Sexual Orientation and the LAW

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I. INTRODUCTION

Sharply conflicting attitudes toward homosexuality[1] share an uneasy existence in today's society. This range of viewpoints is reflected in legislation, legal decisionmaking, and legal scholarship. Social — and therefore legal — attitudes vary along two dimensions. First, individuals hold different opinions on the relationship between same-sex intimacy or desire and an individual's identity. Although some view same-sex intimacy as actions separable from identity, most people today accept the concept of sexual orientation and believe that the gender of those to whom one is attracted is a function of personality and identity. Second, social attitudes vary depending on individuals' reactions to homosexuality. Views toward those labeled homosexual range from condemnation to pity to indifference to respect. This range also appears in the legal community. Although some courts[2] and commentators[3] are very sympathetic to claims by lesbians and gay

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[1] Although sexual orientation denotes heterosexuality as well as homosexuality and bisexuality, sexual orientation only becomes an issue for those not in the majority. This Note, therefore, concentrates on same-sex sexual orientation. Estimates as to the number of lesbians and gay men differ depending on how those terms are defined. Many people who have had same-sex sexual experiences do not label themselves gay or lesbian, and others adopt the label without having had any same-sex sexual experiences. Although equating sexual orientation with sexual activity is both inaccurate and problematic, studies estimating the percentage of the population comprised of gay men and lesbians depend on such definitions. A recent study indicates that 20.3% of men have had at least one sexual encounter to orgasm with another man, and 6.7% have had such an encounter after age 19. *See* Fay, Turner, Klassen & Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 SCIENCE 338, 341 table 2 (1989). Older studies on women report a lower frequency of same-sex sexual activity. *See* A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 474–75 (1953) [hereinafter FEMALE SEXUAL BEHAVIOR] (finding that 13% of women had "overt contacts to the point of orgasm" with other females). The percentage of men and women who acknowledge psychological arousal by members of their gender is much larger. *See id.* at 452 (28% of women); A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948) [hereinafter MALE SEXUAL BEHAVIOR] (50% of men). Gay women and men are found in all geographical areas, social classes, education levels, races, and religions. *See* Gonsiorek, *Mental Health: Introduction*, in HOMOSEXUALITY 61 (W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt eds. 1982).

The range of gay or lesbian existence is much broader than merely sexual acts. Adrienne Rich uses

> the term *lesbian continuum* to include a range . . . of woman-identified experience, not simply the fact that a woman has had or consciously desired genital sexual experience with another woman. If we expand it . . . we begin to grasp breadths of female history and psychology which have lain out of reach of a consequence of limited, mostly clinical, definitions of *lesbianism*.

A. RICH, *Compulsory Heterosexuality and Lesbian Existence*, in BLOOD, BREAD AND POETRY: SELECTED PROSE 1979–1985, at 51–52 (1986) (emphasis in original).

[2] *See, e.g.*, Watkins v. United States Army, 847 F.2d 1329 (9th Cir.), *reh'g granted en banc*, 847 F.2d 1362 (9th Cir. 1988); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987).

[3] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1616 (2d ed. 1988); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

men for equal treatment, a substantial portion of the legal community retains negative views of those with minority sexual orientations.[4]

Differing views along these two dimensions — whether sexual orientation is part of identity and whether gay men and lesbians are viewed positively, negatively or neutrally — combine to create four competing conceptions of homosexuality.[5] The "sin" conception views homosexual acts as immoral and wrong; it generally does not ascribe to the view of homosexuality as an intrinsic part of identity. The "illness" viewpoint similarly sees homosexuality negatively; this framework, however, sees it as part of the affected individual's personality, albeit a potentially curable component. The "neutral difference" approach, like the illness approach, embraces the concept of sexual orientation as identity but views it merely as a difference that should not be a basis for discriminatory treatment. Finally, the "social construct" conception rejects categorizing individuals by sexual orientation and views same-sex acts and relationships as not materially different from opposite-sex ones. The vocabulary one uses in discussing sexual orientation issues, and even the fact that one chooses to discuss them, necessarily implicates one of these four viewpoints.[6]

The sin conception of same-sex sexual activity prevailed in the colonies and in the United States before the late nineteenth century.[7] During this period, the modern concepts of heterosexuality and homosexuality did not exist;[8] rather, almost all nonprocreative or nonmarital sexual activities were considered immoral and made criminal.[9]

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[4] These attitudes not only result in the denial of claims brought by lesbians and gay men but also cause many legal issues concerning gay men and lesbians to be trivialized and ignored. For example, cases dealing with these issues often remain unpublished and legal scholars addressing sexual orientation issues often face stigmatization by their academic peers. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 805 (1979).

[5] This Note refers to "sexual orientation," "homosexuality," and "gay men and lesbians" for simplicity although those who view same-sex attractions and eroticism merely as acts rather than as part of identity would use a more complicated vocabulary.

[6] For example, use of the term "homosexual," with its scientific connotation, is typical of the sickness viewpoint. Most adherents to the neutral difference conception, in contrast, prefer the nonpejorative terms "gay" or "gay and lesbian." Some, particularly those who see sexual orientation as a social construct, use "gay" only as an adjective, viewing the use of the word as a noun as implying that being gay is the most important characteristic of the individuals so described. "Sexual orientation" implies that the gender of an individual's partner is part of that individual's identity and not a matter of choice whereas "sexual preference" does not. This Note will use the term "gay men and lesbians" because it is preferred by most of those whom it describes.

