

# Review Essay

## **A Social Constructionist Critique of Posner's *Sex and Reason: Steps Toward a Gaylegal Agenda***

*Sex and Reason.* By Richard A. Posner.\* Cambridge, MA: Harvard University Press, 1992. Pp. 458. \$29.95.

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Richard A. Posner is law's most successful agenda entrepreneur since Oliver Wendell Holmes, Jr.<sup>1</sup> He has already earned a place in the history of legal studies as a parent of the law and economics movement<sup>2</sup> and as an important contributor to the renaissance of academic interest in statutory

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† Professor of Law, Georgetown University Law Center. This review essay is something of a group project, since many of the ideas were formulated in discussions of *SEX AND REASON* and other books in the Law and Sexuality reading group sponsored by the Gay & Lesbian Attorneys of Washington, D.C. (GAYLAW). I presented an earlier version of this essay to a faculty workshop at the Brooklyn Law School, where I received many very helpful comments. I am particularly grateful to Len Becker, Chai Feldblum, Sarah Goodfriend, Bruce Hay, Nan Hunter, Larry Lessig, Jeff Stempel, and Robin West for their comments on various drafts.

1. Like Holmes, Posner is an agenda entrepreneur in the sense that he has been unusually successful in spotting intellectual market opportunities in law. Both Holmes and Posner were early and perceptive critics of legal theories that prevailed when they started to write about law, and both set forth strongly articulated positive visions of law that over time have won impressive market shares.

2. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972) (synthesizing Posner's early work, updated in two subsequent editions).

interpretation,<sup>3</sup> to the law and literature movement,<sup>4</sup> and to "practical legal studies" and the pragmatist revival in legal scholarship.<sup>5</sup> Posner's new book *Sex and Reason*<sup>6</sup> is an important contribution to the growing literature on law and sexuality in general, and law and homosexuality in particular.

Like Posner's prior work, *Sex and Reason* is informative and scholarly. Indeed, Posner wrote it as a response to his perception that the judiciary's ignorance, or even embarrassment, about sexuality is exceeded only by the topic's importance in modern American law.<sup>7</sup> Hence, the book's initial ambition is to bring to lawyers' attention a vast multidisciplinary literature on sexuality, including medical and biological, historical, philosophical, anthropological, literary, and economic studies. Posner's larger ambition is to use these materials to argue that sexuality can best be analyzed by a theory of "rational choice." He posits that our patterns of rational choice in sexual matters can be analyzed and predicted in much the same way that economics analyzes and predicts our patterns of rational choice in market matters. Governmental regulation of sexual practice can then be understood and criticized in the same way as governmental regulation of the marketplace.<sup>8</sup>

Posner's is a bold enterprise. He is sure to catch hell for it from traditional moralists, on the one hand, and progressive scholars as well as those generally critical of economic analysis, on the other. For example, feminist theorists will (and should) object to *Sex and Reason* as written from a distinctively male point of view, with implications that marginalize women and slight their legitimate concerns.<sup>9</sup> Nevertheless, critics writing from many different perspectives will (and should) praise *Sex and Reason* for insisting that the law's discussion of sexuality be better informed by insights from other disciplines,

3. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 336-40 (1985).

4. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

5. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter POSNER, *JURISPRUDENCE*]. "Practical legal studies" is the name given the revival in Jay M. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988).

6. RICHARD A. POSNER, *SEX AND REASON* (1992). Subsequent citations to this book will be to the relevant page number.

7. Pp. 1-2. Ironically, as his example of the usefulness of judicial education in matters sexual, Posner cites his work on the "Kitty Kat Lounge" case, which tested the constitutionality of municipal regulation of nude dancing. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc) (concurring opinion). But his highly informative opinion (which includes a history of erotic dancing) did not prove very educational to the Supreme Court when it overturned *Miller* in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). This case is not an encouraging example of the usefulness of better informed judicial decision-making.

8. See p. 3.

9. For example, Chapter 4 on "The Biology of Sex," pp. 85-110, uncritically accepts the sociobiological story of men-as-hunters, women-as-breeders that has been largely discredited in the academic community. See, e.g., Frances Dahlberg, *Introduction to WOMAN THE GATHERER 2* (Frances Dahlberg ed., 1981). Throughout the book, I was quite struck by Posner's fascination with male sexuality—whether homosexual or heterosexual—and lack of interest in, or insight into, female sexuality. Perhaps most significantly for the purposes of this essay, lesbians are virtually invisible in a book that seems preoccupied with gay males. I am confident that other reviews of *Sex and Reason* will deal more extensively with Posner's treatment of women than my essay does. See, e.g., Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. (forthcoming Dec. 1992).

more conceptually rigorous, and more skeptical of traditional regulatory policies.<sup>10</sup> *Sex and Reason* should be credited for making sexuality more prominent on the legal academic agenda.

For this reason, Posner's book arrives at a propitious time in the development of bisexual, gay, and lesbian legal studies. This scholarship—much of it written by openly bisexual, lesbian, or gay scholars—has sought to correct biased and inaccurate views that have long been part of Western legal culture; to provide more reliable information and rigorous legal arguments for discussions of issues important to the bisexual, gay, and lesbian communities; and to criticize laws and legal interpretations that penalize or stigmatize us.<sup>11</sup>

Although it does not locate itself in this relatively new tradition, *Sex and Reason* is filled with information, theories, and discourse about homosexuality. Homosexuality is an important part of the book's descriptive and normative account of sexuality and its legal regulation.<sup>12</sup> Because Posner is a celebrated mainstream legal academic and judge (a Reagan appointee to the Seventh Circuit in 1982), his generally sympathetic attention to these themes promises to render them more prominent in American legal discourse. And because Posner invokes libertarian philosophy to criticize morality-based (over)regulation of sexuality, many of his arguments ought to be of welcome interest to members of bisexual, gay, and lesbian communities. Part I of this essay will summarize the part of *Sex and Reason* that deals with homosexuality and related policy issues. The book's major contribution to the gaylegal agenda<sup>13</sup> is to wash the modern regulation of homosexuality in the "acid bath"

10. Praise on this basis has, indeed, already been forthcoming. See, e.g., Martha C. Nussbaum, *Venus in Robes*, THE NEW REPUBLIC, Apr. 20, 1992, at 36 (book review); Alexander Wohl, *Strange Bedfellows: Judge Posner Applies Economic Analysis to Human Sexuality*, A.B.A. J., Apr. 1992, at 95.

11. For an early and important introduction, see Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position Of Homosexual Persons In The United States*, 30 HASTINGS L.J. 799 (1979).

12. Chapter 11 on "Homosexuality: The Policy Questions" (pp. 291-323) is the part of the book dealing primarily with issues relating to homosexuality, but such issues are also discussed in Chapter 2 on "Autres Temps, Autres Moeurs" (especially pp. 42-44, 48-50, 51-52, 57-60, 63-66, 67-68); Chapter 5 on "Sex and Rationality" (especially pp. 114-15, 117, 119, 122-26, 128-30, 136-37, 141); Chapter 6 on "The History of Sexuality from the Perspective of Economics" (especially pp. 146-51, 151-61, 161-73); Chapter 7 on "The Optimal Regulation of Sexuality" (especially pp. 202-03, 207-08, 209, 215); Chapter 8 on "Moral Theories of Sexuality" (especially pp. 223-24, 228-30, 232-33, 234); Chapter 12 on "The Sexual Revolution in the Courts" (especially pp. 341-49); Chapter 13 on "Erotic Art, Pornography, and Nudity" (especially pp. 375-81); Chapter 14 on "Coercive Sex" (especially pp. 398-99, 403-04); and Chapter 15 on "Separating Reproduction from Sex" (especially pp. 417-20).

13. My use of the term "gaylegal" is intended to suggest the close connection for openly bisexual, lesbian, or gay activists between our sexual orientation and our approach to legal issues, analysis, and reform. The first three letters of the word are in no way intended to exclude bisexuals or lesbians. By "gaylegal agenda," I mean the efforts made by lesbian, gay, and bisexual communities to press the law and legal discourse to become more responsive to our perspectives and needs. I believe that bisexual, gay, and lesbian legal scholarship and bisexual, gay, and lesbian legal activism must inform each other; from this cross-fertilization will come the gaylegal agenda. (My own scholarship has been influenced by my work with the bisexual, lesbian, and gay law students' association at Georgetown, and by my work as co-counsel in *Dean v. District of Columbia*, CA No. 90-13892 (D.C. Super. Ct., filed, Nov. 26, 1990, relief denied, Dec. 30, 1991, motion for reconsideration granted and relief denied, June 2, 1992), appeal docketed, No. 92-CV-737 (D.C. Ct. App. Sept. 4, 1992), in which two gay lovers seek an order interpreting the District of Columbia Human Rights Act, D.C. CODE ANN. §§ 1-2501 to 1-2557 (1992), and/or its Marriage Act,

of economic analysis<sup>14</sup> and thereby to expose the emptiness of antihomosexual regulations.

Part II argues that the bath is only mildly acidic, however. The stated regulatory baselines in *Sex and Reason* are utilitarian, libertarian, and antimoralist. If pursued with characteristic Posnerian relentlessness, these premises could yield radically pro-gay policies. But Posner does not press his analysis and, instead, neglects his stated first principles. His treatment of gaylegal issues tends to collapse into well-meaning ad hoc-ness. This results in part from Posner's commitment, revealed in other recent work, to a fourth regulatory principle, pragmatism, which dictates that legal reform be incremental and bounded by extant community attitudes. In our society, community attitudes continue to be antihomosexual.

Posner's analysis also suffers from the shortcomings of his underlying premises: that sexuality can be viewed as a morally indifferent object of inquiry and regulation; that cost-benefit analysis can provide determinate guidance in making policy choices; and that libertarianism, grounded as it is on the distinction between public and private, is a meaningful way to discuss matters of sexuality. In questioning these premises, I rely on social constructionist theory developed preeminently by (gay) philosopher Michel Foucault, whom Posner frequently cites and praises. Unfortunately, because Posner applies Foucault's work in light of his own commitment to a Holmesian-style pragmatism, he does not pursue its critical implications. Part III of this essay begins with the premise that sexuality is socially constructed, and argues that the problems with Posner's book identified in Part II stem from deeper contradictions, not just in Posner's thought and its premises, but in traditional liberal pragmatic approaches to the reformation of laws that touch on sexuality. In addition to offering a more radical critique of existing regulation of homosexuality, as well as positive suggestions for a gaylegal agenda, social constructionism also engenders a deeper appreciation of Posner's *Sex and Reason*, whose pragmatist insights offer suggestions for gaylegal activism in the 1990's.

#### I. AN APPRECIATION OF *SEX AND REASON*

Posner divides *Sex and Reason* into three interrelated parts: Part One on "The History of Sexuality," Part Two on "A Theory of Sexuality," and Part Three on "The Regulation of Sexuality." While dealing primarily with other topics, each part includes detailed analysis of issues that concern lesbians, gay men, and bisexuals, with citation and discussion of myriad academic studies. *Sex and Reason* is a treasure trove of sources (many never before cited in a law

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*id.* §§ 30-101 to 30-121 (1988), to allow same-sex marriage, or ask the court to hold the Marriage Act unconstitutional. I wrote the Plaintiffs' Memorandum on the History of Same-Sex Marriage using many of the sources cited in this review essay.)

14. P. 437.

book or article) that view homosexuality sympathetically. This alone is a salutary contribution to legal scholarship, and one which is all the more remarkable, coming from a celebrated conservative jurist.

More important, Posner has put this literature to good use. Although I do not endorse all of Posner's arguments, his historical, economic, and anti-regulatory analyses generate genuine insights into homosexuality and its regulation.<sup>15</sup> Specifically, *Sex and Reason* cogently argues that current anti-homosexual attitudes and policies are historically constructed (and therefore subject to reconstruction), that antihomosexual regulatory policies tend to be counterproductive because they are not based upon rational expectations about people's behavior, and that most antihomosexual regulations in the United States are not justified and should be changed or abandoned. These ideas in the book are ones that bisexuals, gay men, and lesbians ought to appreciate.

#### A. *Posner's Economic Theory of (Homo)Sexuality*

*Sex and Reason* propounds an eclectic but generally economic theory of sexuality,<sup>16</sup> which in turn informs his discussions of the history and optimal regulation of sexuality. Understanding Posner's descriptive theory is critical to understanding the contributions of his book. In his calculus, sexual behavior is a function of the benefits and costs of different forms of sexual activity and the possibility of substituting one sexual practice for another.

According to Posner, there are three benefits of sex: procreative, hedonistic ("scratching an itch"<sup>17</sup> and erotic appreciation), and sociable.<sup>18</sup> One's various sexual activities will be determined in part by one's purposes and one's non-volitional preferences. For example, vaginal intercourse between a man and a woman is the primary sexual activity meeting the goal of procreation; but it is not the only activity that can meet the goal of sociability (and indeed may be disfavored unless reliable means of contraception are available); and it may be inferior to masturbation as a means of scratching the sexual itch, especially if one is not predominantly heterosexual. Posner assumes that people have different sexual preferences, generally heterosexual or weakly bisexual, with a tiny minority (2-5% men, 1% women) "real homosexual[s]."<sup>19</sup>

The costs of sex also fall into three categories: various personal risks or "taxes" associated with different kinds of sex (e.g., children with non-

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15. My discussion of Posner, in this part especially, rests upon a sympathetic reading of *Sex and Reason*, one willing to resolve ambiguities in ways that enhance rather than denigrate the book's insightfulness for bisexuals, gay men, and lesbians, as well as the more general audience. Throughout this essay, I have tried to approach his text "prepared for it to tell [me] something." HANS-GEORG GADAMER, TRUTH AND METHOD 269 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989).

16. Pp. 111-45, 146-80.

17. P. 111.

18. Pp. 111-12.

19. Pp. 294-95.

contraceptive vaginal sex, disease with promiscuous sex), social or legal disapproval, and search costs.<sup>20</sup> One reason that solitary masturbation is such a popular sexual activity is that it combines one widely shared purpose of sex (scratching the itch), with nominal search costs, no risk of unwanted children or disease, and ease of concealment (thereby avoiding social disapproval).

Posner postulates that the balance of benefits and costs determines the relative frequency of different sexual practices.<sup>21</sup> His concept of "substitution" of one practice for another renders his analysis particularly dynamic: when the cost of a particular sexual activity increases, people will tend to reduce their level of that activity but will also tend to substitute previously less desirable activities.<sup>22</sup> This is the reason that homosexual behavior is common in prisons. Even strongly heterosexual men will be likely to have intercourse with other men, because the search costs for a female partner are quite high (infinite in some prisons) and to scratch the sexual itch inmates will tend to substitute sex with other inmates.<sup>23</sup>

Like most economic analysis, Posner's calculus of sexuality is reductionist,<sup>24</sup> but its simplification of reality enables it to generate interesting predictions about the dynamics of modern homosexuality and efforts to regulate it. For instance, consider the argument that the spread of AIDS through unprotected anal intercourse is a modern justification for sodomy laws.<sup>25</sup> Posner's analysis undercuts such arguments. He notes that the sexual marketplace is already responding to the problem by substituting safe for unsafe sexual conduct, as people adjust their behavior to avoid the dire consequences of the disease.<sup>26</sup> Thus, the incidence of AIDS has dramatically changed the sexual

20. Pp. 115-16, 119-26.

21. P. 116.

22. Pp. 114-15, 116-19.

23. A man who typically values sex with a woman at level twenty and sex with a man at level two (therefore, a strongly heterosexual man) would be unlikely in normal life to have sex with another man. Even if available women were scarce, and the search costs of finding an attractive woman were ten compared with five for a comparably attractive man, our hypothetical male in search of a partner would choose only women (benefit of sex is greater than its cost), never men (benefit of sex is less than its cost). But in prison, where the search cost for a woman might be thirty compared with one for a man, our hypothetical male in search of a partner would settle for the man. Pp. 121-22.

24. For example, *Sex and Reason* (1) never sets forth a precise idea of what "sex" is and seems to assume that sex occurs only when there is orgasm, (2) understates the benefits of sex relating to self-expression and assertion of power, and (3) neglects the costs (to some) and benefits (to others) of sex that are associated with domination. In my view, all of these gaps are somewhat distorting reductions of reality. In the views of others, they will render the book useless. Note, however, that economic models often generate useful conclusions from similarly reductionist assumptions. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 466-68 (1992).

25. Although the AIDS epidemic is never mentioned by the various opinions in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of Georgia's state antisodomy law as enforced against gay men), Posner notes that AIDS was discussed in the briefs, p. 346, and is widely believed to have had some influence on the Justices who formed the majority. See also *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991) (AIDS infection rates among gay men form a rational basis for the military's exclusion).

26. P. 164. This theme is developed in greater detail in TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: AN ECONOMIC APPROACH TO THE AIDS EPIDEMIC* (forthcoming 1993).

practices of bisexual and gay men strongly away from unprotected anal intercourse toward intercourse with a condom (which is safer but not perfectly safe), oral intercourse (likewise), and mutual masturbation (which is safe) or abstinence (ditto).<sup>27</sup> As HIV infection becomes more prevalent in the heterosexual population, the practices of predominantly heterosexual men and women are changing as well.<sup>28</sup>

Acting on this economic analysis, the best way for the government to fight the spread of AIDS would be through public education about the relative safety of different sexual practices. Since AIDS is often, and increasingly, spread by intravenous drug users' sharing of contaminated needles and then, by heterosexual intercourse, to the drug users' sexual partners, economic analysis would also encourage strategies such as the distribution of latex condoms to the general population and of clean needles to those addicted to intravenous drugs.<sup>29</sup> Sodomy laws can contribute little if anything to preventing the spread of AIDS, in part because they regulate conduct that is safe as well as unsafe. Even if sodomy laws reduced the overall incidence of unsafe sexual behavior (which seems doubtful), they create other incentives that contribute to rather than retard the spread of AIDS. By rendering a variety of sexual practices illegal, sodomy laws probably impede the flow of useful information about sex to the public,<sup>30</sup> and certainly impede the accurate reporting of AIDS cases and the tracing of the patients' sexual partners to inform them of their risks.<sup>31</sup> Citing statistics from Sweden as an example, Posner cogently argues that "[a] climate of sexual tolerance may actually retard rather than promote the spread of venereal diseases in general and AIDS in particular."<sup>32</sup>

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27. See J.L. DENSER, AIDS AND THE HETEROSEXUAL 21-22 (1991) (safer sex practices in San Francisco stabilized percentage of population infected, 1982-88); DAVID E. KANOUSE ET AL., RESPONSE TO THE AIDS EPIDEMIC: A SURVEY OF HOMOSEXUAL AND BISEXUAL MEN IN LOS ANGELES COUNTY ix, 44, 46 (1991) (seven out of eight gay and bisexual men had made changes in sexual practices as a result of AIDS); Marshall H. Becker & Jill G. Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 AM. J. PUB. HEALTH 394 (1988); Donald E. Riesenber, *AIDS-Prompted Behavior Changes Reported*, 255 J. AM. MED. ASS'N 171 (1986).

28. See, e.g., DAVID E. KANOUSE ET AL., AIDS-RELATED KNOWLEDGE, ATTITUDES, BELIEFS, AND BEHAVIORS IN LOS ANGELES COUNTY 52 (1991) (Table 18) (three out of ten heterosexuals made changes in sexual practices in response to AIDS).

29. For a complex economic analysis of public education, condom distribution, and needle exchanges as state responses to AIDS, see PHILIPSON & POSNER, *supra* note 26, ch. 6.

30. When public health authorities want to distribute sexually explicit information about unsafe sex, they are routinely confronted with the argument that the government should not advertise or educate the public about conduct that is illegal. See Steve Brewer, *AIDS Seen as Real Threat in Crowded Jails of California*, L.A. TIMES, July 5, 1987, at 3; Jay Mathews, *Antisodomy Laws Targeted for Repeal After High Court Ruling*, WASH. POST, Feb. 4, 1987, at A16.

