# Appendix 1 FROM EUGENICS TO THE NEW BIOLOGY: THE IMPACT OF SCIENCE ON THE LAW'S INTIMATE RELATIONSHIP WITH GAYS AND LESBIANS

# From Eugenics to the New Biology: The Impact of Science on the Law's Intimate Relationship with Gays and Lesbians

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#### Introduction

During World War II, approximately 250,000 state-identified homosexuals were exterminated.<sup>1</sup> Although over a quarter of a million people were exterminated for the crime against the state of homosexual acts (or thoughts), and several thousand more survived this specific persecution, little or no public discussion of this particular atrocity even surfaced until almost 30 years later. The publication of <u>The Men with the Pink Triangle</u>, by Heinz Haeger, was the first attempt at chronicling the Nazi persecution of homosexuals.<sup>1</sup> The silence regarding persecution of homosexuals during World War II is due at least in part to the continuing societal prejudice against homosexuals.<sup>1</sup>

Research of the history of eugenics and the history of homosexuality indicates that the mass extermination of state-identified homosexuals was preceded by several decades of intense interest in race purity in both America and Germany<sup>2</sup> (see attached Timeline A), as well as by unprecedented research into the "cause" of homosexual orientation in men.<sup>1</sup> The scientific "breakthroughs" in eugenics were well received and governmentally endorsed; the concurrent breakthroughs in sexual orientation research were not.

In recent years, genetic research and molecular biology have boomed into what is sometimes referred to as the "New Biology." Most specifically, in the past 3 years researchers have claimed to identify possible specific brain regions responsible for specific sexual behaviors,<sup>4</sup> for sexual orientation,<sup>5</sup> as well as identification of effects of specific hormone levels on regions of the brain associated with sexual differentiation.<sup>6</sup> (see attached Timeline B) Over the same few years this country has seen a dramatic increase in anti-gay rights legislation. As the Human Genome Initiative and other genetic and hormonal studies go forward at a rate far outpacing the ability of lawmakers and ethicists to formulate policies to evaluate and deal with the new technologies, the possibility increases for state (or scientifically) identified homosexuals to once again be persecuted. Whether this persecution evolves a direct oppression, such as limitation of basic civil rights, segregation into camps or even extermination, or instead takes on the more "benign" form of hormone regulation to predestine sexual "behaviors," the threat to a class of people—people who have not yet been deemed people in several states—is great enough to warrant careful attention and thought.

Any analogy to the horrifying results of Nazi Germany's eugenics program must be cautiously made and carefully weighed. To do otherwise risks the devaluation of the point being made and, more importantly, denigrates the lives of those who did and did not survive the Nazi eugenics and extermination programs. The purpose of this paper is not to suggest that the concentration camp extremes are on the verge of occurring in America. This paper's purpose is to suggest that the steps to extremism are each taken one at a time, and often each looks like the logical next step from where we are.

Gays and lesbians have in the last 100 years, with few exceptions, been treated with less than full citizenship and respect by the laws of the United States, largely due to the "sin" influence of organized Christian religions.<sup>7</sup> Developing technologies call into question the traditional Christian condemnation of homosexuality as a chosen, sinful lifestyle. Yet these same developments are seen by some as proof that homosexuality is abnormal and capable of correction at the genetic and cellular level. As long as "[s]harply conflicting attitudes toward homosexuality share an uneasy existence in today's society,"<sup>7</sup> urgent emphasis needs to be placed on determining and applying ethical evaluation of the new technologies and their applications.

The first section of this paper explores the history leading up to the extermination camps of World War II. Section II details significant developments in the "new biology," specifically in the areas of reproductive technology and sexuality studies. The recent history of gay and lesbian legal rights in the United States is explored in Section III. Section IV examines the current focus of the Human Genome Initiative, explores possible ethical frameworks for evaluating new technologies, and suggests one framework as preferable to the other possible frameworks.

Before beginning, however, the limits of this paper will be clarified. This paper is not about AIDS, a subject which is dealt with here only tangentially; nor is this paper intended as a comprehensive overview of the history of the movement for gay and lesbian rights. The focus is intentionally narrowed to the perceived interplay and conflict between science and law (and inevitably religion) as they relate to gays and lesbians.

### I. History of Eugenics

#### America

"Eugenics" is a term first used in 1883 by Sir Francis Galton, cousin to Charles Darwin and premier eugenicist.<sup>2</sup> "Eugenic" was derived from the Greek "*eugenes*" for "well born,"<sup>2</sup> and is defined as "improving, or relating to the improvement of, the race; relating to the bearing of healthy offspring."<sup>8</sup> Prior to and concurrent with Galton's coining of the term eugenics, campaigns for the sterilization of the "unfit" were going forward in America.<sup>2</sup> Much of the early eugenics research and policy was economically driven. Early eugenicists claimed their research revealed that socially undesirable traits were inherited. One famous study of the "Jukes" family was published in the late 1800's.<sup>3</sup> The American Eugenics Society claimed that sterilization of the original Jukes couple would have cost only \$150, while the resultant family and progeny of "social misfits" would cost society an estimated \$2 million.<sup>3</sup> A 1912 "study" detailed the lives of the Kallikak family.<sup>2</sup> The Kallikak's had "both an eminent line and a degenerative line" supposedly followed for several generations.<sup>2</sup> Both of these studies lead to what scholars today term a rise in negative eugenics.<sup>2,3</sup>

At the turn of the century, after an increase in immigration and after the "rediscovery" of Mendel's theories of heredity, America became concerned about the dilution of its Anglo-Saxon superiority.<sup>2</sup> In 1904 the Station for the Experimental Study of Evolution was established at Cold Spring Harbor (CSH), followed in 1910 by the Eugenics Record Office (also at CSH) headed by Dr. Charles Davenport.<sup>2</sup> The two identified purposes of the Eugenics Record Office were to research human heredity and to educate the public about the importance of eugenic research and its impact on public policy.<sup>2</sup> Dr. Davenport and his colleague, Dr. Harry Hamilton Laughlin, were the driving personalities behind the American eugenics movement in the first half of this century.