[7] *See* J. KATZ, GAY/LESBIAN ALMANAC 31–48 (1983).

[8] *See* D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 917 (1986); Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1087 (1988). The terms "homosexual" and "heterosexual" and the concepts behind them were not popular in the United States until the 1920's. *See* J. KATZ, *supra* note 7, at 16.

[9] *See* J. KATZ, *supra* note 7, at 29–65; Law, *Homosexuality and the Social Meaning of*

Yet those who transgressed the society's sexual moral code were not stigmatized as long as they repented.[10] Furthermore, sharp distinctions were not drawn between same-sex sexual activity and other forms of sin; rather, sodomy "represented a capacity for sin inherent in everyone."[11]

This conception of all nonmarital or nonprocreative sexual acts as sinful is reflective of the largely homogeneous society in which the family was the basic economic and social unit.[12] The homogeneity of society also explains the absence of distinction between homosexual and heterosexual sexual orientation. The idea that some members of a community might be "different" and have different sexual orientations was less intuitive in such a society than the contrary notion that all members of the community were equally capable of moral transgression.[13]

The absence of a concept of sexual orientation is particularly vivid in nineteenth-century society's treatment of relationships between women. During this time, deeply-felt, intimate relationships between women were seen as normal and acceptable.[14] These relationships were "both sensual and platonic";[15] they were never labeled "lesbian"[16] but rather were seen as complementary to the woman's relationship with her husband and family.[17] Because men and women lived and worked in different spheres, relationships between women developed naturally.[18]

Gender, 1988 WIS. L. REV. 187, 199. However, sexual acts between two women were generally not criminalized because the laws only sought to deter "the unnatural spilling of seed, the biblical sin of Onan." J. D'EMILIO & E. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 122 (1988); *see also* Law, *supra*, at 202 n.75 ("The traditional common law and religious condemnation of homosexuality did not encompass women.").

[10] *See* J. D'EMILIO & E. FREEDMAN, *supra* note 9, at 15.

[11] D'Emilio, *supra* note 8, at 917.

[12] *See* Law, *supra* note 9, at 199.

[13] *See id.*

[14] *See* L. FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT 157 (1981); Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, 1 SIGNS 1, 9, 27 (1975); A. RICH, *Vesuvius at Home: The Power of Emily Dickinson*, in ON LIES, SECRETS AND SILENCE: SELECTED PROSE 1966–1978, at 162–63 (1979).

[15] Smith-Rosenberg, *supra* note 14, at 4.

[16] Indeed, most people never imagined that relationships between two women could be sexual. *See* P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES 40 (1983); *see also* Law, *supra* note 9, at 202 ("Lesbians were censured by silence; sexual acts between two women were unimaginable."). This view was also a reflection of the common belief that women were asexual. *See* D. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 376–77 (1988).

[17] *See* P. BLUMSTEIN & P. SCHWARTZ, *supra* note 16, at 41; P. CONRAD & J. SCHNEIDER, DEVIANCE AND MEDICALIZATION 173 (1980) ("As long as women's behavior did not interfere with carrying, bearing, and rearing of children, it received comparatively little attention."); D. WEST, HOMOSEXUALITY RE-EXAMINED 177 (1977) ("In male-dominated societies, . . . lesbian activities . . . seem to have been treated with an amused tolerance, so long as they did not interfere with masculine satisfactions.").

[18] *See* Smith-Rosenberg, *supra* note 14, at 9–13; L. FADERMAN, *supra* note 14, at 157–58.

Although the conception of homosexual acts, and more generally "the homosexual lifestyle,"[19] as sinful is much less prevalent today, it has been a powerful influence throughout the twentieth century. Before the rise of the neutral difference conception in the 1970's, the sin conception exerted considerable influence on judicial decisionmaking. For example, in 1969, the Court of Claims based its refusal to reinstate a dismissed gay civil servant on the finding that "[a]ny schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene."[20] Although the immorality viewpoint has present-day supporters,[21] judges less frequently rely explicitly on this conception.[22]

The illness view, which also sees homosexual activity as wrong and deviant, maintains that deviant sexual acts are symptoms of a sickness. In contrast to the sin conception, the sickness view sees the desire to engage in homosexual activity as inhering in the individual's identity. The concept of homosexual and heterosexual individuals emerged during the late nineteenth and mid-twentieth centuries,[23] as science and medicine replaced religion as the major influences in society. The medical and psychiatric professions invented the term "homosexuality"[24] and began to study the illness it described.[25]

During this period, much of the literature on homosexuality focused on means of curing the disease.[26] Although the conception of homosexuality as a disease made criminal condemnation less defensible, it also led to institutionalization of and psychological and medical experimentation on gay men and lesbians.[27] Furthermore, the concept of homosexual persons as a distinct group led to differentiation among

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[19] *See* J. FALWELL, LISTEN, AMERICA! 186 (1980).

[20] Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969).

