Articles

The Use of Criminal Sodomy Laws in Civil Litigation

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I. Introduction

Criminal prosecution for sodomy is rare, and state sodomy laws are commonly assumed to be harmless, anachronistic remnants of some earlier, less tolerant era. In the sixteen states in which sodomy is a crime, adults who engage in private consensual sex of any kind are seldom, as a practical matter, in criminal jeopardy. The sodomy laws do, however, have significant impact in the realm of civil litigation on litigants who are lesbians or gay men. While the laws on their face generally outlaw anal or oral sex between people of any gender, they are interpreted to proscribe only gay sex and are invoked in civil cases to justify rulings against gays.

In three critical areas—family law, public employment law, and immigration law—the sodomy laws have been used to disadvantage gay people. A gay father who could provide a financially and emotionally stable home for his son was denied custody because he was determined to be violating state sodomy laws.[1] The child was instead placed with his

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1. *See* Weigand v. Houghton, 730 So. 2d 581, 583-91 (Miss. 1999).

* Indicates page numbering from journal of original publication — 79 Tex. L. Rev. 813 (2001).

mother and stepfather in spite of the fact that the stepfather had been convicted of assault and charged with domestic abuse.[2] An accomplished attorney's offer of employment from the state attorney general's office was revoked because she was a lesbian and therefore could be presumed to have violated state sodomy laws.[3] A gay immigrant was denied citizenship because his violation of sodomy law made him morally unfit.[4] In these and other civil cases, sodomy laws continue to have a powerful effect on the lives of lesbians and gay men.

This Article examines the ways in which sodomy laws are used in civil cases and concludes that their use violates equal protection. Though prosecution for sodomy between consenting adults may have survived due process scrutiny,[5] the collateral use of sodomy laws in civil cases against gay litigants fails to comply with the requirements of equal protection. When sodomy laws are used in civil cases, they are not used to regulate or punish a particular form of sexual behavior; instead they are used to express general disapproval of and animus toward homosexuality. Government action that has the purpose of harming a particular group is not consistent with the protections of the Equal Protection Clause.[6]

An equal protection analysis of the use of sodomy laws in civil litigation raises issues that are separate from those raised in an analysis of the constitutional legitimacy of criminal prosecution for sodomy. While much attention has, and should, be given to criminal prosecution for sodomy, little has been said about the less dramatic use of sodomy laws in civil cases. In these civil cases, courts have used sodomy laws as a mechanism to justify hostility toward homosexuality. Government decisions openly based on animosity toward a particular group, such as gays and lesbians, would likely be constitutionally impermissible. Using sodomy laws to accomplish the same result is similarly flawed.

In Part I of the Article, I set forth the history and current status of sodomy statutes. I review their origin, the current language and prohibitions of the statutes, and the present understanding of the constitutional

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2. *Id.*

3. *See* Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997) (en banc) (holding that an attorney's lesbian marriage would create a conflict of interest in enforcing state laws and a loss of public confidence in the office of the Attorney General).

4. *See In re* Longstaff, 538 F. Supp. 589, 591-92 (N.D. Tex. 1982), *aff'd on other grounds*, 716 F.2d 1439 (5th Cir. 1983) (finding that an applicant for citizenship "has the burden of proving his good moral character" and that this applicant had not met this burden due to his violations of the Texas Penal Code related to homosexual conduct and sodomy).

5. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that Georgia sodomy statutes do not violate the constitutional rights of homosexuals because the Constitution does not confer a fundamental right to engage in sodomy).

6. *See* Romer v. Evans, 517 U.S. 620 (1996) ("'[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'") (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in original)).

validity of the statutes when used in criminal prosecutions. This statutory examination reveals that while most are gender neutral, sodomy laws have come to be understood to apply to gay consensual sex acts, but not to the same acts when engaged in by heterosexuals.

In Part II of the Article, I analyze the equal protection standards applicable to government action based on a presumed violation of the sodomy statutes. The invocation of sodomy statutes against gay litigants raises two equal protection concerns. The first is the discriminatory application of the presumption of a violation of the law. Heterosexual litigants who may well be violating the sodomy statute of the state in which they reside are not presumed to be violating that law. Only gay litigants bear the stigma of being presumed sodomy committers. The second equal protection concern is that the connection between a violation of sodomy laws and the issues raised in the civil litigations—adequate parenting, value as an employee, or entry into the country—is hard to find. Without a reasonable relationship between the basis of a classification—in this case those who commit sodomy—and a legitimate governmental goal, the governmental action cannot pass constitutional muster.

In Part III, I apply equal protection standards to the family law, employment law, and immigration cases in which the sodomy laws have been invoked. This application of equal protection standards reveals that the use of the sodomy laws in civil cases cannot be understood as anything other than a means of expressing animus toward lesbians and gay men.

Finally, in Part IV, I analyze whether the enforcement of morality could be a permissible basis for the use of sodomy laws against gay litigants. I conclude that enforcement of morality could probably never be separated from a constitutionally impermissible desire to harm an unpopular group, and that even if it could, the sodomy laws are an inappropriate mechanism to enforce that morality.

II. How Sodomy Laws are Used

A. Development and Present Status of Sodomy Laws

Concern with and prohibition of the consensual sex acts labeled as "sodomy" have varied tremendously both historically and geographically. From ancient Greece to modern American criminal codes, the punishment for sodomy has ranged from the imposition of severe penalties to no sanction at all. The kinds of consensual sex acts included in the concept of sodomy have also varied over time. Tracing the ebb and flow of this regulation and tying these variations to larger cultural and historical developments is an ambitious task not within the scope of this Article.[7]

7. For thorough treatments of the history of the regulation of sexuality, both Foucault and Posner are useful. *See generally* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME ONE, AN

In order to understand the current state of the law, however, it is important to identify its origins and note some of the variations that have occurred.

At the origins of the so-called "Western tradition," the views of classical Athens toward sexuality provide an interesting contrast to our own. While perhaps not entirely approved of, anal sex between men and anal sex between people of different genders was tolerated[8] and oral sex seems to have similarly been of little concern.[9] However, contrary to the assertions of some scholars, Athens was not an uninhibited garden of earthly delights. Aristotle explained that people are ashamed of sexual intercourse with an inappropriate partner, at an inappropriate time, or in an inappropriate place.[10] In the last decades of the past century many scholars argued that Athens was a phallocentric society where "passive sex"—that performed by the partner, man or woman, being penetrated—was degrading.[11] More recently, however, James Davidson has convincingly argued that what Athenians considered degrading was an uncontrolled appetite for sexual pleasure.[12] In any event, the Greeks had no particular interest in from whom—male, female, or oneself—one took one's sexual pleasure.[13] Similarly, while the Romans thought that to be

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INTRODUCTION (Robert Hurley trans., Vintage Books 1990) (1976); RICHARD A. POSNER, SEX AND REASON (1992). While excellent in its scope, Foucault's understanding of Greek sexuality as oriented around the distinction between "passive" and "active" must be questioned in light of the recent work of James Davidson. JAMES DAVIDSON, COURTESANS AND FISHCAKES: THE CONSUMING PASSIONS OF CLASSICAL ATHENS 168-82 (1998) (refuting Foucault's phallocentrist conception of Greek sexuality as "simplistic," "overschematic," and "misleading.")

8. *See* POSNER, *supra* note 7, at 41-72 (noting that "[t]he Greeks tolerated practices that are considered heinous crimes today, including pederasty; indeed apart from bigamy . . . there was little concept of wrongdoing"); Paul Veyne, *The Roman Empire*, *in* 1 A HISTORY OF PRIVATE LIFE 5, 204 (Paul Veyne ed., Arthur Golhammer trans., Harvard Univ. Press 1987) (1985) ("To be active was to be a male, regardless of the sex of the passive partner . . . . Pederasty was a minor sin so long as it involved relations between a free man and a slave or person of no account. Jokes about it were common among the people and in the theater, and people boasted of it in good society. Nearly anyone can enjoy sensual pleasure with a member of the same sex, and pederasty was not at all uncommon in tolerant antiquity. Many men of basically heterosexual bent used boys for sexual purposes.").

9. *See* K.J. DOVER, GREEK POPULAR MORALITY IN THE TIME OF PLATO AND ARISTOTLE 216 n.23 (1974) ("Greek laws did not penalize an unnatural act *per se* but were concerned with the civic status of the participants and with the relationships of which the act was an ingredient.").

10. *Rhetoric*, *in* THE COMPLETE WORKS OF ARISTOTLE 2152, 2204 (Jonathan Barnes ed., 1984); *see also* DAVIDSON, *supra* note 7, at 163-64.

11. *See, e.g.*, K.J. DOVER, GREEK HOMOSEXUALITY 100-09 (1978); DAVID HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 34-35 (1990); EVA KEULS, THE REIGN OF THE PHALLUS (1985).

12. *See* DAVIDSON, *supra* note 7, at 167-82 (rejecting Dover's argument and explaining that Greek terms for a sexual degenerate, "katapugon" and "kinaidos," referred not to a male who was penetrated, but to "some creature, animal or human, male or female, that has sex without restraint").

13. The evidence for and literature on Greek acceptance of homosexuality is overwhelming. *See generally* DOVER, *supra* note 9. As for masturbation, Dover notes that in comedies it is usually associated with slaves, *see id.* at 206 n.2, but this may be because of the obvious lack of sexual partners for those who were either at work or shackled in a small cubicle. Diogenes the Cynic was a big fan of the practice, stating that were he able to assuage his hunger by rubbing his belly, he would do that too. *See* DAVIDSON, *supra* note 7, at 180. Perhaps the clearest explanation of the Roman

sexually penetrated was indeed degrading,[14] and had several other sexual taboos,[15] sex between men was not, in and of itself, considered a particularly bad thing.[16] This relative tolerance waned with the waxing influence of Christianity.[17] As one scholar has explained, "[t]he crime of sodomy originated in ecclesiastical regulation of a range of nonmarital, nonprocreative sexual practices. Nonprocreation was the central offense and the core of the crime."[18] Since the only proper purpose for sexual activity was procreation, a range of sex acts that could not lead to pregnancy was condemned, including oral and anal sex.[19] "'The crime against nature' . . . was not . . . a crime against heterosexuality, but a crime against procreation."[20]

This religious condemnation of nonprocreative sex acts became part of secular criminal law. Evidence of early regulation of sodomy in the Anglo-American legal regime can be found in Blackstone's Commentaries, which discuss "the infamous crime against nature, committed either with man or beast."[21] The infamous crime appears to have included anal sex between men and men, men and women, or any human and an animal.[22]

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attitude toward passive sex comes from Seneca the Elder, who noted that one advocate had defended a freedman accused of being his master's lover with the remark that being the passive partner in anal sex was a "'crime in the freeborn, a necessity in a slave, [and] a duty for the freedman.'" 4 THE ELDER SENECA, CONTROVERSIAE I-VI 431 (M. Winterbottom trans., Loeb Classical Library 1974).

14. *See* Veyne, *supra* note 8, at 202-03

15. For example, for a woman to expose her breasts was considered extremely debauched, as was engaging in sexual intercourse during daytime.

16. *Id.* at 204-05.

17. *See* POSNER, *supra* note 7, at 45-50 (asserting that although Christianity was influenced by both Greek and Roman views on the human body and sexuality, "the contrast between that attitude as formulated by the early Church and the dominant sexual customs of the pagan empire is sharp enough").

18. Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 533 (1992) (citing JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988)).

19. POSNER, *supra* note 7, at 46 ("One may engage in sexual intercourse, but only to preserve the human race. . . . Nonprocreative sex, ranging from masturbation to sodomy to contraceptive intercourse and possibly even to sex with one's infertile spouse, is out; it is necessary for nothing except sexual release, and sexual release is not necessary, since people can live without it.").

