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Fact, Norm, and Standard of Review - The Case of Homosexuality Symposium: The Legal System and Homosexuality - Approbation, Accommodation, or Reprobation

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FACT, NORM, AND STANDARD OF REVIEW—THE CASE OF HOMOSEXUALITY

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I. INTRODUCTION

Judicial decisions in hotly contested, emerging areas of law often turn on disputes over legislative facts,[1] values,[2] and standards of review.[3] The many articles in this symposium illuminate these disagreements as they affect homosexual rights cases. Unlike the disagreement surrounding specific elements of fact, value, or standard of review, the interdependences among these elements have received little scholarly attention, but may be just as critical to judicial decision making. Whether a fact is found to be the case may depend on the intensity with which evidence of it is reviewed and the party assigned the burden of proof with respect to it.[4] These determinations may turn on other facts,[5] or may require normative judgments—which may require yet

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1. *See* Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980); Delgado, *Active Rationality in Judicial Review*, 64 MINN. L. REV. 467 (1980); Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 47 (E. Cahn ed. 1954); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975); *see also* Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

"Legislative facts," sometimes called "constitutional facts," are facts that courts are concerned with in connection with a broad, lawmaking function, such as construing a statute or declaring legislation constitutional or unconstitutional. They are contrasted with "adjudicative facts," which concern only the parties before the court. H. HART & A. SACKS, THE LEGAL PROCESS 384 (tent. ed. 1958); R. MISHKIN & C. MORRIS, ON LAW IN COURTS 143 (1965). An example of an adjudicative fact is a finding that a specific child was refused permission to register at a school because of her race; of a legislative fact, that "separate but equal" schools stigmatize black children and harm them emotionally.

2. *See* Delgado & McAllen, *The Moralist as Expert Witness*, 62 B.U.L. REV. 869 (1982); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 293–94 (1981); *see also* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

3. G. GUNTHER, AMERICAN CONSTITUTIONAL LAW, CASES AND MATERIALS 671–74 (10th ed. 1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991–1002 (1978); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

4. *See infra* text accompanying notes 96–97, 101–08. The state must prove factual issues in strict scrutiny analysis.

5. *See, e.g., infra* note 20 and accompanying text.

further facts.[6] A fact or norm may enter into the analysis more than once,[7] or may come with some degree of legislative authority.[8]

When, because of partiality or oversight, a judicial opinion fails to take account of the entire matrix of fact, norm, and standard of review,[9] the opinion often fares badly in history's judgment. In *Buck v. Bell,*[10] an institutionalized, mentally retarded woman was ordered sterilized after a finding that she was the daughter of a feebleminded mother and had given birth to a daughter also diagnosed as feebleminded.[11] The United States Supreme Court compared the woman's interest in resisting sterilization to a soldier's interest in avoiding combat and summarily upheld the order.[12] The Court left unaddressed a number of questions that are now seen as highly relevant: (i) whether procreation, even though of lesser importance than life, is nevertheless constitutionally protected; (ii) whether feeblemindedness, in general or in Carrie Buck's case, is hereditary; (iii) whether, if it is hereditary, its eradication justifies compulsory sterilization of the institutionalized; and (iv) whether any less onerous means exist for reducing the incidence of feeblemindedness in the next generation. The opinion is now considered to be one of the least distinguished in Supreme Court history. The Court's failure to analyze fully the matrix of normative, factual, and standard-of-review questions just mentioned seems a likely factor in its low estate.[13]

Bell is not a historical anomaly; recent cases evidence similar failures of analysis. In *Roe v. Wade,*[14] several normative and legal conclusions depended, as they often do, on multiple findings of legislative fact.

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6. *See, e.g., infra* notes 79–81.

7. *See infra* text accompanying notes 105–12.

8. *See generally infra* notes 139–54.

9. Usually, the mind's innate logic prevents these connections from being overlooked. *See* N. CHOMSKY, LANGUAGE AND MIND (1972); N. CHOMSKY, SYNTAX AND STRUCTURE (1978).

10. 274 U.S. 200 (1927).

11. *Id.* at 205. The diagnosis was made by a nurse shortly after the child's birth. It later came to light that the petitioner was the mother of a second child, who dies of measles after completing second grade and was reported to be a bright child. M. SHAPIRO & R. SPECE, BIOETHICS AND LAW 405 (1981).

12. *Buck,* 274 U.S. at 207.

13. Some legal realists might argue that whether a court is justified in reaching a given conclusion is beside the point; judges decide cases not for reasons of logic, but because of conscious or unconscious class loyalties, biases, and political perceptions. This article is about judicial reasoning—about ways in which opinions can be sound or unsound, convincing or unconvincing. I do not deny that judicial sociology, the study of judges' actual behavior, is a valid enterprise, nor that knowing a judge's social or political views may sometimes help predict the judge's decision. But knowing that a judge will probably decide a case a certain way does not help us know whether he or she *should* decide it that way—whether the decision is correct, persuasive, or sound. Nor does it help the judge who wants to decide a case in a principled way. This article concerns problems of the latter type.

14. 410 U.S. 113 (1973).

The Supreme Court accordingly devoted considerable attention to the factual predicates[15] from which it drew such conclusions as that a woman's interest in an abortion is fundamental;[16] that two, and only two, countervailing interests must be accommodated;[17] and that these interests become compelling at the first and second trimesters of pregnancy, respectively.[18] Despite the extensive survey of medical and psychological fact, many found the opinion unpersuasive.[19] A likely reason for the failure to convince was that many of the Court's findings of legislative fact depended on a further level of facts and normative choices that was not fully explored.[20]

More satisfactory treatment of a web of norms, legislative facts, and considerations affecting standard of review is found in *In re Quinlan*.[21] In *Quinlan*, the parents of an irreversibly comatose young woman brought suit to be appointed her guardian for the purpose of terminating medical treatment that, doctors testified, was preserving her existence.[22] Emphasizing the momentous and personal nature of the choice

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15. *Id.* at 146–52, 162–64.

16. *Id.* at 153–54.

17. *Id.* at 162.

18. *Id.* at 163.

19. *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

20. For example, why, normatively speaking, should a choice the frustration of which causes specific physical, psychological, and lifestyle "detriments," be constitutionally protected by the right of privacy, *Roe*, 410 U.S. at 153 (psychological, economic, social, and physical detriments imposed on a pregnant woman forced to carry an unwanted child), when other choices are not? Nonregistration for the draft, ingestion of mind-altering drugs, and homosexual relations are choices that the law forbids, even though the prohibition imposes costs (detriments) on the draft resister, drug user, and homosexual. Why are only two state interests worth balancing against the woman's right to abortion? *Id.* at 162–63. One interest that was mentioned briefly, and then dismissed, is protection of the fetus as life, *id.* at 159, an interest that arguably could have been compelling before viability. *See* Ely, *supra* note 19, at 933–35. The factual and normative underpinnings of the protectible-only-if-viable finding are not closely analyzed. Clarity on all these questions would have required more analysis than the Court offered. Without it, the opinion fails to persuade; the result may seem right, but the method by which it is reached remains troublesome. *See generally* Ely, *supra* note 19; Epstein, *supra* note 19.

That a more complete analysis is possible is shown in Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979). Professor Regan details the physical and psychological burdens a pregnant woman carrying an unwanted fetus may be forced to bear. *Id.* at 1579–88 (faintness, nausea, vomiting, tiredness, insomnia, slowed reflexes, poor coordination and balance, manual clumsiness, shortness of breath, aversion to certain foods, tender breasts, edema, urinary disturbances, backache, weight gain, awkward gait, varicose veins, changes in pigmentation, stretch marks, emotional volatility, the pain of childbirth itself, and numerous postpartum complaints, including depression). Regan then explains why these burdens are normatively significant, *id.* at 1588–91, and develops a theory, based on equal protection, to protect the woman's right to abort and escape these burdens when they are unwanted. *Id.* at 1621–29.

21. 70 N.J. 10, 355 A.2d 647 (1976).