[21] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."). In fact, this viewpoint witnessed a resurgence in the late 1970's due to the efforts of the Moral Majority and the New Right. These groups seek to restore the heterosexual, patriarchal family, and view homosexuality as a threat to their vision of an ideal society. *See, e.g.*, A. BRYANT, THE ANITA BRYANT STORY 53–55 (1977); J. FALWELL, *supra* note 19, at 181–86.

[22] *See, e.g.*, Constant A. v. Paul C.A., 344 Pa. Super. 49, 54, 496 A.2d 1, 3 (1985) (terming "gratuitous" the trial court's "finding concerning the moral nature" of a mother's lesbian relationship).

[23] *See, e.g.*, 1 M. FOUCAULT, THE HISTORY OF SEXUALITY 43 (R. Hurley trans. 1978) (placing the birth of the "psychological, psychiatric, medical category of homosexuality" in 1870); V. BULLOUGH, HOMOSEXUALITY: A HISTORY 7 (1979).

[24] *See* Goldstein, *supra* note 8, at 1088 (noting that the word homosexual "was coined in the nineteenth century to express the new idea that a person's immanent and essential nature is revealed by the gender of his desired sex partner").

[25] *See* P. BLUMSTEIN & P. SCHWARTZ, *supra* note 16, at 41–42.

[26] *See* J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970, at 17 (1983).

[27] *See id.* at 18; J. KATZ, *supra* note 7, at 131.

various immoral sexual activities. Although all states had sodomy statutes criminalizing both male/male and male/female acts, over time these were enforced primarily against gay men.[28]

The third conception of homosexuality, that of neutral difference, could not emerge until both the concept of homosexuality and a group of people who defined themselves as homosexual came into existence.[29] Although developments in the medical and psychiatric professions led to the creation of a concept of the "homosexual" individual, it was social and economic changes that inspired the formation of gay communities. The rise of industrial capitalism and the accompanying movement of individuals to large urban centers in the late nineteenth century decreased the importance of family units in determining morality and law.[30] In addition, some barriers to women's economic independence were reduced, allowing women to live apart from men and pursue relationships only with women.[31] These changes allowed individuals to choose to have same-sex relationships instead of marrying.[32] Between the 1870's and 1930's, gay and lesbian communities appeared in American cities[33] and continued to grow during and after World War II.[34] In 1948 and 1953, Kinsey's groundbreaking studies[35] of human sexuality were released, causing mainstream American society to realize that homosexual activity was much more prevalent than generally thought.[36]

The 1950's witnessed both the increase of anti-gay sentiment and official harassment[37] and the formation of precursors to the contemporary gay and lesbian rights movement. Relatively secret "homophile" organizations, such as the Mattachine Society, held meetings in major urban centers and published magazines aimed at informing gay

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[28] *See infra* p. 16.

[29] *See* J. D'EMILIO, *supra* note 26, at 1–5; J. D'EMILIO & E. FREEDMAN, *supra* note 9, at 288 ("The infiltration of psychiatric and psychoanalytic concepts into popular culture contributed to this process of labeling homosexual desire even as they cast the shadow of morbidity over gay relationships.").

[30] *See* J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 35 (1980).

[31] *See* V. BULLOUGH, *supra* note 23, at 118. Because women were still barred from many occupations, the phenomenon of "passing women" became more common. These women dressed and worked as men, and entered into relationships, often marriages, with other women. By living as men, these women were able to escape the limitations of women's roles. *See generally* J. KATZ, *supra* note 7, at 209–79 (documenting the lives of passing women between 1782 and 1920); *Musician's Death at 74 Reveals He Was a Woman*, N.Y. Times, Feb. 2, 1989, at A18, col. 1.

[32] *See* J. D'EMILIO, *supra* note 26, at 11; D. GREENBERG, *supra* note 16, at 355.

[33] *See* J. D'EMILIO, *supra* note 26, at 11–13.

[34] *See id.* at 23–39.

[35] MALE SEXUAL BEHAVIOR, *supra* note 1; FEMALE SEXUAL BEHAVIOR, *supra* note 1.

[36] *See* J. D'EMILIO, *supra* note 26, at 37. The Kinsey authors rejected classifications in terms of normal and abnormal. *See* MALE SEXUAL BEHAVIOR, *supra* note 1, at 201.

[37] *See* J. D'EMILIO, *supra* note 26, at 42.

men and lesbians.[38] In 1955, lesbians formed the Daughters of Bilitis to promote their interests separately.[39] These groups rejected the view of homosexuality as wrong or sick, and instead viewed lesbians and gay men as an oppressed minority whose civil rights deserved protection.[40] The neutral difference model gained momentum in the late 1960's with the birth of the contemporary gay and lesbian[41] rights movement.[42] The women's movement's attack on traditional gender roles, increased openness about and lessened taboos on sexuality, and the "culture of protest" in the 1960's all contributed to the spread of "gay liberation."[43] Mental health professionals also revised their views on homosexuality during the early 1970's and ceased to characterize homosexuality as an illness.[44]

Many legal developments reflect the neutral difference model's view that homosexuals either deserve legal protection or should not be legally penalized for their sexual orientation.[45] In 1962, the Amer-

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[38] *See* P. CONRAD & J. SCHNEIDER, *supra* note 17, at 200–01; Licata, *The Homosexual Rights Movement in the United States*, in HISTORICAL PERSPECTIVES ON HOMOSEXUALITY 168–70 (J. Licata & R. Petersen eds. 1980). The publication of magazines by these groups led to legal conflict when the Los Angeles Postmaster withdrew the October 1954 issue of the magazine *One* from the mail. In *One, Inc. v. Olesen*, 355 U.S. 371 (1958), the Supreme Court required the Postmaster to deliver the magazine, summarily reversing the Ninth Circuit's decision in favor of the Postmaster.

