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FEDERAL LAW'S INDIFFERENCE TO HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION

I. INTRODUCTION

The purpose of this Note is to report the extent that federal law fails to prohibit sexual orientation discrimination in general housing practices such as the sale, rental, or lease of a residence.¹ Many states and local communities prohibit housing discrimination based on sexual orientation, including Massachusetts and several of its cities and towns.² The federal government, however, does not explicitly prohibit such conduct.³ Does the federal government approve of housing discrimination based on an American's sexual preference?⁴ Or does the absence of federal statutory protection merely reflect a bias by the country's majority against non-heterosexuals?⁵

Section II of the Note addresses societal attitudes towards non-heterosexuality, as well as the dynamics of the non-heterosexual American population. Section III(A) discusses constitutional protection from housing discrimination. Section III(B) examines federal statutory laws that prohibit housing discrimination. Section IV concludes with an outline of findings and recommendations.

II. NON-HETEROSEXUALS AND THE STRUGGLE AGAINST DISCRIMINATION

Between eight and twenty-eight million non-heterosexual Americans live in the United States, according to different surveys.⁶ Non-

¹ This Note will refer to sexual preference, sexual orientation, and sexual affection interchangeably throughout the text.

² See M.G.L. c. 151B § 4(6) (2001) (prohibiting housing discrimination based on sexual orientation); CAMBRIDGE, MASS., ORDINANCES ch. 14.04.040 (1992) (prohibiting housing discrimination based on sexual orientation).

³ See *infra* notes 117-23 and accompanying text.

⁴ See *infra* notes 69-86, 117-21 and accompanying text.

⁵ See *infra* notes 25-34 and accompanying text. This Note will employ the term 'non-heterosexual' to include gay, lesbian, bisexual, and transgender people rather than the GLBT acronym. See National Gay and Lesbian Task Force web site, *available at* <http://www.nglftf.org/issues/issue.cfm?issueID=21> (discussing components of GLBT civil rights movement) (last visited Jan. 20, 2002).

⁶ MARK J. PERRY & PAUL J. MACKUN. U.S. Census Bureau, Population Change and

heterosexuals, therefore, represent three to ten percent of the country's population.⁷ By comparison, the lowest estimate of non-heterosexual Americans is equal to the number of Asian Americans, while the highest estimate of non-heterosexual Americans is slightly lower than the number of African Americans.⁸

The indefinite number of non-heterosexual Americans demonstrates an important difference between race and sexual orientation.⁹ Sexual orientation is an invisible characteristic, unlike the visible characteristic of race.¹⁰ Many non-heterosexuals, consequently, are able to conceal their sexual orientation.¹¹ Notwithstanding the difference between race and sexual orientation, non-white and non-heterosexual Americans have encountered similar patterns of discrimination from the arguments against interracial and same-sex marriages to targets of hate crimes.¹²

Discrimination against non-whites and non-heterosexuals spawned mass movements in opposition of their maltreatment.¹³ Dr. Martin Luther King, Jr. and other activists initiated the Civil Rights Movement to eradicate racial and ethnic discrimination during the 1950's.¹⁴ The Modern Gay Rights Movement began after the Stonewall riots of 1969 in New York City.¹⁵ Although the Gay Rights and the Civil Rights Movements

Distribution 1990:2000 Census Brief, (April 2001). The current population of the United States is 281.4 million people. *Id.* The famous sex researcher Alfred Kinsey estimated that 10% of the American male population engaged in some form of homosexual behavior in his landmark survey during the late 1940's and early 1950's. ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 651 (Indiana University Press, 1st Ed.) (1948). A more restrictive survey in 1992, however, found that lesbians and gay men comprise only 3% of the population, or 8 million Americans. See Jonathan A. Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19, 20 n.15 (2000) (citation omitted).

⁷ *Id.*

⁸ U.S. Census Bureau, Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin, available at <http://www.census.gov/population/estimates/nation/intfile3-1.txt> (Jan. 2, 2001) (estimating American population of Asian-Americans at 3% and African-Americans at 12%) (last visited Jan. 20, 2002).

⁹ See *supra* notes 6-8 and accompanying text.

¹⁰ See Darren Lenard Hutchinson, "Closet Case": Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility, 76 TUL. L. REV. 81, 107 (discussing reinforcement of non-heterosexuals' invisibility by rationale employed by Supreme Court in Dale case).

¹¹ See *id.* at 108-10. (citations omitted) (noting psychological effect of concealing sexual orientation for non-heterosexuals and importance of self-identification).

¹² See FBI Uniform Crime Reports 1991 - 1999, available at http://www.hrc.org/issues/hate_crimes/background/stats/stats2000.asp (last visited Jan. 20, 2002). In 2000, 4,368 or 53.6% of all reported hate crimes were because of race. See *infra* notes 26, 184 and accompanying text.

¹³ See *infra* notes 14-15 and accompanying text.

¹⁴ PETER B. LEVY, *LET FREEDOM RING* 1-2 (Praeger 1992).

¹⁵ JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A*

battled discrimination based on different immutable characteristics, both movements sought equality on social and legal levels.¹⁶ Tolerance and acceptance of non-whites or non-heterosexuals demonstrate social equality, while laws prohibiting discrimination demonstrate legal equality.¹⁷

An overall greater tolerance of sexual orientation is generally prevalent in America compared to forty years ago.¹⁸ For example, 75% of Americans believe that job discrimination against gays and lesbians should be illegal.¹⁹ As of 2000, there were 236 local and county laws specifically protecting or benefiting non-heterosexual Americans.²⁰ Several states have adopted legislation prohibiting sexual orientation discrimination in public and private employment, public accommodations, and housing.²¹

Many private companies and governmental entities offer employment benefits to employees with domestic partners, in recognition of the increasingly common trend of cohabitation among both heterosexual and same-sex couples.²² Forty-one municipal governments have established some type of domestic partnership registry for its constituents, with eighty-three municipal governments offering employment benefits to the domestic partners of their employees.²³ In addition, seven states offer domestic partner benefits to their state employees.²⁴

HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970 231-39 (1983).

¹⁶ MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 64 (Penguin Group, 1964).

¹⁷ *See id.*

¹⁸ *See* Hein, *supra* note 6, at 19. *But see* Sharon D. Drieger, *Fear and loathing: A brutal murder raises concerns about violence against gays*, *MACLEAN'S*, Oct. 26, 1998, at 78 (discussing murder of Matthew Shepard and other anti-gay incidents).

¹⁹ Thomas H. Barnard & Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555, 556 (1999) (quoting Penn. Schoen & Berland Assocs., Inc., National Survey on Gay Rights for the Human Rights Campaign, July 29, 1998).

²⁰ WAYNE VAN DER MEIDE, *LEGISLATING EQUALITY*, The Policy Institute of the National Gay and Lesbian Task Force 1, 1 (2000), *available at* <http://www.ngltf.org/downloads/legeq99.pdf> (last visited Jan. 20, 2002). The laws include civil rights protection, domestic partnership registries and benefits, and hate crime laws. *Id.*

²¹ *See id.* at 4. Eleven states and the District of Columbia prohibit sexual orientation discrimination in private employment, while eighteen states and the District of Columbia offer similar laws regarding public employment. *Id.* Nine states and the District of Columbia prohibit sexual orientation discrimination in public accommodations and housing. *Id.*

²² *See* *Perks Seen as Key Lure for Employees Out in the Field*, *BOSTON GLOBE*, Dec. 24, 2000, at G2 (showing 47 of America's 100 best companies offer domestic partner benefits to employees); *Firms Including Domestic Partners Out in the Field*, *BOSTON GLOBE*, Dec. 17, 2000, at J2 (noting 22% of companies offering domestic partner benefits in survey compared to 10% in 1997); MARTHA L. LESTER AND JULIE LEVINSON WARNER, *Providing Domestic Partner Benefits*, 159 N.J. L.J. 413 (Jan. 31, 2000) (reporting 2,856 American employers offer domestic partner benefits including Microsoft Corp., Xerox Corp., and Walt-Disney).

²³ *Id.* at 7. Approximately 4.5 million American couples cohabitate as unmarried, life partners, with one-third being same-sex. *Id.* The U.S. Census Bureau reported 601,209

Homophobia, however, continues to pervade American society in its treatment of non-heterosexuals, as well as through the creation of its laws that affect non-heterosexual people.²⁵ In 2000, 16.3% or 1,330 documented incidents of all reported hate crimes were based on sexual orientation.²⁶ Private consensual sexual activity between same-sex adults is a criminal offense in nineteen states.²⁷ Thirty-five states have adopted some form of legislation or constitutional amendment that specifically prevents the recognition or performance of same-sex marriages.²⁸ Referendums in several communities threaten to repeal civil rights laws protecting non-heterosexuals.²⁹ Housing discrimination based on sexual orientation has forced many non-heterosexuals to conceal their sexual orientation in order to obtain and remain in adequate housing.³⁰

The judicial branch itself continues to exhibit animosity towards non-heterosexuals.³¹ In February of 2002, the Alabama Supreme Court recently considered a child custody case involving a lesbian and her former husband.³² Chief Justice Roy Moore concurred in the majority opinion awarding custody to the heterosexual father, commenting that "[h]omosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and

same-sex, unmarried partner households in the 2000 Census. David Elliot, August 20, 2001, "601,209 and Counting: Census Figures on Same-Sex, Unmarried Partner Households Released For All 50 States," available at <http://www.nglrf.org/news/release.cfm?releaseID=402> (last visited Jan. 20, 2002).

