A Philosophical Ground for Gays' Rights: "We Must Learn What is True In Order to Do What Is Right"

James M Donovan
ARTICLES

A PHILOSOPHICAL GROUND FOR GAYS' RIGHTS:
"WE MUST LEARN WHAT IS TRUE IN ORDER TO DO WHAT IS RIGHT"

James M. Donovan*

INTRODUCTION

This Article defends difference. Americans collectively — putting aside whatever we may do individually — but collectively, have never been comfortable with difference.1 Perhaps this is because we have so much of it. We have come from all over the globe but have interacted for a mere two hundred odd years. Were we to confront the fact of difference directly, perhaps we would realize how little there is that actually holds us together as a nation. Lacking any of the usual bonding similarities (e.g., religion, ancestry), American society manufactures them from psychological whole cloth and promotes them as allegiance to “American Ideals,” or pursuit of the “American Dream.” Problems over differences are intimately related to philosophies about equality, and consequently the laws and judgments meant to elaborate that concept. Just what does it mean to claim that “All men are created equal,”2 or that they are entitled to “equal protection of

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1 The one consistent exception to this statement is in the field of advertising (E.g., Arbys “Difference is Good” campaign). When several all-but-identical products compete for market shares, the emphasis must be on distinguishing a product by highlighting it’s differences. But this seems only to be an acceptable strategy for inanimate objects.

2 THE DECLARATION OF INDEPENDENCE PAR. 1 (U.S. 1776) (emphasis added).
the laws."89 Reconciling differences with equality taxes the American consciousness. Our contrived in-group markers function not so much to supersede the obvious differences within our population (e.g., "Yes, we're all different, but because we share these common ideals and dreams, the differences do not matter; we're all equal"), as to blind us to their presence through false reciprocity ("All Americans are equal; All Americans are alike in that they share these ideals and dreams: therefore all those who share American ideals and dreams must be alike, and all those who are alike are equal"). In the latter case, the part is confused with the whole, and the core Americanism taken to signify identity on all dimensions. This error read backwards produces the result that to deviate from the norm on any variable signifies a deviance at the core: One is judged "unAmerican."

But must individuals be similar to be equal? In other words, does the presence of difference ipso facto preclude social and political equality? While there are strong currents that assume the affirmative, this Article argues to the contrary.

Gays' rights organizations,4 one might think, would be at the forefront of advocating the social value of difference. But even here there is equivocation. Tom Stoddard, a leader of the March on Washington, was clearly uncomfortable defending the leather events during the march while being interviewed on Larry King Live, but he did not disown them despite the obvious political advantages of doing so.8 But on

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8 U.S. CONST. amend XIV, §1 (emphasis added).
9 I will not enter into the following debates: (1) I find it redundant and stylistically awkward to expand "gay" to explicitly include every nonheterosexual segment. As of today, at least, the full expansion of "gay" has become "Gay, lesbian, bisexual and transgendered." I shall stay with simply "gay"; and (2) "Gay rights" is a volatile expression in itself. Where most advocates struggle to reassure the American public that "gay rights" means only normal civil rights for all people, which includes gay people, opponents of these measures have successfully struck terror in the hearts of middle America by claiming that "Gay rights" means special rights that are reserved for gay people alone. Given the potential ambiguity, I will favor the technically more accurate "gays' rights" to highlight the point that the issue is the rights of gay people, not the rights for gay people.


7th CALLER: I just wanted to ask Tom there, I was reading in USA Today about the list of events they're having, and one of the events is, like, a leather-fetish festival or something. And if they want to be taken seriously, why do they do things like that? Because that wouldn't be taken seriously if they were heterosexual.
Mr. STODDARD: Well, as I mentioned before, this is a very large movement with a lot of different kinds of people, and we could probably find similar kinds of diversity within other movements. And I can't otherwise explain it to you, frankly.
KING: Do you think it'll harm them, William?
the whole, the gay establishment and its footsoldiers have not been unhesitant supporters of the value of difference. Some observers of the March felt that its organizers did exactly what Stoddard claimed should not happen:

[ACT UP's Steven] Smith also complains that the gay community's most extreme fringe members — including drag queens and leather fetishists — were pushed aside at the April gay-rights march to make the demonstration more appealing to straight America. In fact, many opponents of gay rights made a similar complaint about the march: In their view, the liberal media had deliberately downplayed the fringe elements to make the cause more palatable. a

This tension characterizes not merely factions within the movement, but also opposing tendencies within a single individual. Such vacillation was displayed by Ron Madson, a "leader in the Lesbian and Gay Teachers Association," during a recent appearance on Sixty Minutes. "The difference in our lives is that we fall in love with someone of the same gender." b Not a difference, but the difference, which further is "just one tiny part of our lives." c

Later in the same piece, Olivia Banks, chair of one of New York City's School Board curriculum committees, attempts to undermine the claims for equal protection of gays on the grounds that they are not different enough. "They have no special language, no special clothing, no special food, no special dress wear, so what — what makes them a culture? They don't fit into any definition of what a culture is." d Banks is, of course, wrong, at least from an anthropological perspective. But when confronted with this challenge, Madson is ready to counter, "We do have a culture. We do have our own literature. We have our own artworks. We have music that would be identifiable to lesbian and gay people." e

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a Mr. KRISTOL: It probably won't help.
Mr. STODDARD: I don't believe in trying to control people. I spend my life trying to empower people. People make their own choices. That's really what this is about.


c The Rainbow Curriculum, Sixty Minutes Transcript (Apr. 4, 1993) 25(8), Livingston, New Jersey: Burrello's Information Services, p. 3.

d Id.

e Id. at 6.

Id.
What we see is that when being attacked for being too different, gays can be packaged as vanilla as everyone else; but, when criticized for not being different enough, we can suddenly enumerate a plethora of sociocultural distinctions. Such versatility may be politically advantageous, but it is philosophically inconsistent. At the very least, it is unclear where the truth lies. Are we different, or aren't we?

A major platform of gays' rights seems to be that gays are entitled to social and political rights because, in fact, they are not different from the heterosexual majority when one looks past the definitional criteria of sleeping with the same sex. Any other differences, they claim, are "myths" and do not exist. From this perspective, without investigating bedroom behavior, one can never tell who is gay and who is not: Gays are just like regular people, the line goes, so they should be treated like them. "The best hope for acceptance," writes one Ann Landers reader, "is to show the straights that we are not very different from them."

The mission to portray gays as indistinguishable from heterosexuals has attracted some social scientists who try to legitimize this political strategy by arguing that it accurately reflects our empirical knowledge. The present Article seeks to remove this legitimization by demonstrating that such attempts are not, in actuality, accurate depictions of the present state of knowledge. It will do this through a systematic dissection of an exemplar of the type. If the "no difference" stance is at variance with the known facts, then any political strategy

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11 Letter from Out But Sane in Illinois, to Ann Landers, Advice Columnist, TIMES-REGISTRATION Jan. 4, 1993, at C-4. This reader's philosophy is wholly in keeping with that which Landers drills into her readership. Another letter-writer quotes her as saying that "I would rather concentrate on the similarities of humans instead of their differences." Letter to Ann Landers, Advice Columnist, SUN SENTINEL, May 2, 1993, at 2E. While the altruism within this philosophy cannot be denied, taken as a general approach to interacting with real people, it is tantamount to chronic denial of the fact that people are different, and that it is unfair to all parties to homogenize them.

Similar assertions in the gay context can be easily collected. For example:

Many people, [Larry] Kramer among them, continue to invest in this fantasy of the homosexual as a separate category of persons defined by a stable sexuality. This gets in the way of attempts to show straight culture that there is no hard-and-fast distinction between homosexual and heterosexual desire except in particular historical moments — and, thus, no sound basis for devaluing homosexuals.

Letter from John Champagne, to Editor, 620 ADVOCATE 12 (Jan. 12, 1993). Note that, according to this letter writer, homosexuals should not be devalued because ("thus") there are no extra-definitional distinctions between them and heterosexuals. To him, apparently, full social participation is an entitlement for full conformity only. Assuming he holds this consistent philosophy, should differences be proven to exist, he would necessarily concede that their presence warrants the disenfranchisement of gays and lesbians. I will address this problem in the concluding section.
that adopts it as a justification for legislative or judicial action is perpetrating a philosophical fraud.

I. AN EXEMPLAR OF THE DENIAL OF DIFFERENCE

In the premiere volume of *Law & Sexuality*, Gregory M. Herek contributed an article in which he intended to provide "members of the legal profession with an overview of social science theory and empirical research concerning sexual orientation." Specifically, he hoped to arm "attorneys involved with litigation concerning gay rights" with the necessary data to "refute myths and erroneous stereotypes about lesbians and gay men." 18

A numbered series of so-called "myths" are stated, followed by relevant empirical findings designed to debunk them. The eight stereotypes addressed by Herek are: (1) Homosexuality is a form of mental illness; (2) Because of social stigma, lesbians and gay men are more likely than heterosexuals to manifest low self esteem, to be depressed, or to be suicidal; (3) Being homosexual is a choice that can be changed; (4) Homosexuals are more likely than heterosexuals to molest children sexually; (5) Being exposed to a homosexual parent or role

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19 Id. at 172.
14 So-called, because "myth" in ethnocentric Western parlance is defined as being necessarily false, probably due to the fact that the supernatural subject matter of prototypical mythology is also deemed necessarily false by Westerners (usually without adequate justification). Cf. James M. Donovan, *Blaming it on God: Considerations when Presented with Supernatural Explanatory Entities*, 2(2) *Method & Theory in the Study of Religion* 230 (1990).

According to Webster's, myth can be colloquially understood as "any fictitious story, or unscientific account, theory, belief, etc." *Webster's New World Dictionary* 898 (3d college ed. 1988). To label a priori these eight statements as myths, therefore, is to surrender any claim to objective consideration on the scientific merits. We are immediately cued to the possibility that the article might be as much propaganda as review.