22. *Id.* at 26, 355 A.2d at 655–56. Her higher brain centers were irreversibly destroyed; she

to terminate lifesaving medical treatment,[23] the New Jersey Supreme Court upheld the parents' right to exercise that choice for their daughter.[24] The court supported its selection of a stringent standard of review with factual and normative reasoning,[25] including a comparison of termination-of-treatment decisions with decisions already included within the right of privacy.[26] The court next considered competing state interests. The most powerful competing interest, preservation of life, was found incapable of justifying abridgement of a patient's right to terminate treatment when the patient is unlikely to experience a return to full, sentient life.[27]

Many of the connections the *Quinlan* court explored among fact, norm, and standard of review illustrate what might be called "horizontal dependence"—dependence of one element on another at a given stage of analysis. *Quinlan* also illustrates a second type of dependence, "vertical dependence," in which a finding made at one stage of analysis influences findings at a later stage. In *Quinlan,* the court's conclusion that the decision to forgo life-sustaining treatment falls within the right of privacy increased New Jersey's burden of justification for invading that interest. Not only must any justification be substantial,[28] entire categories of justification were effectively ruled out.[29]

Horizontal dependence can arise at several stages of a constitutional analysis: (i) determining the nature of the interest invaded;[30] (ii) assessing the seriousness of the invasion;[31] (iii) evaluating countervailing state interests;[32] (iv) determining less onerous alternatives;[33]

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was unresponsive to stimuli and unable to communicate. *Id.* Her brain was not, however, completely dead. *Id.* at 24, 355 A.2d at 654.

23. *Id.* at 38 & n.7, 39, 355 A.2d at 662 & n.7, 663. *See also Roe,* 410 U.S. at 211–12 (Douglas, J., concurring) (privacy protects "the basic decisions of one's life").

24. Since Karen Ann Quinlan's wishes were impossible to ascertain, the "only practical way to prevent destruction" of her right to terminate treatment was to permit a proxy decisionmaker to exercise that right for her. *Quinlan,* 70 N.J. at 41, 355 A.2d at 664. The parents' decision was subject to review by a hospital ethics committee. *Id.* at 54, 355 A.2d at 667.

25. *Id.* at 25–26, 39–40, 355 A.2d at 655, 663–64.

26. *Id.* at 39–40, 355 A.2d at 663.

27. *Id.* at 41, 355 A.2d at 664.

28. *Id.* at 40, 355 A.2d at 663.

29. Although the court does not say so, it would seem that a consequence of an activity's falling within the right of privacy would be that most paternalistic justifications ("for his or her own good") for interference would be ruled out. In these areas a person is assumed to know his or her own wants and how best to satisfy them.

30. *See infra* text accompanying notes 85–93.

31. Minor deprivations of liberty are treated less solicitiously than drastic ones. *Compare* Heffron v. International Soc'y for Krishna Consciousness Inc., 451 U.S. 904 (1981) (minor time, place, and manner restrictions on religious fundraising in public place held permissible) *with* Griswold v. Connecticut, 381 U.S. 479 (1965) (ban on sale of contraceptives, punishable by prison sentence, held unconstitutional).

32. *See infra* text accompanying notes 94–114.

and (v) balancing state and individual interests.[34] Vertical dependence can arise among any two or more such stages.

The remainder of this article analyzes these interdependences in homosexual rights cases. These cases present complex issues of fact, value, and standard of review. My purpose is not to decide whether the law should protect homosexuals' rights, or even whether particular legislative facts are the case or normative propositions about homosexuality are valid. Rather, it is the more limited purpose of identifying the factual and normative questions which a full analysis entails and tracing the logical relations among them. Homosexual rights cases are, in some respects, like decisions respecting abortion and sterilization; they arouse strong pro or con attitudes. When this occurs, it is easy to overlook issues that seem obvious later. The road map, or checklist, this article develops may help avoid oversimplifying issues that are, in reality, complex.[35]

II. JUDICIAL DETERMINATION OF THE RIGHTS OF HOMOSEXUALS

A. The Controversy and Its Components

In 1974, the American Psychiatric Association voted to remove homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders*.[36] Since then, attitudes toward homosexuality have been in flux. A number of municipalities and a few states have decriminalized sodomy or enacted gay rights ordinances,[37] but homosexuals still live

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33. *See infra* text accompanying notes 115–19.

34. *See infra* text accompanying notes 98–99, 115–19.

35. Certainly, opinions need not address every factual, normative, or standard-of-review issue that bears on the controversy. They may justifiably omit issues that are settled, obvious, or noncontroversial. No one would condemn a court that, in a homosexual teachers' case, neglected to consider whether homosexuals are human beings (obvious), whether the state has a legitimate interest in assuring that public school teachers are good role models (settled), and whether a tenured teacher has an interest in continued employment (settled). One could criticize a court that decided such a case without examining whether homosexuality is a psychological impairment, whether a homosexual teacher might nevertheless serve as an adequate role model, and whether the teacher's suit is entitled to strict or relaxed judicial review.

I also concede that there may be cases where a court must omit treatment of an element that, while relevant to its decision, cannot be addressed without fragmenting the court and threatening consensus. These exceptions aside, courts have a stake in providing opinions that are persuasive to others and examples of "reasoned elaboration." *See* Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUT.-CAM. L. REV. 399 (1978).

36. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281 (1980); N.Y. Times, April 4, 1974, at 12, col. 4 (reporting APA vote to delete homosexuality from list of illnesses). The decision was controversial, even among psychiatrists. Some charged that the declassification was "political"—a concession to the growing influence of homosexuals. *Id.*

37. See ordinances and statutes collected in E. BOGGAN, M. HAFT, C. LISTER, J. RUPP & T. STODDARD, AN ACLU HANDBOOK: THE RIGHTS OF GAY PEOPLE apps. A & C (rev. ed. 1983) [hereinafter cited as ACLU HANDBOOK]; *see also* Rivera, *Our Straight-Laced Judges: The Legal*

under varying degrees of legal disability with respect to housing,[38] employment,[39] child custody,[40] occupational licensing,[41] and immigration.[42]

Challenges have been brought to restrictions in all these areas, but with little success.[43] Some courts find the state's regulatory interest facially adequate and demand little or no justification.[44] Other courts require justification, and purport to find it in some physical, psychological, or social disability that homosexuals are thought to suffer.[45] Others find homosexuality immoral and justify repressive legislation as a means of reinforcing conventional values.[46]

A few courts have begun a cautious retreat from these positions by increasing the state's burden of justification,[47] rejecting certain justifications outright,[48] or requiring individualized treatment or tightness of

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Position of Homosexual Persons in the United States, 30 HASTINGS L.J. 799, 949–51 (1979).

38. ACLU HANDBOOK, *supra* note 37, at 69–76. *But see* WIS. STAT. ANN. § 942.04 (West Supp. 1984–85) (makes it a misdemeanor to discriminate in rental housing or public accommodations on the basis of sexual orientation); Hubert v. Williams, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (Col. Super. 1982) (homosexuals are a protected class under state law prohibiting discrimination in rental housing).

39. *See, e.g.*, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); ACLU HANDBOOK, *supra* note 37, at 16–23; Rivera, *supra* note 37, at 813.

40. *See, e.g., In re* Jane B., 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976); ACLU HANDBOOK, *supra* note 37, at 94–101; Rivera, *supra* note 37, at 884.

41. *See, e.g.*, Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); ACLU HANDBOOK, *supra* note 37, at 24–31; Rivera, *supra* note 37, at 855.

42. *See, e.g.*, Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967). *But see* Hill v. United States Immigration & Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983). The INS can only bar gays who have been certified by government doctors, a task the doctors have refused to perform since 1979. San Francisco Chronicle, Apr. 23, 1982, at 2A, col. 1. *See also* ACLU HANDBOOK, *supra* note 37, at 58–68.

43. *See generally* ACLU HANDBOOK, *supra* note 37; Rivera *supra* note 37. The ACLU and Gay Rights Advocates provide legal counsel in many test cases.

44. Military and immigration cases best illustrate this "hands-off" approach. *E.g.*, Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978); Beard v. Strahr, 200 F. Supp. 766, 773–74 (D.D.C. 1961), *vacated per curiam*, 370 U.S. 41 (1962) (complaint dismissed as premature); Rivera, *supra* note 37, at 842–52, 934–42.