²⁴ VAN DER MEIDE, *supra* note 20, at 7. Massachusetts acting Governor Jane Swift received attention for her decision to extend domestic partner benefits to gay and lesbian state employees. See Yvonne Abraham, *Swift to Extend Same-Sex Benefits Limited Rights to State Employees*, BOSTON GLOBE, Aug. 16, 2001, at A1.

²⁵ See David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223, 235-36 (2002) (discussing acceptable use of homophobia in politics despite non-heterosexual acceptance in entertainment industry).

²⁶ FBI Uniform Crime Reports 1991 - 1999, available at http://www.hrc.org/issues/hate_crimes/background/stats/stats2000.asp (last visited Jan. 20, 2002).

²⁷ See VAN DER MEIDE, *supra* note 20, at 14.

²⁸ See National Gay and Lesbian Task Force, *Specific Anti-Same Sex Marriage Laws in the U.S. - June, 2001*, available at <http://www.nglrf.org/downloads/marriagemap0601.pdf> (last visited Jan. 20, 2002).

²⁹ David Elliot, July 25, 2001, "GLBT Communities Expected to face 12 Hostile Ballot Measures in Next 16 Months," available at <http://www.nglrf.org/news/release.cfm?releaseID=406> (last visited Jan. 20, 2002).

³⁰ Yvonne Abraham, *Housing site urged for gay elders; Study says many face discrimination*, BOSTON GLOBE, Oct. 30, 2001, at B1, B4. Coupled with the obstacles of adequate housing for the elderly, "men and women who came out in the 1970s and 1980s and have lived their lives openly now find themselves increasingly dependent and fearful of revealing their sexual identity." *Id.* at B1.

³¹ See, *Ex parte H.H.*, 2002 WL 227956, at *5, (Ala. Feb. 15, 2002) (Moore, C.J., concurring).

³² *Id.* at *1.

of nature's God upon which this Nation and our laws are predicated."³³ Adoption rights, domestic partner benefits, intestacy rights, the right to make emergency medical decisions for a partner, and palimony are other legal issues for same-sex couples encountering staunch opposition from various groups.³⁴

III. FEDERAL LAW

A. Constitutional Protection

1. Equal Protection: Standards of Review

The Fourteenth Amendment of the United States Constitution contains the Equal Protection Clause, which states that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."³⁵ The Equal Protection Clause protects individuals from governmental action only.³⁶ Thus, the clause does not protect an individual from purely private acts unless a special relationship exists between the individual actor and the state.³⁷

Although the purpose of the clause is to prevent the government from treating similarly situated individuals inconsistently, the clause must "coexist with the practical necessity that most legislation classifies for one purpose or another, with the resulting disadvantage to various groups or persons."³⁸ A classification is unconstitutional if it randomly burdens one group compared to another group that is similarly situated.³⁹ The Supreme

³³ *Id.* at *5. Judge Moore received national attention when he defied a federal court order to remove the Ten Commandments from his Alabama courtroom. Daniel B. Kennedy, *Landslide into Controversy: Alabama Chief Justice Calls Homosexuality 'An Inherent Evil,'* ABA JOURNAL REPORT, Vol. 1, Issue 7 (Feb. 22, 2002). Judge Moore also observed that homosexuality "is an inherent evil against which children must be protected." 2002 WL 227956 at *5.

³⁴ See Elliot, *supra* note 9.

³⁵ U.S. CONST. amend. XIV, § 1.

³⁶ The Civil Rights Cases, 109 U.S. 3, 11 (1883). The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

³⁷ See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961) (finding symbiotic relationship between publicly-run garage and private restaurant enough for state action).

³⁸ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

³⁹ *Allegheny Pittsburgh Coal Co. v. County Comm'r of Western County*, 488 U.S. 336, 346 (1989) (discussing permissibility of states to tax classes differently if not arbitrarily or capriciously burdensome). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*,

Court has developed three separate standards of review to analyze claims of Equal Protection Clause violations: strict scrutiny, intermediate scrutiny (also referred to as heightened scrutiny), and rational basis.⁴⁰

Strict scrutiny is the most difficult level of review that a law must satisfy.⁴¹ First, the law or act must pursue a compelling governmental objective.⁴² Second, the means proscribed by the law or act must be necessary in order to accomplish the objective.⁴³ The Supreme Court will invoke this level of review only when a fundamental right is at issue or when the law involves a suspect classification.⁴⁴ The Supreme Court, for example, has deemed the right to vote as one of the few fundamental rights recognized by the Equal Protection Clause.⁴⁵ In addition, the Supreme Court has determined that laws using race, national origin, and alienage are the only classifications that merit strict scrutiny.⁴⁶

Intermediate scrutiny is less demanding than strict scrutiny, but more rigorous than rational basis review.⁴⁷ A law or act subject to intermediate scrutiny must pursue an important governmental objective.⁴⁸ In addition, the means of the law or act must be substantially related to the government's goal.⁴⁹ The Supreme Court will invoke intermediate scrutiny when a quasi-suspect classification is at issue.⁵⁰ Classifications based on sex and illegitimacy are the only quasi-suspect classifications for purposes of the Equal Protection Clause.⁵¹

517 U.S. at 633.

⁴⁰ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-43 (1985) (discussing constitutional standards of review).

⁴¹ *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). *But see Adarand Constr. v. Peña*, 515 U.S. 200, 237 (1995). "We wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* (citation omitted).

⁴² *Id.* at 440.

⁴³ *United States v. Paradise*, 480 U.S. 149, 165-66 (1987).

⁴⁴ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301 (1986) (stating strict scrutiny applies only to suspect classes or fundamental rights).

⁴⁵ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (applying strict scrutiny to validity of poll tax because of fundamental right to vote).

⁴⁶ *See, e.g. Washington v. Davis*, 426 U.S. 229, 242 (1976) (applying suspect scrutiny because of race-based action); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating strict scrutiny applies to national origin-based action); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (applying strict scrutiny to classification based on alienage).

⁴⁷ *Tuan Anh Nguyen v. United States*, 533 U.S. 53, 121 S. Ct. 2053, 2067-69 (2001) (distinguishing between degree of permissible governmental action under intermediate scrutiny versus rational basis review).

⁴⁸ *City of Cleburne*, 473 U.S. at 441.

⁴⁹ *See id.*

⁵⁰ *See id.* at 440.

⁵¹ *See Craig v. Boren*, 429 U.S. 190, 199-200 (1976) (applying middle-level review to classification based on gender); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (applying heightened scrutiny to classification based on illegitimacy).

Rational basis review is the least stringent standard that a law or act must satisfy, compared to strict or intermediate scrutiny.⁵² Courts will presume a law to be constitutional under rational basis review, so long as the classification it employs is rationally related to a legitimate governmental objective.⁵³ The Supreme Court will invoke this level of review in all instances where an equal protection claim does not involve a fundamental right, a suspect classification, or a quasi-suspect classification.⁵⁴ A law will pass constitutional muster under rational basis review if it has a reasonable purpose regardless of whether the law results in some inequality upon a group.⁵⁵ A statute, for instance, that requires state troopers to retire at age fifty invokes a rational basis review because the right to a job is not fundamental, nor is age a suspect or quasi-suspect class under the Equal Protection Clause.⁵⁶ The statute is constitutional because there is some slight, overall relation between age and fitness despite the discriminatory effect on state troopers over the age of fifty.⁵⁷

2. Equal Protection: Housing and Sexual Orientation

The probability that a court will determine a law to be constitutional varies according to the level of scrutiny applied.⁵⁸ A court employing strict scrutiny review will almost always reject the governmental classification at issue.⁵⁹ In contrast, constitutional scholars refer to the rational basis standard as toothless because courts rarely determine a law to be unconstitutional when applying the lowest level of review.⁶⁰ A court will subject a housing discrimination claim based on sexual orientation to strict scrutiny under the Equal Protection Clause in only one of two circumstances: if the right to housing is fundamental right or if a law's use of sexual orientation as a classification is suspect.⁶¹ Also, a governmental

⁵² See *Nguyen*, 533 U.S. 53, 121 S. Ct. at 2067-69.

