

CIVIL RIGHTS, HUMAN RIGHTS, GAY RIGHTS: MINORITIES AND THE HUMANITY OF THE DIFFERENT

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The topic of this panel is "What are civil rights, and to whom do they belong?" After listening to much of the discussion, and considering the current public debate on the civil rights of lesbians and gay men, though, I am reminded of the precept that "When people talk about God, it's not about God that they talk."

It is clear from the speeches here, and from recent decisions by the federal courts concerning civil rights (with the usual sub-text that gay people should have none), that those who take anti-gay positions are not really talking about civil rights at all. Something else is present beneath the arguments, some deeper view or gut reaction or obsession in much of the talk about gay people and our rights. Rather than join in the farrago of legalisms about civil rights, I would like to try to get at that "something else."

Before we can properly speak of civil rights, we must understand human rights. I know that anyone like my co-panelist William Allen, who, while charged with protecting the civil rights of all Americans, could deliver a speech entitled, "Blacks? Animals? Homosexuals? What is a Minority?,"¹ would surely agree on the importance of acknowledging human rights. I trust he would agree that perhaps the first human right is the right to be considered and treated as human.

Yet throughout history, and to this day, minority groups of people have been dehumanized by others who, granting themselves what C. Vann Woodward called "permissions-to-hate,"² felt free to portray them as sub-human, *untermenschen*, animals, and alien. Indeed, dehumanization is the most potent and ef-

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1. See Address by William B. Allen, *Blacks? Animals? Homosexuals? What Is a Minority?*, West Coast Symposium on Homosexuality and Public Policy Implications (Oct. 7, 1989) (presented during Allen's tenure as Chair of the United States Commission on Civil Rights).

2. C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 81 (2d ed. 1966).

fective tool of bigots and tyrants.³ A review of historical examples of the dehumanization of the different will put in better perspective many of the current assaults on the equality and civil rights of gay people.

For the past two thousand years Jews have suffered from dehumanization and persecution because of their difference. Classic charges leveled against minorities by the intolerant, including spreading disease, molesting children, sexual depravity, and selfishness, have all been made against the Jews.⁴ For example, a Thirteenth-Century French law expressly equated Christians having sex with Jews to those having sex with animals.⁵ A similar law in England, promulgated as all Jews were expelled from that country, condemned to death "arsonists, sorcerers, those who abandoned the Christian faith, those who dared sleep with the wife of their feudal lord (or even the nurse of his children), and those who had intercourse with Jews, animals, or persons of their own gender."⁶ We should note, as William Allen undoubtedly would, the juxtaposition of the last three.

In *The Judensau: A Medieval Anti-Jewish Motif And Its History*, Isaiah Shachar describes an image of a Jew entwined with a pig, a powerful symbol used in the mass media of the time, carvings on churches in central Europe.⁷ Shachar writes that "the Jew

3. See J. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980). Professor Boswell argues that authoritarian governments, governments seeking to consolidate power, and conformity-minded institutions often play a "large role in the narrowing of social tolerance." *Id.* at 270. See also *id.* at 37-38, 121, 127-28, 333.

4. Studies like Boswell's show, first, how connected the fates of vulnerable minorities often are, and second, how common many of the charges made against minorities have been. See *id.* at 15-16; see also *id.* at 16-17 (comparing gay people and Jews as minority groups).

In the Thirteenth Century, Jews were sometimes ordered to wear specific clothing, the "Jewish badge," to distinguish them from the Christians, a dehumanizing measure that ostracized the Jews and aggravated public hostility to them. See *id.* This badge requirement reappeared relatively recently in Nazi Germany, where Jews were identified with Stars of David and gay people with pink triangles, now a symbol of gay identity and resistance to oppression. See, e.g., R. PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* (1986). Plant documents not only the persecution, brutality, and extermination campaign directed against gay people and other groups, but also the shameful failure by historians and government to shatter the "taboo" of silence about this anti-gay horror. Indeed, even at the war's end, when others were liberated, gay victims of Nazism were actually forced by the Allies to remain incarcerated. See *id.* at 181.

5. See J. BOSWELL, *supra* note 3, at 274.

6. *Id.* at 292.

7. See I. SHACHAR, *THE JUDENSAU: A MEDIEVAL ANTI-JEWISH MOTIF AND ITS HISTORY* (1974).

sucking the sow's teats is shown in all but two, which show the sow embraced and kissed. Additional occupation with the animal's hindquarters, and the eating and drinking of its excrement are shown in most."⁸ He concludes: "The Jews are, by association with the animal, implicitly but clearly labelled as not being human, 'like us' . . . thus sanctioning aggression."⁹ In our own time, of course, that dehumanization and aggression led to the Holocaust.

Western history is in part a chronicle of such dehumanization, one that has waxed and waned in cycles of intolerance. The fortunes of minorities as diverse as Jews, gay people, heretics and Christian non-conformists, "witches," moneylenders, gypsies, Moslems, and others frequently rose and fell together.¹⁰ The language and style of dehumanization were startlingly recurrent, and shockingly modern.

The United States was supposed to be different. The Declaration of Independence proclaimed: "We hold that all men are created equal, that they are endowed by their Creator with certain inalienable rights . . . life, liberty, and the pursuit of happiness."¹¹ America combined the promise of open, unencumbered geographical and historical space with an inheritance from secular philosophy: the new concept of human rights and the ideas of the political revolutions of the Seventeenth and Eighteenth Centuries.¹² Those revolutions included

8. *Id.* at 2-3. Shachar notes that "[w]hile the meanings attached to the *Judensau* changed considerably over the years, these obvious elements of oral and anal obscenity were always retained and, indeed, elaborated." *Id.* at 5-6.

9. *Id.* at 3. "[T]he attitude expressed in the *Judensau* toward the Jews is not just scurrilous. There was a further element or sub-motif present in all its representations: the Jews belong to the sow, the sow to the Jews. These people, in other words, belong to another and abominable category of beings . . ." *Id.*

Shachar notes, "It would not be necessary to mention this partly concealed meaning if the question of the common humanity of the Jews had not been so important in Germany since the eighteenth century." *Id.* In an analysis of vital relevance to gay people and other stigmatized minorities today, he observes,

the notion of [the Jews'] totally alien quality could not have persisted beyond the Middle Ages had it not been *stereotyped* at various cultural levels, including verbal abuse, proverbs, and jokes [and with] forceful image[s] such as the *Judensau*,] which kept imprinting itself on the mind, conditioning, indeed stereotyping, an attitude toward Jews . . . help[ing] in fixing the idea of Jews being absolutely *not* "of us."

Id. (emphasis added).

10. See J. BOSWELL, *supra* note 3, at 6-7, 15-16 (listing persecuted groups and noting that "the separate histories of Europe's minorities are the same story"); see also V. BULLOUGH, *HOMOSEXUALITY: A HISTORY* 64-65 (1979).

