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EQUALITY FOUNDATION v. CITY OF CINCINNATI: INVISIBILITY AND IDENTIFIABILITY OF OPPRESSED GROUPS

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This Article examines how minority groups, particularly "invisible" minorities and those groups' members, can be identified. The Article discusses a recent appeals court ruling reinstating a Cincinnati amendment, passed by referendum, which prohibited protection from discrimination on the basis of sexual orientation.[1] A key claim of the ruling was that sexual orientation minorities are "unidentifiable."[2]

This Article argues that the court's reasoning fails. There are many cases of paradigm minorities where individuals may not be recognizable on sight. Gay and lesbian persons are "identifiable" if identifiable is defined clearly. The Article presents an account of the nature of oppressed groups that see their identity as determined not so much by apparent features as by how society delineates those groups.

Questions whether someone is a member of an oppressed group and therefore merits protection from discriminatory treatment focus on two issues: (1) whether the group is indeed oppressed, which can mean either that the group is not treated badly at all or that any bad treatment is deserved and therefore not oppressive, and (2) how membership in that group can be identified, or what counts as belonging to the group.

The May 1995 ruling by the United States Court of Appeals for the Sixth Circuit reinstating the Cincinnati charter amendment[3]

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1. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995).

2. *Id*. at 267.

3. *See infra* note 5.

prohibiting any protection of sexual orientation brings these issues sharply to the forefront. Attention to this ruling and problems with its reasoning will be helpful in several ways. First, the ruling mirrors fairly common popular arguments about rights and oppressed groups.[4] Second, confusion in the opinion shows the need for a clearer, subtler analysis of oppressed groups and membership in oppressed groups. Third, the holding demonstrates that federal judges can be confused and reason so poorly that minority groups can place only limited trust in the judiciary.

In November 1993, voters in Cincinnati passed (by sixty-two to thirty-eight percent) an amendment to the city charter prohibiting the adoption by the city of any measure that "creates a 'minority or protected status' on the basis of sexual orientation" and nullifying any existing protections of that sort.[5] In August 1994, a district court found the amendment unconstitutional for a number of reasons, including that it infringed on a "[f]undamental [r]ight to [e]qual access to the political process."[6] This court's findings of fact included a long history of "irrational and invidious discrimination" and the continuous targeting of gay and lesbian people for discrimination and violence.[7] The district court claimed that homosexuals are a "quasi-suspect class."[8] Legislation applying to such a group requires "heightened scrutiny" to be sure it is not based on prejudice or stereotype, in order to meet the equal protection clause of the Constitution.[9] Examples of "quasi-suspect" or "semi-suspect" categories that have been recognized in the past include gender and illegitimacy.[10] Laws involving "suspect" classes (for example, race, alienage, national origin) must pass stricter scrutiny: they have to be

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4. *See, e.g.*, ROGER J. MAGNUSON, ARE GAY RIGHTS RIGHT? (1990). Magnuson does not focus so much on difficulties of identifying gay and lesbian persons as he does on reasons for why there should be no protection of them.

5. *See* David W. Dunlap, *Court Upholds Anti-Homosexual Initiative*, N.Y. Times, May 14, 1995, at 18. The exact language of the measure was: "The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with a basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect." *Equality Foundation*, 54 F.3d at 264.

6. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 430 (S.D. Ohio 1994).

7. *Equality Foundation*, 54 F.3d at 265.

8. *Equality Foundation*, 860 F. Supp. at 440.

9. *Equality Foundation*, 54 F.3d at 265.

10. *Id.* at 266.

drawn as narrowly as possible to achieve compelling state interests.[11] Legislation covering other classes does not require special scrutiny to meet equal protection requirements.[12] It must only meet a "rational relationship" test. That is, the legislation must be related to a legitimate state interest.[13]

The court of appeals reversed the district court's holding. The Sixth Circuit held that the Cincinnati Charter amendment passed in the referendum did not impede homosexuals' access to the political process but only made futile lobbying the City Council for laws prohibited by the amendment.[14] The court asserted that homosexuals are not a "quasi-suspect" class and cited various court rulings, including *Bowers v. Hardwick*, which have permitted legal distinctions between homosexual and heterosexual persons.[15] Furthermore, the court held that homosexuals are not an "identifiable class" of citizens, but are instead defined by their conduct, which is not constitutionally protected.[16] Finally, the court held that the amendment rationally relates to community interests. Those interests included not suffering legal punishment for not wanting to associate with homosexuals, freedom from regulation in social and economic conduct with regard to "deeply personal choices and beliefs," and the saving of tax money by not having to pay to execute protective laws.[17]

