

Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws

Christopher R. Leslie*

Millions of laws fill American statute books. Operating without omniscience and with finite resources, law enforcement officials cannot possibly enforce them all. Occasional calls to purge criminal and civil codes of archaic and unenforced laws are rarely answered.¹ So it comes as no surprise that many laws are simply not enforced.² Some are forgotten, but not gone. Some are viewed by observers as historical curiosities or humorous trivia rather than legitimate laws. Courts, scholars, and the public tend to view such unenforced laws as inconsequential.³ Unenforced laws need not be repealed, the argument goes, because they are harmless. Unfortunately, this reasoning can lull legislators and the electorate into unwarranted complacency. A criminal law, though not enforced through prosecutions, may still affect society. This Article presents a case where courts and mainstream scholars incorrectly presume that a lack of criminal enforcement necessarily means an absence of harm: sodomy statutes. The Article demonstrates that the very existence of sodomy laws creates a criminal class of gay men and lesbians, who are consequently targeted for violence, harassment, and discrimination because of their criminal status.

Although scholars have written numerous articles about sodomy laws since the Supreme Court's decision in *Bowers v. Hardwick*,⁴ one important aspect of sodomy laws has been largely ignored. Despite the

* Assistant Professor of Law, Chicago-Kent College of Law. The author wishes to thank Kathy Baker, Mara Goldman, Hal Krent, David McGowan, Miranda McGowan, Sheldon Nahmod, Tony Reese, Laura Seigle, and Jeffrey Sherman for their criticisms of previous drafts. All remaining mistakes and omissions belong to the author alone.

¹ However, sometimes state legislatures do recognize that their criminal codes are filled with outdated laws and correspondingly revise their statute books. See *Poe v. Menghini*, 339 F. Supp. 986, 988 (D. Kan. 1972) ("Several years ago, the Kansas Legislature recognized that many Kansas criminal statutes were archaic and obsolete and that a complete modernization of the Criminal Code was required.").

² Cf. *Poe v. Ullman*, 367 U.S. 497, 512 (1961) (Douglas, J., dissenting) ("[I]t would be absurd to pretend that all criminal statutes are adequately enforced.").

³ Of course, this broad statement is subject to many important qualifications and exceptions. The prime exception is First Amendment jurisprudence, where courts recognize that unenforced laws can chill protected speech. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1055 (5th Cir. 1985); *Spartacus v. Board of Trustees of Ill.*, 502 F. Supp. 789, 796-97 (N.D. Ill. 1980) ("Injury to First Amendment rights may result from the threat of enforcement itself, since it may chill . . . ardor and eliminate . . . desire to engage in protected expression.").

⁴ 478 U.S. 186 (1986).

fact that state sodomy statutes provide for imprisonment of up to twenty years for committing private sodomy with another consenting adult,⁵ a persistent myth maintains that laws proscribing consensual sodomy between adults are not enforced and, as a result, inflict no injury. This Article demonstrates that simply because a law does not result in prosecutions or convictions, it does not necessarily follow that the law is harmless. This case study of sodomy laws illustrates how the mere existence of an "unenforced" criminal law creates a criminal class whose members are treated as felons, even though they have been convicted of no crime.

Part One presents the general myth that unenforced laws are without consequence and shows how this myth affects perceptions of state sodomy statutes. It briefly discusses the *Hardwick* case and explains how the myth that sodomy laws are not enforced—and are therefore harmless—affected the outcome of *Bowers v. Hardwick*.

Part Two initiates the case study of sodomy laws by debunking the myth of harmlessness. Despite the widespread perception that sodomy laws are benign, this section explains how sodomy laws are used to create a criminal class composed of gay and lesbian Americans, regardless of whether these individuals commit sodomy or even live in states that maintain sodomy laws. Part Two explains how a criminal law that is not enforced through prosecutions can still cause insidious social and legal consequences. The primary impact is symbolic: nominally unenforced laws are used to classify groups and stigmatize common behavior. By creating a criminal class, sodomy laws stigmatize gay men and lesbians, which weighs heavily on their psyche. By labeling gay men and lesbians as criminals, sodomy laws make gay individuals targets for physical violence in the form of gay bashing, sometimes perpetrated as de facto enforcement of sodomy laws. Sodomy laws encourage the abuse of gay citizens by both private individuals and police officers.

Part Three discusses how sodomy laws are enforced through mechanisms short of criminal prosecution. Public agencies, private actors, and courts all rely on the criminality of sodomy to justify discrimination against gay and lesbian Americans. Sodomy laws are used to facilitate employment discrimination, bias against gay and lesbian parents in custody disputes, discrimination against gay organizations, discriminatory enforcement of solicitation statutes, and immigration discrimination.

Part Four engages in the status versus conduct debate and argues that sodomy laws create a class of presumptive criminals. Although supporters of sodomy laws routinely assert that the statutes punish only conduct, this section shows how, in fact, sodomy laws convert all gay men and lesbians into presumptive felons based on their sexual orientation, a status. Gay citizens are consequently treated as criminals without any

⁵ See, e.g., VA. CODE ANN. § 18.2-361 (Michie 1996).

proof of conduct. This section shows how this conflation of status and conduct is both legally improper and factually inapt.

Ultimately, an examination of the ongoing harm caused by sodomy laws illustrates but one facet of homophobia. Although this Article concludes that the existence of state sodomy laws is used to brand gay men and lesbians as criminals—a criminal label that is subsequently used to justify a myriad of indignities against gay citizens—sodomy laws are obviously not the sole cause of homophobia. Homophobia is far too complex a phenomenon to have a singular explanation. Gay people are stigmatized by several sources, including religion, social mores, and, as this Article argues, the law. Eliminating one cause of stigmatization among many may not be a panacea but would be a step in the right direction.