The legitimate core of what Herek means by "myth" is more accurately conveyed by the term "stereotype." Stereotypes, Herek writes elsewhere, "result when we (1) categorize people into groups on the basis of some characteristic; (2) attribute additional characteristics to that category; (3) then attribute those other characteristics individually to all of the group's members." Gregory M. Herek, *Stigma, Prejudice, and Violence against Lesbians and Gay Men, in Homosexuality: Research Implications for Public Policy* 67 (John C. Gonsiorek & James D. Weinrich eds., 1991). In other words, extra-definition attributes are presumed to have the same distribution as definitional ones. Such attribution may or may not be accurate, the determination being a matter for empirical study. But because "stereotype" denotes an attribution process and not a truth-value, its use is to be preferred to "myth."
model is likely to have negative effects on a child; (6) Lesbians and gay men are not capable of sustained relationships; (7) Gay people are not a minority group; and (8) Gay people are detrimental to the morale, discipline, or efficiency of an organization or institution.

The author performs a valuable service to legal professionals when he guides them swiftly through literature of which many of them would not be aware. However, having discussed these eight points, he closes with the following sweeping statement: “[T]he overwhelming conclusion to be drawn from empirical data is that lesbians and gay men, as a group, do not differ significantly from heterosexuals in their psychological and social functioning.”15 The implication is that no scientific grounds exist to raise the issue of a party’s sexual orientation during the course of a judicial proceeding. An opponent’s efforts to do so, therefore, should be objected to on the grounds of attempting to inflame rather than inform a jury or judge. Herek’s interpretation is receiving the legal establishment’s stamp of approval, having been cited warmly by at least two of the discipline’s major reviews.16

This broad dismissal of between-group differences can be read at two levels. First, the literal understanding of his phrase is that there are simply no differences, period; second, playing off the use of “significant,” that such differences as do exist are not relevant or pertinent to any legal contexts. Since the author does not make clear which meaning he intends, both must be considered.

II. BETWEEN-GROUP DIFFERENCES

Herek oversimplifies when he claims that “researchers should assume the burden of proof for showing that lesbian and gay people differ from heterosexuals on social and psychological variables.”17 He seems to imply first that one’s working assumption in the absence of both theory and data should be that no differences exist. This is true. But he seems also to suggest that, if there is neither contrary evidence nor theory, then the null hypothesis can be asserted as a “fact.” Thus, the lack of evidence that group A and group B differ on variable X can be

15 Herek, supra note 12, at 172.
17 Herek, supra note 12, at 138.
interpreted as a positive finding that these groups do not differ on this variable. This conclusion is not valid.

The scientist can never prove the null hypothesis. Research design requires that he or she attempt to disprove it. The null hypothesis is never accepted experimentally; one merely fails to reject it. Herek’s conclusion that homosexuals do not differ from heterosexuals is dangerously close to asserting the null hypothesis. Even were he absolutely correct that all studies to date had failed to document any substantial between-group differences, the most that could be concluded is that, today, no differences have been observed. Tomorrow, new approaches examining different variables might uncover major differences. Thus, as a description of the present state of knowledge, “no differences” might be accurate; as a conclusion of fact about the immutable nature of the groups, “no differences” would be scientifically irresponsible.

But legal professionals need not dwell upon this strand of philosophy of science, since Herek has wrongly depicted the data as failing to reveal differences between the two populations. In fact, his conclusion that there are no differences of note between homosexuals and heterosexuals comes as something of a surprise. Gonsiorek, a noted researcher and writer on homosexuality, states that “[h]omosexuals and heterosexuals may differ from each other in many ways; indeed, it would be curious if they did not.”18

The finding by Herek of “no differences” is logical only if two conditions are met. First, full consideration of Herek’s eight stereotypes must reveal no meaningful differences between the subject populations. Second, the eight stereotypes must somehow exhaust the complete universe of possible dimensions of “psychological and social functioning” along which variation can occur. If they do not, then even should no differences emerge among his eight highlighted conditions, no broader conclusion is warranted. Should either of these conditions not be met, then the conclusion offered by Herek is a logical non sequitur.

A. Reconsidering “Myths” Two and Four

“Myth” Number Two: “Because of social stigma, lesbians and gay men are more likely than heterosexuals to manifest low self es-

to be depressed, or to be suicidal.”

Under this stereotype, Herek discusses whether homosexuals are at higher risk for various forms of psychological distress, and, if they are, whether this increased risk is a factor of stigmatization. This Article examines only one form of this distress, alcoholism. Although there is an extensive literature about the interactions between homosexuality and alcoholism, Herek mentions it only tangentially.

It is unclear why Herek phrases this stereotype as he does. The important point for his purposes is whether or not homosexuals are distinguishable from heterosexuals by being “more likely . . . to manifest low self esteem, to be depressed, or to be suicidal.” If these differences hold, why they hold is certainly of interest, but largely irrelevant for present purposes.

However, as phrased, it would appear that Herek cannot win with this one. If we take as a given that, generally speaking, stress contributes to alcohol abuse, and, as Herek concedes, being gay in American society can be a chronically stressful circumstance in part due to the need for “passing” and “covering,” and the potentially dire consequences for failing to do so adequately, then either of three outcomes are possible, any of which deny Herek’s result of no differences.

On the one hand, if, despite the added stresses associated with their sexual orientations, gays demonstrate no differential alcoholism rates, then it is reasonable to expect that, absent these added stresses, the rates would be lower than among heterosexual samples. Thus, all things being equal, the correct conclusion to draw would be that homosexuals are less prone to alcohol abuse. On the other hand, if homosexuals have the same initial tendencies toward alcohol abuse as do heterosexuals, then the increased stresses of coping in a heterosexual society

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10 Not necessarily an extensive literature of high quality. As the review by S. Israelstam and S. Lambert demonstrates, the quality of much of the psychoanalytic literature dwelling on this topic is inversely proportionate to the author’s dogmatism. S. Israelstam and S. Lambert, Homosexuality as a Cause of Alcoholism: A Historical Review, 18 Int'l. J. Addictions 1805 (1983).

11 Herek, supra note 12, at 144.

12 Christopher D. Tori, Homosexuality and Illegal Residency Status in Relation to Substance Abuse and Personality Traits among Mexican Nationals, 45 J. CLINICAL PSYCHOL. 914 (1989); John E. Monegeon & Thomas O. Ziebold, Preventing Alcohol Abuse in the Gay Community: Toward a Theory and Model, in ALCOHOLISM & HOMOSEXUALITY 89 (Thomas O. Ziebold & John E. Monegeon eds., 1982).

should result in increased rates of alcohol abuse. A final logical possibility, that homosexual populations do not translate increased living stresses into proportionate alcohol abuse would again distinguish the two populations if for no other reason than implying that homosexuals have better alternative social and psychological coping mechanisms than do heterosexuals.

All resolutions require that the groups be nonequivalent. The only difference is in what variable the difference will manifest. Logic impels us toward the conclusion that significant differences exist between homosexuals and heterosexuals on this variable. We now turn to the empirical arguments.

Do samples of homosexuals report higher alcoholism rates than comparable heterosexual groups? Almost all, if not all reviews and research on the problem conclude that homosexual samples indeed display higher alcohol abuse than do heterosexual samples. For instance, Smith reports that “[a]vailable statistics suggest that approximately one-third of homosexual male adults in cosmopolitan areas are alcohol abusers, while one in 10 is the estimate of alcohol abusers in the population at large.” Zehner and Lewis cite without reservation Ziebold’s 1979 estimate that “[a]mong the gay and lesbian population probably 20%-30% are alcoholic, twice to three times as large a percentage as in the general population,” while Kus’ review concluded much the same:

Fifield, for example, found that 31.4% of gays and lesbians in Los Angeles could be considered alcoholics or at least heavy drinkers. Lohrenz . . . [et al.] found that 29% of [their gay sample] could be categorized as alcoholic. Saghir and Robins also found high incidence of “excessive drinking behavior” or “alcohol dependency” among both gays and lesbians at some point in their lives. Specifically, they found 35% of the lesbians fit this pattern compared to only 5% of heterosexual women, and 30% of gays compared to 20% of heterosexual men.

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The important issue in all of these statements is not the absolute rate of alcohol abuse, but the comparative rates between homosexual and heterosexual samples. How alcoholism is defined,
McKinnan and Peterson, in a sample of 3,400 homosexuals, found that “[s]ubstantially higher proportions of the homosexual sample used alcohol, marijuana, or cocaine than was the case in the general population.” Although higher use does not necessarily signify increased abuse, the authors found that in this case the rule applied: “23% of the homosexual sample reported an alcohol problem versus 12% among the general population.” Lewis et al., after comparing 57 homosexual women with 43 heterosexual women, reported that “[h]eavy drinking or questionable alcoholism was reported for 33% of the homosexuals versus 7% of the controls, and the alcoholic group accounted for 28% of the homosexual versus 5% of the heterosexual subjects.”

Stall and Wiley failed to document prevalence rates as high as these, but they did find that “gay men in this sample were approximately twice as likely to be frequent/heavy drinkers or abstainers as heterosexual men.” Tendency toward heavy drinking among homosexuals may well apply cross-culturally. Tori found that “[c]ontrary to initial expectations, . . . the two [Hispanic] homosexual groups [one living illegally in the United States, the other living in Mexico] were not significantly different. As predicted, however, homosexuals were found to be drinking more than the heterosexual participants.”

and whether it is distinguished from “problem drinking” can impact discovered absolute rates. This is particularly important here, since much of the published contrasts come from the 1970s.

“Room has argued convincingly that estimates of the number of alcoholics in the general population have typically been based on survey data collected during the 1970's which have focused on 'problem drinking', a much broader category than that used in the typical clinical diagnosis of alcoholism.” W. Faulkner et al., The Disease Concept of Alcoholism: The Persistence of an Outmoded Scientific Paradigm, 9 DEVIANT BEHAV. 317, 320 (1988).

Attempts to replicate these results would most likely apply more stringent criteria to distinguish true alcoholism from simple problem drinking, and consequently find lower absolute rates than those reported here. Thus our attention is not on how high is the rate of alcoholism among homosexuals, but rather, if the same criteria are applied to both homosexuals and heterosexuals, whether the rate of incidences is higher in the former sample.