⁵³ *City of Cleburne*, 473 U.S. at 440.

⁵⁴ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (applying rational basis review because no fundamental right or suspect class at issue).

⁵⁵ *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

⁵⁶ *Id.* at 313-14.

⁵⁷ See *id.* at 314-16.

⁵⁸ *Fullilove*, 448 U.S. at 519.

⁵⁹ *Id.*

⁶⁰ See Shawn M. Filippi & Edward J. Reeves, *Equality or Further Discrimination? Sexual Orientation Nondiscrimination in Oregon Statutory Employment Law After Tanner v. Ohsu*, 3 Journal of Small and Emerging Business Law 269, 274 (Winter, 1999). But see *City of Cleburne*, 473 U.S. at 450 (applying rational basis review to find ordinance unconstitutional).

⁶¹ *Railway Express*, 336 U.S. at 110. A court will subject a similar claim to intermediate scrutiny only if a quasi-suspect classification is at issue. See *Craig*, 429 U.S. at 199-200.

entity must perform the alleged discriminatory act, not a private individual.⁶²

a. Housing as a Fundamental Right Under Equal Protection

While the Supreme Court has acknowledged the importance of adequate housing conditions, it refused to recognize a fundamental right to housing under the Constitution.⁶³ Basic necessities of life such as shelter and housing are not fundamental under equal protection because the Constitution has no independent text creating a right to shelter and housing.⁶⁴ Although welfare enables impoverished Americans to access basic economic needs such as food and shelter, the distribution of public assistance is not fundamental because it is not a substantive constitutional right.⁶⁵

Federal courts have no power to impose their views of proper economic or social policy under the Equal Protection Clause.⁶⁶ The Supreme Court has a duty to refrain from creating substantive constitutional rights under the Equal Protection Clause.⁶⁷ Thus, the Supreme Court has found that the omission of housing from the text of the Equal Protection Clause requires the legislature to assure adequate housing, rather than the judiciary.⁶⁸

b. Sexual Orientation as a Suspect Classification

In *Bowers v. Hardwick*,⁶⁹ the Supreme Court held that the Fourteenth Amendment does not guarantee a substantive due process right to engage in consensual homosexual sodomy in the privacy of one's home.⁷⁰ The *Bowers* opinion did not apply strict scrutiny review to the anti-sodomy statute because the Court found no fundamental right at issue.⁷¹ The Supreme Court subjected the statute to a rational basis review,

⁶² *Burton*, 365 U.S. at 723.

⁶³ *Lindsey*, 405 U.S. at 74; *see also* *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1101-02 (6th Cir. 1985) (finding no constitutional right to furnishing of safe, sanitary, and decent dwelling by Housing Authority).

⁶⁴ *Craig*, 429 U.S. at 216-17 (1976) (Burger, C.J., dissenting) (citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

⁶⁵ *Dandridge*, 397 U.S. at 485.

⁶⁶ *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

⁶⁷ *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

⁶⁸ *Lindsey*, 405 U.S. at 74.

⁶⁹ 478 U.S. 186 (1986).

⁷⁰ *Bowers v. Hardwick*, 478 U.S. 186, 191-93 (1986).

⁷¹ *Id.* at 190-91.

finding a rational basis between Georgia's "majority sentiments and the morality of homosexuality."⁷²

Bowers did not address the issue of whether non-heterosexuals were a suspect class under an Equal Protection Clause analysis.⁷³ Thus, the inference is misplaced and inaccurate that the Supreme Court prohibited the application of heightened scrutiny to non-heterosexuals in light of *Bowers*.⁷⁴ Some courts, however, have interpreted the Supreme Court's application of rational basis review to mean that non-heterosexuals are neither a suspect nor quasi-suspect class for purposes of Equal Protection Clause violations.⁷⁵ In actuality, the Supreme Court has never addressed whether non-heterosexuals as a class are suspect under the Equal Protection Clause.⁷⁶

The Supreme Court has enunciated various considerations for a group to be recognized as a suspect or quasi-suspect class.⁷⁷ One example where the Court has applied strict scrutiny is to a law that discriminated based on immutable characteristics, such as race or national origin.⁷⁸ Another instance of strict scrutiny's application is if the characteristic relates to an individual's ability to contribute to and participate in society.⁷⁹ Other examples include whether the group has experienced a history of discrimination and whether the group is politically powerless.⁸⁰

The Supreme Court, however, is reluctant to recognize new suspect or quasi-suspect classifications under an equal protection analysis.⁸¹ The

⁷² *Id.* at 196.

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See, e.g.,* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 268 (6th Cir. 1995) (stating non-heterosexuals cannot constitute suspect or quasi-suspect class under *Bowers*); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (stating homosexuals cannot constitute suspect or quasi-suspect class because homosexual sodomy's criminalization); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (applying rational basis because constitution permits criminalizing homosexual conduct); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (rejecting heightened scrutiny because criminalization of homosexual conduct passes constitutional muster).

⁷⁶ *Bowers*, 478 U.S. at 202 n.2 (acknowledging absence of question regarding whether homosexuals comprise suspect class under equal protection).

⁷⁷ Webster v. Reproductive Health Svcs, 492 U.S. 490, 548 (acknowledging court's creation of strict scrutiny to weigh and evaluate strength of equal protection claims) (Blackmun, J., concurring in part and dissenting in part).

⁷⁸ Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (discussing immutable characteristics as those beyond someone's control).

⁷⁹ *See City of Cleburne*, 473 U.S. at 441 (citing Mathews v. Lucas, 427 U.S. 495, 505 (1967)).

⁸⁰ *See Frontiero*, 411 U.S. at 684-85 (observing history of sex discrimination); *See San Antonio Sch. Dist.*, 411 U.S. at 28 (failing to find political powerlessness of poor children).

⁸¹ *See City of Cleburne*, 473 U.S. at 441-42 (denying heightened scrutiny to mentally

last time the Supreme Court recognized a new classification was over twenty-five years ago.⁸² The Supreme Court had an opportunity to articulate the appropriate level of judicial review for a law employing sexual orientation as a classification, in *Romer v. Evans*.⁸³ The law at issue was an amendment to the Colorado Constitution that prohibited the state government from extending any special protection to individuals on the basis of sexual orientation.⁸⁴ Ultimately, the Supreme Court struck down the amendment on the grounds that it violated the Equal Protection Clause, finding that the amendment sought to treat homosexuals unequally.⁸⁵ The opinion avoided establishing a heightened level of scrutiny to laws regarding sexual orientation by subjecting the amendment to rational basis review.⁸⁶

B. Statutory Protection

1. Legislation Prohibiting Housing Discrimination

Deadly riots occurred during the mid-1960's in Los Angeles, Detroit, and Newark as a result of heightened racial and ethnic tension.⁸⁷ President Lyndon Johnson formed the Kerner Commission to determine a peaceful solution to the riots in the summer of 1967.⁸⁸ The Commission concluded that one of the underlying causes of riots was the presence of residential segregation and discrimination because of race.⁸⁹ Congress enacted the Fair Housing Act⁹⁰ (FHA) or Title VIII of the 1968 Civil Rights Act⁹¹ (Title VIII) in response to the urban unrest and violence, after considering both the Kerner Report and the assassination of Dr. Martin

retarded); *Murgia*, 427 U.S. at 313 (denying heightened scrutiny to age classification).

⁸² See *Mathews*, 427 U.S. at 505-06 (applying heightened scrutiny to illegitimacy).

⁸³ *Romer*, 517 U.S. at 631 (addressing constitutionality of state amendment prohibiting protection based on sexual orientation).

⁸⁴ *Id.* at 624. The amendment came in response to various Colorado cities that passed ordinances prohibiting discrimination based on sexual orientation, including housing discrimination.

⁸⁵ *Id.* at 635.

⁸⁶ *Id.*

⁸⁷ Jonathan Karl and Kevin Smith, Mar. 1, 1998, "30 Years After Kerner Report, Some Say Racial Divide Wider" available at <http://www.cnn.com/US/9803/01/kerner.commission/#3> (last visited Jan. 20, 2002).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 42 U.S.C. § 3601 et seq. (1968).

⁹¹ See *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting) (recognizing Title VIII and Fair Housing Act as different names for same statute).