31. Also, to the extent that sodomy laws apply to different-sex couples and prohibit oral sex, they penalize sexual behavior that is considered safer for women than vaginal sex is. See p. 345 n.54.

32. P. 165.

### B. *Posner's History of Attitudes Toward Homosexual Activity*

Of Posner's three benefits of sex, one (sociability) is clearly linked to cultural attitudes, the second (hedonistic, especially the aesthetic feature) is partly linked, and the third (procreation) is biological in nature but dependent upon culture and context as to whether or to what extent it is a benefit. Of the three costs of sex, one (disapproval) is nothing but cultural attitudes, another (search costs) is heavily dependent upon such attitudes, and the third (taxes) is biological in nature but dependent upon culture and context as to whether or to what extent it is a benefit (a desired child is a benefit of man-woman vaginal sex, an unwanted child a tax). Thus, a corollary of this sort of sexual calculus is that cultural context, perhaps more than biology,<sup>33</sup> is critical. Posner appreciates this, and much of *Sex and Reason* traces the different attitudes toward sex taken in different societies over time. His mini-history of Western attitudes toward sexual behavior traces a progression through three stages.<sup>34</sup> Although only a preliminary effort at synthesizing prior scholarship, the history contributes to Posner's overall argument that such attitudes are highly variant and therefore subject to change and reform.

Posner's account of different attitudes toward homosexual behavior across cultures as well as across history demonstrates that modern American culture is unusually antihomosexual. American intolerance is in stark contrast with the social tolerance of male homosexual activity in ancient Greece and Rome,<sup>35</sup> medieval China and Japan,<sup>36</sup> and modern Scandinavia, especially Sweden<sup>37</sup>—all flourishing cultures from which we might learn.<sup>38</sup> Indeed, Posner invokes these cultures in developing his own regulatory model, which treats sexuality as "morally indifferent" and advocates tolerance of homosexual behavior.

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33. Chapter 4 on "The Biology of Sex" (pp. 85-110) explicates a sociobiological theory of sex, which Posner recognizes is quite controversial. Pp. 108-10. *See, e.g.,* MICHAEL RUSE, *HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY* 130-49 (1988). Posner claims that little if any of his analysis of sexual behavior would be affected if sociobiology were completely wrong. P. 110. *But see* Hadfield, *supra* note 9.

34. Posner's Stage One existed in ancient Greece, where, he says, companionate marriage was rare and society offered few restraints on male sexual activity (including homosexual activity). Pp. 38-45, 146-51, 173. Western culture moved into Stage Two during the early Christian era, during which women enjoyed greater status within marriage; once companionate marriage became the center of sexual morality, practices outside of marriage (including homosexual activity) became more problematic and were subjected to increasingly stringent regulation. Pp. 45-54, 151-61, 173-77. The First World War inaugurated Stage Three, during which the greater economic independence of women and the decline of marriage as the center of sexual morality have freed both men and women from the restrictive mores of Stage Two; hence, homosexual activity has lost much of its moral stigma. Pp. 54-60, 161-73, 174-75.

35. Pp. 42-44.

36. Pp. 68-69.

37. Pp. 56-58, 161-73.

38. *See also* CLELLAN S. FORD & FRANK A. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* 130-31 (1951) (in 49 of the 76 societies other than our own that were surveyed—64%—homosexual activities were considered "normal and socially acceptable").

The most striking feature of Posner's history is his qualified acceptance of the view that sexual norms do not come from nature but instead express historically contingent values held by society at any given time. His historical account is a useful step toward understanding that antihomosexual attitudes are neither immutable nor universal, but rather have been created by social arrangements that are now in the process of change. For example, Posner's argument that the (still incomplete) economic and social liberation of women has eroded traditional attitudes justifying intolerance of homosexual behavior<sup>39</sup> suggests that antihomosexual attitudes have a direct link to attitudes subordinating women to men.

### C. *Posner on the Regulation of Homosexuality*

If Posner's history is correct, not only are American attitudes about homosexuality changing, but antihomosexual regulations are ripe for reform as well. Thus, most of *Sex and Reason* represents Posner's rethinking of Americans' traditional regulation of sexuality in general and homosexuality in particular. As the basis for his analysis, Posner posits three normative principles: antimoralism, utilitarianism, libertarianism.<sup>40</sup>

First, Posner rejects moralistic approaches to sexuality and its regulation<sup>41</sup> and proposes that our society treat sex as "morally indifferent," much as it does eating.<sup>42</sup> While we have different eating habits and tastes in food, most members of Western societies do not attach moral significance to those differences.<sup>43</sup> Posner proposes that we treat sexual habits and tastes the same way. Inspired by the tolerance for various sexual activities evident in other times and cultures, the antimoralist principle nullifies many traditional arguments for the regulation of sexuality. For example, Posner refuses to consider arguments to criminalize sodomy because it is allegedly "unnatural" or contrary to the Bible.<sup>44</sup>

39. Pp. 174, 178, 180.

40. These principles are most explicitly developed in Chapter 7, on "Optimal Regulation of Sexuality," pp. 181-219. For other especially pointed statements of Posner's philosophy of regulating sex, see pp. 3, 85, 437-38, 441.

41. Pp. 220-40.

42. Pp. 85, 181-82.

43. There are exceptions, of course: many Jews observe strict dietary laws, as do Hindus and Muslims; some secular vegetarians consider their diet a moral imperative, as well. See also CAROLINE WALKER BYNUM, *HOLY FEAST AND HOLY FAST: THE RELIGIOUS SIGNIFICANCE OF FOOD TO MEDIEVAL WOMEN* (1987). Michel Foucault speculates that, in the West, sex did not become more morally problematic than eating until the eighteenth century. MICHEL FOUCAULT, *THE USE OF PLEASURE* 51-52 (1985) [hereinafter FOUCAULT, *PLEASURE*] (vol. 2 of *THE HISTORY OF SEXUALITY* (Robert Hurley trans.)). Foucault completed only three volumes of *The History of Sexuality*. The other two are *AN INTRODUCTION* (vol. 1) (1978) [hereinafter FOUCAULT, *INTRODUCTION*] and *THE CARE OF THE SELF* (vol. 3) (1986) [hereinafter FOUCAULT, *CARE OF THE SELF*].

44. Pp. 228, 233.

Second, in place of moral arguments, Posner advocates utilitarian cost-benefit analysis as the lodestar for justifying any regulation of sexuality. That is, regulations of sexual behavior must be justified by a fact-based demonstration that the behavior has generated "externalities" (costs of individual behavior imposed upon third parties without their consent) *and* that the regulation will reduce the externalities without itself imposing excessive costs. Externalities that might justify regulation include the spread of disease, aggregate population problems, harm to children, and so on. The list is broad, but Posner requires a tight fit between regulation and problem; thus, he rejects regulatory policies that do not really solve the problem and/or generate other costs exceeding the benefits they are likely to bestow.<sup>45</sup>

Third, Posner argues for a libertarian presumption in the cost-benefit calculus.<sup>46</sup> As Posner uses the term, libertarian means two related things: a presumption against government intervention into private behavior and a refusal to include in the cost-benefit analysis nosy preferences, namely, the desire of some people to impose their preferences on others.<sup>47</sup> The libertarian presumption therefore disallows defenses of antihomosexual laws as means by which some citizens express dislike of bisexuals, gay men, and lesbians, and requires the defender of such laws to demonstrate both that they are narrowly tailored to address true externalities, and that they are cost-effective.

The acid bath of economics exposes many antihomosexual laws and policies as unjustified or counterproductive, especially if one denies the validity of moralist arguments or arguments based upon nosy preferences. Accordingly, Posner's policy prescriptions are on the whole supportive of the legal concerns of gay and lesbian activists. For examples, *Sex and Reason* takes the following arguably pro-gay positions:

45. See, e.g., *supra* text accompanying notes 25-32 on sodomy laws and AIDS.

46. P. 438. This libertarian principle is independent of utilitarianism. Its inspiration is JOHN STUART MILL, ON LIBERTY 70-86 (David Spitz ed., 1975) (1859). See pp. 3, 202-04, 441.

Since utilitarianism does not compare preferences, Amartya Sen has suggested that it is insufficiently bounded; for example, it might justify torture in circumstances where utility to a sadist (and observers) outweighs disutility to the victim. See AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 79-88 (1970). In a century haunted by Adolf Hitler, Pol Pot, and Joseph Stalin, the libertarian principle may be necessary to protect utilitarian analysis from Sen's paradox.

47. For a similar distinction between selfish preferences and nosy preferences, see RONALD DWORKIN, A MATTER OF PRINCIPLE 363-65 (1985). Clearly, libertarianism seeks to minimize active government enforcement of people's nosy preferences (e.g., putting people in jail). Less clear is whether libertarianism also opposes more passive enforcement of nosy preferences, such as using them to decide who gets government benefits (e.g., allowing certain couples to marry). Posner's libertarianism clearly counsels against active enforcement, and seems to seek to avoid passive enforcement as well. See, e.g., p. 311 (right to marry should, presumptively, not be limited to accommodate preferences); pp. 322-23 (job discrimination statutes, to the extent we want to have them at all, should bar discrimination on the basis of sexual orientation). In any case, I do not think this distinction is analytically sustainable. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

- Sodomy laws are unjustified, and indeed retard serious efforts to prevent the spread of AIDS among bisexuals and gay men.<sup>48</sup>
- Domestic partnership laws recognizing and providing statutory benefits for same-sex relationships seem justified.<sup>49</sup>
- Most of the stated reasons for excluding bisexuals, gay men, and lesbians from the United States military are absurd. Although Posner is not ready to end the exclusion now, he argues that bisexuals, gay men, and lesbians already in the military should be allowed to remain.<sup>50</sup>
- So long as we have statutes prohibiting employment discrimination, they should prohibit discrimination by reason of sexual preference, since such discrimination is just as irrational and inefficient as race or gender discrimination in the workplace.<sup>51</sup>
- Prohibitions preventing gay men or lesbians from being school teachers lack evidentiary support.<sup>52</sup>
- A flat rule against adoption by gay men and lesbians is unjustified.<sup>53</sup>
- The best ways to fight AIDS in the bisexual/gay population involve education and tolerance rather than prohibition of homosexual behavior; mandatory AIDS testing is a bad idea.<sup>54</sup>

The willingness of a principled conservative intellectual to treat these important gaylegal issues with enthusiasm and sympathy is laudable. But we—members of the lesbian, gay, and bisexual communities—should also understand the limits of Posner's approach for issues that concern us. Those limits expose important contradictions within Posner's analysis of gaylegal issues.

## II. A INTERNAL CRITIQUE OF POSNER'S ANALYSIS OF THE REGULATION OF HOMOSEXUALITY

While Posner's policy prescriptions will strike many as surprisingly pro-gay, they are not satisfactory to most of us who are bisexual, gay, or lesbian. From our point of view, repealing sodomy laws and outlawing overt discrimination against bisexuals, gay men, and lesbians are easy cases for a rationalist,

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48. Pp. 309-11, 164-65.

49. Pp. 311-14.

50. Pp. 314-21.

51. Pp. 322-23.

52. Pp. 403-04.

53. Pp. 417-20.

54. Pp. 163-65, 209.

libertarian analysis. But a tough-minded cost-benefit analysis would not stop with the easiest cases. Recognizing the same constitutional right to privacy for same-sex intimacy as is accorded different-sex intimacy, ending the military's exclusion of bisexuals, gay men, and lesbians, and requiring states to issue marriage licenses to same-sex couples are conclusions that are scarcely less compelling under Posner's first principles. Yet Posner himself rejects or avoids these latter conclusions. And he does not even discuss other issues of profound importance to lesbian, gay, and bisexual communities.<sup>55</sup>

To be sure, *Sex and Reason* is only a sampler of issues and arguments and does not pretend to support a gaylegal agenda. But Posner's analysis is insufficient according to his own stated criteria. I argue in this Part that Posner's views about the military exclusion, same-sex marriage, and sodomy laws (the three most prominent legal issues related to homosexuality discussed in the book) are inconsistent with Posner's libertarian, utilitarian, and antimoralist principles. Much but not all of the inconsistency can be explained by reference to an implicit fourth principle, pragmatism, which has been prominent in Posner's recent work and which declaws the proclaimed libertarianism of *Sex and Reason*.

A. *The Libertarian Presumption—Trumped by Deference to Public Opinion, Authority, and the Status Quo*

A libertarian baseline seems almost automatically lethal to state sodomy laws (state intrusions into private consensual conduct) and to state discrimination against bisexuals, gay men, and lesbians in marriage and service in the military (discriminations based upon nosy preferences and not upon true externalities), because libertarian theory suggests that government has no authority to regulate private conduct or give effect to nosy preferences. Yet *Sex and Reason* shrinks from these logical applications of its own theoretical foundation.

For example, working from a libertarian presumption, one would find sodomy laws easy targets, and indeed hardly worth much analysis.<sup>56</sup> They are classic state intrusions into private sexual conduct and seem inspired by nothing more than nosy preferences. Surprisingly, Posner does not invoke libertarianism

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55. For example, *Sex and Reason* hardly discusses indirect governmental discrimination against bisexuals, gay men, and lesbians, which is amply displayed in the weakness of state efforts to discourage crime and violence against members of our communities, to deal with violence within same-sex households, to penalize harassment and hate speech targeted at bisexuals, gay men, and lesbians, and to prevent bisexual, gay, and lesbian teen suicides. Neither does Posner analyze the government's belated and inadequate response to the AIDS epidemic. These issues affect the lives of bisexuals, gay men, and lesbians far more than sodomy laws and the military exclusion.

56. Such laws were roundly condemned by the original utilitarian, Jeremy Bentham, in *An Essay on "Paederasty"* (ca. 1785), reprinted in *PHILOSOPHY AND SEX* 353-69 (Robert Baker & Frederick Elliston eds., rev. ed. 1985).

in tackling the issue of sodomy laws, but uses only a cost-benefit analysis (and one which belittles or minimizes most of the costs of such laws).<sup>57</sup>

Ultimately, Posner does conclude that sodomy laws should be repealed,<sup>58</sup> a conclusion consistent with the libertarian principle. But he stops short of arguing that *Bowers v. Hardwick*<sup>59</sup> was wrong in refusing to recognize the same constitutional right to engage in homosexual intimacy as the Supreme Court has recognized for heterosexual intimacy—even though the *Bowers* dissenters were clearly following the libertarian presumption<sup>60</sup> and even though Posner subjects the majority opinion to analytically powerful criticism.<sup>61</sup> His coyness about *Bowers* suggests that, for Posner, libertarianism is only a policy presumption, without any constitutional bite.

Posner's reluctance to vest constitutional significance in the libertarian presumption signals the weakness or conflicted nature of his preference for the libertarian principle in *Sex and Reason*. Posner adopts the principle from John Stuart Mill's *On Liberty*.<sup>62</sup> Mill's enterprise was to set forth "the nature and limits of the power which can be legitimately exercised by society over the individual."<sup>63</sup> For Mill, society is not acting legitimately when it limits individual actions simply because they disgust some citizens.<sup>64</sup> If Posner agrees

57. Pp. 309-11.

58. P. 311.

59. 478 U.S. 186 (1986).

60. Both dissenting opinions emphasize the individual's right to choose in matters of sexual intimacy. "From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions." *Bowers*, 478 U.S. at 218-19 (Stevens, J., dissenting); see *id.* at 205-06 (Blackmun, J., dissenting); see also *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (invoking classic libertarian philosophy to strike down state sodomy law on constitutional grounds), *cert. denied*, 451 U.S. 987 (1981). Posner expresses sympathy for the dissenters' arguments. P. 350.

61. Pp. 341-49. Posner offers a number of criticisms of *Bowers*. (1) *Bowers* cannot easily be distinguished from the Court's earlier privacy cases. *Bowers* is remarkably similar to *Griswold v. Connecticut*, 381 U.S. 479 (1965), in that it involved a law which discouraged a form of contraception (the Georgia sodomy statute applied to oral and anal sex among heterosexuals) and is an easier case than *Roe v. Wade*, 410 U.S. 113 (1973), in that the conduct condemned by the statute did not involve the Court in the intractable issue of "when life begins" (that is, when internalized costs become legitimate externalities). (2) Reflecting as they do vicious sentiments against a minority, sodomy laws are in some ways worse than the abortion and anticontraception statutes the Court had earlier invalidated. There is a "gratuitousness, an egregiousness, a cruelty, and a meanness about the Georgia statute," p. 346, whose twenty-year sentence for violations struck even Justice Powell (the critical fifth vote for the *Bowers* majority) as questionable. (3) The Court's justification of sodomy laws as resting upon "millennia of moral teaching," *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring), overlooked the fact that Michael Hardwick was prosecuted for oral sex. The historical pedigree of sodomy laws includes only anal sex. See Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988).

62. Pp. 3, 202-04, 438.

63. MILL, *supra* note 46, at 3; see *id.* at 10-11 (central thesis is that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others").

64. I concede, of course, that Mill was writing for an audience (nineteenth-century Britons) that had no written constitution enforceable by judges, the Magna Carta being nonjusticiable. But Mill did consider government enforcement of nosy preferences "illegitimate," beyond the powers of limited government. In our society, such government action is subject to judicial review.

with Mill that government cannot legitimately regulate this private sphere, and concludes that sodomy laws illegitimately invade that sphere, then it is hard to see why he is so reluctant to argue that *Bowers v. Hardwick* was wrongly decided as a matter of constitutional principle. An explanation is suggested by Posner's recent work on pragmatism.<sup>65</sup> While *Sex and Reason* indicates that Posner is a libertarian child of Mill, this other work suggests that Posner is just as much a pragmatist child of Holmes. For Posner as for Holmes, law reflects society but does not transform it; the power of law is very much limited by the balance of forces and attitudes within the political community.<sup>66</sup> The pragmatic legislator seeks incremental rather than radical change, and the pragmatic judge defers to precedent, legislative judgments, and political consensus instead of forcing them into a desired shape. Just as Holmes was unwilling to disregard precedent and override legislative judgment in *Lochner v. New York*,<sup>67</sup> Posner seems unwilling to urge the overruling of *Bowers* and the overriding of legislative judgment in favor of sodomy laws.<sup>68</sup>

My hypothesis is that pragmatism is an implicit principle in *Sex and Reason*, one that cuts against its explicit libertarian theme. The Holmesian pragmatic strands of Posner's approach to gaylegal issues are in tension with the Millian libertarian strands. The latter favor radical reconstruction (by the judiciary if necessary) of American regulation of homosexuality, while the former counsel gradual legislative reform that follows changes in traditional antihomosexual attitudes. The hypothesis that deference to status quo attitudes trumps the libertarian presumption is borne out, and unfortunately expanded, in Posner's treatment of same-sex marriage and of the military exclusion.

Posner writes: "The libertarian places the burden of proof on those who would limit the right to marry."<sup>69</sup> Applying a cost-benefit analysis, Posner

65. See POSNER, JURISPRUDENCE, *supra* note 5; see also Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988) [hereinafter Posner, *Skepticism*].

66. On Holmesian pragmatism, see, for example, Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

67. 198 U.S. 45 (1905).

68. To continue the parallel, Holmes probably considered the maximum hour law for bakers at issue in *Lochner* to be almost as silly as Posner considers the sodomy law at issue in *Bowers*. Both jurists are happy to second-guess the legislature, but for reasons of judicial competence are not willing to raise their second guesses to the level of constitutional doctrine. There is this important difference between *Lochner* and *Bowers*, however: Holmes' willingness to uphold the New York labor law was easily consistent with and arguably required by the Court's prior cases, e.g., *Holden v. Hardy*, 169 U.S. 366 (1898), while the *Bowers* Court's willingness to uphold Georgia's sodomy law was in tension with *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973), as Posner recognizes. Pp. 342-46.

