largely hostile society must have profound effects on his life. [442]

Since this hostility in part arises out of, and is sustained directly and indirectly (through the law) by, stereotypes, it is necessary to explore them more explicitly.

A. Personality Theory: An Etiology of Sexuality and Sexualism

One major prejudice contributing to sexualism is the idea that gay sexuality is "unnatural." While it is never clear just what this means or why it is relevant,[443] it presumably at least in part involves the causation or source of sexual orientation. "What 'causes' homosexuality is an issue of importance only to societies which regard

gay people as bizarre or anomalous."[444] Since ours is at present such a society, an inquiry into the etiology of sexuality is invited.

Modern experts differ on the subject, offering a variety of explanations for sexual orientation based on: (1) genetic,[445] hormonal,[446] or other biological factors;[447] or (2) conditioning--not between parent and child[448]--but in society at large,[449] or in very early social (not sexual) experience;[450] or (3) some combination.[451] They concur, however, on a rejection of certain stereotypical conceptions, particularly theories of maladjustment or of gay individuals as twisted or ill nongays.[452]

Thus, one writer evaluates the evidence to say that no single factor is decisive.[453] As with intelligence or other components of the personality, the key is how various internal and external influences combine and reinforce one another in each individual case. As he notes, "how a budding sexual value system drowns out competing alternatives is central to the whole question of how exclusive orientations arise."[454] In most of us, the polarization of our tastes is not confined merely to the issue of gender, but also affects aspects of attraction and interest within each gender.[455] There is a mix of environmental and contingent factors such as circumstances and social conditions, together with the basic biological package that makes up all individuals and their predispositions. Like Aristophanes' metaphorical creatures in Plato's Symposium, we are all less than the whole, as sexual beings, as individuals vis-a-vis the society which helps form us,[456] and as humans of infinite capacity.[457] Weinberg sums it up:

> What we seem to have identified...is a pattern of feelings and reactions within the child that cannot be traced back to a single social or psychological root; indeed, homosexuality may arise from a biological precursor (as do lefthandedness and allergies, for example) that parents cannot control.... In short, to concerned parents, we cannot recommend anything beyond the care, sympathy, and devotion that good parents lavish on their children anyway. 458

Nevertheless, the attempt to reach a consensus has boiled down to a difference as to how significant the biological, prebirth component is, with general agreement

that a person's sexuality is fairly solidly established by early childhood at the latest.[459] One legal commentator notes that "purely physiological explanations of homosexuality have received increased credence as new evidence has accumulated."[460] In any case, almost every single expert concurs that, whatever its origins, "an individual's sexual orientation, once acquired, is extremely difficult to alter."[461]

That does not prevent social attempts at alteration, however. In this sense, even if sexual orientation is biologically influenced, how people live and deal with their sexualities is still a social phenomenon. "Most people see their heterosexual responses as innate and automatic, but trained observers understand that people are specifically heterosexual because they have been geared by their upbringing to expect and want to be."[462] Even if a majority were somehow born predisposed toward male-female attraction, just as a majority is born without 20/20 vision, society exerts a massive pull. "Certainly there is nothing mysterious in how family life communicates itself as a model to be followed by each new generation."[463]

In our society, male-female sexual relationships are given full benefit of socialization, logistic support, ceremony, and other reinforcements, while samesex relationships and gay aspirations are denied almost all. While the family and society may not form a person's internal sexual orientation,[464] they certainly can affect and shape how an individual proceeds to act upon it. Where people are what they are for reasons beyond their control, by their "nature", to confine or punish them without cause or legitimate interest is the true immoral act.[465] As a violation of human rights, such sexualist discrimination is also unconstitutional.

B. Diversity: A Look at the Lives of Gay People

Another major prejudice influencing attitudes toward gay people is the misconception that their behavior is somehow "immoral."[466] Again, it is unclear what is meant, and even why it should be relevant to their legal status insofar as the Constitution guarantees all citizens their human rights regardless of others'

moral appraisals.[467] Generally, however, the popular sexualist stereotypes focus on gay sexuality's disturbing upsetting of gender roles,[468] reputed promiscuity,[469] purported danger to the young,[470] and perceived excessive physicality to the exclusion of other manifestations of love.[471]

This fixation on "sex" and neglect of the full range of affectational, emotional, and psychological needs and desires inherent in gay sexuality ironically conforms to the way in which society restricts the available expressions of gay love. Society makes the rules and then condemns the group in the name of those who most flagrantly violate them, those who are most visible. Gay individuals are refused access to marriage, and then blamed and further stigmatized for not having marriage-like relationships or values. In fact, of course:

> Homosexuality encompasses far more than people's sexual proclivities. Too often homosexuals have been viewed simply with reference to their sexual interests and activities. Usually, the social context and psychological correlates of homosexual experience are ignored, making for a highly constricted image of the persons involved. 472

Gay love, like its nongay equivalent, generates "numerous lifestyles" which include more than mere sex, and, often, only one partner.[473] Indeed, "there are clearly more differences between individuals and individual couples than there are between kinds of couples."[474]

One important fact is that most gay individuals, as well as those with some inchoate attraction or interest in others of their gender, do not publicly identify themselves as such.[475] They may not so conceive themselves,[476] or else survive only "by living a double life of 'sheer, unmitigated fear'."[477] While some gay people manage to buck sexualist oppression and even exploit their differences,[478] most live in "the closet", an apt metaphor for the confinement of their precious human personality. Whether they deny their sexual orientation to themselves or try not to act upon it, such gay individuals miss out on basic values and opportunities of life and love.

By contrast, "the lifestyles of people who consciously accept their homosexuality vary far more. Self-acceptance opens the door to a great variety of possible arrangements....For the homosexual who is largely free of fear and self-doubt, there are often more social (and sexual) opportunities than he has time to exploit."[479] More and more gay individuals, naturally, are rejecting the social constrictions of the closet and are developing themselves as full human beings.[480] They are doing so with an "astonishing diversity"[481] really not so surprising, given the nature of the personality whose protection is at the center of the Constitution. In fact, the diversity is such that some gay people fear that "Our differences over the ways in which we make love and the lifestyles that grow out of them are threatening to tear us apart."[482] Clearly, no limited stereotype can stand up.

Patterns of sexual behavior are part of the variety of gay, like nongay, sexuality. Social attitudes vary toward forms of erotic expression, often on a "do what I say, not what I do" basis. One such "immoral" and disfavored type of conduct is promiscuity, a charge often leveled against gay people. As Boswell notes, "only in comparatively recent times have gay feelings come to be associated with moral looseness."[483] The stigmatizing myth of indiscriminate, anonymous sex is as true for gay individuals as it is for millions of nongay people who avail themselves of brothels or the typing pool.[484] To the extent that gay people lead promiscuous lives, it is due both to individual choices[485] seemingly ratified by their nongay contemporaries,[486] and to social limitations on other forms of sexual and especially emotional expression. "Many homosexuals view their own promiscuity as a hopefully temporary transitional stage in which they more or less systematically search for the 'right' partner with whom they can have a lasting relationship."[487] Other people are promiscuous for precisely the opposite reason, "primarily to avoid entangling commitments" dangerous to career and social position in sexualist society.[488]

More profoundly, an important reason for what is branded "gay promiscuity" is that:

> society provides them with little or no opportunity to meet on anything more than a sexual basis. Driven underground, segregated in what have been termed "sexual marketplaces", threatened but perhaps also stimulated by the danger of their enterprise, homosexual men would be expected to have an enormous number of fleeting sexual encounters. Sex with persons other than strangers can, in fact, be a liability, the occasion for blackmail and unwanted public exposure. In other words, sex without commitment may reflect an even greater commitment to the reality of their circumstances, given the 'homoerotophobic' society in which they live. 489

That society then uses the stigma of "promiscuity" as a further reason to deny gay individuals equal freedom--for example, access to marriage--is thus cruelly ironic. In view of the religious and quasi-religious "moral" face of the discrimination against gay citizens, it is fitting that the legal approach to sexualism be modeled after the constitutional solution to the problem of religious difference[490] -- non-establishment by the government of any parochial vision, and equal respect for individual freedom. One necessary result is the equal recognition of samesex relationships and gay marriage.

Indeed, "the fact that homosexual liaisons, unlike those of their heterosexual counterparts, are not encouraged or legally sanctioned by society probably accounts for their relative instability."[491] Studies as well as litigation indicate that "a relatively steady relationship with a love partner is a very meaningful event in the life of a homosexual man or woman" in every way parallel to the nongay experience, save for social support.[492] Aside from the social hostility and lack of a reinforcing structure[493] which make it difficult to sustain lasting commitments, gay lovers also face a large pool of competition for their partner's affection. This is exacerbated by the "likelihood that homosexual couples will meet many sexually available partners in their social milieu, conditions which may militate against fidelity to one's partner."[494] As a result, however, "since it is relatively easy for homosexual partners to

backtrack from their mistakes in partner-selection simply by separating, the relationships which do last tend to be excellently balanced."[495] These would be the first individuals to seek formal marital status with their lovers.

"What must an ongoing homosexual relationship have in order to deserve the title--and by what means is its stability to be judged?"[496] These questions are as hard to answer for samesex couples as they are for female-male relationships.[497] The same issues are raised: If permanence is the standard, what if they ever split? if monogamy, what if it is permanent with some side action? if continuing affection is the test, what if they stay together regardless? What if the break-up is due not to some inherent problem or weakness in gay sexuality, but to a misunderstanding or a "particular conflict that neither partner knows how to resolve."[498] The state's experience in the area of traditional marriage has taught at least one lesson: these are issues for the individuals themselves to work out.

"Homosexual adults are a remarkably diverse group."[499] Their behavior as a group is no more "moral" or "immoral" than that of any other such group in America. As for sexualist restrictions on marriage, the human rights of gay individuals are fundamentally at stake because of the importance of the values at risk; some may wish to formalize their union with their lover.[500] The government should be an audience, not a critic or censor, recording their definition and recognizing their marriage, consistent with the Constitution's prohibition on statist impositions of "moral" orthodoxy.

C. Diversity: Changing Attitudes Toward Gay People

Societies have differed dramatically in their approach to samesex love, just as they have in all other aspects of sexuality and family relationships. The ancient world, as shown,[501] was generally indifferent to the categorization per se, while some cultures of the time, particularly urban ones, idealized samesex love above all others.[502] Recent groundbreaking historical study has described the transformation of the "almost limitless tolerance of Roman mores into the

narrowness" of present society, attributing it to a complicated combination of factors.[503] These include the decline of urban civilization[504] and a corresponding increase in the importance of conformity and rigid sex codes.[505] With the advent of corporate authorities willing, able, and eager to enforce particular rules of conduct on individual behavior and thought,[506] gay sexuality, like human freedom in general, went under. Religion itself played a far less significant direct role than is commonly thought.[507]

There was not a simple historical march from freedom and tolerance to repression; the interaction of the urban-rural and government power factors meant that some centuries swung back toward the earlier attitudes of the higher ancient civilizations.[508] Thus, the years c.1050-1150, for example, saw the reappearance of a gay subculture, literature, and network "conscious of their common difference from the majority."[509] The subsequent decline and repression prevented a similar reawakening until the nineteenth century, following the eighteenth century's great revolutions for liberty, equality, and fraternity.

Specific legislation against gay individuals and samesex relations was also late in coming, and historically erratic. The original laws were aimed at particular facets of samesex activities, especially male prostitution and "passivity".[510] The first prohibitions of samesex relations in general came two hundred years after the entrenchment of Christianity at the center of state power.[511] Later measures saw a linkage between gay people and other minorities viewed as dangers to the state, including Moslems, Jews, heretics, and witches.[512] By the thirteenth century, general intolerance of minority groups, the new emergence of powerful centralizing regimes, the general fervor of the Crusades and related ideas, and the theological compilations of the time combined to lay the foundations of the sexualist conformism and anti-gay persecution which has continued to our time.[513]

Part of that attack on gay love was an abolition of the institution of samesex marriage "which had hitherto been legal (at least de facto) and well-known."[514] Indeed, prior to the decline of urban civilization under the Roman Empire, "marriages between males or between females were legal and familiar,"[515] and "references to gay marriages are commonplace" in the history of that era.[516] Samesex marriages were "well-known in the Roman world,"[517] although not confined to it.[518] Even some rural societies recognized them.[519] Legally, gay couples appeared to enjoy a "completely equal footing with their heterosexual counterparts."[520]

Positive, or at least accepting, attitudes toward samesex attraction and love were not confined to the ancient Western world. A 1951 anthropological survey concluded: "In forty-nine (sixty-four percent) of the seventy-six societies other than our own for which information is available, homosexual activities of one sort or another are considered socially acceptable for certain members of the community."[521] Presumably, given the increasing opening of cultures to the values of others, the results would be even more dramatic today. Tribal cultures in South America show a high tendency toward samesex relations, described as almost exclusive.[522] The American Indians evolved a very complex system of gay love and relationships, the <u>berdache</u>.[523] With varying cultural nuances and differing resistance to labels, other societies tolerate and even encourage samesex interaction.[524]

Despite such worldwide variation, American society is in many ways extremely intolerant and repressive of gay love and samesex experience. In the criminal law, as one judge noted, sex with a person of the same gender has often meant a penalty two times as harsh as that meted out to second-degree murderers, six times that of an abortionist, thirty times higher than the sentence meted out to a child molester or drunk driver, and 730 times that of a public drunk.[525] Only recently have such laws been repealed or struck down; they are still on the books in twenty-four state jurisdictions.[526]

Despite some improvement and particular cases, employment discrimination against individuals who love another of their gender is still a reality and a constant threat.[527]

Gay activists, given the limited government protection in this area, have undertaken negotiations with large employers through the National Gay Task Force (founded in 1973), among other organizations.[528] A number of major institutions, corporations, schools, and organizations have committed themselves to explicit nondiscrimination on grounds of sexuality.[529] Several have called for legislation banning sexualist discrimination.[530] The State of Wisconsin, and the cities of Detroit, Harrisburg, Los Angeles, Minneapolis, Philadelphia, San Francisco, Seattle, and Washington, D.C., among others, have already adopted such legislation.[531] There have been significant shifts in popular attitudes and indulgence,[532] yet gay individuals still perceive themselves, rightly, as victims and likely targets of discrimination and animosity.[533]

Sexualism in our society rests not on reason or constitutionally permissible moral judgments, but on vestigial prejudice, ignorance, confused notions of what is "natural", and illegitimate conceptions of the proper power of the state to enforce conformity. The same "moral" condemnations of gay sexuality so often appealed to also proscribed lending at interest, sex during menstruation, jewelry and dyed cloth, shaving, regular hygiene, wigs, keeping kosher, circumcision, working on holidays, extramarital sex, divorce, and gender, religious, and racial equality.[534] Notions of "unnaturalness" and "immorality, largely irrelevant and unconstitutional in any case, do not apply to gay sexuality. As Sigmund Freud wrote:

> Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation; it cannot be classified as an illness; we consider it to be a variation of the sexual function. 535

The time has come to let gay people live and love as equals in the freedom they deserve, in the social diversity the Constitution and human rights esteem and protect.

IV. THE CONSTITUTIONAL VISION OF HUMAN RIGHTS

A. A Moral Theory of the Constitution Founded on Human Rights to Freedom and Equality

A belief in the paramount importance of human rights of freedom and equality animates the Constitution of the United States. As a preeminent defender of human

rights, Justice Brandeis, understood:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things, They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. 536

Brandeis, of course, co-authored the seminal article on privacy[537] often viewed as inaugurating the "privacy" doctrine[538] of the cases following Griswold.[539]

Brandeis' concept of privacy was something greater than the narrow "right of information control" which the Supreme Court has sometimes proposed it to be.[540] The justice was in fact "appealing to an underlying moral argument about the place of human rights in the American contractarian conception of the relations of individuals among themselves and to the state."[541] His privacy vision was the Constitution's purpose--the protection of the "inviolate personality",[542] the curtailment of unwarranted intrusion on a person's "estimation of himself and upon his feelings",[543] and the equal and "general right of the individual to be let alone."[544] This right to autonomy, to equal protection and government deference to individual choice, is the "most comprehensive of rights and the right most valued by civilized men."[545]

If constitutional privacy means the right of all individuals to make their own choices and lead their own lives free of government "moral" regulation, what are the sources of such a vision? What are the values in these human rights of choice and equal treatment? How are they in the Constitution? Given the judicial confusion over privacy and human rights, and the too frequent willingness to play a paternalistic[546] role, it will be useful to address these questions directly.

(1) The Idea of Human Rights and Privacy

Human rights[547] occupied a central position in American political thought even before the Declaration of Independence with its ringing assertions of them. They have moral weight by definition, as they reflect a choice in favor of a view of human nature and the imperatives of, and prerequisites for, protecting it.[548] As

a substantive value choice, they mean that the American constitutional system is not value-neutral, but rather rests on and impels an equal respect for individual thought, expression, and lifestyle.[549] The government, even representing majoritarian tastes, prejudices, or "morality", therefore, cannot override individuals' right to choose, or the choices they make, except to the extent they infringe upon other people's constitutional rights.[550]

The idea of human rights has a history dating back at least to the seventeenth century. Hobbes,[551] Locke,[552] Rousseau,[553] and Kant,[554] all elaborated what was then a radical theory and "way of thinking about the moral implications of human personality."[555] The idea was a powerful one, playing a significant role in the great national revolutions of the seventeenth and eighteenth centuries as it has ever since. In America, it led to the unique innovation of judicial review, one means of defending the "multiplicity of interests",[556] and minority rights against "reiterated oppressions of factious majorities"[557] and the conformist pressures of "unjust and partial laws."[558]

In his insightful article, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution",[559] David Richards has demonstrated that "the meaning of constitutional provisions necessarily rests on the background theory of human values that the Constitution assumes as its communicative context."[560] Human rights are the necessary reflections of the underlying values of freedom and equality which the human personality, in turn, mandates.[562] Conceiving such a value system as in the Constitution "alone enables us to understand how it is that constitutional provisions have any meaning at all."[563]

Protecting the values of autonomous choice requires that the rights they engender be weighed only against other people's rights. Private "moral" opinions or particular preferences and prejudices propelled into positions of power may not restrict individual rights.[564] Rights trump utilitarian or majoritarian decisions,[565] and, in the extreme, justify forms of resistance and disobedience.[566]

American citizens, according to their Constitution, are to be "let alone" to plan and conduct their lives as they see fit, with those they love, obliged only to respect the equal rights of others.

As Richards makes clear, thinking of people as having human rights means embracing two basic truths about human nature:[567] First, people have a capacity for autonomy, defined as an ability and desire to arrange their lives and make themselves.[568] Second, as such, individuals are entitled to equal concern and respect in exercising their capacities for choice and creation. People, in this, are unlike animals;[569] to some degree, they can choose to be other than they are; they can plan a life. In a sense, "humans are, by nature, unnatural."[570] These human capacities demand human rights.

Although not all capacities are identical, humans are all equal in requiring respect for their capacities in order to live as humans.[571] Thus, all have and deserve human rights. We all share a desire to make basic choices of life, love, and contribution for ourselves.[572] Richards observes that most people, particularly those not exposed to or enamored of philosophical discussions of "identity", identify other people in "certain characteristic ways";[573] through their life choices--for instance, what work they do, who their friends are, whether they have children, whether they are married. Because such choices define us as we make them, for others as well as for ourselves, they are crucially important to all of us, equally.