11. The Declaration of Independence para. 1 (U.S. 1776).

12. See Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in*

in their battle cries something historically new: an ideal of equality.

But because of particular and massive dehumanization already endemic in American society, the Constitution, when written, acknowledged the need for "Justice," "domestic Tranquility," "general Welfare," and the "Blessings of Liberty," but somehow left out equality.¹³ Indeed, the dehumanization of the African-American was expressly codified in the Constitution.¹⁴ As James Madison put it in *The Federalist Number 54*: "The federal Constitution . . . views [African-Americans] in the mixed character of persons and of property. . . . [It] regards the *slave* as divested of two fifths of the *man*."¹⁵ In *Dred Scott v. Sandford*,¹⁶ the Supreme Court reiterated this view of African-Americans as "*beings of an inferior order . . . so far inferior that they [have] no rights which the white man [is] bound to respect.*"¹⁷

This dehumanization has corrupted our society to this day. Whatever our race, we have all been harmed, we have all paid in blood, in social pathology, and in false senses of inferiority or superiority, as Abraham Lincoln foretold in his Second Inaugural Address.¹⁸ For example, in describing the consequences to white children of seeing blacks segregated out of the schools, deprived not only of civil rights, but of equal humanity, Senator Charles Sumner declared, "Their hearts, while yet

Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957, 960-61, 966-71 (1979).

13. See U.S. CONST. preamble. In fact, judicial construction of the term "citizen" operated to remove the Constitution as a source of protection for the interests of black people, particularly black people as a group. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Only with the adoption of the Fourteenth Amendment did all persons born or naturalized in the United States even in theory become equal citizens.

14. See U.S. CONST. art. I, cl. 3 (apportioning representatives and taxes on the basis of the number of free persons and "three fifths of all other Persons," that is, slaves). See also U.S. CONST. art. V (protecting the slave trade until 1808); U.S. CONST. art. IV, § 2, cl. 3 ("fugitive slave" clause, which required return of escaped slaves even though they had migrated successfully to a free state).

On the occasion of the Constitution's bicentennial, Justice Thurgood Marshall observed that "[w]hen the Founding Fathers used [the phrase, 'We the People'], they did not have in mind the majority of America's citizens," and noted the pre-Civil War constitutional "contradiction between guaranteeing liberty and justice to all, and denying both to Negroes." T. Marshall, Remarks to the San Francisco Patent & Trademark Law Association 2, 6 (May 6, 1987) (available in office of *Harvard Journal of Law & Public Policy*).

15. THE FEDERALIST No. 54, at 337-39 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

16. 60 U.S. (19 How.) 393 (1857).

17. *Dred Scott*, 60 U.S. (19 How.) at 407 (emphasis added).

18. See *Second Inaugural Address of President Abraham Lincoln*, reprinted in 11 COMPLETE WORKS OF ABRAHAM LINCOLN 44-47 (J. Nicolay & J. Hay eds. 1905).

tender with childhood, are necessarily hardened by this conduct, and their subsequent lives, perhaps, bear enduring testimony to this legalized uncharitableness.”¹⁹ Even more succinctly, Frederick Douglass observed, “No man can put a chain about the ankle of his fellow man, without at last finding the other end fastened about his own neck.”²⁰

The post-Civil War constitutional revolution for the first time put “equality” into the fundamental law of the land.²¹ At last there was hope that all American people would finally receive their civil rights. But the dehumanized image of black people, fueled by selfishness and fear, negated that promise.

Not truly viewing African-American people as equal, the powers in society refused to carry out the plain meaning of this constitutional command. As Richard Kluger documents in *Simple Justice*, with the refusal of Congress and then the courts to enforce the words of the law, dehumanization of black people actually increased.²² For example, in 1884, a future dean at Harvard cited “the Negro’s ‘animal nature’ and his innate and allegedly uncontrollable immorality”²³ as a basis for disenfranchisement of African-Americans.

19. R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 76 (1977) (quoting Senator Sumner on the need for integration).

Of course, segregation also had negative effects on the African-American children attending segregated schools. See *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 494 (1954). The *Brown* Court examined sociological studies and concluded that segregation itself had a negative psychological effect on students. See *id.* at 493-94 n.11. The Court therefore held that separate facilities “are inherently unequal.” *Id.* at 495.

Segregation was in fact intended to produce this very feeling of inferiority and unequal humanity. See Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424-27 (1960). Such dehumanizing segregation fed upon itself, denying members of both races not only their lawful right of association, but the benefits of association as well. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 34 (1959). By separating black children from white children, the two groups were brought up to distinguish themselves from each other, rather than to recognize their common humanity.

20. Douglass, *The Civil Rights Case: Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall, October 22, 1883*, reprinted in 4 P. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 392, 397 (1955). Most Americans can now see how this is true in regard to the effects of racism on majority and minority alike. Fewer see how anti-gay prejudice and our cultural insistence on defining sexuality and sexual orientation by polarization and labels have harmed all people in our society, gay, non-gay, bisexual, homosexual, and asexual. See *infra* note 63.

21. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States . . . are citizens of the United States. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

22. See R. KLUGER, *supra* note 19, at 84-85; see also C. WOODWARD, *supra* note 2, at 67-109.

23. R. KLUGER, *supra* note 19, at 85.

In 1896, the Prudential Life Insurance Company circulated a report arguing that "the Negro's 'race traits and tendencies' naturally caused his high incidence of tuberculosis, syphilis, scrofula, and other diseases."²⁴ The high incidence of disease was later recognized, of course, as environmentally, not congenitally, caused. The report concluded that no improvement in the environment of black people, let alone in their legal status and civil rights, would improve their health record, because the root of black people's problem was their "immense amount of immorality."²⁵

A flood of books followed. *The Negro a Beast or in the Image of God?*²⁶ again might sound familiar to the author of "Blacks? Animals? Homosexuals? What is a Minority?" Once more, dehumanization bore its characteristic marks: charges of "immorality" and animal behavior, and association with, and blame for, disease.

We could go on with these examples forever,²⁷ but I have one more I must share, lest you think this is all ancient history. By next year, 200,000 people in this country will have AIDS. Several times that number are already infected with the virus that appears to cause it.²⁸ In America, most of the fatalities

24. *Id.*

25. *Id.*

26. *See id.*

27. For example, the American internment of persons of Japanese descent during World War II was the result of dehumanization by the majority. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the conviction of an American citizen for remaining in his home contrary to Civilian Exclusion Order No. 34. *See id.* at 224. The Court purported to find that Korematsu had been removed from his home, not because of racial prejudice, but because the United States was at war with the Japanese Empire. *See id.* at 223-24.