It may be that Posner would have voted with the dissenters in *Bowers* as an original matter but is now reluctant to advocate overruling a Supreme Court precedent (a bold proposal in any event for a federal judge!). I believe Posner's institutional status underlies his reticence about *Bowers*, but that is no excuse to be so coy in a work of scholarship. Academic work ought to be bold (as Posner's usually is). And it requires little boldness to argue that the Court's right to privacy case law is incoherent. Mill's libertarian principle that government cannot legitimately regulate conduct that has no third-party effects would provide a more principled basis for the *Griswold* line of cases, although I agree with Mill's critics that pure "self-regarding" acts are hard to define precisely. See, e.g., C.L. TEN, MILL ON LIBERTY 10-41 (1980).

69. P. 311.

notes that there are significant arguments in favor of recognizing same-sex marriages—self-esteem of gay men and lesbians, somewhat greater stability of same-sex relationships, and reduced promiscuity and spread of the AIDS virus—while “the costs seem slight.”<sup>70</sup> Q.E.D. Recognition of same-sex marriages would seem to be required.

But in an immediate rhetorical *volte-face*, Posner suggests that same-sex marriage need not be adopted, because discriminating against bisexuals, gay men, and lesbians in marriage laws is less irrational than discriminating against us in sodomy laws.<sup>71</sup> This is a bad form of argument generally—like arguing that one should vote for David Duke because he is nicer than Hermann Goering. Then, Posner poses a distinctly antilibertarian justification for state discrimination against same-sex marriage. “[S]ince the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified,” he suggests that “maybe the focus should be shifted to an intermediate solution,” such as the limited rights permitted by domestic partnership laws.<sup>72</sup> Posner’s analysis of same-sex marriage is thus far less libertarian than his analysis of sodomy laws. Not only does he refuse to argue that judges should implement the libertarian presumption, but he does not even discuss the possibility, even though the constitutional arguments are (when viewed without anti-gay bias) quite powerful.<sup>73</sup> To abandon libertarianism for the obviously Holmesian reason of “public hostility” is a notable sacrifice of Millian principles.<sup>74</sup>

The schizophrenic tension between Posner’s stated libertarian principle and his underlying pragmatic impulse is even more keenly reflected in his analysis of the military’s exclusion of bisexuals, gay men, and lesbians.<sup>75</sup> Drawing on the recent studies conducted by the Department of Defense’s Personnel Security Research and Education Center (PERSEREC),<sup>76</sup> Posner skewers all but one of

70. P. 311.

71. Pp. 312-13.

72. P. 313.

73. Compare *Loving v. Virginia*, 388 U.S. 1 (1967) (Due Process right to marry protects interracial couples, even though people of Virginia were hostile to such couples and did not consider their relationships to be “marriages”) and *Turner v. Safley*, 482 U.S. 78 (1987) (extending Due Process right to marry to prison inmates, including those who would never be able to consummate their marriages because they were serving life sentences) with *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Due Process right to privacy does not protect right to engage in homosexual sodomy). A principled application of the *Loving* line of cases would assure same-sex couples the right to marry. See Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN’S L.J. 134 (1988); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988); see also EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 95-101 (1989).

74. It is also incompatible with Posner’s discussion of laws or policies preventing bisexuals, gay men, and lesbians from adopting children, pp. 417-20, and from teaching schoolchildren, pp. 403-04. In those cases, the libertarian presumption trumps public hostility to bisexuals, gay men, and lesbians.

75. Pp. 314-21.

76. The PERSEREC reports, together with their accompanying attachments and the story of how they were smuggled out of the Department so that Congress and the public would be informed of their findings,

the Department's main justifications for excluding us from the armed forces.<sup>77</sup> Although by this point the libertarian presumption has disappeared from his discussion of gaylegal issues, Posner's analysis of the military's asserted policies is ruthless—until he reaches the argument which, he writes, “seems the worst but is the best,” namely, “that the morale of heterosexuals, and hence the effectiveness of the military services, would suffer if homosexuals were allowed to serve.”<sup>78</sup>

Posner is half right. The morale argument *is* the worst. Posner himself thoroughly canvasses the evidence.<sup>79</sup> During the 1940's and 1950's, for example, the open presence of gay men in the barracks did not demonstrably hurt morale. Rather, more damage was done to morale by the erratic (and therefore terrorizing) persecution of fellow soldiers whom everyone in the company knew to be brave and patriotic.<sup>80</sup> Bisexuals, gay men, and lesbians have served in the armed forces throughout the century. Furthermore, all over the country, police and fire departments, as well as paramilitary organizations that depend upon close partnership relationships, have accepted gay and lesbian officers without mishap.<sup>81</sup> Most other Western countries, including some intolerant ones, do not

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are reproduced in *GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS* (Kate Dyer ed., 1990) [hereinafter *GAYS IN UNIFORM*]. See also GOVERNMENT ACCOUNTING OFFICE, *DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY* (June 1992) [hereinafter *GAO REPORT*], a study published after *SEX AND REASON*.

77. There are three main clusters of arguments: (1) Gays and lesbians are security risks because we may be blackmailed. This “old chestnut” (as Secretary of Defense Cheney has called it, Tracy Thompson, *Judge Backs Navy's Right to Oust Gay Midshipman; AIDS Epidemic Cited as Justifiable Rationale*, WASH. POST, Dec. 10, 1991, at A4) is an unusually weak argument, for there has never been any historical experience to support it. Furthermore, on its face it can apply only to those who remain closeted. Pp. 314-15. (2) Gays and lesbians are unstable. Posner considers this a bad argument even if it is factually correct (which I, obviously, dispute), because the military has all sorts of screening processes that are supposed to exclude the unstable. P. 315. (3) Gay or lesbian officers might seek sexual favors from soldiers and/or create an atmosphere of sexual intrigue. Posner points out that “this bridge was crossed when the armed forces admitted women over the same objection” and the objection was no longer believed to be sufficient ground for segregation. P. 316.

78. This rationale has recently become the military's main argument for the exclusion. See, e.g., [General Colin] Powell Says Discipline Is Basis of Military Homosexual Ban, WASH. POST, Feb. 6, 1992, at A3. In a kinder, gentler version of traditional antihomosexual discourse, Powell, who is chairman of the Joint Chiefs of Staff, testified to the House Budget Committee (on questioning by member Barney Frank, who is gay):

[I]t is difficult in a military setting where there is no privacy . . . to introduce a group of individuals who are proud, brave, loyal, good Americans, but who favor a homosexual lifestyle, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive. . . .

*Fiscal Year 1993 Defense Budget: Hearing Before the House Comm. on the Budget*, 102d Cong., 2d Sess. 45 (1992) (testimony of General Colin Powell, Chairman, Joint Chiefs of Staff). Posner may not entirely agree with Powell's remarkable argument, but he is, like Powell, willing to give decisive weight to antihomosexual attitudes as the basis for penalizing gay men, lesbians, and bisexuals. P. 316.

79. Pp. 316-20.

80. See ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990); MARY ANN HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT* (1990); Allan Bérubé & John D'Emilio, *The Military and Lesbians during the McCarthy Years*, 9 SIGNS 759 (1984).

81. See *GAO REPORT*, *supra* note 76, at 41-42 (all but one of the eight police and fire departments visited by GAO admitted gays and lesbians on an equal basis; all the nondiscriminating forces said that

seek to exclude bisexuals, gay men, and lesbians from their armed forces, again without any evidence of ill effects on morale.<sup>82</sup> And so on.

Not only does the cost to morale of ending the exclusion appear to be overstated by defenders of the military exclusion, but Posner points out the many benefits of ending the policy, such as “saving the cost of administering a policy of excluding homosexuals, expanding the supply of soldiers, reducing the incentive to fake homosexuality when a draft is in force, and bolstering the self-esteem of homosexuals by deeming them fit to serve their country in positions of responsibility and danger.”<sup>83</sup> The benefits of ending the exclusion are even more extensive than those Posner mentions. While there is little if any evidence that the presence of lesbians in the barracks is disturbing to straight servicewomen, there is evidence aplenty that the morale of servicewomen, lesbian and straight, is undermined by sexual harassment through lesbian-baiting, by discrimination against women who are even suspected (often for the most spurious of reasons) of being lesbian, and most of all by the periodic “witch hunts” conducted by the military to track down lesbian “gangs” (almost always yielding very few “culprits” even while terrorizing dozens of hundreds of servicewomen).<sup>84</sup>

Homophobic attitudes and policies within the military have become a powerful weapon for sexism, as Michelle Benecke and Kirstin Dodge have documented. Based on Benecke’s experience in the military and on case studies, they argue that charges of lesbianism are most often directed at servicewomen who work in traditional “men’s jobs,” servicewomen who are assertive and in good shape (often, therefore, women who are the most valuable members of the armed forces),<sup>85</sup> and especially servicewomen who rebuff the sexual advances of servicemen. Servicewomen know this, and the threat of investigation serves as a way for some servicemen to harass them and put them down.<sup>86</sup>

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“homosexuals and heterosexuals appear to have acceptable working relationships,” and several stated that “exclusionary policies based on sexual orientation are counterproductive and only create further stress”).

82. *Id.* at 40-41, 54 (only four of seventeen Western countries, most within NATO, excluded bisexuals, gay men, or lesbians from their armed forces).

83. P. 318.

84. Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces’ War on Homosexuals*, 13 HARV. WOMEN’S L.J. 215 (1990).

85. One anti-homosexual officer expressed his frustration in obtaining “credible evidence” to expel lesbians from the military:

Experience has also shown that the stereotypical female homosexual in the Navy is hardworking, career-oriented, willing to put in long hours on the job and among command’s top professionals.

As such, allegations that this woman is a homosexual, particularly if made by a young and junior female sailor with no track record, may be dismissed out of hand or pursued half-heartedly.

GAO REPORT, *supra* note 76, at 27. Of course, many competent servicewomen are *not* lesbians. Benecke and Dodge’s point is that assertiveness and failure to conform to gendered stereotypes is punished by lesbian-baiting, whether the victim is or is not in fact a lesbian. See Benecke & Dodge, *supra* note 84, at 216.

86. Benecke & Dodge, *supra* note 84, at 216. Thus, it should be no surprise that the rates for discharging service personnel for homosexuality are between twice (Navy) and eight times (Marines) as high for servicewomen as for servicemen. See GAYS IN UNIFORM, *supra* note 76, at 84 (First PERSEREC report, App. B).

Ending the military's antihomosexual policy would therefore not only benefit lesbians and gay men, but would have tangible benefits for most women in the military.

Even without a libertarian presumption, then, the cost-benefit analysis seems to point overwhelmingly against the exclusion. Still, Posner insists that morale remains a problem. He cites to a poll indicating that most veterans do not want the exclusion to end and stresses that "heterosexuals were upset at the prospect of being seen in the nude by a homosexual."<sup>87</sup> Thus, pragmatism—which at this point in the analysis verges on pandering to juvenile feelings—trumps normal cost-benefit analysis just as it has trumped the libertarian presumption.

Posner's analysis concludes with a series of arguments remarkable even for a pragmatist. To begin with, he argues that the benefits to lesbians, gay men, and bisexuals of ending the exclusion must be balanced against "some unknown cost in military effectiveness. . . . If we give the military social assignments, we also give it an excuse for failing to achieve combat effectiveness."<sup>88</sup> This point is exactly backwards; the current policy of discrimination against gays and lesbians is itself a social assignment, one that the military seems to have constructed to bolster its own concept of manhood,<sup>89</sup> and that the military's own studies have suggested has no relationship to combat effectiveness or other jobs the military is publicly charged with doing. And even if allowing us to serve entailed a cost in military effectiveness, the significance of this cost may be questioned if Posner is correct in noting that thousands of gay men, lesbians, and bisexuals already serve in the military notwithstanding the exclusion. Posner also counsels deference to the military's informed judgment, emphasizing that deference is especially deserved *now*, when the military's combat effectiveness is high.<sup>90</sup> This is a hollow argument, because the

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87. P. 318. Posner concedes that such squeamishness sounds "silly," but "one cannot simply *assume* that declaring homosexuals fit for service in our armed forces would create no morale problems." P. 318. Though Posner also notes that a more recent poll found 60% of the respondents ready to allow gay men and lesbians to serve in the military, p. 319, he does not note that many polls taken in the 1980's found respondents skeptical of the military exclusion, usually by substantial margins. See GAO REPORT, *supra* note 76, at 39 (Table 4.1) (Gallup Poll percentages of public believing that lesbians and gay men should be allowed in the armed forces: 51% in 1977; 52% in 1982; 55% in 1985; 55% in 1987; 60% in 1989; 69% in 1991); *id.* at 39-40 (Human Rights Campaign Fund poll in April 1991 found 81% of respondents opposing military discharge because of homosexuality).

88. P. 320.

89. For an excellent elaboration of this and other points, see Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991); see also William Arkin, *Military Socialization and Masculinity*, 34 J. SOC. ISSUES 151 (1978).

90. P. 321. However, there is some evidence that during the Gulf War, when combat effectiveness was most required, the Army ceased to enforce the military exclusion, putting discharges of gay, lesbian, and bisexual soldiers on hold. See, e.g., Nick Bartolomeo, *DOD Denies It Halted Policy on Gays in Desert Shield*, WASH. BLADE, August 2, 1991, at 1; Nick Bartolomeo, *Military Sends a Dozen Gays to the Gulf*, WASH. BLADE, February 1, 1991, at 1; Nick Bartolomeo, *Pentagon Says There's 'No Change' in Policy on Gays in the Military*, WASH. BLADE, January 18, 1991, at 1.

military's own experts (in the PERSEREC reports) do not support the exclusion.<sup>91</sup>

Indeed, Posner immediately abandons any pretense of deference to the military's expertise and proposes his own experiment, in which lesbians, gay men, and bisexuals would continue to be excluded from enlisting in the military but would be permitted to remain inside the armed forces once admitted.<sup>92</sup> There is a thin line between this sort of pragmatism and hypocrisy. Although Posner opposes outright repeal of the military exclusion, his experiment would amount to the same thing. It appears that many recruits who later turn out to be bisexual, gay, or lesbian are not fully aware of their sexual orientation when they join the military;<sup>93</sup> under Posner's proposal they would be admitted to the armed forces and then could not be expelled once their sexual preference became clearer to them. And those who are aware of their homosexual feelings when they sign up are usually clever enough to sneak through the military's historically porous psychiatric gendarmerie.<sup>94</sup> Posner's experiment verges on institutionalized doublethink: the government can parade its homophobic policy so long as it studiously refuses to enforce it. This is the very phenomenon Posner condemns in the sodomy law context, and it strikes me as a squalid practicality.

Thus in dealing with the most prominent gaylegal issues, Posner sacrifices his libertarian principle when it would lead to unpopular results, disrupt the status quo, or run up against traditional legal process notions of institutional competence. This is disappointing as well as paradoxical. What has been exciting about Posner's work in the past (and what is exciting in much of *Sex and Reason*), has been a willingness to press his economic analysis relentlessly to support radical and unsettling conclusions. The whole point of a Millian libertarian presumption is to cut through bad traditions, institutional stupidity, and hostile public opinion and to rethink the rationality of outdated or bigoted policies. Even Posner's earlier work on pragmatism revealed a lively nonsense pragmatist who "prefers ferment to stasis" and "likes to kick sacred cows."<sup>95</sup> It is ironic that Posner's actual application of his stated libertarian presumption is not only at odds with the libertarian philosophy, but also with

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91. See *supra* note 76 and accompanying text.

92. P. 321. Remarkably enough, an editorial in *Navy Times*, the unofficial weekly newspaper of the Navy, seems to have endorsed a similar proposal. (*Army Times* and *Air Force Times* called for the repeal of the military exclusion.) *End Ban on Gay G.I.'s*, 2 *Service Papers Urge*, N.Y. TIMES, August 20, 1992, at B10.

93. Joseph Harry, *Homosexual Men and Women Who Served Their Country*, in BASHERS, BAITERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 117, 121 (John P. De Cecco ed., 1985) [hereinafter BASHERS, BAITERS & BIGOTS].

94. See, e.g., Jackie Cursi, *Leaping Lesbians*, LESBIAN ETHICS, Fall 1986, at 81.

95. POSNER, JURISPRUDENCE, *supra* note 5, at 28. Posner also says he "prefers shaping the future to maintaining continuity with the past," but with the qualifier "within the bounds of prudence." *Id.* The qualifier may be a tip-off. Prudence in modern America traditionally has meant looking the other way when gay-bashing is going on.

his previous statement of pragmatist philosophy. This is as puzzling as it is frustrating to those of us who are stigmatized by the policies Posner should be criticizing.

B. *Cost-Benefit Analysis Undercut by Slanted and Static Calculation of Costs and Benefits*

Even where Posner neglects the libertarian presumption, he analyzes the costs and benefits of different regulations touching upon sexuality. Posner's cost-benefit analysis applies in a new setting the familiar Kaldor-Hicks concept of economic efficiency: a transaction or change is efficient if those who benefit from it are helped more than those who lose from it. Theoretically, the winners in a Kaldor-Hicks efficient change would be able to "buy off" the losers, and still have surplus benefit left over. Consistent with his prior work, Posner in *Sex and Reason* tends to start with the assumption that legal rules should be changed only if the change is Kaldor-Hicks efficient, because only such changes are wealth-maximizing and, hence, win the "hypothetical consent" of the citizenry that is needed to change legal rules in a liberal democracy.<sup>96</sup> On important gaylegal issues, Posner's application of this Kaldor-Hicks test makes it exceedingly difficult to change the antihomosexual status quo. Indeed, since Posner's use of Kaldor-Hicks privileges status-quo baselines (reflecting decades of homophobic nosy preferences), he not only neglects but inverts the libertarian presumption.

Consider the cost-benefit analysis of same-sex marriage, which is much more complex than Posner makes it out to be. Specifically, Posner's cost-benefit calculus undervalues tangible as well as intangible benefits of legal reform for bisexuals, gay men, and lesbians; ignores substantial third-party benefits; and overvalues the costs. Thus Posner whizzes through the benefits of allowing same-sex marriage in less than a paragraph: it would "raise homosexuals' self-esteem"; would "contribute, although perhaps only marginally, to the stability of homosexual relationships"; and would "reduce the spread of venereal disease in general and of the justly dreaded AIDS virus in particular."<sup>97</sup> Although he first suggests that the costs of recognizing such relationships "seem slight," he analyzes these costs at length: institutionalization of same-sex marriage would "be widely interpreted as placing a stamp of approval on homosexuality"; would carry an "information cost" in that the informational value of the term "marriage" is lessened as the term is broadened (though this might be offset by the signaling advantage that marriage would offer to same-sex couples); and would have "many collateral effects, simply because marriage

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96. See generally Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

97. P. 311.

is a status rich in entitlements," most of which were not designed with same-sex couples in mind.<sup>98</sup> The bottom line is that Posner is uncertain whether same-sex marriage is cost-justified but does endorse more limited domestic partnership laws.