John Rawls' analysis of the values in our constitutional system supports Richards' thesis.[574] Rawls sees self-esteem, or one's sense of one's self and one's ability to act in the world, as the "primary human good."[575] His metaphorical means of assuring a maximal fulfillment of each individual's primary good is to envision an "original position" in which individuals come together to establish a system in their interest. Rawls posits that each "contractor" is ignorant of her "specific identity", that is, the place she will occupy in the society she helps create. It is thus to each person's advantage to design a system whereby no

particular position is disfavored, or, more specifically, where the worst position is the best it could possibly be--the famous "maximin" strategy.[576]

The ignorance of one's specific identity "assures...neutrality by depriving people of any basis for distorting their decisions (illegitimately) in favor of their own, possibly parochial vision of the good life."[577] Respect for the diversity which results from individual pursuit of happiness and free choice induces one to adopt an attitude of equal respect and protection. People being as they are, susceptible to particular tastes, prejudices, opinions, and intolerance, however, it is not always enough. For these people, Rawls' way of picturing the issue may clarify the importance of neutrality, of equal freedom.

Richards illuminates the connection between the constitutional right of privacy and the Rawlsian, constitutional human rights conception generally.[578] Privacy fundamentally means leaving people free to live their version of "the good life." Privacy means not letting the majority or religion or the government decide for all what "the good life" is. Privacy means "intrinsic limits on the power of individuals and the state to violate the basic interests of the person,"[579] the constitutionally protected human rights. Shining through the Constitution is

> a body of understandings that gives a coherent meaning to the constitutional design. This meaning is the basic constitutional commitment to the ultimate value of human rights, the guarantee to persons of effective institutional respect for their capacities, as free and rational beings, to define the meaning of their own lives. 580

Defined like this, the human right to privacy makes "ultimate moral sense of the constitutional design."[581]

(2) Human Rights in the Constitution

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties....They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness."[582] The Founders viewed the greatest danger to freedom as being "...faction...a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the

rights of other citizens, or to the permanent and aggregate interests of the community."[583] Despite their hostility to faction, however, they would not sacrifice individual liberty to extinguish it.[584] Rather, they prized the freedom of individuals and the inevitable "diversity" and "different opinions" it produced.[585] Intrusion on rights, whether by a faction or of a faction, was unacceptable.

In fact, in the famous Federalist #51,[586] James Madison wrote:

> In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects. 587

For the Founders, multiplicity of interests, or sects, was a good thing, not so much because it reflected diversity, but because it preserved it; "since all wanted to prevail, none of them should."[588] Just as religious controversy is not supposed to produce a winner,[589] an established church, so the competition of interests was to prevent an entrenchment of any one faction, its narrow opinions, or desires adverse to the rights of others or the public good. To the extent one appreciates the depth and infinite potential of the human personality, diversity can also be seen as valuable in itself, as its reflection. At a minimum, however, and in the Founders' constitutional scheme, respect for diversity is what makes freedom possible and prevents the "compulsory unification of opinion."[590]

Thus, the government's proper role is in promoting, not narrow "morality", but, rather, the diversity necessary to the free self-governance of autonomous individuals, for the public good. Government's legitimate paternalistic role is in facilitating the "deliberate sense of the community" against any "sudden breeze of passion" which might result in tyranny or a violation of human rights.[591] "When men exercise their reason coolly and freely on a variety of distinct questions, they inevitable fall into different opinions on some of them."[592] For the Founders, government's role was as a vigorous agent of the public good, always distinguished from private opinion, passion, or morality. For this reason, judicial review, one

feature of the Constitution, was specifically intended to curb "dangerous innovations in the government, and serious oppressions of the minor party in the community."[593]

The Supreme Court has often reaffirmed this human rights vision, prohibiting "officially disciplined uniformity"[594] and declaring that "Freedom to differ is not limited to things that do not matter much."[595] In many significant cases, the Court has held that the state cannot, for example, seek to "standardize its children"[596] or "foster a homogeneous people."[597] In Stanley v. Georgia,[598] the Court pronounced it "wholly inconsistent with the philosophy of the First Amendment for the state to assert "the power to control men's minds" or "the right to control the moral content of a person's thoughts."[599]

The Court has often seen the importance of a right to act on such free thoughts as well, consistent with the rights of others. Attacking attempts at public enforcement of majoritarian tastes ungrounded in the Constitution, the Supreme Court has ruled:

> Without doubt [autonomy] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [600]

Finally, in Smith v. Orgn. of Foster Families,[601] the Supreme Court acknowledged that such privacy rights, the freedom of the individual against majoritarian consensus or community regulation, had their source in the basic liberty interest protected by the Due Process Clause and in "intrinsic human rights" prior to the Constitution.[602]

B. The Foundation of Human Rights: Personality Theory and the Value of Diversity

(1) Freedom: Human Nature and Sexuality

As discussed,[603] the idea of human rights rests on a theory and empirical information about the human personality as having a valuable capacity for choice. The vision of individuality and the "inviolate personality" that follows, with its implications of equal respect and autonomy, evolved over time in Western history.[604]

Greek political thought, for instance, the source of so much of our culture, lacked the idea, "fundamental to the idea of human rights, that autonomy is a capacity of all persons, as such."[605] Psychologically, the Greeks conceived of the human ego as fragmented, a passive battleground, and not as a developed actor choosing and executing its plans.[606] Their sense of equality suffered accordingly.[607]

Equality is as central as freedom to the idea of human rights. Human worth is assessed, not according to the actual choices individuals make, or the conditions in which they find themselves (i.e., poverty, oppression, slavery, disdain), but according to their capacity for autonomy as humans.[608] Thus, blacks, women, Jews, gay people, and others, must be viewed as human--having the capacity for and entitlement to freedom--even before they are free. They, too, therefore, have human rights and are entitled to exercise them equally, consistent with the rights of others.[609] As was true for Publius,[610] Rawls,[611] and Richards,[612] equality is the key to justice, the protection of all people's freedom to attain self-respect.

Through the work of Freud[613] and Roberto Unger,[614] among others, we acquire an understanding of the self which senses itself as infinite and transcendent.[615] "Most...of what is learned about man from a careful study of his nature and origins tends to underline his diversity, usually at the expense of his social traditions."[616] It is society, which Alfred Kinsey called "the clustering tendency of living organisms", that tends to "resist diversity and to seek a relatively narrow uniformity...especially in the emotion-laden matters of sex."[617] Empirical evidence of the kind seen in Sections II and III above, for example, confirms this impression.[618]

Students of the human personality often are drawn to the significant aspects of sexuality. Unger extols the "primacy of the person"[619] and places great weight on the cultural revolution of possibilities, particularly androgony and new avenues for love and self discovery, in hopes of rendering the world less a prison.[620]

Cultural revolution asserts the "radical individuality" of the self and abolishes restricting roles which confine the human plasticity Unger describes philosophically, ontogenetically, phylogenetically and pshchologically, as well as through empirical observation.[621]

There are those who fear the implications of a break with sexist and sexualist strictures in favor of androgyny and heightened individual freedom. To them, Unger responds in two ways. First, the "spiritual ambiguity of denaturalization", the abolition of restraints on the individual justified as being "natural", does not just threaten our sense of values through relativism, but gives us a chance to deepen them and find truer ones.[622] Second, the bubbling, irreducible infinity of the individual's potential inevitably dooms any arbitrary structure or confine, particularly those with a misguided appeal to "naturalism".[623] This is for the good, as such limited visions restrict the potential not only of those directly oppressed, but of all.

Richards sees sexuality as casting light on the significance of human rights. For him, sexuality is a fundamental experience through which, as an end in itself, people define the meaning of their lives. Sexuality is this important because it comes so close to the core of human rights values of personhood, love, and self-expression: (a) It is a means of transcendence, fantasy, release, and freedom,[624] a prime instance of the ability to be something else, to recast oneself. (b) Sexual love can be an important component of lasting personal relationships.[625] Few decisions are more central to the shaping of one's life and self; "the choice of one's lover is one with one's life 'dream'."[626] As Richards remarks, it is no coincidence that such relationships are called "knowledge" in the Bible.[627] Through love and sexuality, we come to know others and ourselves. (c) Sexuality contributes to and opens up the desire to participate with a beloved in the creation of one's immortality, from children to "common projects" to inspired works.[628] Love is extolled by artists and poets alike as the source of their creations.[629] Sexuality and love are thus at the heart of the meaning of life itself.

Because they are so central to the individual, so much a part of human rights, sexuality and love clearly must be the very kinds of values the privacy notion is intended to reinforce and protect. People's infinite capacities do not necessarily compel an agreement with the utopian vision of some who have advocated that the state supply sexual gratification to its citizens just as it should minimum requirements of food and shelter.[630] The reality of, and respect for, the human personality and its implications for freedom do require that all be allowed to love as they must and choose.[631] Richards expresses it best: "Freedom to love means that a mature individual must have autonomy to decide how or whether to love another."[632]

(2) Equality: Diversity and Tolerance

Applying the "maximin" arguments to love and sexuality supports the removal of all but those barriers shown to be relevant and well-grounded in solid reasoning and empirical justification.[633] Since self-respect is so important in the original position, and sexuality is so important to self-respect and fulfillment, there is no reason to restrict arbitrarily, or on the grounds of majoritarian taste, each individual's full freedom and opportunity to love. Free choice requires equal respect,[634] and the human diversity we see[635] and could see[636] is the result.

The tendency of people to wish to limit others, and its self-perpetuating limit on everyone, however, often bring demands for government to promote "morality" and restrict the choices of others. Dislike of the unusual or the different adds a "certain visceral force to [the "naturalistic" belief] in the rightness of majority sentiment."[637] In Wisconsin v. Yoder,[638] Chief Justice Burger held, for the Court, that:

> There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong'. A way of life that is odd or even erratic but interferes with no rights of interests of others is not to be condemned because it is different. 639

Nevertheless, the promotion or regulation of public "morality," conceived as something narrower than the Constitution's morality of human rights, is often put forward as reason to curb individual choice or the freedoms of particular groups. The case

made against samesex marriage, for instance, shows that this paternalistic taste for unconstitutional interference in the name of morality is still alive and dangerous.

C. Human Rights and Morality: The Obligations of Government

(1) Impermissible Government Enforcement of "Morality"

The Constitution and respect for human rights require that the government facilitate the freedom of individuals to make their own reasoned choices as to the version of the good life they wish to lead, consistent with the rights of others.[640] This means that the state has no role to play in the promotion of morality in the sense of imposing or encouraging a parochial vision of "natural" or "righteous" conduct on citizens of different normative viewpoints.[641] Society makes nonconforming behavior difficult enough; there is a compelling need to protect individuals from "the one entity that retains a monopoly over legitimate violence--the government."[642] Nevertheless, in cases barring samesex marriage or upholding prohibitions on private consensual sex between adults of the same gender, the alleged state interest in the "promotion of morality and decency" is always invoked.[643]

The state's ambition to "promote morality" is particularly suspect when it comes to gay sexuality. Here, its principal concern seems to be "to regulate the content of messages about sexual preference."[644] As one court noted, "one 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."[645] Since openly gay individuals bear the direct brunt of sexualism in its impact on their jobs and material well-being, the government's refusal to legitimate samesex marriage and even its "selective enforcement of [laws against gay sex] lends credence to the notion that one of the main policies being pursued is the suppression of expression."[646] The attack on gay sexuality takes the form of an attack on the First Amendment, preventing the self-identification in which a gay citizen has a double interest.[647] Government promotion of morality, state speech, cannot be permitted to drown out individuals exercising their constitutional human rights.[648]

The issue goes beyond speech and expression of ideas, however. Modern attempts to reform sexualist law have consistently provoked responses asserting the "right" of society to impose a moral viewpoint on dissenting, nonconforming individuals. The most celebrated of these debates was the Devlin-Hart[649] controversy over the "Wolfenden Report,"[650] which urged the decriminalization of samesex relations in the United Kingdom. Devlin argued that morality is necessary for society, and could be defined, like negligence, according to the "man in the street's" sense of right and wrong. Since the ordinary man presumably abominated gay sexuality, it must therefore be "immoral" and could legitimately be prohibited by the government.[651]

As Richards points out,[652] such reasoning wrongly identifies morality with conventional or prevailing social attitudes. Not only do these vary over time, as in the contrasting historical perspectives on gay love,[653] and from culture to culture,[654] but they should further be open to change through moral criticism and social reform. "Adoption of this view would effectively turn the measure of legally enforceable moral ideas into an interim victory of one set of contending ideological forces over another."[655] Such an appeal to conventional morality, however, because it seems more objective than direct personal taste, is sometimes attractive to judges seeking to impose "moral" limits on behavior such as samesex affection or relations.[656] Of course, such a heckler's veto has no place in our nonmajoritarian constitutional scheme of human rights protection.

Just how inappropriate this kind of moral regulation is can be clearly seen from a survey of its sources. The "moral" abhorrence of gay sexuality in our culture has several roots, notably:[657] sexism,[658] sectarian religion, specific historical developments in the evolution of the West, the urge toward enforced conformity, fallacious reasoning and arguments about "nature", and self-perpetuating stereotypes and stigma.[659] To address a few of these:

(a) Many people with a self-described "moral" opposition to gay sex would ascribe their hostility to religious sources.[660] Indeed, Kinsey commented on the "considerable conformity between the Talmudic and Catholic codes and present

day law on sex, including the laws on homosexual activity."[661] Boswell has shown, however, that interpretations of religious scriptures as being opposed to gay sexuality are historically inaccurate.[662] Religion, particularly Christianity, was the conduit, not the author, of "moral" attitudes and judgments,[663] and was not itself inherently or peculiarly liable to antigay feelings or doctrines, apart from its general mistrust of eroticism.[664] People who act from a belief that such sexualism is mandated by their religion should reread their scriptures and church history. In any case, of course, individual religious creeds have no place in a secular, nonestablishmentarian system such as ours. As Unger notes, "in the modern world, a heavy cost is attached to any mention of God."[665] When it comes to tolerance and human rights, God knows God's place.[666]

(b) If religion was merely a vehicle for sexualist intolerance, antigay attitudes must have had other causes. Boswell describes the "devolution, especially in the West, of a brilliant and complex civilization into a comparatively much less advanced state of organization and culture."[667] The shift to a rural society enhanced the importance of kinship and blood ties, and correspondingly reduced the tolerance for unconventional sexual arrangements.[668] Such a development, of course, perpetuates itself, as rural children see only one lifestyle and learn only one moral possibility.[669] The particular qualities of urban life which reinforce tolerance are absent in a rural society.[670] The rise to power of people raised in such a repressive, sexualist atmosphere intensifies the repression, as the law enters into the picture. This closely conforms to the situation in which we find ourselves today, as heirs to the sexualist patterns the past has set.

Another important historical cause of sexualism and antigay prejudice was the "rise of corporate states and institutions with the power and desire to regulate increasingly personal aspects of human life."[671] Governments which can regulate religion or dissent can also attack people's personal lives and sexuality. Historically, the "sedulous quest for intellectual and institutional uniformity

and corporatism;"[672] moral regulation, has been devastating to minorities, including gay people. When a government can dictate public morality, human rights are jeopardized and usually curtailed.

(c) Another source of sexualist stigma has been arguments about "nature" and the "unnaturalness" of "immoral" sexualities.[673] Frequently, all kinds of animal images are summoned forth.[674] Most of them are so patently ludicrous that, as Boswell, for example, suggests, they really must be considered after-the-fact justifications for sexualist prejudice and not its source.[675] Is incest "natural" because animals have incest? Is literacy "unnatural" because we teach ourselves to read, or because animals do not? Animals are promiscuous, so is promiscuity "natural"? Does that mean it is moral? Animals eat their young...etc.

The real problem with "naturalistic" arguments is that majoritarian opinions, confirmed by the prejudices of others and apparent widespread conformity, take on a mythic quality of sanctity. Majority norms, inculcated in most from birth on, appear "natural" rather than utilitarian and socially indoctrinated;[676] people "feel it in their bones" that a given particular discrimination is justified.[677] In their minds, vox populi must be vox dei, with woe to those expressing other ideas or sentiments.

Modern society has rejected such Aristotlean teleological explanations and appeals to nature in every other area but that of personal "morality".[678] It is time we disposed of them altogether, and time people stopped having to justify their humanity because they are in some ways different.[679]

Such sources illustrate the danger of substituting parochial opinions and prejudices for moral vision and reason. Indeed, the permissible content of government promotion of morality is properly limited in our constitutional system. Richards, for example, sees the state's moral enforcement role as constrained in three ways:

> (a) by the principle of mutual respect; treating others as we each would like to be treated under similar circumstances;[680]

(b) by universalization: the consequences of universal application,[681] conforming to the equal protection principle and the human right to equal respect; and

(c) by the nonreliance on impermissible or irrelevant criteria as the foundation of discriminatory treatment.[682]

The theme of these checks on government interference is again the human rights appeal for freedom and equality. Unlike paternalistic, polities or perfectionistic republics of virtue, our state is not supposed to make us good; it is intended to let us be good, as we define good.[683] Our human rights leave it to each of us to evolve our own conception of the good life. The Constitution commands the government to approach morality as did Tennessee Williams, declaring, "Nothing disgusts me, except what is violent or unkind."[684]

The state may only act in pursuit of the Constitution's moral vision. Majority distaste or discomfort is no basis for the abridgement of protected human rights. As the Supreme Court held in O'Connor v. Donaldson:[685]

> One might as well ask if the State, to void public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. 686

The same applies to a person's liberty in general, the individual's right to love freely, unshackled by the fears and predilections of others.

"The privilege of living in a free and open society entails...some obligation to tolerate ideas and moral choices with which one disagrees."[687] Individuals and majorities cannot always have their views embodied in the law in a society placing value on the freedom and dignity of each citizen. At a very minimum, courts must require a strong showing of serious and specific, actual harms, with solid empirical evidence or sound logical reasoning, before acquiescing in the constriction of individual choice. As the Pennsylvania Supreme Court held in striking down the

state's prohibition on samesex sexual activities:

> The police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality, but not to enforce a majority morality on persons whose conduct does not harm others....Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be 'moral' changes with the times and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals. 688

(2) Permissible Government Enforcement of Morality

Government is entitled to enforce the morality of the Constitution's human rights vision, and to assure the conditions which make it possible.[689] Thus, the state is justified in taking collective social action against such afflictions as hunger, deprivation, discrimination, and lack of education which impair the development of human capacity and individual freedom. The government has a further obligation to ensure that the rights of all citizens are protected and respected by all.[690]

Paternalism is also permissible in the rare cases where individuals' irrationality prevents them from acting in a manner consistent with their own interests. As Richards observes, however, there are several limits on this kind of paternalism. First, the concept of irrationality employed must be consistent with the constitutional conception of morality and human rights;[691] it must accommodate the many visions of the good life within those bounds. Second, irrationality must be conceived as doing those acts which seriously frustrate the actor's own ends.[692] The state must not substitute its own ends for the ends of the actor,[693] however, nor interfere unless severe and permanent harm is likely. The privacy right of the individual against government interference is in part a means of curbing that strong temptation to run other people's lives. Individuals are largely free to lead their own lives even if they do so "wrongly" in the eyes of others.[694]

Finally, the state may sometimes intervene to strike a balance where rights are genuinely in competition on both sides of an issue, and where neither side holds a "trumping" right. Living in society means the peaceful resolution of such legitimate disputes through reason and compromise. Government is the agency by which we achieve such results consistent with the rights of individuals, whose freedom we cherish equally. Vindicating human rights, making possible the freedom and equality to achieve people's chosen ends, is the true moral purpose of government.

CONCLUSION

Constitutional human rights and the fundamental needs of each person compel the recognition of samesex marriages as equal in legality and worth to those between men and women. It is time that our society's attitudes toward sexuality focus on the "quality of love, not the gender of the parties involved or the biological function of their affection."[695] The interests of gay lovers in getting married are the same as any others seeking marriage: an occasion to express their sense of self and their commitment to another human; a chance to establish and plan a life together, partaking of the security, benefits, and reinforcement society provides; and an opportunity to deepen themselves and touch immortality through sexuality, transcendence, and love.