Luther King, Jr. in 1968.⁹² A primary goal of the legislation was to promote integration through open, residential housing patterns and to prevent increased segregation by race in ghettos.⁹³

Two other federal civil rights statutes that prohibit housing discrimination are 42 U.S.C. Section 1981⁹⁴ and Section 1982.⁹⁵ The former prohibits discrimination in contract creation or enforcement.⁹⁶ The latter prohibits discrimination in the exercise of property rights.⁹⁷ Both statutes apply to intentional discrimination only.⁹⁸

Congress enacted the Civil Rights Act of 1991⁹⁹ after the Supreme Court limited the applicability of Section 1981 to contract formation.¹⁰⁰ The legislators amended Section 1981 to include the prohibition of discrimination in the terms, performance, modification, or termination of the contract.¹⁰¹ The amendment, however, did not expand Section 1981's reach to unintentional discrimination.¹⁰²

Recipients of federal funds for housing are subject to additional statutory protections against discrimination.¹⁰³ For instance, Title VI of the 1964 Civil Rights Act¹⁰⁴ prohibits discrimination based on race and national origin.¹⁰⁵ The Rehabilitation Act of 1973¹⁰⁶ forbids discrimination based on handicap.¹⁰⁷ The Age Discrimination Act¹⁰⁸ prohibits discrimination based on age.¹⁰⁹ Consequently, most public housing

⁹² H.R. Rep. 100-711, 100th Cong., 2d 1988, 1988 U.S.C.C.A.N. 2173, 1988 WL 169871 (Leg. Hist.) (citation omitted).

⁹³ *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 240 (E.D.N.Y. 1998). *See also* *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836, 845 (D.C. Ill. 1979) (finding Congressional intent limiting conduct preventing racial minorities from leaving ghettos for suburban housing).

⁹⁴ 42 U.S.C. § 1981(a) (2001).

⁹⁵ 42 U.S.C. § 1982 (2001).

⁹⁶ 42 U.S.C. § 1981(a) (2001).

⁹⁷ 42 U.S.C. § 1982 (2001).

⁹⁸ *General Bldg. Contractors Assoc. v. Pennsylvania*, 458 U.S. 375, 389 (1982) (requiring finding of discriminatory intent for Section 1981 violation); *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981) (concluding violation of Section 1982 requires discriminatory intent or racial animus).

⁹⁹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2)(b), 105 Stat. 1071 (1991).

¹⁰⁰ *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (applying section 1981 only to contract's initial formation or conduct impairing contract's enforceability).

¹⁰¹ *See supra* note 99.

¹⁰² *See id.*

¹⁰³ *See infra* notes 104-10 and accompanying text.

¹⁰⁴ 42 U.S.C. § 2000d.

¹⁰⁵ *Id.*

¹⁰⁶ 29 U.S.C. § 504(a).

¹⁰⁷ *Id.*

¹⁰⁸ 42 U.S.C. § 6102.

¹⁰⁹ *Id.*

programs and private landlords who accept Section 8 certificates are subject to these federal statutes.¹¹⁰

Title VIII is the most comprehensive federal statute addressing housing discrimination.¹¹¹ The language of Title VIII is broad and inclusive, which allows housing authorities generous construction and wide latitude to remedy discrimination.¹¹² After its passage in 1968, Title VIII prohibited discrimination on the basis of race, color, national origin, or religion, in the terms, conditions, or privileges of a housing sale or rental.¹¹³ Eventually, Congress added sex as a protected class in 1974, as well as handicap and familial status in 1989.¹¹⁴ Although Title VIII applies to intentional and unintentional discrimination,¹¹⁵ certain entities are exempt from Title VIII including single-family homeowners renting their homes, owner-occupied residences with four or less units for rent, religious organizations, and private clubs who rent or sell dwellings for non-commercial purposes.¹¹⁶

A plaintiff's Title VIII claim depends upon his or her membership within a protected class, in order to establish the first element of a *prima facie* claim of housing discrimination.¹¹⁷ Despite the wide scope of Title

¹¹⁰ See, e.g., *Passanante v. R.Y. Mgmt. Co.*, 99 CIV. 9760, 2001 U.S. Dist. LEXIS 1205, at *18-19 (S.D.N.Y. Feb. 13, 2001) (discussing applicability of Rehabilitation Act to section 8 recipients); *Brecker v. Queens B'Nai B'rith Hous. Dev. Fund Co., Inc.*, 607 F. Supp. 428, 436 (E.D.N.Y. 1985) (noting Age Discrimination Act's similarity to Rehabilitation Act in Section 8 case); *Caractor v. Town of Hempstead*, No. 97-9150, 1998 U.S. App. LEXIS 20186, at *3-4 (2d Cir. June 11, 1998) (analyzing Title VI claim of discrimination by Section 8 recipient).

¹¹¹ See *Groome Res. Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 212-13 (5th Cir. 2000) (citation omitted) (quoting congressional record demonstrating FHA's intent to offer comprehensive civil rights in housing).

¹¹² See *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359 (6th Cir. 1995); *Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996).

¹¹³ See 42 U.S.C. § 3604(a)-(b).

¹¹⁴ See Pub. L. 93-383 (1974) (prohibiting discrimination because of sex); Pub. L. 100-430 (1988) (prohibiting discrimination because someone has children or a handicap).

¹¹⁵ See, e.g., *Huertas v. East River Hous. Corp.*, 674 F. Supp. 440, 454 (S.D.N.Y. 1987) (holding proof of discriminatory intent not necessary for Title VIII violation); *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 728, 733 (S.D. Ala. 1980) (finding Title VIII violation despite absence of discriminatory intent); *Fox v. United States Dept. of Hous. & Urban Dev.*, 468 F. Supp. 907, 915 (E.D. Pa. 1979) (stating plaintiff need not prove discriminatory acts as intentional to prove Title VIII violation); *United States v. Reece*, 457 F. Supp. 43, 48 (D. Mont. 1978) (holding Title VIII provable absent unlawful intent).

¹¹⁶ 42 U.S.C. § 3603(b)(1) (exempting FHA's applicability to rental of house occupied by single-family home owners); 42 U.S.C. § 3603(b)(2) (exempting FHA's applicability to owner-occupied residences with four or less units for rent); 42 U.S.C. § 3607(a) (exempting FHA's applicability to religious organizations and private clubs).

¹¹⁷ *Hamilton v. Svatik*, 779 F.2d 383, 387-88 (7th Cir. 1985) (presenting *prima facie* requirements for FHA claim).

VIII's application, discrimination based solely on sexual preference is a permissible practice under this statute because sexual orientation is not a protected class.¹¹⁸ Title VIII's failure to protect non-heterosexuals from discriminatory treatment is contrary to the statute's assertion that it embodies a national policy against housing discrimination.¹¹⁹

Legislators have attempted to expand Title VIII to include sexual orientation as a protected class on several occasions, but none have succeeded.¹²⁰ Currently, a bill exists in the House of Representatives that would amend Title VIII to prohibit sexual orientation discrimination.¹²¹ Victims of sexual orientation discrimination, however, continue to develop alternative arguments that effectively extend housing discrimination protection to non-heterosexuals, despite sexual orientation's omission from Title VIII.¹²² The following sections display ways to avoid the exclusion of non-heterosexuals from Title VIII protection.¹²³

2. Title VIII and Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII) to prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.¹²⁴ The federal government enacted Title VII and Title VIII as part of a coordinated effort to enact civil rights laws to end discrimination.¹²⁵ In recognition of these shared aims, several

¹¹⁸ See 42 U.S.C. § 3604 (omitting sexual orientation from classes protected by section regarding discrimination in sale or rental of housing).

¹¹⁹ See *id.* § 3601. "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.*

¹²⁰ See, e.g., H.R. 311, 106th Cong., 1st (1999); H.R. 423, 103d Cong., 1st § 2(f) (1993); H.R. 1430, 102d Cong., 1st § 3 (1991), reprinted in 137 CONG. REC. H1728-29 (daily ed. Mar. 13, 1991); S. 47, 101st Cong., 1st §§ 7-8 (1989), reprinted in 135 CONG. REC. S340-41 (daily ed. Jan. 25, 1989); H.R. 655, 101st Cong. (1989). Each of the bills proposed to amend the FHA and Civil Rights Act to extend prohibition of discrimination based on affectional or sexual orientation. *Id.*

¹²¹ Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong., 1st. U.S. Rep. Edolphus Towns of New York introduced the bill on January 3, 2001, where it was referred to the House Judiciary Committee and House Education and the Workforce Committee. *Id.* The only major activity to occur since then was the House Judiciary Committee's referral of the bill to the Subcommittee on the Constitution on February 12, 2001 and to the Subcommittee on the Employer-Employee Relations on March 2, 2001, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00217:@@@X> (last visited Jan. 20, 2002). Not only is the 1999 version of this bill identical in text, but it traveled a similar path from committee to subcommittee before failing to pass. H.R. 311, 106th Cong., 1st (1999).

¹²² See *id.*

¹²³ See discussion *infra* Parts III.B.2-3.

¹²⁴ See 42 U.S.C. § 2000e-2.