At the outset, it is worth noting that many progressives are ambivalent about the institution of marriage. Many feminist scholars view marriage as a patriarchal institution that has little normative appeal,<sup>99</sup> and that critique has impelled some thoughtful gaylegal scholars and activists to reject marriage as a goal for our movement.<sup>100</sup> Additionally, some lesbians, bisexuals, and gay men reject the moral ideal of lifelong monogamy and favor a less exclusivist concept of sexual relationships. My own view is that domestic partnership laws offer a useful alternative to marriage for all couples (different-sex as well as same-sex), but marriage remains a useful institution for many couples because of the formal commitments it entails. The tragedy of AIDS makes marriage a more attractive option for male couples in particular. In any case, I believe same-sex couples should have the same opportunities to choose marriage as different-sex couples. Few bisexuals, gay men, or lesbians would disagree.<sup>101</sup>

Our general agreement on this issue stems from a fact that Posner also recognizes: becoming married triggers all sorts of legal rights, duties, and entitlements. In the District of Columbia, which is typical of most jurisdictions on these issues, the main statutory rights and duties a spouse has but a lover does not include the following:<sup>102</sup>

98. Pp. 311-13.

99. Feminist critiques of marriage include MICHÈLE BARRETT & MARY MCINTOSH, *THE ANTI-SOCIAL FAMILY* (1982); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970); Sheila Cronan, *Marriage*, in *RADICAL FEMINISM* 213-21 (Anne Koedt et al. eds., 1973); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 *WIS. L. REV.* 187, 197-206.

100. For an excellent introduction to the debate within the bisexual, gay, and lesbian communities, see *Symposium: The Family in the 1990s: An Exploration of Lesbian and Gay Rights*, 1 *LAW & SEXUALITY* 1-96 (1991); see also the exchange between Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?* 6 *OUT/LOOK*, Fall 1989, at 8, and Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *id.* Scholarly critiques of marriage include Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 *LAW & SEXUALITY* 63 (1991); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *GEO. L.J.* 459, 560-61 (1990); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMPLE L. REV.* 511 (1990).

101. See, e.g., Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *LAW & SEXUALITY* 31, 42 (1991). By the same token, many gay men and lesbians are harshly critical of the United States military and consider its regimentation unacceptable. But virtually all of us strongly believe that those of us who want to serve ought to have that choice.

102. For a similar listing of rights and benefits in other jurisdictions, see HAYDEN CURRY & DENIS CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (6th ed. 1991). Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 *WIS. WOMEN'S L.J.* 1 (1986), sets out ways by which cohabiting couples can create some of the same benefits of marriage.

- the right to receive, or the obligation to provide, spousal support and (in the event of separation or divorce) alimony and an equitable division of property;<sup>103</sup>
- preference in being appointed the personal representative of an intestate decedent;<sup>104</sup>
- priority in being appointed guardian of an incapacitated individual,<sup>105</sup> or to act for an incapacitated person in making health care decisions;<sup>106</sup>
- all manner of rights relating to the involuntary hospitalization of the spouse, including the right to petition,<sup>107</sup> the right to be notified,<sup>108</sup> and the right to seek release;<sup>109</sup>
- the right to bring a lawsuit for the wrongful death of the spouse;<sup>110</sup>
- the right to spousal benefits statutorily guaranteed to public employees, including health and life insurance<sup>111</sup> and disability payments,<sup>112</sup> plus similar contractual benefits for private-sector employees;
- the right to invoke special state protection for “intrafamily offenses”;<sup>113</sup>
- the right to visit one’s spouse on furlough while incarcerated in prison;<sup>114</sup>
- the right to claim an evidentiary privilege for marital communications;<sup>115</sup>
- a presumption of joint ownership of real estate,<sup>116</sup> and a right not to be held to a mortgage or assignment of rights to creditors that was entered without spouse’s written permission;<sup>117</sup>

103. D.C. CODE ANN. §§ 16-910 to -916 (1981).

104. *Id.* § 20-303(a) (“spouse” is first in line for appointment after personal representatives named in a will, while “lover” is last in line, included in the category “any other person,” after any “relation” of the decedent and the decedent’s largest creditor).

105. *Id.* § 21-2043(c).

106. *Id.* § 21-2210(a).

107. *Id.* § 21-541.

108. *Id.* § 21-522.

109. *Id.* § 21-546.

110. *Id.* § 16-2701.

111. *Id.* §§ 1-622.7(b), 1-623.7(b) (Supp. 1991).

112. *Id.* § 1-624.10.

113. *Id.* § 16-1001; *see generally* §§ 16-1006 to -1036 (Supp. 1991).

114. *Id.* § 24-483(a), (c) (1981).

115. *Id.* § 14-306.

116. *Id.* § 45-216.

117. *Id.* § 15-502.

- a right to priority in claiming human remains,<sup>118</sup> and to make anatomical donations on behalf of the deceased spouse;<sup>119</sup> and
- various inheritance rights, including priority in inheriting the property of an intestate decedent,<sup>120</sup> the right to a family allowance,<sup>121</sup> and the right to dower.<sup>122</sup>

Posner argues from these rights and duties that recognizing same-sex marriage would have collateral effects, because more couples would be entitled to these rights. This is true; but he then adds that “[t]hese incidents of marriage were designed with heterosexual marriage in mind, more specifically heterosexual marriages resulting in children. They may or may not fit the case of homosexual marriage.”<sup>123</sup> The rights and obligations I have listed have nothing to do with children; there is no reason to confine their application to Ozzie-and-Harriet families (father, mother, toothy children). Indeed, states are not very choosy as to who gets to claim these rights and duties; a libertarian approach to the ability to marry has been held guaranteed by the Due Process Clause.<sup>124</sup> The law facilitates the ability of the two spouses to form a unit, a family, in which each spouse is responsible for the other and can act for the other. This goal is just as applicable to same-sex couples (who also, in fact, often have children) as to different-sex couples (who often don’t have children).

Posner’s analysis slights the strong positive value that marital rights and even obligations have for some gay and lesbian couples.<sup>125</sup> Same-sex partners often need or want these legal protections more than do partners of different-sex marriage because they face an unusual amount of family hostility. For example, during the illness of a loved one, the unmarried partner has little or no recourse if a disapproving blood family bars her from the hospital, expels her from the shared family home, and destroys or sequesters the ill person’s possessions.<sup>126</sup>

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118. *Id.* § 2-2813.

119. *Id.* § 2-1502; *see also* § 2-1507 (custody of remainder of body vests in spouse).

120. *Id.* §§ 19-301 to -305 (surviving spouse usually receives 50% or all of estate).

121. *Id.* § 19-101.

122. *Id.* §§ 16-2921 to -2925, 19-102.

123. P. 313. He then adds, rhetorically but gratuitously: “Should we worry that a homosexual might marry a succession of dying AIDS patients in order to entitle them to spouse’s medical benefits?” *Id.* This question has no place in a quasi-scientific policy discussion; merely posing it can only appeal to readers’ prejudices.

124. For example, *Turner v. Safley*, 482 U.S. 78, 96 (1987), struck down a statute restricting the ability of prison inmates to marry while they were in prison. Were all the rights and benefits of marriage designed with incarcerated felons, including murderers, in mind? The Court did not even bother to ask that sort of question and, instead, invoked the collateral effects of marriage and held marriage a benefit that could not constitutionally be denied without strong justification.

125. However, Duclos, *supra* note 101, at 53-55, demonstrates that marriage entails burdens that same-sex couples (like different-sex couples) should consider before they tie the knot. Like Duclos, I would leave it to the couple to weigh personal benefits and costs, and do not condone a state-enforced ban on same-sex marriages.

126. *See, e.g.,* In re Guardianship of Sharon Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (holding that partner should have been appointed as guardian). Incapacitated by an auto accident in 1983, Sharon Kowalski fell under the guardianship of her father, who excluded her lover, Karen Thompson, from even

The law stands with the blood family against the family chosen by the individual.

There are, as Posner stresses, costs to recognizing same-sex marriages: not only would employers and others incur the extra costs of providing statutory or contractual benefits to same-sex married couples, but many people would be offended that a woman would be legally considered the spouse of another woman.<sup>127</sup> Neither cost, especially the latter, is particularly impressive if viewed over time. That is true because intolerant attitudes can and do change, although they change more slowly than people's actions.<sup>128</sup> And, as economists say, preferences based upon imperfect information can be discounted, if not ignored altogether (in the case of nosy preferences under the libertarian philosophy).<sup>129</sup> Studies have shown a correlation between tolerating gay men and lesbians and knowing openly gay men and lesbians,<sup>130</sup> and there is every reason to believe that once people come to know same-sex married couples at least some of them will change their ideas about marriage—and about bisexuals, gay men, and lesbians as well.<sup>131</sup>

Finally, Posner's cost-benefit analysis is flawed by its omission of third-party benefits from prospective changes in marriage law. Allowing same-sex marriage would benefit many women, especially those whose social subordination has been effectuated as well as reinforced by the Western tradition of male-dominated marriage.<sup>132</sup> This tradition has been eroding as women gain more economic and social independence. Recognizing same-sex marriage would contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender.

seeing his daughter, denying Sharon's wishes and denying her previous life with Karen. Only after five years of litigation was Karen able to "bring Sharon home." See generally Nan D. Hunter, *The Sharon Kowalski Case: Sexual Dissent and the Family*, THE NATION, Oct. 7, 1991, at 406-11.

Note that same-sex couples can avoid some of these problems through contractual arrangements. See Cox, *supra* note 102. The same could be said of different-sex couples, of course. But in both cases the law makes a difference, because it creates default rules for situations in which couples through inadvertence, bad planning, or simple ignorance do not enter into optimal contracts. That different-sex married couples are protected by favorable default rules and same-sex couples completely unprotected (in most jurisdictions) is unfair, and, in a just polity, unconstitutional.

127. See Hunter, *supra* note 126.

128. See generally Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335-44 (1987) (analyzing the slow and complex process by which racist attitudes change).

129. Similarly flawed is Posner's argument that "permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality." P. 311. Even under current preferences it is hard to credit this as a significant cost. It appears that Americans regard marriage much more as a public commitment to consensual monogamy than as a public approval of particular types of relationships.

130. See Gregory M. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, in BASHERS, BAITERS & BIGOTS, *supra* note 93, at 1, 13-15 (summarizing prior studies).

131. See *infra* Part III(B).

132. See sources cited in *supra* note 100. See also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151 (David Kairys ed., 1990).

Partly for this reason, accounts of contemporary same-sex homes and families suggest that, generally, they enjoy greater freedom from hierarchy than do different-sex homes and families.<sup>133</sup> By providing examples of less hierarchical marital unions, same-sex marriage can contribute to an evolution of marriage. Indeed, the shock value that Posner considers a cost of same-sex marriage can just as easily be considered a benefit, for such marriages would stimulate discussion about what marriage "really should be" in our society. Because same-sex marriage "would create for the first time the possibility of marriage as a relationship between members of the same social status categories," it could provide benefits to women, as Professor Nan Hunter has suggested.<sup>134</sup> Synergistically, because there is a high correlation (especially for men) between antihomosexual attitudes and belief in traditional gender roles (man as breadwinner, woman as housekeeper),<sup>135</sup> gay men as well as lesbians might benefit from the improved status of women generally.

My disagreement with Posner's cost-benefit analysis goes beyond his flawed valuation of the benefits and costs of recognizing same-sex marriages, and is methodologically more general. Posner's cost-benefit approach is *not* neutral and is severely inconsistent with his supposed libertarian presumption, because it privileges an antihomosexual status quo. Since Posner does the cost-benefit analysis using the entitlements and values that exist in the status quo ante, he ends up with policies that tend to mirror the values he started with, namely, those of compulsory heterosexuality. For example, if Posner were right that the only beneficiaries of same-sex marriage would be same-sex couples who want to marry, he probably would be right that these beneficiaries could not offer enough money to buy off opposing bigots and zealots (who would ask a lot to compromise their prejudices) as well as employers and others who

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133. For accounts of same-sex households, see especially KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991) (recent and broadly based scientific survey of gay and lesbian families), as well as ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978) (early studies of different ways in which homosexual relationships are structured); JOSEPH HARRY & WILLIAM B. DEVALL, *THE SOCIAL ORGANIZATION OF GAY MALES 80-100* (1978) (early study of gay marriages); MARY MENDOLA, *THE MENDOLA REPORT: A NEW LOOK AT GAY COUPLES* (1980) (informal survey of gay and lesbian couples in the 1970's).

134. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 17 (1991). See also Law, *supra* note 99; Lewis, *supra* note 73.

135. "It has been shown that people who hold negative attitudes toward homosexuals are likely to support the maintenance of traditional sex roles, are more likely to stereotype the sexes than those who hold positive attitudes, and favor preserving the double standard between men and women. . . . Finally, other studies suggest that an individual who holds negative attitudes toward homosexuals is likely to hold negative attitudes toward other minorities and underrepresented groups as well." Mary E. Kite, *Sex Differences in Attitudes Toward Homosexuals: A Meta-Analytic Review*, in BASHERS, BAITERS & BIGOTS, *supra* note 93, at 69-70 (citations omitted); see SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1988); Kathryn N. Black & Michael R. Stevenson, *The Relationship of Self-Reported Sex-Role Characteristics and Attitudes Toward Homosexuality*, in BASHERS, BAITERS & BIGOTS, *supra* note 93, at 83; see also Nancy M. Henley & Fred Pincus, *Interrelationship of Sexist, Racist, and Antihomosexual Attitudes*, 42 *PSYCH. REP.* 83 (1978) (correlation between male antihomosexual attitudes and negative attitudes toward women and toward blacks); Judith E. Krulowitz & Janet E. Nash, *Effects of Sex Role Attitudes and Similarity on Men's Rejection of Male Homosexuals*, 38 *J. PERSONALITY & SOC. PSYCHOL.* 67 (1980).

would incur more tangible expenses. But if (and this is the radical move that Posner will not contemplate) the entitlement were to be relocated so that same-sex couples could marry, the Kaldor-Hicks result would change at the same time: it is very unlikely that the bigots and the zealots would be able to buy off same-sex couples' entitlement to marry. Thus, the application of Kaldor-Hicks cost-benefit analysis to regulation of homosexuality is beset by the same "endowment-effect" problem that undermines its application to regulation of the market.<sup>136</sup>

The endowment effect shows up in an even more distorting way in Posner's Kaldor-Hicks analysis of the military exclusion. On the cost side, Posner gives significant weight to existing antihomosexual preferences. Thus, he pays careful attention to swings in public opinion on the military exclusion<sup>137</sup> and treats public revulsion and its surrogate, military morale, as the decisive reason not to end the exclusion.<sup>138</sup> This sort of argument ignores the interdependence of preference and policy: people often accept a policy because that's the way things are, but they are also willing to adjust to the opposite policy once they actually experience it. A further circularity to Posner's argument is that once people get used to an irrational policy, that reliance interest can be used to privilege the preferences of those who see themselves as benefiting from the policy over the preferences of those who suffer from it. It is partly because homophobes in the military believe they are entitled to object to the presence of gays and lesbians that they do so.

On the benefit side, the status quo plays a limiting role. Just as Posner ignores the potential benefits of same-sex marriage to women generally, so he slightes the potential benefits of ending the military exclusion for women and for the military itself. While Posner wrings his hands over speculative costs to military morale of allowing openly gay men and lesbians to join, he undervalues the benefits to morale that such a policy would offer. As I discussed in detail above, what Posner considers the critical cost of ending the military exclusion—the morale of the soldiers—is actually a powerful potential benefit.<sup>139</sup> That only becomes apparent, however, when one abandons the perspective

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136. This dynamic, also called the "offer-asking" dilemma, determines outcomes in more traditional fields of economic analysis as well: the price a buyer will offer to obtain an entitlement she does not have is likely to be lower than the price she would ask to give up an entitlement she does have. Thus static cost-benefit assessments tend to favor those who start with the entitlement. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-21 (1981); see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 141-50 (1987).

137. See p. 318 (the main cost of ending the military exclusion would be public intolerance, as documented in opinion polls); but compare p. 319 (more recent poll indicates greater public acceptance). For Posner's interest in opinion polls on other gaylegal issues, see p. 202 n.38 (a 1989 Gallup poll indicated that 47% of respondents favored legalizing homosexual relations between consenting adults); p. 310-11 (sodomy laws are unenforced); p. 311-12 (government sanctioning of same-sex marriage would put an official stamp of approval on homosexuality).

138. Pp. 316-21.

139. See *supra* text accompanying notes 83, 85-86.

of privilege and views the matter through the eyes of those penalized by the status quo.

The status quo orientation of Posner's cost-benefit analysis is related to his pragmatic willingness to abandon the libertarian presumption. One way to express libertarianism (faithful to Mill, its father) is as an entitlement: citizens are entitled to be free of excessive and nosy state intrusion. Yet in analyzing sodomy laws, same-sex marriage, and the military exclusion, Posner's status quo baselines assume the converse: citizens are entitled to the existing state regulatory apparatus. Hence, the burden is on us—the victims of antihomosexual regulations—to demonstrate their inefficiency. By setting the entitlement pragmatically, with the regulatory status quo, Posner makes the task of legal reform doubly difficult and unjustifiably slow.

C. *Moral Indifference Principle Shattered by Heterocentric Assumptions: Gay Men and Lesbians as The Other*

Posner makes a strong effort throughout *Sex and Reason* to treat sexuality generally, and homosexuality in particular, as a morally indifferent object of inquiry. His treatment of homosexuality is without passion, indeed is almost clinical. Posner avoids emotionalism about the topic and subjects some popular stereotypes about gay men and lesbians to empirical and logical scrutiny. He seems sympathetic to many of the legal concerns of lesbian, gay, and bisexual communities. But at bottom, he still treats us as The Other.

Posner's isolating viewpoint is most apparent in the description of homosexual behavior that prefaces his analysis of sodomy laws.<sup>140</sup> Although the descriptive discussion is characteristically well-documented and intelligent, the argument is framed by the traditional understanding that "homosexuals" deviate psychologically from the heterosexual norm. Posner says that the best-case scenario for repudiating sodomy laws would be if (1) homosexuality were biologically determined and not chosen; and if "real homosexuals" were (2) widespread in our society and (3) basically just like other people, except for their sexual orientation.<sup>141</sup> He finds the first condition to be met.<sup>142</sup> In his opinion, the other two prove not true: "real homosexuals" comprise only 2-4% of the population,<sup>143</sup> tend to be more "effeminate" (for males) and "somewhat more neurotic" than everyone else,<sup>144</sup> and can expect lives that are "grimmer than those of an otherwise identical heterosexual," even in a tolerant society, which ours is not.<sup>145</sup> Though these findings do not make out the best case

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140. See pp. 291-309.

141. P. 293.

142. Pp. 295-300.

143. Pp. 294-95.

144. P. 304.

145. P. 307.

Posner has outlined for treating "real homosexuals" like everyone else, he suggests that they support repeal of sodomy laws and other legal disabilities anyway, since there is no reason to make grim lives grimmer.<sup>146</sup>

Posner's discussion reflects structures of thought grounded upon one form of traditional moralizing against nonconforming sexual behavior. For all his talk of empirical studies, Posner's frame of reference predates the first Kinsey report in its segregation of "real homosexuals" from everybody else.<sup>147</sup> For all his effort to create a neutral understanding of homosexuality, Posner centers its regulation upon heterocentric assumptions. For all his devotion to generating a therapeutic and morally indifferent discourse about sexuality and homosexuality, Posner's actual discourse is influenced by stereotypes that have never been empirically verified and that contribute directly to antihomosexual attitudes and violence in our culture.

Most striking is Posner's insistence throughout *Sex and Reason* upon a thorough segregation of "real homosexuals" from everybody else (including "opportunistic homosexuals," who are just fooling around) and his further insistence that "real homosexuals" are quite rare. This is at first glance quite odd, for such a segregation of categories has no formal bearing on the desirability of sodomy laws, which potentially reach anal (and often oral) intercourse by different-sex couples (and in any case are about behavior, not orientation). Nor does it bear on the military exclusion and same-sex marriage issues, which affect bisexuals as well as gay men and lesbians. The segregation becomes significant only in the informal operation of these laws. By focusing official persecution only on "real homosexuals," and not "normal people" who happen to slip up, the segregation of categories reassures mainstream society of its immunity from these bigoted policies, while isolating and ghettoizing the victims of persecution.<sup>148</sup> For such segregation to work, though, it must enjoy at least tacit complicity from the experts, in this case the medical establishment. These categories no longer enjoy much support within the medical establishment, and Posner's use of them reflects a pre-Kinsey, even a pre-Freud,<sup>149</sup> approach to homosexual behavior.

