

THE FORGOTTEN MINORITY—SEXUAL PREFERENCE AS A PROTECTED CLASS UNDER TITLE VII?

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ABSTRACT

Gay Americans do not enjoy the same rights offered to heterosexual Americans. Gay Americans have been discriminated against in the areas of marriage, housing, military privileges, and employment rights. Although the federal government has historically protected minority groups from private discrimination, both Congress and the federal judiciary have refused to provide similar protection to Gay Americans. The reason for the federal government's failure to protect Gay Americans currently remains unclear. This project reviews and then rejects various theories which attempt to justify the government's failure to expand federal discrimination statutes to protect Gay Americans. After recognizing that each of these theories fails to offer support for the lack of federal legislation, the Supreme Court should make efforts to extend its recent holding in *Oncale v. Sundowner* and allow Gay Americans protected status under Title VII of the Civil Rights Act of 1964.

Since when do you have to agree with people to defend them from injustice?
Lillian Hellman [1, p. 241]

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964, enacted to forbid discrimination in employment, housing, education, and public accommodations [2]. The new act represented an enormous victory for minorities. The diligent work of African-American civil rights activists such as Martin Luther King, Jr., Rosa Parks, and James Meredith was finally brought to fruition through the codification of this law [2, 3]. Although the 1964 act forbade only discrimination based on race, color, religion, sex, and national origin, Congress later extended comparable protective privileges to age [4] and disability [5] in similar legislative acts. Notoriously absent, however, from the Civil Rights Act

of 1964 or any of the other federal Civil Rights legislation, is the mention of sexual preference or homosexuality as a protected class.

The following sections focus on whether Title VII of the Civil Rights Act of 1964 should be amended to provide gays [6] the same employment privileges afforded to African-Americans, women, and other protected classes. The article is comprised of two parts. The first provides a brief legal review of the minimal rights gays are afforded in the United States today, including an analysis of the "same-sex discrimination" debate currently raging in the federal court system [7]. The second part sets forth, and then critiques, various potential theories that assert gays can be distinguished from the minority groups currently protected under federal law and, therefore, are not deserving of the protected class status under Title VII.

A BRIEF SURVEY OF HOMOSEXUAL RIGHTS IN AMERICA TODAY

Historically, homosexuality has been an American taboo. In fact, every state had laws forbidding the practice of homosexual expression until 1968, and more than half of the states continue to maintain these laws today [8]. Most of these antiquated statutes use such denigrating language as "the abominable and detestable crime against nature" or "unnatural and lascivious conduct" to describe gay activity, and, further, refer to homosexual acts as criminal violations against the state [8, p. 19]. Since most of these laws require corroborating evidence, few gay men and women have been convicted under these statutes [8, p. 20]; however, the mere existence of these state codes acts to illegitimize the efforts of the modern gay civil rights movement.

Most civil rights historians credit the beginning of the gay rights movement to a group called the Gay Liberation Front (GLF)—a New York City organization formed after the notorious Stonewall Inn incident [9] in early 1969 [10]. Despite immense efforts by the GLF and other similar gay liberty groups, the law has changed very little over the past thirty years to provide homosexuals with the same legal protection afforded to other minority groups. Without federal legislative protection, Gay Americans cannot acquire and maintain such fundamental privileges as the right to marry, the right to serve their community and country, or the right to work in a discrimination-free environment.

Same-Sex Discrimination in Marriage

For most Americans, the ability to choose a companion, enter into a marital relationship, and raise children together is an essential part of life. However, gay couples have been deprived of these family opportunities in nearly every state [11]. While many states statutorily forbid same-sex marriage [12], other state courts and officials merely find an implicit statutory requirement that a couple applying for a marriage license be of different sexes [13]. The sole exception to

America's refusal of same-sex marriage was formed in the 1993 Hawaii circuit court decision of *Baehr v. Miike* [14].

In *Baehr*, three gay couples applied for marriage licenses and were rejected solely on the ground that they were of the same sex [14, at 49]. The applicants then challenged the rejection on the basis of their right to privacy and the denial of equal protection under the Hawaii state constitution [14]. The Hawaii supreme court rejected the gay appellant's right to privacy argument stating that the right of same sex marriage is not implicit in "the concept of ordered liberty such that liberty nor justice would exist if it were sacrificed" [14, at 56]. However, the court determined that sex is a "suspect class" and remanded the equal protection cause of action back to the circuit court to analyze under a "strict scrutiny test" [14, at 68]. On remand, the circuit court determined the defendant failed to demonstrate compelling state interests sufficient to justify withholding the legal status of marriage from the gay plaintiffs and therefore recognized the first legal gay marriage in the United States [15].