The reason samesex marriage is particularly essential to gay individuals is perhaps precisely the reason it continues to be withheld: the importance it has as an expression of their equal worth as they are. Marriage is a statement about oneself to society, reflecting the central value of freedom, the aspiration to "be master of the identity one creates in the world."[696] As Tribe observes, the privacy right must protect the "freedom to have impact on others--to make the 'statement' implicit in a public identity...central to any adequate conception of the self."[697]

A meaningful definition of the right to privacy cannot be confined to inward-directed affairs which only concern the individual. Part of our individual freedom necessarily affects others, in what we say about ourselves and what they learn about us. Indeed, the "generation of such consequences is essential to personhood as virtually everyone now experiences it."[698] In Cohen v. Calif.,[699] the Supreme Court declared:

> The constitutional right of free expression [places] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity, and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. [700]

Just as we all hold rights which trump the mere tastes and prejudices of those who would suppress them, so, too, do gay individuals among us have human rights to express their identities, their "innermost traits of being",[701] and their love together, regardless of what others believe or fear.[702]

Refusing people samesex marriage denies them the opportunity to develop their loving selves, and contributes to negative perceptions and feelings about gay people.[703] Gay individuals, like society as a whole, lose faith in their ability to develop personal relationships and in their capacity to love.[704] The resultamt alienation often takes on a political cast as well, as gay citizens on some levels reject the society which rejects them.[705] Deprived of a stable shelter perhaps even more essential to them than to those conforming to majority standards,[706] gay people often stand exposed and alone.[707] Thus, the refusal to recognize gay marriage is not merely the withholding of one final blessing, but a global and sometimes devastating blow to people striving to build lives for themselves in society.

It need not, and should not, be this way. The Constitution morally respects the freedom of individuals to create, live, and love in the happiness they can make for themselves in the world, consonant with the rights of others. Marriage, the social recognition and approbation of one such choice, is an institution of

much value to many.[708] People are born different, into different circumstances, but are inherently equal in moral terms and in the eyes of the law, as our Constitution confirms. According this equality is perhaps most vital when it comes to love, the great leveler, which comes to each of us not wholly by choice[709] or design. The choice we do and should have is what to make of what we are. For gay women and men, who also love, samesex marriage is a human aspiration, and a human right. The Constitution and real morality demand its recognition.. By freeing gay individuals as our constitutional morality requires, we will more fully free our ideas of love, and thus more fully free ourselves.[710]

Evan Wolfson
April 1983
4B

NOTES

1. Sexualism is defined as discrimination or classification on the basis of sexuality or sexual orientation, or as the oppression which flows from such a categorization. A person who, or society which, classes people according to the gender of person to whom they are attracted or whom they love, or narrowly confines the permissible range of love choice, is sexualist. Sexualism as a term is preferable to others such as "homophobic" (generally defined as anti-gay), because it eschews the gay/nongay distinction and makes it clear that greater sexual and emotional possibilities exist for all of us. Sexualism, like racism, sexism, and religious bigotry, is a burden and constraint for all people, not just those who bear its brunt. See, infra, Part III at 44-50.

2. See, generally, infra, Part III at 44-50 and III (c) at 56-59.

3. See, infra, Parts I(A), II(B), III, III(A), III(B), III(C).

4. See, for example, infra, Parts II, II(B), III, III(B), and III(C). There is also the constitutional danger; in violating equal protection for some on unacceptable grounds, we all become less secure. See, for example, infra, pp. 62-63. Even more significantly, a privacy right where the government can pick and choose is no privacy at all. Autonomy needs respect in order to remain meaningful.

5. D.J.West, Homosexuality Reexamined 1(1977). See, also, Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States", 30 Hastings L.J. 799, 801-2, and generally (1979) (hereafter: Rivera). See, also, infra, Parts III, III(A), III(B), III(C).

6. This article presupposes a general familiarity with the Supreme Court's handling of the privacy right, first formally acknowledged in Griswold v. Connecticut, 381 U.S. 479 (1965). Excellent surveys of the numerous articles written on privacy can be found in, inter alia, D. Richards "Sexual Autonomy and the Constitutional Right to Privacy", 30 Hastings L.J., (1979)(hereafter: Richards); L. Tribe, American Constitutional Law (1978),(hereafter: Tribe), and K. Karst, "The Freedom of Intimate Association", 89 Yale L.J. 624 (1980)(hereafter: Karst). ,Since Griswold, there have been well over fifty Supreme ourt cases involving marriage, family, and such privacy issues.

The Supreme Court's most comprehensive attempt at an explanation of its privacy doctrine came in Whalen v. Roe, 97 S.Ct. 869 (1977), (privacy is more than the least common denominator of previous court decisions; it is, in part, "an interest in independence in making certain kinds of important decisions." at 876). Privacy must be seen as a broad respect for human rights of autonomous choice, not mere seclusion, sanctuary, or information control. See, infra, Part (C)at 28-31, and Part IV.

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8. As Masters & Johnson put it, "Sex is, after all, always a fact of life and yet always more than just a fact of life." Homosexuality in Perspective p. VIII (1979). Sigmund Freud's work shows that "human sexuality, rooted in the high degree of cortical control of sexuality, serves complex imaginative and symbolic purposes, and thus is extraordinarily plastic and malleable." Richards at 1001-2. See,also, evidence from anthropology in C. Ford & F. Beach, Patterns of Sexual Behavior 199-267 (1951) (hereafter:Ford & Beach). Dorothy Dinnerstein notes that "for us, sensual experience is embedded in a highly developed mental life". partaking of "the other". his sentient presence, ours, history, and time, etc. Human sexuality, thus "resonates...with the massive orienting passions that first take shape in pre-verbal, pre-rational human infancy." More than just agreeable sensation, sexuality is"a manifestation of the human delight in existence...our erotic connections to the world. D. Dinnerstein, The Mermaid and the Minotaur 14-15 (1976)(hereafter: Dinnerstein). As such, sexuality is at the heart of those human rights values enshrined in our Constitution.

9. See, infra, note 8; Ford and Beach, infra, note 8.

10. But privacy extends also to the nonsexual choices of individuals, as in matters of personal appearance, use of artificial intoxicants and stimulants, the right to die, and so on. See, Tribe supra note 6, at 958-65 and Richards, supra note 6, at 1015n245. See, also Wilkinson & White, "Constitutional Protection for Personal Lifestyles", 62 Cornell L. Rev. 563 (1977).(hereafter: Wilkinson & White).

11. The use of the word "gay" as opposed to "homosexual" or other such familiar, if misleading, nomenclature, is deliberate. In this article, as in other recent explorations of similar topics, gay is used to "describe persons who are conscious of erotic preference for their own gender...

principally self-assigned." Boswell, supra note 7, at 43. In other words, gay implies an element of choice--not to be something, but to recognize it and live it out. Nobody has a choice whom to be attracted to; the question is how we deal with what we are. Gay is thus a matter of self-definition, self-acceptance. In a larger sense, definition is what makes people gay. Thus, there is no such thing really as a "gay minority"--that is, an isolable group of people necessarily wholly apart from the nongay majority. Rather, society clumps certain people on one end of a sliding scale or continuum together and chooses to isolate them. See, infra, Parts III, III(A), III(B), and III(C). On the power and use of the "potent...even...necessary myth" of a definite gay minority, see J. Katz, Gay/Lesbian Almanac (1983) and J. D' Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States (1983). This article sometimes refers to gay people in "minority" terms. This is a reflection of our societal classifications and consequent self-perceptions; it does not represent an acceptance of the idea that those with pronounced attraction to, affectational passion for, or sexual interest in, others of their gender are somehow wholly divorced from others in the community. For this reason, this article eschews the term "homosexual" (an awful hybrid word in any case, too prone to fixation on purely physical sexual aspects of gay love). "Homosexual" arises out of a clinical perspective which sought at first to transform the phenomenon of gay love into a mere illness or disorder rather than a sin. See Katz, D'Emilio, or Boswell, supra note 7, at 42-45.

The word gay itself has an interesting history beyond its longtime use by gay people for self-identification. See Boswell, 43, 45-46,253. But see, Rivera, p. 802n18. The word "faggot", which " allegedly arose from the bundles of sticks used to burn homosexual persons alive during the middle ages,"' is clearly unacceptable. See, Rivera, p. 802n17. Finally, nongay seems the appropriate counterpart in any such arbitrary sexualist distinction. "Heterosexual" is not suitable because of its historic scientific implications, now largely discredited. See, infra, Part III, III(A) at 44-52. The most common alternative, "straight," is unsatisfactory for its implications of superiority or healthiness. For its first use, see, W. Shakespeare, Sonnet 121, discussed in R. Giroux, The Book Known as Q (1982) ("I may be straight...")

12. See, e.g., Richards, supra note 6, at 957-8. On the human rights constitutional vision, see, infra, Part IV at 59-75.

13. See, infra, Part IV, IV(B).

14. Ibid.

15. Ibid, Parts IV, IV(A), J. Rawls, A Theory of Justice (1971).

16. Parts IV(A)(2). infra, at 63-65.

17. Ibid. A moral vision is one's idea of "the good life", the right way to live and give meaning to life.

18. Postwar trends in America reflect and portend a "fundamental shift in values: the emergence of a national ethic that, in matters of style and morality, personal choice is paramount." Wilkinson & White, infra note 10 at 563. The authors' comment, interestingly, that as Americans "perceive ourselves less capable of influencing our national and communal fates, we demand greater freedom to direct our lives as individuals." Ibid at 563. On the increasing diversity in opportunities available to liberated individuals in America, see, infra, Part II at 31-44.

19. Ibid; see, also, Part II(B), infra.

20. See, generally, A. DeTocqueville, Democracy in America

21. Gussfield, "On Legislating Morals: The Symbolic Process of Designating Deviancy," 56 Calif. L. Rev. 54,58 (1968); see, also, Comment, "Constitutional Aspects of the Homosexual's Right to a Marriage License," 12 J. of Family Law 607, 621 (1973) (hereafter:JFL).

22. "Samesex" is used in preference to "homosexual". See, supra, note 11.

23. See, Karst, supra note 6, at 658, 683-84. See, also, infra, Part IV(C) on the regulation of public "morality" at 69-74.

24. A comprehensive treatment of the family, sex roles, or marriage per se is, of course, beyond the scope of this article. Attention will be given only to those ways in which the significant demonstrable changes of our time illustrate the core values that are at once reflections of, and foundations for, the constitutional human rights vision described, infra, at 28-31, 59-60, and 65-69.

25. See, infra, Parts I at 5-31 and Conclusion, at 75-77.

26. Note 8, supra. See, also, Richards, supra note 6, at 1000.

27. Karst, supra note 6, at 651. See The Advocate #356 (October 22, 1982) at p. 26. (defining marriage as "a formalized statement, a formalized association that two people make toward each other based on a continuing romantic or living relationship") See, also, infra, Parts II and II(A).

28. Karst, supra note 6, at 651-2. This is so, even though the state undertakes certain obligations under marriage laws, i.e., assuring maintenance or support requirements, arbitration, divorce registration and settlement, etc.

29. Ibid, also see Parts IV and IV(C)(1).

30. See, generally, The Federalist Papers, Numbers 10, 51, (New American Library 1961). See, also, discussion in Part IV(A)(2) at 63-65. A number of commentators have remarked on this analogy; e.g. Karst, supra note 6, at 657, and Wilkinson & White, supra note 10, at 624.

31. Indeed, it should promote them. See, infra, Part IV(A)(2). The government should play a vigorous affirmative role in assisting individuals in the achievement of their ends, as long as those ends are consistent with the Constitution and human rights. While imposition of a parochial viewpoint or orthodoxy is impermissible, infra Part Iv(C)(1), this does not preclude the government from playing an active, vigorous role in collective enterprises to the betterment of the individual in society.

33. See Boswell, supra note 7, generally, and at 15-16.

34. Plato, Symposium 182 B-D translation by Boswell, supra note 7, at 51. The passage is often translated misleadingly, "to gratify lovers", more ambiguous in English than in the context used.

35. Baker v. Nelson, 291 Minn 310, 191 NW2d 185 (Minn. Sup. Ct. 1971), app. dismissed 410 US 810 (1971); Singer v. Hara, 11 Wash App 247, 522 P2d. 1187 (1974). Jones v. Hallahan, 501 SW 2d 588 (Ky 1973). Petitioners' requests for recognition of their marital status were all denied.

36. Denial of a marriage license or access to marriage is one way in which marital issues present themselves to gay couples. Another is the dissolution of samesex unions which then seek state divorce protection. See, for example, Anonymous v. Anonymous, 67 Misc 982, 325 NYS 2d 499 (Sup. Ct. 1971). See, also, Note "Homosexuals' Right to Marry: A Constitutional Test and a Legislative solution'" 128 U.Pa.L.Rev. 193,194 (1979) (hereafter: PA).

37. As in Baker v. Nelson, supra note 35. See, discussion, Parts I(A) at 7-8.

38. As in Baker v. Nelson and Singer v. Hara, supra note 35. The Baker court acknowledged that marriage is one of the "basic civil rights of man" following Loving v. Va, infra note 40, but then declared "in common-sense...there is a clear distinction between a marital restriction based upon the fundamental difference in sex." See, Rivera, supra note 5 at 874-6. The actually cited dictionary definitions avoiding serious consideration of the constitutional arguments. Even where the applicable state statutes did not mention gender or explicitly preclude samesex marriage, the courts chose to so interpret the statutes. In Singer, the court held "appellants were not denied a marriage license because of their sex, rather they were denied a license because of the nature of the marriage itself." 11 Wash App at 264, 521 P2d at 1197. See, discussions, PA, supra note 36, at 193-97.

39. 381 US 479 (1965).

40. 388 US 1 (1967). The Loving Court declared, in the context of the Due Process Clause and the Fourthenth Amendment, the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men..!one of the basic civil rights of man;, fundamental to our very existence." at 12.

41. As numerous commentators have pointed out, "definitions" alone are dubious supports for important arguments. Before the Fourteenth and Fifteenth Amendments, people believed a "voter" was, "by definition", a white male property owner. Before Loving, supra note 40, interracial marriage was by definition immoral and unprotected constitutionally.

42. Baker v. Nelson, supra note 35. The constitutional rights of individuals do not yield to such historical preconceptions and prevailing attitudes based on prejudice.

43. Parts I(A), (B), (C), supra, at 6-31

44. See, discussion, infra, Part I(A)(2) at 11-14, Part I(B) at 21,27, Part II at 31-44, and Part III at 44-50, 52-59.

45. See, infra, Parts I(A), I(B), I(C) and IV(A)(2) and (C)(1).

46. See, e.g. Note, The Legality of Homosexual Marriage, 82 Yale L.J. 573, 574 (1973)(hereafter: Yale), Tribe, supra note 6, at 991,1000-03, 1012-19 1063-66, 1077-1098.

47. See, e.g., JFL supra note 21, at 624, Karst, supra note 6, at 627-28.

48. See, Karst, ibid. Thus, marriage, a "basic civil right" in Loving, supra note 40, and a "fundamental right" in Zablocki v. Redhail, 434 US 374 (1978), is not held a fundamental right for gay people. The "critical examination" of the government's interests required by Zablocki is somehow waived where gay lovers' claims are at issue, despite the imposition of "strict scrutiny" on classifications against "choices concerning family living arrangements" demanded in Moore v. City of E. Cleveland, 431 US 494 (1977). Of course, this strong Zablocki and Moore holdings came several years after the holdings in the gay marriage cases, so perhaps the decision could be different today. For less confident views, see discussion in Karst, supra note 6, at 627-8; Tribe, supra note 6, at 989; PA, supra note 36, at 199.

49. Thus, for instance, before the strong cases suggested in note 48, supra, Yale, supra note 46, at 575 casts the issue as hinging on three factors--legislative motive, importance to gay people, interest of the government in refusal--and then concludes gay individuals do not form a suspect class. The commentator is led to this conclusion because the substantive human rights "interests" of gay people in marriage and to values are underweighed.

50. On "substantive due process, see Karst, supra note 6, at 664-665, 665n183, and Tribe, supra note 6, 421-455, 886-990.

51. See, e.g., Yale, supra note 46, at 574, 574n5.

52. Ibid, at 574-75.

53. 429 US 190(1976)(a two part intermediate scrutiny test for statutory gender distinctions).

54. 102 S.Ct. 3331 (1982).

55. Ibid at 3336.

56. Ibid at 3337.

57. Author's discussion with Kitty MacKinnon, Harvard Law School (Jan. 1983). (MacKinnon also commented on sexualism: when a rapist is caught, he is never referred to by the media as a "practising heterosexual"). But see, Karst, infra note 6, at 683-84.

58. Thus Karst is wrong, supra note 57, when he argues that gender discrimination is not an issue in samesex marriage cases. In Loving, supra note 4(the Court rejected the government's argument that the anti-miscegenation law's equal applicability to blacks and whites meant it was not discriminatory toward either. It held that the issue was not a white's "racial preference" for a black or vice versa, and therefore, permissibly restricted; the classification was race itself. See, Strickman, "Marriage, Divorce, and the Constitution", XV Family L.Q. 259, 281-82 (#4 Winter, 1982). The analogy to gay people is clear. Neither gender can enter into marriage with a member of the same sex. A female in love with a female is treated disparately from a male in love with that female. This is not discrimination on the basis of sexual "preference". but on the basis of sex. Although this analogy was rejected in both Singer and Baker, supra note 35, equal protection analysis then was not what it is now, particularly as regards gender. See, Craig v. Brown, supra note 55, and Miss. U. for Women v. Hogan, supra note 44.

59. 434 US 378

60. Ibid at 384. For a restrictive view of Zablocki, see PA, supra note36, at 200. For a discussion of other cases articulating the liberty interest in marriage, See, e.g., Yale, supra note 46, at 578.

61. Ibid at 383

62. Ibid at 385

63. There has been no samesex marriage case since Zablocki, so no one knows how it might influence the next court's calculus. But see, supra, note 60,

64. Discussed, infra, at 11-12, 30-31, and, generally, Part III.

65. See, e.g., Karst, supra note 6, at 636-7; Tocqueville, supra note 20; and C. Rice, Freedom of Association (1962) at 11-41.

66. For example, Carey v. Brown, 447 US 455 (1980)(the state cannot discriminate among speakers based upon the content of their speech; the Equal Protection Clause demands strict scrutiny where the state seeks to regulate the public expression of another moral view). Thus, the government's prohibition on gay marriage, absent some other compelling interest, is illicit statist speech drowning out a differing, proteced viewpoint to stake out its parochial position. See, also, Police Dept. of the City of Chicago v. Mosley, 408 US 92 (1972), and Gay Alliance of Students v. Matthews, 544 F2d 162, 166 (4th Cir., 1976) which held, citing Mosley that "withholding of recognition from GAS denies that organization the equal protection of the laws guaranteed by the Fourteenth Amendmane...Where the exercise of First Amendment rights is made dependent upon the content of the message to be conveyed, the discrimination 'must be tailored to serve a substantial governmental interest."

67 Frontiero v. Richardson, 411 US 677 (1973)(plurality opinion). See, PA, supra note 36, at 202-3.

68. Ibid, Frontiero.

69. Ibid, see, also, Mathews v. Lucas 427 US 495, 505 (1976), and Acanfora v. Board of Education, 359 F.Supp 843 (D.Md 1973) aff'd on other grounds 491 F2d 498 (4th Cir), cert denied, 419 US 5836(1974).

70. Ibid.

71. PA, ibid, at 202-3. See, e.g., Levy v. Louisiana, 391 US 68 (1967) (illegitimacy), or Korematsu v. US, 323 US 214 (1944)

72. Acanfora, supra note 69, at 852 (relying on Frontiero, supra, note 67).

73. Tribe, supra note 6, at 945n17.

74. See, discussion, PA, supra note 36 at 203-4; JFL, supra note 21, at 615, and infra Parts III, III(B), III(C), esp. 56-59.

