RE-ORIENTING THE SEX DISCRIMINATION ARGUMENT FOR GAY RIGHTS AFTER LAWRENCE V. TEXAS

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"Heightened equal protection scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification. It is also appropriate where, as here, the law employs a gender-based classification to discriminate against gay people."[1]

This claim of sex discrimination in the petitioners' brief in Lawrence v. Texas,[2] a case about criminalized homosexual sodomy, must seem quite out of place to some.[3] Respondents simply belittled its importance in their reply.[4] They chose not to address the extensive argument that the National Organization for Women (NOW) briefed defending sex discrimination.[5] They also did not consider the dissent in the

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* Candidate for J.D., Columbia Law School, 2005. I wish especially to thank Professor Henkin, whose attention and commitment to me revived a desire to improve the law, and Professors Crenshaw, Franke, Thomas, Vance, Miller and Dubler, who lent their insight in improving this argument. My family and friends have been very supportive and helpful, particularly Megan Renfrew. I would dedicate this Article to those who strive to look beyond complexity.

[1] Brief of Petitioners at 32 n.24, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[2] 539 U.S. 558 (2003).

[3] The difference between "sex" and "gender" is formidable but does not fundamentally alter the course of this Article. Anti-gay laws could be said to constitute either sex discrimination or gender discrimination. This piece conflates "sex" and "gender" for the sake of consistency within the Article and with other scholars in the field, not because the concepts are identical.

[4] *See* Respondent's Brief at 30, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102):

The petitioners suggest only in a footnote that laws that incorporate a sexual-orientation-based classification, or a gender-based classification to discriminate against homosexuals, should be reviewed pursuant to a heightened scrutiny standard. Brief of Petitioners at 32 n.24. This assertion is not implicated by the litigation, briefed by the petitioners, or mandated by law.

[5] Brief of NOW Legal Defense and Education Fund as Amicus Curiae in Support of Petitioners at 17 n.6, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) ("Section

Texas Court below, which similarly relied on a sex discrimination argument.[6] In fact, the sex discrimination argument in Lawrence was far more than a footnote. But the respondents devoted their attention to sexual orientation claims instead.[7] The Supreme Court did, too.[8]

Sex discrimination claims for homosexuals have surfaced again in the arena of same-sex marriage challenges. In Massachusetts, the Supreme Judicial Court rejected the treatment of homosexuals as second-class citizens but recognized at least a terminological difficulty.[9] In San

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21.06 expressly discriminates on its face on the basis of gender."); *id.* at 17 ("[C]riminal liability under Section 21.06 turns on a gender classification apparent on the face of the statute."); *id.* at 18 ("Gender is the key element of the crime, given that the underlying conduct is not illegal in Texas but for the gender of the participants."); *id.* at 21-22 ("First, Section 21.06 facially discriminates based on the gender of the defendant . . . . Second, Section 21.06 also facially discriminates based on the gender of the defendant's chosen partner.").

[6] Lawrence v. State, 41 S.W.3d 349, 366, 368 (Tex. App. 2001) (Anderson, J., dissenting):

There are three people in a room: Alice, Bob, and Cathy. Bob approaches Alice, and with her consent, engages with her in several varieties of 'deviate sexual intercourse,' the conduct at issue here. Bob then leaves the room. Cathy approaches Alice, and with her consent, engages with her in several kinds of 'deviate sexual intercourse.' Cathy is promptly arrested for violating section 21.06. I have indulged in this tableau to demonstrate one important point: one person simply committed a sex act while another committed a crime.

See also Koppelman, infra note 17 (discussing Ricky, Lucy, and Fred); Lawrence v. State, 41 S.W.3d at 371 ("The issue regarding whether 21.06 is gender neutral lies at the core of this case."); *id.* at 375 ("I firmly believe 21.06 establishes a gender-based classification.").

The dissent does not, however, deny sexual orientation discrimination. *Id.* at 378 ("The statute at issue here . . . does discriminate against homosexuals."). Instead, it suggests that the presence of facial sex classifications and absence of facial sexual orientation classifications requires deciding the case under heightened scrutiny. *See id.* at 372 ("The majority's *entire* analysis of appellants' equal protection *issues* is premised on the belief that 21.06 is gender neutral on its face.") (emphasis added).

For a broad discussion of the Texas opinion, *see* Jennifer L. Schwartz, Case Note, Lawrence v. Texas: Court of Appeals of Texas Holds Texas Ban on Homosexual Sodomy Does Not Invidiously Discriminate Against Homosexuals Under Federal and State Constitutions, 12 L. & Sexuality 363, 368 (2003).

[7] Respondent's Brief, *supra* note 4. The respondents addressed both the Due Process and Equal Protection arguments in this context.

[8] *See infra* Part I.B.1.

[9] Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003). The Goodridge majority, unlike Judge Greaney's concurrence, does not explain whether a same-sex marriage prohibition is discriminatory based on biological sex or sexual orientation. *Compare id.* at 320 n.11 ("We use the terms 'same sex' and 'opposite sex' when characterizing the couples in question, because these terms are more accurate in this context than the terms 'homosexual' or 'heterosexual,' although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying

Francisco, Mayor Newsom has very clearly relied on a sex equality claim.[10] Only recently, the New York courts have also entered the same-sex marriage debate, with an opinion by Judge Doris Ling-Cohan that affirmed marital rights for same-sex couples without relying on the sex discrimination argument.[11] The legal relationship between sex discrimination and sexual orientation discrimination arguments is currently unclear because the courts have been reluctant to protect homosexuals under any legal theory. As that reluctance passes, however, the need to examine this relationship has become pressing.

This Article argues that a sex discrimination argument for gay rights under the Equal Protection Clause is incompatible with the developing jurisprudence of sexual orientation discrimination and should be reformulated as a postmodern argument for how various biases can and do intersect. Part I examines the sex discrimination and sexual orientation discrimination arguments individually. Part II explores a deep and persistent incompatibility between these arguments. Part III then resolves this conflict by pursuing an intersectional approach to the Equal Protection Clause.

I. TWO EQUAL PROTECTION ARGUMENTS FOR GAY RIGHTS ARE EACH PERSUASIVE

Both sex discrimination arguments and sexual orientation discrimination arguments are persuasive under the current Equal Protection jurisprudence. The Supreme Court has distinguished three standards of

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persons of the opposite sex.") (citing Baehr v. Lewin, 852 P.2d 44 (Haw. 1991)), *with id.* at 344, 345-47 (Greaney, J., concurring) ("That the classification is sex based is self-evident.").

[10] The City of San Francisco's brief pairs a sex discrimination argument with a Due Process claim. Respondents' Brief, Proposition 22 Legal Def. & Educ. Fund v. City & County of San Francisco, et al., No. 503943, slip op. (Cal. App. Dep't Super. Ct.), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/271.pdf.

[11] Less than a week before this piece was submitted to the journal's publisher, New York State Supreme Court Judge Doris Ling-Cohan found the state's ban on same-sex marriage violated the constitutional rights of five plaintiff couples. Hernandez v. Robles (N.Y. Sup. Ct), *at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/378.pdf (Feb. 4, 2005). Judge Ling-Cohan's opinion in Hernandez v. Robles appears skeptical of the existence of any intentional sexism before she concludes:

This Court, however, need not decide whether the exclusion of same-sex couples from the institution of civil marriage discriminates against each of the persons in those couples on the basis of sex. The exclusion of plaintiffs from entering into civil marriages indisputably discriminates against them on the basis of sexual orientation.

Shortly after Judge Ling-Cohan's decision, New York City Mayor Michael Bloomberg announced his administration's plans to appeal, making both the ultimate resolution of the case and the significance of the sex discrimination argument unclear. *See* William Glaberson & Jim Rutenberg. City to Appeal Move Backing Gay Marriage, N.Y. Times, Feb. 5, 2005, § 1 , at 1.

review for Equal Protection cases: a lenient rational review, a nearly fatal strict scrutiny, and a sensitive intermediate level of review. These "tiers of scrutiny" vary according to the relationship of the law and the strength of the asserted state interest. Strict scrutiny requires a law be narrowly tailored towards meeting a compelling state interest.[12] Strict scrutiny is not fatal in fact, however, and both the rational and intermediate standards have been applied less deferentially by the modern Court.[13]

Courts and commentators have devoted tremendous attention to these tiers of scrutiny. However, Justice Stevens once noted how simpler questions come first:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies disparate treatment?[14]

Sex discrimination and sexual orientation discrimination claims for homosexuals answer these "basic" questions in different ways. Still, the immediate results can be the same. Each claim is a persuasive theory for the legal equality of homosexuals.

A. An Argument for Equal Protection of Homosexuals Under a Sex Discrimination Theory Is Persuasive

In Baehr v. Lewin, the Supreme Court of Hawaii became the first court to embrace the sex discrimination argument in addressing same-sex marriage.[15] The sex discrimination argument grew within a legal climate hostile to Due Process and Equal Protection claims for homosexuals. The argument represented an opportunity to "break this impasse" with a "third

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[12] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[13] The clarity of the tiers of scrutiny has been called into some question as a result of the Court's modern jurisprudence. *See infra* Part I.B.1 (discussing rational review in Romer and Lawrence); *see also* Frontiero v. Richardson, 411 U.S. 677 (1973) (strict scrutiny plurality); U.S. v. Virginia, 518 U.S. 515, 531 (1995) (applying "skeptical scrutiny"); Deborah L. Brake, Reflections on the VMI Decision, 6 Am. U. J. Gender & L. 35 (1997).