The *Baehr* decision certainly represents a victory for the gay rights movement. However, the language used by the Hawaii supreme court in rejecting the right to privacy claim grants the movement only a qualified victory and illustrates the court's overall negative attitude toward gay rights:

[We] do not believe that a right to same-sex marriage is so rooted in the traditions and conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions [14, at 56].

Same-Sex Discrimination In Housing and Public Accommodations

American business owners and landlords have historically been given the uncensored freedom to exercise discretion in deciding to whom they would sell or lease their products. However, that freedom dramatically changed with the passage of the 1964 Civil Rights Act, which prohibited business owners from discriminating on the basis of race, religion, color, sex, or national origin [2]. Yet, since the legislature initially failed to include gays as a protected class, landlords and business owners may still discriminate against members of the gay community today. Although a small number of states include gay people as a protected class in their state discrimination status [16], most homosexuals simply have no recourse against a landlord who refuses to rent to them or against a restaurant owner who posts a sign stating "No Gays Allowed."

In addition to housing and consumer goods, gay Americans have been refused access to other public accommodations as well. For example, several recent cases have arisen involving gay Americans challenging the Boy Scouts of America for discriminating against them because of the sexual preference [17, 18, 19]. One of

the more highly publicized of these cases is the New Jersey decision of *Dale v. Boy Scouts of America* [18].

The plaintiff in the decision, Mr. James Dale, brought a state discrimination action against the Boy Scouts of America when he was expelled from his position as assistant scoutmaster after announcing his homosexuality [18, at 1]. Despite earning the organization's highest rank and over thirty merit badges, the Boy Scouts argued that Mr. Dale had to be dismissed for violating the established standards for moral leadership by publicly announcing his homosexuality [18, at 2]. The national director of the Boy Scouts stated that allowing a homosexual to become a scoutmaster would be inconsistent with the "requirements that a scout be 'morally straight' and 'clean' " [18, at 3]. Mr. Dale contended that the Boy Scouts of America is a place of public accommodation under the New Jersey discrimination statute and is therefore prohibited from discriminating on the basis of sexual orientation [18, at 4].

In finding for Mr. Dale, the New Jersey court ruled that social organizations, such as the Boy Scouts of America, which extend invitations to "the public at large" are required to abide by the state discrimination law [18, at 24]. Mr. Dale's decision represents a rare victory in today's legal system. New Jersey is one of the few states today that has opted to recognize homosexuals as a protected class in the state discrimination legislation; however, since the federal government has failed to recognize homosexuals as a protected class, most gay Americans are left without any form of corrective legal action when they are refused access to public accommodations.

Same-Sex Discrimination in the Military

Another right Americans have traditionally enjoyed is the ability to serve their country as members of the armed forces. However, the United States Department of Defense's official policy currently requires the discharge of any military personnel who, prior to or during military service: 1) "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; 2) "has stated that he or she is a homosexual or bisexual"; or 3) "has married or attempted to marry a person known to be of the same biological sex" [20]. This policy is based on the idea that homosexuality will weaken the military cause by adversely affecting the military's ability to "maintain discipline, good order, and morale" [20]. The effect of this policy had been rather dramatic—over 100 military officers were discharged for homosexuality between the years of 1985 and 1989 [21].

During his 1992 presidential campaign, President Clinton pledged to end the prohibition of gays in the military [22]. However, after facing a predominately Republican Congress led by Georgia Senator Sam Nunn, President Clinton yielded to partisan pressure and compromised his campaign promise by accepting a "don't ask, don't tell" policy [23]. Under this policy, men and women who express homosexuality by word or deed are banned from military service, but

military officials and recruiters may not ask about or investigate an individual's sexual preference [23]. The proposed policy was codified in 1993 as Section 654 of the Federal Code, entitled "Policy Concerning Homosexuality in the Armed Forces" [24]. The statute states "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability [24, § 654(a)(15)]."