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146. P. 308.

147. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 639 (1948).

148. A tragically amusing example of this confusion was the Navy's use of supposedly straight sailors as bait to lure homosexual sailors into revealing themselves at Newport Naval Training Station in 1919-20. The Navy came under fire for its tactics, which involved homosexual activities between the bait and the suspects. See George Chauncey, Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 294 (Martin Duberman et al. eds., 1989) [hereinafter *HIDDEN FROM HISTORY*].

149. Freud viewed humans as potentially bisexual. Although he did not believe that psychoanalysis could much affect one's sexual orientation, he saw heterosexuality in most male homosexuals, and homosexuality in most male heterosexuals. Although the American psychiatric community suppressed this feature of Freud from the 1940's through the 1960's, it is now part of a pro-bisexual, gay, and lesbian reinterpretation of Freud. See generally KENNETH LEWES, *THE PSYCHOANALYTIC THEORY OF MALE HOMOSEXUALITY* 24-47 (1988); RUSE, *supra* note 33, at 22-27, 48-50.

The Kinsey report on *Sexual Behavior in the Human Male*, published in 1948, remains the most comprehensive empirical study of male homosexuality in America.<sup>150</sup> Although Posner repeatedly invokes the seven-point Kinsey scale of human sexual orientation (zero being exclusively heterosexual and six being exclusively homosexual), he neglects Kinsey's central thesis:

Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. . . . It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separated pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.<sup>151</sup>

The actual Kinsey findings—which everyone cites but no one reads—remain the best empirical evidence of male homosexuality in America, and they include the following observations:

- 37% of the male population has had at least one overt homosexual experience to orgasm between the ages of 16 and 45, while another 13% have reacted erotically to other males without having an experience to orgasm. This means that 50% of the male population has experienced significant homosexual erotic attraction during adulthood.
- 30% of the male population has had at least incidental homosexual experience or reactions (rating one or above on the Kinsey scale) over at least a three-year period between ages 16 and 55.
- 25% of the male population has had more than incidental experience (rating two or above) over at least a three-year period between the ages of 16 and 55.
- 18% of the male population has had at least as much homosexual as heterosexual experience (rating three or above) over at least a three-year period.
- 13% of the male population has had more homosexual than heterosexual experience (rating four or above) over at least a three-year period.

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150. There have been extensive studies of male homosexuality in Europe as well, most of which present findings similar to Kinsey's. Note, however, that recent studies in both Britain and France have found significantly less homosexual behavior in those countries than Kinsey found in the United States. See Peter Aldous, *French Venture Where U.S. Fears to Tread*, SCIENCE, July 3, 1992, at 25.

151. KINSEY, *supra* note 147, at 639; see also *id.* at 651 (criticizing earlier efforts to identify those who were "really homosexual" when authors had no precise definition of their subject).

- 10% of the male population has been more or less exclusively homosexual (rating five or six) for at least a three-year period, with 8% being completely homosexual (rating six) for at least that period.
- 4% of the white male population was exclusively homosexual (rating six) throughout adulthood.<sup>152</sup>

The Kinsey report on *Sexual Behavior in the Human Female*, published in 1953, reported significant though much lower homosexual attraction and activity among women,<sup>153</sup> figures that probably understate same-sex attraction and activity among women today.<sup>154</sup> Posner reduces all of this complexity to the assertion that Kinsey reported only 6% “real [male] homosexuals,” and 2% “real [female] homosexuals,” which Posner further discounts to 2-4% and 1%, respectively.<sup>155</sup> The actual Kinsey findings belie Posner’s assertion that sodomy laws, non-recognition of same-sex marriage, and the military exclusion have no relevance for more than 96% of Americans.

Posner’s urge to segregate by the use of artificial categories is related to his tendency to invoke marginalizing stereotypes. He characterizes “real homosexuals” as neurotic because they are likely to be “effeminate,” “artistic,”<sup>156</sup> and unfulfilled (because they cannot easily form companionate marriages and have children).<sup>157</sup> These characterizations rest upon questionable Brady Bunch concepts of the happy life and upon stereotypes that are not empirically supported. Posner’s theories about “effeminate” men generate some of the book’s wackiest conclusions,<sup>158</sup> and his interconnection of “real” homosexuality,

152. *Id.* at 650-51, based upon the data in Tables 141-150 and Figures 162-170.

153. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 474-75 (1953), found that 28% of the women sampled had experienced significant erotic attraction to other women (compared with 50% of the male sample), and 13% had homosexual experiences to orgasm (compared with 37% of the male sample).

154. It seems likely that in the 1960’s the combined force of feminism and gay rights stimulated a great deal more awareness by women of their erotic attraction for other women. For views that all women are potentially lesbians or that lesbianism is the best way to express feminism, see CAROL ANNE DOUGLAS, *LOVE AND POLITICS: RADICAL FEMINIST AND LESBIAN THEORIES* (1990) (summarizing works and controversies). On the recent history of lesbian separatism and other movements, see LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (1991).

155. P. 294.

156. *See* pp. 304-05. Indeed, Posner seems to believe that gay men are artistic *because* they are effeminate. This is pure fancy.

157. *See* pp. 305-07.

158. For example, Posner asserts that “macho” men have more heterosexual experiences than “effeminate” men with the same Kinsey numbers, because macho men will have lower search costs than effeminate men, since women find macho men more attractive. *See* pp. 122-23. I find this whole line of analysis imprecise as well as naive: whether a man is macho or effeminate changes over time and over cultures (a man with a British accent may be macho in England but unmanly in the U.S.) and even in our culture seems vague and indeterminate except for extreme types. Was Marlon Brando in *The Wild One* macho because of his tough guy swagger and aggressive risk-taking? Or was he effeminate because of his high-pitched voice and sensitivity? Years ago, I read an essay by movie critic Molly Haskell (I think) arguing that he was both macho and effeminate, and that it was Brando’s combination of male/female characteristics that made him sexually attractive to women. Her analysis suggests that women are not necessarily attracted to macho types.

artistic ability, effeminacy, and neurosis among males is both insulting and unscientific.

Additionally, there is substantial empirical evidence against Posner's belief that there is a correlation between homosexuality and maladjustment, or grimness of life if you will. Studies by Dr. Evelyn Hooker in the 1950's (a difficult decade to be gay) found no correlation between homosexuality and poor mental or social adjustment.<sup>159</sup> Her pathbreaking work contributed critically to the collapse of the medical consensus that homosexuality is a mental disorder<sup>160</sup> and has been confirmed and expanded by subsequent studies.<sup>161</sup> Dr. Hooker's conclusion that a person's homosexuality tells us nothing about his psychological or personal characteristics<sup>162</sup> is a standing challenge to those, including Posner, who perpetuate traditional stereotypes.

Posner's lament that "homosexuals" are unhappy because they do not form companionate marriages depends upon the questionable assumption that companionate marriage (with accompanying children) is critical to human happiness. Gay men and lesbians do create "families we choose"<sup>163</sup> that fulfill our needs. Studies of same-sex couples have demonstrated that many bisexuals, gay men, and lesbians form companionate relationships,<sup>164</sup> though perhaps with less

(Posner's references for the proposition go only to "masculine-appearing men," p. 122 n.20, which hardly correlates with macho.) Are women more attracted to macho Charles Bronson than to the more effeminate Cary Grant? Does either characterization make sense for either man?

Even if women found macho men more attractive, that might not assure these men lower search costs, because search costs depend on whom you are searching for; there may be a correlation between one's search and one's perception of one's own attractiveness. The heterosexual man who knows he is attractive to women might not settle for unattractive women, as would a man who knows he is not so attractive, and hence might have the same or higher search costs than a less attractive man.

159. Evelyn Hooker, *Male Homosexuality in the Rorschach*, 22 J. PROJECTIVE TECHNIQUES 33 (1958); Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 18 (1957) [hereinafter Hooker, *Adjustment*]. Dr. Hooker's empirical testing of comparable male heterosexual and homosexual samples found no significant differences between the two populations in their social adjustment and mental health.

160. The story is told in RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981).

161. See, e.g., John C. Gonsiorek, *Results of Psychological Testing on Homosexual Populations*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 71 (William Paul et al. eds., 1982) (psychological testing reveals that homosexuality per se is not linked to psychopathology).

162. See Hooker, *Adjustment*, *supra* note 159, at 30:

Homosexuality as a clinical entity does not exist. Its forms are as varied as are those of heterosexuality. Homosexuality may be a deviation in sexual pattern which is within the normal range, psychologically. . . . The role of particular forms of sexual desire and expression in personality structure and development may be less important than has frequently been assumed.

163. The phrase is taken from WESTON, *supra* note 133.

164. "Evidence indicates that most homosexuals want to have a steady love relationship and find this preferable to having only casual liaisons. Research also shows that lesbians and gay men look to their relationships primarily for affection and companionship—goals much like those of matched groups of heterosexuals." Letitia Anne Peplau, *Research on Homosexual Couples: An Overview*, in *GAY RELATIONSHIPS* 33, 35 (John P. De Cecco ed., 1988) (citations omitted).

The longevity of gay and lesbian relationships is uncertain and may be changing, compare PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 594 (1983) (relationships fairly long-lived), with BELL & WEINBERG, *supra* note 133, at 82-83 (relationships of shorter duration) and HARRY & DEVALL, *supra* note 133, at 83 (similar). One would expect the AIDS epidemic to encourage gay men and bisexuals in particular to form longer-lived and more monogamous relationships, not only as

hierarchy and gender subordination<sup>165</sup> and with more variety and less exclusivity. There is no reason to believe that the families we choose—with their greater emphasis on friendship and support networks within the gay and lesbian community, and less emphasis on kinship, possession, and bloodline—are any less meaningful and useful for us than traditional companionate marriage is for straight couples. Thus, it should not be surprising that studies have found same-sex couples to be just as satisfied (or more satisfied) with their relationships as different-sex couples are.<sup>166</sup> It may be more surprising that many bisexuals, gay men, and lesbians have children—through marriages to people of the opposite sex, artificial insemination (generating the current “lesbian baby boom”),<sup>167</sup> *familles á trois* (consisting of a lesbian couple and a gay man), surrogate motherhood (for gay men), and adoption.<sup>168</sup>

His questionable characterizations reveal Posner's cultural baselines to be more moralist than rationalist. In his paradigm of happiness, males are heterosexual and masculine and females are heterosexual and feminine; masculine males and feminine females form companionate marriages, and they procreate up a storm (or a 2.2 squall). Those of us who do not fall within that paradigm are almost by definition “neurotic” and “artistic” and have “grim” lives. But the “normal” majority should not add to our woes by persecuting us and should just leave us alone.

Although Posner's attitude may be well intended, his invocation of stereotypes setting “real homosexuals” off from the “normal” population contributes to antihomosexual attitudes. In a recently released study based upon data compiled in 1970, the Kinsey Institute developed a dynamic model of anti-homosexual attitudes.<sup>169</sup> According to the study, even positive or neutral

a way to protect against infection, but also to provide emotional support in crisis times. For a widely appreciated literary account, see PAUL MONETTE, *BORROWED TIME: AN AIDS MEMOIR* (1988).

165. See Letitia A. Peplau & Steven L. Gordon, *The Intimate Relationships of Lesbians and Gay Men*, in *GENDER ROLES AND SEXUAL BEHAVIOR* (Elizabeth Rice Allgeier & Naomi B. McCormick eds., 1983); see generally WESTON, *supra* note 133.

166. Barbara Sang, *Lesbian Relationships: A Struggle Toward Partner Equality*, in *WOMEN-IDENTIFIED WOMEN* 51, 55-56 (Trudy Darty & Sandee Potter eds., 1984) (summarizing studies showing that lesbian relationships are on the whole more satisfying to women than are women's heterosexual relationships); see also Lawrence A. Kurdek & J. Patrick Schmitt, *Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships*, 51 *J. PERSONALITY & SOC. PSYCHOL.* 711 (1986); Mona Cardell et al., *Sex-Role Identity, Sex-Role Behavior, and Satisfaction in Heterosexual, Lesbian, and Gay Male Couples*, 5 *PSYCHOL. OF WOMEN Q.* 488 (1981); Letitia A. Peplau & S.D. Cochran, *Sex Differences in Values Concerning Love Relationships* (paper presented at American Psychological Association, 1980, described in Peplau, *supra* note 164, at 36).

167. See Polikoff, *supra* note 100, at 461 & n.2.

168. According to Nancy Polikoff, “[t]here are no precise statistics on the total number of children with a lesbian mother or a gay father, including those born during [different-sex] marriages before their lesbian or gay parent ‘came out.’ Estimates range from six million to eight to ten million.” *Id.* at n.2 (citations omitted). See generally *DIFFERENT MOTHERS: SONS AND DAUGHTERS OF LESBIANS TALK ABOUT THEIR LIVES* (Louise Rafkin ed., 1990).

169. See ALBERT D. KLASSEN ET AL., *SEX AND MORALITY IN THE U.S.: AN EMPIRICAL ENQUIRY UNDER THE AUSPICES OF THE KINSEY INSTITUTE* 206-24 (Hubert J. O’Gorman ed., 1989). See also Stephen F. Morin & Ellen M. Garfinkle, *Male Homophobia*, *J. SOC. ISSUES*, Winter, 1978, at 29 (stereotypical belief that gay men are “effeminate” correlates most strongly with male homophobia).

stereotypes (“homosexuals are artistic”), and certainly negative stereotypes (“homosexuals are neurotic”), which distance a group of people from the perceived norm, easily become the basis for negative emotional reactions based upon the group’s deviation (“homosexuals are distorted heterosexuals”). These negative feelings have behavioral consequences (“avoid homosexuals”) and create a mindset that is prone to penalize (“deny homosexuals jobs and freedoms”) or harm (“I’d like to kick them”). The Kinsey model suggests that Posner’s segregation of “real homosexuals” from everyone else, along with his tendency to stereotype, not only fails to treat homosexuality as morally indifferent, but also contributes to a malignant morality that has dire consequences for the lives of bisexuals, gay men, and lesbians.

### III. A SOCIAL CONSTRUCTIONIST CRITIQUE OF POSNER: STEPS TOWARD A GAYLEGAL AGENDA

When I read early drafts of *Sex and Reason*, I believed Posner’s project an exciting one, notwithstanding my skepticism about some of his specific assertions. My enthusiasm for Posner’s project is reflected in Part I of this essay. The balance between enthusiasm and skepticism changed as I discussed Posner’s work with others, as I engaged in activism on the main gaylegal issues discussed in the book, and as I wrote this essay. Upon reflection, I have come to believe that Posner’s actual analysis of gaylegal issues is unresponsive to the legitimate concerns of our communities and inconsistent with the author’s stated first principles. This conviction is expressed in Part II of this essay. Some of that inconsistency (especially the failure to espouse a more thorough libertarianism) can be attributed to Posner’s general commitment to a pragmatic approach to legal reform, but some of the inconsistency (especially the underlying moralism and the stubborn resistance to same-sex marriage and immediate end to the military exclusion) is harder to explain. Given Posner’s extraordinary intellect, integrity, and tolerance,<sup>170</sup> I found this puzzling.

Insight into this puzzle involves a cultural rather than a purely logical analysis. I believe that Posner’s approach to gaylegal issues is filtered through frameworks of thought about law and reform, sexuality and homosexuality, and society and its institutions that are rooted in the moral culture of 1950’s liberalism.<sup>171</sup> The fifties-liberal culture of pluralism and the melting pot, of law as

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170. Posner’s intellect and integrity are clear from his published work. My views about his tolerance are based upon my own experiences with him, including frank exchanges on earlier drafts of *Sex and Reason*. Posner has done nothing but encourage my intellectual engagement with his views on gaylegal issues. Indeed, notwithstanding our different perspectives on these and other issues, Posner (in my view quite generously and far beyond normal collegiality) has encouraged me at every stage of my academic career and helped me relocate at Georgetown after I was denied tenure at Virginia.

171. I arrived at this conclusion after reading a book suprisingly similar to *Sex and Reason*, but published forty years ago: DONALD W. CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* (1951). Written (under a pseudonym) by a gay man, it was a perceptive application of fifties-style liberalism

process and neutral principles, of the Nelsons and the Cleavers as the happy nuclear family, is a world that presents itself as open and inclusive.<sup>172</sup> Its formal openness, however, was accompanied by crushing pressure for conformity and by deference to the values of the striving heterosexually virile white male—locker room values marginalizing the interests and perspectives of women, people of color, “homosexuals,” people with disabilities, poor people. Gay men, lesbians, and bisexuals could participate in the 1950’s only by denying—publicly or privately or both—their sexual attraction to people of their own sex. The struggle of the post-Stonewall<sup>173</sup> generation—my generation—to change this world has involved individual decisions to “come out” of the closet (a fight for identity) and group efforts to undermine structures of repression against us (a fight for transformation).

A further feature of our struggle has been intellectual, an effort to understand how homosexuality has come to be problematized in Western civilization. An identifiably but not exclusively gay and lesbian understanding that sexuality is socially constructed and historically contingent has emerged from our struggle to understand the background of our suppression.<sup>174</sup> Pioneered by Mary McIntosh<sup>175</sup> and Michel Foucault,<sup>176</sup> social constructionism posits that the

to the situation of gay people in America. Cory’s brief for homosexual rights rested upon the same basic principles as does Posner’s book (though without the economic gloss). There is also a remarkable similarity between the specific policy prescriptions of the two works. Like Posner, Cory considered sodomy laws and job discrimination to be the main targets of liberal reform, *id.* at 38-41, 46-47, 49-58, did not attack the military’s exclusion of gay people but did argue that we should not be treated unfairly once we have served with distinction, *id.* at 43-44, and was openly ambivalent about same-sex marriages, in part because he believed them unstable, *id.* at 139-40, 201-06. Like Posner, Cory criticized stereotypes about gay men, but believed that gay men are promiscuous because of men’s greater sex drive, *id.* at 24, 86-87, personally unstable and unable to form lasting relationships, *id.* at 24, 201-06, and at bottom rather sad. *See also* Donald W. Cory & John LeRoy, *Homosexual Marriage*, 29 *SEXOLOGY* 660 (1963). Like Posner, Cory believed there are relatively few lesbians. CORY, *supra*, at 86-88, 211-12.

172. For striking insight into the ideology of this world, see Gary Peller, *Neutral Principles in the 1950’s*, 21 *U. MICH. J.L. REF.* 561 (1988); *see also* EDWIN A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973).

173. The Stonewall riots occurred on the nights of June 27 and 28, 1969, after police raided the Stonewall Inn, a gay bar near the corner of Christopher Street and Seventh Avenue in New York City’s Greenwich Village. Since the Stonewall was located across the street from *The Village Voice*, the riots were widely reported, and they have taken on mythological status as the first notable defiance of lesbians and gay men against state (and, by implication, social) oppression. *See* TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 71-99 (1981).

174. Many people in many disciplines have applied the insight that a certain category is socially constructed. Feminists defined the word “gender” to mean that part of sex that is constructed rather than biological. Other theorists have written a library of books and articles discussing the ramifications of a social constructionist view of race. What I am here calling “social constructionism” is merely the part of this massive literature focusing on sexual orientation. And let me be clear: not all the social constructionists who write about sexual orientation are bisexual, gay, or lesbian. Not all bisexual, gay, or lesbian intellectuals are social constructionists. But lesbian and gay intellectuals pioneered this perspective on sexuality and continue to be greatly overrepresented in its writings; social constructionism in turn dominates gay and lesbian intellectual discourse.