[39] *See* V. BULLOUGH, *supra* note 23, at 72. For more about the Daughters of Bilitis, see D. MARTIN & P. LYON, LESBIAN/WOMAN 219–55 (1972).

[40] *See* J. D'EMILIO, *supra* note 26, at 65–66.

[41] Although gay men and lesbians have joined together to fight discrimination, it would be a mistake to suggest that the histories, experiences, and beliefs of all members of the two groups are identical. *See* A. RICH, *supra* note 1, at 52–53; Licata, *supra* note 38, at 171. Some lesbians find themselves more closely aligned with feminists than with the "gay movement." *See id.* at 180–81; V. BULLOUGH, *supra* note 23, at 117. Other lesbians, however, reject the mainstream feminist movement as heterosexist and anti-gay. *See* D. MARTIN & P. LYON, *supra* note 39, at 266–67; *see also* R. MORGAN, GOING TOO FAR 7 (1978) (discussing the lesbian/nonlesbian rift in the women's movement). A lesbian separatist movement also developed as the gay movement grew. *See generally* FOR LESBIANS ONLY: A SEPARATIST ANTHOLOGY (S.L. Hoagland & J. Penelope eds. 1988).

[42] The Stonewall Bar riot in the early hours of June 28, 1969, in response to police harassment following Judy Garland's burial, is generally considered to be the start of the gay and lesbian rights movement. *See* M. BRONSKI, CULTURE CLASH: THE MAKING OF GAY SENSIBILITY 2 (1984). Important gay and lesbian activist organizations such as the Gay Liberation Front and the Gay Activist Alliance, were formed after Stonewall. *See* P. CONRAD & J. SCHNEIDER, *supra* note 17, at 202; *see also* V. BULLOUGH, *supra* note 23, at 76; Voeller, *Society and the Gay Movement*, in HOMOSEXUAL BEHAVIOR 243 (J. Marmor ed. 1980) (reporting that by 1972 twelve hundred lesbian and gay groups had formed in the United States).

[43] *See* J. D'EMILIO & E. FREEDMAN, *supra* note 9, at 321.

[44] In 1973, the American Psychiatric Association removed homosexuality from its list of psychiatric disorders. *See* R. BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY 137 (1987). In 1975, the American Public Health Association and the American Psychological Association passed similar resolutions. *See* Law, *supra* note 9, at 214 n.131.

[45] Adherents of the illness approach often also favor legal reform on gay and lesbian issues. They see homosexuality as not freely chosen, and therefore requiring sympathy and understand-

ican Law Institute issued its Model Penal Code recommending decriminalization of consensual private same-sex activities between adults.[46] In the late 1960's and early 1970's, gay and lesbian plaintiffs began to challenge successfully federal civil service dismissals,[47] gay bar liquor license revocations,[48] and other anti-gay state actions.[49] Legislative changes also reflected the shift toward a civil rights conception of sexual orientation. Since then, half the states have repealed sodomy statutes[50] and anti-discrimination legislation is in force in the state of Wisconsin and over sixty cities and counties.[51]

The fourth approach views sexual orientation as a social construct.[52] Under this approach, the gender of those to whom an individual is attracted becomes important only if society attaches importance to it. Not all societies share the American conception of sexual orientation.[53] In the United States, the institutionalization of gender roles and heterosexuality causes the label "homosexual" to be placed upon individuals as a mark of difference.[54] The label "homosexual" stands in sharp contrast to the term "heterosexual" and cre-

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ing rather than discrimination. *See, e.g.*, R. KRONEMEYER, OVERCOMING HOMOSEXUALITY 9 (1980). Those within the neutral difference framework ground arguments for the legal protection of gay men and lesbians in the immutability of homosexuality, *see, e.g.*, R. MOHR, GAYS/JUSTICE 39–40 (1988), or argue from the proposition that sexual orientation is intrinsic to personhood. *See, e.g.*, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1300–05 (1985).

[46] *See* MODEL PENAL CODE § 213.2 note on status of section (Proposed Official Draft 1962).

[47] *See infra* p. 44.

[48] *See, e.g.*, One Eleven Wines & Liquors Inc., v. Division of Alcoholic Beverage Control, 50 N.J. 329, 235 A.2d 12 (1967).

[49] *See infra* pp. 156–57.

[50] *See infra* p. 9.

[51] *See infra* pp. 157–58.

[52] *See* J. KATZ, *supra* note 7, at 7 ("All homosexuality is situational, influenced and given meaning and character by its location in time and social space.").