Though the Sixth Circuit's holding was subsequently overturned by the U.S. Supreme Court,[18] for the purposes of this analysis, the key argument of the case is that homosexuals are not an "identifiable class." Underlying this ruling seems to be the claim that, even if homosexuals were identifiable as a class, homosexual rights are not in enough danger to require protection. On this the appeals court said[19] that even if sexual orientation is fixed and not under the control of individuals, "[t]he reality

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 269.
15. *Id.* at 266.
16. *Id.* at 267.
17. *Id.* at 270.
18. This ruling was significant in several ways. It was the highest level court ruling on initiatives such as this one. In addition, only three months after it was issued, Westlaw showed 108 citations of the ruling in other cases. Requests for the U.S. Supreme Court to review the ruling were filed in August 1995. On June 17, 1996, the United States Supreme Court vacated the judgment of the 6th Circuit, and remanded the case "for further consideration in light of Romer v. Evans. . . ." Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 116 S. Ct. 2519 (1996).
19. The Sixth Circuit opinion was written by Judge Robert Krupansky, one of three judges on the panel. There are no dissenting opinions.

remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts."[20] Those persons having a homosexual "orientation" simply do not, as such, constitute an identifiable class. Many homosexuals successfully conceal their orientation.

> Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]"[21]

At the outset I note that the court's claim that homosexuals do not constitute an identifiable class contradicts the general consensus. Even those who are anti-gay regard gay and lesbian persons as members of a group, a minority group, which can be identified in some way. When polls are taken concerning the public's attitudes toward homosexuals the questions presume that people have some sense of who gay and lesbian people are, even though identifying particular individuals may not be easy.

The reasoning of the appeals court fails because the criteria used for identifiability are problematic in other areas, including some cases of race, religion, and nationality and probably all cases of illegitimacy. Some gay and lesbian people are identifiable without declaring their orientation or displaying affection. The court's understanding of what it is to be in a minority and be identifiable involves fallacious reasoning and a misunderstanding of the concept of minority, particularly of a minority that is oppressed and vulnerable to discrimination. Finally, there are dangers in the court's erroneous suggestion that, since people can conceal their gay or lesbian identity, protection of the sort sought is not warranted.

Consider examples falling in what the court would consider paradigms of classes requiring some level of increased scrutiny. First, the example of race: Gregory Williams, in his recent book *Life on the Color*

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20. *Equality Foundation*, 54 F.3d at 267.
21. *Id.* (alterations in original).

Line, writes about his experience finding out at the age of ten that his father had been passing for white, and that because his grandmother was black, he is black.[22] In appearance white, once his family background was known, he right away "crosse[d] the line." By counting as black by society's standards, Williams is a clear example of someone who, according to the court's understanding, merits protection. Nevertheless, he is not identifiable "on sight." He is identifiable only if his family background is revealed.[23]

Adrian Piper, another light-skinned mixed race person who, by American society's standards (the infamous "one drop" rule) would be regarded as black, writes:

> What joins me to other blacks, then, and other blacks to another, is not a set of shared physical characteristics, for there is none that all blacks share. Rather, it is the shared experience of being visually or cognitively *identified* as black by a white racist society, and the punitive and damaging effects of that identification.[24]

Thus, identifiable here is not restricted to "on sight." Identifiable includes the judgments and reactions of others, including the reactions of a racist society.

Other members of paradigm minority groups are not easily identifiable. Judaism may be a religion, but being Jewish, in terms of the law, often seems regarded as close to race. Many individual Jews are not easily identifiable. Usually people are identified as Jewish by physical features or a surname typically regarded as Jewish.[25]

That one is an alien may not be easily known. For some aliens, like Canadians, appearance or accent are not clear markers of nationality. Nevertheless, being an alien is regarded as a suspect class. Illegitimacy is

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22. GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995). He discusses the revelation in Chapter 4.

23. A book about a black family in which some members passed for white and some did not, notes: "Some geneticists have said that 95 percent of 'white' Americans have widely varying degrees of black heritage." SHIRLEE TAYLOR HAIZLIP, THE SWEETER THE JUICE 15 (1994).

24. Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4, 30-31 (1993).