75. See, infra, Part III at 44-50, 56-59. Part IV at 69-74. For a comprehensive discussion of discrimination against gay people in private and government employment, the military, teaching, civil and criminal areas, etc., see Rivera, supra note 5, generally. Perhaps the most alarming recent manifestation of sexualist discrimination is the government reluctance to fund research into the new epidemic "AIDS". Although AIDS has killed more people than "Legionnaire's Disease" and "toxic shock syndrome" combined, research into it has not received nearly the amount spent on them because gay people are the primary identified victims to date. See, Newsweek (April 18, 1983) at 74-80.

76. See, PA, supra note 36, at 204-5; Rivera, ibid, and at 822n15; See, T.Branch, "Closets of Power", Harper's 34 (Oct '82.)

77. See, infra Parts III, III(B). See, e.g. Norton v. Macy, 417 F2d 1161 (D. C. Cir.1969) (gay sexuality per se irrelevant to job).

78. See discussion, in PA, supra note 36, at 204; Karst, supra note 6, at 683, 683n264. See, also, not 76, supra. Under Hitler, gay people, like Jews, were compelled to wear a "badge" of distinction--a yellow star for Jews, pink triangles for gay women and men.

79. See, infra, Part III(A) at 50-52. See, also, JFL, supra note 21, at 615. (noting that status need not be 100% unalterable to qualify--i.e., alienage, poverty). See. also, A. Karlen, Sexuality and Homosexuality, 572-606(1971).

80. As Dan Bradley, an openly gay man who formerly headed the Legal Services Corp., put it, "sexuality is a way to be, not a way to think." This is true in terms of what we are internally, what is given to us. Our choice comes in how we will deal with ourselves and the world, as we are.

81. J. Baldwin, Giovanni's Room, p.10 (1956).

82. See, e.g., JFL, supra note 21, at 624. Curiously, the same commentator in 82 Yale 573, supra note46, reached a different conclusion on "suspectness".

83. "[I]ntermediate level of scrutiny is appropriate for classes that come close to meeting the traditional indicia of suspectness." PA., supra note 46, at 582.

84. See PA, supra note 36, at 207 for other useful cases. On Craig v. Boren, see supra, note 55, text pp. 7-8.

85. Mass. Bd. of Retirement v. Murgia 427 US 307, 325 (Marshall dissent, urging application of heightened scrutiny to age discrimination.).

86. Perhaps advantageously, given the impermissible sexualist prejudices,shibboleths, and unconstitutional paternalistic impulses constituting the alleged state interests. See, infra, 14-21, 69-74. Such important rights and interests are at stake, however, that as long as they are undervalued, the scrutiny of the state's case may be overly charitable. See, infra 11-14, 65-69.

87. See, e.g., Yale, supra note 46, at 583; PA, supra note 36, at 210.

88. Karst, supra note 6 at 684, also, 673-74. Since clergy also often refuse to perform samesex marriages, gay people are left without an opportunity to celebrate ceremonially and formally their union. See discussion of N.J. Welfare Rights Org v. Cahill, 411 US 619 (1973)(importance of ceremony for "aura of permanence") in Yale, supra note 46, at 580.

89. As well as other First Amendment rights, such as association. See, e.g., NAACP v. Button, 371 US 415 (1963); note 65, supra. In Eisenshadt v. Baird, 405 US 438, 453 (1972), the Court declared that, "The marital couple is not an independent entity with a heart and mind of its own, but an association of two individuals, each with a separate intellectual and emotional make-up." (emphasis added).

90. It is "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Bd. of Educ. v. LaFleur 414 US 632(1974). See, also Zablocki, supra note 48.

91. Zablocki, supra note 48, at 383

92. For example, laws against bigamy affect only the class of people already married, while a minimum age is temporary and applies to all citizens equally. As for laws on incest, see, Wilkinson and White, supra note 10, at 569-70. It does seem, however,

that laws against polygamy should fall under the analysis of this article, as an unsupported "moral" restriction on individual choice which violates no other people's rights. Laws related to the protection of children's rights and interests could be redrqwn to serve that function without impermissible parochial "moral" visions.

93. Amicus curiae brief submitted by GLAD (Gay and Lesbian Advocates and Defenders, of Boston) in the pending case of De Santo v. Bainsley (Super Ct. Pa) p. 17 (arguing for recognition of samesex "common law marriage").

94. See, e.g., JFL, supranote 21, at 609n9, and Yale, supra note 46, at 573n3 citing Robinson v. California, 370 US 660 (1962) (Eighth Amendment prohibits criminalization of "status"). On gay sexuality as a status, see, infra, Part III, III(A) at 44-52.

95. See, e.g., JFL, supra note 21 at 609n10 and Yale, supra note 46 at 574. This argument in particular is undervalued by commentators, owing primarily to their too limited constitutional vision (see, infra, 28-31, 59075), probably caused by fixation on the word "privacy" and the Supreme Court's confusion over it.

96. See, PA, supra not 36, at 198-9; JFL, supra note 4, at 621-3.

97. See, infra, Parts III, III(B) at 44-50, 52-56.

98. For example, Yale, supra note 46, at 574n3.

99. Part IV, supra, at 56-69.

100. See, e.g., Karst, supra note 6, at 684, 684n270; JFL, supra note 21 at 620; infra 52-59. See, also, E. Rubington & M. Weinberg, Deviance, the Interactionist Perspective, 9(1968)(gay people suffer from stigma and resent labels), T.S. Eliot describes this stigmatizing process of labeling in "The Love Song of J. Alfred Prufrock":

> And I have known the eyes already, known them all--
> The eyes that fix you in a formulated phrase,
> And when I am formulated, sprawling on a pin,
> When I am pinned and wriggling on the wall,
> Then how should I begin
> To spit out all the butt-ends of my days and ways?
> And how should I presume?

The Wasteland & Other Poems, p. 5 (1962).

101. JFL, ibid. See, also, L. Hobson, Consenting Adult (1976).

102. Wilkinson and White, supra note 10.

103. Karst, supra note 6.

104. Wilkinson and White, supra note 10, at 613.

105. Ibid. Part of the problem with the"equal protection school" is that it plays into the sexualist understanding of gay people as just another minority, and not as a created minority carved out arbitrarily from the rest of society. See, supra, note 11, and infra, Parts III and III(A) at 44-52.

106. Ibid.

107. Ibid. See, also, Part IV(C)(A), infra, at 69-74.

108. See, supra, at 6-11.

109. NOte 35, supra.

110. Yale, supra note 46, at 580-81.

111. See, Katz and D'Emilia, supra note 11, discussed there. Also, infra, Part III, especially at 44-52, 56-59.

112. See, infra, 50-52. Also, for example, Press Release, American Psychiatric Assoc'n (Dec. 15, 1973)(declaring "homosexuality" not a mental disorder), and Karlen, supra, note 79, at 572-606.

113. New York Times at 20 col. 1 (8/12/79).

114. See note 111 supra, and text, infra, at 44-59.

115. 359 F.Supp. 843 (D.Md 1973), note 69, supra.

116. Ibid at 847-48.

117. Ford, "Homosexuals and the Law: Why the Status Quo?" 5 Cal. West. L. Rev. 233, 236 (1969).

118. See, APA supra, note 112, and New York Times at 12 col. 4 (4/9/74).

119. Indeed, denial of marriage is harmful, not just to human rights values, but on other levels. See, infra, at 44-59. See, also, A. Bell & M. Weinberg, Homosexualities pp. 81-83, 91, 101-102, 138, 160-61 (1978)

120. PA, supra note 36, at 211.

121. See, e.g., Tribe, supra note 6 at V.

122. Paris Adult Theater v. Slaton, 431 US 49, 67 (1973).

123. Wilkinson & White, supra note 10, at 619.

124. See, Richards, supra note 6, at 1009-11; also, discussion, infra, at 74-75.

125. "So you think you're a failure, do you? Well, you prabably are. What's wrong with that? In the first place, if you've any sense at all, you must have learned by now that we pay just as dearly for our triumphs as for our defeats. Go ahead and fail. But fail with wit, fail with grace, fail with style. A mediocre failure is as insufferable as a mediocre success. Embrace failure! Seek it out! Learn to Love it! That may be the only way any of us will ever be free. T. Robbins, Even Cowgirls Get the Blues (1976)

126. Wilkinson & White, supra note 10, at 595.

127. Ibid.

128. Ibid, at 596.

129. People feel their sexuality to be innate in them; we open our eyes and are attracted to someone; we do not look at someone and decide to be attracted. Attraction is, however, more complex than that. See, infra, 44-52 (mix of "prepackaging" and socialization).

130. Yale, supra note 46, at 581.

131. Infra, 44-59.

132. See, e.g., Boswell, supra note 7, at 9.

133. 403 F.Supp 1199 (E.D.Va. 1975) aff'd mem. 425 US 901 (1976) (Brennan, Marshall, and Stevens, dissenting)(declining to grant declaratory or injunctive relief barring enforcement of the state's criminal statute against samesex sexual relations). The state failed to offer any interests supporting the law, but there was no real threat of prosecution against the parties. See Tribe supra note 6, at 941-3.

134. Ibid, (dissent, Merhige) at 1204-5. Merhige was right, of course. See, for example, PA, supra note 36, at 215n138, citing a study which indicates that children raised by lesbian mothers and their lovers "appear to be traveling the normal path of boy-girl heterosexuality."

135. See, e.g., Karst, supra note 6, at 635n5, and C. Tripp, The Homosexual Matrix at 37-8 (1975)(hereafter: Tripp)("Societies which tend to actively suppress homosexuality tend to do so with broad-based moral tenets which at the same time cut into heterosuality much further than could any of its competition.").

136. See, e.g., Bell & Weinberg, supra note 119, at 160-61. Also, infra, at 44-50, 52-59.

137. Ibid. See, also, Part II at 31-40.

138. PA, supra note 36, at 212. This, however, conforms to the approach taken by investigators, assuming "gay" (or rather, "homosexual") was something wholly different.

139. Social constraints are quite powerful, and often outside the immediate reach of the Constitution--for example, "Social exclusion from private gatherings and organizations" or "use of derogatory epithets.". As Wilkinson and White, supra note 10. at 624, observe: "A reality of American life is that community acceptance, respect, and influence are bestowed upon those whose behavior is generally conventional." This can change slowly, with help from the law and role models.

140. The state is required to produce at least rational objectives for discrimination. See, supra, 6-11, and infra, 69-74.

141. See, e.g., Singer, supra note 35, and Baker, supra note 35, discussion in Yale, supra note 46, at 578-9.

142. Singer, ibid, at 259/1195.

143. See, infra, Part II at 31-44.

144. Strickman "Marriage, Divorce, and the Constitution", XV Fam L.Q. 259, 282-83 (#4 Winter)

145. Ibid. And who knows what else technology has in store? Further, as Rivera, supra, note 5, at 383 points out, there are anywhere from 8-16 million lesbians in the US of whom 1.5-5 million may be mothers. If each of the 1.5 million lesbians in the US has two children, that is three million children of gay parentage alone (not counting gay men). For a novelistic treatment of artificial insemination, see P. Warren, The Front-Runner. (1974).

146. A religious writer condemned gay people as "against nature," see, infra, 69-74, and also savaged men who married sterile women, saying "Those who woo women who have been shown to be barren...are simply mounting them in the manner of pigs or goats" and are therefore enemies of God. Quoted in Boswell, supra note 7, at 155. See, infra, note 317.

147. Boswell, supra note 7, at 10.

148. Tripp, supra note 135, at 37-8.

149. Richards, supra note 6, at 978.

150. For an illuminating view of the influential, "naturalistic", procreational, anti-erotic, and gender-based ideas of St. Augustine on love and sexuality, see, Bowell, supra, note 7, at 26, 147-165.

151. JFL, supra note 21, at 628.

152. Ibid,

153. Mosley, supra note 66. See Gay Students, Org v. Bonner, 509 F2d 652, 660 (1st Cir 1974) citing Tinker v. Des Moines Ind. Community Sch. Dist, 393 US 503 (1969); "Conduct may have a communicative content sufficient to bring it within the ambit of the First Amendment", even if not "pure speech".

154. 403 US 15(1971)("Fuck the draft") See, infra, p.76. See, discussion, Tribe, supra, note 6, 681-2.

155. Quoted in Karst, supra note 6, at 653-54,

156. Boswell, supra note 7, at 272-74. The famous "blood libel " against the Jews (killing Christian children to make matzot, unleavened bread, for Passover) is a case in point. See, e.g., G. Chaucer, Canterbury Tales ("Hugh of Lincoln").

157. See, infra, 44-50, 52-59, and note 459, infra. Also, JFL, supra note 21, at 628-29.

158. To the degree those prejudices are not purely willful. See, infra, 28-31, 44-59, 75-77.

159. The so-called "sodomy" laws. For a more accurate interpretaion of the "Sodom" story in the Bible, see, Boswell, supra note t, at 92-98. Also, D. Bailey, Homosexuality and the Western Christioan Tradition, 1-28 (1955), and J. McNeill, The Church and the Homosexual. 42-50 (1976).

160. See, generally, H. Curry, and D. Cuffore, A Legal Guide For Lesbian and Gay Couples, 9 (1980); Rivera, supra note 5, 949-55; PA, supra note 36, 211.

161. Karst, supra note 6, at 648.

162. See, e.g., Baker v. Wade, No.Ca-3-79-1434-R(N.D.Tex, filed 8/17/82); People v. Onofre, 51 NY2d 476, 415N.E.2d 936, 434NYS2d947(1980), cert den'd, 451US987(1981); Commonwealth v. Bonadio, 490 PA 91, 415 A2d 47(1980), all striking down as unconstitutional, state prohibitions on samesex sexual activity; Stone v. Wainright, 478F2d390(5th Cir1973), But see Doe, supra note 133.

163. For empirical information indicating just how out of step the law is with the way people live, see, infra, 31-44. As Justice Powell wrote in Zablocki, supra note 48, (concur at 399), "State regulation of marriage has included laws on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce."

164. See, supra, notes 138-39.

165. See, e.g., Dinnerstein supra note 8, MacKinnon supra note 57, generally, on the use men have made of women in marriage. See, further, L. Weitzman, "Legal Regulation of Marriage", 62 Cal.L.Rev. 1169 (1974) (hereafter:Weitzman), and discussion, infra, Part II (B) at 40-43.

166. See, e.g., Eisenstadt, supra note 89, (extending Griswold-like protection to unmarrieds). Thus, benefits to people with children should be unrelated to marital status, but rather viewed as aid to the children. The parents would thus be a vehicle of the state subsidies for recognized needs on the part of, and arising out of the human rights of, the minor individual (a sort of reverse Social Security entitlement for the young). This avoids the penalizing of those choosing not to marry, forbidden by Eisenstadt.

167. See, infra, Part III at 44-59.

168. See, e.g., Dr. M. Hoffman, The Gay World 90-92 (1968); discussion infra, Part III.

169. See, infra, 44-59, 75-77; Richards, supra note 6, 989.

170. See, e.g., Mosley, supra note 66, 153, 154; Karst, supra note 6, at 684-5.

171. Richards, supra note 6, at 996.

172. See, infra, 68-74.

173. Wilkinson and White, supra note 10, at 624. See, infra, Part IV(A)(2).

174. But see Wilkinson and White, ibid, disagreeing over extension of full equal protection to gay people.

175. Ibid at 564.

176. See, infra, pp. 6-11.

177. Op cit; also, Karst, supra note 6, at 667-68 (arguing either Equal Protection or Due Process).

178. See, e.g., Tribe and Karst, supra note 6.

179. Note 10, supra.

180. Ibid at 611.

181. Ibid at 565.

182. Ibid at 612.

183. See, supra, pp.6-11.

184. Wilkinson and White, supra note 10, at 611.

185. Ibid at 572-3.

186. Ibid at 572.

187. Ibid at 572.

188. Ibid at 568.

189. Note, 174 supra. See, also, Yale, supra note 46, at 582 (writing, however, before such cases as Zablocki, supra note 48).

190. Karst at 653, 664-65, see note 50, infra.

191. Ibid at 653.

192. Thus,although he leans toward a value-oriented Due Process view, Karst, supra note 6, acknowledges that privacy is something more, and even says Equal Protection will also do. Note 177, supra. He is classed with the Due Process "school" because he permits government regulation of "morality", implying a misperception of how human-rights-based equal protection would prohibit such "moral" interference. Karst needs a grounding which makes substantive due process more than a subjective choice. See, infra, Part IV. Karst is quite close, however, (see p. 665, 658-59), and has done considerable work in showing the oevrlap of substantive values with equal protection. See, e.g., Karst, "Equality as a Central Principle in the First Amendment," 43 U.Chi. L.Rev. 20 (1975).

193. Tribe, supra note 6, at 892.

194. Ibid at 888-89.

195. Ibid at 889, (quoting Freund).

196. Karst, supra note 6.

197. Ibid at 628,684-85.

198. Ibid at 628.

199. Thus Karst, ibid, at 684, criticizes the states' marriage restrictions for "denying any comparable status to homosexuals", but then permits some moral content regulation, on a balance that, even with his "freedom of intimate association" addition, see Karst at 627, 690-92, gives too short shrift to the full human rights values of autonomy (see Part IV). Karst thus falls short of the full protection mandated by our constitutional rights. Supra, note 192.

200. But see analysis and amplification through empirical awareness, Parts II and III, and expanded constitutional visions, such as that of Richards, supra note 6, discussed in Part IV, and personality theory, such as Roberto Unger's, infra, 65-68.

201. Karst, supra note 6, at 630. See, Parts II, III, IV, infra.

202. Ibid at 630-31. See, infra, Parts, II, III, IV.

203. Ibid at 632-34. See,infra, Parts II, III, IV.

204. Ibid at 634-35. See infra, Parts II,III,IV.

205. Ibid at 635-36: Goffman, The Presentation of the Self in Everyday Life 77-105 (1959); Weitzman, supra note 165, infra, Parts II.III.IV.

206. Thus, he agrees, minimally, that perhaps the freedom of intimate association cannot "claim a full share in the 'firstness of the First Amendment'", Karst, supra note 6, at 656. But see, Tribe, supra note 6, at 577-79, (arguing for expression as value in itself, rejecting the "Meiklejohn" instrumental view of the First Amendment).

207. Karst, supra note 6,realizes this sometimes (see p.626 n.8), but then backs away perhaps from fear of drawing a line that would entrench a substantive moral vision in the constitution. (For example, consider his discussion of the First Amendment values, alternately strong, pp. 684-85, and weak, pp. 654-56). This leaves him tolerating government regulation of morality on the basis of majoritarian value choice and exposes his own (correct) moral vision on its equal protection flank. Thus, for example, gay people lose their deserved and constitutional human rights protection to majoritarian prejudice under the guise of government promotion of morailty. See Part IV, particularly pp. 69-74.

208. Karst, supra note 6, at 690. Then how do we draw a line? See, note 207, supra. Why is his freedom of intimate association significant, then, short of full-scale constitutional validation (which it has, despite his reluctance; see Part IV).

209. Ibid, at 690-91.

210. See note 207, supra, and Part IV, esp. 69-74. Similarly, Roberto Unger critiques the work of Tribe, supra note 6, for inadequate justification for his otherwise valid "substitue metarules", or substantive human rights values. R. Unger, Lectures at Harvard Law School on Jurisprudence (Jan. 1982),

211. Tribe, supra note 6, at 980.

212. Ibid at 983 (emphasis deleted).

213. L. Tribe, "Toward a Metatheory of Free Speech", 10 S.W.U.L.Rev. 237,241 (1978).

214. See Parts III and IV.

215. Like Karst, Tribe, supra note 6 at 896, recognizes this somewhat, and yet fails to explain how the Constitution favors these human rights values. Accordingly, he, too, permits inappropriate government "promotion of morality", including, most disappointingly, such erroneous cases as Belle Terre v. Boraas, 416 US1 (1974). See Tribe, 988-990, this is not a straight "morality" argument of the impermissable kind (see, infra, 69-74); to the extent it can be read as attempting a balance between competing rights rather than between individual right and majoritarian tastes, (see, infra, 74-75), Tribe's approach has constitutional merit. All that is missing, then, is a coherent emphasis of values and their constitutional sources, as in Richards, supra note 6; see Part IV at 59-69.