[14] Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453 (1985) (Stevens, J., concurring).

[15] 852 P.2d 44 (Haw. 1991) (remanding judgment on pleadings against same-sex marriage applicants). The Baehr decision saw an odd plurality addressing the same-sex marriage prohibition as a sex classification warranting strict scrutiny under Hawaii law. *See* Koppelman, *infra* note 17, at 204-08.

Baehr is cited approvingly by the Massachusetts Supreme Judicial Court in Goodridge, further confusing the issue of classification. *Supra* note 9.

path."[16] Less severe than strict scrutiny, sex discrimination's intermediate scrutiny would still invalidate more legislation against homosexuals than would rational review. For this reason, demonstrating that laws against homosexuals are a form of sex discrimination is an attractive legal argument.

1. The Sex Discrimination Argument Is Persuasive in Arguing Both Facial Sex Classifications and Discriminatory Sexist Purpose

The sex discrimination argument details several ways to consider laws against homosexuals as a form of sex discrimination. One prong maintains that laws against homosexuals contain facial sex-based classifications. For example:

> If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex.[17]

Professor Koppelman maintains that this constitutes discrimination "as a matter of definition."[18] Other scholars have similarly argued "explicit" sex discrimination in laws against homosexuals.[19] The Baehr Court also recognized facial sex discrimination.[20]

The most common response to this claim argues that laws targeting homosexuality are not discriminatory by sex because they apply to both men and women equally.[21] Even if persuasive, this criticism is at least

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[16] Andrew Koppelman, Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 Yale L.J. 145, 147 (1988).

[17] Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 208 (1994). *See also* Lawrence v. State, 41 S.W.3d at 368 (discussing Bob, Alice, and Kathy).

[18] Koppleman, *supra* note 17, at 208; *see also* Koppelman, *supra* note 16, at 151 ("if a statute defines prohibited conduct by reference to a characteristic, then the statute is not neutral with respect to that characteristic.").

[19] *See* Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 18 (1994) (considering a hypothetical law that "seems to contain explicit discrimination on the basis of sex. It treats one person differently from another simply because of gender. It is therefore a form of sex discrimination.").

[20] *See* Baehr, 852 P.2d at 62; Koppelman, *supra* note 17, at 207 n.34 ("[I]t is the state's regulation of access to the marital status, on the basis of the applicants' sex . . .") (citing the Baehr plurality).

[21] *See, e.g.*, State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986):

> The State concedes that the statute prohibits men from doing what women may do, namely, engage in sexual activity with men. However, the State argues that it likewise prohibits

partially non-responsive because it does not deny the reliance of these laws on sex classifications. In this sense, it argues more around than against the existence of a facial sex classification.[22] Facial findings involve "judgment calls."[23] While this discretion makes a facial argument alone difficult to impress upon a skeptical court, it also makes the finding of a facial classification difficult to refute.

The sex discrimination argument also investigates the underlying purpose of the challenged statute. It identifies unconstitutional "gender premises."[24] Professor Cass Sunstein suggests that the same-sex marriage ban "has everything to do with constitutionally unacceptable stereotypes about the appropriate roles of men and women."[25] Professor Sylvia Law argues that laws against homosexuals serve "primarily to preserve and reinforce the social meaning attached to gender."[26] Koppelman agrees that homophobia has an impact on "other traditional, restrictive attitudes about sex roles."[27] While the first prong recognizes these laws as *facial*

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women from doing something which men can do: engage in sexual activity with women. We believe it applies equally to men and women because it prohibits both classes from engaging in sexual activity with members of their own sex. Thus, there is no denial of equal protection on that basis.

See also infra Part I.A.2 (discussing equal application in miscegenation context).

[22] Equal application asserts that the neutrality of facial classifications does not invoke heightened scrutiny. But this position does not seem to genuinely deny that there are facial classifications. *Cf.* Sunstein, *supra* note 19, at 17 (discussing interracial marriage, "It is a form of discrimination to be sure—but not the form that justifies special judicial skepticism under the Constitution. Because blacks and whites were treated exactly alike, that kind of skepticism was unwarranted.").

[23] *See* Winkfield F. Twyman Jr., Justice Scalia and Facial Discrimination: Some Notes on Legal Reasoning, 18 Va. Tax Rev. 103, 114 (1998) ("Because the Court is operating without textual guidance or clear original meaning, every definitional issue necessarily involves a judgment call by the Court.").

[24] William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet (1999); *see* Fajer, *infra* note 94, at 608 (discussing gender stereotyping of homosexuals); *id.* at 611 (discussing accuracy of these stereotypes).

[25] Sunstein, *supra* note 19, at 21.

[26] Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 187 (1988); *see also* Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1019 n.227 (1984) ("There is a deep, complex interrelationship between sexist and homophobic attitudes in a patriarchal society.").

[27] *See supra* note 16, at 159:

Another datum helps to solve this mystery: Hostility to homosexuals is linked to other traditional, restrictive attitudes about sex roles. This suggests that Thomas Szasz is right: '[T]he homosexual does not threaten society by his actual behavior but rather by the symbolic significance of his acts.' Homosexuality threatens not the family as such, but a certain ideology of the family.

discrimination, this theoretical prong condemns these regulations as discriminatory in their *purpose*.[28]

2. An Analogy to Miscegenation Bolsters the Argument's Persuasiveness

Sex discrimination advocates also emphasize an analogy to the constitutional battle over interracial intimacy or "miscegenation." Like same-sex relationships today, miscegenation was seen by some as a radical redefinition of the social order. The miscegenation cases suggest that laws regulating homosexuals are a form of sex discrimination. This analogy impressed Justice Blackmun as "almost uncanny."[29] At the least, the analogy is very thought-provoking.

The miscegenation analogy serves concrete legal functions as well. It harkens back to the eventual rejection of the equal application defense in the miscegenation cases.[30] In 1883, the Supreme Court in Pace v. Alabama[31] upheld a statute against interracial adultery because penalties extended to "each offending person, whether white or black."[32] However, the Supreme Court rejected Pace in McLaughlin v. Florida,[33] and again in Loving v. Virginia.[34] The McLaughlin Court declared that "Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."[35] Loving extended this repudiation to

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[28] *See* Koppelman, *supra* note 17, at 234; *see also* Sunstein, *supra* note 19, at 21 ("The ban on same-sex marriages may well be doomed by a constitutionally illegitimate purpose."); Church of the Lukumi Babalu Aye v. City of Haialeah, 508 U.S. 520, 562 n.3 (1993) (Souter, J., concurring in part and concurring in the judgment) ("One might further distinguish between formal neutrality and facial neutrality. While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law.").

[29] Bowers v. Hardwick, 478 U.S. 186, 210 n.5 (1986) (Blackmun, J., dissenting) (citations omitted):

> The parallel between Loving and this case is almost uncanny. There, too, the State relied on a religious justification for its law. There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions . . . . There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue.

Justice Stevens' dissent also notes that, "[i]nterestingly, miscegenation was once treated as a crime similar to sodomy," *id.* at 216 n.9 (Stevens, J., dissenting).

[30] *See, e.g.*, *supra* note 21.

[31] Pace v. Alabama, 106 U.S. 583 (1883).

[32] *Id.* at 585.

[33] McLaughlin v. Florida, 379 U.S. 184 (1964).

[34] Loving v. Virginia, 388 U.S. 1 (1967).

[35] McLaughlin, 379 U.S. at 188.

interracial marriage.[36] Critical Queer scholars urge that the rejection of mere equal application should apply to the sex discrimination argument.[37]

The miscegenation analogy is also important because Loving denounced discriminatory purpose in especially clear terms.[38] Loving's unequivocal renunciation of discriminatory purpose did not rely on the social science research featured prominently in Brown v. Board of Education.[39] Similarly, a forceful articulation of the sex discrimination argument claims that these biases are just as overt as Loving's racial supremacy.

Taken together, the support for a sex discrimination claim is strong. Laws against homosexuals could be seen as sexually discriminatory for using sex classifications on their face. Gender stereotypes or biases could also support the argument. Recognizing the analogy to miscegenation strengthens each argument. For all these reasons, viewing laws against homosexuals as sex discrimination gives rise to a persuasive legal theory.

B. An Argument for Equal Protection of Homosexuals Under a Sexual Orientation Discrimination Theory Is Persuasive

Arguments against sexual orientation discrimination are also persuasive. The Supreme Court's recent jurisprudence suggests a path around the "impasse" constructed by Bowers v. Hardwick.[40] Other contemporary cases show that sexual orientation discrimination itself can invalidate laws concerning homosexuals. Further, an examination of the basis for the protection of other suspect classes suggests that stricter scrutiny for homosexuals is appropriate.

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[36] Loving, 388 U.S. at 13.

[37] *See* Koppelman, *supra* note 16, at 151 ("McLaughlin stands for the proposition (which should be obvious even without judicial support) that if a statute defines prohibited conduct by reference to a characteristic, then the statute is not neutral with respect to that characteristic."); *see also* Koppelman *supra* note 17, at 211.

[38] Loving, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification . . . . The racial classifications must stand on their own justification, as measured designed to maintain White Supremacy."); *see also* Koppelman, *infra* note 45, at 132 (calling Loving "probably the most severe attribution of invidious legislative purpose in any Supreme Court opinion").