¹²⁵ *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988). See also Equal Pay Act of 1963, 29 U.S.C. § 206(d) (prohibiting discrimination in

courts have “been willing to import doctrines or interpretations of language accepted under Title VII to Title VIII claims.”¹²⁶

a. Sexual Harassment

A sexual harassment claim is actionable under both Title VII and Title VIII.¹²⁷ Although the conduct prohibited by Title VII in employment is virtually identical to conduct prohibited by Title VIII in housing, Title VIII claims of sexual harassment are less common than Title VII sexual harassment claims.¹²⁸ Courts deciding sexual harassment claims under Title VIII, therefore, have relied upon the precedent and analysis of similar Title VII cases for guidance.¹²⁹

Title VII prohibits employers from harassing employees because of his or her sex.¹³⁰ Courts have recognized two types of sexual harassment claims under Title VII: quid pro quo or hostile environment.¹³¹ In the context of housing, an example of a quid pro quo claim may involve a tenant who shows that a landlord conditioned housing benefits, such as timely repairs or continued occupancy, on the provision of sexual favors.¹³² A hostile environment claim requires the aggrieved party to show that the alleged harassment was sufficiently severe or pervasive to alter the conditions of tenancy and to create an abusive living environment.¹³³ A prima facie claim of sexual harassment requires a plaintiff to prove that the request (if quid pro quo) or the harassment (if hostile environment) was unwelcome and because of the plaintiff's sex.¹³⁴

wages based on gender); Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (prohibiting discrimination in employment based on age).

¹²⁶ *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490, 495 (D. Md. 1996).

¹²⁷ *Id.*

¹²⁸ See David J. Stephenson, Jr., *Actions Under Fair Housing Act (42 U.S.C.A ss 3601 et seq.)*, *Based on Sexual Harassment or Creation of Hostile Environment*, 144 A.L.R. FED. 595, 595 (1998).

¹²⁹ See *Reeves v. Carrollsburg Condo. Unit Owners Assoc.*, 1997 WL 1877201, at *5 (D.D.C. Dec. 18, 1997) (citations omitted); See also *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1178 (E.D. Va. 1995). “In evaluating Fair Housing Act claims, courts employ the same method of analysis used in Title VII employment discrimination claims.” *Id.*

¹³⁰ 42 U.S.C. § 2000e-2(a)(1).

¹³¹ *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982).

¹³² See *Grieger v. Sheets*, 689 F. Supp. 835, 837 (N.D. Ill. 1988), related reference, *Grieger v. Sheets*, 1989 WL 38707, at *1 (N.D. Ill., Apr. 10, 1989).

¹³³ See *Williams*, 955 F. Supp. at 496.

¹³⁴ *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending (P-H) § 15,472 at 16,129 (W.D. Ohio 1983) (examining quid pro quo harassment); *Meritor v. Vinson*, 477 U.S. 57, 64-65 (1986) (examining hostile environment harassment).

b. Sexual Orientation Harassment as Sexual Harassment

Title VII and Title VIII prohibit discrimination because of sex, but omit sexual orientation from their list of protected classes.¹³⁵ A gay male plaintiff claimed that his employer terminated him because he wore an earring in the 1979 case of *Desantis v. Pacific Tel. & Tel. Co.*¹³⁶ The plaintiff argued that his termination violated Title VII because of a gender-based "stereotype that a male should have a virile rather than an effeminate appearance."¹³⁷

The Ninth Circuit concluded that discrimination based on effeminacy is not within Title VII's purview because the statute omits such a classification, in addition to homosexuality and transsexualism.¹³⁸ The court relied on the absence of any amendments to Title VII that include sexual orientation as a protected class.¹³⁹ The Ninth Circuit observed that the plaintiff's argument attempted to "bootstrap" sexual orientation within the umbrella of sex as a protected class, stating that sex discrimination applies to gender discrimination only and should not extend to include sexual preference.¹⁴⁰ After *Desantis*, other federal courts considered subsequent Title VII arguments based on a failure to conform to gender stereotypes.¹⁴¹ The opinions did not break from *Desantis*' precedent, interpreting the legislative intent of the term "sex" as within the context of biological male or female rather than sexual orientation.¹⁴²

In 1989, the Supreme Court addressed the issue of sexual stereotypes again in the landmark case of *Price Waterhouse v. Hopkins*.¹⁴³ The plaintiff's employer denied her partnership in part because she was "macho" and "masculine."¹⁴⁴ One partner suggested that the plaintiff should walk, talk, and dress more femininely by styling her hair and wearing make-up and jewelry.¹⁴⁵ The Supreme Court stated that if an

¹³⁵ See 42 U.S.C. § 2000e(2)(a)(1); Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong., 1st. The bill proposing modification of Title VIII to prohibit housing discrimination based on sexual orientation also proposes modification of Title VII to prohibit employment discrimination based on sexual orientation. See *id.*

¹³⁶ *Desantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979).

¹³⁷ *Id.*

¹³⁸ *Id.* at 332 (citing *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978)).

¹³⁹ See *id.* at 329.

¹⁴⁰ *Desantis*, 608 F.2d at 329-30.

¹⁴¹ See *Hamner v. St. Vincent Hosp. and Health Care Ctr.*, 224 F.3d 701, 704 (7th Cir. 2000) (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)). See also *Monitor v. Chicago*, 653 F. Supp. 1294, 1300 (N.D. Ill. 1987); *Carreno v. Local Union No. 226*, No. 89-4083, 1990 U.S. Dist. LEXIS 13817, at *9 (D. Kan. Sept. 27, 1990).

¹⁴² See *id.*

¹⁴³ 490 U.S. 228 (1989).

¹⁴⁴ *Id.* at 235.

¹⁴⁵ *Id.*

employer acts on the basis of a sex stereotype, the employer has acted on the basis of gender.¹⁴⁶ The employer's behavior violated Title VII because Congress intended to prohibit disparate treatment of men and women, including treatment resulting from stereotypes based on sex.¹⁴⁷ The decision resurrected the previously unsuccessful argument in *Desantis* that Title VII prohibited discrimination based on a failure to conform to a gender stereotype.¹⁴⁸

Despite the Supreme Court's decision in *Price Waterhouse* finding that discrimination based on a gender stereotype nonconformity violated Title VII, federal circuits disagreed on whether Title VII applied in a sexual harassment case where the harasser and victim were of the same sex.¹⁴⁹ In 1998, the Supreme Court clarified the discrepancy when it decided *Oncale v. Sundower*,¹⁵⁰ recognizing same-sex sexual harassment as an actionable claim under Title VII.¹⁵¹ Thus, sexual harassment is actionable under Title VII or Title VIII whether the alleged harasser and victim are the same or a different sex.¹⁵²

The Supreme Court does not require a plaintiff alleging same-sex sexual harassment to prove that the harasser is homosexual or motivated by sexual desire.¹⁵³ Instead, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discriminat[ion] ... because of ... sex.'"¹⁵⁴ Accordingly, both heterosexual and non-heterosexual victims of harassment may argue successfully that discriminatory treatment occurred because of a harasser's belief that the victim did not conform to the stereotypes of his or her gender.¹⁵⁵

¹⁴⁶ *Id.* at 250.

¹⁴⁷ *Id.* at 251.

¹⁴⁸ See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (finding Title VII violation where sexual stereotyping of workplace unfairly burdened women); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (overruling previous *Desantis* holding regarding failure to conform to sexual stereotype as Title VII violation); *Centola v. Potter*, 2002 WL 122296, at *4 (D. Mass. Jan. 29, 2002) (finding discrimination because of gender stereotypes involving sexual orientation).

¹⁴⁹ See, e.g., *Garcia v. Elf Atochem N. Amer.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (precluding Title VII sexual harassment claim because victim and harasser were same sex); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (recognizing Title VII same-sex sexual harassment claim if harasser was homosexual); *Doe v. City of Belleville*, 119 F.3d 563, 575 (7th Cir. 1997) (finding Title VII same-sex harassment so long as harassment's nature was sexual).

¹⁵⁰ *Oncale v. Sundower Offshore Serv., Inc.*, 523 U.S. 75, 82 (1998).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 80.

¹⁵⁴ *Id.* (quotations in original).

¹⁵⁵ See *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (recognizing gender stereotype conformity discrimination violates Title VII's "because of sex" clause).