The Eugenics Record Office was very involved in American politics, and in 1920 Dr. Laughlin was appointed as eugenics expert of the House Committee on Immigration and Naturalization.<sup>2</sup> During debates leading up to the restrictive Johnson Immigration Act of 1924, Dr. Laughlin testified repeatedly regarding the threat to Anglo-Saxon superiority being posed by the increasing number of southern and eastern European immigrants.<sup>2</sup> The Johnson Immigration Act of 1924 was an isolationist measure which restricted immigration levels to those reflected in the 1890 census.<sup>2</sup> The immigration numbers from the 1890 census were low due to those immigrations being prior to the famines and economic collapse which struck Europe and caused the immigration numbers to later increase. "In retrospect the passage of the Johnson Immigration Act can be seen as the misuse of pseudoscientific and incorrect genetic information in order to justify prejudicial viewpoints."<sup>2</sup>

At the same time restrictions on immigration were being debated and implemented, states were passing sterilization laws. While the laws initially focused on criminals and mental incompetents, they quickly expanded to encompass alcoholics, prostitutes, and the unemployed.<sup>2</sup> Between 1907 and 1931, 30 states passed involuntary sterilization laws.<sup>3</sup> Some state laws included "sexual perverts" as among those to be sterilized.<sup>2</sup> In 1927, the Supreme Court joined its power and presence to the eugenics movement.<sup>9</sup> The Court's notorious decision in *Buck v. Bell*, approved the involuntary sterilization of a supposedly feebleminded woman, and specifically noted, "Three generations of imbeciles are enough."<sup>9</sup> (Sadly, it now appears that neither Carrie Bell nor her child were "feebleminded." A physician who interviewed Carrie Bell in 1980 reported that she is not mentally retarded by today's standards. The child Ms. Bell had before being involuntarily sterilized lived until successfully completing second grade, after which she succumbed to measles.<sup>3</sup>) It would be 15 years before the Court would again address the subject of involuntary sterilization.<sup>10</sup> The sterilization law struck down in *Skinner v. Oklahoma* was invalidated on equal protection grounds and distinguished from *Buck v. Bell*. The decision in *Buck v. Bell* has never been overturned.

Sterilization of the mentally retarded continued at least into the 1960's, and 19 states still had sterilization laws in 1987.<sup>2</sup> Today's focus on the sterilization of the mentally retarded is on protection of the mentally retarded individual. Court approved sterilization, however, rarely occurs.<sup>2</sup>

Overall, the eugenics movement was of great strength in America during the first half of this century. Countries around the world were influenced by American research in this area. Dr. Davenport and Dr. Laughlin were among the Americans aware of and supportive of the German eugenics efforts in the 1920's and 1930's.<sup>2</sup> When Germany finally passed its eugenic sterilization law in 1933, it was based on Dr. Laughlin's "model sterilization law" published eleven years earlier.<sup>2</sup> In addition, during the International Congress of Eugenics held in 1929, Dr. Davenport sent Mussolini a letter which urged implementation of a eugenics program, indicating, "Maximum speed is necessary; the danger is enormous."<sup>2</sup> Other physicians were aware of, if not actually supportive of, the German eugenics efforts as evidenced by letters published in the Journal of the American Medical Association between 1933 and 1941.<sup>2</sup> These letters "described the German sterilization and euthanasia programs, discrimination against Jewish physicians, . . . and many other topics."<sup>2</sup>

#### Germany-Eugenics and the Nazi Party

The eugenics movement in Germany had three distinct focuses: racial hygiene, eugenic sterilization, and euthanasia.

The racial hygiene focus began in the late 19th century, and viewed the German "race" as being all German citizens, regardless of ethnic or racial differences.<sup>2</sup> An early racial overtone to Germany's racial hygiene movement occurred in 1908 when Germany outlawed all interracial marriages in Southwest Africa. Germans who violated the law against interracial marriages were deprived of their civil rights.<sup>2</sup>

Similar to the eugenic sterilization movement in America, economic and social concerns drove the "science" of eugenic sterilization in Germany.<sup>2</sup> Germany was behind America, however, and didn't pass its first involuntary sterilization law until 1933, when the Nazi party was in power.<sup>2</sup> As noted above, this law was based on Laughlin's model sterilization law.<sup>2</sup> While this 1933 law was decades behind the individual states' laws in America, it was a national law with the full force of the German Nazi government behind it.<sup>2</sup> By 1937, Germany decided to expand the sterilization law and all colored children were to be mandatorily sterilized.<sup>2</sup>

The German eugenic movement, again like America's, was also driven by the scientific and medical communities. In fact, physicians were the single largest professional group in the Nazi party.<sup>2</sup> The physicians who were directly involved in the sterilizations and medical "experiments" in the concentration camps did not

feel remorse for their actions. A striking feature of the "Doctor's Trials," as the war crimes trials of these individual physicians came to be called, is that the physicians continued to strenuously argue in favor of their actions.<sup>11</sup> "... they maintained that scientists and doctors are not responsible for and have no knowledge of values. They are only responsible for discovering and explaining empirical facts... they had left decisions about [ethics and morality] to others.<sup>21</sup>

One difference between the German and American eugenics movements was the widespread use of euthanasia by the Nazi German government. In 1895, Adolph Jost promoted state controlled and medically directed killing in his book *The Right to Death*.<sup>2</sup> Jost's conception of euthanasia as a right of the state is directly contrary to the American understanding of euthanasia as a right of the individual.<sup>12</sup> Jost used the analogy of the state's right to send members off to die in war, in order to perpetuate the state, to strengthen his argument that the state "must own death.<sup>112</sup> The health and survival of the state was the justification for killing in war and should be justification for medical killing.<sup>12</sup> By 1920, Professors Hoche and Binding published *The Sanctioning of the Destruction of Lives Unworthy to Be Lived*, which designated "the incurably ill ... the mentally ill, the feebleminded, the retarded, and deformed children" as lives unworthy to be lived.<sup>2</sup> Binding and Hoche stressed the <u>healing</u> aspect of eliminating unworthy lives, comparing the state to a human needing treatment for an illness.<sup>12</sup> An important part of Binding and Hoche's work was the professionalizing and medicalizing effect it had for the concept of eugenic euthanasia.<sup>12</sup>

The euthanasia program began with the extermination of children under age 3 who had birth defects.<sup>2</sup> These children were identified through a program which had first been approved at the political level, then medicalized through the involvement of physicians sympathetic to euthanasia.<sup>12</sup> The euthanasia program quickly grew to include older children, Jewish children, and finally, adults. As with the children's extermination, adults with mental illness or retardation were the first targets, and the target group again quickly expanded, and eventually included state identified homosexuals.<sup>1,12</sup>

# Dr. Magnus Hirschfeld and Paragraph 175

At the same time the American and German eugenics movements were gathering momentum, Dr. Magnus Hirschfeld was collecting information regarding the causation of homosexuality in men.<sup>1</sup> Dr. Hirschfeld was "a Jew, a homosexual and a physician" and devoted his life to his research. Hirschfeld eventually compiled a massive library of questionnaires, literature and research regarding male homosexuality. Dr. Hirschfeld founded the Scientific-Humanitarian Committee in 1897 in Germany, and in 1899 began publishing his Yearbook for Intersexual Variants.<sup>1</sup>

Initially, Hirschfeld believed homosexual men were a "third sex" somewhere between male and female.<sup>1</sup> In 1898, Hirschfeld published a work titled *What People Should Know About the Third Sex*. Hirschfeld abandoned this theory around 1910, but the impact of his theory remained a powerful influence with the Nazi party, and influenced the party's persecution of homosexuals. The "third sex" theory may regain relevance in light of recent research, although no scientist is explicitly referring to the theory (see discussion below).

On the political scene, Hirschfeld was an ardent opponent of Germany's anti-homosexual law, paragraph 175. During Hirschfeld's life, he circulated many petitions asking for the repeal of paragraph 175, which read:

1. A male who indulges in criminally indecent activities with another male or who allows himself to participate in such activities will be punished with jail.