216. Tribe, supra note 6, at 989.

217. Karst, supra note 6, at 692.

218. Originally suggested in 1965, before Baker, supra note 35, in J. Goldstein and J. Katy, The Family and the Law 9n.1. See, also, Yale supra note 46 at 588-89, and PA, supra note 36, at 213. Whatever happened to the principle evoked in "Separate educational facilities are inherently unequal," Brown v. Board of Education 347 US 483 495 (1954)? "Separate, but equal", as in quasi-marital status "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id at 494. The same holds true for gay lovers seeking marriage, more than the sum of its material parts.

219. The problem with such arrangements has been the traditional reluctance of courts to recognize and enforce such private agreements. See e.g. Doe v. Doe, 365 Mass 556, 314 NE2d.128(1974) (refusing to interfere with intra-marital arrangements). As Weitzman suggests, supra note 165, this is changing. 1266-78. For nonmarried couples, i.e., gay lovers, the problem has been getting the court to ignore the "meretricious" aspect of any agreement. Rivera, supra note 5, at 904-05; J. Sonenblick, The Legality of Love 35, 130 (1981) (suggesting that couples create arbitration panels as well to avoid the need for judicial recourse). On the advantages of partnership agreements over cohabitation contracts, ibid at 130, and Weitzman, supra note 165, at 1249-1266 (proposing "Uniform Conjugal Partnership Act at 1256). See, generally, Legal Guide, supra, note 160. See, also, note 385, infra.

220. 18 Cal 3d 660, 557 P2d 106, 134 Cal. Rptr. 815 (1976) (parties to a nonmarital relationship may enforce express or implied property division agreement). See, discussion, Rivera, supra note 5, at 901-05; Legal Guide, supra note 160, at 12-24. Marvin has been applied by at least one court to a lesbian couple. The Advocate at 12 (7.12/78), but see Rivera at 901 (doubting reach of Marvin).

221. Rivera, supra note 5, at 904. See pending cases in California courts (gay lovers suing state agencies for various marital benefits for their lovers on equal protection grounds); The Advocate #364 (3/31/83) at 54-55, #356 (10/22/82) at 11-12. San Fransisco is currently embroiled in a flap over a "Domestic Partners" bill, passed by the City Board of Supervisors, vetoed by the Mayor.

222. "Bill 86" adopted 12/18/82. See, Advocate # 364 at 10 (3/31/83). With such a measure, Quebec goes beyond its present policy of nondiscrimination on the basis of sexuality to a de facto recognition of samesex marriage-like relationships.

223. And even less satisfactory ones as the adoption of one gay lover by another (sometimes even the younger one). See, e.g., In Re Adult Anonymous II, 45 N.Y.S. 2d 198, 8 Fam. L. Rptr. 2576 (N.Y. App. Div. 1982). Marriage would clearly be preferable (as well as just); for one reason, not the least important, marriages can be dissolved; adoption is forever.

224. Rivera, supra, note 5, at 9049 Yale, supra note 46.

225. PA., supra, note 36, at 213.

226. Ibid.

227. Aside from the inherent problems of "separate but equal" and its inadequacy as regards human rights (see note 218, supra), the quasi-marital status has other flaws. Consider the willingness of its proponents to accept a "rebuttable presumption" against gay couples seeking to adopt. PA., supra note 36, at 214-15, 215n.138. The stigma continues.

228. See, e.g., Karst, supra note 6, at 634.

229. Note 218, supra; also, Karst, ibid, at 663-64. Loving, supra note 40, should prohibit this kind of stigma and restriction.

230. Karst, supra note 6, at 666-67.

231. For example, Doe, supra note 133. See, discussion, supra, esp. 21-26.

232. Richards, supra note 6, generally. See, Part IV, 59-69.

233. Whalen v. Roe, 97 S. Ct. 869, 876 (1977).

234. Ibid.

235. Wilkinson and White, supra note 10, at 567.

236. Ibid. This is true even despite its frequent, indeed unusual deference to the states. Sosna v. Iowa, 419 U.S. 393 (1975).

237. Karst, supra note 6, citing R. Woodward and S. Armstrong, The Brethren 238-40, 413-14, (1979). See, also Doe, supra note 133, in which the Court's summary affirmance has mystified commentators (e.g. Tribe, supra note 6, at 943, 943n6) and even seemingly, the Court itself. See, Carey v. Pop. Services. Int'l, 431 U.S. 678, 694 n. 17 (1977) (saying the consensual adult sex issue is still unresolved).

238. See, infra, Parts II and III.

239. Note 133, 237 supra.

240. Rivera, supra note 5, at 945. Perhaps even more than that, the Virginia statute said nothing about marriage either.

241. Note 59, supra at 1204, which, in the words of the Doe dissent, eliminates "the legal viability of a marital-nonmarital distinction in private sexual acts."

242. Doe, supra note 133 at 1202.

243. Rivera, supra note 5, at 883.

244. Ibid at 945.

245. The Doe court also ignored Eisenstadt, supra note 241, Roe v. Wade, 410 U.S. 113 (1973) (extending Griswold and Eisenstadt privacy to cover abortion decisions), Stanley v. Ga., 394 U.S. 557 (1964) (privacy protects possession of unlawful obscenity in the home), and so on, all of which significantly expanded on the imprecise nature of privacy suggested in Griswold, reflecting the primary value given to individual autonomy in the Constitution. See Part IV at 59-69.

246. Doe (dissent) supra note 133 at 1204-05.

247. Ibid at 1203.

248. Ibid. at 1204-05.

249. Ibid at 1203-04.

250. Ibid. at 1205.

251. See note 237, supra.

252. "Doe is deeply, morally wrong." Richards, supra note 6 at 1017. See Part IV.

253. Karst, supra note 6 at 663.

254. As Tribe, supra note 6, does on p. 904.

255. See, R. Unger,"The Critical Legal Studies Movement", 96 Harv. L. Rev. 563, 602-615 (1983) urging an expanded conception of, and role for, Equal Protection.

256. Richards, supra note 6, at 1013.

257. Karst, supra note 6, at 655.

258. See, infra, Parts III, IV; also consider the nature of marriage itself, an expression of commitment. How does one separate out values like these at the core? See note 259, infra.

259. For those bearing the brunt of sexualism, the two are often identical. As Karst, supra note 6, at 654, observes, coming out of the closet is "a statement of great personal importance and may also be a political act." Thus, the First Amendment is held to "protect a rich variety of expressional modes." Tribe, supra note 6 at 579. See, supra, note 153. It is no coincidence that these values, so intertwined constitutionally, are at the heart of the matter for samesex marriage.

260. CBS v. Democratic National Convention, 412 U.S. 94, 145 (1973) (Stewart concurring).

261. See empirical discussions 31-44, 44-59. "What's wrong with the world from Arnold's perspective, is that it doesn't seem to include an Arnold in its schema...When the play ends, Arnold does know who he is, and so does the audience. He's a human being, and he wants what most human beings want: a partner, a family, shelter." , Cantwell, "The Sexual Masquerade" New York Times § 2 at 1 (1/16/83)(discussing Harvey Fierstein's Torch Song Trilogy, a current play about Arnold Beckoff, a gay man)

262. To the extent government should show joy at all. See, infra, Part IV(C).

263. Karst, supra note 6, at 659-60. See, generally, R. Kluger's inspiring Simple Justice (1975). Gay people "traditionally have faced many of the same problems as blacks, chicanos, women, and other groups who were denied equality of opportunity." V. Bullough, Homosexuality: A History 64-65 (1979) (hereafter: Bullough).

264. Karst, ibid. As Bullough, ibid, notes, one reform movement tends to beget another. Thus, the Nineteenth Century's abolition movement gave impetus to the women's suffrage push. This galvanized women into Prohibition and similar moral crusades and reforms collapsed into the "Progressive Era" of American History. The 1960's civil rights movement blossomed into broader liberation struggles against sexism and sexualism. See, infra, Part II at 31-33, 40-44, and 44-50, 56-59.

265. Cultural revolution is the change and reduction of arbitrary confines on the individual in the sphere of personal relations and society, as opposed to the state level. See Unger, supra note 225, at 671. Cultural revolution is the reform of the texture of elementary relations between individuals. Unger, Lectures on Jurisprudence (Harvard Law School, January, 1982).

266. Simple Justice note 263, supra.

267. See 31-44, infra.

268. Tribe, supra note 6, at 898.

269. See Weitzman, supra note 165, at 1191- 1235; infra pp. 31-44.

270. Ibid, generally.

271. Ibid at 1235-36.

272. Ibid.

273. Note 40, supra.

274. Ibid; see also, notes 41; 58 supra, and accompanying text.

275. Wilkinson and White, supra note 10, at 574.

276. Weitzman, supra note 165, at 1228-29 describes the de facto development in America of a dual system of marital regulation: penal/political for the poor, civil/less-penal for the middle class. This inequity arises out of the inappropriate judicial attempt to cling to prejudices and preconceptions about how people live and should live, in defiance of changing patterns and diversity in real life.

277. Aside from gay lovers, these can include illegitimate children, Mormons, minority group members, the poor, etc. See Wilkinson and White, supra 10 at 568-69.

278. See Eisenstadt, supra note 59. Tribe, supra note 6, at 974, and Karst, ibid, at 638, both note that the right not to associate is part of any meaningful freedom of association. As Karst points out, although freedom to leave (divorce) may reduce the value of the choice to get married, it enhances the decision to remain. In any case, for whatever reason, at least ten percent of today's young adults will choose never to marry, a 100% increase over the rate of the 1970's. "Death of the Family" Newsweek at 26 (1/17/83).

279. Op cit.

280. See, infra, pp. 31-40, and esp. 40-43.

281. Wilkinson and White, supra note 10, at 623.

282. See, e.g. Weitzman, supra note 165, at 1242; also, Part II(A), infra, at 33-34.

283. For example, what Karst, supra note 6 at 647 describes as "incongruities between associated status and associational values". (married but not living together; living together but not married.") See infra, pp. 31-44.

284. Heymann and Barzelay, "The Forest and the Trees: Roe v. Wade and its Critics", 53 B.U. L. Rev. 765, 772-73 (1973).

285. W. Goode, The Family 2-3 (1964).

286. This is what Tribe, supra note 10, at 898, describes as the "ancient paradox of liberalism: to destroy the authority of intermediate communities and groups in the name of freeing their members from domination destroys the only buffer between the individual and the state, and risks enslaving the individual to the state's potential tyranny." Worse than a mere "paradox", it is in fact a "dilemma" because of the countervailing "risk that individuals will remain at the mercy of heirarchial and subjugating social structures." Of course, the object here is not the destruction of "the family", but the recognition of familial diversity. Rhetoric and prejudice should no longer cloud the issue and eclipse the human rights of real people suffering from sexism and sexualism, which the state surely must combat.

287. Karst, supra note 6, at 647.

288. Richards, supra note 6 at 994. Also Unger, Lectures on Jurisprudence (Harvard Law School, January 1982) (on the good at stake in love and cultural revolution);R. Unger, Passion (unpublished MS.). See, Plato, Symposium in The Collected Dialogues pp. 559-60 (E. Hamilton and H. Cairns, ed. 1961).

289. Griswold, supra note 39, at 486.

290. Note, Same-Sex Marriage, 15 Tulsa.L.Rev. 141 (1975).

291. GLAD brief, supra note 93, at 8.

292. JFL, supra note 21, at 619n. 46.

293. See note 38, 41 supra, and accompanying text. In Jones v. Hallahan, supra note 35 at 589, the court said that two lesbian women were not prevented from marrying by the gender-neutral state laws, but "rather by their own incapability of entering into a marriage as that term is defined."

294. Ibid.

295. See e.g., Boswell, supra note 7, at 26.

296. Ibid, see also, D. Hunt, Parents and Children in History 57-75 (1970) for a somewhat different, though corroborating, look at another culture and period.

297. See, e.g., Baker, supra note 10.

298. Boswell, supra note 7, at 26.

299. Foreword, Masters and Johnson, supra note 8, at V.

300. Wilkinson and White, supra note 10 at 566.

301. Ibid.

302. Ibid. Three percent (1.9 million) of American households are made up of "persons of the opposite sex sharing living quarters." See Newsweek, Supra note 278 at 27.

303. See, e.g., "Common Law Marriage and Unmarried Cohabitation: An Old Solution to a New Problem", 39 U.Pitt.L.Rev. 579 (1978)

304. Weitzman, supra note 165, at 1200.

305. Bell, "Let's Get Rid of Families!", Newsweek at 19 (5/9/77) Because of urbanization and industrialization, past social patterns shifted from kinship to nuclear family arrangements; today, however experts disagree on the degree to which American life resembles each model. Much depends on the class and group studied. See Winch, "Some Observations on Extended Famialism in the U.S." in Selected Studies in Marriage and the Family 127 (R. Winch and L. Goodman, eds. 1968).

306. Karst, supra note 6, at 650.

307. Ibid.

308. Described in Part I, and Part IV; 65-77.

309. Weitzman, supra note 165, at 1171.

310. This section, calling for the elimination of certain outmoded legal assumptions impermissably based on stereotypes and "moral" prejudice, follows closely the format used by Weitzman, supra note 165, at 1197-1236.

311. Ibid at 1200-1203.

312. Ibid at 1201; See, also, Boswell, supra note 7 at 114 on Jesus' values (relatively indifferently to sexuality compared to emphasis on wealth or demonic possession, no mention of gay love, focus on fidelity rather than procreation or childrearing, no divorce, advocacy of celibacy.)

313. "Divorce today is accomplishing some of the reshuffling of marriages which only a few years ago occurred through death...Apparently, longevity has now exposed the fact that the human race has never been mature enough for early marriages, a fact which used to be obscured by early deaths." L.Kubie, "Psychoanalysis and Marriage" in Neurotic Interaction in Marriage 12(V. Eisenstein ed. 1956) quoted in Weitzman, supra note 165, at 1210n.187. See also J. Bernard, "Infidelity: Some Moral and Socail Issues" in Renovating Marriage: Toward New Sexual Lifestyles 75-76. (R. Libby and R. Whitehurst eds, 1973) (The trend [today] seems to be in the direction of exclusivity at the expense of permanence in the younger years, but permanence at the expense of exclusivity in the later years"). See Weitman at 1200-10; Newsweek, supra note 278, at27 for more recent statistics.

314. Weitzman, supra note 165, at 1204-05 on "serial family formation" "[T]here is an awareness now that marriage doesn't have to have a permanence if it isn't working out according to the desires and expectations of the people involved. It can be ended and reentered". A. Norton of the Census Bureau in Newsweek, supra note 278, at 26. See also M.Bane, Here to Stay (1976).

315. Weitzman, ibid, at 1204.

316. Ibid, at 1206.

317. Boswell, supra note 7, at 126. "Sexual, (as opposed to romantic) issues for Romans were primarily proprietary..."Id at 62n.4 Saint Thomas Aquinas placed supreme value not even on reproduction, but on "the legitimacy of the offspring" as the"chief good of marriage". Id at 165.

318. Note 146, supra.

319. See, e.g. Weitzman, supra note 165, at 1211. It also may have been the source, surprisingly, of "age of consent" notions in this area, rather than the modern view which sees meaningful individual choice and a human rights vision as requiring mature consent. Id at 1212. This is another reason to move to a broader view of marriage based on an appreciation of people as people and marriage as their choice, rather than instruments of procreation under an archaic "moral" code.

320. E.g., Griswold, supra note 39 (contraception); Levy v. Louisiana, 391 U.S. 68 (1967) (illegitimacy); Eisenstadt, supra note 59 (marriage/nonmarriage), etc. Even the limited constitutional vision of the Supreme Court has required that we ignore many of the theological injunctions (i.e. against divorce, barren women marrying, etc. See Boswell, supra note 7, at 165-66) although we have kept one--hostility to gay love.

321. Weitzman, supra note 165, at 1216. This discredits the court's argument in Singer, supra note 35, at 259/1195 that marriage is "a protected legal institution primarily because of societal values associated with the propagation of the human race." See supra notes 142, 143, 149, and accompanying text. See also, Newsweek, supra note 278, at 27 (on unwed mothers).

322. See, infra, Part II(B) at 40-43. Indeed, until recently, historically, "'love'between husband and wife was something expected to develop as a consequence of marriage, not to occasion it." Boswell, supra note 7 at 62. Women were misprized and condemned, often worse than gay men, often together.

323. See Weitzman, supra note 165, at 1216-17.

324. Ibid at 1226.

325. Ibid at 1216-17, 1277.

326. Gender-based prejudices, usually misogynistic, are often at the root of much anti-gay stereotyping and animus. See infra, Part III at 44-50, 56-59. See also, McNeill, supra note 159, at 83-87, and Baily, supra note 159, at 61-63.

327. See, Weitzman, supra note 165, at 1230, and e.g., Boswell, supra note 7 at 113-17.

328. Weitzman, ibid.

329. Ibid.

330. Stanley v. Ill., 405 U.S. 645, 651-52 (1972) (man need not marry to raise children). This is correct, because marriage itself, after cohabitation or whenever, is not just conduct but a statement, doubly protected as autonomous choice. See, e.g., Karst, supra note 6, at 661.

331. R. Whitehurst, "The Monogamous Ideal and Sexual Realities" in Renovating Marriage: Toward New Sexual Lifestyles 38, 42 (R. Libby and R.Whitehurst, eds. 1973).

332. See, e.g., Weitzman, supra note 165, at 1233, 1243. See also G. Leonard, "The End of Sex", Esquire (Dec 1982)("high monogamy" vs. "low monogamy").

333. See, e.g. T. Deniger, "In Defense of One Night Stands", The Advocate #363, at 28 (3/17/83) (noting that those who condemn casual sex as "compulsive", "joyless", and even "cruel" often ignore "the fact that long term monogamous relationships can be just the same.") See, supra, notes 313, 331.

334. Ibid. As Christopher Isherwood put it,"Brief encounters can be something marvelous, even more marvelous than other forms of sexual relationship."

335. Deniger, supra note 333, at 29.

336. Boswell, supra note 7, at 164. See supra notes 146, 317.

337. Ibid.

338. Ibid, at 164.

339. See, e.g. Eisenstadt, supra note 59; Stanley v. Ill, supra note 330; See also, M. Glendon, "Marriage and the State: The Withering Away of Marriage", 62 Va.L.Rev 663 (1976).

340. See, e.g., Karst, supra note 6, at 648-48.

341. See Weitzman, supra note 165, at 1266-75; see also, notes 219-20, supra, and accompanying text.

342. Note 340, supra.

343. This is not to minimize the tangible material benefits of marriage still remaining including tax benefits, evidentiary privilege, visitation rights, adoption advantages, tort recovery, intestate succession, support and maintenance liability, funeral benefits, death-tax breaks, lower insurance rates, citizenship extensions, Social Security and military benefits, pension rights, some property rights, divorce protection, and so on. See, e.g., Yale, supra note at 579-81; Sonenblick, supra note 219, at 73-74; Legal Guide, supra note 160.

344. See Parts III, pp 44-50, 52-58, and IV pp. 59-60, 65-69, Conclusion at 75-77.

345. See, supra pp. 14-21, 33-40, and infra, pp. 44-50, 52-59, 69-74.

346. See, R. Dworkin, Taking Rights Seriously 240-58 (1977).

347. See Richards, supra note 6, at 995-96.

348. Dinnerstein, supra note 8, p.4.

349. "Androgyny" has a faintly ominous ring to us, evoking something dehumanized, artificial, or "unnatural". This is a reflection of our inculcated sexualism, which requires us to see male and female as inherently apart and incapable of combination. Unger cites two ways of looking at androgyny, defined as the overcoming of the specialization of experience and function, not a biological hermaphroditism. The minimalist position is the reduction of sexist barriers (in a sense, allowing women to be men, as our society's structures go). The more full conception is an empowerment of the individual to combine and

experience new social possibilities, to exhibit deeper feelings of both genders and of many sexualities. Unger lectures on Reinventing Democracy (Harvard Law School, Spring, 1982). See also Part III, infra, at 44-59, 65-68. On the consequences of male dominated culture, see, e.g., D. Trumbo, The Night of the Aurochs 153-59 (1979) ("the apocalyptic male absolutism of the Nazi which, aside from its political and territorial ends, resulted in the total subjugation of women, and extermination of the Jews" and gay people.)