20. Hunter, *supra* note 18, at 533.

21. 4 WILLIAM BLACKSTONE, COMMENTARIES *215 (emphasis omitted).

22. William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1012-13 (1997).

> At the behest of Henry VIII, the Reformation Parliament of 1533 made "the detestable and abominable vice of buggery committed with mankind or beast punishable by death." Elizabeth I's second Parliament reenacted the Act of 1533, including a mandatory penalty of death. . . . As applied by the English courts, buggery was understood to include anal intercourse between two men or between a man and a woman (these acts are often referred to as "sodomy") and any sexual intercourse between a human male or female and an animal ("bestiality"). As construed by the English judiciary, the law did not include oral intercourse between humans. Sexual intercourse between women was clearly unregulated by the Act of 1533.

See id. (footnotes omitted).

At the time of the formation of the United States, some states had taken no specific action concerning the criminalization of sodomy but had adopted, along with the rest of the English common law, the offense of sodomy.[23] A few states specifically enacted statutory prohibitions against sodomy.[24] These early prohibitions were vague about what specific sex acts were prohibited and continued to apply to both same-gender and different-gender sex acts.[25]

As state criminal codes developed in the United States during the late eighteenth and early nineteenth centuries, every state eventually adopted laws prohibiting sodomy.[26] These sodomy laws were linked to similar

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23. Georgia adopted the common law of England in 1784. An Act for Reviving and Enforcing Certain Laws Therein Mentioned (1784), *reprinted in* 1 THE FIRST LAWS OF THE STATE OF GEORGIA 290 (John D. Cushing ed., 1981). Maryland asserted its reliance on the common law of England in 1776. 4 WILLIAM SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 372 (1975). Sodomy was a crime under the common law in New Jersey. Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOW. L.J. 173, 176 n.21 (1992). North Carolina had adopted the English criminal statute that prohibited sodomy by 1791. A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 314 (Francois-Xavier Martin publ. 1792). Virginia had adopted the English common law by 1776. An Ordinance to Enable the Present Magistrates and Officers to Continue the Administration of Justice (1776), *reprinted in* 9 HENING'S LAWS OF VIRGINIA 126, 127 (1821).

24. *See* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639-1673, at 83 (John D. Cushing ed., 1977); 1 THE FIRST LAWS OF THE STATE OF DELAWARE 67 (John D. Cushing ed., 1981); THE FIRST LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 250 (John D. Cushing ed., 1981); ACTS AND LAWS OF NEW HAMPSHIRE 1680-1726, at 141 (John D. Cushing ed., 1978); THE EARLIEST PRINTED LAWS OF NEW YORK 1665-1693, at 124 (John D. Cushing ed., 1978); THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 43 (John D. Cushing ed., 1978); THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND THE PROVIDENCE PLANTATIONS 1647-1719, at 142 (John D. Cushing ed., 1977); THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA 49 (John D. Cushing ed., 1981).

25. *See* Eskridge, *supra* note 22, at 1014 (noting that early "crime-against-nature statutes forbade unspecified intercourse between men and women as well as men and men"); Hunter, *supra* note 18, at 534-35 (explaining that laws of the Massachusetts Bay Colony emphasized the characteristics of proscribed sexual acts themselves rather than the gender of their participants).

The philosopher Michel Foucault has asserted that, beginning in the 17th century, sexual regulation underwent a significant change. The focus moved from regulation of permissible procreative behavior in marriage to stigmatizing sexual deviance. The criminal law was called to regulate this deviant behavior.

> There emerged a world of perversion which partook of that of legal or moral infraction. . . . An entire sub-race was born, different—despite certain kinship ties—from the libertines of the past. From the end of the eighteenth century to our own, they circulated through the pores of society; they were always hounded, but always by laws; were often locked up, but not always in prisons; were sick perhaps, but scandalous, dangerous victims, prey to a strange evil that also bore the name of vice and sometimes crime.

1 FOUCAULT, *supra* note 7, at 40.

26. *See* Yao Apasu-Gbotsu, et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526 (1986); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 710 (1997); Hunter, *supra* note 12, at 538; William Rubenstein, *The Stonewall Anniversary: 25 Years of Gay*

laws prohibiting nonprocreative or nonmarital sexual activity such as adultery and fornication.[27] As with their English predecessors, these laws referred to such vague concepts as "carnal knowledge" and "crime against nature" and applied to sexual acts between men and women, men and men, and humans and animals.[28] During this period the sodomy laws were not used primarily against those who engaged in consensual same-gender sexual acts, but instead were used to prosecute nonconsensual sex between either gender.[29]

By the early to mid-twentieth century, some states began to repeal statutes criminalizing consensual sex between adults. Starting in 1961 with Illinois, the movement toward the repeal of sodomy laws began.[30] Illinois adopted the American Law Institute Model Penal Code, which was in draft form at the time.[31] The American Law Institute promulgated a Model Penal Code in 1962 that decriminalized adult consensual sex acts.[32] Over the course of the next two decades, twenty-two states followed the lead of the American Law Institute and decriminalized sodomy and other adult consensual sex acts.[33]

This trend toward decriminalization of consensual sex was consistent with a larger cultural relaxation of the norms of sexual behavior that was occurring both in the United States and in Europe.[34] More tolerant attitudes were expressed toward a range of sexual behavior, and popular culture encouraged a rejection of the more rigid rules of the past and a freer expression of sexuality.[35] The retreat from sexual regulation was

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Rights, 21 HUM. RTS., Summer 1994, at 18, 19 (all indicating that every state had anti-sodomy laws during the mid-twentieth century).

27. *See* Eskridge, *supra* note 22, at 1013-14.

28. *Id.*

29. *See id.* at 1014.

30. *See* Apasu-Gbotsu, et al., *supra* note 26, at 526 (noting that in 1961 Illinois became the first state to adopt the Model Penal Code provision decriminalizing private sexual conduct of consenting adults).

31. *Id.*

32. MODEL PENAL CODE § 213.2 cmt.2 (1962).

33. Apasu-Gbotsu, et al., *supra* note 26, at 526-27 (listing the states that decriminalized sodomy during this period, beginning with Connecticut in 1969 and ending with Wisconsin in 1982); *see also* Hunter, *supra* note 18, at 538-39 (describing the decriminalizing trend); Rubenstein, *supra* note 26, at 19 (noting that fewer than half the states have sodomy laws).

34. *See* D.J. West, *Homosexuality and Social Policy: The Case for a More Informed Approach*, 51 LAW & CONTEMP. PROBS., Winter 1998, at 181, 193 ("With a few notable exceptions . European countries, including those in Eastern Europe, do not criminalize voluntary adult homosexual behavior. Bit by bit, more and more countries are adopting a tolerant approach.").

35. *See, e.g.*, *Sodomy*, *on* HAIR (RCA 1968) ("Sodomy, fellatio, cunnilingus, pederasty, Father, why do these words sound so nasty? Masturbation can be fun. Join the holy orgy kama sutra, everyone."); *see also* D'EMILIO & FREEDMAN, *supra* note 18, at 300.

> By the 1960s the nation had traveled a long way from the sexual values and practices of its nineteenth-century ancestors. Efforts to subsume the erotic into a gentle spiritualized passion and to keep it contained within the private sphere had given way as sex became

consistent with common sexual practices. For example, in a survey conducted in the early 1980s, approximately 72% of heterosexual couples reported having engaged in some kind of oral sex.[36] Similarly, 79% of lesbians and 84% of gay men reported having oral sex at least sometimes.[37] Anal sex was reported as a regular sexual behavior by 70% of gay couples[38] and as an at least occasional practice by approximately 25% of heterosexual couples.[39] Thus, the nonprocreative sex acts that were prohibited by sodomy laws were practiced by a substantial portion of the population.

In the midst of this general loosening of sexual mores, the link between the sodomy laws and sex acts of lesbians and gay men became more prominent. Perhaps in response to the gay rights movement, a backlash of anti-gay political initiatives were launched. The focus of sodomy laws began to shift; they were increasingly used against consensual sex between people of the same gender.[40] As gay culture became more visible, increased efforts to suppress homosexuality were made, including prosecution for sodomy.[41] The decriminalization of sodomy slowed and in some states new sodomy laws were passed.[42] Sodomy laws were amended or adopted to apply only to same-sex conduct.[43] This increased connection between criminal sodomy laws and homosexuality was highlighted by the United States Supreme Court's 1986 decision in *Bowers v.*

> an integral part of the public domain. Sexual imagery abounded in the culture. The erotic loomed large in the expectations of married couples. Youth had created a social world in which males and females shaped their own standards for what was permissible and what was not. The diffusion of contraception and technological improvements in its reliability allowed couples to separate sharply their reproductive intentions from their desire for physical pleasure.

See id.

36. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 236 (1983). Specifically, 5% of heterosexual couples reported engaging in fellatio every time they had sex, 24% usually, 43% sometimes, and 18% rarely. Similarly, 6% of heterosexual couples reported engaging in cunnilingus every time they had sex, 26% usually, 42% sometimes, and 19% rarely. *See id.*; *see also* John Cary Sims, *Moving Toward Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543, 1559 (1992) (stating that a variety of studies "report that 80-90% of all married couples engage in oral sex").

37. BLUMSTEIN & SCHWARTZ, *supra* note 36, at 236.

38. *Id.* at 243.

39. MORTON HUNT, SEXUAL BEHAVIOR IN THE 1970S 204 (1974) (reporting that "nearly a quarter" of those surveyed in the 25 to 34 age group had engaged in anal sex).

40. *See* William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*, *supra* note 26, at 711-12 (contrasting nineteenth-century-style laws prohibiting sodomy, public lewdness, and indecency, which applied to same-sex intimacy, with their post-World War II analogues, which "aggressively hunted the homosexual").

41. *See id.*

42. Hunter, *supra* note 18, at 538-39.

43. *See* D'EMILIO & FREEDMAN, *supra* note 18, at 345-54 (describing the sexual politics of conservatives in the 1980s).

Hardwick,[44] which held that prosecution for gay consensual sex did not violate due process privacy rights.[45]

Sodomy is currently a criminal offense in sixteen states.[46] Twelve of these states criminalize sodomy regardless of the gender of the people involved;[47] four states criminalize only sodomy between people of the same sex.[48] The crime is described in a few different ways. The most common description is the prohibition of sexual acts, sexual gratification, or carnal knowledge involving the mouth or the anus of one person and the genitals of another.[49] Other states describe the prohibited behavior as the "crime against nature,"[50] "unnatural carnal copulation,"[51] or "unnatural

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44. 478 U.S. 186 (1986).

45. *See id.* Since 1986, political activists have continued to challenge the constitutionality of criminal prosecution for lesbian and gay sex, but the only challenges to sodomy laws that have been successful have used individual rights protections in state constitutional law. In Kentucky, Tennessee, Georgia, and Montana, state courts have found that laws criminalizing consensual sodomy violated privacy rights protected by their state constitutions. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996). No challenges based on federal constitutional law, whether substantive due process or equal protection, have yet proved successful. *See* 70A AM. JUR. 2D *Sodomy* § 10 (1999) ("The United States Constitution does not confer a fundamental or substantive due process right to engage in consensual homosexual sodomy sufficient to render invalid the laws of states that make such conduct a crime."). Recently a challenge to the Texas same-sex sodomy statute was made based on both state and federal constitutional law. However, the Fourteenth Texas Court of Appeals, an intermediate appellate court, resolved the issue based on state constitutional law. *See* Lawrence v. State, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417, at *1 (Tex. App.—Houston [14th Dist.] June 8, 2000, no pet. h.) (invalidating a Texas law prohibiting same-sex sodomy as violative of the state constitution).