All three dissenting Justices noted in their separate opinions that only people of Japanese descent were interned even though the United States was also at war with Germany and Italy. *See id.* at 227-28 (Roberts, J., dissenting); *id.* at 240 (Murphy, J., dissenting); *id.* at 243 (Jackson, J., dissenting). Justice Murphy found that the exclusion of all Japanese from military areas went "over 'the very brink of constitutional power' and [fell] into the ugly abyss of racism." *Id.* at 233 (Murphy, J., dissenting). This "obvious racial discrimination . . . deprive[d] all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment." *Id.* at 235 (Murphy, J., dissenting). Justice Murphy noted that the discrimination predated the war with Japan, and was based on "the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices." *Id.* at 239 (Murphy, J., dissenting) (citing testimony of California farmers' association representative that "we don't want want them back when the war ends, either").

28. Recently, the Centers for Disease Control (CDC) reported that over one million people in the United States are infected with HIV, the human immunodeficiency virus linked to AIDS. *See Centers for Disease Control, Estimates of HIV Prevalence and Projected AIDS Cases: Summary of a Workshop, October 31-November 1, 1989*, 39 MORBIDITY & MOR-

have been gay men.²⁹

This holocaust of gay men was deliberately ignored by our government and our mass media until, and only until, it appeared that non-gay people were also affected.³⁰ With many of our friends and lovers already dead or dying, with our lives and identity inescapably altered, as we scrambled alone to cope with the onslaught in the face of unremitting social hostility, gay people heard our government say first, nothing, and then,

TALITY WEEKLY REP. 110 (1990). The CDC estimates that 37,500 new cases of AIDS were reported during the period October 1988 to September 1989, an increase of 14 percent over the preceding year. *See id.* at 117. In the future, the toll will run higher still: in 1990, 52,000 to 57,000 new cases of AIDS and 37,000 to 42,000 AIDS deaths; for the period 1989 to 1993, 390,000 to 480,000 new cases and 285,000 to 340,000 deaths. *See id.*

29. Gay men accounted for the first five reported AIDS cases. *See Centers for Disease Control, First 100,000 Cases of Acquired Immunodeficiency Syndrome—United States, 38 MORBIDITY & MORTALITY WEEKLY REP. 561 (1989)*. Most reported AIDS cases involve, in the CDC's phrase, "homosexual or bisexual men," although their proportion has been dropping over time. *Id.* Sixty-three percent of cases reported before 1985 involved gay men; by 1989 that percentage had dropped to 56 percent. *See id.*

Of course, death is not AIDS's only effect on those of us in the gay communities and on friends and families. AIDS and dealing with AIDS and fear of AIDS touch one's life in many ways every day. For example, one AIDS activist has described his thoughts on growing close to another person:

I found myself in love. Like other human beings, I desire the experience. I wanted to hold this man and to kiss him. Is this wanting too much? Is this wanting too much now? *Can any straight person understand what it is like to want to make love but to be terrified that to do so means possible death? . . . I feel guilty falling in love. I should have much more control over my emotions. I don't want to die.*

L. KRAMER, REPORTS FROM THE HOLOCAUST: THE MAKING OF AN AIDS ACTIVIST 228 (1989) (emphasis added).

30. *See, e.g., R. SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987)*. In this history of the AIDS crisis, Shilts observes that "[b]y the time America paid attention to the disease it was too late to do anything about it." *Id.* at xxi. The Reagan administration ignored pleas from scientists for funding; many scientists at first avoided the epidemic "because they perceived little to be gained in studying a homosexual affliction"; public health authorities and politicians refused to act for reasons of political expediency; some gay community activists at first "played politics with the disease"; and the mass media did not want to cover stories about the gay community. *See id.* at xxii, *passim*. Indeed, "[m]ore media attention and federal funding (\$22 million) were heaped upon the Tylenol murders in one week than on the AIDS crisis in the first three years of its existence." V. RUSSO, THE CELLULOID CLOSET 325 (rev. ed. 1987); *see also* R. SHILTS, *supra*, at 191.

Dr. C. Everet Koop, Surgeon General from 1981 to 1989, noted that he encountered "considerable opposition within the Reagan administration" for his efforts to promote AIDS education. Adelman, *Do the Right Thing*, WASHINGTONIAN, Apr. 1990, at 81, 87. Even the federal government's own National Commission on AIDS (Commission) has criticized the lack of leadership and dreadful response of the Reagan and Bush administrations. *See Panel Says Government is Not Leading AIDS Fight*, N.Y. Times, Apr. 25, 1990, at A1, col. 2 (citing the second report of the National Commission on AIDS to the President, dated April 24, 1990). The Commission found that "coordination of the [government's] efforts is the missing link to an effective national strategy," and characterized the national AIDS policy even in 1990, the tenth year of the epidemic, as like "an orchestra without a conductor." *Id.*

only the likes of this hateful bit of dehumanization: "We must conquer AIDS before it affects the heterosexual population and the general population. . . . We have a very strong public interest in stopping AIDS before it spreads outside the risk groups, before it becomes an overwhelming problem."³¹

The history of this epidemic is a national moral disgrace in which people have been allowed to die; to stagger under the burden of fear, caring for others, and fighting to live; to watch their family members and lovers die; and to be mocked, ridiculed, assaulted, and denied humanity at the same time. As one chronicler has described it:

The number of AIDS cases measured the shame of the nation. . . . The United States, the one nation with the knowledge, the resources, and the institutions to respond to the epidemic, had failed. And it had failed because of ignorance and fear, prejudice and rejection. The story of the AIDS epidemic was that simple . . . [I]t was a story of bigotry and what it could do to a nation.³²

Instead of treating it as a health issue, our society has made AIDS first an echoing tomb of silence, then a battleground of antipathy toward "otherness," and now, on the part of many, a smug complacency completely at odds with reality, not to mention humanity. This complacency, of course, has been furthered not only by the association of AIDS with gay men, but now also with other vulnerable and often dehumanized minorities: African-Americans, Latin Americans, intravenous drug users, and the poor.³³

To this day, all we hear from some quarters of society, (including, I am sorry to say, many at this symposium, in the Federalist Society, and in the administrations you embrace) are calls for forced testing and collecting names,³⁴ detention,³⁵ dis-

31. R. SHILTS, *supra* note 30, at 554 (quoting remarks by Margaret Heckler, U.S. Secretary of Health and Human Services, to the first International AIDS Conference, April 15, 1985). The statement was remarkable not only for its insensitivity (Was not AIDS, the unchecked killer of thousands, already an "overwhelming problem"? When did gay people cease to be part of their country's "general population"?), but also for its failure to commit resources or provide leadership even four years into the crisis.

32. *Id.* at 601.

33. See Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome—United States, 1989*, 39 MORBIDITY & MORTALITY WEEKLY REP. 81, 84, 85 (1990).

34. Although public health officials concluded early that mandatory testing, whether selective or universal, is a poor method of infection control, see R. BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH 140-41 (1989), cries for testing, and mandatory reporting of the names of those who test positive for the HIV virus, have been the centerpiece of many politicians' response to the

crimination (actually endorsed by the Justice Department under Edwin Meese),³⁶ denial of entry into the country,³⁷ and

epidemic. See, e.g., Letter of Robert Anderson and John Quigley, N.Y. Times, June 21, 1989, at A21, col. 5 (professors examining failed November 1988 ballot proposition sponsored by anti-gay congressman to set up mandatory reporting and contact tracing).