[39] *Compare* Brown v. Board of Ed., 347 U.S. 483, 494 n.11 (1954) (citing psychological and social studies on the effects of race) *with* Koppelman, *supra* note 17, at 226 (noting "[t]he Court's decision in Loving did not depend on, or even cite, questionable social science evidence").

[40] *Supra* note 29; *see also infra* Part I.B.2.e.

1. Homosexuals Are Entitled to a Rational Basis for Government Regulations

The Court's decisions in Romer v. Evans[41] and Lawrence v. Texas affirm that laws can fail under even rational review. In Romer, the Court invalidated a Colorado constitutional amendment that deprived homosexuals of past and future protection through local anti-discrimination measures.[42] The Supreme Court had invalidated statutes under rational review before.[43] Romer was most notable for extending that reasoning toward a case involving homosexuals. Still, its language was "opaque."[44] Romer spoke only reluctantly about homosexuals themselves,[45] emphasizing how Colorado's Amendment 2 deprived homosexuals of ordinary political mechanisms.[46]

Lawrence v. Texas overruled Bowers v. Hardwick[47] and held the Texas statute unconstitutional under the Due Process Clause.[48] The majority

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[41] Romer v. Evans, 517 U.S. 620 (1996).

[42] *See id.* at 635.

[43] Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating a mental health classification under rational review); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a "related households" clause because it was based on animus towards hippies and lacked a legitimate governmental interest).

[44] *See* Koppelman, *infra* note 45, at 92 (noting Romer was "puzzling and opaque" and had "missing pages").

[45] Romer, 517 U.S. at 624 ("[Amendment 2] prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class *we shall refer to as* homosexual persons or gays and lesbians.") (emphasis added); *id.* at 632 ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability *on a single named group*, an exceptional and, as we shall explain, invalid form of legislation.") (emphasis added).

For further discussion of Romer, *see* Andrew Koppelman, Symposium: Romer v. Evans: Romer v. Evans and Invidious Intent, 6 Wm. & Mary Bill Rts. J. 89 (1997); Richard F. Duncan, The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman, 6 Wm. & Mary Bill Rts. J. 147 (1997) (discussing overbreadth in Romer); Roderick M. Hills, Jr., Is Amendment 2 Really a Bill of Attainder? Some Questions about Professor Amar's Analysis of Romer, 95 Mich. L. Rev. 236 (1996) (discussing overbreadth in Romer); Sunstein, *supra* note 19, at 10; Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 Const. Comment. 257 (1996).

[46] Romer, 517 U.S. at 633 (generally discussing "disqualification of a class of persons from the right to seek specific protection from the law"); *see also infra* Part I.B.2.b (discussing deprivation of the political process as a suspect criterion).

[47] *See* Lawrence, 539 U.S. at 575 ("The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons."); *id.* at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled."); Brief Amicae Curiae of the American Civil Liberties Union and the ACLU Texas in Support of Petitioner at 26, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) ("Bowers was wrongly decided . . ."); *see also* Brief of

opinion recognized an argument under Romer as "tenable."[49] A lone concurrence by Justice O'Connor invalidated the statute under the Equal Protection Clause instead, likening public morality to bare moral disapproval.[50]

Justice O'Connor's language invokes Romer very clearly. Still, her concurrence potentially extends Romer in two significant ways. First, as Justice Scalia notes, Justice O'Connor's concurrence contemplates a "more searching form of rational basis review."[51] Yet Justice O'Connor simultaneously argues that bare moral disapproval is insufficient under the Equal Protection Clause "under any standard of review."[52] Justice

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Amicus Curiae of American Bar Association at 16, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) ("Bowers should be overruled.").

[48] Lawrence, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the *Due Process Clause* gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' *Casey, supra, at 847, 120 L Ed 2d 674, 112 S Ct 2791.* The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

[49] *Id.* at 574-75:

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

[50] *Id.* at 583 ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'") (citing Romer, 517 U.S. at 633).

[51] *Id.* at 582:

Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. *See, e.g., Department of Agriculture v. Moreno, supra, at 534, 37 L Ed 2d 782, 93 S Ct 2821; Romer v. Evans, 517 U.S., at 634-35, 134 L Ed 2d 855, 116 S Ct 1620.* Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

[52] *Id.* at 585 ("A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under *any* standard of review.") (emphasis added); *see also id.* at 580:

The dissent apparently agrees that if these cases [Eisenstadt, Cleburne, and Romer] have *stare decisis* effect, Texas' sodomy law would not pass scrutiny under the Equal Protection

O'Connor's distinction between a more searching review and rational review for economic and taxation policies *suggests* that Section 21.06 warrants the searching variety of rational review.[53]

Second, Justice O'Connor's concurrence in Lawrence is less opaque than the Court in Romer in referring to the class involved. Justice O'Connor recognizes a statutory scheme of Texas policies targeting homosexuals as a class on the basis of 21.06's criminal sanction.[54] Rare enforcement of 21.06 affirms its role as part of a broader statutory scheme

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Clause, regardless of the type of rational basis review that we apply. See *post*, at 156 L. Ed. 2d, at 540 (opinion of Scalia, J.).

[53] This is an article in itself. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (calling for "a correspondingly *more searching* judicial inquiry") (emphasis added).

The concurrence notes that economic and tax legislation "normally pass constitutional muster." Lawrence, 539 U.S. at 579. *But see* Cleburne, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) ("The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation.").

Section 21.06 is a clear candidate for the searching variety of review because it "exhibits such a desire to harm a politically unpopular group." Lawrence, 539 U.S. at 579; *see also id.* at 584 ("The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause.") (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)); *id.* at 585 ("A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause.").

Both the other aspects of Texas law and narrow judicial construction belie this simplicity. The concurrence recognizes collateral effects of 21.06. *See id.* at 582. These "collateral effects" fall between the criminal sanctions of 21.06 and the economic affairs of toothless rational review.

Further, the applicability of "searching" review does not necessitate its application in every case. Like heightened scrutiny arguments, the class could warrant searching review without needing it to dispose of the present case. But even this explanation must account for the inclusion of both propositions—that a more searching rational review exists and that 21.06 fails any standard of review—in the opinion.

[54] Lawrence, 539 U.S. at 583-84:

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word 'homosexual' 'imputes the commission of a crime.' *Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310 (CA5 1997)* (applying Texas law); see also *Head v. Newton, 596 S.W.2d 209, 210 (Tex. App. 1980).* The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. See *State v. Morales, 826 S.W. 2d, at 202-03* ('The statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law'). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law.

and gives strength to the assertion of an underlying invidious purpose.[55] This recognition aligns the concurrence with the Romer precedent while emphasizing a previously obscured point—that sexual orientation discrimination is being invalidated.[56]

Together, cases like Romer and Lawrence show that homosexuals can prevail before the courts under rational review. These cases demand that laws express a legitimate state interest reasonably related to the chosen means. Laws against homosexuals that cannot show such an interest will fail under any standard of review.

2. *Sexual Orientation Is Also Entitled to Strict Scrutiny as a Suspect Class*

Homosexual litigants are also entitled to greater scrutiny as a "suspect class."[57] The accepted starting point for this doctrine stems from a footnote in United States v. Carolene Products.[58]

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[55] *Id.* at 583 ("Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law 'raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.' *Id., at 634, 134 L Ed 2d 855, 116 S Ct 1620.*").

[56] *Id.* at 584 ("In Romer v. Evans, we refused to sanction a law that singled out homosexuals 'for disfavored legal status.' *517 US, at 633, 134 L Ed 2d 855, 116 S Ct 1620.* The same is true here."); *see also id.* at 574 ("As an alternative argument in this case, counsel for the petitioners and some *amici* contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument . . . ").

[57] *See* Korematsu v. United States, 323 U.S. 214 (1944) (articulating strict scrutiny for suspect classes while upholding Japanese exclusion order); *see also* Brown v. Board of Ed., 347 U.S. 483 (1954) (striking down racial segregation in education); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Matthews v. Lucas, 427 U.S. 495 (1976) (awarding intermediate scrutiny for classifications based on illegitimacy); *supra* note 13 (discussing intermediate review in gender).

[58] United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938):

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

The significance of this single footnote to the Equal Protection Clause has earned it acclaim as "the most celebrated footnote in constitutional law." Justice Lewis F. Powell, Jr., Carolene Products Revisited, 82 Colum. L. Rev. 1087, 1087 (1982); *accord* Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 6

Existing jurisprudence, however confused, lends much support to viewing homosexuals as a "suspect class." The late Justice Powell commanded a majority in San Antonio v. Rodriguez to recite two "traditional indicia of suspectness."[59] This section will consider these two indicia before discussing two additional factors often considered. Lastly, this section will consider a final criterion commonly used in rejecting strict scrutiny for homosexuals.

a. History of Unequal Treatment

This factor—significantly—seems relatively undisputed. The most complete account came in the *amicus* brief of professional historians in Lawrence v. Texas.[60] The historians conclude that legal prohibitions on sodomy only recently took a decidedly anti-gay form.[61] The historians first traced the growth of the "homosexual" as a distinct identity to the 1870s,[62] but they are equally clear that this creation was quickly followed by discrimination in science, the arts, and government.[63]

Moreover, the vast weight of authority seems to recognize that a history of purposeful unequal treatment clearly *does* exist. Not ten years ago, Justice Scalia remarked in Romer v. Evans that the majority opinion contained "grim, disapproving hints that Coloradans have been guilty of 'animus' or 'animosity' toward homosexuality, as though that has been established as un-American."[64] Even earlier, a leading authority noted, "after all, what more palpable discrimination could there be than to criminalize the conduct that defines the class."[65] This sentiment is pervasive.[66]

(1979) (calling the footnote the "great and modern charter for ordering the relation between judges and other agencies of government").

