WE ARE ALL PART OF ONE ANOTHER: SODOMY LAWS AND MORALITY ON BOTH SIDES OF THE ATLANTIC

INTRODUCTION

Sodomy laws which criminalize private consensual gay and lesbian sexual intimacy are the subject of this note. In 1986, nearly half of the states in the United States have sodomy laws on their books, statutes which are being enforced zealously[1] since this summer's bitterly anti-gay Supreme Court decision in *Bowers v. Hardwick*.[2] In the United Kingdom, acts of lesbian sexuality were never criminalized,[3] but gay male sex was once punishable by death and, until recently, could lead to life imprisonment.[4] In 1954, the Wolfenden Committee, chaired by Sir John Wolfenden, was appointed to study, *inter alia*, "the law and practice relating to homosexual offences"[5] and to suggest possible reforms. After three years of study, the Committee issued its recommendation "that homosexual behaviour between consenting adults in private should no longer be a criminal offence."[6] Ten years later, after much debate, Parliament enacted this view into law: the Sexual Offenses Act of 1967 decriminalized sodomy in England and Wales.[7] Nineteen-eighty Legislation enacted in 1980 included Scotland in the reform,[8] and in 1981, the European Court of Human Rights struck down Northern Ireland's sodomy law in the landmark *Dudgeon Case*.[9]

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1. *See, e.g.*, Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986) (en banc).

2. 106 S. Ct. 2841 (1986).

3. Swept up in the tide of gay-bashing that accompanied the trial and conviction of Oscar Wilde, the British House of Lords attempted to amend the infamous Labouchere Amendment (1885 Criminal Law Amendment Act), which imposed harsh criminal penalties on gay men, to include lesbians. The House of Lords, however, rejected the inclusion, largely based on the belief that its passage would plant the concept of lesbianism into otherwise ignorant female minds, and thus actually increase lesbianism rather than combat it. *See* J. WEEKS, COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN, FROM THE NINETEENTH CENTURY TO THE PRESENT 106-07 (1979).

4. 9 Geo.IV c. 31 sec. 15: "That every Person convicted of the abominable crime of Buggery committed with Mankind or with any Animal, shall suffer death as a Felon."

5. REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, CMD. 4, No. 247, at 7 (1957) [hereinafter Wolfenden Report].

6. *Id.* at 25.

7. Sexual Offences Act, 1967.

8. Criminal Justice (Scotland) Act, S.80 1980.

9. Dudgeon Case, 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 45 (Eur. Ct. on Human Rights) [hereinafter Dudgeon Case]. Almost all of the non-communist countries in Europe are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention established the Commission on Human Rights which hears discrimination complaints against state parties to the Convention who are accused of breaking it. The Commission investigates each complaint and tries to resolve the dispute, although its terms

Sodomy laws are always defended on morality grounds, whether in the courts or the legislature, in both the United States and Great Britain. How a state responds to the morality argument largely determines the fate of its sodomy law: in the United States, reformers have been unable to repeal or strike down these criminal statutes because legislators and judges straightforwardly express their moral objections to gay and lesbian intimacy.[10] Although the same morality arguments were offered in support of sodomy laws in Great Britain, the quality and nature of official response there has differed: Parliamentary reformers acknowledged the moral objections but responded to them. Similarly, in the *Dudgeon Case*, the European Court on Human Rights specifically held that "moral attitudes. . .cannot, without more, warrant interfering with the applicant's private life to such an extent."[11] Yet the legal and political status of lesbians and gay men in Great Britain today is little better than that of their American counterparts.[12]

What are the "moral attitudes" that are used to justify prison sentences in the United States and discrimination in both the United States and Great Britain for adult acts of love and intimacy? What sense of morality leads a hostile majority to persecute those with different erotic practices? Is there a satisfying moral theory in response? This note first examines the traditional morality debates surrounding sodomy law reform, then offers a viable alternative moral theory upon which sodomy law reform can be grounded. It next considers the British Parliamentary Debates which commenced with the Wolfenden Report and led to the Sexual Offences Act of 1967. Finally, this note assesses sodomy law challenges in American cases in light of the different moral theories. It argues that the territory covered by both sides in the traditional sodomy law morality debate is barren—both from the standpoint of legal process and political outcome—and that ultimately a richer moral theory, feminist morality, should supplant the older terms of analysis on both sides of the Atlantic, and lead to more just regulations of human behavior.

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of settlement are not binding. If the terms are not agreed to, the Commission or a state party to the convention may refer the case to the European Court of Human Rights, so long as the defendant state has accepted the jurisdiction of the Court. Acceptance of the Court's jurisdiction is optional for state parties to the Convention, although most of them have chosen to accept it. The Court's decision is binding. *See* AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 79 (1982).

10. "To ask the question is to answer it," responded Judge Bork to the military's assertion of the *per se* moral harm supposedly inflicted by homosexuals in Dronenberg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984). Justice White, for the majority in Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986), similarly dismissed Hardwick's impassioned plea for constitutional protection as "at best, facetious."

11. Dudgeon Case at 24.

12. *See generally*, WEEKS, *supra* note 3.

I
THE TRADITIONAL MORALITY DEBATE ON SODOMY LAW REFORM

Generally, those opposed to and those in favor of sodomy law reform assume that lesbian and gay intimacy is inherently immoral. Discussions of this issue tend to center almost exclusively on whether or not the state, through law, may implement morality *per se*: if it can, lesbian and gay sex may be prohibited; if it cannot, such intimacy must be allowed. Immediately, the conversation disregards actual lesbians and gay men and focuses instead on abstract concepts of "law and morality." Advocates in this debate generally fall into one of two camps: "individual liberties" proponents or "moral fabric" defenders. The debate almost inevitably is played out as follows.

Individual liberties proponents elevate personal freedoms to the position of the paramount social good. In the sodomy law reform context, the best known advocate of this camp is H.L.A. Hart, whose *Law, Liberty, and Morality*[13] addresses the Wolfenden proposals from the point of view of the political philosophy of John Stuart Mill's *On Liberty*.[14] This camp argues that since a just society is based on the freedom of the individual, encroachments upon that freedom must be viewed with suspicion, and allowed only to protect others against harm. Private consensual adult sexuality which, they argue, directly "harms" no one, must thus be a matter of personal choice rather than state control.