25. The clues used for speculating about such identification vary in different contexts. In Poland during World War II, circumcision in a male was regarded as conclusive evidence of being Jewish since in Poland only Jewish men were circumcised. Other clues that Polish Jews seeking to pass as Christian had to be very careful about included certain speech patterns and intonations, a lack of familiarity with the Catholic religion, and a fondness for onions and garlic. *See* Nechama Tec, *Sex Distinctions and Passing as Christians During the Holocaust*, 18 E. EUR. Q. 113, 117-18 (1984).

a category generally regarded as "quasi-suspect"[26] and is not visible at all. Illegitimacy is marked only by family history and the history surrounding an individual's birth. Further, while people with disabilities are regarded as a class that merits protection, there are many disabilities which are not identifiable on sight, including mental illness, seizure disorders, learning disabilities, and behavioral disorders.

Religion is not specifically included in examples of categories requiring heightened scrutiny. Perhaps this is because freedom of religion is so basic in the Constitution that legislation based on religious categories is inconceivable. Though protection of people from discrimination on the basis of religion is widely assumed, in general one's religion is not at all visible, or knowable "on sight." Religion, then, is another basic counterexample to the court's reasoning. Unless I tell people about my religious beliefs, they are reduced to guessing from conduct, such as my participating in a religious service, wearing certain religious symbols, engaging in certain activities, or displaying gestures like rolling out a carpet, facing toward Mecca and praying. Yet protection for religious minorities is basic to our constitutional scheme.

Before examining what lies at the heart of the appeals court's mistake in understanding what it is to be a member of an oppressed group that merits protection, let us first note that there are ways in which some gay and lesbian people are identifiable. First, there are those whose physical appearance, dress, and mannerisms "give away" that they are gay or lesbian.[27] These people are identifiably gay or lesbian "on sight." Perhaps under its reasoning, the court should be willing to offer protection to this group. Second, because people are often interested in a person's sexual orientation, people often do figure out whether someone is gay or lesbian. Sometimes it may be on the basis of mannerism or dress, but often it is on the basis of whether the person is married,[28] whether the person is dating people of the opposite sex, and whether the

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26. *See* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 947-48 (1986). This view is not settled in the courts. While there has been great concern about this being outside a child's control, and a case of punishing a child for the parents' "sin," some court decisions have allowed it to be used because of concerns of having predictable and orderly passing on of estates, and also to act as a kind of moral pressure.

27. It should be noted that sometimes people who "look" gay or lesbian are not, and sometimes people are thought to be gay or lesbian because they are with gay and lesbian people, etc. Such people are sometimes victims of discrimination or hate crimes. Therefore, some human rights legislation and hate crime legislation covering sexual orientation adds "or perceived to be . . ." to its language.

28. A person of my acquaintance was recently told at an informal social gathering in the suburban neighborhood in which he owns a house: "If you're not married by the time you're 30, it'll look funny."

person is seen with known gays and lesbians. People identify gays and lesbians absent conduct of the sort the court mentions, self-identification or homosexual displays of affection. Many of the people who suffer discrimination on the basis of sexual orientation are people whose gay or lesbian identity has been determined absent such conduct. We could, following Piper, call this cognitive, as distinguished from visual, identification. So the court on the one hand is failing to acknowledge various ways class membership is identified and on the other hand has too strict a sense of identifiability.

With regard to the court's emphasis on the visibility of group membership it should be noted that once someone has been identified as gay, or a mixed-race person identified as black, those who know tend to "see" him or her as gay or black, particularly those who are concerned to know in terms of carrying out discrimination. Categories of oppression function so that people are often "reduced" to them. Once such a category is known to apply to a person, that becomes his principle identity and attention is paid to little else about him. Hence the desire of some members of such minority groups to pass or claim that they are "not really" members, a strategy which may work temporarily, but which is often ineffectual and in the end helps to entrench oppression.

At the heart of this problem is, I believe, a confused and mistaken understanding of the nature of oppressed groups in our society. Some minorities include many people who are readily identified as members of that minority. Race and sex or gender are usually good examples. The court's reasoning would seem to suggest that whatever enables one to identify, particularly visually, someone as a member of the group is the "essence" of the minority group. But this is not true. If one considers the history of how race has been treated in this society (the "one drop" rule),[29] it is clear that looking black is not at all a sine qua non of being black. Consider the experiences of Adrian Piper and Gregory Williams. Piper notes that a significant percentage of Americans are, in fact, mixed race, a fact that most are unwilling to face.[30]

Social psychologist Kurt Lewin has a helpful analysis of what it is to be a member of an oppressed group or "an underprivileged minority

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29. In American custom, anyone who has any African ancestry is regarded as black. To be legally identified as Native American one must, at the minimum, have a Native American great grandparent (be 1/8 Native American). *See* Piper, *supra* note 24, at 18.