[59] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

[60] Brief of Professors of History, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[61] *Id.* at 4-9.

[62] *Id.* at 2.

[63] *Id.* at 10-12.

[64] Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

[65] Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

[66] *See infra* Part I.B.2.e.

b. Deprivation of the Political Process

At least one circuit court has already recognized that homosexuals have suffered deprivation of the political process.[67] The systematic persecution of homosexuals in government service may also be of some relevance.[68] Most prominently, it is hard to read Romer's Amendment 2 as anything but such a deprivation.

Justice Kennedy's majority began by recalling the local anti-discrimination ordinances that gave rise to the amendment.[69] "Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class."[70] Amendment 2 both took away local political gains and prevented further gains.

The Supreme Court of Colorado even held that Amendment 2 violated a fundamental right to equally participate in the political process.[71] Justice Scalia argued that his peers "implicitly" rejected that argument by applying rational review.[72] But even conceding Justice Scalia's argument, the Court was very attentive to the political deprivation created by Amendment 2.[73] It would be difficult to deny this deprivation. So too, it would be difficult to ignore that homosexuals have been deprived of the political process.[74]

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[67] Johnson v. Campbell, 92 F.3d 951 (9th Cir. 1995) (holding peremptory jury strikes against homosexuals to be deprivation of political process); *see also* Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("Neither slaves nor women could hold office, *serve on juries*, or bring suit in their own names . . . .") (emphasis added); Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 Colum. L. Rev. 1753, 1793 (1996) (comparing various tests for political powerlessness).

[68] *See* Brief of Professors of History, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[69] *See* Romer, 517 U.S. at 623-24.

[70] *Id.* at 624.

[71] Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993).

[72] Romer, 517 U.S. at 640 (Scalia, J., dissenting).

[73] *Id.* at 629-30.

[74] *Compare* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("Moreover, legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power.") *with* Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1380 (E.D. Wis. 1989) ("In only a very few communities do homosexuals possess the political power effectively to obtain redress from invidious discriminations in the political arena. It is estimated that homosexuals constitute between 8% and 15% of the population. *Rowland v. Mad River Local School District, 470 U.S. 1009, 1014 n.7, 84 L. Ed. 2d 392, 105 S. Ct. 1373 (1985)* (Brennan J., dissenting from denial of cert.).").

c. Immutability

The application of strict scrutiny standards to homosexuals may affect other factors, but these factors have themselves been roundly criticized. Shortly after Justice Powell's San Antonio opinion, the Court split in the pivotal Frontiero v. Richardson. In addition to the considerations recounted above, the Frontiero majority noted that sex "is an immutable characteristic determined solely by the accident of birth."[75] Arguments can be made that homosexuality constitutes such an immutable characteristic.[76] Interpretation of the Equal Protection Clause could also look to its Canadian analog in recognizing degrees of immutability.[77]

Yet the most important thing to be said of the immutability criterion is that it is simply not a criterion.[78] Janet Halley argues that "immutability is

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Political gains do not outweigh political deprivations under the Equal Protection Clause. The substantial political gains afforded other minorities have not caused the Supreme Court to reconsider the application of heightened scrutiny. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing *en banc*):

Blacks are protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875 (ill-fated though it was), 1957, 1960, 1964, 1965, and 1968, as well as by antidiscrimination laws in 48 of the states. By that comparison, and by absolute standards as well, homosexuals are politically powerless.

[75] Frontiero, 411 U.S. at 686.

[76] *See* Jantz v. Muci, 759 F. Supp. 1543, 1547 n.3 (D. Kan. 1991):

In *High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990)*, the Ninth Circuit, without citation to any evidence in the record or to a single medical authority, announced that: 'homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.' In *Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989)*, the Federal Circuit also opined that 'members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character.' As with the Ninth Circuit in *High Tech Gays*, the court offered not the slightest support or authority for the position that homosexuality is a mutable characteristic.

See also Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 Stan. L. Rev. 503 (1994) (noting pro-gay scientific essentialist arguments); Edward Stein, The Relevance of Scientific Research about Sexual Orientation to Lesbian and Gay Rights, 27 J. Homosexuality 269 (1994) (arguing scientific material on genetics of homosexuality is inconclusive as to immutability).

[77] *See* Patrick J. Dooley, Note, I Am Who I Am, or Am I? A Comparison of the Equal Protection of Sexual Minorities in Canadian and U.S. Courts: Immutability Has Only Found a Home North of the Border, 17 Ariz. J. Int'l & Comp. L. 371 (2000).

[78] As a plurality, the Court could no more declare a new criterion than award strict scrutiny.

not a requirement but a factor."[79] Even as a factor, however, federal courts have viewed immutability skeptically. It has not been consistently applied since Frontiero[80] and is not neatly applicable to the suspect classes before Frontiero.[81] As a result, it is unlikely to single-handedly disturb a "suspect class" argument for homosexuals.

d. Discrete and Insular Minority

Unlike immutability, whether a group is a "discrete and insular minority" seems to lie at the heart of Carolene Products.[82] Like immutability, however, arguments can be made both that homosexuals satisfy the factor[83] and that the jurisprudence should move past considering the factor at all.[84] Whether homosexuals constitute a discrete and insular minority likely rests on defining each individual term.

Professor Bruce Ackerman thoroughly investigated these terms in Beyond Carolene Products.[85] Professor Ackerman identifies insularity as the degree to which a minority community is confined.[86] He also defines "a minority as 'discrete' when its members are marked out in ways that make it relatively easy for others to identify them."[87] Ackerman concludes that

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[79] *See* Halley, *supra* note 76, at 507.

[80] Jantz, 759 F. Supp. at 1548 n.5 ("In listing the factors relevant to the determination that a governmental classification is suspect, the Supreme Court has omitted citing immutability as a requirement on several occasions. *City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973).*").

[81] *Id.* at 1548 ("Race, gender, alienage, and illegitimacy can all be changed, yet discrimination on the basis of any of these categories compels heightened scrutiny by the courts. Aliens may obtain citizenship, gender may be altered by surgery, lighter-skinned blacks may pass as white. Discrimination on the basis of race would not become permissible merely because a future scientific advance permits the change in skin pigmentation.").

[82] *See supra* note 58.

[83] Ben-Shalom, 703 F. Supp. at 1380 (finding homosexuals were a discrete and insular group).

[84] *See* Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1299-1300 (1985).

[85] Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985).

[86] *Id.* at 724-25 ("[H]owever oppressed the *I*'s [or 'insular' groups] may be in other respects, they have not been prevented from building up a dense communal life for themselves on their tight little island. Thus, wherever an *I* looks, he will find himself in businesses and churches, schools and labor unions, composed largely of people speaking in distinctively *I*-accents about the daily problems of social life.").

[87] *Id.* at 729.

the Carolene Products premise that discrete and insular minorities are politically disadvantaged "cannot withstand close scrutiny."[88] Professor Ackerman argues that neither "insularity" nor "discreteness" function as especial political impairments.[89]

Two further observations affirm that discrete and insular minority status cannot form a stable foundation for suspect classification. First, the Equal Protection Clause has been applied symmetrically across class—to whites and blacks alike, for example.[90] This "symmetry" fundamentally contradicts the discrete and insular minority factor.[91] Second, Professor Ackerman's application of discreteness and insularity to homosexuals raises another interesting issue. Homosexuals seem "anonymous and somewhat insular."[92] But each of these traits is malleable. Groups can grow more or less diffuse over time. Anonymity varies according to both conscious and unconscious forms of personal expression as well as general social awareness of the trait. Unlike the above factors, the discrete and insular minority determination varies over time. Its faithful application therefore implies constantly fluctuating scrutiny.[93]

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[88] *Id.* at 717.

[89] *See id.* at 724 ("Far from being a patent disadvantage, insularity can help *I*-groups in at least four different ways . . ."); *id.* at 728 ("Instead, the American system typically deprives *diffuse* groups of their rightful say over the course of legislative policy. If there is anything to Carolene Products, then, it cannot be a minority's insularity, taken by itself . . . "); *id.* at 730 ("But even if discreteness is no cure-all for selfishness, it does free a minority from the organizational problem confronting an anonymous group of comparable size.").

[90] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) ("This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (discussing racial affirmative action programs); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding use of race in law school affirmative action plan); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down use of race in undergraduate affirmative action plan).

[91] Beyond the obvious meaning of the term "minority," it also seems difficult to conceptualize how all groups can simultaneously be insular.

[92] Ackerman, *supra* note 85, at 742; *Id.* at 724:

Except for special cases, the concerns that underlie Carolene should lead judges to protect groups that possess the opposite characteristics from the ones Carolene emphasizes—groups that are "anonymous and diffuse" rather than "discrete and insular." It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.