One major health organization recently summed up the arguments against mandatory reporting:

Although permissive reporting policies, designed to protect third parties, are warranted under some circumstances, *mandatory* name-reporting requirements would breach patient confidentiality without achieving any significant practical benefit to the public health. Mandatory reporting does not assure successful implementation of contact-tracing programs because the tracing of contacts ultimately depends on the cooperation of infected individuals. Moreover, current data indicate that if name-reporting of HIV-seropositive individuals were legally required, many people would be discouraged from seeking HIV testing and would not have the benefit of early access to counseling and treatment.

American Psychiatric Association, Position Statement Opposing Mandatory Name-Reporting of HIV-Seropositive Individuals (Nov. 1989) (emphasis added). See also Association of State and Territorial Health Officials, National Association of County Health Officials & U.S. Conference of Local Health Officers, Guide to Public Health Practice: HIV Partner Notification Strategies 6 (Sept. 1988). The White House has now announced its opposition to such policies. See *Bush Says He Doesn't Favor Mandatory Reporting to AIDS*, N.Y. Times, June 9, 1989, at A8, col. 1.

35. See *Bennett Would Detain Some Carriers of AIDS*, N.Y. Times, June 15, 1987, at A13, col. 1 (quoting Senator Jesse Helms to state: "I think somewhere along the line we are going to have to quarantine, if we are really going to contain this disease.").

Both recent and past experience with syphilis outbreaks have shown that confidentiality and counseling, rather than threatened quarantine, are much more effective at curbing the spread of disease. See generally A. BRANDT, *NO MAGIC BULLETS: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* (1987); see also GOSTIN, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1026-38 (1989). Education and environmental reinforcement (that is, access to health care, psychological and social support, economic sufficiency, and non-discrimination) are the keys to enabling each person to modify his or her behavior so as to protect against transmission. See, e.g., Mann, *Global AIDS: Epidemiology, Impact, Projections, Global Strategy, AIDS PREVENTION & CONTROL*, 1988, at 3.

36. An infamous Meese Justice Department memorandum asserted that, while discrimination against a person with AIDS may be impermissible, discrimination based on the *fear* of AIDS, however irrational, is legally permitted. See Memorandum of Charles J. Cooper, Assistant Attorney General (June 20, 1986). Fortunately, the Supreme Court rejected such a malicious position in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

The position taken by the Department of Justice in *Arline* was consistent with the Reagan administration's approach throughout the AIDS epidemic. See Barnes, *AIDS and Mr. Korenatsu: Minorities in Times of Crisis*, 7 ST. LOUIS U. PUB. L. REV. 35, 39-40 (1988). Early and consistently, the administration went "on record as opposing federal action to ban discrimination against those with AIDS, preferring to leave such action to states." *AIDS Panel Endorses Stiffer Anti-Bias Laws*, L.A. Times, June 18, 1988, at 1, col. 2. The administration thus ignored the key recommendation of the Presidential Commission on the HIV Epidemic that the administration itself had, belatedly, appointed in lieu of action. See *id.*

37. See 8 U.S.C. § 1182(a) (1988) (excluding aliens from the United States if afflicted with any dangerous contagious disease); 42 C.F.R. § 34.2(b) (1990) (including HIV infection in list of dangerous contagious diseases that must be reported to the immigration service when an alien seeks a visa).

This policy of exclusion drew nearly unanimous condemnation from scientists,

even tattooing³⁸ of the HIV-infected, as if "health [could be] promoted by vigorously punishing the sick."³⁹

How, not fifty years after the Holocaust, not ten years after the genocide in Cambodia, could we hear again such shameful, unashamed hatemongering? How could a society constitutionally dedicated to the proposition that all men (and presumably women) are created equal so blithely allow people to die? Again, the answer is dehumanization. For many people, lesbians and gay men are somehow not people. We are not real. We are not equal. And we most assuredly are not to be free.

Of course, for gay people, dehumanization did not begin with AIDS.⁴⁰ Indeed, it was the dehumanized and vulnerable

health care professionals, and community workers at the Sixth International Conference on AIDS. See, e.g., International AIDS Society, Statement Concerning IAS Co-sponsorship (1990) ("there is no valid scientific or public health basis for discriminatory policies toward HIV-infected travellers").

The administration has yet to eliminate this discrimination, despite the conclusion of even the government's own public health experts that HIV-based restrictions are unwarranted. See *U.S. Restrictions on AIDS-Infected Visitors Challenged*, L.A. Times, May 23, 1990, at A14, col. 1 (citing memorandum of James O. Mason, Assistant Secretary of Health and Human Services, March 14, 1990).

38. See, e.g., Buckley, *Crucial Steps in Combatting the AIDS Epidemic*, N.Y. Times, Mar. 18, 1986, at A27, col. 4.

39. *Senator Helms and the Guilty Victims*, N.Y. Times, June 17, 1987, at 30, col. 1 (comparing Helms's proposals for discrimination to Samuel Butler's satire of Victorian hypocrisy).

40. Dehumanization of gay people and hostility toward same-sex sexuality are nothing new, but they have not always been the way they are now. As Boswell convincingly documents, reclaiming gay history from distortion and silence, "Only in comparatively recent times have homosexual feelings come to be associated with moral looseness." J. BOSWELL, *supra* note 3, at 27; see also V. BULLOUGH, *SEXUAL VARIANCE IN SOCIETY AND HISTORY* (1976). Boswell also discusses societal views of homosexuality in Western history. See J. BOSWELL, *supra* note 3, at 51.

Indeed, to give just one example, for much of the ancient world, acceptance of homosexuality was equated, not only with normal or ordinary human behavior, but with democracy and human freedom. See *id.* at 51 (quoting Plato on the connection between anti-gay attitudes and "despotism"; quoting Aristotle on the "public honor" accorded gay sexuality among barbarians"), 41-60 (generally), 130 (quoting Zeno the Stoic: "Do not make invidious comparisons between gay and non-gay, male and female"; "You make distinctions about love objects? I do not.").

Sexual activity between people of the same sex has always been present in societies around the world; some have idealized it, others condemned it, others merely tolerated it or remained indifferent. See Carrier, *Homosexual Behavior in Cross-Cultural Perspective*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* 100 (J. Marmor ed. 1980); C. FORD & F. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1951); see also Richards, *supra* note 12, at 982-84.