2. If one of the participants is under the age of twenty-one, and if the crime has not been grave, the court may dispense with the jail sentence.<sup>1</sup>

Although Hirschfeld was able to obtain the signatures of noteworthy German politicians and scientists on his petitions, he was never successful in obtaining the repeal of paragraph 175.<sup>1</sup> In fact, in 1933 the Nazi party

amended paragraph 175 to make jail mandatory for any homosexual conduct. Added to paragraph 175 was the revocation of a man's civil rights for engaging in indecent activities with animals.<sup>1</sup>

In 1919, The Institute for Sexual Research was founded by Hirschfeld and became the world's most complete repository of sexual research and "therapy."<sup>1</sup> Considered quite innovative for its day, the institute studied sexual behavior, and treated venereal disease.<sup>1</sup> On May 6, 1933, the Institute was destroyed by the Nazi youth, and Hirschfeld's extensive library was burned. Hirschfeld was out of the country at the time of the institution's destruction, and died in exile 2 years later.<sup>1</sup>

It is relevant to note that while both the eugenics research and the sexual behavior research were being pursued with zeal, only the eugenics research received state sanction. With state sanction came ever expanding power and control. Hirschfeld's research may have equalled or even surpassed the quality of the eugenics research of his day, but because he was a member of at least two socially disfavored classes (homosexuals and Jews), his research was dismissed. Indeed, the Nazi reaction to the disfavored Hirschfeld's findings was to destroy the results of the research.

As the Nazi eugenics program of sterilization and euthanasia grew, its expansion saw the inclusion of homosexuals as among those to be eliminated for the health of the German nation.<sup>1</sup> Mauthausen was established as the camp designed specifically for the internment and extermination of homosexuals, who were identified with a pink triangle. Lesbians were grouped with Gypsies and the unemployed, and were marked with a black triangle.<sup>1</sup> While acts of lesbianism were never outlawed, lesbians were included in the general persecution of homosexual men and women.<sup>1</sup>

#### Conclusion

The eugenics movement in the late 19th and early 20th centuries was a powerful force in the political and scientific communities. Nearly all the leading participants in both Germany and America believed in the conclusiveness of their "research," and in the redeeming value of their suggestions regarding keeping their nation's people strong and superior. An inescapable aspect of any eugenics philosophy is the division of people into those with traits worth perpetuating and those with traits which should be eliminated, or at the least altered to be more desirable. In the two countries, the choices about who should be perpetuated and who should be eliminated or prevented from reproducing were made by governments—governments greatly influenced by the scientific and medical establishments of the day. Also inescapable is the fact that the events in Nazi Germany which horrify us today were common knowledge to a great number of physicians at the time—in both Germany and America. It is not just the "holocaust" aspect which we should remember about the Nazi era, but also the fact that it had such an appearance of "normalcy" and scientific justification when it was taking place.

#### II. The New Biology

#### Molecular Level Understanding

American science in the last few decades has progressed at an amazing pace on all fronts of exploring and understanding the world without and within. One area of research which has had a most profound effect on the way we view ourselves is the area of molecular and genetic research. In the past ten years alone, significant advances have been made; specific genes have been identified as associated with serious diseases such as cystic fibrosis and Huntington's disease. In addition, a Human Genome Initiative has been put in place to "map" human chromosomes,<sup>13</sup> and criminal law has seen the entry of "DNA fingerprinting" as a potentially foolproof method of identification of wrongdoers.<sup>14</sup>

The new developments are exciting and challenging, and to many people more than just a little frightening. It is no minor shift of consciousness to go from defining a culture, a country and a self on the basis of shared and individual history, to defining those same things on the basis of electrical and biochemical interchanges within the cells and genes of the individual person. With little or no prior meditation on the moral and ethical implications of molecular- and genetic-level knowledge, people in the 1990's are facing a monumental task of productively controlling and channeling the technologies developing daily with lightening speed. Much of the new biology has eugenic implications, although few in the sciences are willing to apply the term to their research.<sup>2</sup> Perhaps the most widely understood and implemented of the new technologies is reproductive technology. In the name of the worthy goal of improving quality of life, the arguments at times sound remarkably like those advanced earlier this century by the eugenicists.

# Reproductive Technology

Prenatal testing has developed far beyond the screening for Rh incompatibility to now include prenatal genetic testing and "counselling" for such conditions as Down's Syndrome and Tay-Sachs disease. Once potential parents are informed of the "defect" of the fetus, they must decide whether to elect abortion or birth. At the least, a presumption seems to have arisen that no "good parent" would want to bring a "defective" child into the world. As one commentator has noted:

The state's interest in protecting fetal life is considerably less compelling when the fetus is severely defective. A child afflicted with a severe genetic defect, such as Tay-Sachs disease, often has tragically little in positive terms to contribute to society, and such children are likely to be an *economic burden to both the state and the parents*.

The question of whether the potential life of a genetically deformed child is intrinsically as valuable as that of a healthy child, even if remotely answerable, need not be addressed. There is, instead, another recognized state interest that undercuts the argument that the life of a defective fetus is intrinsically valuable and requires the state's protection—the state's interest in minimizing suffering.

When a severely defective child is born, it ordinarily must endure considerable pain and suffering, both physical and emotional. It is far from certain that the state's interest in protecting fetal life on the ground that all life is intrinsically valuable outweighs its concomitant interest in preventing the future suffering of the child as well as its parents. (emphasis mine)<sup>15</sup>

Note that the author of the above quote uses an economic argument as the segue into the broad brush assertion that the value of life question "need not be addressed."<sup>15</sup> The German government in the 1930's and 1940's also used the economic argument as the argument for euthanasia for retarded children, and eventually for Jewish children, as a savings to and strengthening of the people through the elimination of "lives not worth living."<sup>1</sup> At least one recent American case seems to endorse this analysis:

Society has an interest in insuring that genetic testing is properly performed and interpreted. The failure to properly perform or interpret an amniocentesis could cause either the abortion of a healthy fetus, or the unwanted birth of a child afflicted with Tay-Sachs disease. Either of these occurrences is contrary to the public policy of Pennsylvania.<sup>16</sup>

The implication seems to be a social policy that all healthy fetuses should be brought to term, and all unhealthy fetuses should be terminated.

Ruth Hubbard also sees this implication, and rather than defining this "social policy," with its mix of eugenics and economics, as a presumption, instead notes the emerging social policy as a <u>duty</u> to have healthy children.<sup>17</sup> Hubbard goes on to express the view that, as long as the reproductive technologies are furthering prejudices against those with disabilities, the technologies are restricting—rather than expanding—reproductive choices.<sup>17</sup> Hubbard draws a clear distinction between the choice of *whether* to bear a child at all and the choice regarding what *kind* of child to bear.<sup>17</sup> Hubbard concludes, "Eugenic principles are part of our largely unexamined and often unspoken ideology—preconceptions that society instills in us about who should and who

should not inhabit the world. Scientists and physicians once again provide the ways to put them into practice."<sup>17,18</sup>

An article by Drugan, *et al.* in *Fetal Therapy* indeed posits a future in which a disease such as Lesch-Nyhan syndrome could be tested for, and treated at the early cellular stages just following conception.<sup>19</sup> Intervention in the woman's or couple's reproductive lives would be extensive and ongoing, with the laboratory technicians and physicians deciding which "conceptuses" to implant and which to discard.<sup>19</sup>

Another facet of "which life to value" is expressed in the "designer genes" concept. Generally, the theory is that a potential parent will be able to "design" a child for traits such as gender, hair and eye color, height and so forth. Artificial insemination providers currently present their clients with a "menu" of sperm donor profiles from which to choose. Political and medical opinions are numerous and varied regarding designing our future generations to this extent.