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91 Id. at 549.

92 Collins E. Lewis et al., Drinking Patterns In Homosexual and Heterosexual Women, 43 J. CLINICAL PSYCHIATRY 277, 278 (1982).


94 Tori, supra note 21, at 816.
Finally, we may turn our attention to Gonsiorek's summary:

With regard to rates of alcoholism, Mostbacher reviewed the literature on alcohol and substance abuse rates in homosexual and heterosexual women and concluded that lesbians appear to be at greater risk for alcohol abuse than heterosexual women. Similarly, Anderson and Henderson, in their review, concluded that there was an increased risk of alcoholism among lesbian populations and theorized that it is due to heightened stress resulting from societal oppression. Kus concluded that there is a higher instance of alcoholism among gay men and theorized that this is related to lack of self-acceptance concerning homosexuality.81

Thus, the weight of empirical evidence seems to come down in favor of the conclusion that, indeed, the homosexual population displays a higher rate of alcohol abuse than does the heterosexual population. However, Gonsiorek concludes his review, "Herek raised questions about the nonrepresentative samples used in some of this research, and concluded that truly empirical support for a higher incidence of alcoholism among homosexuals is lacking."82

Herek, then, is the lone dissenter on this point. But an examination of Gonsiorek's source for Herek's argument reveals that Herek devoted but a single paragraph to the topic. There Herek offers not an analysis detailing the flaws of these studies (and he mentions only two by name), but an easy dismissal: "Blau's allegation [that 'gay people should be subject to more intensive SCI (sensitive compartmented information) clearance investigation . . . because [they] are more likely to manifest drug or alcohol dependence'], based on studies with non-representative samples, has not been supported by empirical research."83

Going against the published findings as it is, this dismissal is less than convincing for at least two reasons. First, it is not clear how he is using the term "empirical." Something is "empirical" to the extent that it is "relying or based solely on experiment and observation rather than theory."84 Thus, a project can draw upon a wholly unrepresentative sample without impugning its status as "empirical." What is compro-

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81 Gonsiorek, supra note 18, at 134.
82 Id.
83 Herek, supra note 22, at 1040.
mised is the work's inferential power.

More puzzling, however, is Herek's willingness to use sample unrepresentativeness as a fatal flaw. As Gonsiorek notes elsewhere, "Few research endeavors to date have used a representative homosexual sample. . . . [E]very study in this area has sampled from particular, and sometimes unusual, segments of the homosexual population."95 In fact, he correctly asserts that "it is impossible to obtain a completely representative sample of homosexuals . . . ."96 The best a researcher can do is to make the samples as comparable as possible, in order to avoid as many sampling error pitfalls as he or she can.

The mere claim of unrepresentative sampling should be insufficient to dismiss a research report, since this criticism can be leveled at literally everything ever written about homosexuality.97 Herek cites no corroborating literature in support of his contention that differential alcoholism rates are a tenuous and unestablished conclusion. The conclusion must be, therefore, that the preponderance of evidence suggests that alcohol abuse occurs at higher rates within homosexual as compared to heterosexual populations.

This stereotype also specifically includes the denial that any differences, should they be found, would be due to stigmatization. A recent study, one not considered by Herek, demonstrated "empirically" that such is exactly the case. McKirnan and Peterson speculated that "[m]embership in a 'sexual minority' may exacerbate the stress-related substance use found generally, and the importance of bar settings as social foci in homosexual culture may create vulnerability for substance abuse."98 Based on a large sample (n = 2,603), the authors concluded:

The hypothesis that the interactions of personal or social stress with these vulnerability measures would significantly predict alcohol abuse was sup-

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95 Gonsiorek, supra note 18, at 120.
96 Id. at 123.
97 In actuality, Herek displays a willingness to accept the conclusions of reports that favor his positions, even when he admits the biased sampling upon which they are based. For instance, he refers approvingly to a telephone interview conducted by the San Francisco Examiner. In a footnote, he admits that "the sample is biased by the willingness of respondents to identify themselves as gay to a telephone interviewer," but that, despite this flaw, the survey is important because it "represents the first published study of its kind in the United States." Herek, supra note 22, at 1037 n.3. All we ask is that he be as generous to articles that challenge his presuppositions.
ported. The stressors of discrimination attributable to sexual orientation and negative affectivity were directly related to alcohol abuse, and had significantly greater effects among those who were more "vulnerable" in terms of expectancies or a bar orientation.90

The attempts by Herek to refute the second stereotype fail on all counts. First, homosexuals and heterosexuals do differ on rates of some forms of psychological distress, such as those related to alcohol and substance abuse. Also, although I have not researched the matter in depth, a community perception has emerged that gay teens, at least, are vulnerable to another form of psychological distress, suicide. Second, the increased tendency toward alcohol abuse among homosexuals can be directly linked to the stigmatization of being "queer" in a "straight" society.

Plainly and sadly stated, "Myth" Two is no myth.

"Myth" Number Four: "Homosexuals are more likely than heterosexuals to molest children sexually."

If the failing of Herek in the previous section was to ignore the contrary literature, he errs in a different way here. Everything hinges upon how one defines homosexual.

Herek opts to use homosexual "adjectivally to refer to sexual behavior between men or between women."40 He avoids the "use of 'homosexual' as a noun . . . because of its clinical connotations and its historic association with pathology."41 Gay, finally, "is used to describe a person whose personal identity is based upon a homosexual orientation."42

These definitions, not wholly inappropriate, do present Herek with an unrecognized problem. The stereotype is about "homosexuals," while his ultimate conclusion is about "gays." But is homosexual synonymous with gay save for the "clinical connotations" attached to the former? Such an equivalency is most assuredly not the case.43 Even if

90 Id. at 465 (emphasis added).
40 Herek, supra note 12, at 134 n.2.
41 Id.
42 Id.
43 Cf. Kus, supra note 25, at 39 n.1. Stephen O. Murray reports the following from one of his informants: "[T]here are others who have a lot of homosexual, um, 'release' shall we say' --- like they make it every day in some sordid tea room, for instance, but would never admit to being gay."
Herk is allowed his conclusion that "[i]t appears from these studies that gay men are no more likely than heterosexual men to molest children," he still has not refuted the stereotype that refers to homosexuals, not merely those homosexuals who are also gay.

But do the studies show even this much? We need not dwell upon the literature that Herk cites as evidence intended to support the stereotype. Cameron's data clearly refer to "homosexual molestation" in the sense that it is man/boy sexual activity. He assumes in discussion that all those adult men who pursue sex with young boys are homosexuals. Herk correctly argues that this assumption is invalid, leading to the conclusion that there is no positive evidence to support the stereotype; that is to say, we cannot reject the null hypothesis. But this is not what Herk needs to refute the stereotype, nor is it what he claims.

Philosophical reservations notwithstanding, we might be inclined to accept a null hypothesis as practically valid even if it is not factually so. We do not, after all, wish to become caught up in an evidentiary version of Zeno's Paradox. To make this heuristic leap, a substantial body of literature, which tried to document the alleged higher molestation rates among homosexuals but failed, is needed. None of the literature Herk cites, however, seems to have directly addressed this point.

The necessary strategies to research the problem are described by Newton:

In principle, it should not be difficult to design a study which would provide the information needed to show the relationship between homosexual behavior and child molestation. One might, for example, take a random sample of those men and women who are "homosexual" and find the proportion of them who can be regarded as "child molesters." Alternatively, one might identify a random sample of those who are "child molesters" and see what part of this sample can be classified as "homosexuals." Finally, appropriate comparisons

\[\text{[What are they? What would you call them?] Closet cases. They're homosexual, but they aren't gay.] Murray, A Folk Theory of Homosexual Categorisation: Extract from an Interview, 4 Anthropological Res. Group on Homosexuality Newsl. 6 (1982). For a more detailed consideration of the defintional boundaries of homosexual and gay see James M. Donovas, Homosexual, Gay, and Lesbian: Defining the Words and Sampling the Populations, 24 J. Homosexuality 27 (1992).}

\[\text{** Herk, supra note 12, at 156.}

with comparable groups of "heterosexuals" would allow an investigator to determine the extent to which child molestation is an act characteristically related to homosexual behavior.\footnote{David E. Newton, Homosexual Behavior and Child Molestation: A Review of the Evidence, 13 Adolescence 29, 31 (1978).}

At the time he wrote, Newton was able to state that "no such study has ever been conducted."\footnote{Id.} This lack should not be mystifying. Both homosexuals and child molesters are hidden populations, therefore the sampling limitations already discussed for the former apply to the latter and their joint presence in a research design can render meaningful interpretation of research outcomes a tricky task indeed.

The Groth and Birnbaum study was published contemporaneously with Newton's review, and may be an exception to his conclusion. Indeed, Herek seems to believe that it is, since he discusses it extensively. He approvingly summarizes it as showing that "[i]n a sample of 175 adult males who were convicted in Massachusetts of sexual assault against a child . . . none had an exclusively homosexual adult sexual orientation."\footnote{Herek, supra note 12, at 154.} The rub here is with the word "adult."

Groth and Birnbaum divide their sample (which they inaccurately depict as "random") "into two groups on the basis of whether the offender's sexual involvement with a child represented a fixation or a regression in his sexual orientation in regard to age preference."\footnote{A. Nicholas Groth & H. Jean Birnbaum, Adult Sexual Orientation and Attraction to Underage Persons, 7 Archives Sexual Behav. 175, 176 (1978).}

"Fixation" is defined as a temporary or permanent arrestment of psychological maturation resulting from unresolved formative issues which persist and underlie the organization of subsequent phases of development. A fixated offender has from adolescence been sexually attracted primarily or exclusively to significantly younger persons . . . \footnote{Id.}

"Regression" is defined as a temporary or permanent appearance of primitive behavior after more mature forms of expression had been attained, regardless of whether the immature behavior was actually manifested earlier in the individual's development. A regressed offender has not exhibited any predominant sexual attraction to significantly younger persons during his sex-
ual development.\textsuperscript{41}

We are not told how this subdividing of subjects was accomplished.