46. *See* ALA. CODE §§ 13A-6-63 & 13A-6-64 (1994); ARIZ. REV. STAT. ANN. §§ 13-1411-1412 (West 1989 & Supp. 1999); ARK. CODE ANN. § 5-14-122 (Michie 1997); FLA. STAT. ANN. § 794.01 (West 2000); IDAHO CODE § 18-6605 (Michie 1997); KAN. STAT. ANN. § 21-3505 (1999); LA. REV. STAT. ANN. § 14.89 (West 1986); MASS. ANN. LAWS ch. 272, §§ 34, 35 (Law. Co-op. 1990); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1999); N.C. GEN. STAT. § 14-177 (1999); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 2001); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994); UTAH CODE ANN. § 76-5-403 (1999); VA. CODE ANN. § 18.2-361 (Michie 1996).

47. These twelve are Alabama, Arizona, Florida, Idaho, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, South Carolina, Utah, and Virginia.

48. Arkansas, Kansas, Oklahoma, and Texas.

49. *See, e.g.*, ALA. CODE § 13A-6-60(2) (1994) (defining "deviate sexual intercourse" as "sexual gratification . . . involving the sex organs of one person and the mouth or anus of another"); ARK. CODE ANN. § 5-14-122(1) (Michie 1997) (making the penetration of a male's anus or mouth by a penis a misdemeanor); MINN. STAT. ANN. § 609.293 (West 1987) (defining "sodomy" as "carnally knowing any person by the anus or by or with the mouth"); UTAH CODE ANN. § 76-5-403 (1999) (criminalizing any sexual act involving the "genitals of one person and mouth or anus of another person"); VA. CODE ANN. § 18.2-361 (Michie 1996) (outlawing carnal knowledge by the anus or with the mouth).

50. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1411 (West 1989 & Supp. 1999); IDAHO CODE § 18-6605 (Michie 1997); MISS. CODE ANN. § 97-29-59 (1999); N.C. GEN. STAT. § 14-177 (1999); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 2001).

51. LA. REV. STAT. ANN. § 14.89 (West 1986).

and lascivious act."[52] One state refers to the criminalized behavior simply as "buggery."[53]

The crime of sodomy, which began as a prohibition against nonprocreative sex, has been transformed into a way of sanctioning lesbians and gay men.[54] While the statutes have largely remained gender neutral, sodomy is understood to refer to homosexual sex.[55] Apart from a few dramatic exceptions,[56] private consensual sex between lesbians and gay men is rarely the basis for criminal prosecution. Nonetheless, the existence of the statutes serves as a powerful reminder of potential governmental intrusion into the private consensual sexual behavior of lesbians and gay men.

B. Use of Sodomy Laws in Civil Actions

Three areas in which sodomy laws play a particularly prominent role are family law, public employment law, and immigration. In each of these areas of law, the presumption that lesbians and gay men are violating state sodomy laws has affected the determination of custody rights, employment rights, and immigration status. These cases are, of course, distinct from criminal prosecutions for sodomy. Often no express factual finding that the law has been violated is made. Instead, the fact of homosexuality, sometimes combined with the presence of a sexual partner, has often been the basis for the invocation of the sodomy laws. Thus, unproved status as a violator of the sodomy laws becomes a basis, in civil litigation, for the allocation of parental rights, the availability of public employment, and the conferral of immigration status.

While the constitutional issues, both state and federal, raised by prosecutions for consensual sodomy have been extensively considered,[57]

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52. MASS. ANN. LAWS ch. 272, §§ 34, 35 (Law. Co-op. 1990).

53. S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985).

54. Criminally, the use of sodomy law is not linked solely to gays and lesbians when sexual assault is prosecuted. Sodomy laws are used to criminally penalize nonconsensual heterosexual sex. *See* William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 852 (1997).

55. *See* Deb Price, *Colonial-Era Anti-Sodomy Laws Now Simply Reflect Discrimination*, DETROIT NEWS, July 11, 1997, 1997 WL 5592392 (stating that anti-sodomy laws were introduced in the seventeenth century not "to forbid homosexuality" but rather to sanction nonprocreative sexual activity, and that currently "[t]heir colonial purpose [is] largely forgotten" and "anti-gay prejudice is the only reason for the continued existence of sodomy statutes").

56. The plaintiff in *Bowers v. Hardwick* was arrested for violating the Georgia sodomy statute at his home in his bedroom. 478 U.S. 186, 188 (1986). Similarly, in *Lawrence v. State*, a case still pending in the Texas appellate courts, the defendants were arrested at home for violating the Texas "Homosexual Conduct" law which makes "deviate sexual intercourse" between persons of the same sex a crime. Lawrence v. State, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417, at *2 (Tex. App.—Houston [14th Dist.] June 8, 2000, no pet. h.) (not designated for publication) (quoting TEX. PEN. CODE ANN. § 21.06 (Vernon 1994)).

57. *See, e.g.*, Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355 (1998); Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After*

much less attention has been paid to the constitutional legitimacy of using the sodomy laws as a basis for decisionmaking in civil cases. Three issues, distinct from those in a criminal prosecution, are raised by the use of sodomy laws in a noncriminal context. First, use of the criminal law in the civil context calls into question whether the presumption that a person violates sodomy laws is conferred in an even-handed manner, or whether some are more likely to be presumed violators. Another basic question is the validity of the connection between the violation of the sodomy laws and the claims being litigated in the civil cases. Finally, the question arises whether the prohibition of specific sex acts motivates this use of sodomy laws, or whether the laws are used as an expression of hostility toward homosexuality.

III. Equal Protection Analysis and Sodomy Laws

Decisions are made in civil cases based largely on a presumed, but sometimes on an admitted, violation of the sodomy laws by gay people. Applying equal protection analysis to these cases requires an examination of government classifications based on sexual orientation as well as government classifications made on the basis of violation of sodomy laws. While the two overlap in the civil cases I have examined, they raise separate issues.

A. Equal Protection Standard

1. Sexual Orientation.—Government actions making distinctions on the basis of sexual orientation are, like all other governmental classifications, subject to an equal protection challenge.[58] While sexual orientation has not been considered a suspect classification and so government actions made on this basis do not receive the highest scrutiny,[59] a lesser level of scrutiny may still invalidate such governmental

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Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993); Hunter, *supra* note 18 (all criticizing the analysis of state and federal courts that articulate a heterosexual viewpoint focused on identity rather than conduct).

58. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1166 (1988) (stating that the Court has not "prevented a plaintiff from resorting to the Equal Protection Clause to challenge a statute discriminating on the basis of sexual orientation or, indeed, criminalizing homosexual but not heterosexual sodomy").

59. Some have argued that classifications based on sexual orientation should receive heightened scrutiny. *See* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 137-46 (1997) ("Because homosexuality is a determinative feature of personhood and because gay people have historically been victims of stigmatization and discrimination, courts must subject legislation that classifies on the basis of sexual orientation to a heightened standard of review and must closely scrutinize the state interests embodied in the legislation. If these interests are important or compelling, and if they are implemented by appropriately tailored means, they could survive judicial

classifications.[60] Even at a low level of scrutiny, the Equal Protection Clause serves to prevent the government from favoring one group over another by treating those who are similarly situated differently.[61] If one group of people is treated differently from another, the United States Supreme Court has "insist[ed] on knowing the relation between the classification adopted and the object to be attained."[62] If the reason for the different treatment is not the furtherance of a legitimate public policy, but instead, the unpopularity of the affected group, the governmental action violates the equal protection guarantee.[63]

In *Romer v. Evans*,[64] the Court addressed the question of what constitutes a legitimate state interest when a governmental classification is made based on sexual orientation.[65] The Court struck down an amendment to Colorado's Constitution that prospectively prohibited the enactment of anti-discrimination laws based on sexual orientation.[66] The Court

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scrutiny."); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1305, 1309 (1985) (asserting that heightened scrutiny in discrimination cases based on sexual preference is justified because homosexuals' unequal treatment in society is a pervasive problem and that sexual preference equality "is not generally outweighed by any articulable state interest geared to the prevention of actual harm").

60. Prior to the *Romer* decision, the United States Supreme Court had not addressed the question of what standard of review should be applied to classifications based on sexual orientation. There was some dispute among the United States Circuit Courts of Appeal on what standard was appropriate. *Compare* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *vacated and aff'd en banc on other grounds*, 875 F.2d 699 (9th Cir. 1989) ("[O]ur analysis of the relevant factors in determining whether a given group should be considered a suspect class for the purposes of equal protection doctrine ineluctably leads us to the conclusion that homosexuals constitute such a suspect class."), *with* Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984) ("We cannot find that a classification based on the choice of sexual partners is suspect, especially since only four members of the Supreme Court have viewed gender as a suspect classification."). Justice Brennan in *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1018 (1985), unsuccessfully argued that the Court should grant certiorari because of the confusion in the lower courts over the proper constitutional analysis to apply to government actions based on sexual orientation. *See id.*

61. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) ("'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation, it affects alike all persons similarly situated, is not within the [prohibitions of the Equal Protection Clause].'") (quoting Barbier v. Connolly, 113 U.S. 27, 32 (1884)); *see also* Tartar v. James, 667 F.2d 964, 967-68 (11th Cir. 1982) (also quoting *Barbier* and stating that the Fourteenth Amendment "requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed").

62. Romer v. Evans, 517 U.S. 620, 623 (1996).

63. *Id.* at 632 (striking down Colorado's Amendment 2 because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests").

64. 517 U.S. 620 (1996).

65. *See id.* at 635.

66. *See id.* at 635-36. The Colorado amendment (Amendment 2) provided that:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or

explained that because the Colorado amendment neither "burdens a fundamental right nor targets a suspect class" the amendment would be upheld if it "bears a rational relation to some legitimate end."[67] The touchstone in applying this standard is the purpose of the Equal Protection Clause, which the Court described as requiring government action that "neither knows nor tolerates classes among citizens."[68]

The Court found that the amendment in *Romer* could not meet the requirements of the Equal Protection Clause because it "impose[d] a broad and undifferentiated disability on a single named group" and because the "breadth [of the amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[69] The amendment could not survive rational basis scrutiny because it did not further any "identifiable legitimate purpose or discrete objective."[70] The amendment sought to place a special burden on a group that could not be justified by the rationales offered by Colorado.[71] The purpose of the amendment, the Court determined, was based not on a legitimate public purpose but on a desire to harm an unpopular group and "to make them unequal to everyone else."[72]

> bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. at 624.

67. *Id.* at 631.

68. *Id.* at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Holmes, J., dissenting)).

69. *Id.* at 632.

70. *Id.* at 635.

71. *Id.* Colorado justified the amendment as protecting citizens' freedom not to associate with homosexuals and as a way of conserving its resources to fight discrimination against other groups. The Court rejected these justifications, stating that:

> The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. . . . It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id.