Under this theory, that some may dislike what others do in private is too remote an injury to be classified as a "harm." It follows that "[r]ecognition of individual liberty as a value involves, at a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does—unless, of course, there are other good grounds for forbidding it."[15] This approach thus centers on a classic legal definition of "harm": only where a challenged activity tangibly injures another may the state regulate that activity.[16]

The individual liberties philosophy is fundamentally amoral, offering no moral standard or theory in and of itself. It leaves specific value judgments to individuals, merely delineating in which spheres a state may act and in which spheres it may not. Conceptualizing society as an amalgamation of atomized participants, the approach offers no standards for guiding social activity, but only bars some types of behavior regulation which a state might seek to enact. In the best remembered words of the authors of the Wolfenden Report, "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[17]

13. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).
14. J. S. MILL, ON LIBERTY (1859).
15. HART, *supra* note 13, at 47.
16. *See generally*, MILL, *supra* note 14.
17. Wolfenden Report at 24.

The moral fabric defenders, by contrast, see society as cohesive rather than atomized. In this view, collective moral judgments, not individual freedoms, are what sustain a community. In the context of sodomy law reform, Lord Devlin is the best known modern adherent to this view. In *The Enforcement of Morals*,[18] he insists that society has a right (indeed, an *obligation*) to force its collective moral judgments on those who rebel: the moral fabric of the community, in this view, unites individual members into a whole. When those moral bonds dissolve, Devlin argues, "the society will disintegrate."[19] Thus, in order to reinforce crucial social bonds and avoid anarchic chaos, the majority may legitimately regulate or prohibit gay and lesbian sexuality.

Defending majoritarian hostility, Devlin canonizes "intolerance, indignation, and disgust" as "the forces behind the moral law."[20] Where the individual liberties proponents focus their inquiry on the presence of harm, the moral fabric defenders focus theirs on social approbation, the presence of which denotes an area of legitimate social regulation. The moral fabric camp is moralistic and judgmental; it plainly suggests that social standards be based on subjective disgust and dislike. Where the individual liberties adherents proscribe laws in certain fields, moral fabric advocates prescribe them, believing that society has an affirmative duty to regulate rebels against its dominant moral code. Yet, like the individual liberties school, the moral fabric camp is fundamentally amoral, offering no standards for appraising a law beyond common intolerance, and refusing to delve more deeply into more difficult questions of right and wrong.

Sodomy law reformers, of course, generally take the individual liberties position, while those who favor retention of sodomy prohibitions tend to take the moral fabric approach. However, this facile drawing up of sides ignores the true colors of each approach.

If the goal is long-term progress for the lesbian and gay movement, rather than just simple sodomy law reform, the individual liberties philosophy is unsatisfying. It leaves untouched the assumption that gay and lesbian sexuality is immoral, arguing only that the resolution of this particular question of secular right and wrong rests with the individual. No attempt is made to challenge the pervasive belief that the existence and activities of a substantial minority group are reprehensible and deserving of open social hatred. While individual liberties theory may win repeal of a given sodomy law, it nevertheless permits anti-gay sentiment to proliferate unchecked. Beyond the realm of their homes, lesbians and gay men continue to encounter second class legal status in the areas of employment, family, immigration and health, along with still-flourishing popular hatred.

Socially, moreover, individual liberties theory forces separation of the lesbian and gay minority from the heterosexual majority under the "privacy"

18. LORD DEVLIN, THE ENFORCEMENT OF MORALS (1965).
19. *Id.* at 11.
20. *Id.*

rubric. Only when same-sex lovers are behind closed doors, out of sight of the still-disgusted majority, may they live freely. Assimilation is necessarily precluded, as is the unity that inclusion of lesbians and gay men into the mainstream would foster. The individual liberties approach gives the individual lesbian or gay man the artificial liberty of the closet. The knowledge that the closet accompanies law reform keeps sexual minorities hidden and fearful. And any potential law reform collapses under its right-of-privacy house of cards as soon as lesbians and gay men enter the public domain and encounter public discrimination and harassment.

On the other hand, although it leads to a conclusion that is unacceptable to reformers, the entire moral fabric approach should not be discarded. Devlin begins with principles of social cohesion: "What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals."[21] Stressing the connections of society rather than the solitary domain of the individual, Devlin observes: "[f]or society is not something that is kept together physically; it is held by the invisible bonds of common thought."[22] This bare supposition of connection and cohesion cannot be dismissed lightly, given the promise of sharing and communal spirit it embodies. The problem lies in the conclusion Devlin draws from his premise: that tyranny of the majority is desirable. Salutary "bonds of common thought" are so easily transformed into bondage for lesbians and gay men: "[i]f the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price."[23]

From an ethic of mutuality and shared living, Devlin endorses the subjugation of those outside common morality. This crucial logical leap in no way follows from his community-based premise. Abandoning his assumptions about mutuality and bonds among social actors, Devlin shifts to a hierarchical analysis which asks whether the majority judgment or the minority practice is better. He thereby creates a false dilemma which he resolves by severing minority practices from majoritarian activities and by allowing the minority to be castigated by the majority. Devlin never fully delineates the price that must be paid by lesbians and gay men or other minority groups who have fallen from communal grace. Instead, what emerges is a cold willingness to sacrifice one segment of the population for the benefit of another, all in the name of community spirit. Devlin never spells out why those who are burdened most by a torn social bond must alone struggle to repair it.

Both the individual liberties and the moral fabric theorists divide the players and choose a winner. The former chooses lesbians and gay men, so long as their sexuality remains behind closed doors, as its victors; the latter

21. *Id.* at 9.
22. *Id.* at 10.
23. *Id.*

chooses the condemning majority. Each expects the loser to pay its due: either the majority must permit lesbian and gay intimacy and abandon its moral objections, or same-sex lovers must stifle the natural expression of their intimacy. Both focus their views away from lesbians and gay men themselves. Individual liberties proponents concentrate on "harm" to one from another's private activity, while the moral fabric theorists depend on the content of popular opinion. What both sides of the traditional debate fail to propose is an approach which confronts the real human suffering which anti-gay laws induce, and the victory that sodomy law repeal would achieve for society as a whole. Feminist morality corrects both of these flaws.