[53] *See* J. BOSWELL, *supra* note 30, at 41 n.1. Similarly, not all societies have condemned same-sex relationships or sexual conduct. In some societies, such behavior was or is widely tolerated. *See, e.g.*, Goldstein, *supra* note 8, at 1087 (noting that some sexual practices between men were widely accepted in ancient Greece and Rome, and in medieval Europe); *see also* Carrier, *Homosexual Behavior in Cross-Cultural Perspective*, in HOMOSEXUAL BEHAVIOR, *supra* note 42, at 108–12 (stating that in some areas, such as Mexico, Southern Europe and Morocco, stigmatization of men who engage in same-sex sexual activity is limited to those who play the passive role). *See generally* D. WEST, *supra* note 17, at 132–36 (reviewing the anthropological research involving homosexual practices in nonwestern societies). In others, same-sex sexual conduct is or was institutionalized. *See, e.g.*, J. MONEY, GAY, STRAIGHT, AND IN-BETWEEN: THE SEXOLOGY OF EROTIC ORIENTATION 10–11 (1988) (discussing tribal practices in Sumatra, Papua New Guinea, and Melanesia).

[54] *See* Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 Women's Rts. L. Rep. (Rutgers Univ.) 143, 156 (1988) ("[G]ay people emerge as a social minority only in the context of a heterosexually-dominant culture."); Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 780 (1989).

ates difference by forcing individuals to choose exclusively between their same- and opposite-sex attractions — in effect, to choose to be "deviant" or "normal," as society has defined those terms.[55] Labeling individuals based on the gender of their sexual partners reinforces prejudice by making sexual orientation appear fundamental to their identity.[56] Adherents to the social construct conception reject the civil rights model of neutral difference, and argue that basing legal protections for gay men and lesbians on the fundamental difference of their sexual orientation reinforces the very repression sought to be removed.[57]

The four conceptions of sexual orientation — as sin, sickness, neutral difference, and social construct — inform much of the law and policy concerning gay men and lesbians. One or more of these views underlies the statutes, regulations, and case law discussed in this Note.

The past few years have brought increased attention to legal issues involving gay men and lesbians. In 1986, the Supreme Court in *Bowers v. Hardwick*[58] upheld a Georgia sodomy statute as applied to oral sex between two men. The Acquired Immune Deficiency Syndrome (AIDS) epidemic and its disproportionate impact on gay and bisexual men[59] also have brought gay and lesbian issues into mainstream American media. The epidemic has increased discrimination against both gay men and lesbians,[60] even though lesbians are at a much lower risk than heterosexuals of contracting the disease,[61] and despite the increasing number of heterosexuals with AIDS.[62] AIDS

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[55] Although bisexuals do exist, they are pressured by both society in general and the gay and lesbian community to choose to be either exclusively heterosexual or exclusively homosexual.

[56] *See* D'Emilio, *supra* note 8, at 920 ("[C]entral to the oppression of lesbians and gay men, and to society's ability to shape and enforce it, are the homosexual and heterosexual categories themselves.").

[57] As Jed Rubenfeld states:

> To protect the rights of 'the homosexual' would of course be a victory; doing so, however, because homosexuality is essential to a person's identity is no liberation, but simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies 'faggots.'

Rubenfeld, *supra* note 54, at 781.

[58] 478 U.S. 186 (1986).

[59] A majority of persons with AIDS are bisexual or gay men. *See* Altman, *Who's Stricken and How: AIDS Pattern Is Shifting*, N.Y. Times, Feb. 5, 1989, at 1, col. 1.

[60] *See* D. GREENBERG, *supra* note 16, at 478 (reporting the results of a survey finding that one-third of Americans have less favorable attitudes toward lesbians and gay men because of AIDS). Anti-gay people have claimed that AIDS is God's punishment for deviant sexual conduct. *See id.* at 478–79.

[61] *See* Mueller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW, MED. & HEALTH CARE 250, 256 (1986) ("At present, there is no evidence of transmission between lesbians."); *see also* Arriola, *supra* note 54, at 171 (reporting that much of the general public assumes that lesbians are in a high risk group).

[62] *See* Altman, *supra* note 59, at 1, col. 1.

itself, however, is not solely a gay issue; it is a medical problem for everyone.[63]

This Note examines the legal problems faced by gay men and lesbians. Part II examines the interaction between gay men and lesbians and the criminal justice system. Part III discusses sexual orientation discrimination in public and private employment. Part IV addresses the first amendment issues posed by gay and lesbian students and teachers in public schools and universities. Part V analyzes the legal problems faced by men and women in same-sex relationships. Part VI explores the rights of gay and lesbian parents to custody and visitation of their children as well as the ability of gay men and lesbians to become adoptive or foster parents and the legal difficulties associated with having children of their own. Part VII examines a variety of other contexts in which gay men and lesbians face discrimination, including immigration, insurance, and incorporation of gay rights organizations, and also discusses legislation enacted by some cities and states to prevent sexual orientation discrimination.

II. Gay Men and Lesbians and the Criminal Justice System

A. The Criminalization of Same-Sex Sexual Activity

1. Sodomy Statutes. — Despite efforts by the gay- and lesbian-rights movement to obtain reform,[1] sodomy remains a crime in twenty-four states and the District of Columbia.[2] These statutes vary

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[63] AIDS will not, therefore, be discussed in this Note except insofar as it has increased anti-gay discrimination, *see* note 64, *infra* p. 127; *infra* pp. 70, 153–56, and violence, *see infra* p. 31.