45. *See, e.g.*, Singer v. United States Civil Serv. Comm'n, 530 F.2d 247, 252–55 (D.C. Cir. 1976), *vacated*, 429 U.S. 1034 (1977); Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.) *cert. denied*, 419 U.S. 836 (1974); *Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848.

46. *See, e.g.*, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); *see* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, CIV. LIB. REV., Jan.-Feb. 1979, at 19 (criticizing this view); Dressler, *supra* note 35, at 400–17 (chronicling societal reactions).

47. *See, e.g., Norton*, 417 F.2d 1161; Watkins v. United States Army, 541 F. Supp. 249 (W.D. Wash. 1982) (mem. and order granting in part and denying in part motions for summary judgment); Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973); *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975); *Morrison*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175; People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 957 (1980), *cert. denied*, 451 U.S. 987 (1981).

48. *See, e.g., Morrison*, 1 Cal. 3d at 220–30, 461 P.2d at 378–86, 82 Cal. Rptr. at 178–86

classificatory fit.[49] The Supreme Court has not yet spoken on any of these issues; it has declined to review recent homosexual rights cases,[50] affirmed without opinion a Virginia decision upholding a sodomy statute,[51] and decided without opinion a homosexual rights case on grounds of free speech.[52]

When courts, as they must, decide such cases on their merits, they will need to identify carefully and to make decisions on matters of fact and values, and determine the appropriate standard of review. The factual questions at issue may include the following: whether homosexuals are unstable, narcissistic, or violence-prone;[53] whether they are more likely than heterosexuals to seduce the young;[54] whether homosexuality is "transmissible" from one person to another;[55] whether homosexuals are superior to the general population in such respects as artistic ability, gentleness, or empathy;[56] and whether homosexuality is an ordinary option, like preferring chocolate to vanilla.[57]

(rejecting "immorality per se" as grounds for dismissal of homosexual teachers); *Onofre*, 51 N.Y.2d at 489, 415 N.E.2d at 941, 434 N.Y.S.2d at 952–53 (rejecting argument that sodomy statute is necessary to protect the institution of marriage); Schuster v. Schuster, No. D-36867 (Wash. Super. Ct. Nov. 7, 1974), *aff'd in part en banc*, 90 Wash. 2d 626, 585 P.2d 130 (1978) (rejecting view that a homosexual parent's custody invariably harms children).

49. *See* Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977) (requiring particularized showing of unfitness for duty in action for military discharge); *Society of Individual Rights*, 63 F.R.D. 399 (requiring particularized showing of unfitness for employment); *Morrison*, 1 Cal. 3d 214, 461 P.2d 375, 812 Cal. Rptr. 175 (same, in action for dismissal from public teaching position); *Onofre*, 51 N.Y.2d at 490–91, 415 N.E.2d at 940–41, 434 N.Y.S.2d at 952–53 (rejecting blanket assertion that sodomy statute was necessary to protect morality).

A greater judicial emphasis on narrow classifications would be consistent with recent studies indicating that homosexuals fall into different groups. A. BELL & M. WEINBERG, HOMOSEXUALITY: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 195–231 (1978). *See also* A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR OF THE HUMAN MALE 638–41 (1948) (homosexuality "on a continuum"); D. WEST, HOMOSEXUALITY AND THE LAW 85, 330 (1978) (multifactorial view of homosexuality).

50. Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984), *appeal dismissed*, 105 S. Ct. 1860 (1985); Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1373 (1985).

51. *Doe*, 403 F.Supp. 1199, *aff'd mem.*, 425 U.S. 901.

52. National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985).

53. Emotional instability is a ground for excluding a person from a security clearance, employment, or immigration. *See* Rivera, *supra* note 37, at 830, 934–42.

54. Rivera, *supra* note 37, at 889–904. A propensity to molest or seduce the young would argue strongly against teaching employment or child custody.

55. Rivera, *supra* note 37, at 855–56, 889–904. *See also* Board of Educ. v. Calderon, 35 Cal. App. 3d 490, 110 Cal. Rptr. 916 (1973), *cert. denied*, 414 U.S. 807 (1974); Comment, *Federal Employment of Homosexuals*, 19 CATH. U.L. REV. 267, 268 (1969) (letter from chair of U.S. Civil Service Commission to gay organization expressing concern over contagion and conversion if government were to employ homosexuals).

56. *E.g.*, D. WEST, *supra* note 49, at 317 (gays successful in arts, government, and medicine).

57. *E.g.*, LETTERS OF SIGMUND FREUD 1873–1939, at 4119–20 (E. Freud ed. 1960) (homo-

Normative questions include whether homosexuality is vicious or morally evil;[58] whether it is a threat to social institutions such as the family;[59] and whether society may punish homosexuality to guard against these dangers, and if so, how severely.[60] Standard of review questions include whether homosexuals should be treated as a suspect class[61] and whether homosexual relations should be regarded as a fundamental interest.[62] The three types of questions are interconnected; few are susceptible of conclusive proof. How should courts approach the welter of overlapping issues?

B. Fact, Norm, and Standard of Review: Analytical Context

The first issue a court must determine when a homosexual challenges legislative or administrative action is whether the action burdens him or her because of sexual preference.[63] The answer is an adjudicative fact, the disposition of which will affect primarily the parties before the court.[64]

1. Standard of Review

If the challenger establishes that state action burdens him or her because of sexual preference, the court must next select the standard of judicial review for determining whether that burden is justified. Courts uphold governmental action affecting ordinary economic or liberty in-

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sexuality a "variation of the sexual function . . . it cannot be classified as an illness"); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 982–83 (1979). *See supra* text accompanying note 36 (American Psychiatric Ass'n declassifies homosexuality); *see also* C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 134–43, 257–59 (1951) (homosexuality occurs in animals, i.e., "naturally"); A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 49, at 659–60. The decision to classify behavior as "normal" or "abnormal" may, of course, be value-laden. *See infra* notes 84, 122–23 and accompanying text (reasons for curtailing rights of homosexuals often thinly veiled value judgments).

58. *E.g.*, R. ATOLLER, PERVERSION: THE EROTIC FORM OF HATRED (1975); H. CLECKLEY, THE CARICATURE OF LOVE (1957); Socarides, *Homosexuality and Medicine*, 212 J. A.M.A. 1199, 1200 (1970). According to Gerald Gunther, one advantage of means-end scrutiny is that it requires the legislature to spell out ill-considered or anachronistic grounds for action. Gunther, *supra* note 3, at 45–46.

59. *See infra* notes 99–104 and accompanying text.

60. *See infra* notes 115–19 and accompanying text.

61. *See infra* notes 68–84 and accompanying text.

62. *See infra* notes 85–92 and accompanying text.

63. *See* L. TRIBE, *supra* note 3, at 79–88. This threshold question is analytically straightforward: was or was not the homosexual dismissed from his or her position, threatened with criminal prosecution, denied child custody, or otherwise disadvantaged?

64. This is not to say that the rules pertaining to standing and injury in fact are not sometimes vitally important. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). They rarely, however, require a court to make broad findings of legislative fact.

terests if it has any rational basis.[65] Strict review is applied when governmental action abridges a protected liberty or classifies according to suspect criteria.[66] Some courts purport to apply sliding-scale review, in which the state interest and means-end fit are judged according to the relative suspectness of the class affected and the fundamentalness of the interest invaded.[67]

a. Suspect or Quasi-Suspect Class

Although no court has found homosexuals to be a suspect class,[68] commentators have urged that homosexuals be declared a "quasi-suspect" class entitled to an intermediate level of solicitude.[69] A number of criteria have been offered to explain what makes a class suspect or quasi-suspect: (i) that the trait or traits defining the group are immutable;[70] (ii) that the class has suffered a history of discrimination and stigma;[71] (iii) that the classification bears little relationship to the members' ability to contribute to society;[72] (iv) that the class is politically powerless and unable to protect its interest in legislative marketplaces.[73]

Most will agree that homosexuals have been discriminated against historically and have little organized political power.[74] Immutability

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65. *E.g.*, Williamson v. Lee Optical Inc., 348 U.S. 483, 491 (1955); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Delgado, *supra* note 1, at 467–68.

66. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); L. TRIBE, *supra* note 3, at 1090.