I. The Pervasive Assumption that Unenforced Laws Are Harmless

The general purpose of criminal law is to punish and deter. Legislators criminalize the conduct they determine is most egregious to the public weal. Once a prohibition is codified in a criminal statute, violators are subject to penal sanctions, which serve the complementary functions of punishment and deterrence. The individual violator is punished for her transgression, usually through imprisonment, fines, or both. The punishment also deters future violations of the criminal code, both by the convicted individual (specific deterrence) and by society at large (general deterrence), which learns from the convict's mistakes.

Both of these functions, punishment and deterrence, require active enforcement of the criminal statute in question. If the police never enforce a given criminal statute, then prosecutors never prosecute and juries never convict. Without convictions, trial judges never sentence violators of the statute, and logic suggests that the purposes of the statute cannot be achieved. If the law is never enforced, then people who violate the law are never imprisoned or fined. Consequently, without punishment, the argument goes, there is no deterrence because only the threat of punishment deters.

An unenforced criminal statute is thus perceived as useless because it cannot achieve the general purposes of criminal law. Through either sleight of hand or untested logic, "useless" is often equated with "harmless." After all, if no one is punished under a law, then no one is held accountable if they commit the proscribed act. Furthermore, because the absence of punishment undermines the deterrent value of the law, no one experiences the harm of restricted personal liberties. In theory, an unenforced law is harmless because, with deterrence eviscerated, people continue to commit the proscribed act without any fear of punishment.⁶

⁶ Some scholars suggest that outmoded laws are harmless because they are not enforced and that statutory repeal is unnecessary since prosecutors serve as a safety wall.

Nowhere is this logic more often applied than in the context of sodomy laws.⁷ Although all fifty states and the District of Columbia had sodomy laws on their books in the mid-twentieth century, since then over half of the states have discarded their sodomy laws.⁸ This leaves approximately twenty states with sodomy laws in effect. The net result is that the United States is "the only major Western industrial democracy where same-sex relations continue to be illegal in a significant part of the country."⁹ However, because sodomy laws are perceived as unenforced, most courts and scholars assert that they are harmless.¹⁰ This section evaluates the bases and ramifications of this perception.

A. "Harmless Laws" and the Hardwick Case

In the summer of 1982, Michael Hardwick worked at a gay bar in Atlanta, Georgia.¹¹ When Hardwick left the bar one afternoon holding a beer, Officer Keith Torick issued him a ticket for drinking in public. Because Officer Torick had written the wrong date on the ticket Hardwick missed his court date;¹² however, Hardwick appeared in court the next day and paid the \$50 public-drinking fine, wiping out the warrant.¹³ Three weeks later, in the early morning of August 3, 1982, Officer Torick went to Hardwick's house with an outdated and invalid arrest warrant for failure to appear in court.¹⁴ Torick claimed that a houseguest admitted

See, e.g., Cass Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 678 n.143 (1985) ("Traditions of prosecutorial discretion have served, in the criminal context, as a safeguard against enforcement of outmoded or unpopular statutory prohibitions. Congress or a state legislature need not repeal such proscriptions; in the enforcement process, prosecutors may achieve most of the benefits of a repeal through refusal to enforce."). See also Matt Ridley, *Comment: Cut Red Tape, Gordon, Not Taxes*, DAILY TELEGRAPH (LONDON), Mar. 8, 1999, available in 1999 WL 14026050 ("[T]here was nothing wrong with unenforced laws-it is the enforced ones that do the harm[.]").

⁷ Although various states define sodomy differently, in general sodomy laws proscribe both oral and anal sex. See *infra* note 39 and accompanying text.

⁸ Elimination has occurred in two ways. In a majority of states, the state legislature repealed the sodomy statute. For example, during the 1970s, twenty state legislatures repealed their state sodomy laws. See Paula A. Brantner, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 498 (1992). In the remainder, state courts struck down sodomy laws as unconstitutional.

⁹ James D. Wilts, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33, 34 (1995).

¹⁰ See Sunstein, *supra* note 6; see also *infra* notes 32-34 and accompanying text.

¹¹ See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 381 (1988).

¹² Torick was at Hardwick's residence within a couple hours of the court date because the officer had apparently circumvented the normal procedure, which took 48 hours for an arrest warrant to issue, in order to arrest Hardwick post haste. Torick had not expedited the processing of an arrest warrant in 10 years. See *id.*

¹³ See *id.* at 382.

¹⁴ See *id.* at 381. The warrant was invalid not on some legal technicality, but because Hardwick had, in fact, appeared in court, a fact that Torick could have easily ascertained.

him into the house and invited him to look around for Hardwick.¹⁵ Torick found Hardwick in his bedroom, engaging in oral sex with another man. Torick arrested Hardwick and his companion for violating Georgia's sodomy law and possession of a small amount of marijuana.¹⁶ At Atlanta's central police station, both men were booked, photographed, fingerprinted, and thrown in a holding tank.¹⁷ In graphic detail and with offensive language, the officers informed the guards and other prisoners that Hardwick and his companion were charged with sodomy.¹⁸

Gay rights advocates approached Michael Hardwick and persuaded him to use his arrest as a test case against Georgia's sodomy statute.¹⁹ Hardwick paid the fine on the marijuana charge and challenged the sodomy charge. When prosecutors declined to prosecute Hardwick for sodomy, he sued in federal district court to have the sodomy law under which he was arrested declared unconstitutional. The district court found for the state, but the Eleventh Circuit reversed, holding that Georgia's sodomy law infringed Hardwick's constitutional right to privacy.²⁰ The state appealed.