350. What would such a world be like? "there is no division of humanity into strong/weak halves, protective/protected, dominant/submissive, owner/chattel, active/passive. In fact, the whole tendency to dualism that pervades human thinking may be found to be lessened, or changed..." U. LeGuin, The Left Hand of Darkness 94 (1969) (evoking an androgynous world without sexism or sexualism).

351. This is Rawls' premise, supra note 15; see, infra, Part IV pp. 59-63. See also, LeGuin, supra more 350.

352. LeGuin, ibid, at 95.

353. Dinnerstein, supra note 8, p.5. Another author suggests a different metaphor: "Either you played the Great Ear, or you accepted the label of Festering Hole. One way or another, men were determined to fill your orifices." L.Alther, Original Sins 381 (1981) Even the inverse, "chivalric" language of the pedestal or "gentlemanly" idealization is a form of dehumanization and distancing. For women, as for blacks, Jews, or gay people, forced separation is inherently unequal.

354. Tripp, supra note 135, at 48. See his examples of distancing socialization--from combative elements in sexual intercourse to male-bonding (p.49) to tribal exogamy. Anatole France's contention that one of Christianity's greatest contributions to Western civilization is the impetus it gave to sex becomes comprehensible given the social needs to heighten mystery and control behavior (with safety valves) through taboos. See Tripp, at 110-112.

355. Ibid; see also, note 353, supra.

356. Traditional thinkers who see a fundamental difference (unsually inferiority) in women. Dinnerstein, supra note 8, at 24-25, attacks this contention arguing that the only real significant biological difference between women and men is the reproductive function. Since a woman needs to be "out of commission" for, at most, only six months per child, this equals 1½ years (assuming three children). or only 3% of a fifty- year adult life (ages 15-65), or too small a time to make a meaningful difference. Thus, she locates the cause of sexism elsewhere. See note 357, infra. Boswell, supra, note 7, at 101n.12, comments that the greater potential investment required of women in childbearing and rearing is compensated in most societies by less choice for women on marital status, and thus greater loss of prestige and freedom if unmarried and childless, vis-a-vis men.

In any case, as feminist Kate Millett observes, Iran's religious autocrat, Ayatollah "Khomeini's dismissal of half the population [i.e., women] against him is crucial...It's very important to the social order that rightists endorse that women be servants of the family and the family be a servant of the state." Interview in The Advocate #363, p. 34. (3/17/83).

357. Dinnerstein, supra note 8, p.4, 5-6, generally. On the harmfulness of such sex-roles to both mather and child, and, therefore, society, see also, A. Rossi, "Equality Between the Sexes: An Immodest Protest" in The Woman in America 113 (R, Lifton, ed. 1964) "If a woman's adult efforts are concentrated exclusively on her children, she is more likely to stifle than broaden her children's perspective and preparation for adult life...In myriad ways, the mother binds the child to her, dampening his initiative, resenting his growing independence in adolescence, creating a subtle dependence which makes it difficult for the child to achieve full adult stature..." Id.

358. See Tripp, supra note 135, at 44.

359. See, e.g. Weitzman, supra note 165, at 1239-41.

360. See, e.g., Boswell, supra note 7, at 76-77, 156-58 and Richards, supra note 6, at 984n.120, 985. See infra, 44-50, 56-59.

361. Ibid.

362. Thus, St. Paul ("neither male nor female...all one in Christ") in Boswell, supra note 7, at 158, and ibid. The history of intolerance toward gay people, sexualism, provides "singularly revealing examples of the confusion of religious beliefs with popular prejudices." Id at 6. See infra, Part IV(C) pp. 69-74.

363. See, e.g., Tripp, supra, note 135, at 59, and supra, notes 354-358 and accompanying text.

364. See, e.g., Weitzman, supra note 165, at 1225 (citing sources).

365. Tripp, supra note 135, at 53-55.

366. Ibid, at 633.

367. "In large part it is the changing position of women with respect to men in the larger society which has influenced and altered the position of the two sexes within the family." Weitzman, supra note 165, at 1220. Cultural revolution is always this tandem internal/external change. It is hard to say which must come first--law or social custom, each of which affects the other. For the importance of internal social constraints in our constitutional system, see G. Wills, Explaining America pp. XVII-XX, 37, 80-86, 102-125 (distilling "virtue" as well as institutional hedges on power) but prejudice must always be challenged, and laws based only in fairness and reason. Part IV, infra, esp. 59-65, 69-74, also note 441.

368. Weitzman, supra, note 165, at 1222-23 (quoting empirical study)

369. They are all related. See, supra note 7 and accompanying text, and Weitzman ibid.

370. M.Cantwell, "The Sexual Masquerade" in New York Times §2 at 1 (i/16/83)

371. Ibid, at 25.

372. Ibid, at 25. (Cloud Nine)

373. Ibid, (Tootsie)

374. Ibid, (Victor/Victoria)

375. Ibid, (quoting Carolyn Heilbrun, author of Toward a Recognition of Androgyny)

376. Ibid, at 25 (Tootsie, Torch Song Trilogy, The World According to Garp, Cloud Nine, Victor/Victoria.)

377. A comprehensive survey of sexist discrimination is beyond the scope of this article. Consider, however, some examples: a recent report by the U.S. Commission on Civil Rights showing the "feminization of poverty" in the words of Commissioner Mary Louise Smith, former chair of the Republican National Committee. Boston Globe at 14 (4/12.83) (women head almost half of all families below poverty level; even worse for minorities); the annual median income for a "traditional family headed by a married couple" is $23,141, while for those headed by a female with no spouse, it is $9,230. Newsweek, supra note 278, at 26.

378. "The stereotypical "family unit" that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality." Tribe supra note 6, at 987. As he notes, the Supreme Court decision, containing the most pronounced praise in recent years for family values was in fact a defense of the extended family more common among racial minorities than in the modern American mainstream." Id at 987n. 17A (referring to Moore v. City of E, Cleveland, 431 U.S. 494). See, also Wilkinson and White, supra note 10 at 566-67; and Weitzman, supra note 165, generally.

379. In Re Adult Anonymous II, supra note 223, at 2577.

380. See, supra, note 162, and Legal Guide, supra, note 160. In all, 26 state jurisdictions have, in one way or another, essentially decriminalized private consensual adult sex. See, infra, Part III, pp. 56-59,

381. Rivera, supra, note 5, at 906; Karst, supra note 6, at 666. See also, the dictum in Smith V. Org. of Foster Families, 97 S.CT. 2094, 2109-10nn49-50 (1977) (protection of family arrangements not limited to those related by blood).

382. Rivera, ibid. See infra, Part III at 44-50, 56-59 , and note 531, infra.

383. Karst, supra note 6, at 666n191.

384. 25 Cal.3d.238, 599 P2d. 636, 158 Cal.Rptr.330 (1979).

385. See, e.g. Jones v. Daly, 176 Cal.Rptr. 130 (1981), Bramlet v. Selman, 597 S.W.2d.80 (Ark. 1980), Weekes v. Gay, 234 Ga.784, 256 S.E.2d 901 (1979), Richardson v. Conley. 4 Fam.L.Rptr. 2532 (Cal.Super 1978). See also, notes 219, 220, and accompanying text, supra.

386. <cite> — MASS — (MASS. ADV. SH. 2133) (1980)

387. DeSanto v. Barnsley, pending in Super Ct.Pa., No 00837PHL82.

388. A.Kantrowitz, "Till Death Do Us Part: Reflections on Community" in The Advocate #363 at 27 (3/17/83). The author is wrong in that samesex marriage has existed in other cultures and at other times, see infra, p. 45, 58, but is correct as regards the U.S.

389. Ibid.

390. Rivera, supra note 5, at 800. See also, note 11, supra, and Part III, 44-59, infra.

391. Both of the uselessness of the categorization and the emptiness of the stereotypes, given the complexity of sexuality. See, infra, Part III, at 44-59.

392. Again, gay people are those who have made some choices in lifestyle and acceptance of what aspect of them, their sexuality, compelling interest in, and love of, those of the same gender. See, note 11, supra, and Part III, infra. Gay people are not to be confused with transexuals, see, Rivera, supra note 5, at 804, 874n451, or transvestites, ibid at 804-5, the great majority of whom are nongay. Tripp, supra note 135, at 26. Those attracted to others of their gender can be found living a great diversity of different lives with no unifying characteristics, save, if it is one, that category of love. Part III(B) infra, pp. 45, 56-59. Even if it did not have a cost attached, it is doubtful whether categorizing people according to their mode of love is particularly useful. See, e.g., J. Barth, The Floating Opera 43-44 (1956).

393. Boswell, supra note 7, at 47, 58-59. They might ask "chaste or unchaste," "married or single", "active or passive", "romantic or unromantic", but not "gay or nongay", a distinction that never occurred to them, although samesex eroticism and love was clearly present, widespread, and even idealized.

394. Ibid, at 59. As sociologist Kenneth Clark put it, "racism [is] to be understood not in terms of the black man's deficiencies but in terms of the white man's," quoted in R. Kluger, Simple Justice 130 (1975). Sexualism shows the same dynamic.

395. Boswell, ibid.

396. Ibid. See, for example, Part II(B) supra, 40-43 or Part III, infra.

397. Boswell, ibid, at 73.

398. Ibid.

399. See discussion, infra, p. 58.

400. Tripp, supra note 135, p. 1.

401. It is sometimes hard to shake loose of the sexualist distinction, ingrained in all of us, that leads to the conception of a fixed gay minority. For a variety of reasons, some individuals are more inclined to samesex attraction than others, Part III(A), infra, pp. 50-52; some are more willing to identify themselves as such, as gays. These self-identified or socially emphasized gay people do constitute a minority in modern America, at least so far as self-identification, and perhaps in terms of biological or formative sexual orientation as well. In any case, due to sexualist oppression, gay people are in need of constitutional protection to preserve their human rights. Part IV, infra. This must not obscure the fact that sexualism, which categorizes and restricts all of us, is an unnecessary burden we all bear, limiting the rich possibilities we all inherit and claim as our own.

402. Tripp, supra note 135, at 127.

403. Boswell, supra note 7, pp. 17, 23.

404. Rivera, supra note 5, pp. 804-5.

405. See, e.g., Tripp, supra note 135, at 141. In an interview with Martin Weinberg, see, infra p. 46, the reviewer noted: "The fact that so-called classic developmental patterns were not found among the [gay clinical] respondents 'never in treatment' suggests the possibility that counselors and therapists may teach their homosexual clients to see or interpret their family backgrounds in ways that are consistent with the therapists' particular theoritical perspective." Boston Globe p. 15, 2/20/82. This would explain many of the misconceptions and stereotypes about gay people, even in "expert" etiological study. Part III(A), infra, pp. 50-52. One writer described this process: "Truth eternally eludes us....Take crabs, for example. We poke them with a stick to find out how they behave, and they behave as if poked by a stick." J. Gardner, The Wreckage of Agathon 92 (1970).

406. Masters and Johnson, supra note 8, p.3.

407. Globe Interview with Martin Weinberg, supra note 405, at 15.

408. See, infra, Part III(A) pp. 50-52,

409. Gay Alliance of Students v. Matthews, 544 F2d 126, 164n3. (4th Cir. 1976).

410. Ibid, see, infra, Part III(A) pp. 50-52.

411. Ibid, at 164, Part III, infra.

412. A. Kinsey, W. Pomeroy, & C. Martin, Sexual Behavior in the Human Male, 617, 638-41 (1948 Rivera, supra note 5, at 811n66. Paul Gebhard, current Dir.of Kinsey's Institute for Sexual Research as estimating that 13.95% of the male population and 4.25% of the female, 9.13% of the whole, can be classed as having extensive or more than i[illegible] incidental samesex experience. Forty per cent of the male population, and 20% of the female, have had at least some overt samesex experience after puberty. Boswell, supra note 7, at 54nn35-36 notes that the Kinsey studies, unparallelled in scope, may not even be representative of the United States, given the prevailing rabid politics of the time. See, also, Tripp, supra note 135, at 232-40. In a sense, the numbers are irrelevant: Certainly, insofar as rights and oppression go, "suffering is not increased by numbers; one body can contain all the suffering the world can feel." G., Greene, The Quiet American 177. (1955). Further, we all could perhaps be of different sexuality in a different cultural climate.

413. Boswell, supra note 7, at 44, 44n7, relying on Kinsey and Gebhard statistics.

414. L. Humphreys, Tearoom Trade: Impersonal Sex in Public Places 105(1970).

415. Can we ever successfully class people on such level? "Wouldn't we all be better not trying to understand, accepting the fact that no human being will ever understand another, not a wife a husband, a lover a mistress, or a parent a child? Perhaps that's why men have invented God--a being capable of understanding." G. Greene, The Quiet American 53.(1955) The important object in our dealings with others, then is compassion, concern, and equal respect for their autonomy, as for ours.

416. The Advocate at 8 (8/23/78)

417. Masters and Johnson, supra note 8, p. 403.

418. Ibid, foreword, p. VIII. The sex is essentially the same, too. Tripp, supra note 135 pp. 97-98.

419. Clark, "Homosexuality and Psychopathology in Nonpatient Males," 35 Am. J. Psychoanal. 164, 167 (1975).

420. Boswell, supra note 7, p. 10n13.

421. Tripp, supra note 135, p. 169.

422. Ibid.

423. Masters and Johnson, supra note 8, foreword p. VIII.

424. Tripp, supra note 135, p. 162.

425. Letter of Bishop Melvin E. Wheatley, Jr., forty-four years a minister in the United Methodist Church (9.7 million members, nation's second largest Protestant denomination), Bishop of Rocky Mountain and Yellowstone Conferences, quoted in The Advocate #362 p. 18, (3/2/83).

426. See, supra, note 33. Thus, the fate of Jews and gay people is almost identical in European history, right down to the characterization as animals. See, infra, p. 72, Boswell, supra note 7, at 15-16, 51. See, also, for example, supra note 349.

427. Boswell, supra note 7 at 16.

428. Ibid. Consider also the pervasive presumption that the viewer, indeed the world, is nongay in the media, television, advertising, billboards, radio songs, etc.

429. Boswell, ibid. p. 16. See, also, L. Hobson, Consenting Adult (1976).

430. Boswell, ibid, pp.16-17.

431. Ibid.

432. Ibid.

433. Ibid., but see, the dangers of the "closet" described in Bullough, supra note 263, p.2 (Nazi Germany, Cuba, the United States, inter alia)

434. See, e.g., T. Branch, "Closets of Power" in Harper's (Oct. 1982). There is a direct nexus between the needs to be open and the form discrimination takes; thus, for instance until the late 1960's, Bell Telephone Co. refused to include in directories any group with "homosexual" in its name. Bullough, supra note 263, at 67. See, infra, note 645 and accompanying text, and supra, note 259 and accompanying text.

435. See Parts III(B) and (C), infra pp. 52-59; also, Tearoom Trade, supra note 414.

436. Boswell, supra note 7, p. 17. This is because their "identity as a group" is so inextricably linked with the others who so created it in the first place. Until society reacts, it is no big deal being gay; it seems "natural".

437. See, e.g., Bullough, supra note 263, pp. 31-37, and Finman and Macanlay, "Freedom to dissent: The Vietnam Protests and the Words of Public Officials," 1966 Wis.L.Rev. 632, 679.

438. Bullough, ibid, p. 31 (emphasis added) giving a formative role to the law, but see, Boswell's, supra note 7, more penetrating inquiry examining the complex causation of cultural revolution. Part III, infra, pp. 56-59.

439. Bullough, ibid, p. 2.

440. Infra, pp. 52-59, 69-74. See, generally, Taylor, "History and Mythical Aspects of Homosexuality " in Sexual Inversion 140-64(J.Mormor ed. 1965) and Boswell, supra note 7.

441. The familiar problem of precedence in effecting change and cultural revolution. See, supra, notes 367, 438 and accompanying text, also, infra, pp. 50-59. The difficulty of knowing whether to change law or social attitudes first, or which more influences which, is Escherian in its complexity. See, pictures in M.C.Escher, The World of M.C. Escher, (ed. J. Locker 1974).

442. M. Hoffman, The Gay World 176 (1968). Hoffman is a psychiatrist.

443. See, infra, note 674 and accompanying text, also, pp. 69-74.

444. Boswell, supra note 7, p. 48.

445. See, e.g., D.J. West, Homosexuality 169 (1967) and Boswell, supra note 7, at 53 (citing Aquines).

446. Tripp, supra note 135, p. 12 (citing early Kinsey theories, and rejecting them)

447. See, e.g., M. Weinberg, A. Bell, & S. Hammersmith, Sexual Preference: Its Development in Men & Women (1983)(raising again the possibility of some biological etological prepackaging "simply because no psycho-sociological theories came true"); also, Heston & Shields, "Homosexuality in Twins", 18 Arch. Gen. Psychi 149 (1968). As an early anthropological study concluded, TThe apparent universality of the form of sexual activity might be due to some equally widespread social influence that tends to force a portion of every group into homosexual alliance. Certain social factorsprobably do incline certain individuals toward homosexuality, but the phenomenon cannot be understood solely in such terms." C. Ford & F. Beach, Patterns of Sexual Behavior 250 (1951). Curiously, this is in a sense closer to the Victorian notions of etiology. Tripp, supra note 135, p. 84. Tripp also cites sources indicating that " for a boy to reach puberty early, to begin masturbation even before that, and to look at his own genitalia in the process are among the highest known correlates of homosexuality" Id. at 84. This suggests some innate biological component influencing sexuality, not merely samesex attraction which could also be explained in terms of social response to the individual's composition.

448. Globe interview, supra not 405, p. 15. The leading proponent of the now discredited "parental" model explanations was I. Bieber, Homosexuality: A Psychoanalytic Study of Male Homosexuals 310-313 (1962). But see Tripp, supra note 135, pp. 36-100, and supra, note 405.

449. See, e.g., Masters and Johnson, supra note 8, or Kinsey, supra note 412. Tripp, supra, note 135, p.16, provides a modification of such theory, writing, however, before many of the major new studies.

450. "Early (or any) sexual experience, by itself, carries little weight; what counts is the context in which it occurs" (i.e., the person's predisposition and other, social, factors). Tripp, supra note 135, p, 39. "Childhood and adolescent sexual experiences by and large reflect rather than determine a person's underlying sexual preference. What differs markedly between the homosexual and heterosexual respondents, and what appears to be more important in signaling eventual sexual preference, is the way respondents felt sexually, not what they did sexually.

Weinberg discussing new study in Globe interview, supra, note 405, p. 16. "A homosexual predisposition becomes evident for the majority of our homosexual respondents, through their feelings of homosexual arousal or felling sexually different which in most cases occurred years before any advanced homosexual activities took place." Id. (emphasis added). This, of course, has great significance as far as the recurring "proselytizing child molester" stereotype goes. See, infra, note 459. As Tripp comments, "eroticism often arises a late guest at its own banquet". Op cit at 81.

451. See. e.g., W. Barnett, Sexual Freedom & the Constitution, 151-60 (1973), Tripp, supra, note 135, pp. 76-86, 92; also, infra, p. 51.

452. See, e.g., Tripp, ibid, pp. 77-80. Supra, note 405, 448 and accompanying text.

453. Tripp, ibid, p. 92, but he wrote before the latest major studies--particularly, Masters and Johnson, supra note 8, Bell and Weinberg, supra note 119, and Weinberg, Bell, Hammersmith, supra nde 447.