II
FEMINIST MORALITY

What I call "feminist moral theory" is a value system based on the psychological research of Carol Gilligan in *In a Different Voice: Psychological Theory and Women's Development*,[24] and more fully explained by theorist Marilyn French in *Beyond Power: On Women, Men and Morals*.[25] I will first explain Gilligan's findings, then discuss French's application of them, and lastly examine the implications of their theory in the context of cross-cultural sodomy law reform.

Gilligan's work is factual only. Her purpose was to analyze the different moral voices of females and males by reinterpreting older psychological studies and conducting her own new tests. Though a feminist, Gilligan was not attempting to create a new feminist moral vision. She merely wanted to point to previously ignored gender differences in moral development. Yet, as a result of her work, she ultimately validated the different moral voice she found primarily in women and girls, and redefined the system professionals had used to evaluate boys' and girls' development.

Gilligan argues that due to the male's early separation from his mother, he later differentiates himself from the outer world in a way that the female does not. Since girls experience attachment to their mothers during this early stage, they "emerge. . .with a basis for 'empathy' built into their primary definition of self," and "with a stronger basis for experiencing another's needs or feelings as one's own."[26] The female's sense of continuity with the outer world continues throughout her psychological growth, while the male tends to individuate further. Traditional boys' games, for example, involve individual or team competition and a preoccupation with rules even for the rules' own sake. Girls' games, on the other hand, occur in smaller, more intimate groups, are experiential rather than competitive, and form rules which last only so long as they further their friendships.

24. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

25. MARILYN FRENCH, BEYOND POWER: ON WOMEN, MEN AND MORALS (1985).

26. GILLIGAN, *supra* note 24, at 8.

When girls and boys become women and men, their outlooks on life have been affected profoundly by their different types of development. Men tend to construct what Gilligan calls "a morality of rights," while women tend to build what she terms a "morality of responsibility."[27] When presented with a moral problem, male subjects generally set up a hierarchical mental structure, choose the highest value, and "solve" the problem. Women, on the other hand, offer more complex answers, concerning themselves with all the parties involved and working towards compromise and long-term consensus. Thus the female subjects "see the actors in the dilemma arrayed not as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend."[28]

The morality of rights that Gilligan posits gives social actors the "right" to pursue pleasure up to the point where another has the "right" to prevent the action. It is classical liberalism. The morality of rights assumes that individual choice will lead to destructive actions which others, to protect themselves, must have the "right" to stop. It is marked by a clash of selfish desires. In the words of eleven-year-old Jake: "[I]f I want to throw a rock, [I could be prevented from] throwing it at a window, because. . .of the people who would have to pay for that window."[29] In this system, two sides each assert a right, a winner is chosen, and the loser suffers.

The predominately female "morality of responsibility" is a positive morality, urging its adherent toward positive action (such as nurturing and caring), rather than inaction (such as refraining from aggression). Jake's laboratory counterpart, Amy, emphasizes that "[o]ther people are counting on you to do something, and you can't just decide, 'Well, I'd rather do this or that.' "[30] "To her," Gilligan concludes, "responsibility signifies response, an extension rather than a limitation of action."[31] Because of her perception that she is connected to others in need of her aid, Amy's morality spurs her to provide care. Since he believes in the primacy of separation, Jake's morality stops him from harming others. Both may lead to just results (Jake does not break the window; Amy offers succor), but each is fundamentally different in both analytical process and practical outcome.

Where Gilligan has offered a descriptive account of two different moral systems, French has constructed a prescriptive moral theory largely based on that account. French's moral theory shuns the hierarchical, dichotomous rights-morality in favor of strengthening the bonds of human similarity and connection: "We must recognize that since we are all human and share the same basic human condition, we also share the same basic needs and aversions, and what is good (in the profoundest sense) for some of us is good for all

27. *Id.* at 17.
28. *Id.* at 30.
29. *Id.* at 37.
30. *Id.*
31. *Id.* at 38.

of us."[32]

In this sense, French's starting point is the same as Devlin's: they would both endorse Barbara Deming's statement that "we are all part of one another."[33] They both agree that the bonds of society are forged on commonality. Similar to French, who notes that "at every level, self is part of group, group part of self,"[34] Devlin finds that the social network between individual and community is strong and extensive.[35] However, Devlin ultimately abandons this premise and reverts back to dualism and hierarchy when he chooses the hostile majority over the shunned minority. Severing the connections he had proclaimed as pivotal, Devlin willingly casts off one segment of the whole for the benefit of the remainder.

French spurns this dichotomous thought in which "difference is more important than similarity,. . .distinction is more important than equivalence, division than solidarity."[36] She sees it as "a necessary component of a morality that seeks to confer superiority on one group or caste of humans; their superiority rest[ing] upon their difference from other humans."[37] Emphasizing social interrelationships as an end, not merely a starting point, French disfavors removal or condemnation of one part of society for the sake of another:

> We know that within any ecosystem—meadow, sea, or mountain—all elements, even predation, are necessary to maintain the balance of the whole. The removal or eradication of even one species of plant or animal can do serious damage, can lead in time to the destruction of that system. Remove the termites from it, for example, and an entire wetland can begin to die. It makes sense that such meshing interconnections would function at every level. . . .The metaphors created by scientific thought comprise a new image of the universe and intimate a new moral vision.[38]

In order to preserve the delicate balance of the whole, French stresses inclusion over Devlin's exclusion. This feminist morality of responsibility views separation as a harm in itself, and puts faith in the restorative value of "meshing interconnections."

Unlike the individual liberties and moral fabric theories, feminist morality places a premium on human pleasure, and sees as *per se* immoral actions which cause human misery. Like the girls in Gilligan's study who willingly changed their rules to maximize the participants' enjoyment of the game, feminist morality urges a restructuring of systems in which members suffer. Unlike the individual liberties or moral fabric theorists, advocates of feminist

32. FRENCH, *supra* note 25, at 23.
33. BARBARA DEMING, WE ARE ALL PART OF ONE ANOTHER (1984).
34. FRENCH, *supra* note 25, at 500.
35. *See* DEVLIN, *supra* note 18, at 9.
36. FRENCH, *supra* note 25, at 500.
37. *Id.*
38. *Id.*

morality center their inquiry not on abstract conceptions of harm and causation or majoritarian sentiment, but on the tangible pain inflicted on a stigmatized group. Feminist morality brings the shunned into a network of social relationships and strengthens social connections.