*Hamner v. St. Vincent Hospital*¹⁵⁶ and *Ianetta v. Putnam Investments*¹⁵⁷ are two post-*Oncale* cases involving Title VII same-sex sexual harassment claims in the federal District of Massachusetts.¹⁵⁸ The decisions illustrate the fine distinction between harassment “because of sex” and harassment based on sexual orientation.¹⁵⁹ In both cases, the plaintiffs were gay men who alleged sexual harassment by their male supervisors.¹⁶⁰ The plaintiff in *Hamner* described how his supervisor “refused to acknowledge or communicate with him, screamed at him during telephone conversations, and harassed him by lisping, flipping his wrists, and making jokes about homosexuals.”¹⁶¹ The plaintiff in *Ianetta* alleged that his supervisor “twice called him a ‘faggot,’ singled him out, and treated him differently.”¹⁶² The district court found harassment because of sex in *Ianetta*, but not in *Hamner*.¹⁶³

In *Hamner*, the court found that the supervisor’s jokes and imitative mannerisms were directed at Hamner’s homosexuality, while his other unprofessional conduct was merely general harassment.¹⁶⁴ The plaintiff testified to his belief that no difference exists between sex and sexual orientation.¹⁶⁵ Hamner argued also that his supervisor’s homophobic actions constituted sexual harassment.¹⁶⁶ The opinion concluded that Hamner’s claim did not involve sexual harassment where he failed to assert that his supervisor treated him differently because he is a man.¹⁶⁷

In *Ianetta*, the plaintiff argued that the supervisor’s use of an offensive epithet and other maltreatment was because Ianetta failed to conform to stereotypical male characteristics.¹⁶⁸ The employer claimed that Hamner’s precedent urged a dismissal of Ianetta’s claim because his allegations constituted discrimination because of sexual orientation, rather than sex.¹⁶⁹ The court disagreed, recognizing that stereotyped expectations

¹⁵⁶ *Hamner*, 224 F.3d at 703.

¹⁵⁷ *Ianetta v. Putnam Inv., Inc.*, 142 F. Supp.2d 131, 133 (D. Mass. 2001).

¹⁵⁸ See *Hamner*, 224 F.3d at 703; *Ianetta*, 142 F. Supp.2d at 133.

¹⁵⁹ See *Hamner*, 224 F.3d at 703; *Ianetta*, 142 F. Supp.2d at 133.

¹⁶⁰ *Hamner*, 224 F.3d at 704; *Ianetta*, 142 F. Supp.2d at 133.

¹⁶¹ *Hamner*, 224 F.3d at 703.

¹⁶² *Ianetta*, 142 F. Supp.2d at 133.

¹⁶³ *Id.*; *Hamner*, 224 F.3d at 707-08.

¹⁶⁴ *Id.* at 706.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* Similarly, the District Court of New York rejected a Title VII same-sex sexual harassment claim where the victim’s testimony revealed evidence that harassment resulted only because of his homosexuality. *Trigg v. New York City Transit Auth.*, 2001 WL 868336, at *5 (E.D.N.Y. July 20, 2001).

¹⁶⁸ *Ianetta*, 142 F. Supp.2d at 133.

¹⁶⁹ *Id.* at 133.

based on gender constituted sexual harassment where it was discrimination because of sex.¹⁷⁰

In January of 2002, the district court considered another gender stereotype discrimination claim in *Centola v. Potter*.¹⁷¹ The defendant employer argued that the alleged discrimination did not violate Title VII because it was discrimination because of sexual orientation, just as the defendant employer argued successfully in *Hamner*.¹⁷² The court agreed that discrimination because of sexual orientation alone does not violate Title VII.¹⁷³ The opinion, however, ruled that the statute does allow recovery in situations where a combination of a lawful and an unlawful motive has occurred.¹⁷⁴ Thus, the plaintiff was able to prove a Title VII violation under a "mixed motive" analysis to the extent that he proved discrimination based on his failure to meet gender stereotypes.¹⁷⁵

c. Interracial Relationships and Race Discrimination

Title VII and Title VIII prohibit housing discrimination based on race.¹⁷⁶ Race cannot be the sole reason to reject a prospective tenant nor can it be part of a reason.¹⁷⁷ The Supreme Court has recognized that whites also have standing to sue under Title VIII for race discrimination.¹⁷⁸

Title VII and Title VIII prohibit housing discrimination against interracial couples, in keeping with the aim of Congress to redress racial discrimination.¹⁷⁹ Discriminatory acts against an interracial couple violate

¹⁷⁰ *Id.* at 133-34 (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999)).

¹⁷¹ 2002 WL 122296, at *1.

¹⁷² *Id.* at *2.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *4.

¹⁷⁵ *Id.* The court found gender stereotype discrimination in evidence that co-workers placed a picture of Richard Simmons in pink hot pants in the plaintiff's work area. The opinion observed a similarity where just as the plaintiff from *Price Waterhouse* "was vilified for not being 'feminine' enough, Centola was vilified for not being 'manly' enough." *Id.*

¹⁷⁶ 42 U.S.C. § 3604(a)-(e); 42 U.S.C. § 2000e-2.

¹⁷⁷ *Oliver v. Shelley* 538 F. Supp. 600, 602 (S.D. Tex. 1982) (concluding Title VIII violation occurred because of race as part of reason for housing refusal).

¹⁷⁸ *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-12 (1972) (finding Title VIII violation because white plaintiffs lost benefit of interracial association).

¹⁷⁹ See e.g. *Monley v. Q Int'l Courier, Inc.*, 128 F. Supp.2d 1155, 1159-60 (N.D. Ill. 2001) (observing courts' findings of Title VII violation because of adverse employment action based on interracial relationship) (citations omitted); *Portee v. Hastava*, 853 F. Supp. 597, 611 (E.D.N.Y. 1994) (upholding FHA violation where landlord refused to rent to white woman because of black husband); *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal., 1991) (holding Title VII prohibits employment discrimination because white employee had Hispanic husband); *Bishop v. Pecsok*, 431 F. Supp. 34, 38 (N.D. Ohio 1976) (noting FHA violation where landlord refused to rent to white man because of black wife).

Title VIII because the differential treatment is due to the difference of each partner's race.¹⁸⁰ In addition, the statutes prohibit discrimination because of associations with a person of another race such as the race of guests or biracial children.¹⁸¹ A party claiming interracial relationship discrimination must prove that race was merely one of the reasons they endured housing discrimination in order to have a viable Title VIII claim.¹⁸²

d. Same-Sex Relationships and Sex Discrimination

Title VIII prohibits housing discrimination based on the protected class of sex.¹⁸³ By incorporating the rationale employed by victims of interracial relationship discrimination, it seems logical to infer that a violation of Title VIII occurs when a person experiences housing discrimination because of the sex of his or her partner.¹⁸⁴ A federal district court addressed a related claim in *Braunstein v. Dwelling Managers, Inc.*¹⁸⁵

Braunstein involved four single parents who applied to live in federally subsidized housing with their respective four children, each of whom was the same sex as the parent.¹⁸⁶ The parents challenged a housing policy whereby a parent and child of the same sex were not eligible for two-bedroom apartments, but a parent and child of different sexes were.¹⁸⁷ The parents alleged that the policy constituted sex discrimination in violation of Title VIII on the grounds that but for having the same sex as

¹⁸⁰ See *Oliver*, 538 F. Supp. at 602.

¹⁸¹ See e.g. *United States v. Big D Enter. Inc.*, 184 F.3d 924, 931 (8th Cir. 1999) (recognizing FHA violation where landlord refused rental to white with biracial child and black ex-husband); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (finding violation of FHA where landlord evicted white tenant because of black guests); *Tetro v. Elliot Popham Pontiac*, 173 F.3d 988, 994 (6th Cir., 1999) (concluding that discharge because of biracial child violates Title VII); *Merrifield v. The Beaven/Inter-American Co., Inc.*, 1991 WL 171376, at *2 (N.D. Ill. Aug. 30, 1991) (finding Title VII violation because of white plaintiff's interracial associations); *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (upholding white woman's discrimination claim where termination occurred because of social relationship with black man).

¹⁸² See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (observing FHA prohibits discrimination because of race).

¹⁸³ See 42 U.S.C. § 3604(a)-(e).

¹⁸⁴ See *supra* notes 175-81 and accompanying text. A detailed discussion regarding the similarities of arguments against interracial marriages and same-sex marriages are strikingly similar, but beyond the scope of this note. For a more detailed discussion, see Ron-Christopher Stamps, *Domestic Partnership Legislation: Recognizing Non-Traditional Families*, 19 S.U.L. REV. 441, 446 (1992) (comparing past obstacles preventing interracial marriages to current obstacles preventing same-sex marriages).

¹⁸⁵ *Braunstein v. Dwelling Managers, Inc.*, 476 F. Supp. 1323, 1327 (S.D.N.Y. 1979).

¹⁸⁶ *Id.* at 1325.