454. Tripp, ibid. It is still a mystery, often an epiphany, but we know that on seeing our first love we were "stunned perhaps that knowledge could come so quickly...one desired truth one truthed desired...one...wanted so sharply" J. Fowles, The Ebony Tower 89. (1974)

455. Tripp, ibid, p. 93.

456. Whether through categories, (see notes 11, 394 and accompanying text and pp. 44-50 supra, or in other ways (e.g., Dinnerstein, supra note 8, pp. 30-31).

457. Plato, Symposium, 191E-192D(Aristophanes sees current human conditions as a fall from androgony; see, supra, discussion, pp. 41-43) See, supra, pp. 65-69.

458. Globe interview, supra note 405, p. 15.

459. Weinberg in Globe interview, supra note 405; see, also note 453, supra. Experts thus reject the fear of proselytization or corruption often lurking behind much antigay discrimination. The influence teachers, for example, have on children is not of this kind. Weinberg observes, "People don't believe that a child is heterosexual because the teacher is. Do they believe a child in a Catholic school will become celibate because the nuns are?" Id. at 16. Kinsey, supra note 402, too, considered

the "child seduction" fear devoid of legitimacy. Tripp, supra note 135, p. 91. Nevertheless, the prejudices continue, and are deliberately exploited by those who benefit from sexualism and the convenience of the gay political whipping boy. See, the discussion of the sexualist or "homophobic double standard: in the controversy over NAMBLA (the North American Man-Boy Love Assoc.) in The Advocate #363 pp. 10-13 (3/17/83). Consider the outcry over the sensationalized and false accusations against NAMBLA versus the silence over the man-girl affair depicted in Woody Allen's Manhattan, for instance, or the fact that much more sexual abuse occurs against young girls by nongay men than ever between samesex partners. Id. See also Boswell, supra note 7, at 28-28; Tripp, supra note 135, at 166 (discussing " thralldom" of an older man to a younger beloved); and text, supra, p. 19.

460. Tribe, supra note 6, p. 945, but he also wrote before the recent major studies, supra note 453 (most of which confirm his impression). He may also have been familiar with corroborating anthropological evidence, see, e.g., Ford and Beach, supra note 447. Cf., Masters & Johnson, supra note 8, who reject the idea of a particular predisposition in favor of an undirected sexual potential. Tripp supra note 135 p. 20 describes this"focusing in" "learning" theory of sexual orientation by noting that "what started out as a general sexual response to fire engines and cataclysmic events may wind up with its entire investment focused for an instant on the way the light falls into the dimple on somebody's cheek." (i.e., "each individual gradually loses his initial diversity of response as his sexual interests become ever more narrowed down [through socialization] to specific channels of expression") Id. at 21 But see, note 453, supra.

461. Tribe, supra note 6, at 945. Numerous studies confirm this, in addition to those discussed supra, see A. Karlen, Sexuality and Homosexuality, 572-606. and others cited in PA, supra note 36, at 206. Weinberg observes that gay individuals "are relatively impervious to change or modification by outside influences. It would probably make far more sense to recognize it [samesex attraction] as a basic component of a person's identity and to help the client develop more positive feelings about, and respect for, his or her sexual proclivities." Globe interview, supra note 405, at 16.

p, supra note 135, at 36.

464. "There's absolutely no evidence that the family plays any role in the development of sexual orientation." Weinberg, quoted in Globe interview, supra note 405, at 15.

465. Leading to reflections like these: "I might try to explain. Giovanni tried to explain. I might ask to be forgiven, if I could name and face my crime, if there were anything or anybody anywhere with the power to forgive. No. It would help if I were able to feel guilty. But the end of innocence is also the end of guilt. No matter how it seems, now, I must confess: I loved him. I do not think that I will ever love anyone like that again." J. Baldwin, Giovanni's Room 148 (1956)(an early modern gay love tragedy). An earlier author put it similarly: "It is not you who teach the age but the age which instructs you...God made our natures full of love; Nature teaches us what God taught her...What we are is a crime, if it is a crime to love, for the God who made me love made me love." Baudri (1046-1130) quoted in Boswell, supra note 7, at 247. See, also, note 709, infra.

466. As distinguished from arguments that gay people are dangerous(usually reduced when pressed to the contention that they are "immoral" and cause "creeping social decline". See, for example, pp. 69-74, supra, but see note 459, supra. On some speculative broad social effects of gay sexuality, see Tripp, supra note 135 p. 286 (suggesting that it reduces aggression at close and distant range while increasing intramural aggression between males at medium distance).

467. Infra, Part IV.

468. In two ways. Gay people seen as violating some kind of rule that males can only love females and females, males. The stereotypes or "sociosexual expectaions" hold women and men totally different. Bell & Weinberg, supra note 119, at 81. This leads to another misconception, that gay people must therefore be either "effeminate"(men) or over "masculine" (women) since people are only attracted to opposites. This, of course, is false logic based on false premises. See, supra, pp 44-50 and infra, pp. 52-59. Since only those gay people who fit the stereotype--i.e., "effeminate" men--register on the public consciousness and are most played up by the media (to make the shorthand reference to their gay sexuality), the prejudice is perpetuated. See, e.g., infra, pp 54-59, and Tripp, supra note 135, p. 8.

469. Infra, pp. 54-56.

470. Totally unfounded. See, supra, notes 459, and text. pp. 19.

471. Because society structures the visible outlets for gay sexuality, denying security to steady relationships and recognition to samesex marriage, while tolerating casual sex and relatively impersonal physical encounters, the main aspect of samesex relations it then sees and registers. See, supra, note 468 and accompanying text and, infra, pp. 54-59. St. John Chrysostom noted that St. Paul did not condemn people who "had fallen in love and were drawn to each other by passion", but only those who "burned in their lust toward one another." Boswell, supra note 7, at 117, declaring that "Enduring love between persons of the same gender albeit erotic, may have seemed a quite different matter." Of course gay sexuality is erotic, but it is also emotional, romantic, compassionate, intellectual, and as multifaceted as love between people can be.

472. Bell & Weinberg, supra note 119, pp. 24-5.

473. Ibid, pp. 24-25, 81-82. See, also pp. 54-56, infra.

474. Tripp, supra note 135, p. 170.

475. Ibid, p. 8.

476. Ibid, pp. 134-140 (describing typical "denial-umbrellas")

477. Dan Bradley, the highest federal official in American history to declare publicly that he is gay, quoted in "Closets of Power", supra note 76, at 35. As Bradley puts it now, "At least I don't have to lie anymore. Nobody who hasn't come out of the closet can ever know what a blessing that is." Id.

478. Aside from the familiar, sometimes speculative lists of gay geniuses and celebrities from every walk of life, see Tripp, supra note 135, p. 2

479. Ibid, pp. 140-143.

480. Not overnight, however. "People who have been stigmatized as deviant all of their lives do not immediately get over it even though society becomes more tolerant." Bullough, supra note 263, p. 150-52.

481 Tripp, supra note 135, p. 80.

482. Kantrowitz, supra note 388, p. 26.

483. Boswell, supra note 7, p. 27.

484. D. Vining, "Cruising", in The Advocate # 364 p. 16 (3/31/83). Nor is "anonymous" sex necessarily impersonal. Even casual "tricks" can be very talkative; gay people are sometimes "very much interested in our tricks as individuals even if we don't plan to see them again." Id. See, also, Tearoom Trade, supra note 414; Tripp, supra note 135, p. 151.

485. Ibid, see, also, Kantrowitz, supra note 388, at 56 ("sex with many partners may be dangerous, but it isn't bad. Exclusive sex with one person may be less risky, but it isn't more moral."); Cf, supra, pp. 38-39.

486. Supra, pp. 38-39. "There is no indication that homosexual promiscuity is any greater than its heterosexual equivalent would be [or now is] in the face of equal opportunity." Tripp, supra note 135, at 151.

487. Tripp, supra note 135, p. 154. This is borne out by Bell and Weinberg's study, supra note 119, noting that " only one-third of the homosexual men said that having a permanent living arrangement with a male sexual partner was very important to them at the beginning of their homosexual careers. At the time of the interview, however, two-thirds considered such an arrangement at least somewhat important."

488. Tripp, supra note 135, p. 154.

489. Bell & Weinberg, supra note 119, p. 101.

490. See, e.g., Hoffman, The Gay World 198 (1968); infra, pp. 63-65.

491. Bell & Weinberg, supra note 119, p. 102.

492. Ibid; see, also, P. Fisher, The Gay Mystique 210-12 (1975); Hooker, The Homosexual Community" in The Same Sex 37 (R Weltge. ed. 1969); PA, supra, note 36, pp. 196-97.

493. All the ways in which society favors nongay relationships.

494. Bell & Weinberg, supra note 119, p. 83. See, also, Tripp, supra, note 135, p. 155 ("Part of the reason many homosexual relationships do not survive the first serious quarrel is that one or both partners simply find it much easier to remarket themselves than to work out conflicts.").

495. Tripp, ibid, p. 162.

496. Ibid, p. 161.

497. Supra, pp. 31-40.

498. Tripp, supra note 135, p. 161.

499. Bell & Weinberg, supra note 119, p. 217.

500. Indeed, studies demonstrate that many samesex couples value their marriage like arrangements already. Masters and Johnson, supra, note 8, p. 406, comment that gay people seem to have a better understanding of their partner's needs. Bell & Weinberg, supra note 119, at 138, describe "close-coupled" relationships in which individuals overcome the fact that "a monogamous quasi-marriage between homosexual men is probably difficult to achieve." These "close-coupled" men and women describe themselves as "happily married" and apparently reap more benefits from their sexuality than those leading other lifestyles. Id. at 217-17

501. See, e.g., notes 393-99 and accompanying text, supra.

502. See, e.g., Boswell, supra note 7 at 25, 35, 51 (Plato said that gay lovers make the best soldiers; the Thebans actually formed such an army, the "Sacred Band", which shattered Spartan hegemony); Bullough, supra note 263, p. 2.

503. Boswell, ibid, p. 91. See, infra, pp. 57-59.

504. Ibid.pp. 169-70.

505. Ibid, pp. 31-34, 91, 119-21, 169-70.

506. Ibid. at 37.

507. Ibid, for example, at 171, 174-5, 200-209.

508. Ibid, pp. 174-75, 200-06, 243,269.

509. Ibid, pp. 243, 208-09.

510. Ibid, p. 122.

511. Ibid, p. 171.

512. Ibid, pp. 283-84, 333.

513. Ibid.

514. Ibid, p. 123

515. At least among the upper classes. Ibid, p. 82. It was a workingman, not a poet, however, who carved on a brick,"Hippeus is beautiful, or so it seems to Aristomedes." Tripp, supra note 135, p. 286.

516. Ibid, pp. 62, 82.

517. Ibid,p. 26.

518. Ibid, pp. 21, 54-55.

519. Ibid, p. 34n63.

520. Ibid, p. 86. Indeed, sometimes even a better position, as in the love and passion of Emperor Hadrian for Antinous, id at 85, or the samesex marriage of at least one emperor. id. at 82.

521. Ford and Beach, supra note 447, p. 130.

522. Tripp, supra note 135, pp. 70, 291.

523. Ibid, p. 71; see, also, Boswell, supra note 7, pp. 34n63.

524. It makes for interesting variety. Compare the practical Spanish code of "matelotage" (sexual freedom and fidelity expected of men who "belonged"to each other during

sea voyages), Tripp, supra note 135, at 223n, with the current male bonding and sensuous "nonsexual" physicality in African cultures, for example. Id. pp. 49-52, 61-65, 75n. (the "using-up" theory has more to it than Tripp concedes). Society can meet the many needs of the "samesex side" of our sexuality in a host of ways, explicitly or otherwise.

525. ~~People~~ v. North Carolina Perkins 234 F.Supp 340 333 (1964).

526. Note 380, supra.

527. See, e.g., Rivera, supra note 5, pp. 805-60.

528. The NGTF is a leading gay activist organization. Rm 566, 80 5th Ave., N.Y., N.Y. 10011. Other organizations have undertaken similar initiatives. For example, Harvard Law School's Committee on Gay and Lesbian Legal Issues has requested 1200 law firms throughout the country to adopt explicit policies of nondiscrimination on the basis of sexual orientaition.

529. For example, several prominent law firms and leading law schools, including Harvard and Yale, and many Fortune 500 corporations, including American Telephone and Telegraph, American Express, Bethlehem Steel, CBS, Chase Manhattan Bank, Citicorp, Colgate-Palmolive, General Electric, Merrill Lynch, Sears Roebuck, Standard Oil of California, and United Airlines.

530. For example, the National Council of Churches, the American Catholic Bishops, the Central Conference of American Rabbis, the Democratic Party, the American Civil Liberties Union, the American Psychiatric Association, the National Organization for Women, and the Assembly of the Council of Europe (the Common Market).

531. See, Rivera, supra note 5, at 810 for other cities, including Anchorage, Ann Arbor, Palo Alto, Austin, Portland, Toronto, Tucson, Aspen, Champaign, and Iowa City. The Portland, Oregon town council, concerned about how gay couples splitting up could deal with property division, offered the gay community an arbitration service. Ibid, p. 908.

532. See, e.g., S. Hite, Report on Male Sexuality 880 (1981)(average male in U.S. may not view samesex relations as immoral).

533. Rivera, supra note 5, pp. 806-08, 829-37. The military and education fields are prime examples, not to mention the current scare over "AIDS", see, supra, note 75.

534. Boswell, supra note 7, pp. 165-66.

535. Letters of Sigmund Freud 1873-1939 pp. 419-20 (E. Freud ed. 1962)(which, when sent by its recipient, an American mother, [illegible] to Kinsey in 1948, deprived many traditional psychological models of their presumed principal supporter).

536. Olmstead v. U.S., 277 US 438, 478 (1928)(dissenting opinion), later ackowledged by the majority in Katz v. U.S., 389 US 343 (1967).

537. Brandeis & Warren, "The Right to Privacy", 4 Harv.L.Rev. 193(1890).

538. See, e.g., Richards, supra note 6, p. 972.

539. Note 39, supra.

540. Note 233, supra.

541. Richards, supra note 6, p. 973.

542. Brandeis & Warren, supra note 537, at 205. See, infra, pp. 65-69.

543. Brandeis & Warren, ibid, at 197.

544. Ibid at 205.

545. Olmstead, supra note 536, at 478.

546. Nonpaternalism does not mean libertarianism. Respect for the autonomy of the individual leaves government a role as facilitator of individual self-development and the agency of vigorous collective and national action against oppression, arbitrary boundaries on people's human potential, and common enemies such as disease, poverty, hunger, ignorance, and external threat. As Geroge Orwell wrote, "the belly comes before the soul, not in the scale of values, but in point of time." "The Spanish War in Collected Essays (1946).

Nonpaternalism means the equal respect for individuals' free choices consistent with the Constitution's human rights vision; government should not impose any

particularized "moral"code narrower than the Constitution's. As Tribe, supra note 6 at 989 remarks, freedom cannot be defined simply through negative prohibitions, containment of state action, or telling the government to butt out; there is an affirmative mission for community and government concert. "Both must respond to a substantive vision of the needs of human personality," Ibid, which we find in the Constitution. Part IV(A)(2), infra.

547. See, infra, pp. 60-69. This article's emphasis on human rights theory owes much to Richard's seminal work, supra note 6. The human rights vision described here is not merely the "natural rights" ideology clearly influential in the work of the Founders, (see, e.g., Tribe, supra note 6, at 894; Craven "Personhood: The Right to Be Left Alone,' 1976 Duke L.J. 699, 710n12, 704006), although it overlaps. One can recognize the social aspects of generated rights and still see them as grounded in some conception of human nature. See, e.g., Hobbes, Leviathan; Unger, 'Knowledge and Politics' (1975) and Lectures at Harvard Law School (1982); infra, pp. 60-69; see, Richards, generally.

548. Ibid.

549. Infra, Part IV(A)(2)pp. 62-65. See, also, Richards, supra note 6. pp. 958-60; Rawls, supra note 15.

550. R. Dworkin, Taking Rights Seriously 190-92 (1977)(government may only override a right "when necessary to protect the rights of others or to prevent a catastrophe," but not merely for utilitarian benefits, even if substantial).

551. E.g. Leviathan, 104-05, 109-110 (Liberal Arts Press ed. 1958).

552. See, J., Locke. The Second Treatise of Government, and discussion in B. Russell, The History of Western Philosophy. (1945).

553. See, J.J. Rousseau, On the Social Contract, passim, also 49, 75 (R. Masters ed. 1978)

554. See, Richards, supra note 6, pp. 966-67, 976-77 (including the Rawlsian premise of dealing with others as you would like to be dealt with in similar situations).

555. Richards, supra note 6, p. 960.

556. A. Hamilton, J. Madison, J. Jay, The Federalist Papers (ed. 1961), #51 p. 324.

557. Ibid p. 325.

558. Ibid, #78 p. 470.

559. Note 6, supra.

560. Ibid, pp. 963-64.

562. See, Unger, supra note 547, infra, pp. 65-68. See, also, J. Madison, "Address", quoted in M. Meyers, The Mind of the Founder, p. 32 (1973)(hereafter: Meyers).

563. Richards, supra note 6, at 963. Indeed, without such a conception, it would be hard to understand why the Founders made it so hard on themselves. What were they going out of their way to protect? See, e.g., The Federalist supra note 556, pp. 78,79 152, 319,324, 346. See, also, Madison's Appeal for the Bill of Rights' in Meyers, supra note 562, pp. 223-24 (enumerated rights reflect, not create, liberty interest, and do not disparage nonenumerated).

564. Richards, ibid, at 963-64.

565. Dworkin, supra note 549.

566. See, e.g., Hobbes, supra note 551, p. 237 (right to self-preservation justifies disobedience, even in absolutist regime); T. Jefferson, The Declaration of Independence ("whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it..."); G. Orwell, supra note 546, ("...the moral dilemma that is presented to the weak in a world governed by the strong: break the rules or push...the weak have the right to made a different set of rules for themselves"); Richards, supra note 6, pp. 958, 964

567. Richards, ibid, p. 964.

568. See, infra, pp. 65-69; Richards, ibid; Hobbes, supra note 551, passim. (man can imagine possibilities and act accordingly, unlike animals)

569. Ibid.

570. Dinnerstein, supra note 8, pp. 21-22.

571. See, e.g., Hobbes, supra note 551, pp. 104-05 ("the weakest has strength enough to kill the strongest"), a minimalist conception, or, supra notes 552-54, and accompanying text.

572. This is not to say that society does not form it as well. We have been pushed toward an individualistic creed by the substantive value choice of our Constitution and the Western human rights tradition. Other societies may be less so. For example, Tripp, supra note 135, at 76-77 (the Hindu mentality is less disposed toward gay sexuality than the Moslem in other cultures); see, e.g., P. Shaffer's vision, The Royal Hunt of the Sun (1964). Or are such views just relativistic, and chronistic, and/or mythical?

573. Richards, supra note 6, p. 1000.

574. Rawls, supra note 15, Richards, ibid, 971-72, and passim.

575. Richards, ibid, p. 971 discussing Rawls, ibid 453, 440-46. Maximization of liberty arises directly out of this value, and obviously best benefits all in its permitting the recombination of possibilities. Ibid, 544. This is particularly true, note Richards and Rawls, once a minimum level of economic well-being is established (as in the U.S.). See, Richards, p. 1001; see, also, note 546, supra.

576. Rawls, supra note 15, pp. 150061; Richards, supra note 6, pp. 971-72, 1005-06.

577. Richards, ibid p. 972.

578. Ibid at 1015-16, passim.

579. Ibid.

580. Ibid.

581. Ibid, at 1017. As such, Richards improves on similar analysts such as Karst or Tribe supra note 6, grounding their substantive Due Process values in our affirmative moral theory of the Constitution and privacy, through human rights.