175. Mary McIntosh, *The Homosexual Role*, 16 *SOC. PROB.* 182 (1968), *reprinted in* *THE MAKING OF THE MODERN HOMOSEXUAL* 30-49 (Kenneth Plummer ed., 1981). This article starts with the medical work of Kinsey and Hooker and develops the main social constructionist points made a decade later in more detail by Foucault (who fails to give McIntosh due credit for her ideas). It is an underappreciated classic.

concept of and content of sexual orientation is not a natural category, biologically or otherwise fixed across time and space. Rather, each society creates its categories. While Posner treats homosexuality as roughly constant through time,<sup>177</sup> social constructionists reject such an essentialist view of sexual orientation.<sup>178</sup> The "homosexual" is a creation not of biology (which is at most responsible for urges), but of history. Gay and lesbian social constructionists have transformed intellectual discourse about sexuality in the fields of philosophy, history, and anthropology, and ought to have an impact in law as well.

This Part explores several themes of social constructionist scholarship as a way of understanding the limits of Posner's theory of the regulation of homosexuality.<sup>179</sup> Posner's theory is limited by the poverty of its premises—the antimoralist, cost-benefit, and libertarian principles explicitly noted, and the pragmatism implicit throughout. Like Posner's theory, the traditional liberal themes of regulatory reform are of limited use to bisexuals, gays, and lesbians; sensing that, we must forge different terms for our own liberation. The principles that should guide us in the 1990's are the morality of our human intimacy, the need to disrupt rather than merely reform the interconnected social and political obstacles to such intimacy, and an insistence upon equal citizenship for bisexuals, gay men, and lesbians.

176. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 43. On Foucault, see generally DIDIER ERIBON, MICHEL FOUCAULT (Betsy Wing trans., 1991).

177. For example, Posner believes that you can identify Alexander the Great as having been homosexual in the same way that Donald Webster Cory, see *supra* note 171, was homosexual 22 centuries later; see p. 141 (Posner's list of historic homosexuals, which includes Alexander the Great as a "may have been"); see also A.L. ROWSE, *HOMOSEXUALS IN HISTORY: A STUDY OF AMBIVALENCE IN SOCIETY, LITERATURE AND THE ARTS* (1977), for a more expansive honor roll than Posner's.

178. In addition to the work of McIntosh and Foucault, important statements of the social constructionist position include David M. Halperin, *Sex Before Sexuality: Pederasty, Politics, and Power in Classical Athens*, in *HIDDEN FROM HISTORY*, *supra* note 148, at 37; John Marshall, *Pansies, Perverts and Macho Men: Changing Conceptions of Male Homosexuality*, in *THE MAKING OF THE MODERN HOMOSEXUAL*, *supra* note 175, at 133; Robert Padgug, *Sexual Matters: Rethinking Sexuality in History*, in *HIDDEN FROM HISTORY*, *supra* note 148, at 54; Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carol S. Vance ed., 1984); Jeffrey Weeks, *Discourse, Desire and Sexual Deviance: Some Problems in a History of Homosexuality*, in *MAKING OF THE HOMOSEXUAL*, *supra* note 175, at 76; Harriet Whitehead, *The Bow and the Burden Strap: A New Look at Institutionalized Homosexuality in Native North America*, in *SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY* 80 (Sherry B. Ortner & Harriet Whitehead eds., 1981). Critical of social constructionism are John Boswell, *Concepts, Experience and Sexuality*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY*, (Edward Stein, ed., 1990) [hereinafter *FORMS OF DESIRE*]; Camille Paglia, *Junk Bonds and Corporate Raiders: Academe in the Hour of the Wolf*, *ARION: A JOURNAL OF HUMANITIES AND THE CLASSICS*, Spring 1991, at 139 (book review) (an acidic critique of Foucault and his followers in the American academy).

179. I consider social constructionism a hypothesis whose robustness remains to be evaluated. It is most useful as a tool of criticism, a prod to rethinking traditional wisdoms. As a positive theory, social constructionism is most persuasive in its more moderate variations. See Wayne R. Dynes, *Wrestling with the Social Boa Constructor*, in *FORMS OF DESIRE*, *supra* note 178, at 209; Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in *FORMS OF DESIRE*, *supra* note 178, at 325.

A. *The Impossibility of Moral Indifference About Issues of Sexuality—Our Morality of Human Intimacy*

A central effort of *Sex and Reason* is to create a discourse on sexuality that treats it as a morally indifferent object of study and regulation. I have suggested that Posner himself fails to treat homosexuality as morally indifferent. Historical studies by social constructionists suggest that Posner's failure is inevitable, given his cultural background.

Consider, for example, ancient Greece, Posner's exemplar of a culture morally indifferent about sex.<sup>180</sup> The historical evidence indicates the opposite: ancient Greece (read Athens) treated sex as an object of significant moral concern and anxiety.<sup>181</sup> The virility of male citizens was defined in part by their restraint in sexual matters. The Athenians believed that each man had to be master of himself, if he was also to rule over his wife, household, and other citizens (as a leader). Part of that mastery—part of what it took to be a man—was avoiding excess of anything, especially sex.<sup>182</sup> Another part was always acting within the assigned social role, namely, as a dominant person. Under this morality, the adult male citizen always had to be the active partner in sex; the passive partner was a social subordinate (a woman, an adolescent male citizen-to-be, a slave of either gender).

In addition, the Athenians' restrictions on sex by women, prohibiting premarital sex, adultery, and sex between women, were as draconian as those of the strictest Victorians. Social class further drastically limited who could have sex with whom and who could do what; oral sex was anathema; even the much-noted pederasty between mature and adolescent male citizens was morally controversial.<sup>183</sup> What sets the Athenian morality apart from modern Western morality is that the former did not treat same-sex intercourse much differently from different-sex intercourse; both were considered natural but were strictly regulated based upon the social status of the participants. My point is not only that Athenians saw moral significance in sexual choices and acts, but that moralizing about sex has long been part of human history. My further point is that the history of homosexuality in the West is not the story of progressive

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180. Pp. 181-82.

181. This discussion is drawn from K.J. DOVER, GREEK HOMOSEXUALITY (1978); FOUCAULT, PLEASURE, *supra* note 43; DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE (1990); JOHN J. WINKLER, THE CONSTRAINTS OF DESIRE: THE ANTHROPOLOGY OF SEX AND GENDER IN ANCIENT GREECE (1989). See Paglia, *supra* note 178, for a critique of the last three books.

182. The Athenians considered sex to be a natural and therefore good activity, but one with dangers, specifically its violence (which might destroy a man's self-control), its debilitation (which could sap a man of needed strength), and its prefiguring of death. FOUCAULT, PLEASURE, *supra* note 43, at 125-39.

183. Since boys were not citizens, a boy could take the passive role in sex with an adult male citizen. But there was always the realization that the boy would "someday" be a citizen, and there was moral concern lest the boy continue the practice of receptive sex acts after he reached adulthood. The resulting ambivalence shows up, for example, in the dialogues of Plato. See PLATO, ON HOMOSEXUALITY: LYSIS, PHAEDRUS, AND SYMPOSIUM (Benjamin Jowett trans. & Eugene O'Connor ed., Prometheus Books 1991).

moralization about sex that Posner tells. Rather, I believe it is a story of which the latest installment is the West's recent creation of sexuality as an essential feature of personhood, and homosexuality as a deviate form of personhood. A summary of this history is essential to understanding how Posner's account oversimplifies.<sup>184</sup>

Posner argues that a higher status for women in marriage was the key to the West's growing concern about same-sex intercourse.<sup>185</sup> He is then able to argue that the socio-economic liberation of women in the twentieth century has enabled women to avoid or transform the institution of marriage, that the decline of marriage's moral monopoly on sexual intercourse has rendered same-sex intercourse less problematic,<sup>186</sup> and that these developments are propelling Western society back toward the Greeks' moral indifference toward same-sex intercourse. Told this way, the history of homosexuality provides important support for Posner's thesis that sex today should be treated with moral indifference. But while the history of the construction of homosexuality is still being uncovered, the current understanding renders that history far more ambiguous and far less progressive.

Posner is right that the development of companionate marriage<sup>187</sup> during the Roman Empire and the early Christian era problematized same-sex intercourse,<sup>188</sup> but he overstates that fact's importance. The development of the ideal of companionate marriage called into question a great deal of formerly acceptable sexual conduct. Adultery was the major practice that began to receive moral censure, but pederasty (if the adult man was married) also lost its standing as a morally acceptable act. Contrary to Posner, though, there is not a strong correlation between the development of companionate marriage in late Roman and early medieval Europe and intolerance for homosexual behavior generally. John Boswell, a leading historian of sexual attitudes of this period, argues that same-sex relationships were tolerated and same-sex marriages sanctioned during this period in Europe.<sup>189</sup>

184. For a far more complete account, see especially FADERMAN, *supra* note 154; FOUCAULT, CARE OF THE SELF, *supra* note 43; FOUCAULT, INTRODUCTION, *supra* note 43; DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1988); JEFFREY WEEKS, SEX, POLITICS, AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800 (1981).

185. Pp. 173-74.

186. Pp. 174-75, 177-78.

187. Companionate marriage is "between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management, and other activities, rather than merely the occasional copulation that was the principal contact between spouses in the typical Greek marriage." P. 45.

188. This point was originally made in FOUCAULT, CARE OF THE SELF, *supra* note 43.

189. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 69, 81-86 (1980) [hereinafter BOSWELL, CHRISTIANITY], argues that same-sex marriage existed in republican and imperial Rome. In a work-in-progress, tentatively titled, *What God Has Joined Together: Same-Sex Unions in the Christian Tradition*, Professor Boswell plans to present evidence suggesting that from the fifth to the nineteenth centuries, the Orthodox and Catholic Churches performed ceremonies celebrating same-sex marriages and other forms of Church-sanctioned unions. See also John Boswell, *Homosexuality and*

But by the thirteenth century (long after companionate marriage became the norm), same-sex intercourse had ceased being characterized as simply libertine, and was considered inverted—a form of sexual behavior that reversed what Europeans then considered normal gender roles and which therefore had to be kept under strict control. Attitudes at this time toward same-sex intercourse and its participants varied greatly; it is not clear what caused the critical shift in paradigm to this concept of inversion.<sup>190</sup> One factor may have been an ethic of conformity that accompanied the rise of bourgeois city states in Italy and of the nation states of England, France, Spain. The same impulse that focused popular, ecclesiastical, and secular attention upon Jews, witches, and heretics as different and for that reason excludable may have led to the categorization of “sodomites.”<sup>191</sup>

Moral anxieties about same-sex intercourse grew more intense during the early modern period. The concept of inverted sinful behavior slowly gave way to the category of sexual invert, the person who consistently violated established gender roles and hence was nonconforming as a matter of status.<sup>192</sup> Perhaps it was the very concept of difference that drove those so characterized to associate with one another; in any event, between 1500 and 1800, communities of male and (less commonly) female inverts were persecuted throughout the urbanized states of Western Europe.<sup>193</sup> This persecution was the culmination of centuries of anxiety; it marked the invert as a threat to the fortress of

*Religious Life: A Historical Approach*, in *HOMOSEXUALITY IN THE PRIESTHOOD AND THE RELIGIOUS LIFE* 3-20 (Jeanne Gramick ed., 1989).

190. See BOSWELL, *CHRISTIANITY*, *supra* note 189, at 269-332; GREENBERG, *supra* note 184, at 279-98; Judith C. Brown, *Lesbian Sexuality in Medieval and Early Modern Europe*, in *HIDDEN FROM HISTORY*, *supra* note 148, at 67.

191. “Crusades against non-Christians and heretics, the expulsion of Jews from many areas of Europe, the rise of the Inquisition, efforts to stamp out sorcery and witchcraft, all testify to an increasing intolerance of deviation from the standards of the majority, enforceable for the first time in the newly emerging corporate states of the High Middle Ages.” BOSWELL, *CHRISTIANITY*, *supra* note 189, at 334; see Vern L. Bullough, *Heresy, Witchcraft, and Sexuality*, in *SEXUAL PRACTICES AND THE MEDIEVAL CHURCH* 206 (Vern L. Bullough & James Brundage eds., 1982); see also GREENBERG, *supra* note 184, at 268-98; GUIDO RUGGIERO, *THE BOUNDARIES OF EROS: SEX CRIME AND SEXUALITY IN RENAISSANCE VENICE* 136-40 (1985).

192. See FOUCAULT, *INTRODUCTION*, *supra* note 43 at 38-40, for this central insight. See Brown, *supra* note 190 at 69-73, for the ways in which society’s concern with inversion operated differently for women than for men; cf. Louis Crompton, *The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791*, *J. HOMOSEXUALITY*, Fall/Winter 1980/81, at 11. Monographic studies, focusing mostly on male inversion and tracing this concept in different countries include ALAN BRAY, *HOMOSEXUALITY IN RENAISSANCE ENGLAND* (1982); RUGGIERO, *supra* note 191; Arend H. Huussen, Jr., *Sodomy in the Dutch Republic during the Eighteenth Century*, in *HIDDEN FROM HISTORY*, *supra* note 148, at 141; Randolph Trumbach, *The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern culture, 1660-1750*, in *HIDDEN FROM HISTORY*, *supra* note 148, at 129; see also *THE PURSUIT OF SODOMY: MALE HOMOSEXUALITY IN RENAISSANCE AND ENLIGHTENMENT EUROPE* (Kent Gerard & Gert Hekma eds., 1989); *’TIS NATURE’S FAULT: UNAUTHORIZED SEXUALITY DURING THE ENLIGHTENMENT* (Robert P. Maccubbin ed., 1987).

193. In addition to the sources cited *supra* note 192, see Theo van der Meer, *Tribades on Trial: Female Same-Sex Offenders in Late Eighteenth-Century Amsterdam*, in *FORBIDDEN HISTORY: THE STATE, SOCIETY, AND THE REGULATION OF SEXUALITY IN MODERN EUROPE* 189 (John C. Fout ed., 1992).

marriage, to social order, and to the bourgeois concept of manhood.<sup>194</sup> As Western culture became obsessed with categorizing people and not just acts, it began to mobilize trained professionals (at first priests, later doctors and teachers) to pry into people's actions, and their descriptions of their actions.<sup>195</sup>

The nineteenth and early twentieth centuries saw the completion of the modern construct that is homosexuality.<sup>196</sup> The medical profession came to view sexuality, not just sex, as an important part of a person's mental and physical health. And just as there were dysfunctions of the digestive tract that could be identified and cured, so there were dysfunctions in sexuality. One such was "homosexuality," a term introduced into the English language in 1892.<sup>197</sup> The new conception of sexuality as an important part of identity had a revolutionary impact upon same-sex relations. Its most immediate effect was upon women. By realerting the world to women's sexuality, the sexologists cast a cloud of suspicion over centuries of female friendships and Boston marriages.<sup>198</sup> Before the sexologists, women living with other women could be considered unexceptionable; after the discoveries/constructions of the sexologists, such arrangements became suspiciously sexual, and deviant. The possibility that women's sexuality did not depend upon men was frightening to bourgeois male culture. As big a threat was posed by men whose "sexual orientation" was toward other men, "real homosexuals" whose effeminate existence challenged the masculine world of "real [heterosexual] men."<sup>199</sup>

The creation of the "homosexual" stimulated a hysterical campaign of identification and exclusion, reaching fever pitch in the 1940's and 1950's.<sup>200</sup> Families and government agencies located homosexuals or suspected homo-

194. Male inverts, especially those who played the passive (i.e., female) role in sexual relations, were on the whole considered more dangerous than female inverts. Female inversion was considered most dangerous when it was combined with cross-dressing, for then the woman was most directly challenging lines of male differentiation and dominance. See MARINA WARNER, *JOAN OF ARC: THE IMAGE OF FEMALE HEROISM* (1980); Vern L. Bullough, *Transvestism in the Middle Ages*, in *SEXUAL PRACTICES AND THE MEDIEVAL CHURCH*, *supra* note 191, at 43.

195. This movement of scrutinization, originating in the confession booth and moving into the doctor's office, is a central theme of FOUCAULT, *INTRODUCTION*, *supra* note 43.

196. See GREENBERG, *supra* note 184, at 397-433; WEEKS, *supra* note 184; George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58-59 *SALMAGUNDI* 114 (1982/83), reprinted in *HOMOSEXUALITY: SACRILEGE, VISION, POLITICS* (Robert Boyers & George Steiner eds., 1982-83); Arnold I. Davidson, *Sex and the Emergence of Sexuality*, 14 *CRITICAL INQUIRY* 16 (1987).

197. 2 A SUPPLEMENT TO THE OXFORD ENGLISH DICTIONARY 136 (R.W. Burchfield ed., 1976) (entry for "homosexuality"), credits Charles Gilbert Chaddock, an early translator of German medical treatises on the subject, with introducing the term "homo-sexuality" from German sources. This account is analyzed and criticized in Halperin, *supra* note 178, at 38-39 & nn.1-2.

198. Boston marriages were informal arrangements between women who lived with one another for periods of time. See LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT 190-230* (1981). See FADERMAN, *supra* note 154, at 11-36, for the impact of the sexologists' constructions on these relationships.

199. See, e.g., Marshall, *supra* note 178.

200. See generally JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 139-80* (1976); John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in *PASSION AND POWER* (Kathy Peiss & Christina Simmons eds., 1989).

sexuals and committed them to treatment, which from the victim's point of view amounted to institutionalized torture—sometimes just psychoanalysis and hypnosis, sometimes involving some combination of incarceration, eugenic castration, hormone medication, aversion therapy (a nice term for electrically or pharmacologically induced seizures), and lobotomy.<sup>201</sup> The medical community assisted in these campaigns, seizing upon such clues as the suspect's build or mannerisms, Rorschach and other psychological tests, and ostensibly confidential communications between the suspect and the doctor.<sup>202</sup> The legislative and executive branches wrote statutory and regulatory exclusions from immigration and citizenship, the military and other government jobs, and many public benefits.<sup>203</sup>

Because the campaign of identification resulted in horrible consequences for anyone identified, a suspect's natural first response was to deny that he or she was a homosexual. But modern society's obsession often produced a further reaction in victims, a discovery that, yes, he or she did feel attraction toward people of the same sex.<sup>204</sup> Society's objectification and domination of homosexuals, accomplished through divisive practices and scientific classifications, gave rise to a form of resistance.<sup>205</sup> In opposition to society's classifying us as "homosexuals," we have re-identified ourselves as "gay," "bisexual," and "lesbian," and have flocked to subcultures for social and moral support.<sup>206</sup> We came to see ourselves as an oppressed minority, deserving the same rights that African Americans were seeking. Especially after the Stonewall riot in

201. For a horrific collection of documents detailing the medical establishment's methods of dealing with the freshly discovered disease called homosexuality, see KATZ, *supra* note 200, at 197-316 (Part II: Treatment: 1884-1974).

202. The first large-scale effort along these lines in the United States was the collaboration of psychiatrists and doctors with the military during World War II. Their methods of diagnosing homosexuals, both the successful ones described in text and some amusing false starts, are described in BÉRUBÉ, *supra* note 80, at 149-74.

203. See CORY, *supra* note 171, at 269-80 (App. A: Government Documents Pertaining to Homosexuality).

204. This phenomenon, the way in which perversion and its investigation became intertwined in a "spiral" of pleasure and power, is discussed in FOUCAULT, INTRODUCTION, *supra* note 43, at 45-49.

205. McIntosh was the first to present this view of the origin of our resistance, in her discussion of her labelling theory. McIntosh, *supra* note 175, at 27-28. Foucault develops the idea generally, though without specific mention of homosexuality, in *Afterword: The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208 (Hubert L. Dreyfuss & Paul Rabinow eds., 1982); see also Paul Rabinow, *Introduction* to THE FOUCAULT READER 3, 7-11 (Paul Rabinow ed., 1984), for an exposition of Foucault's theory of the ways in which society exercises power on people through "dividing practices" and "scientific classification," while the people themselves might resist through their own "subjectification."