The authors concluded that “[t]here were no men who were primarily sexually attracted to other adult males found among the group of regressed child offenders.”\textsuperscript{42} Child molesters in the regressed category, in other words, had all previously been heterosexual. Herek would seemingly have us stop here, though, and not proceed to examine the second, fixated category.

By their discussion, to be fixated means definitionally that one does not have an “adult sexual orientation.” By this, however, it is not meant that, as adults, these individuals lack a sexual orientation, but rather that their sexual orientation is not towards adults of either sex, but is instead directed toward juveniles. Thus, Groth and Birnbaum can offer their provocative suggestion that perhaps “the sexual attraction to children has particular and specific psychological dynamics underlying it rather than being the result of either situational opportunity or an indiscriminate, unorganized, polymorphous sexual desire.”\textsuperscript{43}

Unfortunately for Herek, the definition of homosexual does not require that the object be an adult, but merely of the same sex. Scott, the 20-year-old “clinical example of a fixated offender” offered by Groth and Birnbaum is clearly homosexual.\textsuperscript{44} The lack of homosexual males regressing from adult male objects to immature boys does little to dispel the stereotype that homosexuals are more inclined to be pederasts, and can at best only suggest that homosexual pedophiles are more likely to be of one type than another.

Herek’s discussions of this topic in both Myths and Homosexuality depend entirely upon this single research article for support. But the Groth and Birnbaum study does not bolster Herek’s statement that “gay men are no more likely than heterosexual men to molest children” since it explicitly limited its conclusion to the claim that those homosexuals who are attracted to adult men are very unlikely to pursue minors. Should a greater percentage of homosexual men be “fixated,” the category could still evince a greater tendency toward pederasty despite the finding that they are less inclined to “regress.” Ultimately lacking a

\begin{itemize}
\item \textsuperscript{41} Id. at 177.
\item \textsuperscript{42} Id. at 180.
\item \textsuperscript{43} Id. at 179.
\item \textsuperscript{44} Id. at 176.
\end{itemize}
study designed along the lines Newton suggests, this stereotype cannot
be definitively disputed. 86

B. Additional Dimensions of Variation

Herek’s conclusion will also fail if his eight stereotypes do not ex-
haust all variables on which heterosexuals and homosexuals can differ.
Indeed, variables omitted in Herek’s review can be added. The most
fundamental levels of differentiation are the genetic and the biolog-
ical. 86 While some have always advocated a biological and/or genetic

86 There is no escaping the fact that pedophilia is the favorite dead horse of the fear-mongers,
and the amount of disinformation on the subject is incredible. The flap of the admission of
International Lesbian and Gay Association (“ILGA”) to advisor status to the United Nations
unleashed a fresh flood, since the North American Man-Boy Love Association (“NAMBLA”) is a
member of ILGA. Court, if you wish, the factual errors and inflammatory innuendo contained
within John Leo’s one page editorial. John Leo, Pedophiles in the Schools, U.S. NEWS & WORLD

Still, it is not altogether clear why, scientifically, this question needs addressing at all. Mole-
station is a mongrel category, confounding as it does a sense of physical abuse of juveniles with
merely consensual sexual activity between persons, one of whom happens to be on the wrong side
of an arbitrarily designated age of legal consent. It is theoretically uninteresting to pursue re-
search that treats a fifty-year-old man forcing himself upon a six-year-old child and a nineteen-
year-old making love to a sixteen-year old as being two instances of a single type. Nevertheless, if
one feels compelled to pursue the point, a good place to start would be with the “enemy’s” own
data.

Cameron et al. asked “respondents . . . to nominate the age of their preferred and minimum-
aged sexual partner(s).” 44.4% of heterosexual males preferred females of less than 18 years of
age, while only 17.7% of homosexual males preferred similarly-aged males. 7.1% of homosexual
women preferred legal minors, as compared to only 4.2% of heterosexual women. Cameron et al.,
supra note 45, at 334. In the case of men especially, homosexuals seem to be much less interested
in minors as ideal sex partners than heterosexual males.

Surprisingly, Cameron et al., in light of these data, conclude that “bi- or homosexuals more
frequently claimed sexual interest in minors than heterosexuals did.” Id. at 333. This analysis is
clearly invalid, since it must have collapsed all scores into a single comparison, which would be
meaningless. Properly, each sex/sexual orientation should have been compared with the others.

86 The biological foundation of homosexuality is a theme whose popularity rises and falls,
and is usually couched in terms of essentialist versus constructionist schools. E.g., IF YOU SEDUCE
A STRAIGHT PERSON, CAN YOU MAKE THEM GAY? ISSUES IN BIOLOGICAL ESSENTIALISM VERSUS
SOCIAL CONSTRUCTIONISM IN GAY AND LESBIAN IDENTITIES (John P. DeCecceo and John F. Ellis
eds., 1993) (This is a poor book, and therefore typical of the general discussion on this topic).
I will merely point out here that the rejection of a biological contribution is paralleled by a similar
hard-line refusal to admit of biological differences between the races.

In retrospect it is easy to see that the social scientists, in their revulsion to the racism of
Hitler’s Germany in particular, and to the kind of scientific racism that had characterized
Western thought for so long in general, as well as in their determination to correct the
pages of black history, were in no mood to brook any notion, no matter how scientifically
respectable, that smacked of white/black biological differences — differences that they
foundation of homosexual orientation, good evidence was lacking until recently. Swaab and Hofman report that “the volume of the suprachiasmatic nucleus (SCN) ['the principal component of the biological clock generating and coordinating hormonal, physiological and behavioral circadian rhythms'] in homosexual men is 1.7 times as large as that of a reference group of male subjects and contains 2.1 times as many cells.”67 By contrast, “[i]n another hypothalamic nucleus which is located in the immediate vicinity of the SCN, the sexually dimorphic nucleus (SDN), no such differences in either volume or cell number were found.”68 This finding is interesting for the fact that the SDN is “a cubic millimeter of tissue that is exquisitely sensitive to testosterone and estrogen,” and is normally at least twice as large in males as in females.68 “The conclusion . . . is that the SDN data do not support the global hypothesis that homosexual men have a ‘female brain.’ An association was found, however, between sexual orientation in men and SCN size, from which the functional implications are momentarily not clear.”69

LeVay has found that the interstitial nuclei of the anterior hypothalamus, which “participates in the regulation of male-typical sexual behavior,” was “dimorphic not with sex but with sexual orientation, at

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68 Id.
70 Swaab and Hofman, supra note 57, at 146.
least in men.”\textsuperscript{61} Specifically, the nucleus was twice as large in specimens from heterosexual as opposed to homosexual donors. This result “adds to a small but growing body of observations suggesting that many structural differences in the brain — may be determined by prenatal hormone levels.”\textsuperscript{62} The conjunction of this study with that of Swaab and Hofman suggests that one does not have either a “male brain” or a “female brain,” but rather different structures within the brain have their own developmental cycles and windows of sensitivity to hormonal action. The brain, therefore, instead of being perceived as a monolithic whole that is either of one sex or the other, is more accurately envisioned as a mosaic.

Finally, Allen and Gorski similarly report a cerebral anatomical difference between the sexual orientations. What distinguishes this study from its predecessors is that the difference was found in “a sexually dimorphic structure not directly related to reproductive function.”\textsuperscript{63}

The midsagittal plane of the anterior commissure in homosexual men was 18\% larger than in heterosexual women and 34\% larger than in heterosexual men. This anatomical difference, which correlates with gender and sexual orientation, may, in part, underlie differences in cognitive function and cerebral lateralization among homosexual men, heterosexual men, and heterosexual women.\textsuperscript{64}

It is unclear how these anatomical differences arise. While they may be the effect of sexual orientation via some as yet unknown mechanism, it is currently more parsimonious to speculate that these anatomical features and sexual orientation are jointly caused by underlying

\textsuperscript{61} Simon LeVay, \textit{A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men}, 253 Sci. 1034 (1991). LeVay himself interprets these results as being structural analogs to psychological differences:

There are differences in some ways of thinking that, on average at least, separate gay men from straight men. On average, gay men are worse at spatial tasks and better at verbal tasks than straight men. But also I think you have some more complex aspects of personality. It's a stereotype, but many gay men do gravitate to professions that demand more creative, caring traits. That's probably biological.

Joe Dolce, \textit{And How Big Is Yours?}, 630 Advocate, June 1, 1993, at 38, 40 (interview with Simon LeVay).


\textsuperscript{64} Id.
genetic influences.

Bailey and Pillard conducted a twin study, and found that “52% (29/56) of monozygotic cotwins, 22% (12/54) of dizygotic cotwins, and 11% (6/57) of adoptive brothers were homosexuals.”\(^\text{46}\) The authors concluded that even when using the most conservative estimates, “for every model h\(^2\) [heritability estimate] was significant. In contrast c\(^2\) [estimate of variance attributed to shared environment] was significant in none.”\(^\text{46}\) In other words, the question is no longer whether homosexuality is genetic, but rather to what extent it is genetic. Possible values ranged from a low of .31 to a high of .74. The authors have recently replicated this study using women, with similar results.\(^\text{47}\)

The conclusion, which could only be inferred from the above reports, was ratified with the research of Dean Hamer and his team. In a piece that has not been fully digested, and that bears replication before it is treated as a given, they examined the chromosomes themselves. They found on the sex chromosome a region (Xq28) that may contain several hundred genes. Sexual orientation, they conclude, is linked to this region. In their words, “We have now produced evidence that one form of male homosexuality is preferentially transmitted through the maternal side,” and that the statistical confidence in this result is greater than 99%.\(^\text{48}\)

We could also pursue differences that fall into the category of “de-

\(^\text{46}\) J. Michael Bailey & Richard C. Pillard, A Genetic Study of Male Sexual Orientation, 48 Archives Gen. Psychiatry 1089 (1991). Not reported in this article are the data relative to a fourth group, genetically related non-twin brothers of gay men, among which was found a concordance rate of 9%. Cf. Masha Gessen & David McGowan, Raiders of the Gay Gene: Scientists Trying to Prove that Sexuality is Biologically Determined are the New Media Darlings, Advocate, March 24, 1992, at 60, 61. This result is unexpectedly lower that the 11% reported for nongenetically related siblings, and hence confounds any attempt at arriving at a simplistic “gay gene” interpretation of the study.