Although President Clinton called Section 654 an "honorable compromise," most statistics have shown that the new policy has actually further aggravated the situation [22]. The Servicemembers Legal Defense Network [25] has publicly stated that the number of command violations of the policy rose 27 percent in 1997—the fourth consecutive increase since the "don't ask, don't tell" policy was adopted [26]. Additionally, the defense network found that 850 military personnel were discharged for homosexuality in 1996 [26]. Despite numerous unavailing efforts to challenge the constitutionality of the statute [27], gay Americans seeking to serve their country have been rendered helpless by the passage of Section 654.

Same-Sex Discrimination in the Employment Context

Perhaps the strongest component of the 1964 Civil Rights Act was the passage of Title VII, which prevented employers from discriminating in the procurement, promotion, and overall treatment of minority workers [28]. Although gays are not specifically named as a protected class in the act, several challenges have been brought by gay plaintiffs seeking the protection of Title VII [29, 30]. The most notable of these challenges was the Ninth Circuit decision of *DeSantis v. Pacific Telephone & Telegraph Co.* [29].

In *DeSantis*, several male and female homosexuals brought claims against their employers for discriminating against them on the basis of their sexual preference [29, at 327]. The district courts dismissed the actions for failure to state a claim. The gay plaintiffs then appealed, arguing Title VII does prohibit discrimination on the basis of sexual preferences [29, at 327]. The plaintiffs argued that the protected term "sex" in the statutory language meant both gender and sexual preference [29, at 329]. The Ninth Circuit Court of Appeals ruled that the term "sex" protected individuals only on the basis of gender, and therefore stated, "we note that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers partners of the same sex. Thus the policy does not involve different decisional criteria for the sexes" [29, at 330]. The 1979 decision marked a major defeat to the gay civil rights struggle for equality within the federal law.

Although federal courts have refused to extend Title VII employment protection rights to gays, several states have decided to enact their own civil rights legislation to protect sexual preference [31]. With over ten states electing to protect sexual preference, many civil rights leaders question the federal courts' unwillingness to extend Title VII protection to gays [21]. However, a recent U.S. Supreme Court decision on a related subject matter may offer gay Americans additional optimism for the future of gay rights in the federal law.

In *Oncale v. Sundowner*, the plaintiff, an employee on an eight-man oil rig crew, brought a Title VII action against his fellow employees and supervisor after being subjected to both verbal and physical discriminatory actions [32]. The harassment included unwanted physical touching and receiving threats of forced sodomy [32, at 120]. The Fifth Circuit Court affirmed the lower court's summary judgment decision in favor of the defendant stating that same sex harassment cannot be a viable cause of action under Title VII [32, at 128]. The Supreme Court of the United States granted certiorari to hear the case [33].

In an unanimous opinion written by Justice Scalia, the Court held workplace harassment can violate Title VII when the harasser and the harassed employee are of the same sex [33]. The Court found that although same-sex harassment was not the principle evil with which Congress was initially concerned, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed [33, at 1001].

Although the Court's finding in *Oncale* still does not provide homosexuals with broad, protected-class status under Title VII, gay Americans are most often the victims of same-sex employment discrimination and now have a viable cause of action against their workplace harassers. Additionally, the Court's willingness to engage in a more expansive interpretation of Title VII should provide gay-rights leaders with additional optimism. By looking at the Supreme Court's generous language, it appears that if gay harassment and discrimination can be shown to be a "reasonably comparable evil," the term "sex" in Title VII should be interpreted to include gay Americans as a protected class. Although this represents a rather liberal reading of the Court's opinion in *Oncale*, it does seem to be a potentially persuasive argument for gay Americans faced with discrimination in the future.

After briefly examining such fundamental areas as employment, housing, military service, and marriage, it becomes obvious that gays are not afforded the same rights as heterosexuals in American society today. Although this brief synopsis of the current status of gay Americans was designed to be informative, it tends to overlook why federal courts and Congress have opted to ignore the rights of gay Americans while providing full legal protection to numerous other minorities. The remaining part of this project focuses on answering this question of Congressional inconsistency.