Thus, while an inquiry into the propriety of sodomy laws based on feminist morality would reach the same conclusion as one based on an individual liberties approach (namely, that the laws should be repealed), it does so for some moral fabric reasons (*e.g.*, that social links are the bases for continuation of the community). What feminist morality offers is a compassionate approach to alleviate both the suffering of the socially abhorred and the ailment of the larger society's differentiation and subordination. Feminist morality deplores the values that Devlin elevates—"intolerance, indignation, and disgust"—and urges not just society's lukewarm tolerance, but its embracing acceptance of a minority. It forces society to recognize the misery that sodomy laws impose upon lesbian and gay lovers, and thereby strives to bring peace into their lives and to produce a society correspondingly more humane.

III
THE UNCERTAIN MORAL MESSAGE OF BRITAIN'S 1967 SEXUAL OFFENCES ACT

A patchwork coalition of individual liberties advocates, progressives, and gay and lesbian rights activists supported and eventually won repeal of Britain's consensual sodomy law in the 1967 Sexual Offences Act ("the Act"). Although a Parlimentary majority won the immediate reform sought, it nevertheless failed to alter the perception that lesbians and gay men are degenerate. As a result, British lesbian and gay rights advocates have found it difficult to win further gains. One critic, disenchanted with the Act's narrow reform, stated that "both in terms of the criminal law and of the social attitudes promulgated within Parliament, the passage of the 1967 Sexual Offences Act left gays as second-class citizens, stigmatized as immoral and anti-social, and therefore acutely vulnerable to any future increase in the levels of intolerance."[39]

A. The Wolfenden Report

The Wolfenden Report, predecessor to the 1967 Act, set out its own view about the appropriate targets of the criminal law. "[I]ts function," the Report stated, "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable. . . ."[40] The Wolfenden Committee viewed private adult gay sexuality as "not the law's business," although this same behavior was seen as the legiti-

39. Warner, *Parliament and the Law*, PREJUDICE AND PRIDE 87 (1983).
40. Wolfenden Report at 9-10.

mate target of *moral* reprobation. Immediately following its famous "not the law's business" comment, the Wolfenden Committee hastened to validate the hostility commonly felt towards lesbians and gay men: "[c]ertain forms of sexual behavior are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds."[41]

This juxtaposition of the Committee's progressive reformist position and its moral condemnation of gay men runs throughout the report. While the Committee occasionally displays a degree of compassion for gay men remarkable for its time, that sympathy is often tempered with remarks about their supposed moral turpitude. For example, the Committee criticized studies of gay men based on prison or medical samples as "only the worst cases"[42] that ignore the gay man who is a "discreet person with a well-developed social sense."[43] Yet this same Committee argues against labelling gay sexuality as an illness because that would dilute "the concept of moral failure"[44] ever-present in gay lives.

Strikingly, the Commission on several occasions viewed its topic through a feminist morality lens of social interconnections. Using Kinsey's homosexual-heterosexual continuum, which lays out human sexual behavior not as distinct forms of eroticism but as different shades along the same spectrum, the Commission was led to "the conclusion that homosexuals cannot reasonably be regarded as quite separate from the rest of mankind."[45] Echoing this theme, the Commission points out the fallacy in stereotyping all gay men into one category, arguing that in fact they exist "among all callings and at all levels of society; and that among homosexuals will be found not only those possessing a high degree of intelligence, but also the dullest oafs."[46] The recognition that gay men are a diverse group, running the gamut of occupations, social classes, and IQ levels, is a statement of their essential humanity, and of the error of grouping and excluding them. That the Commission noticed the diversity of gay people, decades before "we are everywhere" became the gay rights movement's rallying cry, shows a remarkable open-mindedness.

These premises led the Commission to state one of its most important recommendations: the reintegration of lesbians and gay men into society. In the context of treatment, the Commission suggests in 1950's psychological terms that which can be rephrased in 1980's feminist terms: "a homosexual. . .may be regarded as successfully treated if he is brought to a more nearly complete adjustment with the society in which he lives."[47] Feminist morality would prescribe treatment for the ailing society, while the Commission would

41. *Id.* at 10.
42. *Id.* at 32.
43. *Id.*
44. *Id.* at 13.
45. *Id.* at 12.
46. *Id.* at 17.
47. *Id.* at 66-7.

"cure" the gayness. Both, however, want to reintroduce the gay man into society.

Were the Commission's sole approach one of compassion, inclusion, and reintegration, its message to Parliament would have been unmistakable. Yet perhaps because the Commission necessarily was forced to reach consensus among its diverse membership (from Members of Parliament [MPs] to medical doctors to clergy), its message to Parliament was a mixed bag. The proponents of individual liberties won inclusion of the statement that the law should avert its eyes in this matter of personal choice. The moral fabric defenders won the Commission's refusal to "condone or encourage private immorality,"[48] its acknowledgement of society's "revulsion against [sic] what is regarded as unnatural, sinful or disgusting,"[49] a recommendation that the age of consent for gay sex be five years higher than that for non-gay sex, and the approval of tougher penalties for intergenerational gay sex on the grounds of preserving "decency."[50] In addition, strains of feminist morality ran throughout the Report, in the Commission's compassion for the oppressed group and in its recognition of the need for social integration. Yet the Report, notwithstanding its supportive language, perpetuated the stigmatization of gay men as immoral creatures worthy of pity at best, and subjected them to a decade of Parliamentary and social debate on their worth.

B. The Parliamentary Debates

As with any legislation, MPs supported the Sexual Offences Act for a variety of reasons. Some were individual liberties absolutists; some were moved by the Wolfenden Report as a whole; some felt the minor sexual offenses unworthy of police attention. But a theme echoed repeatedly by advocates of sodomy law reform was compassion for the suffering faced by gay men as a result of the harsh law. (Until the 1967 Act, gay men faced a potential sentence of life imprisonment for private, consensual adult acts.)