Nevertheless, Western history recorded a shift in attitudes toward sexuality and gay people, see generally J. BOSWELL, *supra* note 3, and by 533 A.D., legislation was adopted proscribing consensual same-sex sexual activity. See *id.* at 171. The original edicts declared that such behavior was the cause of famine, earthquake, and plague. See Justinian, *Novellae 77 and 11*, reprinted in D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 73-75 (1955). Blackstone cited Sodom and Gomorrah in support of the death penalty for same-sex sexual acts. See 4 W. BLACKSTONE, *COMMENTARIES*; but

posture of gay people as a minority that permitted AIDS to become what it has become. Our society forbids gay people to marry,⁴¹ denies us equal pay for equal work,⁴² throws us off the job,⁴³ forbids us from serving our country in the armed forces,⁴⁴ refuses us health insurance,⁴⁵ forces us into the

see J. BOSWELL, *supra* note 3, at 92-98 (Sodom story in *Genesis* not related to homosexuality). Boswell documents the fundamental stages in the dehumanization of gay people and restructuring of social attitudes toward homosexuality. *See id.*; see also J. KATZ, *GAY AMERICAN HISTORY* (1976).

41. *See Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1606 n.18, 1603-11 (1989) [hereinafter *Sexual Orientation*].

Preventing gay people from marrying, and then discriminating against us in the provision of benefits and the extension of protections because we are not married, is unfair, unconstitutional, and unproductive. It arbitrarily denies gay people access to a state-sustained institution of immense symbolic, legal, and economic importance. It promotes instability. It puts a stamp of inferiority and implausibility on committed gay partnerships, and denies them substantial material and social protections and support. And, there is simply no legitimate government purpose served by such denial. *See id.* at 1608-11.

Historically, many societies have recognized same-sex marriages. *See, e.g.*, J. BOSWELL, *supra* note 3, at 21, 26, 34, 54-55, 69, 71-73, 82. Even in today's more hostile climate, in our heterosexist culture, " 'couplehood' either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals." P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES* 45 (1983). Studies have shown repeatedly that same-sex relationships are very similar to heterosexual relationships in their diversity and their interaction. Despite social hostility and a lack of legal and structural support, many gay and lesbian relationships are characterized by deep commitment and interdependence, and are of long duration. *See* Peplau & Amaro, *Understanding Lesbian Relationships*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 233 (W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt eds. 1982); Peplau & Jones, *Symposium on Homosexual Couples*, 8 J. *HOMOSEXUALITY* 2 (1982); *see also* Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49 (1989) (landmark decision recognizing gay couple as a family).

42. In a pending case, *Gay Teachers Ass'n v. Board of Educ. of New York City*, Index No. 43069/8 (S. Ct. N.Y. Co. filed May 2, 1988), Lambda Legal Defense & Education Fund has challenged New York City's denial of health benefits to the life partners of teachers and employees who are not legally married.

This denial of health benefits, which amounts to a denial of equal pay for equal work, is unconstitutional, and violates city and state law prohibiting discrimination on the basis of marital status and (in the case of New York City) sexual orientation. For gay persons, this discrimination arises from a state-created "Catch-22," in which, on the one hand, lesbians and gay men are denied benefits unless we are married, and, on the other, are not allowed to marry. Ideally, of course, our society would not base people's access to such important benefits as health care on who people's relatives are or where people work.

43. *See, e.g.*, Levine & Leonard, *Discrimination Against Lesbians in the Work Force*, 9 SIGNS 700 (1984); Levine, *Employment Discrimination Against Gay Men*, 9 INT'L REV. MODERN SOC. 151 (1979).

44. The largest single entity discriminating most comprehensively against lesbians and gay men is the federal government, most notably the military. *See Sexual Orientation, supra* note 41, at 1554-71. Defense Department regulations prohibit lesbians and gay men from serving in the armed forces. *See* Gross, *For Gay Soldiers and Sailors, Lives of Secrecy and Despair*, N.Y. Times, Apr. 10, 1990, at A1, col. 1 (discussing Pentagon Departmental Directive No. 1332.14). An enormous amount of taxpayer money and personnel resources are spent each year hounding out of the military men and women who

closet,⁴⁶ arrests us in our bedrooms,⁴⁷ harasses our daily as-

wish to serve their country, and who have been trained at great expense to do so. Every year, more than 1,400 men and women are discharged under this policy. *See id.*

The military purports to justify the ban with the same arguments it used for previous discrimination against blacks and women. *See id.*; Moore, *Open Doors Don't Yield Equality*, Wash. Post, Sept. 24, 1989, at A1, col. 3 (women in military face institutionalized discrimination and pervasive sexual harassment). The proffered justifications are in fact post hoc rationalizations to support a policy wholly derived from prejudice. *See generally* A. BERUBE, *COMING OUT UNDER FIRE* (1990) (documenting history of exclusion of gays).

For example, the military's undocumented allegation that enlisting gay people discourages non-gay enlistment uncomfortably echoes the excuses the military once gave for segregating blacks and whites—that integration would dampen white morale and enlistment. *See* Weisberg, *Gays in Arms*, THE NEW REPUBLIC, Feb. 19, 1990, at 20, 21. President Truman rejected such arguments when desegregating the armed forces. The military itself is responsible for determining how an integrated force will function, whether black and white, male and female, or gay and non-gay. *See, e.g.*, A. BERUBE, *supra*.

Another rationale, that gay people pose greater security risks, would fall if subjected to a requirement of proof. There is overwhelming empirical evidence that gay enlistees pose no greater security risk than non-gay enlistees, and they might pose even less of one. *See* DEFENSE PERSONNEL SECURITY RESEARCH & EDUC. CENTER, *PRESERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY, ACCESSIONS: IMPLICATIONS FOR SECURITY CLEARANCE SUITABILITY* iii (Jan. 1989). These findings are from a study commissioned by the Pentagon, the results of which the Pentagon attempted to conceal. *See also* DEFENSE PERSONNEL SECURITY RESEARCH & EDUC. CENTER, *NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY* (Dec. 1988) (surveying and rejecting military anti-gay policy); E.L. GIBSON, *GET OFF MY SHIP* 356-67 (1978) (surveying suppression of studies discovered in course of court challenges).

Moreover, practical experience disproves the military's assertions that gay persons are unfit for service; many gays who have been discharged have had exemplary service records. *See* Gross, *supra*; *see also, e.g.*, *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990).

The real difficulty is getting a court, let alone Congress or the White House, to make a decision based on evidence rather than on prejudice. Until gay people receive a fair hearing, justice, and equal rights, gay persons will continue to spend energy fighting to enter the nation's service, and the military will continue to squander our tax dollars fighting to keep gay people out.

45. Lambda Legal Defense & Education Fund now represents an Indiana man denied coverage under his employer's group plan because he is gay, although he is in good health. In an earlier case, Lambda represented a non-gay man discriminated against in the provision of insurance because, as a twenty-six year old single man living with a male roommate in New York City, he was perceived to be gay.

46. *See, e.g.*, Gross, *supra* note 44 (lesbians and gays go to extremes to lead closeted lives in attempts to protect their military careers); Branch, *Closets of Power*, HARPER'S, Oct. 1982, at 34 (discussing gay politicians who do not disclose that they are gay).