582. Whitney v. Calif, 274 US 357, 375 (1927)(Brandeis concurring).

583. Federalist #10, supra note 556, p. 78 (emphasis added.)

584. Ibid.

585. Ibid.

586. Supra, note 556.

587. Ibid, p. 324.

588. G. Wills, Explaining America, p. 204-05 (1981).

589. See, e.g., Epperson v. Ark, 393 US 97 (1968)(anti-establishment).

590. W.Va. State Bd. of Educ. v. Barnette, 319 US 624, 641 (1943)(religious freedom and protected expression.

591. Federalist #71, supra note 556, p. 432, See, also Federalist # 50, ibid, p. 319, and # 63, p. 384.

592. Ibid # 50, p. 319. See, also, Wills, supra note 588, p. 88.

593. Federalist, ibid, # 78, p. 469.

594. Barnette, supra note 590, p. 641.

595. Ibid. p. 642.

596. Pierce v Society of Sisters, 268 US 510, 535 (1925).

597. Meyer v. Nebraska, 262 US 390, 402 (1925).

600. Meyer, supra note 597, p. 399. As Tribe, supra note 6, at 903, observes, the Court in this opinion "recognized that such laws violated the traditional conception of liberty," defined by the justice "using the tools of his time." today our expanded conception of equal protection coupled with the substantive vision of human rights values articulated here, would achieve a fuller recognition of the kind of protected individual autonomy.

598. 394 US 557 (1964).

599. Ibid, at 565-66.

601. 97 S.Ct. 2094 (1977).

602. Ibid, p. 2110-11. The opinion also quotes, with approval from Justice Stevens' dissent in Meachum v. Fano, 427 US 215, 230 (1976): "...neither the Bill of Rights nor the laws of the sovereign States create the liberty which the Due Process Clause protects. The relevent constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liverty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

I had though it self-evident that all men were endowed by their Creator with liberty as one of the cardinal inalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or priviliges enforced by specific laws or regulations. (emphasis added)."

603. Supra, pp. 59-65.

604. Richards, supra note 6, generally and pp. 958-61, 966-67. See, also, note 572, supra; other traditions are beyond the scope of this article.

605. Richards, supra note 6, p. 967n44. There was no language or thought of human rights in Greek political theory because of inegalitarian premises. Id at 966. The Kantian and Rousseauian notions of autonomy and equality, of human rights, were an explicit and "radical repudiation of the platonic therapeutic state", id at 966, where a great "philosopher-king" would govern paternalistically in the name of the sole "Good", moral vision. But see Rousseau, supra, note 683.

606. Ibid.

607. See, e.g., Aristotle, The Politics (Lowell trans. 1943) Books I and III (on slavery, and the distinction between good men and good citizens). Perhaps Greek thought had this inegalitarian flaw because "without a high level of mechanical development, human equality is not practically possible", Orwell, "Charles Dickens", supra note 546, p. 80, at least unless one sacrifices a wide range of autonomous choices as a value. See, e.g., Dinnerstein, supra note 8, pp. 6-22 (early causes of oppression of women: division of labor as well as childrearing psychodynamics).

608. See, e.g. Richards, supra note 6, p.967.

609. Ibid.

610. The Federalist, supra notes 556, 583-87, 593, and accompanying text.

611. Supra note 15, also pp. 59-63.

612. Supra note 6, p.969; and ibid.

613. "Understanding of unconscious imaginative processes was, for Freud, not a concessive plea for irrationalism, but a deepening of our understanding of the concept of autonomy and of the person..."Richards, supra note 6, pp.1002-03, passim.

614. Supra notes 255, 547; see, also Unger, Knowledge and Politics, passim, pp. 213-22, 262-65, (1975). Unger Lectures at Harvard Law School on Jurisprudence Jan. 1982) and on Reinventing Democracy (Spring 1982) also figure in several themes of this article.

615. Ibid; also note 568, supra; H. Thoreau, in Walden, had these observations; "with thinking we may be beside ourselves in a sane sense. By a conscious effort of the mind we can stand aloof from the actions and their consequences; and all things, good and bad, go by us like a torrent. We are not wholly involved in Nature...I only know myself as a human entity:the scene, so to speak, of thoughts and affections, and am sensible of a certain doubleness by which I can stand as remote from myself as from another. However intense the experience, I am conscious of the presence and criticism of a part of me which, as it were, is not a part of me, but spectator..."

616. Tripp, supra note 135, p.280.

617. Ibid.

618. See, also, Part IV(B)(2), infra.

619. Unger, Lectures on Jurisprudenne, Harvard Law School (Jan. 1982);see, also, Unger, "Passion" (unpublished m.s.).

620. Unger, Lectures on Reinventing Democracy, Harvard Law School (Spring 1982).

621. See, supra, notes 255, 547, 614, 619-20. As Unger puts it, attack his personality theory by finding one that works better, not by criticizing its genetics.

622. Ibid.

623. Ibid.

624. Richards, supra note 6, p. 1003; see, also, M. Yourcenar, Memoirs of Hadrian, 18 (Penguin 1978).

625. Richards, ibid, pp.1003-04.

626. Ibid.

627. Ibid.

628. Ibid, p. 1004. See, also, Plato, "Symposium", in Collected Dialogues p. 559, 558-64 (E, Hamilton and H. Cairns, eds. (1961) ("Love is a longing for immortality"); consider Freud's conception, too, of love as combatting the death instinct on behalf of creativity.

629. See, e.g., M. Yourcenar, Fires (1974) pp. XVII-XVIII.

630. C. Fourier, The Utopian Vision of Charles Fourier, 336-40 (J. Beecher and R. Bienvenu, eds. 1971) discussed by both Richards, supra note 6, p. 1006, and Unger, supra note 629.

631. Given those restraints consistent with the human rights vision of the Constitution, that we not harm others' rights, and the limits, infra, Part IV(C)(2) at 74-75.

632. Richards, supra note 6, at 1006.

633. Because in the original position, all are ignorant of their specific identities and "moral" tastes. Richards, supra note6, 1000-01.

634. Ironically, even Chief Justice Roger Tawney was aware that, as he put it, "liberty without equality is a thing of noble sound, but squalid result."

635. Parts II and III, supra.

636. Given greater freedom and an end to invidious distinctions--i.e., racism, sexism, sexualism, religious and ethinic bigotry--still persisting. See Parts II and III, supra. Perhaps less of a fear of freedom is also required. See, e.g., E. Fromm, Escape from Freedom (1941), Unger, supra note 255.

637. Boswell, supra note 7, p. 38.

638. 406 U.S. 205 (1972).

639. Ibid at 223-24.

640. Supra, pp.59-69.

641. See, e.g., Bullough, supra note 263, p.38 (on Bentham, who sought to "demoralize" the law).

642. Tribe, supra note 6, p. 890. Nor do we believe in a Brechtian solution whereby the government dissolves the people and elects another. Brecht, The Solution.

643. See, e.g., Doe, supra note 133, at 1202; Baker and Singer, supra note 35.

644. Karst, supra note 6, p. 658.

645. Gay Law Students Assn. v. Pacific Tel. and Tel Co., 24 Cal.3d 458, 488; 595.P.2d592, 610 (1979); see also, note 434, supra.

646. Acanfora v. Bd. of Educ., 491 F.2d 498, 500 (4th Cir 1974).

647. It is hard to see how this survives under the cases discussed, supra, in notes 66, 153, 259 and accompanying text, and under U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) where the Court held that "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 government interest." As Karst, supra note 6, p. 685 n. 274, observes, even under adverse cases such as Ambach v. Norwick, 441 U.S. 68 (1979) (5 to 4, the court allowed public schools to hire teachers on their appropriateness as role models), a law forbidding Catholics, say, to teach would be denied, even if it were intended to promote the principle of the separation of Church and State. Laws which infringe on rights must be carefully drawn, in addition to being well-founded, to meet constitutional scrutiny.

648. Karst, supra note 6, at 691.

649. Following the issuance of the Report of the Committee on Homosexual Offenses and Prostitution (the "Wolfenden" Report) (1957), see, infra note 650, a celebrated debate took place over the role of morality in the law. Arguing for a state role in the promotion of morality (and against legalization of samesex sexual acts) was Lord Devlin, see P. Devlin, The Enforcement of Morals (1965). Arguing against such "moral" legislation was H. Hart, Law, Liberty and Morality (1963).

650. Ibid, urging the decriminalization of private adult consensual sex acts in the United Kingdom.

651. See, e.g., Richards, supra note 6, p. 990.

652. Ibid.

653. See, supra, pp. 43-50, 56-59.

654. Ibid.

655. Richards, supra note 6, p. 991.

656. Thus, Justice Powell wrote that the state can ensure that "its rules of domestic relations reflect the widely held views of the people." Zablocki, supra note 48, p. 399 (concurrence). One can only describe this rather cavalier majoritarian disregard of disfavored, but presumably constitutional human rights as "Taking Rights, Seriously." Powell is wrong. See, also, Richards, supra note 6, p. 991.

657. See, generally, Part III, supra.

658. See, generally, supra, pp. 31-33, 33-43, 44-50, 56-59.

659. See, supra, Part III, pp. 44-50, 52-59.

660. See, e.g., cases prohibiting samesex marriage, supra note 35.

661. Kinsey et al, Sexual Behavior in the Human Female 482 (1953).

662. Boswell, supra note 6, p. 163, 91-118 (examination of Scriptures).

663. Ibid p. 127-28.

664. Ibid pp. 127-29; see, also, notes 146, 317, supra.

665. Note 620, supra. Indeed, the use of religion often has other, ulterior sources. See the attitude described by W. Percy, The Moviegoer (1963): "Sometimes when she mentions God, it strikes me that my mother uses him as one of the devices that come to hand in an outrageous man's world, to be put to work like all the rest in the one enterprise she has any use for: the canny management of the shocks of life."

666. As Graham Greene puts it: "God can wait, he thought: how can one love God at the expense of one of his creatures? Would a woman accept a love for which a child had to be sacrificed?" in The Heart of the Matter 20 (1948), or perhaps more broadly, see J. Fowles, The Ebony Tower 102 (1974)("There is only one good definition of God: the freedom that allows other freedoms to exist.").

667. Boswell, supra note 6, pp. 119-120.

668. Ibid., pp. 31-34, 91, 119-21, 169-70.

669. Ibid, p.36n.65.

670. Op Cit.

671. Ibid, p. 37, 121.

672. Ibid, p. 270. Sometimes this government power factor meant that minorities were persecuted even with no relation to the general urban-rural dynamic. Thus, for example, one period saw an energetic crackdown on samesex relationships and gay love (even including the assassination of Edward II, the last openly gay monarch of England), the expulsion of Jews from England and France, the dissolution of rival power groups on charges of sorcery and deviant sex, the equation of lending at interest with heresy, and the sudden imprisonment of lepers. Id.pp.270-72. In those years took place the creation of a new state administrative machinery and the consolidation of civil and ecclesiastical authorities. This was bad news enough for minorities in general; for gay people, it meant the end of their last period of relative prominence, as this time the repression was accompanied by the compilation of the major theological works which reworked stereotypes and illogic into the sources of sexualist justification they have remained to this day.

673. For an analysis of the different and misleading ways in which people use "nature' as justification for action, see Boswell, supra note 6, pp.11-15. He explores the frequent obliteration of "prescriptive" and "descriptive" distinctions so fatal to logic and human rights. Particularly harmful has been the teleological or purposive conception of nature as a moral, and moralizing, entity "out there" with standards for us to follow, as if people were not free beings, as if "nature" cared.

674. See, e.g., Boswell, ibid, pp. 313-15, 319-21, ch.11 passim (on how animal behavior, as natural, does not exhibit samesex love). But see, ibid, pp.12, 12n.19, 152 (samesex attraction in animals); Ford and Beach, supra note 8, pp. 134-43, 257-59 (animal samesex activity); see, also, Tripp, supra note 135, pp.24-26 (rodent fellatio). "Moral" arguments from animal behavior are irrelevant in any case, and never

made in any context but sex. People who use such analogies neglect the central fact tha human sexuality is expressive as well as instrumental, and reflective, not compelled.

675. Boswell, ibid, pp.155-56.

676. Ibid p. 38. Consider the Moslem doctrine of Ijima, part of Islam's central creed (a majority of Moslems cannot be in error).

677. Of course, a view is not moral simply because it is strongly held. See, e.g., Richards, supra note 6, pp.976-77. Cf. P. Devlin, supra note 649, p. 114 ("What is important is not the quality of the creed, but the strength of belief in it.") The Constitution rests on a certain morality, that of human rights.

678. Boswell, supra note 7, p. 15. Hobbes rejected Aristotelean teleology, De Cive, as did Sir Francis Bacon who described it as "like a virgin consecrated to God; she produces no offspring." Although teleology was sterile scientifically, Bacon was wrong; prescriptive purposive views of nature and "natural" morality have spawned prejudice, ignorance, and repression.

679. See,e.g., H. Fierstein, Torch Song Trilogy pp. 150-52 (1978)("You want to know what's crazy? That after all these years I'm still sitting here justifying my life. That's what's crazy.")

680. Richards, supra note 6, p. 977; Rawls, supra note 15, pp. 130-32.

681. Ibid.

682. Ibid. Such irrelevant distinctions include left-handedness and hair color, which we have already disregarded--but see, A. Housman, The Collected Poems 233 (1965) ("they're taking him to prison for the colour of his hair"; at the time of the trial of Oscar Wilde)--and gender, race, ethnic origin, religion, clan, and sexuality, which we still use for categorizing each other.

683. Compare the theories of Plato, Aristotle, Rousseau in The Government of Poland, or Robespierre, for example. See, also, Rousseau, supra note 553, p. 82 (despite contradictions like this, Rousseau uses language of human rights + thus contributes to its development as a concept)

684. T. William, Night of the Iquana (1961). It is the obligation of the state to penetrate past prejudice in its treatment of all citizens and its protection of all of our rights. Cautious balancing is not enough. As Moritz Goldstein wrote, in "Deutsch-judischer Parnass":

> We can easily reduce our detractors to absurdity and show them their hostility is groundless. But what does this prove? That their hatred is real. When every slander has been rebutted, every misconception cleared up; every false opinion about us overcome, intolerance itself will remain finally irrefutable." (quoted in Boswell, supra note 7, flyleaf).

It is the premise of our constitutional system that government stands on the side of the individual against unfounded intolerance. Human rights should not, and need not, yield.

685. 422 US 563 (1975)(substantive due process forbids involuntary incarceration when no one is endangered.).

686. Ibid at 575. As Tribe, supra note 6, pp. 982-83 observes, this decision echoes the autonomy arguments(as against the tastes of the "beholder") made in First Amendment cases. He concluded, "the Constitution leaves matters of taste and style... largely to the individual." Cohen v. California, 403 US 15, 25 (1971).

687. Wilkinson & White, supra note 10, p. 618.

688. Commonwealth v. Bonadio, 490 Pa. 91, 415 A2d.47, 50 (1980).

689. Supra, note 546 and p. 64.

690. Thus incest laws, like age of consent, should be viewed as protection of children and meaningful choice, not as religious or moralistic precepts.

691. Richards, supra note 6, p.1009. Thus, the concept of irrationality employed must also be formed with the Rawlsian, supra note 15 and text pp. 59-63, assumptions of ignorance of specific identity, and must be capable of empirical validation.

692. Richards, ibid, pp. 1010-11. Richards gives the example of a drug abuser who seeks to jump out the window on the false assumption he will not be hurt. Since his own ends will not be served, paternalistic intervention is justified given the liklihood of severe impairment of future choice and interests.

693. Ibid.

694. None of the preceding discussion applies to gay sexuality, of course, which is neither "irrational", nor immoral, as the Constitution defines it (or even in a narrower sense; see, for example, Wheatley, supra, p. 48, and Parts III, pp. 44-50, 52-59).

695. Boswell, supra note 7, p.135. As Zeno, the founder of the Stoic school, put it, "Do not make invidious comparisons between gay and nongay, male and female"; "you make distinctions about love objects? I do not." (quoted, ibid, p. 130).

696. Tribe, supra note 6 , p.888.

697. Ibid.

698. Ibid.

699. Supra note 686.

700. Ibid.

701. Tribe, supra note 6, p. 945.

702. As GLAD, supra note 93, p.20, puts it:"What the failure to recognize samesex... marriages actually accomplishes is to express preference for one style of living and family relations over another style. Such a justification is impermissible when it infringes on an individual's right of marry... One has to question the purpose of the State in criminalizing homosexual conduct or in denying recognition to marriage-like relationships between two women or two men where the specific conduct and relationships are the principal forms of expression, sexual and otherwise, that a gay person's love can take.(emphasis added).

703. See, supra, pp. 49-50, 53-56. This is not merely fortuitous; it represents a deliberate social choice to cast gay love in such a negative light. See discussion supra, and JFL, supra note 21, p.621.

704. Supra, pp. 44-50, 52-59. See also, G. Weinberg, Society and the Healthy Homosexual 78-82, 142-43 (1972); Richards, supra note 6, p.1008; Unger, supra note 619 (love is not mere harmony, but the opening of all fundamental fundamental human connections, so they can be played out, in which people live out with each other the truth about themselves).

705. M. Hoffman, The Gay World 77 (1968); see, also, JFL, supra note 21, p. 631.

706. See, e.g., JFL, supra note 21, p. 622; Slovenko, "Sexual Deviation: Response to an Adaptational Crisis", 40 U. Colo. L. Rev. 222. For example, Slovenko remarks that:

> Violent disturbances occur during the breakup of a homosexual partnership, perhaps not so much because of the loss of affection, loyalty and dependence, or because of the loss of an orgiastic outlet, but primarily because it is rather a confirmation of their worst and continual fears that no one is to be trusted, that what existed before was not affection and loyalty. 'I offered you love and the best I could; all I got in return, in the end, was a kick in the teeth.' The breakup is more devastating than the worst of the husband-wife quarrels, and the hostility is not localized against the partner." Id at 232.

707. See, e.g., A. Holleran, Dancer From the Dance 11 (1978)("the real sadness of gay life is that it cuts us off from experience like this") referring to quiet family life. Of course, there is no necessary reason that that must be true.

In addition to the other arguments made in this article, supra, the importance of openness and freedom of expression is suggested by the observation that "how well any relationship does is a function of the quality of the communication in it." The Advocate # 359p. 6 (1/6/83). Good relationships require tender truth and sharing. Gay people are disadvantaged by society's requirement that they learn to withhold and deny their feelings even early on with their own parents and families.

Finally, on the law's intended compulsion of celibacy for gay people, see, Richards, supra note 6, p. 1007, quoting Freud ("Experience shows that the majority of the people who make up our society are constitutionally unfit to face the task of abstinence."). This observation is born out by Kinsey Institute studies. Supra, note 119, at 226-28. Those gay people living with their lovers in as near a marital relationship as they can build, despite sexualism, are the happiest.

708. For a depiction of one such love choice, see, P. Warren, The Front Runner, (1976) pp. 197-98, passim.

709. Love ultimately eradicates all arbitrary distinctions we devise among ourselves. "It lies not in our power to love or hate/For will in us is overruled by fate." C. Marlowe, Hero and Leander. See, also Torch Song Trilogy, supra note 679, p. 66 ("What'd'ya mean, 'Why?' Why does anyone love anyone? Because I did. Because--I did. Because--he let me"); M. Yourcenar, Memoirs of Hadrian p. 16 (1974) ("the lover who leaves reason in control does not follow his god to the end."): St. Aelred, quoted in Boswell, supra note 7, p. 224 ("Feelings are not ours to command. We are attracted to some against our will, while towards others we can never experience a spontaneous affection.")

710. Today certain people in our society are classed as gay. Tomorrow, with the struggle against sexualism, perhaps we will all be free in our ability to love regardless of arbitrary confines. Even with sexualist oppression stigma, however, gay people in our society have managed to confirm C.S. Lewis' observation, Surprised by Joy: The Shape of My Early Life 88-89 (1955),("Eros, turned upside down, blackened, distorted, filthy, still bore the traces of his divinity.").