Not the least of our concerns in the "designer gene" setting should be the as yet unknowable mental and spiritual consequences of "making" our children in this rather clinical and detached method. Laurence Tribe, almost 20 years ago, commented on the moral dilemma of "manmade" people:

But it is not so easy to dismiss the underlying proposition that pursuing the technologies in question, for better or for worse, will profoundly alter what it means to be a human being and will do so in ways that matter whether or not particular "abuses" ever take place. As one observer so aptly put it, to "lay one's hands on human generation is to take a major step toward making man himself simply another one of the manmade things." (citing Kass)<sup>20</sup>

In the past, people have traditionally been left alone to decide whether to have children, when to have children and how many children to have. Today, especially in the contexts of welfare recipients (e.g., the suggested "voluntary" use of Norplant by female welfare recipients) and insurance risk pools (e.g., whether reproductive technologies are "necessary" and reimbursable, or only "experimental" and non-reimbursable),<sup>21</sup> there seems to be a growing weight of opinion that at least some reproductive choices are communal to the extent they involve community resources.

The extent to which society is now "designing" itself at the initial genetic reproductive level, rather than at the social and economic levels, is likely a reaction to the new biology.<sup>17</sup> Of special concern to at least the gay and lesbian community is the possibility that an attempt will be made to "design" homosexuality out of existence—especially when arguments regarding reproductive choices rely to a great extent on quality of life and public policy. In light of the criminalization of sodomy in almost half the states,<sup>7</sup> an argument could be made that the quality of life of a potential person would be much higher if they were to be born "within" the law. Being born within the law would reduce the stigmatization and suffering of the individual, the parents, and other family members.

#### The Meaning of Human

The meaning of "human" became very important in the pre-World War II scientific and political spheres. A book published in Germany, by the Nazi government, in 1942 and titled THE SUBHUMAN, designated Blacks, Slavs, Jews and others as subhuman and not worthy of respect, equal treatment, or even of continued existence.<sup>1</sup> Scientists in America were concerned by the harm being done to the superior race of American whites by being interbred with the inferior races of Southern Europeans.<sup>2</sup>

The meaning of "human" is once again of vital importance. For example, both sides of the abortion issue feel that the legal definition of "person" is crucial to winning the legal battle. Fetal tissue and embryo research is also caught up in the definition of "human"<sup>22</sup> and the disposition of abortuses, whether "living" or not. Euthanasia is becoming an ever bigger issue as medical and economic resources shrink and "quality of life" is

the key concept in deciding whether to treat or when to stop treatment. (One student in the Legal Aspects of Bioethics seminar proposed using the term "living remains" to refer to those in a permanent vegetative state (PVS), thus supposedly helping us to overcome any squeamishness about withdrawing civil rights, food and water from these patients.) A very essential aspect of the American interest in euthanasia is the focus on the individual's decision about their own quality of life and treatment decisions.

The definition of "human" is often consistent with the majority definitions of "normalcy." As the Germans did in the early part of this century with sterilization and euthanasia for retarded or "defective" children,<sup>1,2</sup> and as America has done and continues to do (through involuntary or "voluntary" sterilization, and more recently in the area of testing for genetic disease traits), medically and governmentally defined "normalcy" drives the decisions as to who receives what "treatment."

The definitions of "human" and "normal" are of particular importance to gays and lesbians. As a group (or groups) which has traditionally been on a rollercoaster ride of acceptance and persecution, gays and lesbians are still defined legally in many places as criminal or deviant, which in turn often leads to less than human treatment by society and the laws of society:

In Florida, bigots use Operation Rescue-style tactics to blockade a gay and lesbian film festival. In Maine, a campaign to repeal an antidiscrimination law is followed by a one-third increase in violence against gays and lesbians . . . [anti-gay and lesbian rights] bills and organizing campaigns have had a disquieting side effect: Violence and harassment of gays and lesbians have increased in every one of these places.<sup>23</sup>

Same-sex sexual activity is criminalized in almost half of the states, and no state allows same-sex marriage.<sup>7</sup> Indeed, the question to be answered may be as simple—and as impossibly complicated—as "are homosexuals human?" Without having yet addressed the intricacies of the definition of human, and the further refinement of "worthy human," science continues forward at an almost uncontrollable pace. While some leaders in science warn against repeating past discriminatory practices based on scientific information,<sup>21</sup> few, if any, have developed detailed approaches to developing or implementing an evaluation process for preventing discrimination.

The past few years have seen at least three significant studies into the cellular basis for sexual behavior: Swaab's study of the suprachiasmatic nucleus of the hypothalamus<sup>4</sup>; LeVay's study of the interstitial nuclei of the anterior hypothalamus<sup>5</sup>; and, Wittelson's study of the influence of hormone levels on the traits of handedness and sexual orientation.<sup>6</sup> Significantly, all three studies focus on specific areas or cells of the brain. "As a result of data gathered with these new [technological] tools during the 1970's and 1980's there is now a solid body of data indicating sex differences in the brains of almost every mammalian family examined so far ..."<sup>24</sup>

The past few years have also seen a rise in anti-gay and -lesbian legislation at the state level, accompanied by a rise in anti-gay and -lesbian violence.<sup>23</sup> It is possible, as happened in Germany in the early part of this century, that just as science and research seem on the verge of explaining and educating regarding sexual orientation, the backlash of social disapproval will reach new intensities. With the past record of the medical and political fields working so closely to define the "ideal" society, gays and lesbians—if not all thinking people—should stay aware of developments and research goals in the area of genetic and cellular predestination.

# Recent Significant Scientific Developments Regarding Sexuality

Swaab's studies of the suprachiasmatic nucleus (SCN) of the hypothalamus were completed in the late 1980's. SCN is involved in the regulation of hormonal and behavioral circadian rhythms.<sup>5</sup> Swaab determined that there was no gender differentiation of the size of SCN. Swaab did, however, discover a size difference between the SCN of two transsexuals (specifically, male-to-female transsexuals) and the SCN of the control groups of other men and women.<sup>6</sup> While SCN has not been shown to have much relation to sexual behavior, both LeVay and Wittelson cite Swaab's study as one "suggesting" that SCN is involved in the regulation of sexual behavior.<sup>5,6</sup> Wittelson's investigation of hormonal influence on sex differentiation included a survey of several sexualitybrain reports.<sup>6</sup> Wittelson concludes that "sex differences in the morphology of the cortical surface of the human brain appear to occur in regions related to functional asymmetry." The hypothesis Wittelson herself explores is:

... that the development of the temporo-parietal region of the human brain is an anatomic network dependent on the organizing effects of sex hormones during embryonic or perinatal sexual differentiation, and that in each sex the pattern of functional asymmetries and cognitive attributes is differentially influenced by early sex hormone exposure.<sup>6</sup>

Wittelson concludes that different parts of the brain possibly responsible for sexual differentiation are susceptible to hormonal influence at different points in development *in utero*.<sup>6</sup> Wittelson labels her findings "Neural Sexual Mosaicism." An important point is made by Wittelson in her introduction: biological factors do not exclude the impact of social and cultural factors on the development of sexuality.<sup>6</sup> As she aptly notes," . . . although the factor of sex is demonstrated and accepted as a source of variation in nonhuman brain structure and behavior, the same notion for human behavior is met with discomfort and reluctance by many scientists.<sup>76</sup> (One could easily replace "scientists" in her sentence with the word "people.")