Psychological studies indicate that gay persons who are forced to be secretive about their sexuality, or are isolated from larger gay or lesbian communities, experience significant emotional and psychological distress. *See, e.g.*, A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978); Malyon, *Psychotherapeutic Implications of Internalized Homophobia in Gay Men*, 7 J. HOMOSEXUALITY 56 (1982). By contrast, gay persons who have come out show the highest degree of adjustment and self-esteem. *See* A. BELL & M. WEINBERG, *supra*; Crocker & Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 PSYCHOLOGICAL REV. 608 (1989).

47. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); *infra* note 59 and accompanying text. *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21 (2d ed. 1988). Such laws as the Georgia statute enforced in *Hardwick*, and their enforcement against gay and bisexual people through arrest or in other contexts, reinforce social prejudice and

sociations,⁴⁸ takes away our children,⁴⁹ beats and kills us in the streets and parks,⁵⁰ smothers images of ourselves and others like us,⁵¹ and then tells us we are irresponsible, unstable, and aberrant.

What we all need, gay and non-gay, is, to use Professor Black's phrase, a "humane imagination," defined as the ability and effort to understand and credit "the inwardnesses of others,"⁵² the humanity of the different. Once and for all, we need to recognize that being different is part of being human, not a reduction of it, and not a justification for dehumanization or denial of rights.

This recognition is needed not only for the sake of minorities. As Martin Luther King, Jr., wrote, "Eventually the civil rights movement will have contributed infinitely more to the nation than the eradication of racial injustice. It will have enlarged the concept of brotherhood to a vision of total interrelatedness."⁵³

individual hostility toward gay people. See, e.g., Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexuality*, 5 J. INTERPERSONAL VIOLENCE 316 (1990). They are also used to justify other discrimination. See, e.g., *England v. State of Texas*, No. 484697 (Dist. Ct. Travis Co. filed May 22, 1990) (Lambda challenge to state law criminalizing "homosexual conduct" on behalf of lesbian denied employment as Dallas police officer because of law's existence).

48. See *Sexual Orientation*, *supra* note 41, at 1587-95.

49. See *id.* See also Bozett, *Children of Gay Fathers*, in *GAY AND LESBIAN PARENTS* 39, 39 (F. Bozett ed. 1987) (at least one to three million gay men in the United States are natural fathers; there are an estimated six to fourteen million children of gay and lesbian parents, many from heterosexual marriages); Falk, *Lesbian Mothers: Psychological Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941 (1987) (one-and-a-half to five million lesbian mothers in United States); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theories and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976); Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, in *GAY AND LESBIAN PARENTS*, *supra*, at 89, 92; *Sexual Orientation*, *supra* note 41, at 1643.

50. See NAT'L GAY & LESBIAN TASK FORCE ANTI-VIOLENCE PROJECT, FIFTH ANNUAL REPORT (1990); see also *Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy*, 5 J. INTERPERSONAL VIOLENCE 3 (1990).

51. The funding restrictions imposed in 1989 on the National Endowment for the Arts aimed at censoring art with homoerotic or gay content illustrate the hostility engendered by works by or about lesbians and gay men, and the double standard in the portrayal of gay and non-gay lives. See, e.g., Kastor, *NEA's "Clean-Art" Campaign; Writers Upset By New Grant Conditions*, Wash. Post, Mar. 9, 1990, at D1, col. 1. The restrictions were yet one more prominent example of the use of tax money and legal sanctions to promote non-gay sexuality and depictions of non-gay lives, while denying the voice and equal portrayal of lesbians and gay men and our sexuality and lives. See also V. Russo, *supra* note 30. And, of course, one need only look at television, billboards, advertising, or even the news to not see and hear lesbian and gay people presented in our breadth and diversity.

52. See Black, *The Humane Imagination in the Great Society*, reprinted in C. BLACK, *THE HUMANE IMAGINATION* 1-16 (1986).

53. M. KING, *WHY WE CAN'T WAIT* 152 (1963).

William Allen is partly right; rights should not and do not come because we are members of minority groups.⁵⁴ Rather, minorities are entitled to vigilant protection as the most common and easiest victims of dehumanization that takes away our human rights, that robs us of our birthright of equal civil rights.

In his zeal to deny gay people meaningful protection of our rights, Allen mischaracterizes the purpose of civil rights laws. Civil rights laws do not create rights, nor do they award special benefits. Rather, they attempt to preclude the most frequent bases of discrimination that accompany such dehumanization, bases like race, religion, sex, ethnicity, and sexual orientation. Because gay people need such protection to assure our equal rights, as of March 1990, two states plus some eighty cities and counties nationwide have adopted protective civil rights legislation for those discriminated against on the basis of their sexual orientation.⁵⁵ As yet, the federal government has not.⁵⁶

In *Yick Wo v. Hopkins*,⁵⁷ the Supreme Court invalidated a facially neutral law that was administered in a manner that discriminated against Chinese laundry owners. In so ruling, the Court correctly recognized that sometimes equality on its face is not equality in fact.⁵⁸

Nearly a hundred years later, however, a less honest Supreme Court added to *Dred Scott* and *Korematsu* its decision in *Bowers v. Hardwick*.⁵⁹ The Court rejected as "facetious"⁶⁰ gay people's claim of an equal right to be left free of government

54. See Address by William B. Allen, *supra* note 1.

55. See *Sexual Orientation*, *supra* note 41, at 1582-83. Updated information may be obtained from Lambda Legal Defense & Education Fund.

56. But see Hate Crimes Statistics Act, Pub. L. No. 101-275, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 140 (requiring the compilation of statistics of crimes against people because of their race, religion, ethnicity, or sexual orientation). This is the first small step toward comprehensive federal protection of the equal rights of gay people.

57. 118 U.S. 356 (1885).

58. See *Yick Wo*, 118 U.S. at 373-74 (discretion provided by law allowed board to use legislation that was "fair on its face and impartial in appearance" to "make unjust and illegal discriminations between persons of similar circumstances").

59. 478 U.S. 186 (Georgia "sodomy" law does not violate federal constitutional right to privacy), *reh'g denied*, 478 U.S. 1039 (1986).

In *Hardwick*, a five-to-four majority voted to uphold Georgia's "sodomy" law and, by implication, the similar laws of 24 other states. See *Hardwick*, 478 U.S. at 196. These state laws make criminal an enormous amount of the private, consensual sexual activity engaged in by many American adults. See, e.g., A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 368-70 (1948); S. HITE, *THE HITE REPORT: A NATIONWIDE STUDY ON FEMALE SEXUALITY* 76 (1976). The Georgia statute, for instance, includes within its scope "any sexual act involving the sex organs of one person and the mouth or anus of another." *Hardwick*, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2(a) (1984)). Although the statute does not distinguish between homosexual

intrusion in important personal choices and our claim to an

and heterosexual sexual acts, the Court explicitly refused to discuss heterosexual sodomy. *See id.*

Hardwick challenged the law following his arrest for engaging in oral sex with another man in the privacy of his own home. The Court framed the question presented by such police action in the bedroom in such a way as to guarantee a negative answer: "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190.