67. *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); L. TRIBE, *supra* note 3, at 1190. Some favor this mode of review because its "means" orientation is relatively deferential. *See* Gunther, *supra* note 3, at 44.

68. *See* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (rejecting strict scrutiny and appearing to apply intermediate due process scrutiny in homosexual's suit for improper military discharge), *cert. denied*, 452 U.S. 905 (1980).

69. *E.g.*, L. TRIBE, *supra* note 3, at 944–45 & n.17; Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 648–49 (1980); Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L.REV. 193 (1979). *See* J. ELY, DEMOCRACY AND DISTRUST 162–64 (1980). A "quasi-suspect" group is one that has some, but not all, of the indicia of suspectness. *See infra* notes 70–73; Comment, *Mental Illness: A Suspect Classification?* 83 YALE L.J. 1237 (1974); *see also Beller*, 632 F.2d 788.

70. *See Frontiero*, 411 U.S. at 686; Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting).

71. *See* Mathews v. Lucas, 427 U.S. 495, 506 (1976); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426, 427 (1960).

72. *See Frontiero*, 411 U.S. at 686.

73. *See San Antonio Indep. School Dist.*, 411 U.S. at 28; *Carolene Prods. Co.*, 304 U.S. at 152–53 n.4.

74. They would seem to fall between blacks and women with regard to stigma and political powerlessness. It is possible that *undisclosed* homosexuals are more highly represented than women at the highest reaches of government. Women have considerably more voting power, however. *Cf.* J. ELY, *supra* note 69, at 163–64 (1980); Dressler, *supra* note 35.

and contribution to society present closer cases. Most experts believe that only some adult homosexuality is reversible,[75] and then, only if the patient is highly motivated and has an experienced therapist.[76] Analytically oriented therapy seems less effective than behavior modification and visualization therapy.[77] Recent studies suggest that some homosexuality may be physically or genetically predisposed[78] and difficult to reverse.

Pressured reversal of homosexuality also raises normative questions. Judicial protection of persons against discrimination on the basis of color, sex, or other unalterable characteristic responds, in part, to an intuition that it is unfair to penalize persons for what they are, rather than what they do.[79] If homosexuality is partly chosen (doing), partly predetermined physically (being), courts must decide whether the non-chosen component is great enough to warrant judicial protection. Such an evaluation is inescapably evaluative. Similarly, normative questions are raised if certain types of homosexuality are only reversible at great cost to the homosexual, for example, by undergoing painful conditioning or drug treatment. A condition that is mutable only with drastic treatment might well be deemed immutable because of a conviction that no one should be forced to undergo extreme treatment to escape the consequences of his or her makeup. Further, even assuming homosexual conduct is controllable by an act of will,[80] studies show that per-

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75. *E.g.*, L. HATTERER, CHANGING HOMOSEXUALITY IN THE MALE (1970) (homosexuality difficult to change); N.I.M.H., TASK FORCE ON HOMOSEXUALITY, FINAL REPORT 5 (1969) (same); D. WEST, *supra* note 49, at 241–75 (same). *See also* M. SCHOFIELD, SOCIAL ASPECTS OF HOMOSEXUALITY 212 (1965).

76. *See* sources cited *supra* note 74.

77. D. WEST, *supra* note 49, at 248–64.

78. *See* A. BELL, M. WEINBERG & S. HAMMERSMITH, SEXUAL PREFERENCE (1981); D. WEST, *supra* note 49, at 77–84 (hormonal and genetic causes of homosexuality) (citing studies). Even Sigmund Freud, the originator of psychotherapy, reportedly believed that some female homosexuals were physically predisposed to lesbianism. D. WEST, *supra* note 49, at 173. Some of the more impressive studies indicating a physical component or predisposition for homosexuality are the so-called "twin studies" in which the investigator locates a missing twin of an identical pair who were, for some reason, raised independently. *See, e.g., id.* at 80–83. If the twins were separated at an early age and have had no contact with each other, and if there is a very high "concordance" rate, this is strong evidence of a genetic factor in homosexuality. Other investigators attribute cross-sex or homosexual behavior to prenatal exposure to gonadal or stress hormones, barbituates, or other agents that affect the neurological development of the fetus. *See* 119 SCIENCE NEWS 309 (1981).

The prevailing view, however, is that in most cases, homosexuality is learned through early childhood experiences. *See, e.g.*, I. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS 310–13 (1962). Social learning theorists take a broad view, believing that sexual orientation is molded by conditioning and reinforcement of many types, up to and including the age of adolescence. D. WEST, *supra* note 49, at 80–111 (citing authorities).

79. *See* J. ELY, *supra* note 69, at 154–55.

80. This suggestion would apply, of course, only to burdens on practicing homosexuals.

sons with powerful urges are incapable of forming happy, enduring marriages with members of the opposite sex. Penalizing such an individual for giving in to his or her urges in effect punishes him or her for refusing to lead a life of sexual abstinence. Imposition of such a stark choice is, at least, a close normative question.

The third criterion, contribution to society, also resists summary analysis. Some experts believe that homosexuality indicates an underlying emotional disorder cutting across major areas of a person's life[81] and manifesting itself in narcissism, anxiety, impulsiveness, and a tendency to form shallow attachments to friends, family, nation, and career.[82] Others find the homosexual no more neurotic or unstable than the average person—except insofar as society's treatment makes him or her so—and point out the many gay artists, statesmen, and persons of business and letters who have contributed to civilization over the ages.[83] Many psychological judgments about homosexuality are, in part at least, disguised value statements, requiring evaluation as such.[84]

b. Fundamental Interest

A similar complex of facts and norms arises in fundamental interest analysis. Scholars and gay rights advocates have urged that consensual, adult, homosexual acts be protected as an aspect of the right of intimate association,[85] sexual privacy,[86] or respect for persons.[87] Each

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Some administrative guidelines and state statutes are so broadly drawn, however, that they have been applied to *latent* homosexuals, who have a predisposition toward homosexuality but who have not yet acted on it. Rivera, *supra* note 37, at 810. For these persons, homosexuality is not alterable by an act of will.

81. *See, e.g.*, I. BIEBER, *supra* note 78; H. CLECKLEY, *supra* note 58; C. SOCARIDES, THE OVERT HOMOSEXUAL 7 (1968); D. WEST, *supra* note 49, at 180, 197; Loney, *An MMPI Measure of Maladjustment in a Sample of "Normal" Homosexual Men*, 27 J. CLINICAL PSYCHOLOGY 486, 488 (1971); Myrick, *Attitudinal Differences between Heterosexually and Homosexually Oriented Males and between Covert and Overt Male Homosexuals*, 83 J. ABNORMAL PSYCHOLOGY 81 (1974); Saghir & Robins, *Homosexuality: I. Sexual Behavior of the Female Homosexual*, 20 ARCH. GENERAL PSYCHIATRY 192 (1969); Socarides, *Homosexuality and Medicine*, 212 J. A.M.A. 1199, 1200 (1970).

82. *See* sources cited *supra* note 81. *But see* R. MITCHELL, THE HOMOSEXUAL AND THE LAW (1969); Dean & Richardson, *Analysis of MMPI Profiles of Forty College-Educated Overt Male Homosexuals*, 28 J. CONSULTING PSYCHOLOGY 483 (1964) (authorities reporting little or no psychopathology).

83. *See, e.g.*, sources cited *supra* note 82. *See also* D. WEST, *supra* note 49, at 317 (many homosexuals successful in business, government, and the arts).

84. *See infra* notes 122–24 and accompanying text. *See also* Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOLOGIST 113 (1960) (mental disease categories operate as valuative licenses, justifying what would otherwise constitute illegitimate interference in lives of individuals).