\(^\text{47}\) Bailey & Pillard, supra note 65, at 1093.

\(^\text{48}\) J. Michael Bailey et al., Heritable Factors Influence Sexual Orientation in Women, 50 Archives Gen. Psychiatry 217 (1993). Besides corroborating the results of the first paper, this study focusing on females yields the following remarkable statement: “Probands reported significantly more homosexual sisters than brothers, suggesting that male and female homosexuality are at least somewhat independent etiologically.” Given that most theories of homosexual development have been based on studies of men, and then applied to women by inverting critical variables, this evidence of relative etiological independence is eye-catching indeed. Lesbians and gay men may not simply be mirror images of one another.

velopmental neuroimmunoendocrinology," beginning with the question of handedness. McCormick and her colleagues report that homosexuals display an increased incidence of left-handedness, particularly among women. While this may not seem particularly interesting, it becomes so when one sees the "improbable web" of which it is but one strand: "purported associations" exist between left-handedness and "such seemingly disparate conditions as autism, . . . hair pigmentation, tongue-rolling ability, diabetes, schizophrenia, and Alzheimer's disease." If homosexuals tend both toward alcohol problems and left-handedness, we would therefore expect that handedness is correlated to alcoholism. This would seem to be the case.

Cognitive differences have also been documented between homosexuals and heterosexuals. After reviewing the available literature, Weinrich concludes that "the more representative the sample studied,

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70 Cheryl M. McCormick et al., Left-Handedness in Homosexual Men and Women: Neuroendocrine Implications, 15 PSYCHONEUROENDOCRINOLOGY 69 (1990).
71 Durden-Smith & DeSimone, supra note 69, at 51.
72 Carol J. Fry, Left-Handedness: Association with College Major, Familial Sinistrality, Allergies, and Asthma, 67 PSYCHOL. REP. 419, 429-30 (1990). This report should be of particular interest to lawyers. Although the author initially hypothesized that law was predominantly a left-hemisphere intellectual activity, and hence would have a low incidence of left-handers, in fact this field had the highest of all academic disciplines (21.7%, as compared to the low of 7.5% in microbiology, and approximately 10% in the general population. For the last figure, see McCormick et al., supra note 69, at 71). She offers two possible explanations for this unexpected finding: (1) Cerebral lateralization effects: "Fields such as music and art obviously require well-developed right-hemispheric abilities. There is reason to believe that law may also rely heavily on such abilities. Law requires considerable skill in reasoning analogically and synthesizing details into a meaningful whole." Id. at 426-27. (2) Test performance: "An important criterion for admission to law school is performance on the Law School Admission Test (LSAT). There is a strong possibility that left-handers outperform right-handers on this test . . . . [L]eft-handers may perform better than right-handers on timed tests of reading comprehension, particularly if there is no penalty for guessing (as is the case on the LSAT)." Id. at 426-27.

By inference, non-heterosexuals are probably over-represented in the legal profession. Data on this point are lacking.

73 Cf. Wayne P. London, Handedness and Alcoholism: A Family History of Left-Handedness, 10 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 357 (1986). London reports that not only is treatment outcome for alcoholism related to the individual's handedness, but also upon whether any of his immediate relatives were left-handed ("LH").

In several studies, alcoholic men having a family history of alcoholism show a more severe form of the disorder. The increased frequency of having an alcoholic father of the men either LH or having a LH first-degree relative, and the less favorable treatment outcome of LH alcoholic men, suggest that the alcoholism in men either LH or having a LH first-degree relative may be more severe. For examples, treatment outcome may relate not only to being LH, as has been shown, but also to a family history of left-handedness.
and the less subject to challenge the methodology used, the clearer and more statistically significant was the superiority in intelligence of the more homosexual over the more heterosexual group." Assuming some meaningful relationship between intelligence and education level, indirect corroboration is found in Fay et al.'s "Table 5." Estimates of homosexual experience increase as one moves across the four categories: Less than high school (17.4%), High school (19.6%), Some college (20.0), and College graduate or higher (31.8%)

Clearly, enough has been said to show that Herek failed to consider many dimensions of not merely possible, but in some cases highly probable differentiation along social and psychological dimensions, both direct and subtle, between homosexuals and heterosexuals. This Article considers but one more.

In 1986 the Supreme Court ruled on the case of Bowers v. Hardwick,\textsuperscript{76} upholding the constitutionality of Georgia's sodomy statute. Rivera holds that the post-Hardwick legal strategy for gay activists will be to have homosexuals designated a "suspect class." She reasons that "[o]nce a group falls under this rubric, any legislation that uses this classification to treat citizens differently is presumed by the Court to be invidious, discriminatory, and constitutionally prohibited. The state must overcome this burden and show the law to be constitutional."\textsuperscript{77}

Race is one such suspect group.

Three criteria are required for this classification:

1. Subjection to a long history of persecution for irrational stereotypes.
2. Inability to obtain relief from nonjudicial branches of government, and
3. Immutability of the trait, which makes it impossible or highly unlikely for its members to escape from the class.\textsuperscript{78}

\textsuperscript{74} James D. Weinrich, Nonreproduction, Homosexuality, Transsexualism, and Intelligence: I. A Systematic Literature Search, 3 J. Homosexuality 275 (1978).

\textsuperscript{75} Robert E. Fay et al., Prevalence and Patterns of Same-Gender Sexual Contact among Men, 243 Sci. 338, 343 (1989).

\textsuperscript{76} 478 U.S. 186 (1986).

\textsuperscript{77} Rhonda R. Rivera, Sexual Orientation and the Law, in Homosexuality, supra note 14, at 81, 84.

\textsuperscript{78} Id. While suspectness as a legal category may be the correct goal, the criteria by which one qualifies for inclusion may miss the salient point underlying the need for the category in the first place. One comment suggests that while "it is clearly in the interest of gay people to be deemed a suspect class," it would offer "an alternative account of suspectness that emphasizes the importance rather than the irrelevance of the protected characteristics. This alternative vision
Herek implicitly incorporates this standard when discussing whether gays are a “minority group.”

Despite these differences from racial and ethnic minorities, lesbians and gay men can reasonably be viewed as a minority group in the contemporary United States because they manifest a characteristic that is held in low esteem by the dominant segments of society and is used as the basis for discrimination; further, they form a self-conscious community based on their sexual orientation.79

While there is little to say here about the criteria for classification as a suspect group, this section examines one significant marker of group cohesion that addresses the more generic categorization as “minority group.” One indicator of meaningful distinction as a separate social group is whether that group contains a unique language.80 “In a true community there would be a well-established set of terms — argots, cants, slangs — used to maintain group cohesion, as is found in psychological jargon, sports terminology, or self-help groups.”81

Gays have their own lexicon, wherein lies the “richest features of social Gayspeak.”82 One 1941 study found that, of 329 sexual terms, “139 are identified as exclusively homosexual in use.”83 Similarly, Sonenschein used an ethnographic approach to find that while only 5% of sex terms were unique to the homosexual group, 45% of the role

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79 Herek, supra note 12, at 165. If to some it may seem self-evident that gays are a minority group, it should be kept in mind that “minority group” is here a legal and not a sociological construct. What Herek is really talking about here are not simply “minority groups,” but a limited subset thereof, those minority groups which have been, or ought to be granted legal protection.

80 Recall the objections raised by Olivia Banks in the Introduction.


83 Charles Clay Doyle, Homosexual Slang Again, 57 AM. SPEECH 74, 75 (1982).
terms fell into the category. The existence of a subcultural lexicon is further verified by the fact that several writers have found it productive to collect and publish glossaries of gay slang. Darsey raises the very intriguing question about where gays learn these and all aspects of Gayspeak: “In fact, how do people learn to Gayspeak at all? With no role models until they have already penetrated the gay community to some extent, the process of acquisition is itself problematic.” Knowledge of the acquisition process will significantly increase our understanding of the structure and network of the gay community.

Differences also appear in conversational style. Gays tend toward “camp” in their language. We will follow Babuscio’s discussion:

I define the gay sensibility as a creative energy reflecting a consciousness that is different from the mainstream: a heightened awareness of certain human complications of feeling that spring from the fact of social oppression . . . . The term camp describes those elements in a person, situation or activity which express, or are created by, a gay sensibility. Camp is never a thing or person per se, but, rather, a relationship between activities, individuals, situations and gayness . . . . Four features are basic to camp: irony, aestheticism, theatricality and humour.

The ironical facet of camp “refers to any highly incongruous contrast

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44 David Sonenschein, The Homosexuals Language, 5 J. SEX RESEARCH 281, 286, Table 2 (1969). A similar study can was conducted by Aaron Bruce W. Olson, A Study of Lexical Items in the Gay Subculture, in PILOT STUDIES IN SOCIOlinguistics: VARIATION, USE AND ATTITUDES 72 (1983).

According to Ashley, modern gays “do continue to use a private fluctuating hoard of words describing things the general public has never heard of (and probably doesn’t want to).” See Leonard R.N. Ashley, “Lovely, Blooming, Fresh and Gay”: The Onomastics of Camp, 4 MALEDICTA 223, 234 (1980).


48 James Darsey, “Gayspeak”: A Response, in GAYSPEAK: GAY MALE & LESBIAN COMMUNICATION 58, 66 (James W. Chesebro ed. 1981). Very early, Donald Webster Cory opined on this subject, “It is characteristic of the special nature of the semantics of gay life that the peculiar usage of words in a given context is readily understandable even to those who have never before encountered them.” DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA 110 (1951).

between an individual or thing and its context or association." Humor similarly results from an identification of a strong incongruity between an object, person or situation and its context . . . [T]he message conveyed to us by society is highly contradictory: we are just like everyone else, and yet . . . we are not. It is this basic contradiction, this joke, that has traditionally been our destiny. Not surprisingly, this contradiction has produced, in many, an identity-ambivalence that has found expression in our talk, our behaviour, our artistic efforts . . . .