¹⁸⁷ *Id.* at 1325-26.

their prospective roommate (i.e. their children), they could live in larger apartments.¹⁸⁸

The district court rejected the discrimination claim and found no violation of Title VIII.¹⁸⁹ The court determined that eligibility for two-bedroom apartments depended on the composition of the family unit, as opposed to sex.¹⁹⁰ The opinion noted that the procedure was neutral to gender because it affected men and women equally.¹⁹¹ In other words, the discrimination did not amount to a violation of Title VIII because it failed to affect men and women disparately.¹⁹²

3. Title VIII and the ADA

Title VIII prohibits housing discrimination because of an individual's handicap.¹⁹³ When Congress added handicap as a protected class within Title VIII in 1989, it expressed the legislators' intent to end the exclusion of handicapped persons from participating in American society.¹⁹⁴ The legislation aimed to combat stereotypes, prejudice, and unfounded speculations associated with handicapped individuals.¹⁹⁵

The Americans with Disabilities Act (ADA) pursues a similar policy, prohibiting discrimination because of a disability by certain employers, public programs, and places of public accommodation.¹⁹⁶ There are several steps to determine whether someone is disabled under the ADA: determine whether the plaintiff has or is regarded as having an impairment, identify the life activity cited by the plaintiff, establish whether the activity is a major life activity under the ADA, and determine whether the impairment substantially limited the major life activity.¹⁹⁷

Although they use different terms of disability and handicap, the ADA does not intend a different concept as Title VIII.¹⁹⁸ Title VIII defines

¹⁸⁸ *Id.* at 1327.

¹⁸⁹ *Id.* at 1327-28.

¹⁹⁰ *Braunstein*, 476 F. Supp. at 1326-27.

¹⁹¹ *Id.* at 1327.

¹⁹² *See id.*

¹⁹³ 42 U.S.C. § 3604(f)(1)(A). Protection extends beyond just the prospective renter or buyer; Title VIII also protects "a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available," in addition to "any person associated with that buyer or renter." 42 U.S.C. § 3604(f)(1)(B)-(C).

¹⁹⁴ H.R. Rep. No. 711, 100th Cong., 2nd (1988), 1988 U.S.C.C.A.N. 2173.

¹⁹⁵ *See id.*

¹⁹⁶ *See* 42 U.S.C. §§ 12111 (prohibiting handicap discrimination in employment); 42 U.S.C. §§ 12131 (prohibiting handicap discrimination in public programs); 42 U.S.C. §§ 12181 (prohibiting handicap discrimination in public accommodation).

¹⁹⁷ *Wilson v. Int'l Bhd. of Teamsters*, 47 F. Supp.2d 8, 10 (D.D.C. 1999) (citing *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998)).

¹⁹⁸ *See Support Ministries v. Village of Waterford*, 808 F. Supp. 120, 130 n.4 (N.D.N.Y. 1992) (noting interest group's preference to use disability term instead of

handicap according to the same language that the ADA defines disability.¹⁹⁹ Title VIII's definition of a handicap is one of three meanings: a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment, or being regarded as having such an impairment.²⁰⁰

Neither Title VIII nor the ADA defines specific impairments that qualify as handicaps or disabilities.²⁰¹ Instead, Congress intended Title VIII's definition of handicap to be consistent with regulations issued to implement the Rehabilitation Act.²⁰² The Supreme Court has indicated that the ADA's intended definition of disability also must be consistent with the Rehabilitation Act regulations.²⁰³

The regulations of Title VIII and the ADA define an impairment in one of the following two ways: any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting any major body system; or any mental or psychological disorder, including specific learning disabilities.²⁰⁴ In addition, the regulations provide a representative list of major life activities including "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."²⁰⁵ Lastly, the definition of a substantial limitation is where one is:

[u]nable to perform a major life activity that the average person in the general population can perform ... or ... [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or

handicap) (citation omitted).

¹⁹⁹ See 42 U.S.C. § 3602(h) (defining handicap); 42 U.S.C. § 12102(2)(a) (defining disability). The ADA, in turn, defines disability according to the definition of a "handicapped person" under the Rehabilitation Act of 1973. 28 U.S.C. § 705(8)(b).

²⁰⁰ 42 U.S.C. § 3602(h)(1). The definition of handicap also encompasses individuals with a "record of such impairment," in addition to those who are "regarded as having such an impairment." *Id.* at § 3602(h)(3).

²⁰¹ See 42 U.S.C. §§ 3601 et seq.; 42 U.S.C. § 12111 et seq.

²⁰² H.R. Rep. No. 711, 100th Cong., 2nd (1988), 1988 U.S.C.C.A.N. 2173.

²⁰³ *Bragdon*, 524 U.S. at 638.

²⁰⁴ 24 C.F.R. § 100.201(a)(1)-(2) (2001) (defining impairment for Title VIII purposes); 29 C.F.R. § 1630.2(h)(1-2) (2001) (defining impairment for ADA purposes in employment); 28 C.F.R. § 36.104(1)(i)-(ii) (2001) (defining impairment for ADA purposes in public accommodation).

²⁰⁵ 24 C.F.R. § 100.201(b) (2001) (listing major life activities under Title VIII); 29 C.F.R. § 1630.2(h)(i) (2001) (listing major life activities under ADA in employment); 28 C.F.R. § 36.104(2) (2001) (listing major life activities under ADA in public accommodation).

duration under which the average person in the general population can perform the same major life activity.²⁰⁶

The Rehabilitation Act excludes homosexuality and bisexuality as an impairment, which precludes recognition of either sexual orientation as a disability.²⁰⁷ The ADA specifically states that homosexuality and bisexuality are neither impairments nor disabilities under the statute, in consistency with the Rehabilitation Act.²⁰⁸ Although neither Title VIII nor its regulations excludes homosexuality or bisexuality from its definition of handicap *per se*,²⁰⁹ several courts deciding claims of handicap discrimination rely on the ADA and its relevant case law to interpret Title VIII's meaning of handicap.²¹⁰ Thus, it is fair to infer that Title VIII excludes homosexuality or bisexuality as an impairment under the section defining handicap.²¹¹

a. "Regarded As" and HIV/AIDS

Federal courts have found HIV and AIDS to be handicaps under Title VIII.²¹² Although the Supreme Court has not stated whether AIDS is a disability under the ADA, it has determined that HIV is an ADA disability.²¹³ For example, a landlord violates Title VIII if he denies an application for housing because the prospective tenant has AIDS or HIV.²¹⁴ The definition of handicap includes those "regarded as" handicapped.²¹⁵

²⁰⁶ 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (2001); *see also*, *Toyota Motor Mfg., Ky., Inc., v. Williams*, 122 S. Ct. 681, 691 (2002). *Toyota Motor* states that in order "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota Motor*, 122 S. Ct. at 691.

²⁰⁷ 29 U.S.C. § 705(e)(i)-(ii).

²⁰⁸ 42 U.S.C. § 12211(a).

²⁰⁹ *See* 42 U.S.C. §§ 3601 et seq.; 24 C.F.R. § 100.201 (2001).

²¹⁰ *See* *Keys Youth Servs., Inc. v. City of Olathe*, 52 F. Supp.2d 1284, 1296 (D. Kan. 1999). *See also* *Roe v. Housing Auth.*, 909 F. Supp. 814, 820-21 (D. Colo. 1995).

²¹¹ *See Williams*, 955 F. Supp. at 495.

²¹² *Support Ministries for Persons With AIDS v. Village of Waterford*, 808 F. Supp. 120, 131 (N.D.N.Y. 1992) (finding AIDS as handicap for purposes of Title VIII); *Association of Relatives and Friends v. Regulations and Permits*, 740 F. Supp. 95, 103 (D.P.R. 1990) (including AIDS as handicap within Title VIII); *Baxter v. City of Belleville*, 720 F. Supp. 720, 729 (S.D. Ill. 1989) (stating HIV as a handicap under Title VIII).

²¹³ *See Bragdon*, 524 U.S. at 641 (holding HIV as disability, even where infection has not progressed to symptomatic phase). *But see id.* at 641-42 (declining to state whether HIV infection as a *per se* disability).

²¹⁴ *See id.*

²¹⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). "These misperceptions often 'resul[t] from stereotypic assumptions not truly indicative of ... individual ability.'" *Id.* (citation omitted). "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. *Id.*

Thus, a landlord violates Title VIII if he denies an application for housing because he regards the prospective tenant to have AIDS or HIV.²¹⁶

*Neithamer v. Brenneman*²¹⁷ involved a prospective HIV-positive tenant, William Neithamer, who submitted an application and a credit report to a property owner's rental agent.²¹⁸ Neithamer informed the rental agent that he had a poor credit record because he had devoted his financial resources to paying the medical bills of his lover, who had died of AIDS a few years prior.²¹⁹ Neithamer, however, never disclosed any information regarding his own health or sexual orientation.²²⁰ Ultimately, the property owner denied the rental application.²²¹

Neithamer sued the property owner and rental agents for violating Title VIII based on handicap discrimination.²²² The defendants denied that they ever knew or suspected that the applicant was HIV-positive.²²³ Neithamer claimed that the defendants regarded him as handicapped because they inferred he was HIV-positive from Neithamer's explanation of the death of his lover from AIDS.²²⁴ On summary judgment, the court found that the defendants knew or suspected that Neithamer was gay, but a material disputed fact existed as to whether the defendants regarded the applicant as HIV-positive.²²⁵ Thus, the plaintiff presented enough evidence for a jury to infer discrimination because Neithamer was "regarded as" handicapped.²²⁶

b. Regarded As Handicapped Because of Sexual Orientation

Title VIII and the ADA do not require an individual to have a handicap in order to invoke a "regarded as" claim.²²⁷ According to the regulations, an individual may be "regarded as" having a handicap if he or she has no impairment as defined by the code, but a landlord treats the individual as having a substantially limiting impairment.²²⁸ Thus, if Neithamer was HIV-negative, he could still maintain a Title VIII handicap

²¹⁶ *Id.*

²¹⁷ 81 F. Supp.2d 1, 2 (D.D.C. 1999).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 4.