MPs in favor of reform began their debates with simple statements of the pain and unfair treatment gay men received: "[M]uch human suffering derives from the operation of the present law. It provides scope for the blackmailer. . . .It also so often results in prison sentences which make the victim's last state worse than his first."[51] "[L]ife is harsh enough for these people without society adding to their burden. . . .I believe that ultimately this reform will come. I am only saddened by the fact that it should come only after a still greater toll of human misery has been exacted by society."[52] "[The present law] condemn[s] these people to an existence of extreme loneliness and celibacy. It is a desperate penalty to pay and an enormous burden which is thrust

48. *Id.* at 24.
49. *Id.* at 22.
50. *Id.* at 9.
51. 596 PARL. DEB., H.C. (5th ser.) 379 (1958) (Mr. Butler).
52. *Id.* at 388, 390 (Mr. Greenwood).

upon them."[53]

Reformers immediately saw the political appeal in this popular and moving theme. Lord Arran framed the question of whether gay men should be penalized for their homosexuality as follows:

> Do we or do we not think it right that a man should be persecuted and prosecuted for being what he is born to be? Do we or do we not think it right that hundreds, perhaps thousands, of men should live in permanent fear of blackmail? I pray that this House may show itself. . .to be a place of progress and of compassion.[54]

Lord Byers followed up on Arran's theme by arguing that "[a] gross injustice is being perpetrated against the minority of our people. . . .[I]t can [not] be right to subject a substantial number of our fellow citizens to the misery and degradation they suffer today."[55] The Lord Bishop of Chichester added that the law "is productive of much misery. It produces a squalid underworld of suspicion and fear. It leads to blackmail. It leads often enough to the tragedy of suicide. . . .Indeed,. . .compassion [is]. . .almost precluded under the present state of the law."[56] In registering his support of the Act, Mr. St. John-Stevas also stressed the unfair suffering of gay men under the law.

> The effect of the present law is to increase human suffering. We all know of friends or acquaintances who have contributed to the community, who have had useful lives destroyed by the capricious incidence of the present law. We cannot avoid suffering in what the theologians would describe as 'this vale of tears' but what we can do is to so rationally order our laws that the incidence of human suffering is reduced as much as possible.[57]

However, the unfortunate underside of the MPs' compassion for gay men was pity. Many MPs viewed them as creatures who were weak and highly susceptible to temptation. One reformer pleaded for "compassion to those minorities in our midst who are denied the happiness and fulfillment which is the lot of most of us."[58] Another read a letter allegedly from a gay constituent who mourned his sexual orientation which grew like "cancer" within him.[59] "I feel sorry for these people," tsk-tsked another, "they do not know what they are missing."[60]

Later deliberations retained this air of pity. In the 1966 debates, the gay man was commonly referred to as "unfortunate,"[61] or "indulg[ing] these im-

53. *Id.* at 473 (Mr. Robinson).
54. 266 PARL. DEB., H.L. (5th ser.) 635 (1965).
55. *Id.* at 636-37.
56. *Id.* at 660-61.
57. 724 PARL. DEB., H.C. (5th ser.) 848 (1966).
58. 596 PARL. DEB., H.C. (5th ser.) 383 (1958) (Mr. Greenwood).
59. *Id.* at 394 (Mr. Hyde).
60. *Id.* at 442 (Dr. Broughton).
61. *See, e.g.*, 724 PARL. DEB., H.C. (5th ser.) 803 (1966) (Mr. Strauss).

pulses. . .through no fault of his own."[62] Mr. Abse self-righteously asked, "Have those blessed with the emotional security of a full, heterosexual life the right to demand total and permanent abstinence from those whose terrible fate it is to be homosexual?"[63]

This is the unpleasant side of a model based on compassion: that in order to feel sympathy for gay men, many pro-reform MPs felt it necessary to separate themselves from their subject and condescend to gay men—a *noblesse oblige* style of reformism. This preserved their opponents' view of gay men as pitiable, weak creatures, for whom the law's structures could provide only some measure of guidance.

A more positive facet of the compassion model was displayed by other MPs. Where the Wolfenden Commission only hinted at social bonds between all members of Great Britain, some MPs forthrightly spoke, in what would now be considered feminist terms, of the connections between the heterosexual majority and lesbians and gay men. "Let us put ourselves in the position of a man accused of one of these private offences,"[64] said Sir Linstead in a plea for hands-on understanding rather than arms-length disdain. Another MP, Mr. Shepherd, attempted to explain the gay nature: "We must try to believe that there are men who find it as repulsive to have sex association with a woman as a normal man finds it to have sex association with his own sex."[65] This was so difficult for the 1958 consciousness to comprehend that one member blurted out "[n]onsense."[66]

The clergy, however, was vital in forging the understanding that perhaps gay men were not so different from the rest of society. In 1958, the Reverend Llywelyn Williams railed against "that self-righteousness which says, 'God, I thank Thee that I am not as other men.' "[67] In 1965, the Lord Bishop of Southwark equated the immorality of lesbians and gay men with heterosexual immorality:

> Time and time again, as one has heard their story, one has been, to put it frankly, revolted. But let us also be honest. In the confessional, time and time and time again I have been equally revolted by the confessions I have heard of heterosexuals. But even then, whatever my reaction has been, I have said, 'I am a pastor, and it is my job to help, so that they may win back their self-respect and play their part usefully in society.'[68]

Although the Bishop assumed the immorality of gay men, he universalized that "sinfulness," stressing the sameness between people of different sexual

62. *Id.* at 806.
63. *Id.* at 826.
64. 596 PARL. DEB., H.C. (5th ser.) 415 (1958).
65. *Id.* at 426.
66. 266 PARL. DEB., H.L. (5th ser.) 660 (1965).
67. *Id.* at 482.
68. 266 PARL. DEB., H.L. (5th ser.) 695 (1965).

orientations. Because gay men are more like the majority than not, because they should be "won back" into society, the Bishop favored reform. He concluded by reemphasizing that commonality:

> 'He that is without sin, let him cast the first stone.' If we were to apply that test tonight, there are not many of us who would feel, I think, ready to vote against some Motion which is seeking to help those who have been born with these strange quirks of nature. Even though they may not be ours, thank God, yet nevertheless, we have those of our own.[69]

Non-clergy MPs sometimes stressed the same theme of connection and understanding, especially those who admitted that they had gay friends.[70] As it was for the Wolfenden Commission, the Kinsey Report was influential in convincing reformers that human sexuality existed along a gradation. Gay men "are not a group of people to be regarded as untouchable and peculiar,"[71] but are only different shades along the human spectrum.