72. *Id.* at 634-35. The holding of *Romer* could be considered to be limited to the specific context of denying gays and lesbians equal access to the political process. Making gays and lesbians "strangers to the law" by blocking the ordinary processes of lobbying and political persuasion might be distinguishable from treating the group differently with respect to other government actions. *Id.* at 635. This narrow conception of *Romer*, however, is not consistent with its language and reasoning. In describing the requirements of equal protection, the Court does not limit itself to the political participation context. The Court simply states that "classifications . . . drawn for the purpose of disadvantaging the group burdened by the law" are not permitted. *Id.* at 633. In supporting its conclusions that equal protection forbids laws made based on animosity, the Court cites to cases such as *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988). *Id.* at 635. In these cases the government action in question is not related to limitations on political participation. What makes Colorado's action unconstitutional is not

The standard used in *Romer* allows the government less discretion than is typically allowed in government actions involving neither a suspect classification nor a fundamental interest.[73] The reason for this lack of discretion is that the goal of the amendment, to harm a particular group, can never be a proper basis of government action. The desire to harm lesbians and gay men at the heart of the amendment was transparent to the Court. The *Romer* approach is consistent with a line of cases that apply a rational basis standard but disallow government classifications based on a desire to harm. Those cases—*Cleburne*, *Plyer*, and *Moreno*—applied rational basis scrutiny to government actions based on mental retardation, the relatedness of members of a household, and the legality of entry into the United States, and found that the governmental actions violated the Equal Protection Clause.[74] Cass Sunstein argues that the principle that unites these cases is that the state's action was based on animus toward the affected groups.[75] The government may not make the members of a particular group second-class citizens even if that group is not considered a suspect classification.[76]

In *City of Cleburne v. Cleburne Living Center, Inc.*,[77] the Court held that the city of Cleburne, Texas's requirement that group homes for mentally retarded people obtain special zoning permits, when other types of group residences did not require such a permit, violated the Equal Protection Clause.[78] The Court determined that the Equal Protection Clause required only that the zoning ordinance be "a rational means to serve a legitimate end."[79] The special zoning requirement for group homes for the mentally retarded could not meet this standard because the requirement's relationship to the asserted goal was "so attenuated as to render the distinction arbitrary or irrational."[80] The Court also made

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just that it burdens political participation, but that it is without a purpose other than making lesbians and gay men "unequal to everyone else." *Id.*

73. *See id.* (stating that the law must bear a rational relationship to a legitimate governmental purpose). When determining whether a classification that does not involve a group entitled to heightened scrutiny violates the Equal Protection Clause, the Court has generally deferred to the legislature, stating that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Co., 348 U.S. 483, 486 (1955).

74. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 435 (1985); Plyler v. Doe, 457 U.S. 202, 203 (1981); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

75. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME 146-50 (1999).

76. *See id.*

77. 473 U.S. 432 (1985).

78. *See id.* at 435.

79. *Id.* at 442.

80. *Id.* at 446. In *Heller v. Doe*, 509 U.S. 312 (1993), the Court again dealt with an equal protection challenge to the treatment of the mentally retarded. There, the Court found that different requirements for the involuntary commitment of the mentally retarded and the mentally ill were

clear that the "desire to harm a politically unpopular group" could not be a legitimate state goal.[81]

Plyler v. Doe[82] dealt with Texas's attempt to exclude children who were not legally admitted into the United States from its public schools.[83] While determining that undocumented aliens were not a suspect classification and that education was not a fundamental right, the Court nonetheless found the Texas exclusion from public schools a violation of the Equal Protection Clause.[84] The Court concluded that it was "difficult to conceive of a rational justification for penalizing these children for their presence within the United States."[85]

In *United States Department of Agriculture v. Moreno*,[86] Congress conditioned food stamp availability on the requirement that members of a household be related.[87] If an otherwise-qualified household consisted of any unrelated persons, food stamps would be denied.[88] Applying a rationally-related-to-legitimate-government-action standard, the Court found the unrelated-person distinction to violate the Equal Protection Clause.[89] The unrelated-person rule was apparently meant to deny food stamps to groups of "hippies."[90] The Court determined that if "'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[91]

From these cases the principle emerges that even when the nature of the group affected does not trigger strict scrutiny of the justification for the state's distinction, classifications motivated by a desire to disfavor a particular group fail to meet even a rational basis test. Thus, *Romer*,

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permissible. *Id.* at 315. The commitment of the mentally retarded required a lower standard of proof. *Id.* at 321. The Court stated that "[a] statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* at 324 (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978), quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)). The Court found that differences existed in the diagnosis and treatment of the mentally ill and the mentally retarded that justified a different standard for involuntary commitment for each group. *Id.* at 321-30. Citing *Cleburne*, the dissent found that there was no rational justification for the distinction made in the treatment of the mentally ill and mentally retarded and found the commitment regulations to violate the Equal Protection Clause. *Id.* at 348-49 (Souter, J., dissenting).

81. Cleburne v. Cleburne, 473 U.S. 432, 447 (1985) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

82. 457 U.S. 202 (1981).

83. *See id.* at 205.

84. *See id.* at 223.

85. *Id.* at 220.

86. 413 U.S. 528 (1973).

87. *See id.* at 528-29.

88. *See id.* at 531.

89. *See id.* at 528-38.

90. *Id.* at 534.

91. *Id.* (emphasis in original).

applying a rational basis test, was properly decided because the amendment impermissibly "reflect[ed] a judgment that certain citizens are and are properly treated as social outcasts."[92]

To determine the breadth of the applicability of the standard set forth in *Romer*, one must take into account the due process decision in *Bowers v. Hardwick*.[93] One could argue, as Justice Scalia did in his dissent in *Romer*, that if a state can criminalize sodomy, as *Bowers* determined, then a state surely has a rational basis for refusing to protect homosexuals from discrimination.[94] One way to reconcile *Romer* with *Bowers* is to recognize that while *Bowers* held that certain sexual behavior could be criminalized, the Colorado amendment burdened gay people in a variety of noncriminal contexts.[95] The two decisions can also be understood as reflecting the difference between a challenge based on substantive due process and one based on equal protection. While the function of the Due Process Clause is to protect historically rooted liberties, the Equal Protection Clause relies not on history but on protecting minority groups from discrimination imposed by the majority.[96] Thus, while the right to commit sodomy is arguably not a liberty deeply rooted in the Anglo-American tradition protected by the Due Process Clause, the disadvantaging of lesbians and gay men may nonetheless violate the Equal Protection Clause if not justified by any legitimate state interest.

Notwithstanding these possible theories reconciling the two decisions, the coexistence of *Romer* and *Bowers* indicates that *Romer* has not ushered in sweeping protections for lesbians and gay men. *Romer* does mandate, however, sufficient scrutiny of the interests articulated by the state when it makes distinctions based on sexual orientation. This scrutiny should determine whether the state's interests are nothing more than a dislike for

92. SUNSTEIN, *supra* note 75, at 150. A similar concept has been explored by Daniel Farber and Suzanna Sherry. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996). They argue that *Romer* is based on the illegitimacy of the state's creation of caste systems and declaration that a group of citizens is untouchable. *Id.* at 204. "If the equal protection clause means anything, it means that the government cannot pass caste legislation: it cannot create or sanction outcast groups." *Id.* at 266-67.

93. 478 U.S. 186 (1986).

94. Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (arguing that an amendment to the Colorado constitution prohibiting the treatment of homosexuals as a protected class for, *e.g.*, the purpose of evaluating violations of anti-discrimination laws, merely denied homosexuals preferential treatment and therefore should survive rational basis review as promoting a legitimate state interest in traditional sexual values).

95. *See* SUNSTEIN, *supra* note 75, at 153-54; Farber & Sherry, *supra* note 92, at 278-79. Sodomy has not been a criminal offense in Colorado since 1971. *Romer*, 517 U.S. at 645. Colorado's amendment, therefore, does not seem to have been intended to discourage the sex acts defined as sodomy. Rather, the focus of the amendment was on lesbians and gay men, not those who might have been committing sodomy.

96. *See* Sunstein, *supra* note 58, at 1163.

and a desire to disadvantage homosexuals. To justify its action, the state cannot merely point to a general disapproval of lesbians and gay men or a reluctance to associate with them. It must show the relevant connection between sexual orientation and the purpose of the state action. The state must demonstrate what good is obtained by a distinction based on sexual orientation or what harm is avoided by such a distinction. Under the rational basis test of *Romer*, courts must give more than a cursory glance to governmental justifications in order to guard against a group being treated as social outcasts.

2. *Presumed Violation of Sodomy Statutes*.—The sodomy statutes add a wrinkle to an equal protection analysis of the civil cases in which they are used. In those cases the state action is claimed to be based not on the fact that the litigant is gay or lesbian but on a presumed violation of the sodomy statutes. One issue raised is that the presumption is discriminatorily applied to gays. While some heterosexuals who admit to being in a sexual relationship are undoubtedly also violating sodomy statutes, that presumed violation is rarely if ever used as a basis for adverse governmental action. This raises the question of whether the selective use of sodomy statutes is permissible under equal protection doctrine.

In a classic formulation of the requirements of equal protection, Joseph Tussman and Jacobus tenBroek explained that an unassailable classification for the purposes of the Equal Protection Clause would be a classification "which includes all who are similarly situated and none who are not."[97] To determine whether a classification includes all who are similarly situated, one must look to the harm to be prevented and compare that to the group subsumed by the classification to determine if all those who may cause the harm are included.[98] When there is a less than perfect match between the harm to be prevented and those in the classification, a possible violation of the Equal Protection Clause has occurred. To determine whether such a violation exists, one must then examine whether there is a legitimate nondiscriminatory reason for only including a subset of the relevant group in the classification.[99] Tussman and tenBroek argue that when a classification is under-inclusive, "[i]t is relevant to inquire . . . whether the failure to extend the law to others similarly situated is due to the presence of forbidden legislative motive."[100] The under-inclusiveness

97. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 345 (1949).

98. *See id.* at 348 (discussing in detail the mechanics of "under-inclusive" classifications).

99. *See id.* at 349 (arguing that courts must allow some under-inclusiveness by the legislature as its legislators attempt to tailor the regulation to the problem in light of administrative constraints).

100. *Id.* at 360 (citing Goesaert v. Cleary, 335 U.S. 464 (1948), as an illustration of this situation).

of a classification may indicate a reliance on "hate, prejudice, vengeance [or] hostility" and reliance on these motives is impermissible under the Equal Protection Clause.[101] Thus, under-inclusiveness may expose that the governmental purpose is a "bare . . . desire to harm" that cannot be a "legitimate governmental interest."[102]

Applying this formula to the use of sodomy laws raises the question of why all those who violate (or may violate) the laws are not subject to the same adverse presumption in a civil case. Based on the gender-neutral language of most of the statutes, the harm to be prevented by the sodomy statutes is engaging in certain nonprocreative sexual acts. If the harm to be prevented is certain nonprocreative sexual acts, then all who commit such acts ought to be similarly disadvantaged in order for the use of the sodomy statues to be a reasonable classification. However, the selective application of the law seems to rest on the notion that sodomy is more harmful when committed by gay people. The salient fact is the sexual orientation of the person who is presumed to violate the law, not the commission of the sex acts. Thus, presumed violation of sodomy law, at least when applied collaterally in civil cases, is not used to regulate sex acts, but instead is used as a method of discriminating against lesbians and gay men. As we have seen in *Romer*, discrimination based on sexual orientation is not valid if based merely on a desire to harm an unpopular group. If the sodomy law's function is to provide a seemingly legitimate basis for government actions that are based on hostility, its use must violate the guarantee of equal protection.

To determine whether hostility toward an unpopular group is indeed the basis of the invocation of the sodomy laws against lesbians and gay men, one must examine the fit between the harm to be prevented—commission of certain sex acts—and the civil context involved. To decide whether the classification of some of those who may have committed sodomy is proper, one must look at the relationship between the outlawed sex acts and the ability to be a custodial parent, a competent public employee, or a citizen. If there is no reasonable relationship between the commission of sodomy and the use being made of that classification, the purposes of the Equal Protection Clause are being thwarted.[103] Conversely, if the social good to be promoted is, for example, adequate parenting, there must be a reasonable relationship between the social good of adequate parenting

101. *Id.* at 358.

102. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

103. In the four states, Arkansas, Kansas, Oklahoma, and Texas, in which only same-sex sodomy is criminalized, *see supra* notes 46-48, there is no general under-inclusiveness problem when those statutes are applied only to gay litigants. However, the question of whether there is a sufficient connection between the commission of sodomy and the issues at stake in civil litigation still raises an equal protection problem.

and the classification used—a subset of those who may have committed sodomy. As explained by Tussman and tenBroek, the lack of a reasonable relationship between the good to be promoted and the classification used gives rise to the presumption that an illegitimate motive is driving the use of the classification.[104] If the motive is hostility or antagonism toward a group, the government action cannot meet the requirements of the Equal Protection Clause.[105]

B. Application of the Equal Protection Standard

Examining the use of sodomy laws in light of these equal protection premises illustrates why the collateral use of the laws in the civil context is unconstitutional. First, the cases should be analyzed to determine whether the classification used—those who have committed sodomy—is applied even-handedly. That is, does the classification treat those similarly situated the same way? It is clear that all those who have committed sodomy are not similarly treated. Next, one must examine the relationship between the stated goal of the governmental decision, such as hiring a competent public employee, and the use of the classification of those who may have committed sodomy to further that goal. The cases reveal little or no basis, other than a disapproval of homosexuality, for linking the presumed violation of the sodomy laws to a desired goal such as having a competent employee. In each of these two inquiries, because the classification is either discriminatorily applied or not reasonably related to the stated goal, another motive must be at work. We are left with decisions based on the sexual orientation of the litigant. This basis is likely impermissible under the standard articulated by *Romer*. Or, if not entirely impermissible, this differential use of the sodomy laws is too imprecise and obfuscating to be constitutionally acceptable.

1. Family Law.—The assumption that a gay parent is committing the crime of sodomy motivates many decisions concerning custody. This presumed criminal behavior is a factor to be taken into account in determining which parent or other care-giver a child should be placed with.[106] The

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104. *See* Tussman & tenBroek, *supra* note 97, at 358.

105. *See id.* at 358-59.

> The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the "purpose" of the law, there is a violation of the equal protection prohibition against discriminatory legislation.

Id.

106. In resolving custody disputes, the guiding principle in family law is what is in the best interest of the child. 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 2.04, at 38 (2d ed. 1994). Thus, the family court judge can consider a broad range of factors in determining where the

sodomy laws are most commonly invoked when two parents have a dispute over custody or visitation and one of them is gay. Courts have regularly used the gay parent's presumed violation of the sodomy laws as a justification, wholly or in part, for limiting access of the gay parent to the children.[107]

The fact of homosexuality along with the determination that the gay parent has or had a sexual partner of the same sex is enough for the court to infer violation of the sodomy laws.[108] The purple prose used to describe the gay parent who is a presumed violator of sodomy law is

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child would best be placed. *See id.* at 39. Some of the factors that have been considered are: the child's preference, the parent's health, the child's age and gender, the quality of the home environment, the ability of the parent to provide for the emotional and intellectual needs of the child, and the moral fitness of the parent. *See id.* at 40. This flexible standard allows the family law judge a wide discretion in determining how the best interests of the child should be served.

107. *See, e.g.*, *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998) (restricting a mother's visitation rights so that her children would not be adversely affected by her lesbian lifestyle); *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (transferring custody from the mother to the father because of the mother's open lesbian relationship); Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Craft, J., concurring) (noting that the declaration by the residents of the state through legislative action that "sodomy is immoral, unacceptable, and criminal conduct" can be noted by a chancellor in child custody cases); Weigand v. Houghton, 730 So. 2d 581, 586-87 (Miss. 1999) (granting custody to the mother in part because of the moral unfitness of the homosexual father); L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982) (affirming the trial court's allowing the mother's visitation on the condition that her lesbian lover not be in the children's presence); *In re* J. S. & C., 324 A.2d 90, 97 (N.J. Super. Ct. Ch. Div. 1974) (restricting a father's visitation rights so that his children would not be exposed to his homosexual lifestyle); DiStefano v. DiStefano, 401 N.Y.S.2d 636, 638 (N.Y. App. Div. 1978) (excluding the mother's lesbian lover from visitations); Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985) (finding that the trial court abused its discretion by failing to condition the homosexual father's visitation rights because homosexuality is "errant sexual behavior which threatens the moral fabric"); Constant A. v. Paul C.A., 496 A.2d 1, 9-10 (Pa. Super. Ct. 1985) (affirming the trial court's controlled partial custody and visitation order to minimize the harm from exposing the children to the mother's homosexuality); Chicoine v. Chicoine, 479 N.W.2d 891, 894 (S.D. 1992) (reversing and remanding the trial court's decision to grant the lesbian mother overnight visitation rights without studying the home environment or providing for adequate enforcement of visitation restrictions); Collins v. Collins, No. CA 87-238-II, 1988 WL 30173 (Tenn. Ct. App. 1988) (Tomlin, J., concurring) (arguing that a homosexual parent who has a sexual relationship with a partner should be disqualified from obtaining legal custody); Bottoms v. Bottoms, 457 S.E.2d 102, 108, 109 (Va. 1995) (transferring custody of a son from the mother to the maternal grandmother in part because the mother actively practiced lesbianism in the home); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (granting sole custody to the mother because the "father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law"). While the sodomy laws are most often referred to in custody decisions, the existence of such laws has also been relevant to a determination of the fitness of a gay couple to adopt. *See In Re* M.M.D., 662 A.2d 837, 866 (D.C. 1995) (Steadman, J., dissenting) (disagreeing with the majority holding that a homosexual couple living together in a committed personal relationship may adopt a child by arguing that the court should refuse to expand adoption beyond the situation of a married couple in which "either the husband or wife is the natural parent of the prospective adoptee").

108. *See, e.g.*, *Ex parte* D.W.W., 717 So. 2d at 796 ("The conduct inherent in lesbianism is illegal in Alabama."); *Constant A.*, 496 A.2d at 5 ("[P]ermitting the appellant the freedom to travel could clearly place the children in a situation . . . where the adults could be subject to arrest and prosecution for deviant sexual behavior.").

intemperate. In one opinion, for example, the court seemed beside itself, opining that,

> [A] [l]esbian mother has harmed these children forever. . . . Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination . . . , she should be totally estopped from contaminating these children. . . [S]ome courts have taken a position, under "sodomy statutes" that a homosexual partner (parent) is a criminal and therefore not a fit parent. . . . It appears that homosexuals . . . are committing felonies, by their acts against nature and God.[109]

These opinions, while ostensibly basing the determination that the gay parent is a less fit care-giver on the presumed commission of sodomy, seem to focus more on the fact that the parent is gay than on the nature of the sex acts.

Another way that sodomy laws are used in family law cases does not condemn homosexuality itself. Instead, it presumes the gay and lesbian parents violate sodomy laws and further deduces that because sodomy is a crime, a parent who commits sodomy should be treated like a parent committing ongoing criminal behavior.[110] In *Bottoms v. Bottoms*,[111] for example, the court stated that while "a lesbian mother is not *per se* an unfit parent," the fact that "conduct inherent in lesbianism" is a felony in Virginia can properly be taken into account in determining the custodial placement.[112] Similarly, in *DiStefano v. DiStefano*,[113] the court noted that while the lesbian mother's sexual activity did not render her unfit, it did constitute a crime.[114] In *Ex parte D.W.W.*,[115] the court determined that the trial court would have been justified in restricting the mother's visitation even in the absence of evidence that the children had been

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109. *Chicoine*, 479 N.W.2d at 896 (Henderson, J., specially concurring in part and dissenting in part) (citation omitted). In another expression of the unfitness of a gay parent because of his presumed violation of the state sodomy law, one judge stated:

> Sodomy is against the criminal law of Georgia. . . Here, it is undisputed that the father engaged in pre-divorce sodomy, and currently is in a homosexual relationship. . . Thus, the father has a demonstrable past and present history of engaging in conduct which is against the criminal laws of this state. In determining the father's visitation rights, this criminal conduct . . . cannot simply be ignored by the courts.

In re R.E.W., 472 S.E.2d 295, 296 (Ga. 1996).

110. *See* Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 620-21 (1989) ("[S]ome courts justify their decisions either by asserting that state 'sodomy statutes' . . . embody a state interest against homosexuality or by assuming that a homosexual parent is a criminal and therefore not a fit parent.").

111. 457 S.E.2d 102 (Va. 1995).

112. *Id.* at 108.

113. 401 N.Y.S.2d 636 (N.Y. App. Div. 1978).

114. *Id.* at 637.

115. 717 So. 2d 793 (Ala. 1998).

harmed by her lesbianism, because "the conduct inherent in lesbianism is illegal in Alabama."[116]

In both of these approaches to the use of sodomy law in child custody disputes, we can see the discriminatory motive underlying the application of these gender-neutral statutes only to lesbians and gay men. First, the courts presume that the gay parent, because of his sexual orientation, is committing sodomy, although there has been no conviction for the crime. Second, the court does not ask whether the heterosexual parent is likewise engaging in criminal sexual acts, or, indeed, whether the gay parent is actually engaging in any such act.[117] The classification of a presumed sodomy committer is imprecisely formulated and leaves out sodomy committers who are heterosexual. Alerted to the possibility of a discriminatory motive given this under-inclusive classification, one need only look to the language in these cases dramatically condemning homosexuality to determine the actual motivation of the use of the sodomy statute. In the family law context, sodomy laws express a generalized disapproval of homosexuality.

If the category of sodomy committer is a proxy for homosexuality, the next question is whether there is a reasonable relationship between, for example, homosexuality and the quality of parenting. One way to unearth the relationship between the two and to determine whether it is reasonable is to examine the reasons for the decisions disadvantaging a gay parent. These rationales might explain the perceived connection between homosexuality and the presumed negative impact of that status on parenting.

While a presumed violation of sodomy statues may be the most prominently listed basis for a decision limiting a gay parent's custody

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116. *Id.* at 796; *see also* Weigand v. Houghton, 730 So. 2d 581, 590 (Miss. 1999) ("The conscious [sic] of this Court is shocked by the audacity and brashness of an individual to come into court, openly and freely admit to engaging in felonious conduct on a regular basis and expect the Court to find such conduct acceptable, particularly with regards to the custody of a minor child.") (McRae, J., dissenting, quoting the trial court); L. v. D., 630 S.W.2d 240, 243 (Mo. Ct. App. 1982) ("This court knows of no authority . . . that does not view the homosexual with bewildered compassion. However, homosexual practices have been condemned since the beginning of recorded history. . . . Dev[iant] sexual intercourse with another person of the same sex is a crime in the State of Missouri.").

117. That heterosexual sodomy is invisible to courts making decisions based on the violation of the sodomy law is discussed by Janet E. Halley in the context of *Bowers v. Hardwick*. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993). She comments that:

> *Heterosexual* acts are prohibited by the Georgia sodomy statute and, notably, by virtually identical statutes in force when the Justices rendered their decision not only in Washington D.C., but also in Virginia and in Maryland, where presumably several of the majority Justices spent their most intimate hours.
>
> By reasoning that the Georgia statute plausibly supports an anti-homosexual morality, the Justices engage in masking their own status as potential sodomites even if they never stray from the class of heterosexuals. Invisibility here is immunity . . . .