WHY GAYS HAVE BEEN LEFT UNPROTECTED IN TODAY'S HYPERSENSITIVE SOCIETY

Title VII of the Civil Rights Act of 1964 provided vast employment protection for a large number of historically deprived minorities when it granted protected-class status to race, color, religion, sex, and national origin [2, Title VII]. Additionally, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990 added age and disability to the protective list [4, 5]. However, the terms “homosexual,” “gay,” or “sexual preference” have never been part of any federal congressional legislation preventing discrimination in the employment context. The intent of the following section is to identify, analyze, and then critique theories on how Congress and the federal courts can recognize and provide full legal protection to these seven minority classes and yet completely deprive gay Americans of any such rights.

The Innate Theory: Right by Birth?

The first theory explaining why Gay Americans have not been given the same civil liberties as other minorities is that homosexual behavior is not an innate, inborn trait. The innate theory posits that gay people choose their homosexual lifestyle and therefore should be forced to accept the negative consequences associated with that lifestyle, including discrimination in the work environment. Further, proponents of this theory conclude gays can control their behavior and their sexual preference and therefore have the ability to “act” heterosexual while in the work environment to prevent harassing remarks and behavior. In contrast, legislatively protected groups such as women and racial minorities are born with a certain outwardly appearance that renders them helpless from workplace stereotyping and discrimination.

Several federal courts have adopted this theory in reasoning why homosexuality should not be protected under the Equal Protection Clause. A classic example of this reasoning is found in *High Tech Gays v. Defense Industry Security Clearance Office* where the Ninth Circuit Court of Appeals found a policy subjecting all homosexual applicants for security clearance to additional security investigations did not violate the Equal Protection Clause of the Constitution [34]. The court’s primary rationale was that heightened scrutiny should be given only to those groups or classes of people who have historically suffered discrimination from immutable characteristics [34, at 567]. Therefore, the court concluded that since homosexual behavior was “free-willed” in nature, gays were not discriminated based on an immutable characteristic and did not deserve heightened scrutiny under the Equal Protection Clause [34, at 561].

Although the innate theory initially sounds logical, closer inspection reveals two significant flaws with its content. First, if a minority can receive protected status only by possessing some inborn, innate, or immutable characteristic, Congress should not characterize religion as a protected class under Title VII of

the Civil Rights Act [2]. Americans are able to practice any religious faith they choose; yet, despite not being an innate characteristic, employers are not permitted to discriminate against them for their religious beliefs under Title VII.

The second and much larger problem with the innate theory is that most modern medical studies indicate that homosexuality is not a learned or chosen behavior, but rather an inborn and innate trait similar to that of color or gender. Although not wholly conclusive, there have been a large number of reputable studies conducted over the past ten years that indicate gays do not have a choice in their sexual preference. Researchers Simon Levay [35], Michael Bailey and R. C. Pillard [36], Dennis McFadden and Edward Pasanen [37], and Dean Hamer [38] all published studies setting forth express scientific evidence that homosexuality is an inborn characteristic.

In his research, Simon Levay determined there is an increase in homosexuality where there is an increased size of the superchiasmatic nucleus of the hypothalamus, a decreased size of the third anterior interstitial nucleus, and an increased size of the anterior commissure in homosexual men [35, p. 1034]. Additionally, Levay has found that a prenatal androgen deficit may likely result in male homosexuality and a prenatal androgen surplus likely results in female homosexuality [35, p. 1036]. With the findings from both of these studies, Dr. Levay has preliminarily concluded that sexual orientation is influenced by biological factors.

A second series of studies recently conducted by Dennis McFadden and Edward Pasanen indicates that gay women's inner ears undergo "masculinization" from hormone exposure prior to birth [37]. The research team found that gay women had click-responses that were significantly weaker than those of their heterosexual peers [37]. The University of Texas found that the development of the inner ear is affected by the male hormone androgen prior to birth [37]. This finding offers further corroboration to Simon Levay's finding that prenatal androgen surplus results in female homosexuality [35, p. 1034].

A third, independent study by Michael Bailey and R. C. Pillard involved a study of twins to determine whether there is a genetic link to homosexual behavior [36, p. 1092]. The study examined the concordance rate between identical and fraternal twins and declared homosexuality [36, p. 1092]. The results of the study indicate a strong possibility that homosexuality is a genetic, rather than a learned, behavior: 52 percent concordance rate for the identical twins and 22 percent for their fraternal counterparts [36, p. 1094]. Bailey and Pillard's findings were supported when two similar studies, conducted by F. L. Whitman, J. Bailey, and A. Bell found nearly identical results [39].