[1] *See generally* J. D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940–1970 (1983) (documenting the history of the gay and lesbian legal rights movement).

[2] *See* Ala. Code § 13A-6-65(a)(3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411 to -1412 (Supp. 1988); Ark. Stat. Ann. § 5-14-122 (1987); D.C. Code Ann. § 22-3502 (1981); Fla. Stat. § 800.02 (1987); Ga. Code Ann. § 16-6-2 (1988); Idaho Code § 18-6605 (1987); Kan. Stat. Ann. § 21-3505 (Supp. 1987); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1985); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Code Ann. art. 27, §§ 553–554 (1987); Mich. Comp. Laws §§ 750.158, 750.338–.338(b) (1979); Minn. Stat. § 609.293 (1988); Miss. Code Ann. § 97-29-59 (1972); Mo. Rev. Stat. § 566.090 (1986); Mont. Code Ann. §§ 45-2-101, 45-5-505 (1987); Nev. Rev. Stat. § 201.190 (1987); N.C. Gen. Stat. § 14-177 (1986); Okla. Stat. tit. 21, § 886 (1981); R.I. Gen. Laws § 11-10-1 (1986); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Tenn. Code Ann. § 39-2-612 (1982); Tex. Penal Code Ann. §§ 21.01 (1), 21.06 (Vernon 1989); Utah Code Ann. § 76-5-403 (Supp. 1988); Va. Code Ann. § 18-2-361 (1988). Massachusetts also has a sodomy statute criminalizing anal sex, *see* Mass. Gen. L. ch. 272, § 34 (1986) (prohibiting "the abominable and detestable crime against nature"), but the statute was arguably invalidated as applied to private consensual conduct by Commonwealth v. Balthazar, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974), which found a companion statute criminalizing "lewd and lascivious acts" unconstitutional as applied to private, consensual adult behavior. Although the above statutes do not uniformly use the term "sodomy" to describe the

in the specific acts proscribed and the classes of persons explicitly affected. Most sodomy statutes prohibit oral-genital and anal-genital contact, although some state courts have construed their statutes not to apply to oral acts.[3] Many of the statutes prohibit "unnatural and lascivious acts" or "crimes against nature," rather than naming the specific acts themselves. In these states, judicial construction determines what acts are specifically prohibited.[4] Seven states prohibit only sodomy between persons of the same gender.[5] Among states proscribing both heterosexual and homosexual sodomy, at least one distinguishes between married and unmarried persons.[6]

Consenting adults are generally not prosecuted for nonpublic violations of sodomy statutes.[7] Prosecutors primarily employ such statutes as a lesser charge against defendants accused of rape or aggravated assault.[8] Although rarely enforced against private, consensual

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prohibited behavior, for convenience, "sodomy" will be used throughout this section to refer to oral and/or anal sex. Some states prohibit oral-genital and anal-genital contact under separate statutes. *See infra* note 3.

[3] *See, e.g.*, State v. Potts, 75 Ariz. 211, 213, 254 P.2d 1023, 1024 (1953) (holding that oral-genital contact is not an "infamous crime against nature"). However, states with sodomy statutes construed not to apply to oral sex generally also have statutes proscribing "lewd and lascivious acts" or "sexual misconduct" that include oral-genital contact. *See, e.g.*, State v. Pickett, 121 Ariz. 142, 146, 589 P.2d 16, 20 (1978); ARIZ. REV. STAT. ANN. § 13-1412 (Supp. 1988).

[4] Despite sodomy statutes' use of such open-ended terms, courts have almost uniformly upheld the statutes against vagueness challenges. *See* Rose v. Locke, 423 U.S. 48 (1975) (per curiam) (upholding TENN. CODE ANN. § 39-2-612 (1980), which prohibits "crimes against nature"); Wainwright v. Stone, 414 U.S. 21 (1973) (per curiam) (upholding FLA. STAT. § 800.02 (1987), which prohibits "the abominable and detestable crime against nature"). *But see* Balthazar v. Superior Court, 573 F.2d 698 (1st Cir. 1978) (finding Massachusetts statute prohibiting "unnatural and lascivious acts" unconstitutionally vague as applied to acts of fellatio and oral-anal contact).

[5] *See* ARK. STAT. ANN. § 5-14-122 (1982); KAN. STAT. ANN. § 21-3505 (Supp. 1987); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1985); MO. REV. STAT. § 566.090(3) (1986); MONT. CODE ANN. § 45-2-101 (1987); NEV. REV. STAT. § 201.190(2) (1987); TEX. PENAL CODE ANN. § 21.06 (Vernon 1989). Sodomy statutes in other states may prohibit only same-sex sodomy due to judicial invalidation of the statutes as applied to opposite-sex, but not to same-sex sodomy. *See, e.g.*, Post v. State, 715 P.2d 1105 (Okla. Crim. App.) (finding application of Oklahoma sodomy statute to private, consensual, opposite-sex sodomy unconstitutional but not reaching the question of the statute's validity as applied to same-sex sodomy), *cert. denied*, 479 U.S. 890 (1986).