Of the three studies discussed here, the one which has received the most attention in the popular and scientific press is the work of researcher Dr. Simon LeVay.<sup>5</sup> LeVay's article *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men* was seized upon by the media.<sup>25</sup> LeVay focused his research on the interstitial nuclei of the anterior hypothalamus (INAH), a region associated with the regulation of sexual behavior.<sup>5</sup> LeVay used brains from three subject groups: women; presumed heterosexual men; and, self-identified homosexual men. The research purports to show that INAH 3 is larger in heterosexual men than in homosexual men, but the same size in homosexual men as in women.<sup>5</sup> Interestingly, these conclusions seem almost a restatement of a "third sex" theory,<sup>26</sup> although LeVay does not use that specific language. LeVay concludes "These findings indicate that INAH is dimorphic with sexual orientation, at least in men, and suggests that sexual orientation has a biological substrate.<sup>25</sup> LeVay does caution that his research does not indicate that the difference observed in INAH 3 "causes" homosexuality.<sup>27</sup>

One reason LeVay's study captured the attention of the popular press is the fact that he is homosexual, and his research was prompted by his loss of his partner of 21 years to AIDS.<sup>25</sup> At least one commentator in the scientific community included LeVay's homosexuality as one reason to be skeptical of LeVay's findings.<sup>26</sup> This seems a rather distinct echo of the skepticism and hostility which greeted Dr. Hirschfeld's sexuality studies over 80 years ago. A slightly more veiled skepticism was expressed in the following manner: "LeVay, whose main research focuses on the visual areas of the brain, says he began this study as a hobby project."<sup>27</sup> The author who used the term "hobby project" to describe LeVay's research did not at any point identify LeVay as homosexual nor indicate that the "hobby" was a result of the loss of a lifelong partner.<sup>27</sup> (It would indeed be surprising to discover that LeVay's employer, The Salk Institute, paid its researchers to pursue "hobby" projects.) In contrast, I have yet to find an instance of a sexual orientation researcher having their findings subjected to even the slightest doubt on the basis of his or her heterosexuality.

Perhaps another reason for the popular and scientific press' reaction to LeVay's study is that the sexual orientation of over half of his subjects was "presumed."<sup>5</sup> Yet even with this rather large presumption, LeVay states his "findings" in very bold terms: "The <u>discovery</u> that a nucleus differs in size between heterosexual and homosexual men illustrates that sexual orientation in humans is amenable to study at the biological level . . .<sup>35</sup>(emphasis mine). In addition to the presumption of sexual orientation, several of the subjects died of AIDS.<sup>5</sup> LeVay believes he adequately compensated for the possible influence of AIDS, but admits it could be a factor and further study is needed.<sup>5</sup>

All three of the above studies are significant and challenging in our rapidly changing understanding of who and how we are. Importantly, however, is the division of opinion within the gay and lesbian community of whether biological foundations for sexual orientation are even relevant. As Rist points out:

These arguments [about the source of sexual orientation] among intellectuals—whether art critics or political philosophers or, say, research scientists—treat homosexuality more polemically than it deserves . . . In the end, such "liberated" views continue to imprison desire in the dark cells of "gay" and "straight," rather than freeing our hearts and genitals to the fullest expression of human affection, which ought to be the unabashed ideal of any sexual liberation movement.<sup>26</sup>

Rist also correctly notes that the LeVay study, like so many others, leaves out or trivializes the sexual development of women, whether heterosexual or lesbian.<sup>26</sup> While a few initial studies claimed a link between hormonal variables and sexual orientation in women, a 1990 report out of London found the previous results irreproducible.<sup>29</sup>

The possibility is very real that some will use the new scientific information to discover ways to regulate the development of sexual orientation before birth,<sup>27</sup> to be followed by careful social and cultural education about "normal" sexual relations. After all, it could seem a logical next step to have a control group of hormone regulated babies to study to determine causality. And next, it would seem logical to develop "therapy," once we know causality. Indications of the possibility of this direction of thinking and research are seen in the sodomy statutes still in effect in several states, the recent anti-gay initiatives in Oregon and Colorado, and the overarching national context of the failure of the Supreme Court of the United States to find any constitutional protection for gays and lesbians.

# III. Recent Events in Gay and Lesbian Legal Rights

### Examples of Current Sodomy Statutes

Since 1961 just over half of the sodomy statutes have been repealed or declared unconstitutional under state constitutions;<sup>30</sup> strict sodomy statutes are still in effect, however, in several states.<sup>30</sup> The United States Supreme Court in 1986 upheld the constitutionality of one such sodomy statute in Georgia (see discussion below).<sup>30</sup> Examples of state sodomy statutes are detailed below.

Montana titles its sodomy statute "Deviate Sexual Conduct."<sup>31</sup> The statute prohibits "knowingly" engaging in deviate sexual relations or causing another to engage in deviate sexual relations.<sup>31</sup> The punishment is not to exceed 10 years in prison or a fine of \$50,000, or both.<sup>31</sup> Comments to this statute indicate, "There has been a *reduction in the penalty* because it was felt that the severe penalty was more a product of revulsion than the social harm in fact committed." (emphasis mine)<sup>31</sup> The definition of "deviate sexual conduct" in the Montana code specifically includes homosexuality and bestiality, and specifically excludes consensual heterosexuality.<sup>31</sup> In Montana, bestiality and consensual homosexuality are grouped together as "crimes against nature."<sup>31</sup> A punishment of 10 years plus a \$50,000 fine is considered commensurate with the "social harm" caused by adults engaging in consensual homosexual behavior.