Finally, the most publicized of the studies indicating that homosexuality is genetically determined was conducted by Dean Hamer of the National Cancer Institution [38, p. 327; 40]. Hamer, after examining thirty-two pairs of homosexual brothers from unrelated families, found that two third of the research subjects shared the same version of a genetic material found on the X

chromosome [38, p. 322]. Although Hamer has been unable to identify a specific homosexual gene, his studies indicate that the genetic material found contains a gene predisposing individuals to homosexuality.

Although these research projects are not conclusive when looked at individually, the totality of these findings provide a strong inference to the courts that homosexuality is a genetic, inborn trait similar to the race or gender of an individual. The inclusion of religion as a protected classification under Title VII, coupled with the scientific community's belief that homosexuality is an inborn trait, indicate that the premise set forth in the innate theory fails to logically support the exclusion of homosexuals from the protection of Title VII.

The Revolution Theory: Absence of Threat?

A second theory explaining why homosexuals should not be protected under Title VII is that gay Americans simply do not present any political or social threat to the current majority's position of power. In contrast, African Americans represented an increasingly powerful minority group prior to the passage of the Civil Rights Act of 1964. Both peaceful demonstrations led by Martin Luther King, Jr. and intimidating street riots directed by the Black Panthers warned the American public that African Americans had to be recognized lest there be a revolution [3, p. 40]. Similarly, women's groups armed with the potential support of over 50 percent of the population, led similar protests and marches demanding their political rights and equality during the same period [3, p. 333]. This theory suggests that gay Americans who constitute 2 percent to 5 percent of the population [41], do not pose any form of political or social threat to the majority and therefore should not be given the costly privilege of being recognized as a protected class under Title VII.

Other than obvious equity flaws, the problem with this theory is that none of today's recognized protected classes have ever truly represented a social threat to the majority's power position, with the possible exception of the African-American Civil Rights movement during the 1950s and 1960s [3, p. 40]. Surprisingly, the inclusion of women as a protected class in the Civil Rights Act of 1964 was included by opponents of the act as a filibuster to avoid the recognition of African-American rights [3, p. 298]. Further, proponents of this theory cannot genuinely argue that either Americans aged forty to sixty-five or Americans with disabilities posed any sort of political or social danger prior to the passage of the Age Discrimination Act of 1967 [4] or the Americans with Disabilities Act of 1990 [5]. Unless the legislature is willing to remove the declared protected status from women, disabled individuals, and older Americans, the revolution theory cannot logically support the exclusion of gay Americans from protected status under Title VII of the Civil Rights Act of 1964.

The Slippery Slope Theory: How Can We Protect Everyone?

Another justification in denying gay Americans protected status is that it simply is not economically or socially feasible to extend minority protection any further. Despite the obvious increase in costs behind extending the list of protected groups, it is also important to consider the effect such an extension would have directly on the civil rights legislation itself. Every American both possesses and lacks certain objective physical and mental characteristics; therefore, if we continue to extend heightened protection under the federal law to an ever-increasing number of “minority” groups, it appears that every American will eventually be able to claim protected status under the federal law. The slippery slope theory suggests that if Congress or the judiciary were to include gay Americans as a protected class, the Civil Rights Act of 1964 will move us yet another step closer to living in a society where everyone is considered a protected minority. For example, an individual with an immensely low IQ may claim there should be a protected classification for low intelligence. He could then apply for a nuclear physicist’s position and demand the company provide the reasonable accommodation of having a second employee shadow him throughout the day to avoid mistakes.

The problem with the slippery slope theory is that Congress has already decided to empower certain classes of people with special privileges. The legislative reasoning behind protecting race, sex, national origin, religion, age, and disabilities is that these classes of people experience daily discrimination and harassment because of their unique qualities [2, 4, 5]. As expressly shown in the first part of this article, gay Americans face this same type of life-altering discrimination [42]. While the slippery slope theory is correct in stating that minority privilege cannot be extended to every American, it is still an essential role of both the legislature and the judiciary to identify groups who do not enjoy the same fundamental rights as other Americans and provide these minority groups with sufficient opportunities.