The Supreme Court heard oral argument for *Bowers v. Hardwick*²¹ on Monday, March 31, 1986. After the Justices' conference, there was a five-judge majority to affirm the Eleventh Circuit's opinion holding Georgia's sodomy law unconstitutional. The opinion was assigned to Justice Blackmun, with Justices Stevens, Brennan, Marshall, and Powell on board. But over the weekend, Justice Powell wavered and issued a memorandum expressing his reservations.²² Chief Justice Burger sensed a chink in Blackmun's majority and seized the opportunity. He quickly reassigned the opinion to Justice White, who was, to put it mildly, hostile to Hardwick's position. Although Justice Powell continued to waver, the Chief Justice's reassignment was a *fait accompli* and Justice Powell enunciated his concerns about Georgia's sodomy law as a concurrence to an opinion by Justice White, not Justice Blackmun.

Powell switched his vote because Hardwick had not been prosecuted.²³ Justice Powell seems to have assumed that sodomy laws are be-

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ Hardwick recounted that Officer Torick "brought us in and made sure everyone in the holding cells and guards and people who were processing us knew I was in there for 'cocksucking' and that I should be able to get what I was looking for." *Id.* at 396.

¹⁹ GA. CODE ANN. § 16-6-2 (1984) provided, in pertinent part, as follows: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . ."

²⁰ *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

²¹ 478 U.S. 186 (1986).

²² See Benjamin Weiser & Joan Biskupic, *Secrets of the High Court; Papers Afford a Rare Glimpse of Justices' Deliberations*, WASH. POST, May 23, 1993, at A1; Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1.

²³ See Al Kamen, *Powell Changed Vote in Sodomy Case; Different Outcome Seen*

nign because they are not actively enforced. Indeed, Powell later wrote that he thought Hardwick's "case was frivolous as the Georgia statute had not been enforced since 1935. The Court should not have granted certiorari."²⁴ Powell believed that when there was no force, involvement of minors, or public display, sodomy was essentially harmless.²⁵ According to inside sources, Justice Powell disliked sodomy laws because "they are useless, never enforced and unenforceable."²⁶ Thus, Powell thought that both sodomy and sodomy laws were harmless.

After he retired from the bench, Justice Powell acknowledged that he "probably made a mistake" in voting to uphold Georgia's sodomy law.²⁷ In so admitting, he again explained to the media that "his vote was based on the fact that the statute had not been enforced for several decades."²⁸

B. Myths About Sodomy Laws

Justice Powell's action in *Hardwick* reflects a common three-part syllogism: (1) sodomy laws are not enforced, and (2) unenforced laws are harmless.²⁹ Therefore, (3) sodomy laws are harmless. Each step of the syllogism is flawed. With respect to the first step, there appears to be a consensus among courts and commentators that sodomy laws are not regularly enforced.³⁰ While this perception represents an over-simplification,³¹

Likely if Homosexual Had Been Prosecuted, WASH. POST, July 13, 1986, at A1.

²⁴ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 530 (1994). Justice Powell's belief that the case was frivolous drove his decision. He later admitted that "one of the reasons I voted the way I did was the case was a frivolous case" brought "just to see what the court would do." Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3.

²⁵ See *id.* at 519.

²⁶ Kamen, *supra* note 23, at A1.

²⁷ Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling*, N.Y. L.J., Oct. 26, 1990, at 1. Powell admitted, "When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments." Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3.

²⁸ See Marcus, *supra* note 24. Justice Powell made the point at an American Bar Association luncheon the month after the decision was announced, in which he again noted that Hardwick had not been tried or convicted. See, e.g., Ruth Marcus, *Powell Sees No Major Court Shift*, WASH. POST, Aug. 12, 1986, at A4.

²⁹ See Brantner, *supra* note 8, at 498.

³⁰ See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 382 (9th Cir. 1990) (Canby, J., dissenting); *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982) (sodomy law "not enforced by criminal prosecutions"); Thomas P. Lewis, *Commonwealth v. Wasson: Invalidating Kentucky's Sodomy Statute*, 81 KY. L.J. 423, 441 (1992-93); RICHARD A. POSNER, *SEX AND REASON* 4 (1992) (referring to sodomy laws as "dead letters"); RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 51 (1988) ("Sodomy laws are virtually never enforced."). Indeed, sodomy laws were not enthusiastically enforced during the first century of America's independence. See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 140 (1994).

³¹ It is true that sodomy laws do not appear to be enforced against private, non-commercial sodomy between consenting adults. See William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy*, *No-*

this Article focuses on the second step in the syllogism: Justice Powell's assumption that sodomy laws are benign because unenforced laws are without consequence. Courts and commentators routinely assert that because sodomy laws are not enforced through criminal prosecutions, they inflict no harm.³² Judge Richard Posner summed up the conclusion of

mos, and Citizenship, 1961-1981, 25 HOFSTRA L. REV. 817, 852 (1997). However, sodomy laws are enforced in at least four ways. First, because most sodomy laws make no distinctions based on consent, place, or age, the same sodomy laws that proscribe private sodomy between consenting adults are used in cases of public sodomy, forcible sodomy, or sodomy with a minor. See, e.g., *Hampton v. State*, 620 So. 2d 99, 100 (Ala. Crim. App. 1992) (defendant convicted of forcible sodomy and sentenced to 20 and a half years imprisonment). Similarly, sodomy statutes can be—and have been—used when prosecuting individuals for sexual activity in public "if there is some doubt as to whether the conduct occurred in a public place." *Baker*, 553 F. Supp. at 1146; see also J. Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the Solem v. Helm Test*, 56 U. CHIC. L. REV. 367, 390 (1989) ("almost all the reported cases involving sentences for sodomy also involve punishment for other crimes like rape, forcible sodomy, or public indecency.") Of course, forcible sodomy, public sodomy, and sodomy with a minor should be illegal, but they can be proscribed through more narrowly tailored statutes that do not reach private sodomy between consenting adults.