The Texas Penal Code forthrightly titles its sodomy statute "Homosexual Conduct."<sup>22</sup> Like the Montana provision, the Texas statute prohibits "deviate sexual intercourse" but limits punishment to those engaging in such intercourse "with another individual of the same sex," i.e., bestiality is not included in the section.<sup>32</sup> "Deviate sexual conduct" is defined as including genital to mouth, or genital to anus contact or penetration.<sup>32</sup> Violation of the statute is a misdemeanor punishable by fine not to exceed \$200. The Texas statute is currently on appeal to the Texas Supreme Court on a constitutional challenge to the statute under the Texas constitution.<sup>33</sup>

Some states (e.g., Missouri) have recently amended their sodomy statutes to include hand to genital contact between persons of the same sex.<sup>7</sup> The expansion of the definition is intended to reach consensual lesbian conduct. Historically, lesbianism has not been the subject of criminal laws.<sup>1</sup> Rationally, it would seem doubtful

that a statute such as Missouri's would withstand the *Bowers* "tradition and history" scrutiny.<sup>30</sup> Realistically, however, the statute would likely be upheld under *Bowers* allocation to the states of the right to intervene in homosexual conduct.<sup>30</sup>

Commentators often note that the sodomy statutes are rarely invoked against adults who engage in the prohibited activity consensually and in private.<sup>7</sup> Even so, the knowledge that one's entire life is subject criminal condemnation and potential prosecution is a psychological burden.<sup>34</sup> And as was true in Germany in 1933, a statute remaining on the books is very easily expanded<sup>1</sup> and shifted from non-enforcement to enforcement. Outside the context of sodomy statutes, many states also prohibit adoption by homosexuals, restrict visitation rights on the basis of sexual orientation, and all states refuse to allow same sex marriage.<sup>7</sup> One serious cumulative effect of the various statutes is to trivialize gay and lesbian relationships and to focus on only the sexual aspect of those relationships.

#### Anti-Gay and Lesbian Initiatives in Oregon and Colorado

This election year [1992] saw two state-wide initiatives for the restricting or abolishing of gay and lesbian rights. The states of Oregon and Colorado several times captured headlines with the bitter civil rights battles being fought between Christian fundamentalists and liberal supporters of gay and lesbian rights. At the same time Swaab, LeVay and Wittelson were discovering biological factors in sexual orientation and differentiation, powerful political forces were working tirelessly to legally oppress gays and lesbians.

The state constitutional amendment in Oregon was strongly worded and defined homosexuality as "abnormal, wrong, unnatural and perverse."<sup>35</sup> Additionally, the proposed legislation grouped homosexuality with sadism, masochism, pedophilia, bestiality (as did Germany's paragraph 175), and necrophilia.<sup>36</sup> The lack of scientific support for the grouping was irrelevant to the supporters of the legislation. Most of the support for the constitutional amendment, in fact, was religiously based.<sup>36, 37</sup> After months of bitter battles between the conservative Oregon Citizens Alliance and supporters of gay and lesbian rights, the proposed constitutional amendment was defeated at the ballot box. The battle carried with it some very high human costs: several gay and lesbian businesses were vandalized,<sup>36</sup> and a gay man and lesbian were killed when their home was firebombed.<sup>37</sup>

Analysts believe that one reason the Oregon amendment was defeated was because the wording was so extreme.<sup>37</sup> Confusing wording, and a low key campaign may have combined to secure the passage of a similar state constitutional amendment in Colorado. The wording of the Colorado amendment was to the effect that it would prohibit the banning of anti-gay discrimination. Many voters may have been confused by the wording and thought they were voting in favor of gay and lesbian rights.<sup>35</sup> The conservative and religiously-based Colorado for Family Values (CFV) kept their campaign very low key, and avoided the repeated headline attention that accompanied the OCA's activities in Oregon.<sup>35</sup> Similar to the OCA, however, was the CFV campaign's erroneous grouping of homosexuality with child abuse.<sup>35</sup>

Reaction since the passage of Colorado's amendment seems to indicate that a large number of Coloradans are dissatisfied with the result and will work to repeal the amendment. Several cities nationwide have prohibited their employees from official travel to Colorado, and several conventions have cancelled or are threatening to cancel their reservations in Colorado.<sup>38</sup> The effect of the potential economic boycotts remains to be seen.

#### Constitutional Law and Gay and Lesbian Rights

The most celebrated case involving homosexuality and the U.S. constitution is undoubtedly **Bowers v. Hardwick.**<sup>30</sup> A less well-known precursor to **Bowers** was **Doe v. Commonwealth's Attorney**, which upheld Virginia's sodomy law against a challenge brought by two gay men.<sup>39</sup> The Supreme Court affirmed the lower court ruling without hearing argument.<sup>39</sup> The Georgia statute at issue in *Bowers* made consensual sodomy a crime whether the participants were married, heterosexual or homosexual.<sup>30</sup> A married couple originally part of the suit were dismissed from the suit in the lower court as lacking standing.<sup>30</sup> The case was viewed by the Supreme Court as an attempt to "find" substantive due process in the Fourteenth Amendment.<sup>30</sup> The Georgia attorney general admitted he would not pursue prosecution of married couples or heterosexuals under the statute.<sup>30</sup> While this would appear to make the statute unconstitutional as applied, a majority of the Supreme Court failed to see the statute in those terms:

... respondent would have us announce [a] fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. ... [The constitution does not] extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. ... Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.<sup>30</sup>

Chief Justice Burger used even stronger language in his concurring opinion:

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in *Judeo-Christian moral and ethical standards.*... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching. (emphasis mine)<sup>30</sup>

The dissenters in the case voiced strong objection to the majority's definition of the right at stake in the case:

This case is no more about "a fundamental right to engage in homosexual sodomy" as the Court purports to declare, than *Stanley* was about a fundamental right to watch obscene movies. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." ... [B]efore Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians." (emphasis mine)<sup>30</sup>

In spite of the lack of rights afforded to homosexuals under Fourteenth Amendment due process, other constitutional amendments may be found to contain protections which would include homosexuals. Justice Powell, in his concurrence in *Bowers* noted that he thought respondent might have had an Eighth Amendment claim due to the harsh prison sentence of 20 years for one act of sodomy.<sup>30</sup>

The other side of the Fourteenth Amendment, equal protection, is generally assumed to be based on "immutability" in conjunction with a "discrete minority."<sup>40</sup> To this point, homosexuals have not been found to meet those criteria. Yet other groups not meeting the *Carolene Products* criteria have been protected under the Fourteenth Amendment's equal protection provision. Two specific instances are alienage<sup>41</sup> and illegitimacy<sup>42</sup>— neither of which is any longer "immutable." In light of the current Court's attitude toward homosexuality as being against decency and tradition, however, this is not the most promising avenue. Science may not be much help here, either, as it seems that at virtually the same time that the "cause" of sexual orientation is identified as biologically occurring, the "cure" will also be identified. In other words, any immutability offered by scientific research may be fleeting, at best.

Surprisingly, one of the more promising areas of potential protection of homosexual rights seems to be the First Amendment's Establishment Clause and Free Speech Clause. To the extent anti-gay laws are based either explicitly or historically on religious values (see emphasized excerpts from *Bowers*, above), the laws are subject to attack under the Establishment Clause. The argument will be especially strong in a situation where the religious values are the <u>sole</u> basis for the law. Additionally, California recently held in *Collins v. Shell* that open homosexuality is protected political speech under the California constitution.<sup>43</sup> The *Collins* case involved a gay

man who was fired after his sexuality became common knowledge within his employer's company.<sup>43</sup> The court noted that "coming out" had become a political act of some significance in recent years. As a political act, the court found that the status of Collins as a homosexual was protected under California's constitution.<sup>43</sup> The *Collins* case indicates that as the gay and lesbian rights movement becomes politically cohesive and recognized, the same sort of argument might be successfully brought under the First Amendment of the United States constitution. Ironically, this would mean that if an open declaration of a person's sexuality is seen as a political act or speech, it might be afforded more protection than the private consensual expression of that same sexuality.