²²¹ *Id.* at 2.

²²² *Id.*

²²³ *Neithamer*, 81 F. Supp.2d at 4-5.

²²⁴ *Id.*

²²⁵ *Id.* at 4, 6.

²²⁶ *Id.* at 6.

²²⁷ See 42 U.S.C. § 3602(h)(3) (defining handicap as being perceived as having an impairing condition); 42 U.S.C. § 12102(2)(c) (defining disability as being perceived as having an impairing condition).

²²⁸ See 24 C.F.R. § 100.201(d)(3) (2001); 29 C.F.R., § 1630.2(l)(3) (2001); 28 C.F.R. § 36.104(4)(iii) (2001).

discrimination claim so long as he was able to prove that the property owner and rental agents regarded him as HIV-positive.²²⁹

An extended application of the “regarded as” analysis involves a hypothetical landlord who believes that all non-heterosexuals have AIDS or are HIV-positive.²³⁰ A disturbing stereotype exists that presumes non-heterosexuals, especially gay men, to have AIDS or HIV.²³¹ It is conceivable that a non-heterosexual victim of such prejudice could assert a Title VIII “regarded as” handicap discrimination claim.²³² If the plaintiff succeeded in proving that the landlord had knowledge of his or her sexual preference and that the landlord believed the aforementioned stereotype, a Title VIII claim seems viable.²³³

IV. CONCLUSION

A. Summary of Constitutional Arguments Against Discrimination

It is unclear whether a court would invalidate a housing law that used sexual orientation as a classification, on the grounds that it violated the Equal Protection Clause. The non-heterosexual advocate would certainly argue for the application of strict scrutiny because of the increased likelihood that a court would invalidate an act. The Supreme Court seems adamant that the right to shelter and housing, though inherently and seemingly fundamental, is not fundamental in the context of equal protection. Non-heterosexuals appear to have a better argument for strict scrutiny under equal protection because they exhibit the same characteristics of classes who have received strict or intermediate scrutiny.

Sexual orientation, for example, is an immutable characteristic like race, national origin, and gender.²³⁴ Although the counterargument may

²²⁹ See *supra* notes 214-15, 226-27 and accompanying text.

²³⁰ See *supra* notes 214-15, 226-28 and accompanying text.

²³¹ See, e.g., *Centola*, 2002 WL 122296, at *1 (discussing comments by co-workers to gay employee if he had AIDS because of homosexuality); *Pell v. Trs. Of Columbia Univ.*, 11 N.D.L.R. 322, available at 1998 WL 19989, at *11 (S.D.N.Y. Jan. 21, 1998) (discussing lesbian's harassment claim including false statement she had AIDS); *Higgins*, 194 F.3d at 257 n.1 (observing fellow employee's statement of aversion to homosexuals because of AIDS fear); *Sanford v. Burns*, 1994 WL 267260, at ¶29 (H.U.D.A.L.J. June 17, 1994) (noting 'AIDS kills fags dead' message from skinhead to gay tenant).

²³² See *supra* notes 214-15, 226-28 and accompanying text.

²³³ *Id.*

²³⁴ But see “ex-gay” groups such as Exodus, which promote “the message of ‘Freedom from homosexuality through the power of Jesus Christ.’” available at <http://www.exodusnorthamerica.org/aboutus> (last visited Jan. 21, 2002). Ironically, two years after appearing on the cover of NEWSWEEK for an article on the “ex-gay” movement, former Exodus chairman and poster boy John Paulk was sighted at a notorious gay bar in Washington, D.C. See *Tough Questions for an ‘Ex-Gay.’* NEWSWEEK, Oct. 2, 2000

observe that a non-heterosexual can conceal his or her sexual preference (in contrast to race, national origin, or gender), the question remains why someone has to conceal his or her sexual identity in the first place. The answer is to avoid discrimination or harassment.

Like other unpopular minorities, non-heterosexuals must rely on the judiciary occasionally, in order to compensate for political processes that fail to protect their interests. The unpopularity of non-heterosexuals in Colorado, for example, led to the creation of an anti-gay amendment. Absent the Supreme Court's involvement, the amendment would still exist.

Also, a reasonable argument exists that same-sex couples' inability to obtain enforceable marriages deprives them from participating fully in society. Non-heterosexuals have been subject to a history of discrimination, as evidenced by hate crimes and legislation opposing same-sex marriages. Although United States Supreme Court Justice Antonin Scalia suggests that gays and lesbians comprise a politically powerful minority,²³⁵ legislation like the Defense of Marriage Act²³⁶ is indicia of a contrary conclusion.

The truth remains that no court has been willing to protect non-heterosexuals on the basis that they are a suspect or quasi-suspect class under equal protection. The influence of a conservative president over future federal court vacancies does not bode well for any imminent deviation from *stare decisis*. Rational basis review, therefore, appears to be the level of scrutiny that courts will apply to sexual orientation housing discrimination claims under the Equal Protection Clause.

As evidenced by federal courts' tendency to uphold laws under rational basis review, courts rarely overturn laws under the lowest level of scrutiny. The Supreme Court, however, struck down the anti-gay amendment at issue in *Romer* under rational basis review. The decision is encouraging because the opinion correctly found no rational relationship between non-heterosexuality and the state legislature's prerogative to create laws benefiting non-heterosexuals.

While non-heterosexuals can be assured that strict scrutiny will apply in the event that a fundamental right is at issue, fundamental rights are few and the requirement of a state actor limits the Equal Protection Clause's applicability to purely private discriminatory conduct. Thus, Title VIII appears to be the appropriate source of protection from housing discrimination based on sexual orientation.

available at 2000 WL 21083897.

²³⁵ See *Romer*, 517 at 636. (Scalia, J. dissenting).

²³⁶ See 1 U.S.C. § 7 (1997). The federal statute defines marriage as between only a man and woman. *Id.* Also, it defines spouse as referring to someone of the opposite sex only. *Id.*

B. Summary of Statutory Arguments Against Discrimination

Congress has rightfully enacted measures to protect individuals from potentially hostile treatment and other discriminatory conduct based on race, color, religion, sex, national origin, handicap, and familial status, through the passage of Title VIII. The legislation states that its purpose was to articulate a national policy against discrimination in housing. Congress intended to dispel stereotypes and prejudices associated with the chosen classes, in order to prevent their exclusion from mainstream society. Why should the same despicable conduct, then, be permissible based solely on sexual preference?

The legislature's failure to include sexual orientation as a protected class in Title VIII has resulted in sexual orientation harassment claims camouflaged as sexual harassment or sex discrimination, in order to plead a claim that conforms to Title VIII precedent. For example, one could argue that the failure to conform to a male stereotype is exactly what Hamner's supervisor demonstrated when he mocked the plaintiff by speaking with a lisp and folding his wrists. The court's hands were tied because it is not a violation of law to discriminate because of sexual orientation, even under the most comprehensive federal laws prohibiting discrimination.

Non-heterosexuality is a social and legal impairment in a homophobic society that fails to offer specific legal protection to non-heterosexuals. Any argument relating non-heterosexuality to a Title VIII handicap, however, is problematic because it is unlikely that a non-heterosexual person would want to define his or her sexual preference as a physical or mental impairment. Such a rationale would be contrary to the spirit of equality that non-heterosexuals seek. Further, lawyers and courts should not stretch disability discrimination laws beyond their intended scope just to be consistent with legal precedent.

Housing discrimination based on sexual orientation is fundamentally unjust, immoral, and contrary to the principles of equality. Discrimination because someone is heterosexual is equally egregious as discrimination because of non-heterosexuality. The consideration of a person's sexual orientation should be an irrelevant personal characteristic in the decision-making process regarding the sale, rental, or lease of a residence.

Many states and local communities have passed laws to protect people from housing discrimination based on sexual preference, where the federal government has failed to do so. Although we should applaud those state legislatures, both straight and non-heterosexual Americans have the right to rely on their federal government to adequately protect them from housing discrimination based on sexual orientation. Congress should include sexual orientation as a protected class in its housing discrimination

laws, because it is clear that federal courts have deferred the issue for resolution outside the realm of the judiciary.

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