As Justice Blackmun noted in his ringing dissent, however, *Hardwick* "is no more about 'a fundamental right to engage in homosexual sodomy,' than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth." *Id.* at 199 (Blackmun, J., dissenting) (citations omitted). The majority's disingenuous formulation guaranteed defeat for Michael Hardwick's assertion of "the most comprehensive of rights and the right most valued by civilized men, [namely,] the right to be let alone." *Id.* (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Because the Georgia law on its face criminalizes certain common behavior whether between same-sex or heterosexual couples, the Court need not have addressed the issue of sexual orientation at all. It could have asked itself not what Michael Hardwick was doing in his bedroom, but what the police were doing there. *See* L. TRIBE, *supra* note 47, § 15-21, at 1428.

Unfortunately, however, because of its dehumanized view of gay people, the majority literally could not see the case that way, could not see through the eyes of Michael Hardwick with "humane imagination." *See supra* note 52 and accompanying text. The majority's hostility to gay people and "most willful blindness" to our human desire for equality in self-definition and intimate association led to its total distortion of the privacy line of cases. *See Hardwick*, 478 U.S. at 204-05 (Blackmun, J., dissenting).

Turning constitutional jurisprudence on its head, the Court actually invoked prior discrimination and intolerance of gay people as a justification for continued discrimination and criminal sanctions. *See id.* at 210-11 (Blackmun, J., dissenting) (contrasting the majority's approach with the Court's repudiation of miscegenation laws, supported by "tradition" and "religion," in *Loving v. Virginia*, 388 U.S. 1 (1967)). As Justice Blackmun wrote, "[n]either the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from this Court's scrutiny." *Id.* at 210 (Blackmun, J., dissenting); *see also id.* at 216 (Stevens, J., dissenting) ("[T]he fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.").

In lieu of constitutional analysis, the Court indulged itself in a venomous and unreasoned attack on gay people and homosexuality, what the dissent characterized as an "almost *obsessive* focus on homosexual activity, [which] is particularly hard to justify" given the breadth of the Georgia statute and its applicability to both homosexual and heterosexual acts. *Id.* at 200 (Blackmun, J., dissenting). Writing for four justices, Justice Blackmun concluded: "The Court claims its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others." *Id.* at 206 (Blackmun, J., dissenting).

Critical response has not been kind to the majority's opinions in *Hardwick*; in fact, "[c]ommentators have been virtually unanimous in their criticism of *Hardwick's* reading of the Court's privacy jurisprudence." *Sexual Orientation, supra* note 41, at 1523 n.30 (majority opinion's analysis departs from established privacy doctrine). *See, e.g.,* J. JOSEPH, *BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT* 65-74 (1987) (including *Hardwick* among "worst" Supreme Court opinions); L. TRIBE, *supra* note 47, § 15-21, at 1421-35 (critique of decision by attorney who argued *Hardwick* in Supreme Court); Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate*

equal right to love, thus mangling the Constitution in its caricature of lesbians and gay men—a modern-day *Judensau*.

Gay people are, in this culture, a minority.⁶¹ Our sexual orientation, our romantic attractions, our affectional preference appear to most of us, as to most humans, to be immutable, deeply rooted, beyond our conscious choice, part of our natural identity.⁶² None of us created our fundamental sexual

Decision, 63 N.Y.U. L. REV. 154 (1988) (criticizing *Hardwick* and suggesting ways to minimize its effect on future cases).

Moreover, former Justice Lewis Powell, the "swing vote" on the bitterly divided Court, recently declared that he "probably made a mistake" in voting to uphold the sodomy law. See *Powell Concedes Error in Key Privacy Ruling*, N.Y. L.J., Oct. 26, 1990, at 1, col. 3. Powell stated that, in retrospect, "the dissent had the better of the arguments." *Id.* Powell's reflections further undermine the validity of the reasoning and result in *Hardwick*.

One result of *Hardwick* has been the increased willingness of state courts to give teeth to state constitutional protections beyond those withheld under the federal constitution by current courts. See, e.g., *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (Florida Supreme Court case striking down restrictive abortion law under express state constitutional privacy provision); *Kentucky v. Wasson*, No. 86-X-48 (Cir. Ct. Fayette Co. 5th Div. June 8, 1990); *Mohr v. Kelley*, No. 88-815820 CZ (Cir. Ct. Wayne Co. July 9, 1990) (striking down Missouri sodomy laws under state right to privacy); cf. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (noting the "independent protective force of state law [without which] the full realization of our liberties cannot be guaranteed"). The *Hardwick* opinion expressly acknowledged the "right and propriety" of state legislatures or state courts eliminating sodomy laws on state constitutional grounds. *Hardwick*, 478 U.S. at 190.

60. *Hardwick*, 478 U.S. at 194.

61. Little reliable data exist on the incidence of same-sex sexual activity or lesbian and gay sexual orientation, chiefly because criminal penalties, social stigma, and discrimination make research difficult. The best current data estimate that approximately six to ten percent of the adult American population consider themselves to be gay, while far more engage in sexual activity with those of the same sex on at least an occasional basis. See Fay, Turner, Klassen & Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 SCIENCE 338 (1989); A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 59; A. KINSEY, W. POMEROY, C. MARTIN & P. GEPHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); see also *Sexual Orientation*, *supra* note 41, at 1511 n.1 (citing studies and statistics).

Another problem that makes counting gay people difficult is the artificiality of many of the categories and labels when applied to the lives led by real people: gay or non-gay, homosexual, heterosexual, or bisexual. Many people who engage in same-sex sex and relationships do not consider themselves gay or lesbian. Many gay people are not part of larger gay and lesbian communities. But as one expert has concluded:

An obsession with numbers can divert our attention from the central issues: that women and men in our society are systematically harassed, persecuted, and bashed because they are perceived to be gay and that anti-gay prejudice is unacceptable whether it is directed against a handful of people or against millions. . . . The important question is not how many are gay. Rather it's how many Americans—whether gay, bisexual, heterosexual, or whatever—have a right to live free from heterosexism.

Herek, *The Tyranny of 10%: Does It Really Matter How Many Americans Are Gay?*, THE ADVOCATE, Aug. 1, 1989, at 46, 48 (evaluating the most common estimate, based on the Kinsey studies, that one in ten people are gay).

62. See, e.g., Money, *Sex, Sin, Sickness, or Status? Gender Identity and Psychoneuroendocrinology*, 42 AM. PSYCHOLOGIST 384 (1987); Richards, *supra* note 12, at 957, 983-85 & nn.117-18

“inwardness.”