[6] *See* ALA. CODE § 13A-6-60 (1982).

[7] *See* R. MOHR, GAYS/JUSTICE 51 n.9 (1988). Although rare, arrests and prosecutions for sodomy are not unheard of, as Bowers v. Hardwick, 478 U.S. 186 (1986), demonstrates. Even without further prosecution, the mere arrest for same-sex sodomy may result in publicity. *See, e.g.*, Matthews, *The Louisiana Constitution's Declaration of Rights: Post-*Hardwick *Protection for Sexual Privacy?*, 62 TUL. L. REV. 767, 804 n.208 (1988) (citing testimony by John Anthony D'Emilio). Given the lack of legal protection from discrimination for gay men and lesbians, *see infra* pp. 65–66, 120–22, 151–53, such publicity can prove highly damaging.

[8] *See, e.g.*, Stover v. State, 256 Ga. 515, 350 S.E.2d 577 (1986); State v. Blue, 225 Kan. 576, 592 P.2d 897 (1979); *Post*, 715 P.2d at 1106. The laws are also used to prosecute men for raping men when rape statutes criminalize only the rape of women. *See* R. MOHR, *supra* note

same-sex conduct,[9] these statutes are frequently invoked to justify other types of discrimination against lesbians and gay men on the ground that they are presumed to violate these statutes.[10] This discrimination occurs despite the fact that not all gay men and lesbians engage in sodomy,[11] just as not all heterosexuals engage in sodomy. Sodomy statutes also provide a basis for the enforcement of laws against the solicitation of same-sex sexual activity.[12]

(a) Federal Constitutional Challenges to Sodomy Statutes. — (i) The Right to Privacy and Bowers v. Hardwick. — In *Bowers v. Hardwick*,[13] the Supreme Court upheld against a constitutional challenge the application of Georgia's sodomy statute[14] to consensual

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7, at 51 n.9. However, changing the elements and evidentiary burdens of proof for nonconsensual crimes would more effectively combat violent sexual assault, *see generally* S. ESTRICH, REAL RAPE 92–104 (1987) (advocating negligence liability for rape), while avoiding the stigmatization of gay men and lesbians.

[9] *See* R. MOHR, *supra* note 7, at 52–53. However, military regulations prohibiting sodomy, *see* UNIFORM CODE OF MILITARY JUSTICE, ch. 47, art. 10, § 925 (codified at 10 U.S.C. § 925 (1983)) (prohibiting both same- and opposite-sex sodomy), are enforced against military personnel, some of whom are currently in prison for private, consensual, same-sex sexual conduct, *see* Lewin, *Gay Groups Suggest Marines Selectively Prosecute Women*, N.Y. Times, Dec. 4, 1988, at 34, col. 1.; Bull, *Lesbian Purge by Marines Continues*, Gay Community News, Mar. 12–18, 1989, at 2. Section 925 of the Uniform Code of Military Justice has been upheld against constitutional challenge as applied to private, consensual, same-sex sodomy between enlisted personnel. *See* Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir.), *cert. denied*, 454 U.S. 869 (1981). That women are discharged from military service for same-sex sexual conduct ten times more frequently than men suggests that the prohibitions may be selectively enforced against women. *See* Lewin, *supra*, at 34, col. 1.

[10] *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075–76 (5th Cir. 1976) (invoking state sodomy statute and newspaper's right to choose not to be involved in criminal activity to justify newspaper's refusal to print advertisements for gay counseling and legal aid), *cert. denied*, 430 U.S. 982 (1977); Appeal in Pima City Juvenile Action B-10489, 151 Ariz. 335, 340, 727 P.2d 830, 835 (Ct. App. 1986) (invoking sodomy statute as pertinent to finding bisexual man "nonacceptable to adopt children").

[11] By defining gay people as persons who commit sodomy, *see, e.g.*, Gay Activists v. Lomenzo, 66 Misc. 2d 456, 458, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971) (noting that "in order to be a homosexual, the prohibited act must have at some time been committed, or at least presently contemplated"), *rev'd sub nom.* Owles v. Lomenzo, 38 A.D.2d 981, 329 N.Y.S.2d 181 (App. Div. 1973), *aff'd sub nom.* Gay Activitists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973); Head v. Newton, 596 S.W.2d 209 (Tex. Ct. App. 1980) (finding the statement that someone is "queer" slanderous per se because it imputes the crime of sodomy), courts overemphasize the importance of certain types of homosexual sex and devalue love and companionship in a homosexual relationship. The assumption that sodomy is more essential to homosexuality than it is to heterosexuality ignores the fact that a gay man or lesbian need not be celibate to avoid violating the statutes, as most statutes do not prohibit genital-hand contact. *But see* MO. REV. STAT. § 566.010(2) (1986); MONT. CODE ANN. § 45-2-101 (1987).

[12] *See* R. MOHR, *supra* note 7, at 54–55.

[13] 478 U.S. 186 (1986).