30. *See* Piper, *supra* note 24, at 19-20. She notes "The ultimate test of a person's repudiation of racism is not what she can contemplate *doing* for or on behalf of black people, but whether she herself can contemplate calmly the likelihood of *being* black."

group."[31] His key example is Jewish people. He notes that there are not any similarities shared by all Jews, which generates debate about what it is to be a Jew, and the attempts by those unhappy with being regarded as a member of an often stigmatized group to "not really be one of them." He claims interdependence determines group membership.

> It is not similarity or dissimilarity that decides whether two individuals belong to the same or to different groups, but *social interaction or other types of interdependence*. A group is best defined as *a dynamic whole based on interdependence rather than on similarity.*[32]

He refers to two kinds of interdependence. One kind of interdependence consists of cohesive forces among members of the group. This exists in some oppressed groups. But another kind of interdependence comes from the outside, what we might call "external" interdependence. There is "the boundary which the majority erects" keeping the minority in its underprivileged status, usually as a form of scapegoating to deflect attention away from other problems.[33] Some minorities are made up at least in part of individuals who have few or no relationships with each other and thus lack an internal cohesion. Nevertheless, the majority keeps it together from the outside. "[I]t is not similarity or dissimilarity of individuals that constitutes a group, but interdependence of fate."[34]

This seems to be similar to the analysis of membership in an oppressed group underlying Adrian Piper's comment that what joins her to other blacks is "the shared experience of being visually or cognitively *identified* as black by a white racist society," and the bad effects of that identification.[35] So, regardless of whether I identify with other gay and lesbian people, my fate and their fates are related. The way the society regards us, and the harmful things it might do to us, make us members of the same group.

Some of the ideas developed by social constructionism may be helpful here. Social constructionists can claim that categories of groups that are stigmatized may be particularly good examples for their theories. Rather than existing as givens, such groups are identified, or

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31. *See* Kurt Lewin, *When Facing Danger*, *in* RESOLVING SOCIAL CONFLICTS 159 (Gertrud Weiss Lewin ed., 1948); *see also* Kurt Lewin, *Bringing up the Jewish Child*, *in* RESOLVING SOCIAL CONFLICTS, *supra* at 169.

32. *See* Lewin, *Bringing up the Jewish Child*, *supra* note 31, at 184.

33. *See* Lewin, *When Facing Danger*, *supra* note 31, at 164.

34. *See id.* at 165.

35. *See supra* note 24, at 30-31.

"constructed," by the society. In discussing the issue of how to distinguish prejudice from principle with regard to how disapproval of groups occurs (for instance, blacks as compared with burglars or child molesters), constitutional law theorist Laurence Tribe notes, "people *draw* lines, attribute differences, as a way of ordering social existence—of deciding who may occupy what place, play what role, engage in what activity."[36] Society "constructs" those categories, draws those distinctions. Clearly there is in our society a category of "homosexual," and people are put in that category and quite often discriminated against and treated poorly because they are in that category.

Perhaps such categories are partly independent of the construction of the society. They rely in part on "objective" characteristics such as skin color, ancestry, and sexual orientation. The socially constructed aspect has to do with particular ways of drawing distinctions, like the "one drop" rule in America, and the value judgments attached to such distinctions. If we analyze membership in an oppressed group in this mold, sexual orientation minorities fit. A heterosexist and homophobic society certainly identifies people as such with terms like "gay" or "lesbian" and sometimes vilifies with terms like "dyke" or "queer" on the basis of a variety of information. And society does this even though gay and lesbian groups are not internally cohesive: the "out" gay man, the apolitical gay man in a gay bar, and the very closeted gay man who has never been in a gay space are all "faggots" to the homophobe. Gays and lesbians, as a group, seem to be as "discrete and insular," to use the legal terms the appeals court uses, as Jews in all their variety.[37]

The concern about the fairness of using these categories to make distinctions in how people are treated is what underlies the concern in law about "suspect" and "quasi-suspect" or "semi-suspect" classes. The law recognizes that there are societal stereotypes that are questionable, or wrong, and therefore any laws that use such categories must be examined and justified carefully. It is hard to imagine any thoughtful and educated person not recognizing that such an analysis should apply to the situation of sexual orientation minorities, as well as to the traditionally recognized minorities.

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36. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 15 (1985).