Second, sodomy laws have historically been used to imprison gay men for their private, consensual conduct. See CHAUNCEY, *supra* note 30, at 214-15. Even in modern times, sodomy laws have occasionally been invoked in cases of consensual, private sodomy between adults. See, e.g., *Baker*, 553 F. Supp. at 1126 ("homosexuals have in fact been prosecuted under the Texas sodomy statutes"); *Carter v. State*, 500 S.W.2d 368, 370, 373 (Ark. 1973) (finding that prison sentence of eight years for engaging in consensual fellatio with another adult male was not "so wholly disproportionate to the nature of the offense as to shock the moral sense of the community").

Third, sodomy laws are used as leverage in plea bargain negotiations. There are hundreds of Americans currently incarcerated for violating sodomy law proscriptions on consensual sexual conduct between adults. In rape and sexual assault cases, prosecutors often charge defendants with consensual sodomy as a lesser included offense for many reasons, including use as a negotiating tool to force plea bargains. See Art Harris, *The Unintended Battle of Michael Hardwick After His Georgia Sodomy Case, a Public Right-to-Privacy Crusade*, WASH. POST, Aug. 21, 1986, at C1. When the ACLU performed a computer check before Hardwick's arrest, it found 44 inmates serving time for sodomy, but most were plea bargains from more serious crimes. See *id.* See also POSNER, *supra* note 30, at 345 n.52 ("Defendants who plead guilty have in general no right to appeal, so it is possible despite the absence of reported cases that people still are occasionally being charged with consensual sodomy and pleading guilty in exchange for a promise of light punishment."). Laws proscribing private, consensual sodomy remain important if a case goes to trial because if the jury has a reasonable doubt about consent, the jurors can still convict the defendant of unlawful consensual sexual conduct under the sodomy law. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1777 (1993). For example, in *Fry v. Patseavouras*, 974 F.2d 1330 (4th Cir. 1992) (unpublished disposition available at 1992 WL 212146), a defendant acquitted on all counts involving non-consensual conduct was convicted of one count of fellatio and sentenced to 10 years imprisonment.

Fourth, and most importantly, sodomy laws are enforced by government officials (other than prosecutors) and by private action primarily through a system of collateral punishments that do not lead to incarceration, but also does not provide the constitutional guarantees that go along with the traditional process of arrest, trial, and conviction. See *infra* Parts II.B and Part III.

³² See, e.g., Donald A. Dripps, *Bowers v. Hardwick and the Law of Standing: Non-cases Make Bad Law*, 44 EMORY L.J. 1417, 1444 (1995) ("Georgia's unenforced criminal statute expresses disapproval of homosexuality but inflicts no injury."); Timothy W. Reinig,

most judges and scholars, arguing that because sodomy laws directed against gay people "are not enforced, they do little harm, despite much lore to the contrary."³³

This Article emphasizes the many ways that sodomy laws are enforced outside of traditional criminal law procedures, the significance of which scholars and jurists often lose sight.

II. Creating and Punishing a Criminal Class

Given the widely accepted assumption that sodomy laws are never enforced (and are thus benign), one must ask the question, why do so many states continue to maintain these laws, expending state resources to defend them in court?³⁴ The answer, quite simply, is that unenforced sodomy laws are not innocuous. States maintain sodomy laws to pin a badge of criminality on every gay man and lesbian, whether or not he or she lives in a state with a sodomy statute. This section explains how, even without direct criminal enforcement, states use sodomy laws to create a criminal class composed of homosexuals. As members of a criminal class, gay men and lesbians are targeted for violence, police harassment, and discrimination.

A. Sodomy Laws Create a Criminal Class

Sodomy laws do not merely express societal disapproval; they go much further by creating a criminal class.³⁵ The contours of the criminal class are not defined by conduct, but by sexual orientation regardless of whether one's desires are ever manifested in conduct. Sodomy laws do not merely define the fluid boundaries of a social class; rather, they achieve indirectly what the states cannot do directly: criminalize homosexuals.³⁶

There are two broad categories of sodomy statutes: gender-specific and gender-neutral. Six states have gender-specific sodomy laws that pro-

Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy, 38 BUFF. L. REV. 859, 865 (1990) ("sodomy laws have had little practical consequences").

³³ POSNER, *supra* note 30, at 309.

³⁴ Similarly, if sodomy laws are without moment, why, when the District of Columbia government repealed its sodomy law, would Congress overturn the action and reinstate the law, as it did in 1981? See LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 97 (1998).

³⁵ Cf. HAROLD BROWN, FAMILIAR FACES: HIDDEN LIVES 222 (1976) ("Back in the 1950's, on nights when I set out for one or another of New York's dingy gay bars, I often felt part of a criminal class—a class that included drug addicts, prostitutes, and the Mafia men who owned the gay bars in those days.").