Id. at 1769-70 (emphasis added).

rights, the courts sometimes articulate other rationales for their custody decisions: the ostracism and harassment the children would suffer because of other people's disapproval of their parent's sexual orientation,[118] the interest of the state in preserving marriage and traditional families,[119] and the immorality of the parent's sexual behavior.[120] Applying the rational basis test to these justifications for the custody decisions raises different issues from those raised when sodomy laws are the principal rationale for the decision.

Shielding children of a gay parent from community disapproval or harassment is probably not a sufficient ground for a custody decision.[121] Catering to the prejudices of third parties would not pass the rational basis test explicated by *Romer*.[122] In *Romer* the alleged "personal and religious" objections to homosexuality of landlords and employers were not considered a sufficient justification for the prohibition of anti-discriminatory law.[123]

The other basis for these family law decisions, sodomy laws aside, is a generalized moral disapproval of homosexuality and preference for heterosexual unions.[124] Sometimes the reliance on morality is stated in religious terms:

> It appears that homosexuals . . . are committing felonies, by their acts against nature and God. *Actus naturae, actus Deus.* This is an old Latin phrase, which became a legal maxim. Literally, it means an act against nature is an act against God. . . . There appears to be a transitory phenomenon on the American scene that homosexuality

118. *See* S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

119. *See* Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); Collins v. Collins, No. CA 87-238-II, 1988 WL 30173 at *6 (Tenn. Ct. App. 1988).

120. *See, e.g.*, Larsen v. Larsen, 902 S.W.2d 254, 256 (Ark. Ct. App. 1995) (finding no error in a lower court's designation of female same-sex relationships as "deviant sexual activity"); Thigpen v. Carpenter, 730 S.W.2d 510, 513-14 (Ark. Ct. App. 1987) (condoning a lower court's finding that homosexuality is "generally socially unacceptable" and that it was contrary to the court's sense of morality to expose children to a homosexual lifestyle); *S.E.G.*, 735 S.W.2d at 166 (concluding that homosexuality in the home is "an unhealthy environment for minor children"); Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring) (describing a lesbian mother's life as "contaminating" and an "abomination"); *Collins*, 1988 WL 30173 at *6 (labeling homosexuality as "unnatural" and "immoral" and adding that it "has been considered contrary to the morality of man for well over two thousand years[]").

121. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

122. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) ("Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be obtained.").

123. *Id.* at 635.

124. *See* Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 859-61 (1997) (criticizing the rationales used by legislatures to justify denying custody to same-sex parents); Note, *supra* note 110, at 630-33.

> is okay. Not so. The Bible decries it. Even the pagan "Egyptian Book of the Dead" bespoke against it. . . . In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.[125]

Discriminatory governmental action based on a group's conduct "against Nature and God" seems to be just another way of expressing hostility to the group. One need not resolve whether religious conviction may serve to justify judicial action in order to conclude that the use of sodomy laws to express such conviction is illegitimate.[126]

2. *Employment Law.*—Presumed violation of sodomy statutes has been the basis for barring lesbians and gays from public employment.[127] In these cases the incongruity of having an employee of a law enforcement agency, for example, presumably violate the state's criminal law has been the basis for denying employment.[128] The focus in these cases is not so much general disapproval of homosexuality as the presumed criminality of the gay employee and the damage that criminality could do to the

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125. *Chicoine*, 479 N.W.2d at 896 (Henderson, J., concurring in part and dissenting in part).

126. *See infra* Part IV.

127. *See* Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997) (holding that the attorney general of Georgia did not violate the plaintiff's constitutional rights when he denied her a job based on her lesbian marriage because it was not unreasonable to believe the plaintiff's lifestyle would interfere with the enforcement of sodomy laws and other job duties); Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987) (finding that the FBI could deny the plaintiff a job because of a legitimate concern that his homosexual practices would adversely affect the agency's responsibilities); Childers v. Dallas Police Dept., 513 F. Supp. 134, 140-42 (N.D. Tex. 1981) (holding that a police department could deny the plaintiff a job based on the legitimate concern that his homosexual practices would interfere with job performance). In many similar cases, adverse employment actions concerning gay employees have been upheld, but not based in any direct way on a presumed violation of sodomy statutes. *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (holding that denying the plaintiff security clearance based upon his disclosures regarding visits to gay bath houses and his membership in a gay organization was not a constitutional violation); Singer v. U.S. Civil Service Comm'n, 530 F.2d 247, 256 (9th Cir. 1976) (holding that a government employee's rights were not violated when he was dismissed for openly flaunting his homosexuality); Acanfora v. Bd. of Educ. of Montgomery County, 491 F.2d 498, 499 (4th Cir. 1974) (denying relief to a demoted teacher because he intentionally declined to reveal his affiliation with a homosexual group on his application); McConnel v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971) (upholding a university's decision to refuse to employ a man based upon his active role in "*implementing* his unconventional ideas concerning the societal status to be accorded homosexuals" (emphasis in original)).

128. For example:

> We acknowledge that some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex "marriage" is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy. So, we accept that [plaintiff's] participation in a same-sex "wedding" and "marriage" could undermine confidence about the Attorney General's commitment to enforce the State's law against homosexual sodomy (or laws limiting marriage and marriage benefits to traditional marriages).

Shahar, 114 F.3d at 1105 n.17.

employee's ability to function at the job. The presumed criminal contact could either make it difficult for the employee to enforce the criminal law or subject the employee to blackmail or other improper influence.[129]

In *Shahar v. Bowers*,[130] for example, the Georgia attorney general's dismissal of a lesbian attorney was found to be a proper exercise of his prerogative as an employer in large part because of the attorney's presumed violation of Georgia's sodomy laws.[131] The court held that the attorney general could reasonably refuse to employ an assistant attorney general who "violates the State's law against homosexual sodomy" and therefore interferes with the prosecution of the sodomy statutes.[132] The court reasoned that the attorney general's actions did not violate the Equal Protection Clause because they were based not on the plaintiff's status but rather on her actions in engaging in a same-sex relationship.[133] Similarly, in *Padula v. Webster*,[134] the court determined that the FBI's refusal to hire the plaintiff as a special agent passed muster under a rational basis equal protection test.[135] The FBI's rational basis for its decision included the assertion that "[t]o have agents who engage in conduct criminalized in roughly one-half the states would undermine the law enforcement credibility of the Bureau."[136]

Just as in the child custody cases, no factual finding of a violation of sodomy laws is made before the classification of sodomy committer is used as a basis for governmental action. No determination is necessarily made that the public employee is actually committing the statutorily proscribed sex acts. As in the child custody cases, courts discriminatorily base the presumption that the sodomy law is being violated on sexual orientation. Heterosexuals are not similarly treated. Again, the violation of sodomy laws as a classification is used as a proxy for homosexuality.

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129. *See, e.g.*, *High Tech Gays*, 895 F.2d at 576 (deciding that an expanded security investigation of homosexuals was justified by the possibility of blackmail); *Padula*, 822 F.2d at 104 (finding that agents who violate the criminal law would undermine the FBI's credibility).

130. 114 F.3d 1097 (11th Cir. 1997).

131. *See id.* at 1101, 1110-11. In determining whether the state of Georgia was acting within its discretion as an employer in withdrawing Shahar's employment offer, the court made clear that the government employer has wide discretion in choosing his high level policy-making employees. The court explained that "the government employer's interest in staffing its offices with persons the employer fully trusts is given great weight when the pertinent employee helps make policy, handles confidential information or must speak or act—for others to see—on the employer's behalf." *Id.* at 1103-04. Accordingly, the attorney general of Georgia is entitled to "limit the lawyers on his professional staff to persons in whom he has trust." *Id.* at 1104.

132. *Id.* at 1105 n.17.

133. *See id.* at 1110 (distinguishing *Romer*, which was "about people's condition," while this case was "about a person's conduct").

134. 822 F.2d 97 (D.C. Cir. 1987).

135. *See id.* at 103-04.

136. *Id.* at 104.

The reasonableness of the connection between the classification of sodomy committer and the ability to function well as a public employee must also be examined. The reasonableness of that connection can be determined by looking at the justifications, other than the presumed violation of the sodomy laws, for the employment decisions. Other than the problems attendant upon a law enforcement employee who violates the law, the refusal to retain the plaintiff in *Shahar* was based on her lack of judgment in participating in a controversial "same-sex 'wedding'"[137] and the harm that the wedding may have done to the reputation of the attorney general's office and its ability to handle controversial matters relating to homosexuality.[138] In *Padula*, apart from the presumed violation of the sodomy statute, the FBI's decision was based on the fact that "general public opprobrium" of homosexuality would subject the agent to a risk of blackmail.[139]

As in the custody decisions, it is unlikely that the community bias would be a sufficient basis to justify the government's disfavor of gay employees.[140] The other justification, that the participation in a same-sex wedding showed poor judgment, seems to be a circular one. The same-sex wedding showed poor judgment only because of the presumed disapproval in the community. Apart from reliance on sodomy laws, the basis for the employment decisions seems to be community disapproval. By acting at odds with these community standards, the government job applicant makes herself a controversial and therefore less desirable employee. We again find that the presumed violation of sodomy laws is used to express the community's presumed view about the legitimacy of same-sex relationships.[141]

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137. Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997).

138. *See id.* at 1105.

139. *Padula*, 822 F.2d at 104 (finding that the risk of blackmail might provide a basis for an employment decision, but that the threat would have to be based on something more than a bare assertion).

140. This is a closer question than it would be with respect to a custody decision because the government employer has considerable discretion in choosing its employees. *See supra* note 131.

141. In *Shahar*, the three dissenting judges argued that the government's decision to fire the plaintiff based in large part on her presumed violation of the sodomy statutes violated the Equal Protection Clause. A presumed violation of the sodomy statutes was not a reasonable basis for the decision because it was no more likely that Shahar was violating the sodomy and marriage laws than were other members of the attorney general's staff. As the dissent explains,

> [The attorney general] does not assume . . . that an unmarried employee who is openly dating an individual of the opposite sex has likely committed fornication, a criminal offense in Georgia, and thus may have a potential conflict in enforcing the fornication law. Nor, for that matter, does he apparently assume that married employees could well have committed sodomy . .

Shahar, 114 F.3d at 1128 (Birch, J., dissenting); *see also* Swift v. United States, 649 F. Supp. 596, 602 (D.C. Cir. 1986) ("Homosexual conduct may not be protected under the right of privacy, and homosexuals may not qualify as a suspect class. Nonetheless, the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all.").

3. Immigration.—State sodomy laws can be dispositive in immigration proceedings.[142] At the point of entry to this country, an alien can be excluded if he has been convicted or admits to committing a "crime of moral turpitude."[143] At the point of naturalization, an alien can be denied citizenship because of a lack of "good moral character."[144] At either of these critical junctures, the presumed or admitted violation of sodomy laws can be called into play. The Immigration and Naturalization Service (INS) might determine, for example, that an alien who is gay could not meet the burden of establishing good moral character because of his violation of sodomy laws, or the INS could decide that the admitted violation of sodomy statutes constitutes the commission of a crime of moral turpitude.[145] While not consistently found to be relevant by the courts, violation of sodomy laws has sometimes been invoked when the morality of those seeking an improved immigration status is assessed.[146]

An equal protection analysis of decisions made by immigration officials is problematic because of the large amount of discretion the courts have traditionally ceded to the executive branch in the administration of immigration law.[147] The courts have been reluctant to extend constitutional strictures that would extend to governmental actions in other contexts to immigration decisions.[148] However, distinctions made by the

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142. *See* Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771 (1993).

143. *Id.* at 783; *see* Immigration and Nationality Act § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1988 & Supp. II 1990).