Thus, in addition to merely using different words, the gay subculture also uses language to effect "camp." While camp is not coterminous with gay discourse, it is a salient aspect of it.

While the classificatory oppositions manipulated through camp are innumerable, Babuscio noted that "[t]he most common of incongruous contrasts is that of masculine/feminine." One would expect camp language to revel in gender inversions. The camp attempt to emulate female speech patterns may involve the following specific areas: (a) In general, there is an attempt to imitate the verbal sound of female conversation; this involves primarily the copying of inflectional and stress patterns and rarely the stereotyped lisp. This sound pattern may then underlie the uses of the words. (b) There may be frequent use of what are popularly seen as feminine adjectives. Words like "darling" and "lovely" and phrases like "terribly sweet" are used to describe people and things of inter-

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**Id. at 41.**

**Id. at 47.**

**In the words of Russo, "The relation of camp to gay humor is the same as the relation of guilt to being Jewish." Cf. Vito Russo, Camp, Advocate, May 19, 1976, at 17.**

**Babuscio, supra note 87, at 41.**

**Investigation of this point refers to "the non-segmental phonetic and phonological characteristics of utterance . . . [such as] pitch, loudness, and speed of utterance." D. Crystal, Prosodic and Paralinguistic Correlates of Social Categories, in SOCIAL ANTHROPOLOGY AND LANGUAGE 185 (Edwin Ardener ed., 1971). According to Crystal, our Intuitive impressions of effeminacy in English . . . are mainly non-segmental: a 'simploring' voice, for instance, largely reduces to the use of a wider pitch-range than normal (for men), with glissando effects between stressed syllables, a more frequent use of complex tones (e.g., the fall-rise and the rise-fall), the use of breathiness and huskiness in the voice, and switching to a higher (falsetto) register from time to time. (This provides an interesting contrast with Mohave, for instance, where a man imitating a woman (or transvestite) does not change to falsetto, but uses his normal voice, and rather imitates verbal and segmental effects.)**

**Id. at 189.**
est. (c) The use of feminine familiarities such as "honey" and "darling" as well as the pronouns "she" and "her" are used both as terms of address and reference to males.\(^{63}\) (d) With considerably less frequency, general nouns and other words are feminized with the result of sounding much like baby-talk . . . . (e) Related to point (c) above, is the effeminization of masculine names.\(^{64}\)

While the naive onlooker might interpret these linguistic markers as further proof that gay men are "really women," in fact they are used to emphasize the arbitrariness of the gender roles of our society. Camp, and its relative drag, is not concerned with imitating women, but with pushing the envelope of the symbolic contradiction that homosexuality poses for our social categories.\(^{65}\)

\(^{63}\) Interestingly, the obverse may not apply in the case of lesbians. Cf. J. Lee Lehman, 1 GAI SABER 243 (1981) ("There is no equivalent use of male identification by lesbians. While the term 'butch' may be used in the bar or elsewhere, lesbians do not ever refer to each other as 'he.'").

\(^{64}\) Sonenschein, supra note 84, at 283. While his specific examples suffer from being dated, I find that his general point remains valid.

Because of the ways in which gay camp plays upon female speech patterns, there would seem to be high face validity to the suggestion that gay men might converse at pitches appreciably higher than do non-homosexual males. The single study in the literature to address this point failed to find this difference in a laboratory setting. Cf. J.W. Lerman and P.H. Damsté, Voice Pitch of Homosexuals, 21 FOLIA PHONIOLOGICA 340 (1969).

This hypothesis, however, needs to be retested. Camp is not a feature of individuals, but of social context; one does not camp when alone, unless the person is willfully being his or her own audience. Speech differences which are part of camp, therefore, must be captured "on the hoof," as it were, and cannot be brought in the laboratory. Future investigation, therefore, should replace Lerman & Damsté's method of having subjects self-consciously tape scripts with the unobtrusive recording of natural conversation.

\(^{65}\) On this point, an instructive comparison can be found in MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO (1966). In her convincing analysis, something is deemed either clean or impure respectively by whether it falls squarely within its class, or through the interstices of socially-constructed categories. "Dirt," we are told, is simply "mater out of place." Id. at 35.

Homosexuals fail to meet the cultural definitions of "men" and "women" by virtue of their sexual attraction toward the same sex, and are thereby conceptual "dirt." One conceivable reaction to this judgment might be to accept the initial ground rules of the classificatory game, but try to show how they have been misapplied in this particular circumstance. More healthy, I feel, is the camp response to leave the game entirely, to accept the ostracism as an essentially liberating experience, freeing us to become Socratic gadflies.

Finally, it must be admitted that any attempt to dissect and analyze camp is bound to lose something crucial in the process. "To discuss camp," says Russo, is like smashing a toy to see what makes it run. The essence of camp is its unspoken amusement derived from knowing something is camp without having to explain why. Nobody asked Carmen Miranda why she wore 10-inch heels and danced around with a dozen bananas on her head. Carmen Miranda was just "too much."
Camp does have its dark side, however. Several commentators have noted its tendency to be sexist. For instance, Hayes notes that "[g]ay men's camp is coming under closer scrutiny, particularly with regard to its political implications and what some see as its dependence on the mockery of women." 98 Vito Russo flatly asserts that "camp is often sexist." 99 Finally, Julia Stanley says that "although gay slang is the vocabulary of people who are themselves outcasts from the straight culture, it is also sexist, classist, and racist . . . ." 99 Implications of this dimension of gay camp will be discussed below.

C. Summary

I stated that a literal reading of Herek's conclusion of "no differences" would be a logical non sequitur if either of two circumstances pertained: If any of his refutations of the eight stereotypes failed, or if the eight stereotypes failed to encompass all possible social and psychological dimensions along which heterosexuals could differ from homosexuals. In fact, both conditions apply.

Herek's refutations of at least two stereotypes have been shown to be seriously flawed. In the case of #2, the consensus of the literature is that alcoholism and/or alcohol abuse occurs within homosexual populations at a higher rate than among heterosexual populations, and this rate is attributable in part to the stigma and discrimination suffered by being gay in a heterosexist society. As for #4, while it is unlikely that homosexuals in fact do molest, or are inclined to want to molest, children with any greater frequency than heterosexuals, the data to demonstrate this are lacking. Refutation therefore depends solely upon persuasive rhetoric rather than definitive studies, rhetoric that Herek fails to muster. When Herek claims, therefore, that there are no between-group differences between homosexuals and heterosexuals, he is plainly wrong in the first case, and can offer no compelling substantiation in the second.

We have also seen that the present state of knowledge encompasses many aspects of material and social reality by which homosexuals as a group can be distinguished from heterosexuals. This review

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Russo, supra note 90, at 17.
98 Hayes, supra note 81, at 41.
99 Russo, supra note 90, at 17.
must conclude, therefore, that the belief that there are no significant differences between these two populations is a self-serving denial of the reality before our eyes.

III. Legal Dimensions

The literal reading of Herek’s claim is clearly unjustified. However, an alternative exists that is more generous. While he erroneously claims that there are no significant differences between the two groups, perhaps what he meant to say is that there are no differences of interest to attorneys in their various social roles as lawmakers, advocates and judges. Maybe more homosexuals than heterosexuals are left-handed, creative, or alcoholic, for instance. These conclusions may be relevant for educators and social scientists, but utterly inconsequential for legislators. Herek’s statement would, in this scenario, need to be construed less by what is actually on the page and more by what limited conclusion the author decided would be most relevant to the likely readers of Law & Sexuality.

Unfortunately, this interpretation, too, fails. As a matter of principle, an entire category of facts cannot be deemed extraneous to every imaginable judicial case. One can first suspect that a case might arise in which it is pertinent that one of the parties is gay. For instance, deciding whether a published rumor that a celebrity is gay constitutes libel hinges on whether the plaintiff is actually gay. Although we can lament the state of affairs that makes mistakedly labelling someone “gay” a crime, given that such suits exist we must concede that the sexual orientations of the parties are relevant. The rumor draws its power from a social expectation that being homosexual is a bad thing to be, thus being called a “faggot” can be provocative in the worst way. This acceptance of homosexuality as being unimaginably shocking allows entertainment of the “homosexual panic” defense; the

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\* In Louisiana, sexual preference epithets are defamatory per se, whereby malice and falsity are presumed and the burden shifts to the defendant to rebut the presumption. Manale v. City of New Orleans, 573 F.2d 122 (5th Cir. 1978). In an amicus curiae brief, the United States government petitioned the United States Supreme Court to limit liability to “grave” defamations such as criminal, treasonous, infamous, and, of course, homosexual conduct. Linn v. Plant Guard Workers of America, 383 U.S. 53, 65, n.7 (1966).


Parisi wants the evidence admitted in order to bolster his defense of “homosexual panic”,
effectiveness of which is seriously undermined if the defendant is actually gay himself.

A recent issue of *The Advocate* provides two instances of this sort. In independent reports, two men are each claimed by others to be gay. In the first case, the label was erroneously applied to Secret Service agent Larry Buendorf during a National Public Radio broadcast. Despite having received apologies for the mistake, Buendorf considers the mistake so damaging that "he will pursue a suit he has filed against the news agency."\(^{101}\) The cover for the issue, however, features the outing of Louisiana representative Jim McCrery.\(^{102}\) Although rumors of the conservative Republican's homosexuality have surfaced in the past, *The Advocate* interviewed, and in one case, named former lovers. In light of the heavy substantiation of the claim, McCrery has denied the allegations, but has not threatened to pursue a suit against the magazine. Although we may never know for certain, one can reasonably speculate whether the willingness to seek redress can be in part a function of the truth of the claims.

If sexual orientation itself can become legally relevant, then it is hard to image that the entailments of that orientation will never be so. Consider the following hypothetical.