[14] The statute provides that: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1988).

same-sex sodomy. Justice White,[15] framing the issue in terms of the existence of a fundamental privacy right to engage in homosexual sodomy, found that no such right existed.[16] Justice White read *Griswold v. Connecticut*[17] and its progeny[18] as encompassing only those privacy rights integral to procreative choice and family autonomy,[19] and concluded that the recognition of a fundamental right requires that the right be either "deeply rooted in this nation's history and tradition"[20] or implicit in the concept of ordered liberty.[21] Finding homosexual sodomy unprotected under either standard,[22] the Court engaged in a highly deferential analysis of the state interest involved, and found a rational relationship between the statute and the state's interest in regulating morality.[23]

Justices Blackmun and Stevens each filed a dissenting opinion.[24] Justice Blackmun criticized the majority opinion's focus on the particular act rather than the underlying right to freedom from government intrusion.[25] Justice Blackmun found that private consensual sodomy is protected under the right to privacy as a decision properly left to individuals and as involving places afforded privacy regardless of the particular activities taking place there.[26] According to Justice Blackmun, a fair reading of the Court's prior privacy cases discloses a commitment to individual autonomy in matters of personal choice — a principle that should apply with full force to the decision to engage in sodomy.[27] Justice Blackmun also criticized the majority's state-interest analysis, and concluded that Georgia's interest in en-

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[15] Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined Justice White's majority opinion. Chief Justice Burger and Justice Powell also filed separate concurring opinions.

[16] 478 U.S. at 190.

[17] 381 U.S. 479 (1965). In *Griswold*, the Court struck down a statute prohibiting the use of contraceptives by married couples. Justice Douglas, writing for the majority, recognized a constitutional right to privacy based on the "penumbras" of certain provisions of the Bill of Rights. *See id.* at 484.

[18] Eisenstadt v. Baird, 405 U.S. 438 (1972), held that the right to privacy protects the distribution of contraceptives to unmarried couples; Roe v. Wade, 410 U.S. 113 (1973), held that the right to privacy protects a woman's right to decide to have an abortion in the first trimester of pregnancy.

[19] *See* 478 U.S. at 191. Justice White's formulation defines "family" according to traditional mainstream culture.

[20] *Id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

[21] *See id.* at 191–92 (citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[22] *See id.*

[23] *See id.* at 196.

[24] Justices Brennan, Marshall, and Stevens joined Justice Blackmun's dissenting opinion; Justices Brennan and Marshall joined Justice Stevens' dissenting opinion.

[25] *See* 478 U.S. at 199 (Blackmun, J., dissenting).

[26] *See id.* at 204.

[27] *See id.* at 204–08.

forcing private morality could not sustain the statute.[28] Both Justices Blackmun and Stevens criticized the majority for analyzing the Georgia statute as if it applied only to homosexuals.[29]

The majority's analysis of the right at stake in *Hardwick* solely in terms of marriage, procreation, and the family departs from the privacy doctrine established in the Court's prior cases.[30] Had the majority examined the regulated conduct in *Hardwick* at the same level of generality employed in previous privacy decisions, it would have found constitutional protection for private, consensual, same-sex sodomy. Although *Griswold* and *Eisenstadt v. Baird*[31] involved procreative freedom, these decisions cannot be limited to procreative matters. If constitutional protection extended only to procreative decisions, the government could constitutionally restrict the use of contraceptives because couples could simply abstain from sexual relations. The constitutional protection of private, consensual, nonprocreative sex established by the right to privacy does not depend on any relation to marriage, procreation, and the family. *Stanley v. Georgia*[32] ruled that the right to privacy allows an individual to view pornography in the privacy of his home.[33] *Roe v. Wade*[34] held that the right to privacy encompasses a woman's right to decide not to use her body to procreate. In both cases, the Court protected a person's conduct regardless of his or her family status because of the centrality of sexual freedom to individual autonomy and identity.[35]

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[28] *See id.* at 211–12.

[29] *See id.* at 200–01, 203 n.2 (criticizing the Court for ignoring the statute's facial applicability to heterosexual sodomy and thus avoiding the equal protection problem of selective application); *id.* at 214–20 (Stevens, J., dissenting) (arguing that the Constitution does not permit the statute to reach heterosexual sodomy and that its selective application to homosexual sodomy cannot be justified).

[30] Commentators have been virtually unanimous in their criticism of *Hardwick*'s reading of the Court's privacy jurisprudence. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1422–35 (2d ed. 1988); Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 210–20 (1986).

[31] 405 U.S. 438 (1972). Although *Eisenstadt* was decided on equal protection grounds, the extension to unmarried persons of the freedom from government restrictions on access to contraceptives implicitly guarantees unmarried persons the same right to privacy that *Griswold* provided for married persons.

[32] 394 U.S. 557 (1969).

[33] The *Hardwick* majority interpreted *Stanley* as "firmly grounded in the first amendment." 478 U.S. at 195. Until *Hardwick*, *Stanley* had been consistently read by the Court as a privacy case. *See* L. TRIBE, *supra* note 30, § 15-21, at 1426 & n.41.

[34] 410 U.S. 113 (1973).

[35] *See* L. TRIBE, *supra* note 30, § 15-21, at 1423–24. As Professor Richards stated:

> Traditional moral condemnation of homosexuality has eroded the intimate resources and imaginative, emotional, and intellectual freedom through which homosexuals can con-