85. Karst, *supra* note 69, at 655–63.

86. *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957–58 (1979). *See also* Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (right of privacy extends to private sexual conduct between consenting adults, whether husband and wife, married or unmarried,

of these characterizations depends on normative or legislative fact. For example, how critical is a homosexual orientation to the gay person; how deeply ingrained is the orientation as a part of self or personality?[88] Is a same-sex coupling an intimate association, like marriage, deserving of social protection for the community, solace, and personal enrichment it offers,[89] or a corrupt liaison like that of a band of robbers or partners in a psychopathological relationship?[90] Is it a shallow, impersonal union,[91] or a long-term relationship capable of providing emotional growth and nourishment?[92] Many of these normative and factual questions are horizontally dependent. For example, a decision that same-sex relationships are intimate associations implies a positive (or at least neutral) attitude toward them. A decision to include them within the right to privacy entails that they are essentially self-regarding, and thus, entitled to noninterference unless the state can show a compelling interest.[93]

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heterosexuals or homosexuals; sodomy statute declared unconstitutional), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *reh'g en banc granted*, 743 F.2d 236 (Jan. 25, 1985).

87. *See, e.g.*, L. TRIBE, *supra* note 3, at 994–95, 1090; Karst, *supra* note 69; O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19 (1979). The Supreme Court after 1971 has been less receptive than at previous times to expansion of fundamental rights or creation of new suspect classes. Gunther, *supra* note 3, Under the current restrained approach, courts de-emphasize review of the normative aspects of a legislative choice, concentrating instead on the means by which the statute promotes a legislative end and the closeness of means-ends fit. *Id.* at 33–37. This approach would tend to devalue courts' normative functions and emphasize their legislative factfinding functions. *See supra* notes 1–2 and accompanying text. But, it seems unlikely that courts will be able to eliminate normative scrutiny entirely, for it will often be impossible to know whether a given statute or mechanism promotes a goal unless one knows what is good about that goal and why it is valued. This leads inescapably back into normative analysis. Once a court begins examination of state goals in these terms, one outcome it may reach is that the goal or objective was overvalued, or even not good at all.

88. These are criteria for applying the right of privacy. *See generally* Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474, 477 (1975); Note, Roe *and* Paris: *Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1174 (1974).

89. *See* Karst, *supra* note 69, at 655–63.

90. The term "corrupt," of course, has a strongly normative component. For views that the homosexual relationship is in fact inferior to most heterosexual relationships, see, *e.g.*, C. SOCARIDES, *supra* note 81; A. STORR, SEXUAL DEVIATION 89, 90 (1964); EMPLOYMENT OF HOMOSEXUALS AND OTHER PERVERTS IN GOVERNMENT, S. DOC. NO. 241, 81st Cong., 2d Sess. 1, 4 (1950) (finding homosexuals masochistic, malicious, narcissistic, unreliable, and emotionally unstable).

91. *See* sources cited *supra* note 90.

92. *Compare* sources cited *supra* note 90 *with* A. BELL & M. WEINBERG, HOMOSEXUALITY: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978) *and* C. TRIPP, THE HOMOSEXUAL MATRIX 159 (1975). *See also* sources cited *supra* note 82.

93. Once the factual and normative predicates of a standard-of-review determination are identified, the question arises, which party has the burden of proof regarding them. There is little agreement on this question. *See* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 21 STAN. L. REV. 5, 11 (1959); Delgado, *supra* note 1, at 476 n.44 (parallel between standards of judicial review and trial rules regarding burden of proof). *Cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (government bears burden of proof of facts necessary to sustain statute that

2. State Interest

Once the court selects a standard of review, it will examine the state's reason for acting as it did.[94] Interlocking factual and normative questions arise here as well. Consider a state that denies teaching employment to homosexuals on the ground that they could transmit homosexual tendencies to young students.[95] Before accepting this justification, a court should subject it to empirical and normative analysis. Does exposure to an adult role model predispose children to adopt that person's sexual orientation? If so, how often does this happen? Does the answer depend on the age of the child, or whether the teacher is an avowed, as opposed to a "closet," homosexual? If there is such a conversion effect, is it wholly undesirable?

Experts disagree about whether homosexuality is transmissible from one person to another. Some believe that an individual's sexual orientation becomes fixed in early childhood and cannot easily be changed thereafter even through seduction by an adult.[96] Seduction may be rare; studies indicate that homosexuals are less likely than heterosexuals to seduce or molest children.[97] Proponents of a "learning model," however, believe that any modeling by a respected adult increases the likelihood that a child will become homosexual.[98]A reviewing court must further evaluate the professed state interest and decide whether a child, if so affected, suffers an injury, in normative terms, which outweighs the teacher's liberty interest and economic stake in practicing his or her profession. Is the risk of contagion sufficient to outweigh this burden?

Another interest used to justify laws regulating sexual conduct is

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impairs reproductive rights); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (existence of facts necessary to sustain economic legislation assumed).

94. Invasion of a fundamental interest or classification according to suspect criteria requires a compelling state interest; invasion of an interest subject to intermediate protection, or classification according to quasi-suspect criteria, requires a substantial state interest; all other invasions require a rational state interest. *See supra* text accompanying notes 65–67.

95. *E.g., Gaylord,* 88 Wash. 2d at 298–99, 559 P.2d at 1347. ACLU HANDBOOK, *supra* note 37, at 21–22.

96. A. BELL, M. WEINBERG & S. HAMMERSMITH, *supra* note 78; I. BIEBER, *supra* note 78, at 191; M. HOFFMAN, THE GAY WORLD 122–27 (1968); D. WEST, *supra* note 49, at 94–100, 217–18, 223–24, 239, 639; Bieber, *Homosexuality,* 69 AM. J. NURSING 2637, 2639 (1969) (seduction not a significant cause of homosexuality); Money, Hampton & Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Hermaphroditism,* 97 BULL. JOHNS HOPKINS HOSP. 301 (1955); Socarides, *supra* note 81, at 1200 (before age three).

97. Such a fact may be a result of the more severe sanctions at risk to the homosexual. D. WEST, *supra* note 49, at 213–14 (citing studies). *See generally* P. GEBHARD, W. POMEROY & C. CHRISTENSEN, SEX OFFENDERS (1965).

98. *See supra* note 78.

preservation of the family.[99] Although protection of the family is unquestionably a compelling interest,[100] it is not clear that penalizing homosexuality advances that interest. If homosexuality is relatively resistant to change,[101] the threat of punishment will pressure few homosexuals to enter into heterosexual marriage.[102] And, even if the pressure were effective, the marriage might well fail. As was noted earlier, when a homosexual marries a person of the opposite sex, the marriage rarely succeeds. In a general sense, it may be argued that laws which penalize homosexual conduct reinforce traditional societal values, and thus, encourage the norm of marriage and family.[103] The argument is plausible, but incomplete. How much reinforcement occurs, and at what cost.[104] Is a penalty necessary to avoid harming the family

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99. Richards, *supra* note 86, at 993 (evaluating this interest in the case of homosexuality); Note, *Homosexual's Right to Marry*, 128 U. PA. L. REV. 193, 210–11 (1979) (same). *See* ACLU HANDBOOK, *supra* note 37, at 83–84; Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595 (1977).

100. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Reynolds v. United States, 98 U.S. 145 (1878).

101. *See supra* notes 75–78 and accompanying text.

102. D. WEST, *supra* note 49, at 241–75. *See* L. HATTERER, *supra* note 75; C. TRIPP, *supra* note 92, at 251 (1975).

Further, a court might ask whether homosexuality reduces the number of heterosexual marriages as much as other practices and callings that we tolerate, such as the Catholic priesthood, Arctic exploration, and military service. Inconsistent treatment of similar obstacles to marriage would weaken the case for antihomosexual legislation.

103. *See, e.g.*, Singer v. Hara, 11 Wash. App. 247, ___, 522 P.2d 1187, 1197 (1974). While the Supreme Court has not addressed the interest of the family in the homosexual rights context, the Court has generally acknowledged the link between legislative regulation of marriage and protection of the family as "perhaps the most fundamental social institution in our society." Trimble v. Gordon, 430 U.S. 762, 769 (1977). Additionally, it has been argued that several community values are promoted by exclusive recognition of traditional norms of marriage and kinship: (1) stability and cultural patterns for positive childrearing; (2) continued socialization and enforcement of public virtue; (3) structural support for a democratic society; and (4) objective jurisprudence to achieve generality and reliable expectations. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472–91 (1983). Generalized harm to the family might provide a compelling state interest. The Supreme Court has strongly repudiated the view that restrictive legislation is only proper to prevent identifiable harm to individuals. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Court upheld the right of legislatures to act on "various unprovable assumptions," *id.* at 61, and to promulgate moral legislation to deal with a danger which "has a tendency to injure the community as a whole." *Id.* at 69. For such a view with regard to restriction of homosexuality see L. DEVLIN, *supra* note 46. These arguments are, however, heavily laden with questions of legislative fact and value which *must* be carefully analyzed by a court when confronted with evaluating the preservation of the family as the state interest.