37. It might be claimed that ancestry is a necessary condition for being Jewish and there is nothing comparable to that for sexual orientation. However, one can become Jewish by choice, by conversion. So ancestry, while a common condition of being Jewish (and a sufficient one, given the way the concept operated for the Nazis, and how it seems to operate in our society), is not a necessary condition.

Finally, the court's reasoning appeals to "the closet" as a reason for not regarding gay and lesbian people as an identifiable class and therefore not needing protection against discrimination. "Many homosexuals successfully conceal their orientation," the court says.[38] This is another point at which the court's reasoning mirrors a kind of argument common in the society: "You can hide; just don't flaunt your sexual orientation and everything will be fine. If you give yourself away and get into trouble then it's your fault."

By using the closet, many gays and lesbians have avoided discrimination that might otherwise occur. At certain times, not so long ago, most simply had to. But this is a strategy used to avoid harm, not to escape membership in the group. Light-skinned blacks and Jews not readily known as Jews have also passed. This does not take them out of the class in question. Furthermore, passing or being in "the closet" comes at a cost.

First of all, when one passes intentionally[39] it is a form of lying. Therefore, this court is claiming that one should lie, and that if you have by your "conduct," through what you say or do, revealed your sexual orientation, you have "asked for" whatever consequences follow. A court's toleration of lying for self-protection in situations like this is understandable. But the court's advocation of lying in place of supporting protection is astounding. Support for "the closet" is advocation of dishonesty.

The closet can prevent people from pursuing their legitimate rights.[40] The victim of a gaybashing may not report a criminal battery to police for fear of opening the closet door. Further, since the level of

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38. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995).

39. By intentionally passing I mean things such as avoiding discussing certain topics (one's home life, for instance), changing the gender in an account of a date, etc. To be sure, there is a presumption of heterosexuality that operates in our society (like the presumption of whiteness as long as one does not look dark), and the individual in general does not have a responsibility for the presumptions of others. However, once one comes to know someone the issue of how much one will reveal quickly arises and there is less presumption and more inference based on information about the person.

40. When her partner, Sharon Kowalski, was seriously injured, Karen Thompson had to reveal the fact that both of them were lesbians in order to pursue what she believed was her right to take care of Kowalski. At one stage of her ultimately successful fight, a judge who denied Thompson guardianship of Kowalski ruled, that "Thompson had violated Ms. Kowalski's privacy by disclosing her sexual orientation," Nadine Brozan, *2 Sides are Bypassed in Lesbian Case*, N.Y. TIMES, April 26, 1991, at A12. This seems to be a perfect example of how gay men and lesbians cannot be said to have equal protection under the law unless discrimination on the basis of sexual orientation is prohibited.

personal relationships is determined by how much about themselves a person will share, having to hide sexual orientation interferes with the development of such relationships. Finally, the closet as a strategy for protection from harm will inevitably affect self-respect.

Imagine the court saying that any light-skinned black who lets it be known that she has African ancestry has asked for any trouble she might experience as a result. Or imagine the court suggesting that dark-skinned blacks use skin lighteners, if they were readily available and safe, as a discrimination-avoiding strategy. Here is where the court's nature/conduct distinction breaks down. With regard to very close personal relationships, such as sexual relationships, how can they be separated? In arguing that *Bowers v. Hardwick* was a mistake, and that homosexuality does meet the criteria for at least the heightened scrutiny of a quasi-suspect or semi-suspect class, Laurence Tribe claims that the autonomy and self-definition of homosexual persons is what is at issue here: "The choice about whether to 'come out of the closet' can be of unsurpassed significance to homosexuals, since doing so can entail enormous social and economic disadvantages, while declining to do so can exact an enormous price in fulfillment and self-esteem."[41]

Many gays and lesbians can hide. But this does not make them unidentifiable as a group, and it does not take away their need for protection in a hostile society. What about light-skinned blacks, Jews not easily identifiable as Jews, or members of religious groups? These members of minority groups are afforded constitutional protection without always being identifiable on sight. The appeals court reasoning is outrageous. It concludes that the anti-gay referendum has purposes that "rationally relate" to community interests. Could it be that the real function of this court's decision, as well as the common popular arguments it mirrors, is to keep gay and lesbian people in their "place," as well was the function of many laws concerning Jews in Nazi Germany? It causes one to shudder.

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41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1434 (2d ed. 1988). Tribe notes, with regard to self-definition, "[t]he latter value is of particular importance with respect to lesbians and gay men for whom the mundane aspects of life—such as changing the gender of pronouns when referring to a lover or companion—pose a constant temptation to be false to the self." *Id.*