As they witnessed its growing strength, opponents of reform belatedly realized that they had to respond to the compassion argument. In 1965 the Earl of Kilmuir, speaking against the bill, conceded that "compassion. . .must always exist," and "toleration. . .can be good," but that the law must nevertheless deal strictly with indecency and permissiveness.[72] Sir Black offered a more sophisticated rebuttal of the argument: "True compassion," he insisted, "does not require that we should pass legislation which, on the one hand, may lift the fear of prosecution from a certain body of wrongdoers if we believe that in passing that legislation it would result in a great increase in unnatural vice."[73] Other MPs merely prefaced their remarks with "I am just as sympathetic" as others,[74] and then continued with their anti-reform statements.

Rather than fighting compassion with compassion, some MPs simply asserted that any sympathy for gay men was misplaced. "I am rather tired of democracy being made safe for the pimps, the prostitutes, the spivs, the pansies, and now, the queers," complained Sir Osborne. "It is high time that we ordinary squares had some public attention and our point of view listened to."[75] In an earlier comment, Mr. Bellenger informed the House of Commons that, hardly worthy of understanding, gay men were "a malignant canker in the community," which, if "allowed to grow, would eventually kill off what is known as normal life."[76]

Thus, by stressing inclusion rather than mere tolerance, the reformist MPs managed to put themselves on high moral ground, able to effectively

69. *Id.* at 695.
70. *See, e.g., Id.* at 649; 596 PARL. DEB., H.C. (5th ser.) 431 (1958).
71. 596 PARL. DEB., H.C. (5th ser.) 490 (1958) (Mr. Younger).
72. 266 PARL. DEB., H.L. (5th ser.) 659 (1965).
73. 724 PARL. DEB., H.C. (5th ser.) 796 (1966).
74. *See, e.g., Id.* at 842 (Mr. Tomney).
75. *Id.* at 829.
76. 596 PARL. DEB., H.C. (5th ser.) 417 (1958).

combat the inevitable morality arguments their opponents offered. By the mid-1960s, the opponents of reform were on the moral defensive, forced into saying either "I am sympathetic, but. . ." or into a position of narrow-minded antipathy. The individual liberties voices ran consistently through the debate, and may have pushed a few unsure MPs onto the side of reform, but that position was not nearly as effective as the one that spoke in near-religious terms of lifting the suffering off the oppressed.

Had the debate ended with this dialogue, a debate merely between the voices of compassion and those of disdain, the effect of the 1967 Act would have been to protect gay men and include them to the fullest possible extent within the community. What weakened the Act was the reformers' insistence that decriminalization was in no sense to be taken as acceptance or approval of gay sexuality. Some deemed gay sexuality "nauseating" while others considered it "utterly wrongful." Near the end of the debates, the bill's primary sponsor proudly claimed that "in all the discussions we have had, and in all the speeches, no single noble Lord or noble Lady has ever said that homosexuality is right or a good thing. It has been universally condemned from start to finish, and by every single member of the House."[77] Compassion had its limit: in the final analysis, even though their sexual activities were no longer illegal, gays were still considered immoral and unworthy of social acceptance as equals.

Not surprisingly, the first important House of Lords case to apply the Act failed to protect gay men, casting their sexuality as immoral and still appropriately subject to legal regulation.[78] The case before the Lords was the conviction of the publishers of *International Times*, a magazine which had published advertisements from gay men seeking partners, probably (although not necessarily) for sexual purposes. In the first count, the publishers were charged with a recently-revived British common law crime: conspiracy to corrupt public morals. This crime required the jury to announce their collective view on the morality of same-sex eroticism — which it did readily. The *International Times* jury not only found gay sexuality to be immoral, but found that any procurement thereof, even by consenting adults to other consenting adults for private activity only, corrupted the morals of the public.[79]

What had happened to the "not the law's business" jargon and the newly passed decriminalization of gay sexuality? It appeared that the common law was once again making illegal those activities that Parliament had so recently decriminalized. On appeal, *International Times* argued that the Act rendered this common law construction improper: "homosexual acts between adult males in private are now lawful so it is unreasonable and cannot be the law that other persons are guilty of an offense if they merely put in touch with one

77. 275 PARL. DEB., H.L. (5th ser.) 160 (1966) (Lord Arran).

78. Director of Public Prosecutions v. Knuller Ltd. (The *International Times* Case), [1972] 2 All E.R. 898.

79. *Id.* at 904.

another two males who wish to indulge in such acts."[80]

Refusing to interpret the Act as fully protecting private, adult, gay sexuality from the law's intrusion, the House of Lords saw the Act as only narrowly protecting that behavior. In a fascinating act of legal contortion, Lord Reid held: "There is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense."[81] And, because Parliament had not spoken with one moral voice, the compassion rationale was diminished. Lord Reid stated boldly: "I find nothing in the Act to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting."[82] It therefore remained "open to a jury to say that to assist or to encourage persons to take part in such acts may be to corrupt them."[83]

Parliament's decade of debate, which in part emphasized compassion for gay men and encouraged their social inclusion, was reduced to an extraordinarily narrow recognition of privacy, and was stripped entirely of its potential moral force. Where gay men had rejoiced in 1967 that the law (at least in the limited area of consensual, adult private sexuality) was no longer their enemy, they were told by the House of Lords only a few years later that their situation was precarious. Lord Morris' barely concealed threat that "[t]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in,"[84] warned gay men and lesbians that their social status rested on the ever-shifting winds of Parliament's, or the courts', or a jury's judgment of their moral worth. After three years of study by the Wolfenden Commission and ten years of Parliamentary debate culminating in "reform," British lesbians and gay men found their position little different than before. The hopes of MPs who eloquently sought more just treatment for a persecuted minority, combined with the statements of others who believed in the gay person's inherently immoral nature, produced an impossible situation. On paper, some gay sexuality was protected, but in practice, gay men were always "skating on thin ice." In assessing the post-*International Times* status of gay men, one commentator observed that "in any legal issue affecting our sexuality, we start with diminished rights, having to contend with the basic assumption that our behavior is essentially unlawful and tolerated only in very specific circumstances."[85]

C. The Dudgeon Case

A recent development in the United Kingdom's law regarding sexual orientation is the European Court of Human Right's *Dudgeon Case*.[86] While the

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 907.
84. *Id.* at 910.
85. Warner, *supra* note 39, at 87.
86. Dudgeon Case, *supra* note 9.