³⁶ See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 919–20 (1989) ("If criminal . . . sodomy is the inevitable consequence or the essential characteristic of homosexual identity, then the class of homosexuals is coterminous with a class of criminals.").

scribe only same-sex sodomy.³⁷ These statutes establish gay men and lesbians as a legally distinct "other." Gay sexuality is proscribed as criminal while similar conduct between heterosexuals is permitted. Thus, while the woman who performs fellatio is expressing herself sexually, the man who performs fellatio is a felon, subject to fines and imprisonment. By their clear text, these statutes set up gay men and lesbians as a criminal class.³⁸

The majority of state sodomy laws fall into the second category: gender-neutral statutes. These sodomy laws prohibit all fellatio and cunnilingus whether performed by a man or a woman.³⁹ They proscribe anal intercourse whether the recipient is male or female. Facially, these laws apply equally to heterosexual and homosexuals. This would suggest that any resulting criminal class would be composed of "sodomites," anyone who commits sodomy regardless of their partner's gender. However, as applied and interpreted, even gender neutral sodomy laws typically condemn only same-sex sodomy.⁴⁰

The interpretation of sodomy laws has evolved over time from strictures that applied to all people to edicts that apply exclusively to gay men and lesbians.⁴¹ As of the mid-1960s, all sodomy laws in the United States facially applied equally to both heterosexual and homosexual sodomy.⁴² No state had yet passed any law applicable only to same-sex conduct.⁴³ Yet even though gender-specific sodomy laws are of relatively recent vintage, "sodomy statutes are socially understood as 'homosexual laws,' even if in fact or in origin [they] are not."⁴⁴ Sodomy laws are now viewed in the popular understanding "only as strictures against homo-

³⁷ See ALA. CODE § 13A-6-65 (a) (3) (West 1999); ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. CRIM. CODE ANN. §§ 21-3501, 3505 (West 1995); MD. ANN. CODE, art. 27, §§ 553, 554 (West 1995); See also OKLA. STAT. ANN. tit. 21 § 886 (1999), as interpreted by *Post v. State*, 715 P.2d 1105, 1109 (Crim. App. Ok. 1986); TEX. PENAL CODE ANN. § 21.06 (West 1995).

³⁸ Part IV, *infra*, discusses how a gay man or lesbian need not even perform any proscribed conduct in order to be condemned with the criminal label and treated accordingly.

³⁹ See, e.g., ARIZ. REV. STAT. ANN. § 13-1411, 1412 (West 1995); FLA. STAT. ch. 800.02 (1995); IDAHO CODE § 18-6605 (1996); MASS. GEN. LAWS ANN. Ch. 272 § 34 (1990); MICH. COMP. LAWS §§ 750.158, 750.338, 750.338b (1995); MINN. STAT. § 609.293 (1995); MISS. CODE ANN. § 97-29-59 (1995); N.C. GEN. STAT. § 14-177 (1995); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1993); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (Michie 1996).

⁴⁰ This is not surprising given that the term "sodomite"—which should describe anyone who commits sodomy, whether gay or straight—is often used interchangeably with "homosexual."

⁴¹ See 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 (1997) (sodomy laws came to be increasingly enforced against consensual same-sex intimacy).

⁴² See Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 664 n.45 (1966).

⁴³ See *id.*

⁴⁴ Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 542 n.48 (1992).

sexuals.”⁴⁵ This view is shared by the lay and the educated alike. Legal scholars generally assume that sodomy laws only apply to same-sex conduct.⁴⁶ Perhaps based on this common perception, courts have routinely given legal effect to the assumption that sodomy applies only to same-sex conduct.⁴⁷ For example, in *Bowers v. Hardwick*, the majority opinion described the Georgia law solely as a prohibition on “homosexual sodomy” despite the fact that the statute was gender-neutral and applied to all sodomy.⁴⁸ Not surprisingly, the public shares a widespread perception that even gender-neutral sodomy laws apply only to same-sex sodomy.⁴⁹ The net result is that society has “converted sodomy into a code word for homosexuality, regardless of the statutory definition.”⁵⁰

In sum, sodomy laws single out homosexuals as the “other,” a member of a criminal class. As sodomite becomes synonymous with homosexual, homosexual becomes synonymous with sodomite,⁵¹ pinning a criminal label on all gay men and lesbians. The following section discusses some of the consequences of this criminal moniker.

B. The Consequences of Criminal Classification

1. The Symbolism of Criminality

Sodomy laws exist to brand gay men and lesbians as criminals.⁵² Social ordering necessitates the criminalization of sodomy, thereby creating a hierarchy that values heterosexuality over, and often to the exclusion of, homosexuality. This symbolic effect of sodomy laws is not dependent on their enforcement. Even though very few men and virtually no women ever suffer the full range of criminal sanctions permitted under state sodomy laws, these statutes impose “the stigma of criminality upon same-sex eroticism.”⁵³

⁴⁵ JEFFRIES, *supra* note 24, at 512.

⁴⁶ See POSNER, *supra* note 30, at 291.

⁴⁷ See, e.g., *Oklahoma v. Post*, 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986) (holding that state’s gender-neutral sodomy law could not be constitutionally applied to opposite-sex partners).

⁴⁸ 478 U.S. 186, 188 n.2 (1986).

⁴⁹ See Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 232 (1994). For example, during 1993’s gays-in-the-military debate Senator Strom Thurmond asserted, “[h]eterosexuals don’t practice sodomy.” *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at A9.

⁵⁰ Hunter, *supra* note 44, at 542.

⁵¹ See Halley, *supra* note 31, at 1734 (“In the post-*Hardwick* environment, what Justice White described as ‘homosexual sodomy’ has become homosexuals *as* sodomy.”).