104. A court cannot avoid the necessity of this balancing by urging that the legislature, and not the courts, is the proper arena for the demarcation of homosexual rights. Judicial scrutiny of the restrictions is regulated by constitutional principles and the well-settled role of the courts. In the area of illegitimacy, the Supreme Court has applied an intermediate level of scrutiny notwithstanding the legislative purpose of enforcing the traditional family structure. For a review of Su-

as an institution?

Vertical dependence also can arise at this stage. For example, an earlier conclusion that homosexuals are a suspect or quasi-suspect class may have been based on a finding that homosexuality is unchangeable and marked by stigma.[105] The government could attempt to use a version of this finding to justify denying jobs or other benefits to homosexuals. A school board or military discharge panel could argue, for example, that the presence of such stigmatized individuals in their institutions would lower morale and impair efficiency.[106] Child welfare authorities could refuse custody for homosexuals of their children on the ground that community ridicule would injure the children emotionally.[107] A factual finding that was made in connection with establishing strict scrutiny could thus be used to defeat a claim evaluated under that standard.

This curious give-with-one-hand, take-with-the-other result[108] can be avoided by precluding use of constitutional facts established at one level of generality to establish facts at lower levels of generality.[109] Thus, a challenger who succeeded in showing that homosexuals *in gen-*

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preme Court illegitimacy cases see Comment, *Equal Protection for Illegitimate Children: A Consistent Rule Emerges*, 1980 B.Y.U. L. Rev. 142.

Neither can a court resolve issues in favor of restrictive legislation by adopting a legislative definition of the marital relationship. Such a definition should be subjected to scrutiny in terms of the legislative fact and norms which would support it. When a decision accepts with insufficient analysis such a legislative definition, the opinion will fail to be persuasive. *See, e.g.*, Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

105. *See supra* notes 74–78 and accompanying text.

106. *Gaylord*, 88 Wash. 2d at 297, 559 P.2d at 1345–46 (removal from teaching position); ACLU HANDBOOK, *supra* note 37, at 21, 32–33 (government employment). *See generally* Note, *Security Clearance for Homosexuals*, 25 STAN. L. REV. 403 (1973).

107. *E.g.*, *In re* Jane B, 85 Misc. 2d 513, 380 N.Y.S.2d 848. *See* Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

108. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 535–36 (2d ed. 1977) ("law of the case" doctrine, which provides that facts found during a course of litigation are regarded as proven later during the same course of litigation).

109. An alternative approach might be to adopt a rule that no legislative fact established for a different purpose may be used against the party who established it in the same trial or course of litigation. *Cf.* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 123–24 (2d ed. 1972) (cases denying preclusive effect to finding of fact on preliminary issue when this coincides with central issue in case).

This rule would depart from the practice we follow with regard to adjudicative facts. Many adjudicative facts help the party who establishes them in one way, but injure him or her in other ways. For example, a plaintiff who proves that the defendant has engaged in a pattern of negligent conduct may benefit from the inference that the defendant was probably responsible for the injury on this occasion, but may also cause the jury to believe the plaintiff was also negligent in not taking precautions to protect himself or herself, at least if he or she knew of the danger. We do not consider this unfair; the plaintiff must make a tactical decision whether the item of evidence will provide greater benefit than harm to him or her.

eral are a stigmatized class could still compel the state to prove that stigma would exist as to him or her personally, would be of a type that the legal system should recognize,[110] and would disable him or her from teaching or raising a child.

The same rule would operate in fundamental interest analysis. Suppose a homosexual teacher persuades a court to apply strict scrutiny because, among other things, homosexual conduct is an essential aspect of personal identity for the avowed homosexual.[111] Later, the state might seek to use that fact against the teacher, arguing that one so constituted cannot serve as a good role model.[112] As with suspect-class analysis, the court should permit the teacher to prove a general proposition about personal identity while still requiring the state to prove the disabling trait in the individual case. Perhaps the teacher will be able to show that homosexuality, while deeply engrained, will not become obvious to the children, or that, even if it does, he or she has sufficient redeeming traits to tip the balance.

The same rule, of course, could be invoked by the state. Imagine a case in which the court finds the petitioner entitled to strict judicial scrutiny because consensual, adult, homosexual conduct falls within the constitutional right of privacy. The defendant, a government agency that deals with sensitive information, seeks to justify the petitioner-employee's dismissal on the ground that homosexuality exposes him or her to the risk of blackmail.[113] If the plaintiff were to argue that private conduct cannot lead to blackmail, the argument should be rejected. Homosexual relations may generally be private, but where even a slight risk of exposure is unacceptable, the government should be permitted to show that risk. Indeed, it is the clandestine nature of many homosexual relationships that, coupled with social disapproval, makes blackmail possible.

A second group of interests, somewhat less frequently asserted today, centers around the notion that homosexuality is immoral in itself—that is, without regard to its biological and psychological natures.[114] In this view, homosexuality can be burdened or punished simply because it is wrong. These morals-based interests are discussed

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110. Undeserved stigma or bias should normally be ignored, as there is a less onerous means of avoiding the harm resulting from it, namely, reeducating the public.

111. *See supra* text accompanying notes 85–92 (criteria for fundamental interests).

112. Such rationale would depend for its argumentative force on the view that homosexuality is immoral per se. *See Gaylord*, 88 Wash. 2d at 297, 559 P.2d at 1345–46; ACLU HANDBOOK, *supra* note 37, at 21–22 (discussing "role model" argument against employment of homosexual teachers).

113. *See also* ACLU HANDBOOK, *supra* note 37, at 49, 55–56; Rivera, *supra* note 37, at 855–56; Note, *supra* note 106.

114. *See infra* notes 121–22 and accompanying text.

in the next section.

3. Means-End Fit and Least Restrictive Alternative

a. Instrumental Justifications

If a court applying intermediate or strict scrutiny finds that the state has a compelling interest, the court must still find that the state's action is calculated to advance that interest and is no more onerous than necessary.[115] For example, a single homosexual parent faced with loss of child custody might argue that the state has a less onerous means of protecting the child's emotional health, namely, periodic observation by school and welfare authorities coupled with free counseling.[116] Evaluating arguments of this type requires factual and normative scrutiny. Are surveillance and treatment, in fact, less onerous than simple denial of custody?[117] Is exposure to a homosexual parent detrimental to a child and, if so, how detrimental?[118] Is it equally harmful no matter the child's age, or is there a point beyond which exposure ceases to be cause for concern?[119] Many of these questions can be answered only in relation to others; some resemble and are vertically dependent on questions that arose at earlier stages of analysis.

b. Normative justifications

When the government is required to defend a statute, it will generally do so by showing that it is instrumentally rational—that it efficiently promotes ends that society agrees are good.[120] In other cases, however, the government will simply assert that the conduct in question is immoral[121] and may be burdened as a valid exercise of its "police

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115. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960); L. TRIBE, *supra* note 3, at 722–24.

116. Termination of parental rights eliminates the constitutionally protected right to raise and care for one's children, while the observation-and-treatment approach only inconveniences the parent and child and costs the government money.

Least restrictive alternative considerations seemingly do not arise if *two* divorced biological parents are competing for custody of a child, and one of the parents is homosexual. *Both* parents assert parental rights, and any disposition will be onerous for the losing parent. In these cases, a court should be under no obligation to determine and require the least onerous alternative.

117. The state might argue that the stress and invasion of privacy would be harmful for the child as well as parent. The parent might counter that the state's objective cannot be achieved. Most children maintain some contact with a noncustodial parent and will probably learn about the parent's homosexuality. Refusing the gay parent custody or visitation rights will thus not shield the child from the shock of realizing that the parent is a homosexual.

118. *Compare In re* Tammy F, 2 WOMEN'S RTS. L. REP. 19 (Cal. App. 1974) (causes "adjustment problems") *with* Shuster v. Shuster, 585 P.2d 130 (Wash. 1978) (no likely emotional harm).