#### Conclusion

Science is proceeding at a rapid pace toward scientifically identified factors in genetic and cellular predestination of various traits, possibly including the trait of sexual orientation. At the same time as this scientific progress is being made, "traditional" statutory discrimination continues in existence in a significant number of states, and in some cases is being <u>expanded</u> to include private sexual activity never before prohibited by law. At least two states have experienced backlash to attempts to provide gays and lesbians equality under the law. Current U.S. constitutional law supports states' rights to intervene in and regulate private, consensual homosexual conduct. Some change is state laws may come about under state constitutions, but the effectiveness and reach of state constitutional provisions remains to be seen.

### IV. The Human Genome Initiative and Ethical Constructs for Evaluating and Incorporating New Technologies

### The Human Genome Project

The Human Genome Initiative (the Project) is based at Cold Spring Harbor, former home to the Eugenics Record Office, but utilizes research facilities nation and world wide. The main stated purpose of the Human Genome Initiative is the analysis of the structure of human DNA.<sup>44</sup> The Project has identified five-year goals in the following areas: Mapping and sequencing the human genome; mapping and sequencing the genomes of model organisms; data collection and distribution; ethical, legal, and social considerations; research training; technology development; and, technology transfer.<sup>44</sup> An encouraging element of these goals is the specific place afforded ethical, legal and social considerations. A negative element of these goals is the fact that the 1-3% of the budget devoted to ethics is viewed as a large commitment—and perhaps rightly so as the Project is the first scientific project to devote any funds to the ethical and social implications of its research.

Even with the allocated funds for ethical considerations, however, the Project is a political entity reliant on government funding. In 1988 the U.S. Government's Office of Technology Assessment reported on the potential of the Project in language which seems to come directly from the "old" eugenicists, Davenport and Laughlin:

Human mating that proceeds without the use of genetic data about the risks of transmitting diseases will produce greater mortality and medical costs than if carriers of potentially deleterious genes are alerted to their status and encouraged to mate with noncarriers or to use artificial insemination or other reproductive strategies. (emphasis mine)<sup>45</sup>

Assuming the Project's ethicists have the history of the early eugenics movement firmly in mind, they will also have firmly in mind that their 1-3% is from a budget funded by a government with very definite ideas about the potential application of the technologies being developed.

The government has been afforded ever greater intrusion into reproductive choices through the funding of health care, and there is little reason to predict that the government will be any less intrusive in the area of federally funded genetic testing and counselling. The possibility of gene surgery or therapy being applicable to a fetus at various stages of development also raises like never before the possibility of a scientifically and governmentally constructed (and defined) populace. As James Watson, the co-discoverer of the structure of DNA and head of NIH's Office of Human Genome Research, has said, "We can have at our disposal the ultimate tool for understanding ourselves at the molecular level. ... We used to think our fate is in our stars. Now we know, in large measure, our fate is in our genes."<sup>5</sup> And to a great extent, our genes are in the control of the government.

Genetic research in recent years has already resulted in the location of gene sites for cystic fibrosis and Huntington's disease. At this point, however, carriers can be identified, but no one can be cured. Serious ethical and social concerns regarding testing for incurable conditions have been recognized by the ethics board of the Project, but solutions have not yet been worked out.<sup>44</sup> As the head of the Project's ethics board, Dr. Nancy Wexler, put it, "When you think of yourself as a carrier [of a trait that has no treatment], psychologically it has an impact.<sup>313</sup> (Dr. Wexler is from a family with Huntington's disease in its ancestry.)<sup>13</sup>

The need to deal with the ethical considerations has been recognized. The next step is to identify or develop an ethical construct to employ in evaluating the ethical issues raised by the Project. The Nuremberg Code's basics of informed consent, scientific validity of the study, and a balancing of risk and benefit are only a beginning point in the identification of a workable ethical construct.

# Possible Ethical Constructs for Dealing with the New Biology

Laurence Tribe, in his 1973 article Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality, suggests that traditional analysis and evaluation techniques are inadequate because with reproductive technology we have reached the "fourth discontinuity" (the first three were the Copernican revolution, Darwinism, and Freudian psychology).<sup>20</sup> Tribe urges an ethical construct which allows us to view developing technologies as a part of ourselves, rather than as a phenomenon happening outside ourselves.<sup>20</sup> In recognition of the pace of technology outstripping our ability to deal with all aspects of that technology, Tribe states:

Whatever one's perception of where the threads originated and how they have been woven together, the emerging pattern has been unmistakable: an increasingly shared sense that our society's technological capabilities have moved out of phase with our capacity to understand and direct their development, to humanize and contain their impact, and to integrate their evolution with our cultural and natural lives.<sup>20</sup>

Tribe recommends that the way to integrating technology with ourselves is to recognize that our relationship with technology is a subject-object relationship in which the "act shapes the actor no less than the actor chooses the act."<sup>20</sup> Tribe's ethical evaluation would assume the personal aspect of all developing genetic technologies, and would not, for example, allow the question of whether a life is worth living to be disposed of as "need not be addressed here."<sup>15</sup> Specific questions of life and values would always be addressed as inextricable from the technology itself. Tribe's analysis would be founded on the following three principles: a fluid and reciprocal notion of personal and communal identity; recognition of human existence as one in which wanting and knowing are integrated facets of a common reality; and, rationality that is more personal and more deeply rooted in the life history of the individual.<sup>20</sup> Tribe views this construct as an "organic shaping of an inseparable triad consisting of people, tools, and values as the three define and constitute one another over time."<sup>20</sup>

An attractive feature of Tribe's construct in relation to gays and lesbians is the emphasis which is placed on personal identity and individual history. This emphasis would allow for greater individual freedom against the entrenched "traditions" so deeply rooted in state and constitutional law. Tribe's suggested construct also allows individual input into the focus, goals and implementation of new and developing technologies.

Michael Shapiro, in Who Merits Merit? Problems in Distributive Justice and Utility Posed in the New Technology, sees our technological decisions as based on notions of distributive justice already in place in our society.<sup>46</sup> Shapiro envisions a future world in which the "haves" become increasingly monopolistic over genetic engineering, and gaps between the classes become too wide to be bridged.<sup>46</sup> As the "haves" distribute to

themselves economically and socially attractive traits, they gain more wealth and status, which leads to more "attractiveness," etc.<sup>46</sup> Shapiro finds protection against this cycle in the U.S. Constitution's First Amendment guarantee of freedom of expression. For Shapiro, mentation inevitably precedes expression, and therefore cannot be altered.<sup>46</sup> To the extent, then, that genetic manipulation affects mentation, it would not be allowed under the constitution.<sup>46</sup> "In general, any technological means for significantly modifying intellectual and indeed any mental functioning may, by affecting one's very capacity for thought and feeling, profoundly influence expression and communication" and presumably should therefore be restricted or prohibited.<sup>46</sup>

