1991

Book Review: Sexual Orientation and the Law. by the Editors of the Harvard Law Review.

Beverly Balos

family, and punishes behavior inimical to it. I would suggest therefore that the quest for a cure of AIDs, unaccompanied by any attempt to modify the behavior out of which AIDS was generated, is ultimately futile. I would venture to suggest that if a cure for AIDS were discovered tomorrow, it would not be very long before a new venereal disease would make its appearance, just as herpes did in the 60s and AIDs did in the 80s. What is needed above all is not a medical miracle cure but a moral and behavioral change.

As an abstract debater's point, one might perhaps distinguish between homosexuality and promiscuity. Some homosexuals, especially women, maintain "exclusive" relationships. These may reduce somewhat the incidence of venereal disease. If they are sufficiently discreet—that is to say, if they remain "in the closet"—they may avoid the evil of scandal. "Marriages" between homosexuals would not solve any problems, however. It was not the lack of marriage certificates that produced the bathhouse culture, but rather the uncontrolled indulgence of sexual perversion. Legalizing sexual perversion could only make matters worse. Promiscuity, whether homosexual or heterosexual, is best controlled by moral constraint.

No civilized person today wants to persecute homosexuals, or to see them suffer and die from horrible diseases. But it is equally true that no civilized person should wish to see homosexuality accepted as an equally valid "alternative lifestyle."

SEXUAL ORIENTATION AND THE LAW. By the editors of the Harvard Law Review. Cambridge: Harvard University Press. 1990. Pp. 170. Cloth, $17.50; paper, $9.95.

Beverly Balos [1]

> I wish you would notice that you are heterosexual.
> I wish you would grow to the understanding that you choose heterosexuality.
> I would like you to rise each morning and know that you are heterosexual and that you choose to be heterosexual—that you are and choose to be a member of a privileged and dominant class, one of your privileges being not to notice.
>
> —Marilyn Frye

This book was originally published as a student-authored "developments note" in volume 102 of the *Harvard Law Review*. It is a broad survey of the discrimination faced by lesbians and gay men

1. Clinical Professor of Law, University of Minnesota.

within several areas of the law, including the criminal justice system, employment, family and marriage, and—more briefly—immigration, insurance, and public accommodations.

In its introductory section the book posits four conceptions of homosexuality. First is the notion that homosexuality is immoral and sinful. Conceding that this conception has had a powerful influence even in the twentieth century, the authors nonetheless assert that the view of homosexuality as sinful is less prevalent today. Perhaps so, but one need only peruse Chief Justice Burger's concurring opinion in *Bowers v. Hardwick* to realize that the "old" conception still has a powerful hold on many minds.[2]

The second approach views homosexuality as deviant behavior, symptomatic of disease. This view led to an attempt to find a treatment to cure the disease; sometimes the "treatment" involved the coerced institutionalization of lesbians and gay men. It should be noted that in 1973 lesbians and gay men were miraculously cured when the American Psychiatric Association removed homosexuality from its list of psychiatric disorders.

The third conception, which the editors call "neutral difference," rests on the view that homosexuals are entitled to legal protection and should not be legally penalized for their sexual orientation. This is essentially a civil rights approach.

According to the fourth model, sexual orientation is a social construct: its meaning and consequences flow from the time, place and culture within which it exists. This approach rejects categorization and views same-sex acts and relationships as not materially different from opposite-sex acts and relationships. Proponents of this view assert that the idea of a homosexual identity posits an essential rift or definitive division separating those who engage in homosexual from those who engage in heterosexual sex. Thus homosexual identity has as its origin an invidious classification that is only understood in terms of its "deviancy" from the "norm" of heterosexuality. Defining homosexual identity in opposition to heterosexuality may run the risk of reinforcing the very constraints lesbians and gay men fight to overcome.[3] While the fourth ap-

---

2. Chief Justice Burger asserted that condemnation of homosexual conduct is firmly rooted in Judeo-Christian moral and ethical standards and that to find a fundamental right to engage in homosexual sodomy would be to "cast aside millennia of moral teaching." 478 U.S. 186, 197 (1986). Despite the questionable accuracy of such assertions, the tone and content of the assertions themselves demonstrate that the unexamined view of homosexuality as sinful and immoral is still pervasive.

3. The authors cite a number of commentators who espouse this view, e.g., J. Katz, Gay/Lesbian Almanac 7 (1983); Arriola, *Sexual Identify and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 156 (1988); D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*,

proach is the most theoretically interesting, the first three views continue to direct and structure the legal system's treatment of lesbians and gay men.