119. *Cf. supra* notes 95–96 and accompanying text.

120. *E.g.*, L. TRIBE, *supra* note 3, at 451–52, 995; Delgado, *supra* note 1, at 467–68. *But see* Nagel, Book Review, 127 U. PA. L. REV. 1174 (1979).

121. *E.g.*, Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969); *Doe*, 403 F. Supp. 1199;

power" to promote the general health, safety, welfare, and morals.[122]

Justifications may be normative without containing words like "wicked," "sick," "decadent," or "immoral." Statements that homosexuals are unequipped to hold certain positions, cause disruption by their very presence, or pose a threat to children contain normative components. How should courts evaluate such justifications? The difficulty for the challenger is that such broadly couched justifications could legitimate almost every restriction on homosexual conduct.[123]

Imagine a competent, homosexual, public school teacher whose discreet homosexual relationship with a consenting adult has come to the attention of his or her school board. The board moves to discharge the teacher under a provision permitting dismissal for conduct that is "immoral or against community standards."[124] The teacher will be unable to challenge the dismissal with instrumental justifications—that he or she has good evaluations, teaches a critical subject, or conducts his or her sex life with the utmost discretion. The board invokes the immorality of the teacher's conduct, not its consequences. The means-end fit is, arguably, perfect: the conduct is immoral; the regulation punishes it.

Invocation of morality should not end all analysis, however. Our legal tradition regards morality as more than mere convention or the will of the powerful;[125] moral mistakes are possible.[126] Legislation that burdens homosexuals might be mistaken in a number of ways: (i) homosexuality might not be wrong at all; (ii) it may be wrong, but repression may be an ineffective way of eliminating it; (iii) homosexuality may be wrong, but not wrong enough to justify curtailment of personal

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Wilkinson & White, *supra* note 99, at 591–93 (morals-based objection principal remaining ground for laws against homosexuals). The classic treatment of the view that society may punish homosexual acts to reinforce public morality is P. DEVLIN, *supra* note 46.

122. Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973); Poe v. Ullman, 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting) ("society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well").

123. *See* L. TRIBE, *supra* note 3, at 839, 853; Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 15 (1981). *But see* Gunther, *supra* note 3, at 24 (amorphous goals permissible in complex, unsettled areas). For the view that public opinion is becoming more tolerant of homosexuality, see Richards, *supra* note 57.

124. Actions to dismiss homosexual teachers are frequently brought under rules with language similar to this. *See Gaylord*, 88 Wash. 2d at 296–99, 559 P.2d at 1345–47; ACLU HANDBOOK, *supra* note 37, at 21–22; Rivera, *supra* note 37, at 861–64, 871–74.

125. R. DWORKIN, TAKING RIGHTS SERIOUSLY 131–49, 184, 207, 240 (1977); J. ELY, *supra* note 69; C. FRIED, AN ANATOMY OF VALUES (1970); J. RAWLS, A THEORY OF JUSTICE 46–53 (1971); Delgado & McAllen *supra* note 2; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 691 (1960).

126. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (rectifying error of antimiscegenation statutes); Brown v. Board of Educ., 347 U.S. 483 (1953).

liberty to eradicate it. "Moral due process"[127] requires that challengers be afforded an opportunity to prove the state wrong in any of these ways.

Challenging the state's normative premise is certainly the most difficult of the three options. Yet, it must remain open. Laws regulating private possession of pornography,[128] forbidding dissemination of contraceptives,[129] prohibiting mixed-race marriages,[130] and criminalizing religious use of peyote by American Indians[131] have been declared unconstitutional despite claims that they were needed to promote morality.[132] The same may eventually occur with homosexuality.[133] Moral theorists have urged that rules be supportable with reasons; that without such reasons they are indistinguishable from superstitions, quirks, prejudices, or personal predilections of the lawmaker and are inadequate bases for restricting liberty in a free society.[134] These reasons

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127. The term is my own. It refers to the notion that before a court uses an ethical or moral consideration against a person, the person should be given an opportunity to dispute it or any factual premise necessary to its validity. *See infra* text accompanying note 166; Delgado & McAllen, *supra* note 2. The standard of review will, of course, determine the degree of difficulty a challenger will meet in his or her task. Under the mere-rationality standard, the challenger will be required to prove not just that homosexuality is not immoral, but that no reasonable legislature could have thought it so. *See supra* notes 74–75 and accompanying text. Under strict scrutiny, the state should be required to prove that the dangers to public morals arising from homosexual behavior constitute a compelling state interest.

128. Stanley v. Georgia, 394 U.S. 557 (1969).

129. Eisenstadt v. Baird, 405 U.S. 438 (1972) (distribution to unmarried users); Griswold v. Connecticut, 381 U.S. 479 (1965).

130. *Loving*, 388 U.S. 1.

131. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

132. *See also* State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (declaring unconstitutional the state sodomy statute); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (declaring unconstitutional as beyond the police power a statute that penalized oral or anal sex acts outside marriage).

133. *See Onofre*, 51 N.Y.2d at 490–91, 415 N.E.2d at 941, 425 N.Y.S.2d at 952–53 (rejecting protection of morality as justification for sodomy statute); Dressler, *supra* note 35; *see also* Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1286 (1979). If a court finds that a normative question is genuinely unresolvable, then it may wish to dispose of the case in a way that will hasten the time at which normative uncertainty can be dispelled. For example, an appellate court can require individualized treatment in the hope that case-by-case disposition will facilitate the development, over time, of a stable moral consensus. *See generally* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 305–07 (1975) (decision-making approaches should be calculated to encourage evolution of moral consensus, especially in transitional areas—homosexuality would seem to be such an area).

134. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 996–1004 (1966). *See also* 3 WHARTON'S CRIMINAL LAW § 296 (14th ed. 1980) (reasons *against* criminalizing homosexual conduct; it is a matter of personal choice; has no victim; laws are not enforced; yields no deterrence; acts are done privately and cause no offense). The principal opposing view—that social dislike for homosexuality does constitute a good reason for criminalizing it—is argued in P. DEVLIN, *supra* note 46. It is difficult, however,to see how Devlin's argument could be differentiated from a similar argument for repressing women or forbidding racial intermarriage. Both the thought of a woman holding a "man's" job and the thought of a white woman and a

may be empirical, or may take the form of deduction from a higher norm. When a homosexual challenges a normative rule justified by an asserted empirical fact, the court may review the fact in the usual manner.[135] Where the justification for a normative statement ("homosexuality is wicked") is a broader normative statement ("sex without the possibility of reproduction is a corruption of its original purpose; human faculties should be confined to their original purposes"), the broader statement may be reviewed under accepted criteria of moral discourse—universalizability, impartiality, consistency with other values that we hold.[136] A challenger should also be able to argue that even if homosexuality is undesirable, repressing it is inappropriate. This might be the case if, for example, it appeared that homosexuality is physically caused, not particularly harmful, and beyond a person's power of choice,[137] or if the costs of enforcement were excessive.[138]

III. NONJUDICIAL DETERMINATION OF FACTUAL OR NORMATIVE ISSUES

A final group of issues arise if a party calls to a court's attention that a fact, norm, or standard of review has been established by another branch of government, such as an administrative agency, or the surgeon general.[139] Unless there is a reason to distrust the process by which the agency arrived at a factual finding, a court should ordinarily accept it at face value.[140] Much of the scientific case concerning homosexuality is complex and divided.[141] So long as this is true there is little reason to assume that courts are more likely to be accurate fact finders than other bodies. But where the class affected is a suspect or quasi-suspect class, or the interest invaded by the legislation is fundamental, courts should, and do, reexamine fact-findings for verity and plausibil-

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black man living together as man and wife arouse disgust and revulsion in the minds of some. Devlin argues that society needs to reinforce some such emotions to solidify social consensus. But we have rejected certain consensuses, including the two mentioned above. Devlin's book offers little guidance for determining when a social consensus is worthy or unworthy and thus is of little assistance in deciding whether or not society may punish homosexuality for moral reasons.

135. *See infra* note 142 and accompanying text.