Unlike the low-intelligence man in the example above, gay Americans are not asking to acquire social positions for which they are not qualified, but instead are asking only to be afforded the opportunity to be considered regardless of their sexual preference. The slippery slope theory promotes an arbitrary legislative selection process in determining which minorities are protected and therefore should be dismissed as a basis for excluding gay Americans from federal protection.

The Majority Acceptance Theory: The Real Answer

After examining the three theories above, it does not appear that any of them sufficiently explain why gay Americans have not been provided with federal, protected-class status. Unfortunately, the true hidden reason gays are not protected is simply because the majority of the American public does not feel

morally or socially comfortable with homosexuality. Much like the white American's refusal to recognize African-American status during the first half of this century, heterosexual Americans choose not to understand or recognize the gay American. They fear federal recognition of gays as a protected class would signify their acceptance of homosexuality as a lifestyle. They fear this acceptance would violate their federally protected religious beliefs. They fear their own children may elect to become homosexuals, despite modern science's determination that sexual preference is genetically determined. The totality of these irrational fears provides the simple explanation of why the federal legislature has not enacted or modified a civil rights statute to protect gay Americans. Since gay Americans represent only a small portion (2-5%) of the American public, legislators are generally not concerned with their particular interests. However, Congress' neglect is much more forgivable than the disregard shown by the members of the federal judiciary, who have theoretically been entrusted with protecting this country's minorities.

The Court's Role in the Law: Is It Popularity or Justice?

The federal judiciary's role in government has long been to protect the interests of minority groups from the often-oppressive public. In 1803, Chief Justice Marshall stated in the monumental *Marbury v. Madison* Supreme Court decision that the power of the federal judiciary lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory action. It is this role, not some amorphous general supervision of the operations of government that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests [43, at 137]. According to Justice Marshall, it is the federal court's responsibility to recognize and protect minority groups who are subjugated and discriminated against by the American public [43]. Although Congress has buckled to public pressure and ignored the rights of gay Americans, the most fundamental constitutional principle is that popular opinion should not sway the opinion of the federal court [44]. Therefore, after realizing that homosexuality is a genetic and innate trait, the Supreme Court should make efforts to extend its recent ruling in *Oncale v. Sundowner* and allow gay Americans to enjoy protected status under Title VII of the Civil Rights Act of 1964 [32].

A . . . no . . . uttered from the deepest conviction is better and greater than
a . . . yes . . . merely uttered to please, or what is worse, to avoid trouble.

Mahatma Gandhi [1, p. 102]

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ENDNOTES

1. L. Hellman, *Webster's New World Dictionary of Quotes*, Macmillan, New York, 1996.
2. §42 U. S. C. § 2000e (1981).
3. *Also see* Robert D. Loevy, *The Civil Rights Act of 1964* (1997), State University of New York Press, Fulton, New York.
4. Age Discrimination in Employment Act, § 29 U. S. C. A., §623 (a) (1985).
5. Americans with Disabilities Act, §29 U. S. C. A. §631 (a) (1994).
6. The term "gays" is used as a gender-neutral term throughout this article to describe both gay and lesbian Americans.
7. *See e.g.*, *Oncale v. Sundowner Offshores Services, Inc.*, WL 88039 (1998) (resolving disagreement among circuit courts by finding that same-sex harassment is actionable under Title VII).
8. R. Robson, *Gay Men, Lesbians, and the Law*, (1997).
9. The Stonewall Incident revolved around a harassing police raid of the New York gay bar, "The Stonewall Inn," located in Greenwich Village. Lesbians and gay men engaged in physical resistance to assert their right to assemble.
10. D. Teal, *The Gay Militants*, Stein & Day, New York (1971).
11. Hawaii is the exception to this rule; *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (recognizing the first legal, same-sex marriage in American history).
12. *See e.g.*, Tex. Fam. Code Ann. Sec. 1.01 (1989) (stating that a "license may not be issued for the marriage of persons of the same sex"); Utah Code Ann. Sec. 30-1-2 (1990) (providing "marriage between persons of the same sex void").
13. *See Singer v. Hara*, 11 Wash. App. 247 (1974) (refusing to recognize same-sex marriage because antiethical to intended purpose of marriage); *see also DeSanto v. Barnsley*, 328 Pa. Super. 181 (1984) (refusing to recognize same-sex marriage despite lack of express legislative language).
14. *Baehr v. Lewin* [later changed to Miike], 852 P.2d 44 (Haw. 1993).
15. *See Baehr v. Miike*, 1996 WL 694235 (Haw. App. 1996). Note: The defendant's name changed after Lawrence H. Miike replaced John Lewin as director of Department of Health for the State of Hawaii during the course of the trial.
16. *See e.g.*, Cal. Lab. Code, Sec. 1101.1 (West Supp 1997); Conn. Gen. Stat. Ann. Sec. 46a-81c (West 1994); Mass. Gen. Laws Ann.ch.151B Sec. 4 (West 1997); N. J. Stat. Ann. Sec. 10:5-12 (West 1997); Wis. Stat. Ann. Sec. 111.36 (West 1994).
17. *Curran v. Mount Diablo Council of Boy Scouts of America*, 1998 WL 125249 (Cal.).
18. *Dale v. Boy Scouts of America*, 1998 WL 84577 (N. J. Super. A. D.).
19. *Poff v. Caro*, 549 A.2d 900 (N. J. Super. 1987).