1967 Act decriminalized certain acts of gay intimacy in England and Wales, and a 1980 Act included Scotland in the decriminalization, gay sex remained a crime in Northern Ireland until *Dudgeon* was decided.

The anti-sodomy law was retained in Northern Ireland based on "the view that [permitting consensual sodomy] would be seriously damaging to the moral fabric of [Northern Irish] society."[87] The *Dudgeon* court, in an important ruling for lesbians and gay men, found that criminalizing private gay consensual sex breached Article 8 of the European Human Rights Convention, which broadly provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."[88] The court thus found a privacy right for gay men and struck down Northern Ireland's sodomy law.

In its decision, the Court of Human Rights weighed Northern Ireland's asserted morality interests against the harm to gay men from prosecution under the law. It held that "[t]he detrimental effects" of the law "on the life of a person of homosexual orientation" totally outweighed the state's morality interest.[89] Judging the law from the point of view of those it burdened, and implicitly finding gay men worthy of protection, the court emphasized that the state's morality argument could not, "without more, warrant interfering with the applicant's private life to such an extent."[90]

Yet, like the Wolfenden Commission and like Parliament, the court hastened to validate the moral indignation of homophobes, immediately noting that "decriminalization does not imply approval."[91] Apparently concerned that its human rights ruling might be regarded as a statement about the worthiness of lesbians and gay men, the court further disclaimed "making any value-judgment as to the morality of homosexual relations."[92] Statements like these diluted the essential moral statement made by the *Dudgeon* court: that lesbians and gay men, like other individuals, have a human right to dignity, privacy, and self-respect. *Dudgeon*'s holding is impressive and potentially far-reaching; yet, falling into the same trap as the British legislators, the *Dudgeon* court seriously weakened its impact by conceding too much moral ground.

IV
THE UNITED STATES EXPERIENCE

In the United States, the bare assertion of an alleged morality interest sounds the death knoll for sodomy law reform. Only a very few courts have struck down sodomy laws as a violation of lesbian and gay constitutional rights;[93] most, and now the Supreme Court, hold that only a rational basis for

87. *Id.* at 22.

88. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. VIII, 213 U.N.T.S. 221 No. 2889.

89. Dudgeon Case at 24.

90. *Id.*

91. *Id.*

92. *Id.* at 22.

93. *See* People v. Onofre, 51 N.Y.2d 476 (1980).

the state's interest is necessary to uphold anti-gay legislation.[94] Courts find the state's morality interest to be rational and therefore ignore any further constitutional arguments.

In sodomy law cases, courts find "rational" arguments which would be shocking if applied to other areas of constitutional rights. In *Baker v. Wade*,[95] the Fifth Circuit reasoned that seven centuries of unbroken hostility towards lesbians and gay men justified present sanctions against them. In *Bowers v.Hardwick*,[96] the Supreme Court reiterated this view. In fact, *Hardwick* dwells on the lesbian and gay history of persecution,[97] a history that lesbian and gay activists have strived to bring to public attention. Yet far from condemning this legacy of persecution, the Fifth Circuit and the Supreme Court endorsed it as justification for present and future discrimination. Clearly, a reliance on past discrimination as *per se* justification for present discrimination would have destroyed the possibility of civil rights gains for blacks and women; it is astonishing that courts freely apply this doctrine to lesbians and gay men. The rationale of *Hardwick*'s explicit holding, that popular antagonism towards lesbian and gay sexuality warrants its criminalization, would logically deny rights to any unpopular group.

Legal models for social change, of course, differ among countries. Unlike the European Court of Human Rights and the British Parliament, American courts virtually never use the compassion model or mention the suffering imposed on same-sex lovers by harsh criminal laws. Rather, American reformers must assert some legally recognized "right" in order to gain relief. The two most obviously applicable rights, the right to privacy and the right to equal protection under the laws, are the two which have proved most successful for other groups in the past. *Hardwick*, however, holds that the right to privacy does not apply to sexual acts between women or between men, in their homes or anywhere else. Equal protection challenges have been similarly unsuccessful.[98]

Despite its disclaimer at the outset that "[t]his case does not require a judgment on whether laws against sodomy between consenting adults. . .are wise or desirable,"[99] *Hardwick* is packed with so many hostile judgments and anti-gay innuendoes that it is difficult to read the decision as anything but that which the majority denounces in substantive due process: the "mere imposition of the Justices' own choice of values."[100]

According to the values of the majority, the right of heterosexuals to structure their families and conduct their private sexual lives as they wish

94. *See* Bowers v. Hardwick, 106 S.Ct. 2841, 2846 (1986).
95. 769 F.2d 289 (5th Cir. 1985).
96. 106 S.Ct. 2841 (1986).
97. *Id.* at 2844-46.
98. *See, e.g.*, Rowland v. Mad River Loc. Sch. D. Montgomery County, 730 F.2d 444 (1984), *cert. denied*, 105 S.Ct. 2127 (1985).
99. 106 S.Ct. at 2843.
100. *Id.* at 2844.

"bears [no] resemblance" to the claimed right of Michael Hardwick to structure his personal life in a way that is fulfilling to him.[101] The majority repeatedly casts Hardwick's privacy argument as an assertion of "a fundamental right to engage in homosexual sodomy,"[102] rather than a more general right to be free from state scrutiny into the intimate aspects of his life. Sneering at even the suggestion that such a right could exist in a scheme of ordered liberty, the majority analogized same-sex intimacy to "adultery, incest, and other sexual crimes."[103] Chief Justice Burger, in concurrence, cites with approval ancient Roman law under which lesbians and gay men were put to death for their sexuality;[104] observes that Blackstone classified voluntary gay sex as a crime worse than forcible rape; calls same-sex lovers "a disgrace to human nature;" and then valorizes these historical tragedies as "millenia of moral teaching."[105]

The great sodomy law morality debate took center stage in *Hardwick*, with the majority squarely entrenched within the moral fabric camp, and the dissent angry at the Court's refusal to adopt its individual liberties philosophy. Once the majority could identify Hardwick's argument as individual liberties doctrine, it easily dismissed his claim. The law, the majority pointed out, "is constantly based on notions of morality."[106] If rights are owed to all those burdened by hostile popular sentiments, the Court wrote tellingly, "the courts will be very busy indeed."[107] The dissent, by contrast, eloquently presented the losing argument that "blind imitation of the past"[108] was no excuse for modern discrimination, that the freedom to differ, enshrined in the Constitution, of necessity encompassed "the right to differ as to things that touch the heart of the existing order."[109] The dissent noticed that Michael Hardwick's gay identity made the majority "uncomfortable," and called the majority's focus on homosexual activity "almost excessive."[110]