A heterosexual woman applies for a job in a small business which serves largely a gay clientele. Most of the employees of this company are also gay men. During her interview, she was asked whether she would have any problem working with gays. She replied that although her upbringing in a small town had prevented her from having any interaction with a "gay community," she had included several gay men and women in her circle of close friends,

which is the idea that a latent homosexual — and manifest "homophobe" — can be so upset by a homosexual's advances to him that he becomes temporarily insane, in which state he may kill the homosexual. It is no business of mine whether the State of Illinois chooses to recognize a defense of "homosexual panic" as a subcategory of the insanity defense, but I cannot believe that the Constitution of the United States requires a state to allow defense counsel in a murder case to defame the murderer's victim as a homosexual without satisfying the normal prerequisite to admitting evidence of reputation — that the evidence "be based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness." People v. Moretti, 129 N.E.2d 709, 725 (Ill. 1955), quoted in People v. Parisle, 287 N.E.2d 310, 325 (Ill. App. Ct. 1972).

While homophobia is clearly the underlying dynamic of homosexual panic, it need not be because the person is a latent homosexual. Note also that, again, to name someone a homosexual is inherently defamatory.


and anticipated no problem on this front.

Soon after her employment began, however, she discovered that camp comments directed to her made her uncomfortable. Being called "honey" and "girl," for instance, made her feel patronized and trivialized. Moreover, she perceived the sexist undertones in camp humor as demeaning to women in general, and thereby to her contributions to the business.

She spoke to the owner and, afterwards, he instructed the employees to refrain from "camping it up" when speaking with her. However, they continued to do so both among themselves and when interacting with company clients. Because all business was conducted in the equivalent of a single room, she was unable to avoid witnessing and overhearing these remarks. As a result of this continued exposure to what she perceived to be sexist remarks, the woman decides to file a sexual harassment suit under Title VII of the Civil Rights Act of 1964.

The precedents on this issue would tend to indicate that the plaintiff has a valid complaint, at least on its face. Sexist speech has been defined as including the following: "(1) speech demanding or requesting sexual relationships; (2) sexually explicit speech directed at the woman; (3) degrading speech directed at the woman; and (4) sexually explicit or degrading speech that the woman employee knows exists in the workplace, even though it is not directed at her." Because of its sexist tendencies, camp can qualify as degrading speech when used with out-group members. "The third category of sexist speech...includes speech calling the employee 'honey' or 'dear' as well as 'bitch' or

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108 Marcy Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L. Rev. 1, 7 (1990). Sexist speech is a particular instance of sexual harassment, defined by the Working Women's Institute as any attention of a sexual nature in the context of a work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work, or interfering with her employment opportunities. It can be looks, touches, jokes, innuendoes, gestures, epithets, or direct propositions... It is less obvious when a woman is forced to work in an environment in which she is subject to stress or made to feel humiliated because of her sex through such activities as sexual slurs, the public display of derogatory images of women, or a requirement that she dress in revealing clothing.

'whore.' 

Examples of the fourth type include overhearing, or even avoiding the specifics of a sexually explicit joke, yet still understanding that the story degrades women, and knowing that her supervisor "keeps a poster of a naked woman in his office... even if she never saw it." 

While Strauss argues that the fourth type of sexist speech is the weakest upon which to base a Title VII claim, the fact that the company's physical environment held the employee as a captive audience to camping behavior, even though it was no longer being directed toward her, becomes relevant. "The courts should give the complaining party the opportunity to demonstrate that, in fact, she was unable to escape exposure to the speech. Once such a showing is made, the speech should be considered directed, causing her to be captive to the message." 

The hypothetical suit would be of the non-quid pro quo type, where "the conduct has [the] purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile, or offensive working environment." 

Five elements comprise a claim of sexual discrimination based on the existence of a hostile work environment: (1) plaintiff belongs to a protected category; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) respondent superior, that is, defendants knew or should have known of the harassment and failed to take prompt, effective remedial action.

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104 Strauss, supra note 103, at 8.
105 Id. at 10.
106 Id. at 47.
107 Id. at 48. Strauss bases her analysis upon consideration of FCC v. Pacifica Found., 438 U.S. 726 (1978). In this case, notes Strauss, the Court seemed to retreat somewhat from its position in Erznoznik [v. City of Jacksonville, 422 U.S. 205 (1975)] when it rejected the argument that the viewer could avoid further offense by turning off the radio or switching stations after the initial exposure. Such a solution, according to the Court, "is like saying that the remedy for an assault is to run away after the first blow." 

Id. (quoting Erznoznik, 422 U.S. at 748-49).
109 Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991). These guidelines were first noted in Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).
Our fact situation fulfills all five categories. Plaintiff, being female, is a member of a protected category, and she was subject to unwelcome sexual harassment in the third and fourth senses of sexist speech discussed above. Regarding the third element, plaintiff was not subjected to speech because of her sex; indeed, the speech behaviors that initiated her complaint were directed to everyone, male and female. However, encompassed within this element is also the claim that “actionable conduct is behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex.”\textsuperscript{110} It is from this perspective that her claim meets the third element.

The plaintiff will bear the burden of articulating how exposure to this harassment has adversely affected her working situation.

The fourth element tests the impact of the harassing behavior on the employee and the work environment, separating the “mere utterance of... [a discriminatory] epithet which engenders offensive feelings in an employee,” and the “petty slights suffered by the hypersensitive,” from actionable conduct under Title VII. To affect a “term, condition, or privilege” of employment within the meaning of Title VII, the harassment “must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.”\textsuperscript{111}

She will presumably argue along the lines of the plaintiff in \textit{Robinson v. Jacksonville Shipyards, Inc.}, who stated that she forwent opportunities for overtime and advancement so as to minimize the time she had to spend in the harassing environment,\textsuperscript{112} or as did the successful plaintiff in \textit{Rodgers v. Western-Southern Life Insurance Co.}, who felt that the harassing comments spoke to the supervisor’s perception that “he

\textsuperscript{110} Id.

\textsuperscript{111} Id. at 1523 (citations omitted). A recent ruling by the Supreme Court holds that “conduct need not ‘seriously affect [an employee’s] psychological well-being’ or lead the plaintiff to ‘suffer injury’ ” before it becomes actionable. Title VII, in Justice O’Connor’s words, “comes into play before the harassing conduct leads to a nervous breakdown.” Instead, decisions about whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a more offensive utterance; and whether it unreasonably interferes with an employee’s work performance... [N]o single factor is required.

\textsuperscript{112} Harris v. Forklift Sys., 62 U.S.L.W. 4004 (1993).

\textsuperscript{112} Robinson, supra note 106 at 1520.
was not qualified to be an insurance agent because of his race."

The last element is fulfilled since, although the business owner knew of the complaint and took prompt action, his action was not effective. While comments were no longer directed at her, she was still a captive audience to such comments between others.

Faced with such a suit, the defendants might find it beneficial to introduce into the record information pertaining to the social standards of the gay community, and the role of camp language within that community. To what extent, for instance, are the speech patterns of an entire subculture to be held to the same standard as that of individuals? The courts have already ruled that Black American English has a cultural right to exist in its own right, rather than being perceived as bastardized standard English, and that it must be taken into account by school boards.114 While Gayspeak is not a dialect, it is the means by which a significant segment of the population identifies, bonds and communicates mutual concerns to one another. Even if this pattern is found to be offensive by outgroup individuals, can the subculture be judicially enjoined from its use in their presence at the price of surrendering their own culture?

The answer may be no, if more courts adopt the reasoning expressed in Rabidue v. Osceola Refining Co.,118 which found in favor of a woman who sued her employer for using vulgar language to create a hostile work environment. Along the paths to this end,

This court also considered the particular educational backgrounds of the employees . . . . The reason for the extra analysis to the objective test was that people in different social classes and varying educational backgrounds have

118 792 F. Supp. 628, 633 (E.D. Wis. 1992). Although this case was concerned with racial and not sexual harassment, the Robinson court cites Patterson v. McLean Credit Union, 491 U.S. 164, 109 (1989), as saying that "a racial harassment case . . . is governed by the same standards under Title VII as a sexual harassment case." Id. at 1523.

114 William Labov, Objectivity and Commitment in Linguistic Science: The Case of the Black English Trial in Ann Arbor, 11 LANGUAGE IN SOCIETY 165 (1982). The case referred to is that of Martin Luther King Junior Elementary Sch. Children et al. v. Ann Arbor Sch. Dist. Bd., which generated a series of decisions, the last being 473 F. Supp. 1371 (E.D. Mich. 1979). Specifically, Labov states that Judge Joiner delivered his opinion on July 12, 1979. He found for the plaintiffs, and directed the Ann Arbor School Board to submit to him within thirty days a plan defining the exact steps to be taken to help the teachers (1) to identify children speaking Black English, and (2) to use that knowledge in teaching such students how to read standard English. Id. at 193.

come to expect certain types of behavior and language in the workplace. The court did not state that because women were now viable members of all facets of the workforce, such particular behavior and language should change. This attitude reflects a type of consent. In other words, before women began to work in certain occupations, those work environments were cluttered with various types of behavior that many women would find offensive. Hence, the court seemingly believed that it was the woman who had to accept the work environment, rather than the work environment changing to accept the woman.\footnote{P. J. Murray, Employer: Beware of “Hostile Environment” Sexual Harassment, 26 DUQ. L. REV. 461, 476-77 (1987).}

It might also be suggested that the perception of insult can be a misperception of camp. While camp is supremely capable of being used to “read someone’s beads,” camp itself is not inherently insulting, at least in its intent.\footnote{For a dissenting opinion, compare J. Lee Lehman, 1 GAI SABER 243 (1978). (“I personally see no difference between the gay male use of “she” for another man and the straight male use of “chick” for a woman. Both represent put-downs of the female sex.”)} Hays discusses the ambivalence over social Gayspeak among the radicals of a decade ago, who viewed language itself as innately subjugating, much less the self-deprecating forms of camp.