Turning to constitutional issues, the authors argue that sexual orientation should be a suspect or quasi-suspect classification for equal protection analysis, thus triggering heightened judicial scrutiny. Once heightened scrutiny is applied, so the theory goes, the government's alleged interest in most discriminatory action will fail to survive this more intensive review. Unfortunately, as the authors acknowledge, most courts that have considered equal protection challenges to discriminatory behavior against lesbians and gay men have not found sexual orientation to be a suspect or semi-suspect class.[4]

Another legal theory, touched on only briefly by the authors, is that discrimination against homosexuals is not only discrimination based on sexual orientation but also gender discrimination. Because sexuality largely defines gender, discrimination based on sexuality is discrimination based on gender.[5] This view flows from the initial proposition that lesbian and gay relationships challenge the basic structure of patriarchy. Since the foundation of the male patriarchal structure is domination by men and submission of women, relationships outside this structure are extremely threatening to men. Especially dangerous is the possibility of women choosing to make their emotional, intellectual, and physical connections with women rather than men. Women whose primary relationships are with women challenge male access to and privilege over women. Discrimination against lesbians and gay men and the criminalization of sodomy reinforce traditional gender roles. In a society that privileges males, reinforcement of traditional gender roles is disproportionately harmful to women and perpetuates discrimination against them.

This expanded redefinition of gender discrimination would entail a heightened level of scrutiny of discrimination against gays and lesbians because gender has been viewed by the Supreme Court as a quasi-suspect class triggering an intermediate level of review.[6] This

---

14 N.Y.U. REV. L. & SOC. CHANGE 915, 917 (1986); Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 780 (1989).

4. *See, e.g.*, Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984); Childers v. Dallas Police Dept., 513 F. Supp. 134, 147 n.22 (N.D. Tex. 1981).

5. *See* C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 248 (1989).

6. *See* Craig v. Boren, 429 U.S. 190 (1976).

may be a more successful strategy than arguing that sexual orientation itself should be a suspect or quasi-suspect class.

The authors also note the historical denial of the existence of lesbians. For example, the traditional common law and religious condemnation of homosexuality did not encompass women.[7] Since sexual relationships between women were beyond the imagination, there was no need to criminalize them. However, invisibility and silence can accomplish censure and constriction as effectively as the criminal law. While briefly acknowledging the invisibility of lesbians, this book essentially continues the tradition. It does so by its failure to recognize that lesbians occupy a status that is essentially different from gay men, a critical difference that is only briefly mentioned in a footnote. While gay men are condemned for their behavior of loving other men (behavior that causes them to be in some sense similar to women and thus inferior), they still have access to and can take advantage of male privilege. Equating lesbians with gay men simply because both are stigmatized is to deny the reality of women's lives in a male dominated society. Lesbians and gay men do, of course, share some political goals and objectives. However, the sharing of some objectives does not negate the essential differences. Lesbian and non-lesbian women still lack economic privilege. Lesbian and non-lesbian women still lack cultural and political privilege. Lesbian and non-lesbian women are still subject to rape and battering. To ignore these differences between lesbians and gay men is to ignore the reality of the inferior status imposed on women by the dominant culture.

The book ignores the uniquely dangerous threat lesbian relationships pose to the dominance of men. While the prospect of men choosing other men can be viewed as giving greater choices to men, the prospect of women choosing women is a challenge to male dominance. This challenge to patriarchal culture places lesbians in a critically different status that needs acknowledgement by the law.

This difference in position is exceedingly clear when one examines the origins of the institution of marriage. The historical status of women as property of their husbands and their disappearance as legally recognized human beings upon marriage is well known. This aspect of the marriage relationship as a repressive patriarchal institution that may have less than purely positive consequences for women is nowhere explored in the book. Rather, the desirability of marriage for lesbians as well as gay men is simply assumed, without consideration of the fact that lesbians and gay men do not approach

7. *See* Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 202 n. 75.

this institution from the same position in society. The book's failure to recognize and explore this difference is a weakness that preserves the marginalization of non-lesbian women and lesbians in legal discourse.

Similarly, the authors fail to explore the intersection of race, gender, and sexual orientation. There is no acknowledgement in the book of the diversity of experiences of lesbians and gay men.

In short, while I have some criticisms of this work, the authors are to be commended for choosing to focus on the issue of sexual orientation and the law for serious analysis. However, their failure to question heterosexist assumptions about culture and society perpetuates the essential invisibility of lesbians and gay men.

CONSTITUTIONAL DIPLOMACY. By Michael J. Glennon.[1] Princeton, New Jersey: Princeton University Press. 1990. Pp. 353. Cloth, $35.00.

CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS. By Louis Henkin.[2] New York and Oxford: Columbia University Press. 1990. Pp. 125. Cloth, $24.50.

THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR. By Harold Hongju Koh.[3] New Haven: Yale University Press. 1990. Pp. 340. Cloth, $35.00; paper, $14.95.

Robert G. Kaufman[4]

These books address a subject fraught with a long history of controversy, the constitutional dimension of American foreign policy. Since 1793, when President Washington risked war by declaring neutrality in violation of a treaty with France, presidents and the Congress have continued to debate their respective legal powers in the realm of foreign affairs.[5] The executive branch has consist-

1. Professor of Law, University of California Davis, School of Law.
2. University Professor Emeritus and Special Service Professor, Columbia University.
3. Professor of Law, Yale University.
4. Bradley Resident Fellow, the Heritage Foundation.
5. For an excellent discussion of the origins of this controversy, see R. TUCKER & D. HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON 48-63 (1990).