144. Nemetz v. INS, 647 F.2d 432, 434 (4th Cir. 1981).

145. *See In re* Longstaff, 538 F. Supp. 589, 592 (N.D. Tex. 1982) (asserting that an alien who admitted violations of the Texas law prohibiting homosexual conduct could not be regarded as a person of "good moral character"); Babouris v. Esperdy, 269 F.2d 621 (2nd Cir. 1959) (affirming an order by the INS that declared a Greek male to be deportable for being convicted of two crimes, involving moral turpitude, which were for homosexual behavior).

146. *See, e.g.*, Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981) (finding that a state law against sodomy should not have been used as a basis for determining good moral character); *In re* Labady, 326 F. Supp. 924, 930 (S.D.N.Y. 1971) (holding that one who engages in private, consensual, homosexual sex could be naturalized, for such conduct is not "publicly offensive").

147. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (noting that the dominant "plenary power doctrine" in immigration law affords the legislative and executive branches "broad and often exclusive authority over immigration decisions").

148. *See, e.g.*, Matthews v. Diaz, 426 U.S. 67, 77-87 (1976) (upholding a Medicare statute establishing alien eligibility requirements against a due process challenge because in immigration law, "Congress regularly makes rules that would be unacceptable if applied to citizens"); Kleindienst v. Mandel, 408 U.S. 753 (1972) (upholding the attorney general's denial of a nonimmigrant visa to a Marxist journalist against First and Fifth Amendment challenges because of broad executive discretion). Shannon Minter has argued that even if equal protection and due process challenges are not likely to succeed, the constitutional requirement that there be a "uniform rule of naturalization" obligates the government to treat applicants for admission or citizenship the same regardless of which state they reside in. This, she argues, would prevent the INS from resolving issues of moral turpitude or good

government between similarly situated groups of aliens must at least "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[149] Accordingly, the minimal rational standard derived from *Romer* should apply. Regardless of whether the government would be granted more discretion in this area, it is useful to look at the way the sodomy laws are used in immigration decisions as another illustration of the mechanism by which the criminal sodomy laws are imported into noncriminal proceedings.

While explicit discriminatory treatment of persons based on sexual orientation has been removed from the immigration laws,[150] sexual behavior remains relevant when a person seeks to enter the country.[151] The moral turpitude standard has been used to exclude or deport homosexuals who have been convicted of crimes such as disorderly conduct[152] or gross indecency[153] after the court has determined that conviction was based on some sort of homosexual behavior. Even if no conviction has taken place, aliens have been deemed excludable if they admit to acts that would constitute violation of state sodomy laws. For example, in *In re S*,[154] the court explained that regardless of whether there was a conviction for a crime of moral turpitude, the fact that the person seeking entry admitted to being a homosexual and to committing acts of sodomy was sufficient basis for deportation.[155] As the Board of Immigration Appeals explained, "[t]he fact that an alien can make an admission which, in itself, renders him deportable, even though he may not have been convicted of the precise

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moral character based on the law of a particular state. Minter, *supra* note 142, at 812-16; *see also* Monroe Leigh, *Judicial Decisons*, 76 AM. J. INT'L L. 160, 165-66 (1982) (summarizing "uniform rule of naturalization" arguments in *Nemetz*, 647 F.2d at 435-36).

149. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (deciding an equal protection issue with regard to corporate taxation). The Second Circuit applied this standard to aliens in 1976. *See* Francis v. INS, 532 F.2d 268, 272 (1976) (referring to the standard as the "minimal scrutiny test").

150. Prior to 1990, an alien could be excluded if he was determined to have a "psychopathic personality, sexual deviation or a mental defect." Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 15(b), § 212(a)(4), 79 Stat. 911, 919 (codified at 8 U.S.C. § 1182(a)(4)). In 1990, the clause excluding aliens on these bases was repealed. Immigration Act of 1990, Pub. L. No. 101-649, sec. 601, § 2126, 104 Stat. 4978, 5067-75 (codified at 8 U.S.C. § 1182(a) (1994)).

151. *See* 8 U.S.C. § 1182(a)(2)(A)(i) (1994 & Supp. IV 1998); 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. IV 1998). Aliens are subject to exclusion or to deportation if they have committed acts that constitute a crime of moral turpitude or if they have been convicted of a crime of moral turpitude.

152. *See* Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959) (affirming deportation for violating a disorderly conduct statute prohibiting "soliciting men [in a public place] for the purpose of committing a crime against nature or other lewdness").

153. *In re* Z, 2 I. & N. Dec. 316 (1945) (finding that the term "gross indecency" was not defined in the statute as covering only sodomy, so that violation did not necessarily entail committing a crime of moral turpitude).

154. 8 I. & N. Dec. 409 (1959).

155. *See id.* at 417.

crime which he admits, may be unique and seem severe, but it has been part of the immigration statutes for many years."[156]

Sodomy laws also become relevant in immigration law at the point of naturalization. The alien seeking naturalization has the burden of establishing that he is of "good moral character."[157] The government has argued that when an alien seeks naturalization and is gay, he cannot meet the burden of establishing that he is of good moral character because of the inference that he has violated sodomy laws.[158] This argument has been made in the absence of convictions of any crime, merely because the person seeking naturalization has admitted to acts that would violate sodomy laws.[159] In *In re Schmidt*,[160] for example, the court determined that the petitioner for naturalization "[had] never been convicted of any crime or offense, never discharged from any employment by reason of sexual deviation and a character investigation revealed that although she is known and reputed to be a lesbian, nothing else of a derogatory nature was disclosed."[161] Nonetheless, the court concluded that the petitioner was not of good moral character because homosexual activity is "offensive to American mores."[162] While the government has argued that a presumed violation of state sodomy laws is inconsistent with good moral character, some courts have rejected this approach. For example, in *Nemetz v. INS*,[163] the court granted naturalization in spite of a presumed violation of sodomy statutes, stating that "[appellant's] homosexual activity cannot serve as the basis for a denial of a finding of good moral character because it has been purely private, consensual and without harm to the public."[164]

The use of presumed or admitted violations of sodomy laws to determine the morality of a person seeking entry or naturalization is applied in a discriminatory way. It does not appear that nongay applicants would be subject to the same scrutiny with respect to violations of the

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156. *Id.*

157. 8 U.S.C. § 1427(a) (1994 & Supp. IV 1998).

158. *See* Nemetz v. INS, 647 F.2d 432, 437 (4th Cir. 1981) (rejecting the government's position that a presumed violation of state sodomy law was inconsistent with a finding of good moral character).

159. *See In re* Longstaff, 538 F. Supp. 589, 592 (N.D. Tex. 1982), *aff'd on other grounds*, 716 F.2d 1439 (5th Cir. 1983) (explaining that an alien's mere admission of prior homosexual acts placed him "squarely within a category of persons who by statutory definition cannot be regarded as persons of good moral character").

160. 289 N.Y.S.2d 89 (N.Y. Sup. Ct. 1968).

161. *Id.* at 90.

162. *Id.* at 92 (quoting H. v. H., 157 A.2d 721, 727 (N.J. Super. Ct. App. Div. 1959)).

163. 647 F.2d 432 (4th Cir. 1981).

164. *Id.* at 437; *see also In re* Labady, 326 F. Supp. 924, 928 (S.D.N.Y. 1971) (rejecting the government's argument that private homosexual behavior precluded a finding of good moral character); *In re* Brodie, 394 F. Supp. 1208, 1211 (D. Or. 1975) (granting naturalization to an admitted homosexual after finding that "the community regards homosexual behavior between consenting adults with tolerance, if not indifference").

sodomy laws. That the category of sodomy committer is used in the immigration context as a proxy for the category of gay person is clear from the expressions of moral disapproval of homosexuality that are found in the cases.

Interestingly, the cases that base their decisions on violations of sodomy laws tend to rely solely on that factor in making the determination that the alien has committed a crime of moral turpitude or lacks good moral character.[165] No other evidence of the lack of moral uprightness is sought or described. The invocation of sodomy laws can more directly influence the outcomes of the immigration cases than it does either custody or employment cases. The presumed violation of sodomy statutes based on the admissions of a petitioner has been considered, standing alone, a sufficient basis for denying entry to the country or citizenship.[166] In the absence of sodomy laws, then, these decisions would have no apparent rational basis justifying the outcome.[167]

If the use of the sodomy-committer classification is invalid because of its discriminatory invocation, there is no articulated justification for these decisions other than the generalized reference to "American mores" that are offended by the behavior of gay would-be citizens. We are again left with moral disapproval as the only possibly legitimate justification for the discriminatory use of the sodomy laws.

The invocation of a presumed violation of sodomy laws is a mechanism for discriminatory governmental decisions based on sexual orientation. The category of sodomy committer provides the means by which gay people can be treated differently from heterosexual people. The use of the sodomy-committer classification presents serious equal protection problems because of its discriminatory use and because of the lack of connection between sodomy and the subject of the civil litigation in which it is raised. These problems in the application of the classification make it clear that the sodomy laws are employed to express a general disapproval of homosexuality. Without this general hostility toward and disapproval of homosexuality, little other justification is articulated in these cases for the governmental decisions. The legitimacy of the use of sodomy laws turns on whether societal disapproval, often expressed as moral disapproval, is a proper basis for state action and, if so, whether the

165. *See, e.g.*, Barbouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959); *In re* S, 8 I. & N. Dec. 409 (1959); *In re* H, 7 I. & N. Dec. 359 (1956) (holding that homosexuality is a crime of moral turpitude and thus grounds for deportation) and *In re* Schmidt, 289 N.Y.S.2d 89 (N.Y. Sup. Ct. 1968) (denying naturalization because a woman's admissions of previous homosexual acts showed lack of good moral character).

166. *See supra* notes 154-65 and accompanying text.

167. Immigration decisions, however, may be subject to less than a rational basis standard. *See supra* note 148 and accompanying text.

sodomy laws are an acceptable vehicle for the expression of that disapproval.

IV. Sodomy Laws as an Expression of Public Morality

One explanation for the use of sodomy laws in making governmental decisions in civil cases is that the sodomy laws express the widely held moral condemnation of homosexuality. Expressing moral condemnation has widely been viewed as a proper role for the criminal law.[168] The use of criminal sodomy laws in a collateral way discourages homosexuality and furthers the proper governmental role of expressing the "moral condemnation of the community."[169] Determining whether enforcement of community morality is a sufficient justification for the use of sodomy laws in civil litigation depends both on whether enforcing this type of sexual morality is a proper function of government and, if so, whether the sodomy laws are a permissible mechanism for that enforcement.

Those who believe the moral condemnation of homosexuality is a proper goal of government commonly base their arguments on an assertion that certain forms of sexual expression are inherently unnatural or unworthy of human beings.[170] This argument is often based on a theory of natural law which posits that only potentially procreative sex acts within heterosexual marriage are "intrinsically good and reasonable" and that any other sexual acts are to be condemned.[171] Accordingly, channeling all

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168. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

169. *Id.*

170. *See, e.g.*, John M. Finnis, *Law, Morality and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1062 (1994) (describing the late-classical philosophical tradition that considered homosexual conduct inherently shameful); Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. PUB. L. 309, 322 (1998) (asserting that the sexual union of a man and a woman is "qualitatively different" from homosexual sex because same-sex couples "cannot perform the act of genital intercourse that allows them to actualize and experience true one-flesh union").