They perceive the use of social Gayspeak as inimical and serious, a manifestation of ghetto sycophancy. In their concern for the values implied in social Gayspeak, radical gays seem to have a more restrictive understanding of contextual meaning than gays in the social setting. The lexicon of social Gayspeak may be “elitist” or “sexist” only if the social context is taken seriously. If, as I suggested, the acting metaphor of social Gayspeak presents language as potentially comic or parodic whenever it deals with sex roles or stereotypes, then gays in the radical setting can properly be accused of a failure to understand social Gayspeak.\footnote{Hays, supra note 82, at 54 (emphasis added).}

The plaintiff of our hypothetical, in other words, is insulted by camp
because she does not understand it beyond its literal surface features. She perceives insults when in fact she was perhaps being flattered by her co-workers' efforts to include her in the in-group language forms: "A more positive and very recurrent use of cross-gender reference is the establishing of supportive bonds of nongenital friendship." Paradoxically, her efforts to remove herself from these forms — in the Title VII spirit of creating equal opportunity work environments — may have the opposite effect of handicapping her future interactions with both fellow employees and business clients.

Enough has been said to drive home the immediate point. Here is a possible scenario in which the distinctive features of gays and the community they have structured for themselves can be pertinent in a legal context. Counsel for the defendant would need to be aware of these sociocultural facts about gays, which distinguish them from heterosexuals.

IV. Conclusions

Herek errs when he claims that there are no differences between homosexuals and heterosexuals. These differences not only exist, but can conceivably be pivotal in judicial proceedings. The question then becomes why he offered such an erroneous conclusion.

The writings by Herek that have been cited herein have a common theme. Aware that ill-informed and possibly homophobic policy makers have in the past used differences as grounds to deny homosexuals their most basic of civil liberties, he endeavors to show that these differences simply are not there. The reasoning is that if the differences do not exist, the historical grounds for denying rights will subsequently collapse. The heretofore recalcitrant decision-makers will see the error of their ways, and welcome gays with open arms into full social participation.

Advocates of the position Herek defends could hope for no better champion than he to argue the scientific side. What he does, he does very well; the debate here is whether it needs doing. Despite the admirable energy Herek puts into his chosen task, the strategy must fail for two reasons, and should fail for two others.

First, it must fail because he is simply wrong when he denies that

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the social scientific corpus evidences between-group differences between gays and straights. The most important part of that corpus is the testimony of real people, the gay community members whose personal experiences are a direct contradiction to the claim of "no differences." Writing mid-century, Donald Webster Cory almost sighs with the relief of accepting the inevitable truth:

Delving into these questions, I find that fundamental to all answers is an understanding that the dominant factor in my life, towering in importance above all others, is a consciousness that I am different. In one all-important respect, I am unlike the great mass of people always around me, and the knowledge of this fact is with me at all times, influencing profoundly my every thought, every minute activity, and all my aspirations. It is inescapable, not only this being different, but more than that, this constant awareness of a dissimilarity.\textsuperscript{100}

At the end of the century, this perception by gay individuals has not changed:

[M]y life as a gay man isn't something that takes place only in the privacy of my bedroom. It affects who my friends are, whom I choose to share my life with, the work I do, the organizations I belong to, the magazines I read, where I vacation and what I talk about. I know it's the same for heterosexuals because their sexual orientation affects everything, from a choice of senior-prom date and the finger on which they wear their wedding band to the birth announcements they send and every emotion they feel.\textsuperscript{101}

The second reason why, in any rational consideration of the question, the "no differences" position must fail is that it is unrealistically optimistic about the commitment of individuals and/or institutions to logic. It should suffice to recall that the majority in the \textit{Hardwick} decision claims that "law . . . is constantly based on notions of morality,"\textsuperscript{102} not logic, and expressly eschews the idea that "majority sentiments about the morality of homosexuality should be declared inadequate"\textsuperscript{103} justification to criminalize these behaviors.\textsuperscript{104} One can-

\begin{footnotes}
\item[100] Cory, \textit{supra} note 86, at 6-7.
\item[103] Id.
\item[104] Surprisingly, this is the same Court that ruled that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti,
not reason with this position. Morality is definitionally irrational, and one cannot sway an irrational belief with logical arguments; indeed, the very attempt often results in the person holding the belief with even firmer conviction.

Opponents of gays' rights ultimately enumerate differences as a post facto rationalization for their unequal treatment, not as an a priori reason for it. By removing one set of rationalizations, Herek would force his adversaries to adopt another, but they cannot be expected to reverse themselves because something so trivial as a fact is against them.\footnote{185}

Even if the failure of the strategy Herek here represents were not overdetermined by the convergence of empirical fact and human nature, the gay community should hope fervently that it fails nonetheless. Psychotherapist Irvin Yalom argues convincingly that our species is biologically hardwired to seek meaning in our environment and in our experiences within that environment. Meanings give “birth to values and, hence, to a code of behavior: thus the answer to why questions (Why do I live?) supplies an answer to how questions (How do I live?).”\footnote{186} This same point is phrased more pithily in an observation attributed to Thomas Huxley: “We must learn what is true in order to do what is right.”\footnote{187} It is not true that gays are indistinguishable from straights save for bedroom behavior, and any actions, laws or policies advocated on this assumption will not be “right.” Despite the attractions of short-term gains, sights should be set on the long-term.

Strauss is only too aware of the damage that can be done by winning a fight with the wrong argument.

It should not be forgotten that in the recent past, and perhaps subconsciously today, regulation of some forms of sexist speech was justified on paternalistic

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\footnote{184} S. Ct. 1879, 1882 (1984) (upholding parent's right to child custody despite later interracial marriage). Students of cognitive dissonance would find much to ponder, it seems, within the United States Supreme Court.

\footnote{185} To see the process in action, observe the shifting rationalizations of those who despise homosexuality as a perverse “choice.” The new evidence that homosexual orientation is significantly a matter of biology, not of choice, has caused these individuals and groups to change their excuses, but not their minds.

\footnote{186} IRVIN YALOM, LOVE'S EXECUTIONER AND OTHER TALES OF PSYCHOTHERAPY 12 (1989).

grounds. This country has historically sanctioned laws against offensive speech as a means of protecting women's sensibilities from crude language, not to promote sexual equality . . .

This Article reaffirms both a commitment to preserving the values of freedom of expression and the imperative of eliminating sexual inequality in the workplace. A victory over sexist speech in the workplace that perpetuates sexist stereotypes and trammels first amendment rights is a hollow one. Feminists would have won the battle, but lost the war. 129

This same hollow victory has already afflicted the gays' rights movement once before. Homosexuality goes to great pains to disabuse its readers of the illness model of homosexual orientation. However, this interpretation was originally favored and advocated by early homophile organizations as an improvement over the criminal perspective. Better a hospital than a jail, it was reasoned. With an eye only on the immediate needs, they could not have imagined the cost of their willingness to merely replace one untruth with a more immediately advantageous untruth.

The specific danger that now threatens relates to the qualifications by which American society doles out sociopolitical equality, and the benefits thereof. As was argued, the "no differences" strategy assumes that the majority will automatically accord equality if it can be shown that gays are "just like them." The broader philosophical question, though, is whether this is a legitimate criterion for legal and judicial protection. Simon LeVay speaks candidly to the contrary when considering whether proving that homosexuality is fundamentally biological will have favorable social implications: "I don't think gay rights should depend on proving that we can't help being gay. We should have equal rights even if we are gay out of sheer wanton perversity. It's our own business who we have sex with." 130

Those who remain unconvinced that the "no differences" strategy is philosophically flawed might perceive its weakness better by looking at its logical entailments. They argue that, because gays are not different, they should be accorded equal rights. For this to be a viable contention, they must be willing to accept its negation: Those who are different can legitimately be denied equal rights. But as this Article has

129 Strauss, supra note 103, at 50-51.
130 Dolce, supra note 61, at 44.
gone to great pains to communicate, gays are different from straights. The intellectually honest advocate of the "no differences" strategy must then conclude that gays are not entitled to equal rights in our society. Being different, we somehow "deserve" discrimination.

The sociopolitical philosophy epitomized by Herek's work is thus a double-edged sword. Herek would commit gays to a philosophy that can only lead to their final recognition and treatment as deviant and, thereby, inferior persons not entitled to the full protection of the law. Alternatively, gays' rights should be recognized irrespective of whether differences exist or not, and accorded to human beings who are citizens of the state, not false mimics of white middle-class heterosexual lifestyles and mindsets. Jurisprudence should not read alike and equal as synonyms. On principle we accept that all people are equal, but no one can reasonably claim that all people are alike. Recognition of the former must be independent of the latter.

Gays and lesbians need and desire equal protections, yes, but perhaps we should also insist that equality be given for the right reasons. In that case, admittedly, we would prolong even further our present marginal social position, but for those willing to take a principled stand, this is a small price. The debacle over President Clinton and the military policy on gays shows vividly the rottenness that can be compromised on a moral issue.

Americans have never been comfortable with difference and are no closer to being able to embrace it than ever they were. We accept it only as a preliminary and transitory stage on the way to its annihilation. As anthropologist Clyde Kluckhohn observed, "Americans have generally accepted diversity as a condition, but only some Americans have embraced it as a value. The dominant note has been that of pride in destroying diversity through assimilation." In his account of racial attitudes, Kluckhohn argues against the strategy of arguing for equality of African Americans by denying that any differences exist besides the obvious somatic ones. His plea in that instance holds equally well for the present one.

In a world in which the barriers imposed by distance have almost disappeared we cannot ignore the colored peoples. Nor, assuredly, can we expect to con-

190 Clyde Kluckhohn, Mirror for Man: The Relation of Anthropology to Modern Life 269 (1949, 1985).
continue to treat them as subordinate. We must learn to get along with them. This demands mutual respect. It does not mean pretending that differences do not exist. It does mean recognizing differences without fearing, hating, or despising them. It does not mean exaggerating differences at the expense of similarities. It means understanding the true causes of the differences. It means valuing these differences as adding to the richness and variety of the world.\footnote{Id. at 139.}