The dissent, as individual liberties proponents always do, argued only that personal freedoms trump majoritarian morality interests, rather than offering its own moral theory in response. The dissent seems unable to understand why the majority rejects their individual liberties interpretation of the line of privacy cases beginning with *Griswold v. Connecticut*,[111] while the majority seems baffled by the dissent's failure to recognize what the majority be-

101. *Id.*
102. *Id.*
103. *Id.* at 2846.
104. *Id.* at 2847 (Burger, C.J., concurring).
105. *Id.* (Burger, C.J., concurring).
106. *Id.* at 2846.
107. *Id.*
108. *Id.* at 2848 (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).
109. *Id.* at 2854 (Blackmun, J., dissenting) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943)).
110. *Id.* at 2849 (Blackmun, J., dissenting).
111. 381 U.S. 479 (1965).

lieves is obvious: that all law is based on morality. The dissent commits the mistake of all individual liberties proponents: it grants the majority's assumption that codification of morality entails criminalization of sodomy.

And as usual in the traditional sodomy law morality debate, the lives of lesbians and gay men are overlooked. The only mention by either side that their debate is about real lives rather than abstract legal theory is in one sentence of Blackmun's dissent. Glimpsing the importance of this decision to tens of millions of Americans, Blackmun writes that "this case touches the heart of what makes individuals what they are," and urges special sensitivity towards "the rights of those whose choices upset the majority."[112] He then resumes his discussion of the traditional morality issues.

The problem is not just that five Supreme Court Justices did not take Michael Hardwick's claim seriously. If they view the issue as Hardwick's assertion of a "right to engage in homosexual sodomy," the Supreme Court cannot possibly find a place for Michael Hardwick in the Constitution. Although Hardwick and his many amici sought to frame the issue more broadly as the "right to be let alone,"[113] they were still forced to assert a cognizable "right." In doing so, Hardwick was trapped in the rights-based system full of pitfalls in the struggle for lesbian and gay rights.

To assert his right to privacy, Hardwick was forced to argue the position adopted by the dissent: that *Griswold* and its progeny conceptually included privacy rights for lesbian and gay eroticism. To do that, Hardwick was forced to emphasize the similarities between same-sex lovers and heterosexual couples. But their history of persecution and their experience of daily harassment creates a wide gap between lesbians and gay men and their heterosexual counterparts. The majority recognized this in its explicit review of that history and in its implicit appreciation of the magnitude of those differences. Michael Hardwick is not the same, the majority found, and his case is not like *Griswold*. The differences were fatal.

Ironically, had Hardwick decided to press an equal protection claim, a showing of a history of discrimination would have been required for a finding that lesbian and gay litigants deserve special protection. But even an equal protection claim would have left Hardwick pleading for rights this Court would not grant. An equal protection argument would have required Hardwick to jump through legal hoops, meeting the required "indicia of suspectness": a history of discrimination against lesbians and gay men, their discreteness and insularity today, and a biological basis of same-sex attraction. Again Hardwick would have been forced to analogize the lesbian and gay experience to that of the few other groups to whom the Court has begrudgingly granted special protection status.

Focusing on the similarities between these groups distorts the uniqueness of the lesbian and gay experience, particulary in states with sodomy laws.

112. *Id.* at 2854 (Blackmun, J., dissenting).
113. *Id.* at 2848 (Blackmun, J., dissenting).

While many other groups are considered second-class citizens by virtue of race, ethnicity, gender, religion, age, or handicap, lesbians and gay men are *criminals* in sodomy law states, living in constant fear of discovery and imprisonment. For the lucky who are not arrested, the stigmatization of sodomy laws affects their lives in a host of ways: judges cite such laws as justification for removal of children from lesbian and gay families, cities refuse to pass antidiscrimination ordinances on the ground that "criminals" should not have rights, and lesbians and gay men are loathe to push for social change since sodomy laws are primarily enforced against vocal opponents. Analogies to racism or misogyny ignore the mark of criminalization on lesbian and gay lives.

In the rights-based legal model, discussions of the suffering inflicted on oppressed groups have no relevance to the merits or outcome of a case.[114] No place exists in the argument for any discussion of actual lives; thus, it is not surprising that courts often ignore the suffering of and appear cold and dispassionate towards the disenfranchised. Litigators and activists cannot continue to accept this framework which preordains their defeat. As long as majority hatred passes for American "morality," and lesbians and gay men respond only with ineffective individual liberties arguments, rather than a new moral theory which puts them on higher ground and offers hope for long-term progress, lesbians and gay men will remain the victims of sodomy laws and judicial name-calling.

V
CONCLUSION

At the expense of alienated lesbians and gay men and the fractured society thus generated, American courts have failed to employ the feminist morality model of mutual concern and social cohesion. Sexual minorities in the United States are stuck trying to assert "rights" which courts refuse to recognize. Unless another model is adopted that replaces individuation with cohesion, and suffering with safety, American lesbians and gay men will continue to lead lives marked by secrecy, pain, and fear.

The British experience, beginning with the Wolfenden Committee's strands of compassion, through the remarkable number of MPs who spoke of mercy and understanding, and the European Court's bold refusal to allow moral opposition to override the sexual minority's interest in dignity and self-respect, offered a glimmer of a better legal model. But the reality of persistent hostility towards lesbians and gay men was determined a generation ago by the moral voice Parliament chose: pity for the unfortunate at best, separation for the immoral at worst. If the majorities in the United States and the United

114. Only in the limited procedural context of a standing argument may litigants mention the suffering and fear they have endured by virtue of the majority's "morality." Otherwise, these facts are irrelevant. *See* Hardwick v. Bowers, 760 F.2d 1202, 1204-07 (11th Cir. 1985), *rev'd.*, 106 S.Ct. 2841 (1986).

Kingdom refuse to value social connections over abstract moral theories, they will continue to splinter their respective societies and heap suffering upon lesbians and gay men.

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