136. These are the most commonly accepted criteria of moral discourse. *E.g.*, Delgado & McAllen, *supra* note 2; Richards, *supra* note 62, at 987–99.

137. *See supra* notes 79–81.

138. H.L.A. HART, LAW, LIBERTY, AND MORALITY 45, 52, 67–68 (1963).

139. *E.g.*, EMPLOYMENT OF HOMOSEXUALS AND OTHER PERVERTS IN GOVERNMENT, S. DOC. No. 241, 81st Cong., 2d Sess. 4–5 (1950) (finding homosexuals masochistic, malicious, narcissistic, unreliable, and emotionally unstable); N.Y. Times, Aug. 12, 1979, at 20, col. 1 (surgeon general found homosexuality not a mental disease for purposes of immigration laws).

140. G. GUNTHER, *supra* note 3, at 863. *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152–54 (1938); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1263–81 (1972).

141. *See supra* notes 45–114 and accompanying text.

ity.[142] As courts begin close examination of laws pertaining to homosexual behavior, it seems probable that legislative and administrative fact-findings, like those discussed in section I, will come under increasing scrutiny.

A closer case arises if a legislature purports to make a *normative* finding in support of a statute. For example, in enacting the Natural Death Act,[143] the California legislature declared that failure to provide a method by which irreversibly ill patients may discontinue life support violates their privacy and dignity.[144] These are debatable normative findings.[145] Is a California court free to find otherwise—that continuation of life support does not erode human values, but strengthens them? With respect to homosexuality, suppose a legislature finds the practice to be unnatural and debasing—is a court free to disregard this if it believes homosexuality to be natural and ethically neutral?

A case can be made for holding legislative findings on normative questions conclusive. Legislatures, after all, are supposed to know the people and their preferences in matters of morals and opinion. But, the people may be morally wrong; recall slavery and witch-burning.[146] If moral error were remediable only through formation of a new social consensus and never through judicial action, it might remain forever uncorrected. Judicial repudiation of a legislative value judgment is, however, a harsher form of rejection than that of a legislative fact; it may be expected to occur less frequently.[147]

A final problem arises if the legislature attempts to designate the standard of judicial review to be applied to a controversy. A state legislature might find that homosexuality is nonfundamental and that homosexuals do not constitute a suspect or a quasi-suspect class, and order courts to review state action affecting homosexuality under the rational basis standard.[148] Conversely, a legislature might declare that adult consensual sex is a fundamental right which is not to be abridged without a compelling state interest.[149] How much weight, if any, should

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142. *See supra* notes 47–49 and accompanying text. *See also* M. SHAPIRO & R. SPECE, *supra* note 11, at 300–09.

143. CAL. HEALTH & SAFETY CODE §§ 7185–95 (West Supp. 1985).

144. *Id.* § 7186.

145. *See* M. SHAPIRO & R. SPECE, *supra* note 11.

146. *Cf.* Craig v. Boren, 429 U.S. 190 (1976) (holding unconstitutional a statute that reflected social stereotype of women's role); Katzenbach v. Morgan, 384 U.S. 641 (1966) (Congress has power to find that literacy test violates equal protection clause).

147. Although less frequent, judicial repudiation of legislative values will still occur. *See* cases cited *supra* notes 128–32, 146.

148. *See* Crawford v. Board of Educ., 455 U.S. 904 (1982) (upholding California initiative directing that California courts analyze school busing cases under federal "intent" standard).

149. *Cf.* ACLU HANDBOOK, *supra* note 37, at 17, 109 (gay rights ordinances and states that have decriminalized adult, consensual sex); Rivera, *supra* note 37, at 948–50 (passage of gay

courts give such directives?

The Supreme Court has resisted legislative attempts to limit courts by dictating what evidence is relevant[150] or by enacting presumptions that place matters beyond proof or disproof.[151] It is likely that the Court would take an equally dim view of legislative directives to use a less strict mode of review than it would otherwise employ.[152] Legislative specification of a strict standard of review is less troublesome, as the cost of the resulting leniency is borne by the state.[153] To return to an earlier example, the California Natural Death Act specifies that the right to discontinue life-saving medical treatment is "fundamental."[154] If this right comes into conflict with other rights and interests, it seems highly likely that California courts will defer to the legislative characterization. No statutory designation of an activity as "fundamental" seems ever to have been overturned.

IV. CONCLUSION

Constitutional cases, particularly those of first impression, may require a court to make findings of legislative fact, decide normative questions, and select a standard of judicial review. Factual and normative decision making is often interwoven; even selection of a standard of review requires factual and normative decisions. Elements considered at one stage of analysis may reappear later, at the same or different

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rights ordinances; repeal of antihomosexual laws).

150. L. TRIBE, *supra* note 3, at 40–41 (discussing cases).

151. *See, e.g.*, Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (invalidated statutory presumption that every teacher who is four or five months pregnant is physically incapable of teaching); Vlandis v. Kline, 412 U.S. 441 (1973) (cannot deny a married student who applies as a nonresident to a state university the opportunity to prove a change in residency in order to obtain in-state rates for tuition); Stanley v. Illinois, 405 U.S. 645 (1972) (cannot presume an unmarried father to be an unsuitable parent); Leary v. United States, 395 U.S. 6 (1969) (criminal statutory presumption is invalid unless the presumed fact is more likely than not to flow from the proved fact). *But see Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (Congress may withdraw Supreme Court's power to hear appeals from denials of petitions for habeas corpus).

152. *See* Plyler v. Doe, 457 U.S. 202, 213 (1982).

> To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction . . . would undermine the principal purpose for which the Equal Protection Clause was incorporated. . . . The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here . . . .

Id.

153. *Cf. Morgan*, 384 U.S. 641 (Congress may provide protection of Spanish-speaking person's right to vote that goes beyond protection required by equal protection clause).

154. CAL. HEALTH & SAFETY CODE § 7186 (West Supp. 1985). "The Legislature finds that adult persons have the fundamental right to control the decisions relating to . . . their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition." *Id.*

levels of generality.

Our consideration of homosexuality illustrated all of these principles. Designation of a model of judicial review requires that the court commit itself to a view of homosexuality and the part it plays in the life of the homosexual. Assessment of state interests requires further consideration of the nature of homosexuality, including whether it is a disease, whether it is transmissible from one person to another, and whether it is morally wicked. Means-end analysis entails interest balancing, in the course of which further facts about homosexual conduct may become vital.

Tracing these connections helps to insure a type of substantive completeness in adjudication.[155] However, there are lessons to be gained with respect to process as well. As was seen, many of the questions that arise at early stages of constitutional adjudication are general.[156] At later stages, the level of particularity increases until, at trial, the court will mainly be concerned with adjudicative facts, facts that affect the parties immediately before the court, and particularized norms. This progression from general to specific suggests a caution. The broad early findings a court makes are important for many persons not before the court. They determine whether entire categories of cases will be difficult, or easy, to prove or defend. Fairness dictates that these determinations be made openly, carefully, and with opportunity for participation by persons and groups likely to be affected. At a minimum, opportunities for intervention and submission of *amicus* briefs should be made liberally available.

Just as it protects the many from the one, a court should protect the one from the many, protecting individual litigants from generalizations drawn from the experience of large numbers of persons like them.[157] This may entail confining the effect of early findings so as not to unduly influence more particularized findings required later.[158] At the final stages of review, when a court balances in an individualized way the interests of state and citizen and explores alternative means of advancing these interests, a court may relax its vigilance somewhat and shift responsibility for arguing norms, facts, and policies to the partici-

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155. A court may, of course, choose to obscure the basis of its decision in order to deflect criticism it thinks would follow if the grounds of decision were analyzed openly and distinctly. Whether this tactic is ever justified, and if so, when, is treated elsewhere. *See generally* Delgado & McAllen, *supra* note 2.

156. *See supra* notes 65–93 and accompanying text (nature of class as suspect or quasi-suspect and nature of interest invaded as fundamental or nonfundamental); *supra* notes 94–102 and accompanying text (nature of state interest as compelling or noncompelling).

157. *See supra* notes 105–13 and accompanying text.

158. *See supra* notes 110–13 and accompanying text.

pants themselves, as is the case with other functions in a system of adversary justice.