[93] For example, suppose a discrete group leaves and returns to insular communities over time. All else remaining constant, heightened scrutiny should vary according to the relative insularity-diffuseness of the group over this period. But determining when to remove strict scrutiny seems at least as difficult as determining when to apply it and therefore best avoided.

e. Invidiousness

Most courts that decline to apply strict scrutiny to homosexuals as a suspect class have not, however, relied on the above factors in their decisions. To the contrary, the courts relied on what might be called "invidiousness."[94] Anti-gay discrimination is permissible because, "after all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[95] Bowers v. Hardwick, while expressly disclaiming the decision of any Equal Protection issues,[96] created the basis for denying suspect classification. Bowers "foreclose[d]" that effort.[97]

But this reliance is now inopportune. What Bowers foreclosed, Lawrence has re-opened. An argument for strict scrutiny for homosexuals as a suspect class seems convincing. Like the other arguments, it represents a persuasive route in litigating gay rights issues.

II. THESE TWO PERSUASIVE THEORIES ARE NOT LEGALLY COMPATIBLE

Though both sex and sexual orientation discrimination claims are persuasive, there is a deep legal tension between them. To be precise, litigants could certainly contest a statute by pleading both sex and sexual orientation discrimination. A court could also recognize either argument in potentially striking the same precise statute. A court cannot reasonably accept both theories at once, however, and would need to distinguish the cases decided under each theory.

Justice Scalia's dissent in Lawrence is one clear example of an incompatibilist position. Neither the majority nor Justice O'Connor addresses the sex discrimination argument explicitly. Justice Scalia,

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[94] *See* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (distinguishing discrimination against homosexuals from discrimination in "all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class [since] the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable (in accordance with standards not altogether clear to us) to discriminate invidiously against the particular class"); *see also* Todd v. Navarro, 698 F. Supp. 871, 874 (S.D. Fla. 1988); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Marc Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men, 46 U. Miami. L. Rev. 511, 544 (1992) (discussing Equal Protection extension of Bowers).

[95] Padula, 822 F.2d at 103.

[96] Bowers v. Hardwick, 478 U.S. 186 (1986).

[97] Padula, 822 F.2d at 103; *accord* Todd 698 F. Supp. at 874; Woodward 871 F.2d at 1076.

however, asserts that O'Connor's claim of sexual orientation discrimination effectively denies that sex discrimination is at issue.[98] That is, *because* Justice O'Connor argues that the statute embodies sexual orientation discrimination, she argues that the statute does not represent gender discrimination. The academic, doctrinal, and practical issues surrounding these two arguments all speak to this incompatibility.

A. Academic Tension Reflects Doctrinal Incompatibility

Sexual orientation identifies a class based on an affinity for certain sexual conduct, muting traits that nuance identity like romantic attraction and gender-role.[99] The same has also been said of gender classification. As Susan Sterett observes,

> In addressing masculinity, we are no longer addressing sexual orientation—at least in the sense of sexual desire or who must live with whom to get state benefits. Instead, gender, usually the category we use for discussing masculinity and femininity, subsumes sexual orientation.[100]

The sex discrimination argument is hardly immune to these difficulties. Koppelman vehemently resists extending his argument to say that sexual orientation discrimination is "really" sex discrimination.[101] But he also rejects the superficial difference between same- and opposite-sex conduct: that Lucy and Ricky are not doing exactly the same thing as Fred and Ricky. His response—that the difference is "the artifact of the observer's imposition of a category"[102]—is deeply problematic. If

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[98] Lawrence, 539 U.S. at 585 (Scalia, J., dissenting) ("Justice O'Connor argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.").

[99] *See* Fajer, *supra* note 94, at 547; *see also* Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, *in* Pleasure and Danger: Exploring Female Sexuality (Carole S. Vance ed., photo. reprint 1985) (1984); Janet E. Halley, Reasoning about Sodomy: Act And Identity In And After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1725 (1993).

[100] Susan Sterett, Constructing Heterosexuality: Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s-1920s, 75 Denv. U.L. Rev. 1181, 1188 (1998); *see also* Halley, *supra* note 99, at 1724 ("Heterosexuality exceeds and thus differs from masculinity, just as homosexuality exceeds and differs from the so-called passive role in anal sex. Though they intersect, gender and sexuality exceed and differ from one another.").

[101] Koppelman, *infra* note 109, at 534 n.83; *see* Valdes, Queers, Sissies, Dykes, and Tomboys, *infra* note 134, at 18 (noting "illusionism" of sexual orientation); Halley, *supra* note 99, at 1725 (challenging feminism as a "site of a theory of sexuality").

[102] *See* Koppelman, *supra* note 17, at 211-12.

homosexual conduct is an artifact, isn't homosexual orientation? Though Koppelman does not insist that sexual orientation discrimination is "really" sex discrimination, he does insist that the conduct is not "really" different. Similarly, proponents of sexual orientation discrimination resist denying sexist bias but also resist the sex discrimination argument.[103]

The doctrinal possibilities further demonstrate the incompatibility of these theories. There are four potentially distinct arguments: facial or purposeful gender discrimination and facial or purposeful sexual orientation discrimination. There are mathematically fifteen possible combinations of these arguments that would recognize discrimination.[104] Four recognize only one of the distinct arguments. Two recognize consistent facial classifications and discriminatory purposes. The nine remaining variations would all combine at least one sex discrimination claim with at least one sexual orientation discrimination claim.[105] If none of these nine variations are viable, the two claims must be doctrinally incompatible.

Professor Edward Stein has argued that "some antigay laws do not make use of sex classifications."[106] Stein builds on William Eskridge's division of three types of laws that affect gay people: laws that discriminate explicitly on the basis of sexual orientation (type-1), laws that discriminate

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[103] *See* Stein, *infra* note 106 (suggesting that sexism is not the primary belief system but still supports homophobia).

[104] There are four individual arguments: facial sex discrimination ("A"), sex discrimination in purpose ("B"), facial sexual orientation discrimination ("Y"), and sexual orientation discrimination in purpose ("Z"). There are therefore sixteen potential variations on this set of arguments: ABYZ, ABY, ABZ, AYZ, BYZ, AY, AZ, BY, BZ, AB, YZ, A, B, Y, Z, and an empty set.

Each variation marks a combination of a set of arguments, abstracted from the legal doctrines that give them sequential order. So, ABYZ is ZYBA, ZYAB, BZYA, and so on. But examples for each category are elusive because reversion from the variables to their actual arguments reveals how curious these might sound. "AZ," for example, translates to facial sex discrimination and [or but] sexual orientation discrimination in purpose. One could suggest that "same-sex" regulations generally fit the "AZ" variable: the facial classification system references sex and the regulation is aimed at discriminating against homosexuals. But what about "AB" and "ABZ"? Categorizing "same-sex" regulations as an "AZ" presupposes the regulation is *not* sex discriminatory. What about "YZ"? If a legislature had enacted some expression of sexual orientation discrimination, why did it couch the actual legislation in other terminology instead? So, too, one could suggest that even laws that facially attack homosexuals in their terms are really sexist in their purpose, the "YB" or "BY" variable, and the same questions could be asked. These interesting questions are somewhat beside the point if these arguments can be proven incompatible on the general level of variables.

[105] *See supra* note 104. The first nine in this list all combine an A or B with a Y or Z. In other words, these nine variations combine some sex discrimination argument ("A" or "B") with some sexual orientation discrimination argument ("Y" or "Z").

[106] Edward Stein, Evaluating the Sex Discrimination Argument for Gay and Lesbian Rights, 49 UCLA L. Rev. 471, 509 (2001) ("In virtue of the fact that sex and sexual orientation are conceptually and culturally distinct, not all laws that discriminate on the basis of sexual orientation in fact make use of sex classifications.").

explicitly on the basis of sex (type-2), and laws that do not appear to discriminate against either (type-3).[107]

Stein presents this typology to argue that it "will be much harder for judges to accept" the sex discrimination argument over neutral type-3 laws or type-1 laws, like the military's "don't ask, don't tell" policy.[108] Koppelman denies this "limited reach."[109] Still, formal incompatibility

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[107] *Id.* (citing Eskridge, *supra* note 24, at 217).

To illustrate the typology, consider a policy against same-sex marriages expressed through three distinct statutes:

(1) No homosexual may marry

(2) No two people of the same sex may marry

(3) The sanctity of marriage is paramount.

The classification system of the first statute is clear: sexual orientation. The classification system of the second is clear: sex. The classification system of the third is ambiguous: whatever it is, it must be inferred from an understanding of "the sanctity of marriage."

[108] *Id.* at 509-10:

As an example of a type-1 law, consider the military's policy concerning homosexuality. This law and the regulations that implement it, often referred to collectively as the "don't ask, don't tell" policy, do not facially discriminate on the basis of sex or even mention sex classifications. Under this policy, one of the several ways that lesbians, gay men, and bisexuals can be discharged is if they engage in sexual activities with people of the same-sex. This policy does not, however, discharge heterosexuals who engage in same-sex sexual acts (as some heterosexuals do). Specifically, the law provides for an exemption from discharge of a member of the armed forces who "engages in a homosexual act . . . [if] such conduct is a departure from the member's usual and customary behavior; such conduct . . . is unlikely to recur; . . . and the member does not have a propensity or intent to engage in homosexual acts." In other words, heterosexuals who occasionally engage in same-sex sexual acts might not be discharged for engaging in such acts, even if such acts are discovered. Only lesbians, gay men, and bisexuals will be discharged for engaging in same-sex sexual acts, because, by virtue of their sexual orientations, only they have the propensity to engage in such acts. In light of this exemption, the military policy is a type-1 law: It does not discriminate on the basis of sex, but it discriminates on the basis of sexual orientation. . . .