20. §32 C. F. R. § 41., app. A, pt 1, Sec. H.1.c (1990).
21. N. Hunter, S. Michaelson, and T. Stoddard, *The Rights of Lesbians and Gay Men: An American Civil Liberties Union Handbook Forty-One*, Southern Illinois University Press, Carbondale, Illinois (1992).
22. "Clinton Tells Gay Rights Policy, President Lifts Some Barriers to Homosexuals in the Military, Keeps Same-Sex Conduct Ban," *Chicago Tribune*, July 19, 1993, p. 1.
23. M. Locin, "Nunn Drafts Gay Policy Bill, U.S. Military Faces a Legal Nightmare," *Chicago Tribune*, July 17, 1993, p. 1.
24. §10 U. S. C. A. § 654 (1993).
25. The Servicemembers Legal Defense Network is a gay-rights advocacy group that publishes the number of same sex military harassment incidents reported to it each year. The Pentagon has continuously declined to comment on the organization's report.
26. "Gay Rights Group Says Military Condone Rising Harassment," *Chicago Tribune*, February 20, 1998, p. 8.
27. *See e.g., Thomasson v. Perry*, 80 F.3d 915 (U.S. 4th Cir. 1996) (holding that the "don't ask, don't tell" policy did not violate the equal protection clause of the Constitution).
28. *See* §703 (a), §42 U. S. C. § 2000e (1981) (stating "it shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.").
29. *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979).
30. *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978).
31. *See e.g.*, Cal. Lab. Code, Sec. 1101.1 (West Supp 1997); Conn. Gen. Stat. Ann. Sec. 46a-81c (West 1994); D.C. Code Ann. Sec 1-2512 (1997); Haw. Rev. Stat. Sec. 378-2 (Supp. 1996); Mass. Gen. Laws Ann. ch. 151B Sec. 4 (West 1997); Minn. Stat. Sec. 363.03 (1996); N.J. Stat. Ann. Sec. 10:5-12 (West 1997); R.I. Gen. Laws Sec. 28-5-7 (West 1996); Vt. Stat. Ann. tit. 21, Sec. 495 (1996); Wis. Stat. Ann. Sec. 111.36 (West 1994).
32. *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1998).
33. *See Oncale v. Sundowner Offshore Services, Inc.* 188 S. Ct. 998 (1998).
34. *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990).
35. S. Levay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, *Science*, 253, pp. 1034-1037 (1991).
36. J. M. Bailey and R. C. Pillard, A Genetic Study of Male Sexual Orientation, *Archives of General Psychiatry*, 48(12), pp. 1089-1096 (1991).
37. D. McFadden and E. G. Pasanen, Comparison of the Auditory System of Heterosexuals and Homosexuals: Click-Evoked Otoacoustic Emissions (1998), *Proceedings of the Natural Academy of Sciences*, 95, p. 42, March 1998.
38. D. H. Hamer, A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, *Science*, 261(5119), pp. 321-327 (1993).
39. F. L. Whitman, Homosexual Orientation in Twins: A Report on 61 Pairs and 3 Triplet Sets, *Archives on Sexual Behavior*, 22(3), pp. 187-206 (1993); *see also* J. M. Bailey

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