Shapiro's construct is unpersuasive in that it imposes so narrow a reading of the First Amendment that virtually all genetic and cellular research would come to a halt. Research into the human brain, its development and functions is in its infancy, and we do not yet know with any certainty whether particular applied genetic technologies "affect" mentation. Under Shapiro's construct, we would never know because research would have to be prohibited in order to err on the side of protecting freedom of expression. Shapiro's argument is further weakened by the recent debates over the extent of the right to freedom of expression. Specifically as applied in the context of gay and lesbian rights within the new biology, freedom of expression has traditionally afforded little or no protection of gay and lesbian rights.<sup>7</sup>

Norman Fost notes at the outset of his analysis the difficulty in distinguishing between pure science and technology. "The distinction blurs as the interval between basic and applied research narrows."<sup>47</sup> Fost also notes difficulties in the prohibition of some areas of research from immediate application, the harm caused by suppressing research, and the continuing attempts to impose a false, "value free" framework on developing technologies. In relation to this last difficulty, Fost says:

No activity, none, is value-free. Scientists engage in research for a variety of self-serving reasons, some of them quite innocent, some laudatory, some corrupt. Just as those who would restrict science often do so for ideological reasons, so do governments support science, in general or in particular areas, for political and ideological reasons.<sup>47</sup>

The evaluative construct suggested by Fost is based initially on the simple directive of the Hippocratic oath: First, do no harm.<sup>47</sup> Fost believes doing harm is definitively worse than failing to do good.<sup>47</sup> Fost would include a multi-disciplinary approach to evaluating developing technologies. Finally, Fost would prevent only those with a vested, i.e., monetary, interest from having the sole decision making authority.<sup>47</sup>

Fost's approach is a flexible and inclusive one. To the extent it encourages a multi-disciplinary approach, gay and lesbian rights are afforded protection from a purely clinical and/or governmental decision about applications and development of technologies. The prohibition of vested interests controlling all decisions is an additional protection for gay and lesbian rights. Fost is not explicit regarding his definitions of "harm" and "good," but as long the "do no harm" facet of his analysis is not too restrictive of research and application, his suggested construct appears workable.

#### Preferable Ethical Construct

The preferable ethical construct appears to be a combination of those proposed by Tribe and Fost. As stated above, Shapiro's suggested evaluative scheme is too limited. From Tribe, apply all three of his values of identity, human existence and rationality. Tribe's definition of these values is a fluid and adjustable one capable of being fitted to new situations and technologies as they develop. Add Fost's restrictions on decision-making and application in order to prevent Tribe's flexibility from being abused or controlled by science and government without the input of other disciplines and the general public. The Project already has a multi-disciplinary team on its ethics board, but has not yet identified a specific evaluative construct which it will be utilizing.<sup>44</sup>

The Tribe-Fost construct will protect gay and lesbian rights by opening technological development to the individual and community interests of the non-scientists, as well as by preventing complete governmental control

over the direction of research and development. Adding this construct to the basic Nuremberg Code requirements will provide adequate protection against unwarranted technological intervention not only in the lives of gays and lesbians, but in all our lives.

#### Conclusion

The science of eugenics originated at the same time the industrial revolution was marking irreversible progress in human civilization. Eugenics, in its time, was viewed as a moral and positive direction for leading nations to take. Positive support of eugenics occurred most strongly in both America and Germany. In retrospect, we can see that eugenics was a pseudoscience which advanced political ideologies at the expense of the socially disfavored. Among the socially disfavored classes which were persecuted in the name of eugenics were gay men and lesbians—a fact which is still not widely known some forty years after the end of World War II.

The new biology being developed today is a continuation of the science which began its rapid, and in some ways uncontrolled, development with the industrial revolution. Included in the range of research focus of the new biology is the trait of sexual orientation. As certain sexual orientations, namely gays and lesbians, are currently criminalized in numerous states and legally left out of the United States Constitution, it is in the best interest of the gay and lesbian community to remember history and prevent possible future persecution in the name of the latest favored science.

The best way to prevent the repeat of atrocities which earlier in this century resulted from the exclusive collusion of science and government is to put in place an ethical construct which can be used to evaluate developing and developed technologies and their applications. The ethical framework should emphasize personal identity and individual history, in addition to seeking interdisciplinary input. An important aspect of the evaluative process should be the recognition that our technologies are inextricable from the fabric of who we are culturally and socially. Ethical evaluation should also ensure that the decision making process is not controlled by nor limited to those with vested interests in the technology or its application. An ethical framework such as the one suggested should adequately protect not only the interests of people who identify as gays and lesbians, but the interests of all people, while ensuring that research is not unnecessarily impeded.

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# **Timeline A:** Eugenics Timelines

America:

Anton						
	1875	1883	1900	1910	1924	1931
	The Jukes Study	Galton coins tern "eugenics"	n Mendel Rediscovered	ERO at Cold Spring Harbor Drs. Davenport and Laughlin	Johnson Immigration Restriction Act—Jews genetically Inferior, per Laughlin	30 states have invol. steril. laws
<u>Germ</u>	any:					
	lago's Rassenhyglene Drs. Schallmayer and Ploetz	-   1908 Miscegenation outlawed in SW African colonies	1920 Lives Unworthy to to be Lived, Prof. Hoche	1933 Nazis rise to power. Eugenic Sterilization Law is passed, based on Dr. Laughlin's "Model Steril. Law." Hirschfeld's Institute is raided and destroye	I 935 P. 175 amended and reissued. Jews are deprived civil rights and citizenship.	1941 Extermination camps in full operation
Intern	ational Interaction:		1			
	i 1929 International Congress of Eugenics. Dr. Davenport warns Mussolini that not		1933-41		2	
			JAMA publishes	The Men with the		
			reports of German euthanasia and	with Pink		
	implementing eugenics is		sterilization efforts, and	is th	e <u>first</u> book	
	unwise, "the danger is enormous"		discrimination against Jewish physicians		iling the rmination of	
					men during WWII	

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# Timeline B: Hardwired Sexuality Timelines

Germany: Hirschfeld

1897 Scientific Humanitarian Committee	1899 First issue of Yearbook for Intersexual		1908 1920-23 Efforts to Hirschfeld outlaw attacked lesblan acts during lect fails		Trial of homosexual ctures mass murderer Haarmaan shocks "decent" Germans		-i 1934-41 Homosexual-rights groups are banned, and in 1935 homosexuality is outlawed. Hirschfeld's research is used against gays. Mauthausen is established for detention and extermination of gays.		
nerica: Recent F 1962 ALI/MPC recommends decriminalizing consensual private same- sex activities between adults	Stonewall Riots generate the popularized movement for gay and lesbian rights. Sodomy laws are successfully challenged. The movement gains strength through the end of the 1970's	 1973 APA	1979-80 AIDS appears, but is not yet named. "AIDS" and "gay plague" hit the popular media at about the same time.	S.Ct. Invalid		betweer		1991 LeVay. Homosexual mass murderer Dahmer shocks America.	¦ 1992 OR anti-gay legislation fails; CO anti-gay legislation passes. Sodomy remains a crime in 23 states and DC
		evention	ormonal of homosexuality. J's fail to confirm th		¦ bry regarding lest	bianism			

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