[109] Andrew Koppelman, Defending the Sex Discrimination Argument for Gay Rights: A Reply to Edward Stein, 49 UCLA L. Rev. 519, 526 (2001):

[Stein] thinks that the sex discrimination argument would not reach a law that prohibited gay people from marrying anyone of either sex. In order to enforce this law, though, the registrar of marriages would need to know what A's sex is in order to decide whether A's attraction to B marks A as a gay person. Imagine a law that discriminated against "miscegenosexuals" and denied them the right to marry or other benefits. Does Stein really think that such a law is not racially discriminatory, or that it would not be immediately recognized as such?

The first response assumes that A's attraction to B *does* mark A as a gay person. This is not so if Stein's homosexual marries someone of the opposite biological sex. As for the second response, the proper question is not whether the law is racially discriminatory but rather whether it would be recognized as *facial* discrimination. *Cf.* Loving v. Virginia, 388 U.S. at 7 (considering White Supremacist purpose).

clearly runs throughout the discussion because the typology is itself incompatible.[110] Laws facially classify according to gender or sexual orientation, but not both in a single term.[111]

Like the facial classifications, the discriminatory purposes are also incompatible. Koppelman resists the claim that gender stereotyping is "the total explanation of homophobia."[112] "It could be otherwise, but it is not."[113] This supports the view that the sex discrimination argument makes homophobia a "side effect"[114] of sexism rather than a distinct system of bias itself. Stein's critique of a mistaken moral message[115] shares in the problem.[116] He argues that sexism and homophobia are "coming apart."[117]

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[110] Though Eskridge is sympathetic to the sex discrimination argument, the typology itself distinguishes between sex-based classifications and sexual orientation-based classifications. Stein's argument is very clearly that the sexual orientation-based classification marginalizes the sex discrimination argument. Koppelman's extension of the sex discrimination argument to type-1 laws appears compatible, but it too 'subsumes' the type. What would facial sexual orientation-based classification look like if type-1 laws were facial sex-based classifications? *See infra* note 128 (reconciling typological tension through an intersectionalist approach).

[111] A statute could specify both independently, of course.

[112] Koppelman, *supra* note 109, at n.58:

This may be a good place to clarify an important misunderstanding. I have never claimed that gender role deviance is 'the total explanation for homophobia.' (citations omitted). John Gardner appears to demand an even stronger connection, claiming that in order for the link to sexism to be satisfactorily shown, the tie between the two prejudices would have to be 'a logical tie, so that traditional patriarchal sex roles were incorporated into the operative premises of the discriminator's reasoning by definition whenever discrimination on grounds of sexual orientation takes place.' (citation omitted) This is too demanding and would shield too much invidious discrimination from scrutiny.

[113] *Id.* ("It is a matter of anthropological fact rather than metaphysical necessity that sexism and heterosexism are tightly intertwined.").

[114] *See* Koppelman, *supra* note 17, at 255 (emphasis added):

If these are the positions from which the homosexuality taboo now receives most of its support, then it is fair to conclude that this taboo is crucially dependent on sexism, *without which it might well not exist.* And when the state enforces that taboo, it is giving its imprimatur to sexism.

See also Koppelman, *supra* note 109, at 532-33.

[115] *See* Stein *supra* note 106, at 503:

Laws that discriminate against lesbians, gay men, and bisexuals should be overturned on the grounds that they make invidious distinctions on the basis of sexual orientation, not on other grounds. Overturning laws that discriminate on the basis of sexual orientation because they discriminate on the basis of sex (or gender) mischaracterizes the core wrong of these laws.

See also infra note 150 and accompanying text (discussing the moral message of an intersectionalist approach).

[116] Stein, *supra* note 106, at 501 ("I agree that some laws that disadvantage one group may also disadvantage another and that more than one belief system may undergird

Both views seem cognizant of the ambiguity and interaction of these biases but insist on legally articulating a distinct class. As Koppelman laments, "facts are messy. Legal categories make them clean, usually by stripping off the living flesh."[118]

This language shows that the two discriminatory purposes are in deep tension. Reaching gender bias scrutinizes homophobia for "origins in sexism."[119] As Sterett suggests, this analysis "subsumes" sexual orientation bias.[120] The sex discrimination argument identifies homophobia and traces the underlying sexism—but having found that sexism, it discards the homophobic shell. This path is still available after the Court's decisions in Lawrence, but it must be recognized as a one-way street. Both the facial classification arguments and the discriminatory purpose arguments are incompatible.

Two remaining variations could recognize both sex and sexual orientation discrimination, but they are extremely puzzling. A law could contain sexual orientation classifications but demonstrate sexist purposes, or a law could contain sex classifications but demonstrate homophobic purposes. Whatever the proper decision, a court must decide between the two.[121]

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some laws. Sometimes, however, one group may be more disadvantaged than another and one belief system may play a much more central role than another.").

[117] *Id.* at 499:

While sexism plays a role in the justification of laws that discriminate against lesbians, gay men, and bisexuals, homophobia plays a more central role. Sexism and homophobia are mutually supporting but distinct belief systems. It mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women (or even as harming women as much as they harm gay men, lesbians, and bisexuals). Further, it mischaracterizes laws that discriminate on the basis of sexual orientation to see them as primarily justified by sexism rather than by homophobia.

[118] *See* Koppelman, *supra* note 109, at 533.

[119] *See* Stein, *supra* note 106, at 500.

[120] *See* Sterett, *supra* note 100.

[121] In the language of note 104, *supra*, these two variations would be AZ and BY. AZ represents the combination of facial sex discrimination and homophobic purpose. BY, the combination of sexist purpose with facial sexual orientation discrimination, might better be thought of as YB. How should a court choose between A and Z? Between Y and B?

Are these two choices the same? If so, the decision might hinge on facial discrimination versus discriminatory purpose. Perhaps the court concludes that deference involves always resting on facial classifications. Perhaps it concludes that an undeniably discriminatory purpose must always be recognized and repudiated. In either case, choosing between facial discrimination and discriminatory purpose entails choosing between the sex and sexual orientation claims.

Are these two choices different? If so, the decision might hinge on the standards of scrutiny underlying each classification. Perhaps the court concludes that any cause for relaxed review urges leniency. Perhaps it concludes that heightened scrutiny must be

Because none of the nine variations viably combines sex discrimination and sexual orientation discrimination claims, these two theories are incompatible under current Equal Protection jurisprudence.

B. Narrow Legal Reasoning Augments the Incompatibility of the Sex Discrimination and Orientation Claims

In addition to academic and doctrinal incompatibility, there is a much simpler practical incompatibility. This practical barrier derives from institutional concerns about broad rulings like the sex discrimination argument. In the sex discrimination context, these institutional concerns result in narrower decisions that limit the opportunities to reach broader rulings later.

Even advocates of the sex discrimination argument seem concerned about its legal ramifications. Professor Cass Sunstein warns that "there is reason for great caution on the part of the courts."[122] He contrasts the "adventurous" sex discrimination argument with "rulings which would

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universally invoked. In either case, choosing between relaxed and heightened standards of scrutiny entails choosing between the sex and sexual orientation claims.

There could be other distinctions. There could be no distinctions at all—a simple case-by-case consideration. This Article does not purport to answer these difficult questions. But it seems invariably clear that the court relies on only one classification in resolving each case—that even in these two variations, the sex and sexual orientation arguments are incompatible.

[122] Sunstein, *supra* note 19, at 24:

In Lincoln's view, efforts to create immediate social change in this especially sensitive area could have unintended consequences or backfire, even if those efforts were founded on entirely sound principle . . . . For this reason, it is a mistake to see Lincoln's caution about abolition as indicating uncertainty about the underlying principle. But it is equally mistaken to think that Lincoln's certainty about the principle entailed immediate implementation of racial equality.

See also id. at 25:

There is reason for great caution on the part of the courts. An immediate judicial vindication of the principle could well jeopardize important interests. It could galvanize opposition. It could weaken the anti-discrimination movement itself. It could provoke more hostility and even violence against gays and lesbians. It could jeopardize the authority of the judiciary. It could well produce calls for a constitutional amendment to overturn the Supreme Court's decision.

See also James Trosino, Note, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93, 114 (1993) (discussing judicial restraint in gay marriage cases); Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6 (1996). *Compare* Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999) *with* Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 9 (1998) (distinguishing minimalism from a "pragmatic" approach).

minimally stretch judicial capacity and authority."[123] For Romer, this meant striking amendments that "interfere with the attempts of ordinary democratic processes to outlaw discrimination on the basis of sexual orientation" or "discriminate against people of homosexual orientation without showing that those people have engaged in acts that harm a legitimate government interest."[124] He likens his position to Abraham Lincoln's stance on abolition and equality.[125] Sunstein advances the logic of minimalist rulings while affirming the sex discrimination argument "in the long run."[126]

This plan of relying on narrow arguments ignores how that reliance itself undermines the sex discrimination argument. Even if Justice Scalia's assertion in Lawrence is incorrect, it is also undisputed.[127] A future sex discrimination opinion would apparently need to distinguish that case from the sexual orientation discrimination case in Lawrence. The doctrinal analysis shows this is perilous legal ground. Sexual orientation discrimination claims make sex discrimination arguments *less* available to an institutionally hesitant court.