⁵² See Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1533 (1988) (“[T]he purpose [of sodomy laws] is to give expression and effect to a legislative majority’s moral rejection of homosexual life.”).

⁵³ JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 14 (1983). This has been the purpose and effect of sodomy laws for decades. See PAUL H. GEBHARD ET AL., *SEX OF-*

Based on the mischaracterization that sodomy laws apply only to homosexuals, sodomy laws are currently justified as necessary to uphold an anti-gay morality.⁵⁴ Any deterrent effect from sodomy laws is secondary to these primary symbolic effects. For their supporters, the laws are "seen not as a prohibition to be enforced as such, but rather as a symbol of societal disapproval."⁵⁵ Supporters argue that "these statutes may serve an important function even if unenforced."⁵⁶ But the apparent function is not to condemn homosexual conduct, but homosexual persons.⁵⁷ As one commentator put it, "unenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum."⁵⁸ Indeed, in every state "where sodomy statutes remain on the books, animus against lesbians and gays has been a major, if not the sole, reason for the decision to retain them."⁵⁹ This is illustrated by the gubernatorial campaign of George Bush, Jr. When campaigning to head Texas, Bush promised that as governor he would veto any attempt to repeal the Texas sodomy law, even though the law was not enforced.⁶⁰ Candidate Bush adopted the po-

FENDERS: AN ANALYSIS OF TYPES 324 (1965) ("[T]he law against adult homosexual activity is designed not for the protection of person or property but for the enforcement of our cultural taboo against homosexuality.").

⁵⁴ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986).

⁵⁵ Lewis, *supra* note 30, at 441. Supporters of sodomy laws argue that "[e]ven though they are unenforced, sodomy statutes may reflect a state's determination of its moral values." Page, *supra* note 31, at 391.

⁵⁶ Page, *supra* note 31, at 391. This raises the issue of whether criminal law is an appropriate tool to teach morality. There are several reasons to think that it is not. It has been over forty years since the drafters of the Model Penal Code observed: "The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor." MODEL PENAL CODE § 207.1 cmt. at 207 (Tentative Draft No. 4, 1955). Using criminal law solely as a mechanism for value inculcation can lead to disrespect for law generally. See Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 595 (1967) [hereinafter *Enforcement of Morality*]. For decades, people have argued that sodomy laws are "impossible to enforce and hence ought to go. Some lawyers [have] pointed out that poorly enforced laws gave rise to harmful side effects by encouraging disrespect and cynicism toward the law in general." D'EMILIO, *supra* note 53, at 145. Courts have recognized this disrespect issue for decades. See, e.g., *Harris v. State*, 457 P.2d 638, 645 (Alaska 1969) ("the widening gap between our formal statutory law and the actual attitudes and behavior of vast segments of our society can only sow the seeds of increasing disrespect for our legal institutions."). Ironically, one effect of branding an entire community as criminal is that the community has little incentive to follow the rules because they are already playing outside the rules, as defined by the majority. Society defines sodomy as an illegitimate act and homosexuals as illegitimate citizens; but illegitimacy is a two-way street. In order for the gay community to be governed effectively, it must be recognized as legitimate. See Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS., 83, 97 (Summer 1980).

⁵⁷ See *infra* Part IV.

⁵⁸ Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986).

⁵⁹ Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 153 (1988).

⁶⁰ See KENNETH KARST, *LAW'S PROMISE, LAW'S EXPRESSION* 58 (1993).

sition of those defenders of sodomy laws who argue that unenforced sodomy laws maintain society's "moral climate" by officially condemning homosexual conduct.⁶¹

Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning. Statutes have significance completely independent of their actual enforcement. Law reflects society and informs it.⁶² Current generations enshrine their morality by passing laws and perpetuate their prejudices by handing these laws down to their children. Soon, statutes take on lives of their own, and their very existence justifies their premises and consequent implications. The underlying premises of ancient laws are rarely discussed, let alone scrutinized. In short, the primary importance of sodomy laws today is the government's message to diminish the societal status of gay men and lesbians.⁶³

Some states have tried to magnify the symbolic stigma of their sodomy laws through sex offender registration statutes. Several states require gay men convicted of consensual sodomy to register with authorities as sexual offenders.⁶⁴ Because sodomy laws were aggressively enforced in the postwar era, elderly men—many of whom are married—have been forced to register as sex offenders for consensual, same-sex sodomy that took place decades prior.⁶⁵ For these men, the criminal label is not mere hyperbole, but an ongoing official status. The larger effect is to stigmatize the whole gay population as criminal.⁶⁶

The symbolic function of sodomy laws is similar to Jim Crow laws in that a primary purpose of both types of law is to condemn an entire class of Americans as immoral, inferior, and not deserving of society's tolerance and protection. Independent of the immediate effect of denying

⁶¹ *Id.*

⁶² The Supreme Court recognized the law's ability to both mirror and perpetuate prejudice in *Palmore v. Sidoti*, when it observed that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. 429, 433 (1984).

⁶³ See KARST, *supra* note 60, at 58.

⁶⁴ See Robert L. Jacobson, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431, 2449-53 (1999). See, e.g., ALA. CODE § 13a-11-200 (1994); IDAHO CODE § 18-8304 (1) (a) (Supp. 1998); LA. REV. STAT. ANN. § 15:542 (E) (West Supp. 1998); MISS. CODE ANN. § 45-33-1 (4) (d) (Supp. 1997); MO. ANN. STAT. § 589.400-1 (4) (West Supp. 1998); S.C. CODE ANN. § 23-3-430 (C) (Law Co-op 1997).