206. "If the [World War II] years allowed large numbers of lesbians and gay men to discover their sexuality and each other, repression in the postwar decade heightened consciousness of belonging to a group. . . . The tightening web of oppression in McCarthy's America helped to create the minority it was meant to isolate." John D'Emilio, *Gay Politics and Community in San Francisco Since World War II*, in HIDDEN FROM HISTORY, *supra* note 148, at 455, 459. For detailed accounts of this phenomenon, see JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983); FADERMAN, *supra* note 154, at 139-87.

1969, we came out in numbers and challenged bourgeois society to accept us on our own terms, rather than on the terms constructed by those oppressing us.

Even this compressed discussion of the construction of homosexuality reveals difficulties Posner faces when he aspires to treat homosexuality as morally indifferent. Posner rejects religious forms of moralizing about same-sex behavior, but his discourse in *Sex and Reason* reveals that he has internalized many mid-twentieth century forms—especially pre-Stonewall medical forms—of moralizing about homosexuality. While Posner is basically uninterested in Judeo-Christian concerns about unnatural sexual behavior (even though they remain important to many Americans), he seems obsessed with more modern—and equally moral—concerns such as the distinction between “real homosexuals” and “opportunistic homosexuals,” the “effeminacy” of gay men and “masculinity” of lesbians, and the “neurotic” and “artistic” character of gay men in particular.<sup>207</sup> This discourse is characteristic of 1950’s-style liberalism, which was a socially constructed framework of thought whose categories and classifications directly and indirectly terrorized and excluded us.

Not only does Posner speak from a tradition of moralism (albeit a recent one), but so do those of us who resist that tradition. The revolt of the Stonewall generation has deepened, not alleviated, the moralization of homosexuality. Just as society has constructed homosexuality as an identity that is deviant and grim, so many bisexual, gay, and lesbian activists have sought to reconstruct homosexuality as an identity that is rich and connected.<sup>208</sup> Consider the dynamics of the coming out process, which is central to gay consciousness. Coming out involves, first, recognition that one’s sexuality profoundly involves feelings toward people of the same gender, and that these feelings are important to one’s identity; second, knowledge that this self-recognition links one to many others with similar feelings and identity; and, third, acknowledgment to others of these discoveries and conclusions about oneself.<sup>209</sup>

The gay rights movement has in this way underscored what Foucault recognized as the West’s obsession with sexuality as a central part of one’s

207. Posner believes that all of these points are biologically inherent in homosexuality, and therefore not socially constructed. I think the evidence for his belief is thin, but my argument does not depend upon Posner’s being wrong about that. My point is that *Sex and Reason* reveals itself as a cultural document—situated in a 1950’s culture—by considering these issues significant in the first place. Posner treats the supposed effeminacy of gay men as a significant fact about us, but nowhere does he show its relevance for his policy analysis. Posner’s obsession with effeminacy of gay men makes sense only in light of the view that homosexuality is a threat to strict gender lines—a highly moralistic position. It is important to him, and to his intended audience, because of that moral background.

208. See Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, in *FORMS OF DESIRE*, *supra* note 178, at 239.

209. On “coming out” as a way of constructing and expressing one’s identity, see generally DENNIS ALTMAN, *COMING OUT IN THE SEVENTIES* (1979); BARBARA PONSE, *IDENTITIES IN THE LESBIAN WORLD: THE SOCIAL CONSTRUCTION OF SELF* (1978); Denise M. Cronin, *Coming Out Among Lesbians*, in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 268 (Erich Goode & Richard R. Troiden eds., 1974); Barry M. Dank, *Coming Out in the Gay World*, 34 *PSYCHIATRY* 180 (1971); Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, *J. HOMOSEXUALITY*, Fall 1982, at 47.

moral identity.<sup>210</sup> This recognition, however, has an ambiguous message for us. In seeking to celebrate our identity—our difference—as something that should be valued rather than shunned or condemned, bisexual, gay, and lesbian activists have at least partially internalized the modern discourse that created “homosexuality” as a significant category, one that still resonates with comparison to the heterosexual norm. Read somewhat dynamically, Posner’s *Sex and Reason* challenges us to consider whether our own aspiration should be to demoralize the discourse of homosexuality, rather than to supermoralize it. My intuition is that the cultural forces leading to current moral concerns about sexuality will not abate and that Posner’s pitch for treating sexuality in a morally indifferent way will make little headway, at least in the short and medium term.<sup>211</sup>

Instead, bisexual, gay, and lesbian activists ought to deny the centrality of heterosexuality, particularly as it has been developed around rituals and taboos of manhood in American society. As Adrienne Rich has suggested, bisexual, gay, and lesbian consciousness can undermine claims that compulsory heterosexuality is the universal norm for our society.<sup>212</sup> Rich challenges Americans to rethink sexuality, not from the assumption that everyone must be heterosexual if at all possible, but from the assumption that people are polymorphously sexual, that there is a “lesbian in us.” If Rich’s point is true (and I believe it is), then the bisexual, gay, and lesbian communities should reject the image that we are a subculture on the margins of the mainstream heterosexual culture, for this internalizes the traditional assumption that we are deviants from the norm. Instead, legally as well as culturally, the norm is up for grabs, and as a community we must contribute to reformulation of the norm.<sup>213</sup>

210. “It is through sex—in fact, an imaginary point determined by the deployment of sexuality—that each individual has to pass in order to have access to his own intelligibility (seeing that it is both the hidden aspect and the generative principle of meaning), to the whole of his body (since it is a real and threatened part of it, while symbolically constituting the whole), to his identity (since it joins the force of a drive to the singularity of a history).” FOUCAULT, INTRODUCTION, *supra* note 43, at 155-56.

211. But not necessarily in the long term. Foucault suggests that in the long term, our descendants may “not be able to understand how [we] found the time and the infinite patience to inquire so anxiously concerning the actual state of sex . . . so that we became dedicated to the endless task of forcing its secret, of exacting the truest of confessions from a shadow.” *Id.* at 157-59.

212. Adrienne Rich, *Compulsory Heterosexuality and the Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983). See also ADRIENNE RICH, “It Is the Lesbian in Us . . .” in ON LIES, SECRETS, AND SILENCE 199, 201 (1979) (“It is the lesbian in us who is creative, for the dutiful daughter of the fathers in us is only a hack.”).

213. This idea is related to Celia Kitzinger’s critique of liberal humanist approaches to lesbianism and her articulation of lesbianism as a political challenge to the status quo, see CELIA KITZINGER, THE SOCIAL CONSTRUCTION OF LESBIANISM (1987); to Robert Cover’s concept of a community of interpretation whose norms are generated internally but which offers those norms as a model for the larger society, see Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); to Steven Epstein’s view that lesbian and gay communities are examples of the new ethnicity, in which groups through a process of self-definition exercise greater cultural and political influence, see Epstein, *supra* note 208; and to Gary Peller’s concept that critical race theory argues against a melting pot society, in which groups blend in, and in favor of a creole society, in which groups retain their identity but influence the society in different ways, see Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

The gaylegal agenda then becomes something more than just our struggle for equal rights to engage in sexual intimacy, marriage, and military service. Often in alliance with feminism and critical race theory, gay, lesbian, and bisexual legal studies becomes one fulcrum for shifting the norms that surround intimacy, marriage, and the military.

B. *Pragmatic Cost-Benefit Analysis as Indeterminate and Incremental—Toward Rupture and Reconstruction*

Just as I think Posner's effort to treat sexuality and homosexuality as morally indifferent objects of study is an impossible task right now, so too his effort to generate a cost-benefit policy science for determining the optimal regulation of sexuality and homosexuality is doomed to imprecision if not outright fallacy. Posner's familiar Kaldor-Hicks analysis of costs and benefits is controversial enough when applied to proposals for regulating market transactions.<sup>214</sup> If sexuality is not a commodity or a preference but a construct, there are additional reasons to doubt the ability of the Kaldor-Hicks analysis to determine the optimal regulation of homosexuality.

To begin with, social constructionism underscores the indeterminacy of cost-benefit analysis. Whereas in a market situation, certain variables may be plausibly viewed as exogenous to the cost-benefit analysis, in analyzing sexuality, every behavior, attitude, and regulation influences every other one, and hence is endogenous. Each piece of the puzzle is part of the society that constructs the other pieces. The status quo, far from being a chain of isolated policy choices, is a web of institutions, policies, and attitudes; when one strand of the web is altered, other strands shift or break, and still other strands appear. Thus it is misleading for a Kaldor-Hicks analysis of same-sex marriage proposals to compare (as Posner does, and as I did for much of Part II(B)) the direct and collateral benefits of being married for same-sex couples, with the direct costs to those who would be offended by same-sex marriage and the collateral costs to employers and others. As I argued in that Part, this kind of comparison is bound to be indeterminate because the institution of marriage itself would be changed, perhaps radically but surely unpredictably. I believe recognition of same-sex marriage would contribute to feminist struggles to create greater

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214. Some critics argue that analysis of economic costs and benefits is slanted toward vested interests, others argue that it is completely indeterminate, and still others argue that it carves noncommodity values out of economic regulation. See C. Edwin Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980) (efficient solutions depend on initial wealth distributions and are not necessarily optimal); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 513-14 (1980) (arguing that a Kaldor-Hicks efficient result is not necessarily Pareto optimal); Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (discussing factors that can cause actors to make flawed choices); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (actors are frequently motivated by desires other than wealth-maximization).

gender equality within the institution. If I am right about this, the benefits of same-sex marriage are much augmented, for women in general might benefit.<sup>215</sup>

But the web-like nature of cultural institutions ultimately prevents my defeating Posner's conservative cost-benefit conclusion, because Posner could respond with opposing ripple-effect arguments. Posner could claim that same-sex marriage would hurt its intended beneficiaries by making employers more reluctant to hire lesbian and gay workers because of spousal benefit expenses.<sup>216</sup> Same-sex marriage might also stimulate more gay-bashing, if bigots were incensed by our joining their cherished institution, or if same-sex marriage made lesbian and gay couples more prominent. Finally, even if I am right that same-sex marriage would destabilize marriage as it is currently configured, some might consider this change a cost.

Because attitudes, preferences, and institutions are all changable and changing and therefore hard to determine in the present or predict for the future, the Kaldor-Hicks analysis of sexual regulation ceases altogether to be scientific and becomes little more than organized cultural speculation. Indeed, *Sex and Reason* is Exhibit A for this proposition. Posner's cost-benefit analysis amounts to a generally well-informed analysis of the current topography of antihomosexual attitudes in the United States. I believe Posner's analysis is perceptive and useful—not because he comprehensively balances costs and benefits, but because he has a keen understanding of the historical and modern-day dynamics of antihomosexual attitudes. Ironically, therefore, economic analysis actually obstructs the contribution that is struggling to emerge from Posner's extensive erudition. Contrast his treatment of sodomy laws (repeal them) with the military exclusion (don't repeal it, but don't enforce it either) and the state's refusal to recognize same-sex marriage (don't allow it). The three policies are equally irrational, and Posner's labored justifications for the latter two only confirm my judgment.

For the most part, sodomy laws reflect pre-modern attitudes, in which certain "unnatural" acts, and not some (unknown) status named homosexuality, were the target of moral concern. These laws no longer reflect prevailing morality, even among many Americans whose attitudes are antihomosexual. Indeed, since the large majority of heterosexual couples engage in the acts penalized by sodomy laws,<sup>217</sup> such laws make the population at large uncom-

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215. Such a transformation of marriage would also lessen the objections that marriage is a patriarchal institution which we should not buy into. See, e.g., Duclos, *supra* note 101.

216. Indeed, Posner even speculates that gay people might have *higher* spousal benefit costs for employers, because of AIDS. See *supra* note 123.

217. Many sodomy laws prohibit oral-genital sex as well as anal-genital sex. The 1948 Kinsey study estimated that 59% of all American males violated such prohibitions. KINSEY, *supra* note 147, at 390-93. More recent studies confirm that the violations have continued; the large majority of heterosexual couples engage in oral-genital sex. See, e.g., BLUMSTEIN & SCHWARTZ, *supra* note 164, at 236 (over 70%); MORTON HUNT, *SEXUAL BEHAVIOR IN THE 1970s* 199 (1974) (90% of married couples under 25 years old engaged

fortable, for their penalties potentially touch just about everyone. Hence, the more up-to-date antihomosexual approach is either to repeal sodomy laws because they are overinclusive (they might apply to me!); cease to enforce them; or, if continuing to enforce them, make it clear that in practice sodomy laws apply only to "real homosexuals." In contrast, the military exclusion reflects modern concerns with homosexuality. The exclusion as written targets "real homosexuals," and the military generally does not apply the exclusion to Posner's "opportunistic homosexuals," because they are not The Other.<sup>218</sup> The application has a particular vengeance when it raises an issue of *pure* status, when there has been no proven homosexual conduct.<sup>219</sup>

The military exclusion may be fueled by a kind of status anxiety: a fear on the part of straight men that The Homosexual is in them, too. This kind of fear could explain why the military exclusion has lasted longer than formal exclusions of gay men and lesbians from other government jobs and benefits. In the modern period, institutions which are homosocial, such as the military, become immediately sensitive to suspicions that they also harbor homosexuals, engendering institutional anxiety in a society that is in many ways antihomosexual. If they want to remain homosocial, such institutions tend to become publicly antihomosexual in order to purge the taint.<sup>220</sup> Indeed, I would surmise that the ultimate fear of the military is that if it allows openly gay men and lesbians to join, the military would by reason of its homosociability become disproportionately homosexual, much as the priesthood has become.<sup>221</sup> Even

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in oral sex). A substantial minority have engaged in anal-genital sex. *See, e.g., id.* at 204 ("nearly a quarter" of married couples under 35); Reinisch et al., *The Study of Sexual Behavior in Relation to the Transmission of Human Immunodeficiency Virus: Caveats and Recommendations*, 43 AM. PSYCHOLOGIST 922 (1988) (18% of heterosexual men and 39% heterosexual women).

218. The Department of Defense defines "homosexual" as a person "who engages in, desires to engage in, or intends to engage in homosexual acts." 32 C.F.R. pt. 41 app. A, pt. 1, § H.1.b(1). Separation is justified for committing a homosexual "act," making a statement that one is homosexual, or entering into a homosexual marriage. *Id.* § H.1.c. Thus, a "real homosexual" can be separated from the armed services on the basis of status, feelings, or words. Although homosexual acts can also justify separation, the Directive provides for retention if it is found that (a) the homosexual conduct is a departure from the person's usual and customary behavior, (b) the conduct is unlikely to recur, (c) there were no aggravating circumstances (e.g., use of force), (d) the armed forces would benefit from retaining the person, and (e) the person does not desire or intend to engage in homosexual acts. *Id.* § H.1.c(1). The purpose of this exception is to allow Posner's "opportunistic homosexuals" to escape.

219. In fact, the regulations were expanded during the Reagan Administration to exclude those who merely expressed homosexual thoughts and feelings (the true status offenders). *Id.* § H.1.C.(1). Two cases are now testing the validity of the military's exclusion of personnel based only upon their admission of homosexuality, without evidence of homosexual activity. *See* *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) (remanding to district court to determine whether military discrimination is justified), *amended, petition for reh'g denied, and suggestion for reh'g en banc denied*, 963 F.2d 1160 (9th Cir. 1991), *petition for cert. filed*, Sept. 1, 1992; *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991).

220. *See generally* William P. Snyder & Kenneth L. Nyberg, *Gays and the Military: An Emerging Policy Issue*, 8 J. POL. & MILITARY SOC. 71 (1980). Note that these generalizations about homosocial institutions apply as well to all-male schools, athletic teams, and the boy scouts.

221. Pp. 154-55. Because homosocial environments such as the military contain concentrated numbers of potential sexual partners, search costs for same-sex partners will tend to decline. The number of potential partners is also somewhat higher than for the population as a whole, because the higher search costs for different-sex partners will impel more "opportunistic homosexuals" to accept same-sex partners instead. As

his cursory understanding of military policy explains the pragmatic appeal of Posner's (in my view severely irrational) proposal that the military remain publicly antihomosexual but privately tolerant; that it leave the exclusion in place, but fail to enforce it.

Recognizing same-sex marriage would be an even more difficult step for our culture and its pragmatists to take.<sup>222</sup> Like the military exclusion, the prohibition of same-sex marriages rests upon modern antihomosexual discourse which differentiates gay and lesbian sexuality as a distorted status. One important way the dominant culture finds deviance in gay men and lesbians is by denying our interest in forming families and committed relationships; the prohibition of same-sex marriage rests in part on this stereotype. Recognizing same-sex marriages would require society not only to admit that gay men and lesbians *do* have committed relationships, but also would place a positive societal value on those bonds. In addition, even some progressive heterosexuals shrink in horror from "gay marriage," because the fact that same-sex relationships are recognized by the state means that those bonds are, a fortiori, "flaunted" (which merely means publicly displayed).

Posner, then, helps show where society is right now. Mainstream America may not be ready for same-sex marriage or a military policy that invites gay men and lesbians to enlist. But Posner's pragmatism also promotes intelligent compromises, temporary policy waystations, that might appeal to the moral ambivalence that many Americans have about gaylegal issues—for example, domestic partnership laws and lax enforcement of sodomy laws and of the military exclusion—and that might soften attitudes enough for more radical changes.<sup>223</sup> Both the Posnerian pragmatist and the Foucauldian constructionist are reformers, both believe that attitudes can change, and both understand the difficulty of change when the problem is polycentric and embedded in the system itself. But Posner the pragmatist is a quintessential 1950's-style reformer, taking structures and attitudes as he finds them and working incrementally from that base. His cost-benefit analysis argues against those institutions and customs that are already culturally dead or dying (like sodomy laws, especially if they apply to the entire population), and he pursues a clearcut program against these. For the institutions and customs that are culturally more robust (like the military exclusion and limiting marriage), Posner's status quo

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a consequence, bisexuals, gay men, and lesbians might be expected to gravitate toward the military in disproportionate numbers.

222. Recall that our culture was willing to end the segregation of African Americans in the military (1948) and in the public school system (1954) long before it ended state prohibitions on interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967).

223. In his recent work, Posner has been moving away from the radical policy science of his youth (reductionist economic analysis of everything), toward an accommodationist pragmatism of middle age. See, e.g., Posner, *Skepticism*, *supra* note 65, at 827. Posner's shift reflects a broader movement in public law scholarship, which Gary Peller and I describe, appreciate, and criticize in *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

orientation leaves the pragmatist with little to say until cultural attitudes change.<sup>224</sup> Still, since Posner is an optimistic and energetic pragmatist, he urges experiments and alternatives that will test the cultural waters constantly, and perhaps change some attitudes in the process.