Recognizing sex discrimination in homosexuality regulation effectively amounts to a declaration of heightened scrutiny for homosexuals. If courts have an institutional preference for avoiding heightened scrutiny arguments and have an available body of sexual orientation discrimination that fails rational review, that same institutional preference would weigh against recognizing sex discrimination. Minimalist reasoning would never reach the sex discrimination argument until it needed heightened scrutiny. Each case in the interim, like Romer and Lawrence, suggests instead that laws against homosexuals that classify on the basis of sexual orientation warrant rational review. To expect a recognition of sex discrimination in this climate is to imagine an opinion that simultaneously shifts the category from sexual orientation to sex and

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[123] Sunstein, *supra* note 19, at 25:

The argument I have explored here—for the proposition that same-sex relations and even same-sex marriages may not be banned consistently with the Equal Protection Clause—is, to say the least, quite adventurous. If the Supreme Court of the United States accepted the argument in 1995, or even in 1996 or 1997, it might cause a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much more. Any Court, even one committed to the basic principle, should hesitate in the face of such prospects.

[124] *Compare id.* at 26 *with* Romer v. Evans, 517 U.S. 620 (reasoning similarly).

[125] Sunstein, *supra* note 19, at 23 ("Abraham Lincoln always insisted that slavery was wrong. On the basic principle, Lincoln allowed no compromises. No justification was available for chattel slavery. But on the question of means, Lincoln was quite equivocal—flexible, strategic, open to compromise, aware of doubt.").

[126] *Id.* at 27.

[127] Lawrence, 539 U.S. at 585 (Scalia, J., dissenting); *see supra* note 98.

the standard from rational review to heightened scrutiny. Add to this adventure a dissent that attacks the first shift as questionable and the second as entirely dependent on the first. It truly is practicality, not mere timidity, that demands a better way.

III. RECTIFYING LEGAL INCOMPATIBILITY THROUGH INTERSECTIONALITY

Legal incompatibility reflects the tension between two conceptually distinct systems of bias. This distinction is invited at every stage of the Equal Protection Clause analysis. Legally, it must be either one classification or the other. Socially, however, this distinction is artificial. Recognizing both arguments requires enabling the Equal Protection Clause to recognize the interaction of conceptually distinct biases in the daily lives and legal treatment of minorities.

A. Distinct Biases Can and Do Intersect Generally

Both critical race and critical Queer scholars have examined the way in which multiple social biases reinforce each other. Professor Kimberlé Crenshaw explains an intersectional approach succinctly:

> My objective [in analyzing employment experiences] was to illustrate that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.[128]

Professor Crenshaw proceeds to examine that intersection in domestic violence.[129] Her work on the intersection of race and gender also recognizes other factors "such as class or sexuality."[130]

Queer legal theorists have also embraced this "need to account for multiple grounds of identity."[131] Theresa Raffaele Jefferson analyzes the

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[128] Kimberlé Crenshaw, Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1244 (1991).

[129] *Id.*

[130] *Id.* at 1244-45.

[131] *Id.* at 1245; *see* Mary Anne Case, Constructing Marginality: Unpacking Package Deals: Separate Spheres Are Not the Answer, 75 Denv. U. L. Rev. 1305 (1998); Jane S. Schacter, Constructing Heterosexuality: Taking the InterSEXional Imperative

intersection of race, gender, and sexual orientation in the "lives and legal treatment" of Black lesbians.[132] Transgender issues have also been a focal point of intersectionalist thought. [133] Professor Francisco Valdes, a leading proponent of inter-connectivity in Queer legal theory, has explained intersectionality as just demographically "doing the right thing."[134] He asks Queer scholarship to follow Professor Mari Matsuda's example by asking the "other question":

> When I see something that looks racist, I ask, "Where is the patriarchy in this?" When I see something that looks sexist, I ask, "Where is the heterosexism in this?" When I see something that looks homophobic, I ask, "Where are the class interests in this?"[135]

Seriously: Sexual Orientation and Marriage Reform, 75 Denv. U. L. Rev. 1255 (1998); Francisco Valdes, Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors, 75 Denv. U. L. Rev. 1409 (1998); Janie Allison Sitton, (De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law, 7 Wm. & Mary J. Women & L. 1 (2000).

[132] Theresa Raffaele Jefferson, Toward a Black Lesbian Jurisprudence, 18 B.C. Third World L.J. 263, 266 (1998).

[133] *See* Jody Lynee Madeira, Comment, Law as a Reflection of Her/His-story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex, 5 U. Pa. J. Const. L. 128 (2002); Samantha J. Levy, Comment, Trans-forming Notions of Equal Protection: The Gender Identity Class, 12 Temp. Pol. & Civ. Rts. L. Rev. 141 (2002); Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392 (2001); Julie A. Greenberg, Symposium: Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265; Patricia A. Cain, Toward Intersextionality: Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law, 75 Denv. U. L. Rev. 1321 (1998).

[134] Francisco Valdes, Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation", 48 Hastings L.J. 1293, 1325 (1997) [hereinafter Valdes, Queer Margins, Queer Ethics] ("In short, collectively and mutually embracing the engagement of race and ethnicity at the threshold of a second stage in the development of sexual orientation legal theory amounts to doing the right thing."); *see also* Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 3 (1995) [hereinafter Valdes, Queers, Sissies, Dykes, and Tomboys] (detailing relation of sexual orientation to sex/gender).

Professor Valdes' work embraces a broader theory of abstract identity but affirms the importance of intersectionality as a "predicate." *See* Francisco Valdes, Sex and Race in Legal Culture: Ruminations on Identity and Inter-Connectivities, 5 S. Cal. Rev. L. & Women's Stud. 25, 54-58 (1995).

[135] Mari J. Matsuda, Women of Color at the Center: Selections From the Third National Conference on Women of Color and the Law: Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition, 43 Stan L. Rev. 1183, 1189 (1991).

This approach looks further than the most apparent forms of bias, demanding that the complexity of bias be accurately examined and articulated. Valdes wants Queer scholarship to ask the "other question," to recognize how its own identity is informed by the biases that affect Queer minorities. Intersectionality is also important in addressing the tension between sex and sexual orientation discrimination.

B. The Relationship Between Intersectionality and Legal Incompatibility

Asking the other question is frustrated by a jurisprudence that only cautiously considers the first. Significantly, Valdes urges intersectionality on Queer legal theory as a second stage in the evolution of sexual orientation law.[136] He contrasts a second stage evolution with a first stage where intersectionality is "conspicuously missing."[137] First stage Queer theory relies instead on "unidimensional" construction.[138]

Legal incompatibility can be attributed to the dominance of these constructions in Equal Protection jurisprudence. Scholars like Koppelman and Stein lament the need to categorize laws against homosexuals as representing exclusively one system of bias.[139] Their work advances that exclusive representation because the jurisprudence requires it. Investigating both facial classifications and discriminatory purposes is a search for a single, burdened class. In contrast, an intersectional approach could acknowledge how distinct and separate systems of bias can reinforce each other. Overcoming incompatibility therefore demands a way toward doctrinally recognizing intersectionality.

C. Practical Pursuit

Considering the issue of whether particular discrimination constitutes discrimination against a protected group invariably involves

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[136] *See* Valdes, Queer Margins, Queer Ethics, *supra* note 134, at 1313.

[137] *Id.*:

As the foregoing account of the first-stage record suggests, sexual orientation anti-discrimination legal discourse is quite accomplished, both doctrinally and theoretically, though still quite young. But, as the foregoing account also indicates, conspicuously missing from first-stage accomplishments is a sustained, widescale effort to engage race and ethnicity in the disempowerment or marginalization of lesbian, gay, bisexual, transsexual, or trans/bi-gendered persons both within and beyond sexual minority communities.

[138] *Id.* at 1321.

[139] *See* Koppelman, note 109, at 533 ("Law always picks and chooses among facts in the world, deeming some relevant and ignoring others. It thus flattens the richness of human life . . . . Facts are messy. Legal categories make them clean, usually by stripping off the living flesh.").

considering the relation of that particular discrimination to other forms of discrimination against the protected group. In this sense, a "subsumation" is at least momentarily cognizant of an intersection.[140] One could even argue that a class being legally subsumed need not deny distinct social biases and could therefore support intersectionality. Because of its perceived reach, a practical pursuit of intersectionality should focus on the least drastic or arguable means to achieve recognition. Some instances may be more persuasive intersections than others.

In discussing the case of Lam v. University of Hawai'i, Francisco Valdes shows the importance of the "formal illegality of both" categories.[141] Accordingly, one approach could begin by seeking heightened scrutiny for homosexuals and continue by arguing sex discrimination in a closely analogous case. The difficulty in this scheme rests mostly in the first step.[142] But if homosexuals were accorded comparable scrutiny in one instance, arguing sex discrimination—especially facial sex discrimination—in a closely analogous case would squarely present an intersection to the courts.

This latter approach seems more consistent with the narrow reasoning of the developing jurisprudence. Minimalist reasoning increasingly frustrates the sex discrimination argument by creating a body of sexual orientation discrimination precedents decided under rational review. A sex discrimination argument would then change both the standard of scrutiny and the underlying classifications. Heightened scrutiny for sexual orientation better enables the courts to consider the sex discrimination argument.