⁶⁵ "In one instance, a 90-year-old resident of Leisure World was ordered to re-register for his 1944 conviction of lewd conduct, in which police arrested him after he placed his hand on another man's knee inside of a parked car. More than fifty years later, the police sent him an enveloped stamped 'SEX CRIME' in red ink, which his wife opened." Jacobson, *supra* note 64, at 2460 (citing Nicholas Riccardi & Jeff Leeds, *Legislators Seek to Narrow Megan's Law*, L.A. TIMES, Apr. 4, 1997, at A3).

⁶⁶ See Jacobson, *supra* note 64, at 2458 ("[W]hen targeted specifically at sodomy and gay solicitation charges, the laws perpetuate harassment and stigmatization of the gay community.").

access to public accommodations, Jim Crow laws stigmatized an entire class of citizens by reinforcing the misconception that white people were somehow superior to black people.⁶⁷ Whereas Jim Crow laws represented a direct attempt to eliminate blacks from "white society," police have employed sodomy laws as a convenient weapon to remove gay people from visible society altogether. Although sodomy laws were not originally drafted and enacted to cause discrimination in public accommodations, they now constitute an indirect means to that end. The social ordering effect of sodomy laws is similar to the segregation policies that perpetuated racism by teaching new generations to classify and condemn others on the basis of race. Jim Crow laws are clearly unconstitutional. Yet the conditions that gay men and lesbians live under in many areas of the country bear a striking resemblance to the Jim Crow South.⁶⁸ The secondary effects of sodomy laws resemble the primary effect of Jim Crow laws. Whatever the original purpose of sodomy laws, they are now used to stamp gay men and lesbians with "a badge of inferiority."⁶⁹ Even though the enforcement of "[sodomy] laws is sporadic at best, this is as poor a measure of the injury they inflict as the relative infrequency of lynching in the post-Civil War South."⁷⁰ In short, sodomy laws now serve the same function with respect to gay and lesbian Americans as Jim Crow laws did with respect to African Americans in decades previous: defining a specific class of Americans as inferior and attempting to remove them from view.⁷¹

Labeling gay men and lesbians as "criminal" facilitates discrimination because the law permits differential treatment of criminals. For example, in some jurisdictions convicted felons cannot vote,⁷² cannot hold

⁶⁷ See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (holding educational segregation unconstitutional, in part because of psychological toll on students). See also KENNETH L. KARST, *BELONGING TO AMERICA, EQUAL CITIZENSHIP AND THE CONSTITUTION* 206 (1989) ("[I]f Justice Powell's view [in his *Hardwick* concurrence] should prevail, the main effect of these [sodomy] laws will be their official branding of homosexuals as outcasts. Was that not the very message—and the most grievous hurt—conveyed to black people by the Jim Crow laws?").

⁶⁸ See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1490 (1992) (the government's refusal to punish those who brutalize gay people breaches its social contract obligation to protect citizens from lawlessness). Further, sodomy laws have been used to justify purging the federal government, schools, and even bars, of homosexuals. See *infra*, Part III. Gay and lesbian Americans, in short, are not entitled to the same rights and privileges as their heterosexual counterparts.

⁶⁹ Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 862 (1992) (plurality opinion) (explaining that the effect of *Plessy v. Ferguson* was to stamp "the colored race with a badge of inferiority").

⁷⁰ Koppelman, *supra* note 59, at 145.

⁷¹ KARST, *supra* note 60, at 58. The argument some people make that gay men and lesbians can escape the discriminatory impact of sodomy laws by concealing their sexual orientation is like the argument that Jim Crow laws did not take a toll on light-skinned African Americans who could "pass" for white. A law that forces one to hide his or her true identity is abhorrent even if an individual could conceal his or her status.

⁷² See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 51–52 (1974).

public office,⁷³ cannot carry firearms,⁷⁴ and are treated differently under the Federal Rules of Evidence.⁷⁵ Society sees criminals and non-criminals as separate classes of citizens, the former entitled to fewer rights. Labeling gay people as "criminals" assigns them to a less-privileged class. Once saddled with the criminal moniker, it becomes easy—if not axiomatic—to punish and discriminate against gay men and lesbians.

Sodomy laws serve to codify and enforce social ordering through the creation of a criminal class. By inflicting the taint of criminality on homosexuals, sodomy laws have produced the following effects: (1) creating a social hierarchy that diminishes the value of the lives of gay men and lesbians, imposing severe psychological injury on many gay men and lesbians;⁷⁶ (2) encouraging physical violence⁷⁷ and police harassment⁷⁸ against gay men and lesbians; (3) justifying employment discrimination against gay and lesbian employees and job applicants;⁷⁹ (4) separating children from their gay or lesbian parent;⁸⁰ (5) stifling the development of gay organizations;⁸¹ (6) squelching speech rights of gay citizens;⁸² and (7) facilitating immigration discrimination against homosexuals.⁸³ In short, gay citizens are treated and punished as criminals, but without any of the procedural safeguards afforded criminal defendants.

2. *Mental and Emotional Development*

Stated conservatively, criminalizing an entire segment of a population creates a social hierarchy. Whether the social hierarchy is created by laws that are facially unequal or enforced discriminatorily, or both, the effect is the same: "dignitary harm, an insult, a stigma."⁸⁴ Sodomy laws represent the commission of "emotional violence on the self-esteem of

⁷³ See, e.g., *Roehl v. United States*, 977 F.2d 375, 377 (7th Cir. 1992), *cert. denied*, 510 U.S. 825 (1993) (upholding Wisconsin law prohibiting felons from holding public office); *United States v. Williams*, 128 F.3d 1128, 1134-35 (7th Cir. 1997).