171. Finnis, *supra* note 170, at 1062; *see also id.* at 1067 ("[T]here is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it. Sexual acts cannot in reality be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective and volitional union in mutual commitment, both open-ended and exclusive—which . . . we call marriage."); POSNER, *supra* note 7, at 225 ("Most western intellectuals no longer believe in God, but many of them continue to believe that the metaphor of man's having been created in God's image captures an important truth: that we are not just animals with large brains but beings of a special worth and dignity, endowed with a moral sense and entitled to respectful treatment by our fellow man. . . . Despite having been created in the image of God, man does things . . . that animals do, and they are therefore not things to be proud of. Insofar as they are indispensable to the life of the individual and of the human race, they are okay, although a few saintly people will try to minimize the occasions for them. But carried beyond the indispensable, they become animalistic, and therefore unnatural and disgusting. On this view the only proper human function of the sexual organs

sexuality into procreative marital sex is a proper governmental function.[172] Others have taken the position that morality requires the equal treatment of homosexuals and heterosexuals and thus sodomy laws are themselves immoral.[173] For example, Chai R. Feldblum argues that depriving gay people of the ability to express themselves in ways that are emotionally and sexually gratifying is contrary to society's "shared sense of morality."[174] This shared sense of morality would condemn the pun-

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is procreation . . "); Hunter, *supra* note 18, at 533 ("The crime of sodomy originated in ecclesiastical regulation of a range of nonmarital, nonprocreative sexual practices. Nonprocreation was the central offense and the core of the crime."); Sekulow & Tuskey, *supra* note 170 ("The heterosexual dimension of [marriage] is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different [sexes] creates a relationship of unique potential strength and inimitable potential value to society." (brackets in original) (quoting Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 38-39 (footnotes omitted))).

172. *See* Finnis, *supra* note 170, at 1070. Those taking this position often also argue that if sodomy cannot be criminalized, then bigamy and prostitution must be legalized. *See* Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting) (comparing state laws against polygamy with the Colorado law prohibiting gay anti-discrimination law). *But see* Mark Strasser, *Sodomy, Adultery and Same-Sex Marriage: On Legal Analysis and Fundamental Interests*, 8 UCLA WOMEN'S L.J. 313, 333-35 (1998) (arguing that legalizing same-sex marriage need not be inconsistent with sanctioning sodomy or adultery).

That homosexuality should be discouraged or prohibited because heterosexual marriage is uniquely valuable and the only proper expression of human sexuality has, of course, been widely critiqued from a variety of perspectives. Some commentators point out that if procreative marital sex is what should be protected, other kinds of sexual expression should be condemned along with homosexuality. *See* Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 275 (1995) (noting the moral similarity of all non-reproductive, recreational sex, both homosexual and heterosexual); Paul J. Weithman, *Natural Law, Morality and Sexual Complementarity*, *in* SEX, PREFERENCE, AND FAMILY 227, 238 (David M. Estlund & Martha C. Nussbaum eds., 1997) (discussing the "sterility objection"—that if homosexual sex is illicit, so is heterosexual sex engaged in by sterile men or women). They argue that the natural law justification for condemning homosexuality is suspect because other deviations from the ideal, such as the use of contraceptives, nonmarital sex, and sex where one partner is sterile, are not similarly condemned. Macedo, *supra*, at 276-77. Thus, the premise that homosexuals should be singularly condemned for their failure to live out the natural law ideal reveals a hostility to homosexuality that goes beyond what is justified by the premises of natural law theory. *Id.* at 277 ("Even if one accepts natural law judgments[,] . considerations of fairness suggest that they should not be applied against the homosexual minority until we also apply them against the heterosexual majority."). Natural law abhorrence of promiscuity and noncommitted sex ought to lead natural law theorists to be more tolerant of same-sex marriage; that it does not reveals the uneven application of natural law principles. *Id.* at 287.

173. *See* Chai R. Feldblum, *Panel, The Pursuit of Social and Political Equality: Sexual Orientation, Morality and the Law—Devlin Revisited*, 57 U. PITT. L. REV. 237, 244 (1996) (arguing that it is immoral to ask someone to deny an integral part of their character); Hunter, *supra* note 18, at 538-39 (arguing that sodomy laws originally applicable to heterosexual sex have been manipulated to specifically burden homosexuals); Samuel A. Marcosson, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL. 137, 173-83 (1995) (arguing that discrimination against homosexuals is immoral because homosexuality is an immutable characteristic).

174. Feldblum, *supra* note 173, at 244.

ishment of self-expression merely because that expression makes some uncomfortable.[175] These commentators refuse to cede the moral high ground to those who would discourage or condemn homosexuality. Equally as vital as a morality based on natural law, they would argue, is a morality based on the communal benefits that flow from individual freedom of self-expression.[176]

Some argue that the enforcement of popular moral attitudes is never a proper basis for secular law. Perhaps the most often cited proponent of the view that government control of individuals should be limited to punishing actions that harm other members of society is John Stuart Mill.[177] Imposition of majority moral strictures on the errant individual or group, Mill argued, is often just the expression of a particular prejudice or religious belief and so cannot be justified as a basis for secular law.[178] The central tenet of the liberal philosophy expressed by Mill has been

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175. *See id.* at 305 (arguing that moral principles preclude society from prohibiting conduct that merely causes discomfort and unease where such prohibition and subsequent discrimination causes real emotional and physical harm to the individuals whose actions are being repressed).

176. *See* Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992 (1997).

177. *See* JOHN STUART MILL, ON LIBERTY (Currin V. Shields ed., Liberal Arts Press, Inc. 1956) (1859). In *On Liberty*, Mill sets forth his defense of individual freedom, arguing that the moral sentiments or general opinions of society should not be imposed on non-conforming members:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others to do so would be wise or even right. . . . The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Id. at 13. The liberty of even the nonconforming individual must be absolute in order to ensure greater freedom for all. *See id.* at 16 ("No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified.").

178. Mill elaborates:

> It is easy for anyone to imagine an ideal public which leaves the freedom and choice of individuals in all uncertain matters undisturbed and only requires them to abstain from modes of conduct which universal experience has condemned. But where has there been seen a public which set any such limit to its censorship? Or when does the public trouble itself about universal experience? In its interferences with personal conduct it is seldom thinking of anything but the enormity of acting or feeling differently from itself; and this standard of judgment, thinly disguised, is held up to mankind as the dictate of religion and philosophy. . . .

Id. at 102-03.

echoed in many works of political philosophy in the past century.[179] The legitimacy of criminalizing victimless sexual behavior, such as sodomy and adultery, has been the focus of debate concerning the role of morality in fashioning governmental sanctions.[180] The difficulty of separating moral beliefs from prejudice has been identified as the central problem in governmental action to enforce sexual morality.[181] The use of sodomy laws in civil cases could be seen then as an improper imposition of majoritarian moral and religious values on an unwilling minority. Mill would argue that the enforcement of sodomy laws would be contrary to the individual freedom that is in large part the purpose of the modern liberal democratic state.[182]

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179. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY (1963). Hart reiterated Mill's beliefs in his discussion of the enforcement of sexual morality through criminal prosecution. Hart explained that:

> [W]here there is no harm to be prevented and no potential victim to be protected, as is often the case where conventional sexual morality is disregarded, it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves. The attribution of value to mere conforming behaviour, in abstraction from both motive and consequences, belongs not to morality but to taboo.

Id. at 57. Hart was discussing the Wolfenden Committee Report that in 1954 recommended that British laws outlawing homosexual practices between consenting adults be repealed. The Wolfenden Report prompted Patrick Devlin to respond that the enforcement of sexual morality was a proper basis for criminal law. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 253-55 (1978) (arguing that a popular moral consensus based only on prejudice, rationalization, and personal aversion cannot be enforced, for the belief that prejudice does not restrict another's freedom occupies a more fundamental position in popular morality).

180. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (arguing that laws restricting homosexuality should be viewed as impermissible totalitarian attempts by the state to dictate the course of one's life); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 522 (1989) (stressing the need for "a keener appreciation of the role of substantive moral discourse in political and constitutional argument").

181. *See* Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Moral Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 173 (1998) ("When used as justifications for enacting a law, there is no principled way to distinguish bare moral interests from invidious prejudice."). Because religion is often the foundation of moral strictures against consensual sexual acts, some have suggested that it is impermissible for the state to advance religious values by sanctioning moral prohibitions against certain types of sexual behavior. *Id.* Such an imposition of sexual morality would inevitably be an imposition of a particular religious belief on nonbelievers and, therefore, an improper activity for a liberal democratic state. Taking a contrary view, some political theorists have argued that religious and moral beliefs can never be separated from the fashioning of civil law and that it is futile to attempt to do so. *See* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 258 (1988) (asserting that legislators should not rely on exclusively secular grounds when drafting because doing so separates people from their political characters); POSNER, *supra* note 7, at 230 (countering the suggestion that prejudice and revulsion are not a proper ground for public policy); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475 (1997) ("[L]aw and policy . . . will inevitably be shaped by people's ideas about the truth of the moral and metaphysical claims at stake . . . .").

182. *See* MILL, *supra* note 177, at 140-41 ("The worth of a State, in the long run, is the worth of the individuals composing it; . . . a State which dwarfs its men, in order that they may be more

One need not reject the use of morality entirely in the formation of law in order to reject the constitutionality of the use of sodomy laws in civil cases. The first problem with the use of the sodomy laws as an expression of sexual morality in civil cases is the inaccuracy of the fit between the harm meant to be reached—sodomy—and the provisions of the sodomy statutes. The statutes typically apply to both heterosexual and homosexual oral or anal sex.[183] This type of sexual activity is no more prevalent among homosexuals than it is among heterosexuals.[184] Thus, as an initial matter the behavior proscribed in the sodomy statutes is not consistently discouraged. If a moral sanction against homosexuality is the goal, the sodomy statues are an unwieldy and imprecise tool.

If it is a moral sanction of homosexuality, not sodomy, that is accomplished through the use of sodomy laws in civil litigation, then a more precise fit between that goal and the means used would expose the basis of governmental action and allow it to be examined on its own terms. For example, a legislature could conceivably attempt to pass a law that created a presumption that in a dispute between a gay and nongay parent over custody, the nongay parent should always be given preference. In order to survive an equal protection challenge, of course, this law would have to be based on a rational determination that the best interests of a child are served by limiting contact with a gay parent. It would probably be quite difficult to make that showing without relying on impermissible animus toward the gay parent. Similarly, a civil service regulation could be promulgated that forbade gay people from receiving certain types of government employment. Again, the government would face the likely impossible burden of showing a rational basis for such a law. It would be difficult to uncover a justification for such laws other than prejudice toward gays.

What is so suspect then about the use of sodomy statutes to express a generalized discomfort with gay parents, employees, or immigrants, is that a more precise and accurate expression of this belief would probably be constitutionally impermissible. If the condemnation of gay civil litigants cannot be directly enacted into law, then the use of the sodomy laws to do the job should be equally impermissible. If the goal of enforcing morality through condemnation of homosexuality is legitimate, then it should be reached directly, not by the sleight of hand made possible by the sodomy statutes.

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docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished . . . ").

183. *See supra* note 47 and accompanying text.

184. *See supra* notes 36-39 and accompanying text.

V. Conclusion

While their origin was as a religious proscription against nonprocreative sex, sodomy laws have emerged as an expression of condemnation of homosexuality. Despite their facial applicability to sex acts commonly engaged in by both homosexuals and heterosexuals, sodomy laws are presumed to apply only to gay sex. This association between sodomy and homosexuality is impermissibly used to discriminate against gay litigants in civil disputes. Because government action driven by explicitly anti-gay sentiment is likely to be found unconstitutional, the sodomy laws are used as an indirect way to accomplish the same end. However, what cannot be done directly should not, in this case, be done indirectly. The discriminatory application of sodomy law, and the lack of a nexus between violation of the law and the underlying civil claim make the use of the sodomy laws in civil litigation a failure of equal protection.