But social constructionist arguments challenge pragmatism to offer a normative defense of its starting point, the status quo. Pragmatists tend to believe that the status quo ante enjoys a presumptive political legitimacy, first, because everyone in the United States is presumed to consent to the status quo, and second, because in conditions of uncertainty it seems safest to do nothing. But when the exclusion or oppression of a group of human beings, members of the polity, is embedded in the status quo, what presumptive legitimacy can there be? In the 1940's, the status quo segregated African Americans from whites in the schoolroom, in the military, and even in the institution of marriage. Segregation was one of the social and legal processes by which African Americans were denied citizenship, surely undermining any argument from their implicit consent.<sup>225</sup> With so little, if any, normative justification for privileging the status quo, pragmatic arguments for maintaining segregation sounded empty or bigoted. And so they sound today.<sup>226</sup> This fact explains Posner's clumsy effort to avoid condemning the military's current exclusion of bisexuals, gay men, and lesbians. The military's exclusion of us is almost as morally reprehensible as its previous segregation of African Americans; the state's construction of marriage to exclude same-sex couples is almost as misguided as its prior construction to exclude interracial couples. Both exclusions feed the tyranny of the closet. American culture has created a whole category of citizens, each assured of exclusion once found out and identified. For years we have responded with a form of self-segregation and repression. The remnants of this oppression, of which the military exclusion is among the most legally explicit, divide society in ways that have been exposed as arbitrary, and that represent an historical effort to subordinate a category of citizens. From the perspective

224. "[I]f after acquainting himself with all the facts bearing on the sexual perversions, as he may choose to regard them, a person is left with so profound a revulsion that he desires the state to step in and punish the practitioners and is willing to bear his fair share of the public expense of such punishment, I would have nothing further to say to him except that he ought to reread chapter 4 of *On Liberty*." P. 203.

225. Apart from philosophical problems with consent as the basis for political legitimacy, implied consent is slippery. For example, by being in the United States, are we consenting to the status quo, period? Are we not consenting to the status quo *plus* the state apparatus for changing the status quo? See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 4 (tentative ed. 1958).

226. Indeed, Posner's arguments against ending the military exclusion of bisexuals, gay men, and lesbians echo eerily those used in the 1940's to attempt to head off racial integration of the military. Compare p. 316 ("[M]orale of heterosexuals, and hence the effectiveness of the military services, would suffer if homosexuals were allowed to serve.") with Memorandum from Admiral W.R. Sexton to the Secretary of the Navy (Sept. 17, 1940), reprinted in *BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS* 135 (Bernard C. Nalty & Morris J. MacGregor eds., 1981) (if "colored men" were allowed in the Navy, "teamwork, harmony, and ship efficiency [would be] seriously handicapped" because of the attitudes of white sailors). On the integration of the armed services generally, see, for example, RICHARD M. DALFUMÉ, *DESEGREGATION OF THE U.S. ARMED FORCES* (1969).

of bisexuals, gay men, and lesbians, the structure and history of this exclusion render the perspective of the status quo illegitimate.

Once the social constructionist has identified the normative problems with privileging the perspective of the status quo ante, she is free to use the perspective of the status quo post as a legitimate starting point. Unlike the pragmatist, who seeks incremental changes that never stray too far ahead of public opinion, the constructionist invites dramatic discontinuities, ruptures in policy that pave the way for a reconstruction that will lead rather than follow public attitudes. Chief Justice Warren, in writing *Loving v. Virginia*,<sup>227</sup> and President Truman, in issuing Executive Order No. 9881, which desegregated the military,<sup>228</sup> played this important role—creating policy ruptures that unblocked a morally indefensible status quo. In these instances, public leaders took unpopular actions that challenged Americans to rethink traditional prejudices against interracial marriage and integrated barracks. The actions were profoundly controversial, but the controversy forced issues of racial justice onto the national political agenda, where the wisdom of Chief Justice Warren and President Truman has generally been validated. Hindsight tends to be kinder to those leaders working for inclusion of the marginalized, than to those acquiescing in or pandering to attitudes of exclusion.

Now is the time for similar ruptures in America's antihomosexual culture. A series of lawsuits challenging the military's exclusion on First Amendment and equal protection grounds aims to break with the past.<sup>229</sup> Our hope is that heroic figures—in the Administration, Congress, or a federal appeals court—will do for us what prior figures did for African Americans in search of formal equal citizenship.<sup>230</sup> An even more severe rupture is sought by judicial and political efforts to open up marriage and domestic partnership to same-sex couples. Such recognition would not only attack some core homophobic assumptions, such as the view that gays and lesbians are anti-family and personally unstable, but would test and perhaps expand society's willingness to admit the positive value in intimate same-sex relationships.

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227. 388 U.S. 1 (1967) (invalidating Virginia statute making it a felony for "any white person [to] intermarry with a colored person" or vice-versa).

228. Exec. Order No. 9881, 3 C.F.R. § 722 (1948). The military resisted integration throughout World War II, and continued to do so after that. According to his own oral history, when President Truman ordered an end to segregation, he did so against the advice of every single admiral and general he consulted. See MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 79 n.† (1974).

229. The courts have recently been dodging the constitutional issue. See *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc) (allowing gay staff sergeant to remain in Army on collateral estoppel grounds), *cert. denied*, 111 S. Ct. 384 (1990). The issue may finally come to a head in *Pruitt v. Cheney*, 943 F.2d 989, (9th Cir. 1991), *amended, petition for reh'g denied, and suggestion for reh'g en banc denied*, 963 F.2d 1160 (9th Cir. 1991), *petition for cert. filed*, Sept. 1, 1992, in which the Ninth Circuit remanded the case to determine whether the Army's discrimination is rationally related to a permissible governmental purpose.

230. Complementing the lawsuits challenging the military exclusion, The Military Freedom Act of 1992, H.R. 5208, 102d Cong., 2d Sess. (1992), to prohibit discrimination in the armed forces on the basis of sexual orientation, was introduced by Congresswoman Patricia Schroeder in the House of Representatives on May 19, 1992.

### C. *The Libertarian Principle as a Dead End*

Perhaps the most useful insight accompanying the hypothesis that sexuality is socially constructed, and the most compelling critique of Posner's *Sex and Reason*, derives from social constructionism's suggestions about the relationship of bisexuals, gay men, and lesbians to the state. Reflecting traditional liberalism, Posner locates regulation of (homo)sexuality within the apparatus of the state, views that regulation with suspicion, and posits a libertarian presumption as a way of protecting the individual from undue state regulation. Posner's underlying, quintessentially Millian, idea is "the principle that government has no business regulating beliefs, preferences, or even conduct, as long as it is private."<sup>231</sup> In the past, many gay activists and theorists have relied upon libertarian arguments such as Posner's. For example, libertarian arguments formed the basis for gaylegal constitutional challenges to sodomy laws and prohibitions on same-sex marriage. But libertarian arguments have, so far, had no bite for us.<sup>232</sup>

Posner himself has a hard time applying his libertarian presumption to gaylegal issues. Nosy preferences repeatedly sneak back into Posner's cost-benefit analysis, and his invocation of the libertarian principle fails to screen out a lot of state meddling in the intimate lives of bisexuals, gay men, and lesbians.<sup>233</sup> The social constructionist hypothesis suggests that, like his effort to treat sexuality as a morally indifferent object of cost-benefit policy science, Posner's effort to carve out a private sphere of protection for bisexuals, gay men, and lesbians is inevitably unsuccessful. There is no neutral or objective way to make libertarian arguments, because there is no natural or inexorable

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231. P. 233; *see also* p. 438.

232. In the courts, libertarian arguments have succeeded for groups who are more in the cultural mainstream than are bisexuals, gay men, and lesbians—particularly middle-class heterosexual couples who want to use contraceptives to prevent unwanted births. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). It has also proven effective for couples who want to engage in sodomy even in states where sodomy is forbidden generally. *See Bowers v. Hardwick*, 478 U.S. 186 (1985) (Court insists that it is upholding Georgia's sodomy statute only as applied to homosexual sodomy and refuses to reach the issue of heterosexual sodomy, even though the statute had been amended to include both).

The libertarian principle has also persuaded the Court to grant some constitutional protection in cases concerning women desiring abortions, *Roe v. Wade*, 410 U.S. 113 (1973); consumers of pornography in their own homes, *Stanley v. Georgia*, 394 U.S. 557 (1969) (one of the cases *Bowers* labored to distinguish); and virtually every type of couple, except for same-sex couples, desiring to get married, *see Turner v. Safley*, 482 U.S. 78 (1987) (prisoners); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (people with support obligations); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial couples). Only same-sex couples have been denied a libertarian presumption in their favor; courts have rejected claims by same-sex couples that they have a constitutional right to a marriage license. *See, e.g., Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

233. In my view, Posner operates under a special disability here, because Posner the economist is at war with Posner the libertarian. The latter says that the government cannot regulate sexual behavior unless it can show third-party effects, or externalities. But the former is skilled at finding externalities, which under a pure economic analysis can include nosy preferences (e.g., property values go down because people do not want to live next door to a gay couple, or an interracial family, and so forth). *Cf.* p. 438 (the libertarian presumption is suggested only by Millian political theory and not by economic analysis).

private sphere that can be carved out from public interference.<sup>234</sup> Public rules and ideologies pervade private relationships, which in turn influence what goes on in public life.

The boundaries of the institution of marriage reflect these ambiguities. It is the social construct of bourgeois marriage that has created a framework that defines what is private and what is public; the framework did not create the institution.<sup>235</sup> Traditionally, for example, a husband's forcing his wife to have sex with him was not considered rape, as identical behavior with a woman not his wife would have been, not because the husband's behavior was intrinsically any more private, but because it fell inside the marital castle created by social custom.<sup>236</sup> As *Bowers* suggested, sodomy between a man and a woman (who are at least potentially married) is more acceptable than sodomy between two men. Still, it is hard to see how it is more private. Indeed, for reasons that have nothing to do with any concept of public or private, marriage in the modern West excludes gay and lesbian couples. Just as interracial marriages were long prohibited in the United States because of cultural fears about "dilution" of the "white race,"<sup>237</sup> so same-sex marriages have been prohibited here because of cultural fears about homosexuality.

To recognize that the lines between public and private are contingent and historically mobile is only to recognize the limits of a libertarian strategy, not to reject it altogether. We can still make out a libertarian case in favor of same-sex marriage, for instance. But we must recognize that ours is an uphill battle, because of the culturally embedded definition of marriage as husband and wife. This presents gay and lesbian activists with difficult choices. Many of us favor domestic partnerships, in part to avoid objections that we are destroying marriage. Others favor same-sex marriage and are willing to engage directly in a struggle over cultural meaning, to attempt to wrest marriage away from its status as a purely heterosexual institution, and make it the defining moment of creation for the families we choose. In such a struggle over meaning, we have some powerful arguments to advance, such as examples of institutionalized

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234. See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985) (arguing from deconstructionist precepts that the public-private distinction is incoherent); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 780-82 (1989) (arguing from Foucauldian precepts that the right to privacy as a protection of personhood is problematic); Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991) (similar); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. (forthcoming Oct. 1992) (right to privacy discourse slights the corporal nature of the interests involved, including our interest in avoiding violence against us sanctioned, at least indirectly, by the state).

235. For an excellent constructionist history of Anglo-American marriage in the last hundred years, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (forthcoming 1993).

236. See generally HERMA HILL KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 910-21 (3d ed. 1988); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).

237. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 656.

same-sex marriages in Western history,<sup>238</sup> as well as in other cultures, including Native American tribes,<sup>239</sup> a number of African cultures,<sup>240</sup> and China and Japan.<sup>241</sup>

There is another difficulty with our use of a libertarian approach to secure our liberation, however. A libertarian strategy assumes that the main threat to citizens generally—and bisexuals, gay men, and lesbians in particular—is government regulation. Yet the history of the construction of homosexuality suggests that the critical developments have occurred outside of the halls of government, and that the exercise of oppressive power against “sodomites,” and then “inverts,” and finally “real homosexuals” has not been the result of direct government action. “Power comes from below,” and not “from the top down,” said Foucault; the “relationships of force” that most profoundly affect our lives come not from the state, but from the “machinery of production, families, limited groups, and institutions.”<sup>242</sup>

Historically, changes in cultural institutions and attitudes have preceded changes in laws and regulations of homosexual behavior, and the coercive power of culture has traditionally been much greater than the power of government over sexual behavior. Even in the ten years after World War II, the peak of antihomosexual state regulation in America, it was social power more than governmental power that enforced the tyranny of the closet. This is because cultural power reaches everywhere all the time, while governmental power manifests itself episodically. Contrast the uneven enforcement of the immigration and military exclusions by the federal authorities and of the sodomy laws by local police in the 1950's with the pervasive attitudes of anxiety, embarrassment, disgust, and sometimes violence and hatred toward homosexuality that were held by parents, doctors, friends, and employers. Surely the latter were the forces that frightened us all into the closet and kept us there. Today, most of the government's openly antihomosexual regulations have been repealed formally or through nonenforcement. Yet many (and I believe most) bisexuals,

238. See sources cited *supra* note 189.

239. See WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* (1986); see also JUDY GRAHN, *ANOTHER MOTHER TONGUE: GAY WORDS, GAY WORLDS* 49-72 (1984); Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females*, 10 *SIGNS* 27 (1984); George Devereux, *Institutionalized Homosexuality of the Mohave Indians*, 9 *HUMAN BIOLOGY* 498 (1937); KATZ, *supra* note 200, at 281-334; Whitehead, *supra* note 178.

240. See IFI AMADIUME, *MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY* 71-72 (1987); Eileen Jensen Krige, *Woman-Marriage, with Special Reference to the Lovedu—Its Significance for the Definition of Marriage*, 44 *AFRICA* 11 (1974); Denise O'Brien, *Female Husbands in Southern Bantu Societies*, in *SEXUAL STRATIFICATION: A CROSS-CULTURAL VIEW* 109 (Alice Schlegel ed., 1977); see also E.E. EVANS-PRITCHARD, *KINSHIP AND MARRIAGE AMONG THE NUER* 108-09 (1951).

241. See BRET HINSCH, *PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA* (1990); James McGough, *Deviant Marriage Patterns in Chinese Society*, in *NORMAL AND ABNORMAL BEHAVIOR IN CHINESE CULTURE* 171, 185-88 (Arthur Kleinman & Tsung-Yi Lin eds., 1981); Vivien W. Ng, *Homosexuality and the State in Late Imperial China*, in *HIDDEN FROM HISTORY*, *supra* note 148, at 76; Andrea Sankar, *Sisters and Brothers, Lovers and Enemies: Marriage Resistance in Southern Kwangtung*, 11 *J. HOMOSEXUALITY* 69 (Summer 1985).

242. FOUCAULT, *INTRODUCTION*, *supra* note 43, at 94.

gay men, and lesbians remain closeted due to fear of continuing, even if diminished, antihomosexual attitudes.

This is one reason why advocacy of same-sex marriage or a functional equivalent is useful for the gaylegal agenda. Apart from all the material benefits noted above, marriage provides the same-sex couple some legal refuge from antihomosexual attitudes. Marriage provides tangible incentives (such as the duty of maintenance and support) for couples to stay together, which counterbalance often substantial social pressures to break up. Marriage provides rights to each partner, not only enabling each to protect the interests of the other, but also empowering each against attacks by a disapproving blood family in the event of illness, incapacity, or death.

Thus, the government is potentially important as a support for bisexuals, gay men, and lesbians against social oppression. From my perspective, the greatest limitation of Posner's *Sex and Reason* and its confining libertarian philosophy is that it fails to address the issues that really count in the lives of bisexuals, gay men, and lesbians—violent attacks and threats against us;<sup>243</sup> discrimination against us in employment, housing, and insurance;<sup>244</sup> and the problems associated with the AIDS epidemic.<sup>245</sup> Just as feminists have called upon the government to fight violence against women in the home and harassment and discrimination in the workplace, so those of us who fight for gay liberation should be calling upon the government to fight social oppression against us, through antidiscrimination statutes, hate crime laws, and sex education programs.<sup>246</sup>

In this struggle, of course, our arguments are not libertarian, because the laws we seek will enlist the state as an ally in our struggle against social oppression and because such laws will intrude upon private decision-making.<sup>247</sup> Instead, our arguments must be egalitarian: our sexual orientation is not a rational basis upon which to exclude us, and as equal citizens under

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243. See GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* (1991); Thomas, *supra* note 234 (arguing that sodomy laws contribute to violence against gay men, lesbians, and bisexuals).

244. See generally Gary R. Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991).

245. See, e.g., *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* (Harlon L. Dalton et al. eds., 1987).

246. Rhetorically, all of these struggles entail a redefinition in public terms of something formerly regarded as private. Once forcible intercourse within marriage is thought of as rape and not a husband's due, the formerly private activity becomes a public concern. Similarly, once discharges from employment because of gay-bashing attitudes is thought of as discrimination and not an employer's prerogative, the formerly private activity (employment at will) becomes a public concern.

247. Antidiscrimination statutes such as the one in the District of Columbia, D.C. CODE ANN. §§ 1-2501 to -2557, regulate decisions of private employers, people renting or selling homes, insurers, state licensees selling liquor, and educational institutions. Hate crime statutes are warnings to persons who want to target bisexuals, gay men, and lesbians through violence. Sex education programs may intrude upon parents' preferences about how much their children should be told about sex and sexuality, and at which age(s).

the law each of us has a "right to be treated by the organized society as a respected, responsible, and participating member."<sup>248</sup>

The egalitarian strategy should dominate gaylegal efforts in the 1990's, when our constitutional challenges will typically be based upon the Equal Protection Clause and not the Due Process Clause, and our legislative efforts will focus on antidiscrimination statutes and affirmative policies. Our main drive must be to transform the social attitudes that ultimately frame the legal analysis. For example, we would have lost *Bowers v. Hardwick* under an Equal Protection challenge, just as we lost it under a Due Process challenge, because what informed the Court's analysis was its conviction that antihomosexual feelings have persevered without change for millennia.<sup>249</sup> Similarly, we face an uphill battle for same-sex marriage in the legislatures as well as the courts, under either libertarian right-to-marry arguments or egalitarian equal enjoyment arguments, because of the cultural embeddedness of marriage.

The required tasks are not impossible, in the long run, for what has been socially constructed can be socially reconstructed. One goal for the 1990's will be to persuade America that we are not The Other, and that we deserve to be treated like any other human group. In this struggle, books like *Sex and Reason* can be helpful, because they do much to discredit analysis based upon stereotypes and prejudice which have traditionally formed the basis of our exclusion from America. But we must tell our own stories about, and defend our own positions on, sex and sexuality.<sup>250</sup> This is a collective project already well under way.

Our struggle for social reconstruction entails several interconnected strategies. If we want to break down antihomosexual attitudes in American society, we need to develop positive cases for our equal citizenship. We must draw upon gay and lesbian history, anthropology, sociology, philosophy, sexology, and literature, as well as the more standard legal sources, to reveal that lesbian, gay, and bisexual communities are worthy contributors to America's pluralism and should be accorded the same equal and dignified treatment accorded other communities. This positive case rests more on narrative than on argumentation: we must bring our personal stories and histories to the attention of law and society. Narratives can rectify stereotypical misconceptions about us and can educate society about our legitimate concerns and needs, and the unjustified ways social mores and policies hurt us. Narratives can also help others identify

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248. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977). See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

249. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1638-42 (1987).

250. See Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 537-38 (1989) (there is no neutral moral position on same-sex intimacy; bisexuals, gay men, and lesbians must be prepared to defend their positions to the larger community on moral grounds).

with us and our concerns, creating conditions of empathy and emotional connection,<sup>251</sup> especially with other progressive communities. We lawyers who are openly gay, lesbian, or bisexual can offer ourselves as living narratives that challenge antihomosexual prejudices, arguments, and policies by our presence in legal circles.

In addition to our narratives, critical scholarship is important to the gaylegal agenda; complementing our positive case will be our ongoing guerilla warfare against bigoted precedents, laws, and policies. Gay, bisexual, and lesbian studies should continue the useful doctrinal scholarship which informs us of legal developments and their limitations, but should reach beyond legal doctrine, informing it with our broader narrative concerns and our broader intellectual contributions, such as social constructionism. Also, gaylegal scholarship can be insistent and radical—and here we part company with Posner. We should be insistent that our concerns be addressed now, and not delayed by the standard legal process delays. And we need to argue radically, because our moral ground is firm and our intellectual experience offers possibilities for changing America.

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251. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992). On the importance of narrative generally, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea For Narrative*, 87 MICH. L. REV. 2411 (1989); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).