The same follows in pursuing intersectionality. Encountering a facial sex discrimination argument, a court would not be increasing the level of scrutiny towards homosexuals by recognizing the interaction of sexist and homophobic biases. Though the heightened scrutiny currently afforded sex classifications and the strict scrutiny for homosexuals etched above are not identical, the difference seems more manageable than bridging rational review. Strict scrutiny for homosexuals is neither a

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[140] *See* Sterett, *supra* note 100.

[141] 40 F.3d 1551 (9th Cir. 1994); *see* Valdes, Queer Margins, Queer Ethics, *supra* note 134, at 1334:

> But the Lam analysis hinged on the formal illegality of both race and gender discrimination; had either race or gender been excluded from the text of applicable anti-discrimination statutes, Lam's claim would have been placed in an entirely different analytical position. And because the practice of sexual orientation bias is perfectly legal under federal anti-discrimination statutes, this is the position in which sexual minorities of color find ourselves.

See also Levy, *supra* note 133, at 152 (discussing "trans" litigants trying to fit under pre-existing categories like sex, sexual orientation and disability); *id.* at 159 (discussing creation of alternative categories like "gender variance" in local ordinances).

[142] *See supra* Part I.B.2.e (discussing the history of "suspect class" arguments for homosexual litigants).

panacea[143] nor an essential element of this approach,[144] but it does alleviate many of the institutional pressures against broad theoretical arguments like intersectionality.

D. The Benefits and Value of an Intersectional Approach

An intersectional approach more accurately accounts for various reinforcing systems of bias. This accuracy results in practical and principled gains.

1. The Practical Benefits of an Intersectional Approach

An intersectional approach advances legal equality in at least three ways. First, this approach would eliminate the practical problem underlying the typological debate between Stein and Koppelman.[145] Left alone, the problem could lead to examining laws against homosexuals under different legal standards solely because of the terminology chosen to express bias.[146] Intersectionality could lift equal protection for homosexuals above this typological distinction.

Second, an intersectional approach to legal equality better reflects and maintains a broad coalition. Homosexuals and lesbians could articulate legal claims under either sex discrimination or sexual orientation discrimination. Transgender litigants, in contrast, "do not quite fit" within either category individually.[147] Samantha Levy argues for a separate classification of "gender identity" to remedy this problem.[148] An intersectional approach would at least facilitate this objective. Moreover, the approach itself might be sufficient to address transgender legal issues.

Third, this intersectional approach begins to reach under-included minority groups inside and outside the Queer community. Valdes notes the "strategic quasi-essentialism" of many Queer legal theories.[149] This

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[143] It alone will not cure all the difficulties of the Equal Protection Clause.

[144] Viewing homosexual classifications as "quasi-suspect" would certainly suffice to make them comparably scrutinized as sex classifications, if the current approach does not already. *See supra* Part I.B.1 (noting that rational review can increasingly invalidate anti-gay legislation).

[145] *See supra* note 106.

[146] A law prohibiting homosexuals from marrying anyone would be resolved under some form of rational review. A law prohibiting same-sex marriages would be resolved under some form of intermediate scrutiny because of facial sex classifications. It does not seem logical or desirable for the law to foster such a distinction. *Supra* note 107.

[147] *See* Levy, *supra* note 133, at 143.

[148] *Id.*

[149] *See* Valdes, *supra* note 131, at 1448:

approach shares in the quasi-essentialist problem in so far as it does not emphasize the place of minority outgroups. It differs from predecessors, however, because minority outgroups have a stake in the recognition of intersectionality. That recognition will result in increased visibility for minority outgroups and strengthened bonds between the Queer community and other groups combating discrimination.

2. The Improved Message of an Intersectional Approach

The value of an intersectional approach is especially clear when considering Professor Stein's critique of a mistaken moral message.[150] If these biases truly mutually support each other, the best moral message would be a message that accurately conveyed that support. Stein's aim is to show that the sex discrimination argument is a mistaken message. An intersectionalist position suggests that each individual argument makes the same mistake.

Consider Stein's example of sex discrimination within anti-miscegenation laws.[151] He notes that anti-miscegenation laws may have involved sexist premises and stereotypes, too. He then argues that characterizing anti-miscegenation laws as sex discrimination would "mischaracterize" the group actually affected[152] and the moral statement "underlying the legal questions."[153] He also argues that racism is the bias "primarily" involved.[154] This assertion of primacy must motivate his moral conclusions, but is itself questionable. Proving one system of bias to be "primary" would be difficult.[155] Moreover, Stein does not explain why the

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Strategic quasi-essentialism is a method of legal scholarship and praxis that recognizes the coexistence of essentialism and postmodernism in public affairs, and which seeks to manage on behalf of social justice the complexities of diversity and solidarity in a majoritarian order. Strategic quasi-essentialism is valuable both to intra- and inter-group antisubordination efforts that encompass varied and overlapping identity categories. This form of outgroup quasi-essentialism is strategic precisely because it uses identity only as a point of departure for antisubordination commitment and as the basis of outgroup collaboration.

[150] *See* Stein, *supra* note 106, at 503-05 (claiming the sex discrimination argument sends the wrong moral message).

[151] *Id.* at 496-98.

[152] Stein terms this the "sociological mistake." *Id.* at 497.

[153] *Id.*

[154] *Id.* Stein calls this the "theoretical mistake." *Id.* at 497.

[155] *See* Koppelman, *supra* note 109. Koppelman seeks "better evidence" to justify Stein's claim that sexism and homophobia are growing apart. Similarly, demonstrating the primacy of one system of bias over another would be onerous.

See also Valdes, Queers, Sissies, Dykes, and Tomboys, *supra* note 134, at 17 ("More generally, then, this Project further reveals and concludes that, under the conflation, there is no such thing as discrimination "based" only on any single endpoint.").

law should ignore "secondary" systems of bias that motivate discriminatory legislation.[156] If both biases were involved, both should be recognized and repudiated. A decision that did not recognize this intersection would send a faulty message, even if it invalidated the law and afforded the same legal entitlements under a narrower ruling.

The moral message debate emphasizes that legal decisions influence society. Legal "losses" do not exist in a vacuum.[157] The moral message matters. Neither Stein nor Koppelman would be satisfied with a jurisprudence that always decided legal issues correctly but always articulated values wrongly. But this is exactly what any unidimensional claim perpetuates if various systems of bias genuinely do reinforce and inform each other. Intersectionality is "qualitatively different."[158] An intersectional approach best accounts for the complexity of bias.

IV. CONCLUSION

The course of sexuality law shows that prejudice can be perceived in several different ways. The decisions following Bowers recognized differential treatment of homosexuals but dismissed any "invidious" characterization of that treatment. Contemporary decisions like Baehr, Romer, and Lawrence recognize and reject bias against homosexuals. These courts agree that prejudice against homosexuals is wrong but disagree on

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[156] *See* Koppelman, *supra* note 109, at 530:

I do not know whether sexism or heterosexism (if the latter can be understood as a distinct social force) lies 'at the core' of these laws or plays a more central role in maintaining these laws. I do not think anyone knows. I prefer to rely on weak causal claims because weak causal claims are the only ones we can endorse with any confidence. Further, it seems to me pointless to argue about which strong causal explanation is the correct one.

[157] Paisley Currah, Continuing the Civil Rights Struggle: Ends & Means: Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities, 48 Hastings L.J. 1363, 1367 (1997):

'Losses' like these affect not only the individual litigants involved but also the thousands of other transgendered people who will never file lawsuits, but who will continue to be discriminated against as a result of these decisions. While interrogating the incoherence embedded in the state's attempt to regulate the relationship between genitalia, gender identity, and gender expression, it is also vital that we not lose track of the material consequences of such regulation. As Robert Cover has written, 'A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.'

See also Levy, *supra* note 133, at 163 (arguing sexual orientation classification for trans-litigants "perpetuates the discrimination").

[158] *See* Jefferson, *supra* note 132, at 269 ("Intersectionality is qualitatively different from any type of additive analysis since it recognizes that people actually exist at certain converging points on the socially constructed maps of race, gender, and sexual orientation.").

how to characterize that wrong. Sex and sexual orientation discrimination claims assail the same bias by addressing different dimensions of that bias.

For practical and principled reasons, sexuality law should move beyond these constructions. The pursuit of these individual arguments risks political backlash and an internal divide. These arguments also morally marginalize each other by ignoring the other implicated bias. Though an emphasis on immediate gains is understandable, this growth cannot continue. Intersectionality addresses this problem by recognizing how distinct traits combine to inform an individual's identity.

Just as this approach solves the legal tension between these two theories, that tension addresses the problem with reaching an intersectional approach. Legal tension could produce an intersectional approach because each claim is persuasive. Faced with two formally persuasive legal claims, the courts could look to the socially persuasive conclusion that is intersectionality. It is a distant but attainable and alluring dream.[159]

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[159] "Hold fast to dreams
For if dreams die
Life is a broken-winged bird
That cannot fly.

Hold fast to dreams
For when dreams go
Life is a barren field
Frozen with snow."

Langston Hughes, Dreams, *in* The Collected Works of Langston Hughes Volume 1: The Poems: 1931-1940 154 (Arnold Rampersad ed., 2001).