But because we are different from the present dominant heterosexist culture, we gay people have experienced discrimination, disenfranchisement, disfigurement, and dehumanization. And, of course, in holding us down, our society has also held itself down, harming millions of lives, gay and non-gay, for nothing. All Americans are injured by, and need protection against, sexual orientation discrimination and demands for gender and sexual conformity.⁶³

Like non-gay people, our human need is to be free to make choices that all recognize as undeniably fundamental to a human's life plan and self-conception, such as the choice of a lover or a life partner.⁶⁴ We deserve protection so that we, too,

(discussing psychological studies and concluding that homosexuality is normal part of human spectrum); see also McCombs, *Out of the Cloakroom—The Anti-Gay Crusade: On Capitol Hill, the Fight for the “Heterosexual” Ethic*, Wash. Post, Jan. 25, 1990, at B1, col. 3.

Even members of the Supreme Court have recognized that gay or lesbian sexual orientation is not “a matter of deliberate personal election” and that it “may well form a part of the very fiber of an individual's personality.” *Hardwick*, 478 U.S. at 202 n.2 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). And, as Boswell points out in examining the opinions of other times, societies, and cultures:

In regard to the question of etiology, it should be noted that what “causes” homosexuality is an issue of importance only to societies which regard gay people as bizarre or anomalous. Most people do not wonder what “causes” statistically ordinary characteristics, like heterosexual desire or right-handedness; “causes” are only sought for personal attributes which are assumed to be outside the ordinary pattern of life. Since very few people in the ancient world considered homosexual behavior odd or abnormal, comments about its etiology were quite rare.

J. BOSWELL, *supra* note 3, at 48-49.

63. Non-gay people, too, are injured by anti-gay prejudice and the drive for sexual labelling and conformity. See, e.g., Herek, *On Heterosexual Masculinity: Some Psychological Consequences of the Social Construction of Gender and Sexuality*, 29 AM. BEHAVIORAL SCIENTIST 563 (1986). Anti-gay prejudice, the stigma against stereotyped or “gender-inappropriate” behavior, and ignorance about the reality and diversity of gay lives interfere with non-gay people's personal development, ability to form deep same-sex friendships, and sense of security. See, e.g., Devlin & Cowan, *Homophobia, Perceived Fathering, and Male Intimate Relationships*, 49 J. PERSONALITY ASSESSMENT 467 (1985).

In addition, every gay person is someone else's child, sibling, friend, colleague, and so on. The pressure and pain inflicted on a gay man or lesbian takes its toll also on the lives of those around us, those who care about us, those who depend on us.

The elevated suicide rate among youth grappling with sexuality and possible gay sexual orientation provides a particularly telling example of the effects of sexual orientation discrimination. Gay and lesbian youth attempt suicide at a rate two to three times higher than that for other young people; these suicides represent up to 30 percent of all youth suicides each year. See Gibson, *Gay Male and Lesbian Youth Suicide*, in 3 U.S. DEP'T OF HEALTH & HUMAN SERVICES, REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110, 111 (1989); see also Quintanilla, *Haven for Gay Teens*, L.A. Times, Dec. 7, 1989, at E1, col. 2 (noting that religious right-wing opponents of programs for gay and lesbian youth “help to hand down death sentences to teenagers”).

64. See, e.g., Richards, *supra* note 12, at 994, 1001-06; see also *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting).

can be free to lead our lives, share our hearts, and participate fully in community life. We deserve to have our relationships recognized so that we can have the support and responsibility we want and now strive to build on our own. We deserve these inalienable civil and human rights, as equal citizens of a nation founded on freedom and esteeming equality, and as fully human beings.

Things can still change. It required a civil war for society to begin to include African-Americans into American citizenship, and to add equality to the goals in our Constitution. Other inclusions have been more peaceful. The "inwardness" of Jews and Japanese-Americans, for example, has become less "other," and their humanity is largely accepted.⁶⁵

For lesbians and gay men, however, although we have made some strides in some places, dehumanization and discrimination persist.⁶⁶ In this civil democracy, which prides itself on the rule of law and equal justice under the law, the law must defend gay people's equal rights and equal humanity. When we have achieved these ends, we will make life better for all people, whether gay or not.⁶⁷

To wage our struggle against dehumanization, we gay people must reclaim our history,⁶⁸ break the conspiracy of silence about our lives, demand our rights, and work to pierce the "willful blindness"⁶⁹ of others. Of course, for those who are *willfully blind*, there may not be much we can do. As Moritz

65. *But c.f.* Charen, *Why Pick on Asians and Catholics*, *Newsday*, Apr. 11, 1990, at 58, col. 1; Burress, *The Dark Heart of Japan-Bashing*, *San Francisco Chron.*, Mar. 18, 1990, at 7Z, col. 1.

66. For a survey of public attitudes toward gay people, see Eckles, *Polls Reveal Many Changes in Public's Attitudes Towards Gays*, *Wash. Blade*, Oct. 27, 1987, at 23 (showing measured improvement but persistence of unfounded stereotypes). On the lingering power of stereotypes, despite repeated refutation, see Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* — (J. Gonsiorek & J. Weinrich 2d ed. forthcoming 1991) (evaluating the oft-refuted child molestation myth as regards gay people).

67. *See* M. KING, *supra* note 53, at 151-52 (1963) ("One aspect of the civil rights struggle that receives so little attention is the contribution it makes to the whole society.").

68. *See, e.g.*, J. BOSWELL, *supra* note 3, at 17-32; *HIDDEN FROM HISTORY* (M. Duberman, M. Vicinus & G. Chauncey eds. 1989); J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983); J. KATZ, *GAY/LESBIAN ALMANAC* (1983); L. FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC PRESENT* (1981); J. KATZ, *GAY AMERICAN HISTORY* (1976).

69. *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting). Justice Blackmun accused the majority of "the most willful blindness" for its inability to recognize that "sexual intimacy is 'a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality.'" *Id.* at 205 (Blackmun, J.,

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."⁷⁰

Still, we need to reach out to each other's humane imagination, ideally civilly. For that reason, I am glad to have been invited here tonight. I hope we will all try harder to see our common humanity enriched, not diminished, by our differences.

dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)). Justice Blackmun wrote:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggest, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships will come from the freedom an individual has to *choose* the form and nature of these intensely person bonds.

Id. at 205 (Blackmun, J., dissenting) (citation omitted) (emphasis in original).

By speaking openly of our lives, and by demanding that the heterosexist culture take note of our existence, equality, and diversity, gay people can help reduce the blindness and increase the understanding of our "rightness." Indeed, studies have demonstrated that the single most important factor in improving even a hostile person's acceptance of gay people is knowing and engaging with an openly gay person. See Herek, *Heterosexuals' Attitudes toward Lesbians and Gay: Correlates and Gender Differences*, 25 J. SEX RESEARCH 451 (1988); see also Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. HOMOSEXUALITY 1 (1984).

70. J. BOSWELL, *supra* note 3, flyleaf (quoting Moritz Goldstein (emphasis in original)).