⁷⁴ See, e.g., *United States v. Ramos*, 961 F.2d 1003, 1012 (1st Cir. 1992) ("in Massachusetts, felons are not entitled to carry firearms").

⁷⁵ See, e.g., FED. R. EVID. 609. See *Edwards v. Thomas*, 31 F. Supp. 2d 1069, 1071 (N.D. Ill. 1999) ("Rule 609 embodies '[t]he proposition that felons perjure themselves more often than other, similarly situated witnesses'" (quoting *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987))). This is not to suggest that homosexuals suffer these particular disabilities; rather, these are simply examples of the treatment afforded criminals.

⁷⁶ See *infra* notes 90-101 and accompanying text.

⁷⁷ See *infra* notes 119-153 and accompanying text.

⁷⁸ See *infra* notes 154-220 and accompanying text.

⁷⁹ See *infra* notes 227-297 and accompanying text.

⁸⁰ See *infra* notes 298-340 and accompanying text.

⁸¹ See *infra* notes 341-391 and accompanying text.

⁸² See *infra* notes 400-407 and accompanying text.

⁸³ See *infra* notes 408-433 and accompanying text.

⁸⁴ Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 141-42 (1981). This is particularly true of the six state sodomy laws that proscribe only homosexual behavior. But the stigma is also imposed by those facially neutral laws that are enforced primarily against gay citizens. See *supra* notes 39-51 and accompanying text.

homosexuals, who are effectively told by the statute that their ways of loving one another are criminal, unnatural, deviant, immoral, and worthy of punishment."⁸⁵ The mechanisms by which sodomy laws inflict psychological injury are many.

Before discussing these mechanisms, it is worth noting that there is nothing extrinsically psychologically unhealthy about homosexuality or sodomy.⁸⁶ Homosexuality is not a psychological disorder;⁸⁷ as to sodomy, in their amicus brief in *Hardwick*, the American Psychological Association and the American Public Health Association explained that sodomy "is not, by itself, pathological or harmful to the individual or individual functioning, whether engaged in with a member of the opposite or the same sex."⁸⁸ Indeed, "[m]ental health clinicians have long observed that diverse expressions of sexual feelings between consenting adults are not symptoms of mental disorder, but rather of mental health."⁸⁹

In contrast to the act of sodomy itself, which does not cause or indicate diminished mental faculties, sodomy laws can inhibit sound mental and emotional development in three ways. First, sodomy laws fuel internalized homophobia in some homosexuals, including "denial of membership in the group, self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophecies about one's own inferiority."⁹⁰ Criminalization of sodomy serves as a major cause of this self-hatred, homophobia, and isolation.⁹¹ Many gay Americans feel compelled to remain in the closet, hiding their core identity and intimate feelings from their friends and family in a state of forced invisibility.⁹² The effect of being labeled a member of a criminal class imposes a psychological toll on gay men and lesbians, even if they do not engage in any illegal conduct.⁹³ Thus, even celibate gay men and lesbians are traumatized by sodomy laws, which contribute to the internalization of homophobia.

⁸⁵ Kogan, *supra* note 49, at 234 n.116.

⁸⁶ Some courts have so acknowledged. For example, when invalidating its state sodomy law, a New York court found no societal harm from sodomy. See *People v. Onofre*, 434 N.Y.S.2d 947, 951 (1980).

⁸⁷ See AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M. III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 281-82, 380 (3d ed., 1980); KEEN & GOLDBERG, *supra* note 34, at 66 (noting that the American Psychiatric Association concluded in the early 1970s "that homosexual orientation in and of itself did not constitute a mental illness").

⁸⁸ Brief of Amici Curiae American Psychological Association and the American Public Health Association in Support of Respondents at 7, *Bowers v. Hardwick*, (No. 85-140) (U.S. January 31, 1986) (LEXIS, US Supreme Court Briefs) [hereinafter *APA/APHA Brief*].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *id.* ("The threat of criminal punishment actually has harmful psychological consequences for people who wish to engage in the proscribed conduct.").

⁹² See Gregory Herek, *Homophobia*, in 1 *ENCYCLOPEDIA OF HOMOSEXUALITY* 552 (Wayne R. Dynes, ed., 1990).

⁹³ See, e.g., *Baker v. Wade*, 553 F. Supp. 1121, 1127 (N.D. Tex. 1982); DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* 12 (1960) ("A per-

Independent of causing internalized self-loathing, sodomy laws diminish mental health by placing gay people under constant attack. In *Baker v. Wade*,⁹⁴ a case considering the constitutionality of Texas' sodomy law, "experts testified that severe anxieties are caused by threat of criminal punishment of homosexual conduct, and that this emotional distress could result in mental disorders."⁹⁵ The *Baker* court found that the existence of sodomy laws "harms, rather than helps, the mental health of homosexuals."⁹⁶ The court also noted that even when not enforced, sodomy laws "result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals—fear of arrest, loss of jobs, discovery, etc.—can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials."⁹⁷ Consistent with the findings of the *Baker* court, scholars have observed that

[t]he state also grievously injures gay and lesbian people when it punishes them for the core intimate and loving relationships of their lives. Those harms include the devastating effect of criminal condemnation, as well as the rippling material disabilities that the criminal condemnation justifies. Further, because sexual expression and control of one's body are so central to both material reality and sense of self, state condemnation matters, even when it has no concrete consequences.⁹⁸

This psychological injury is inflicted by the maintenance of sodomy laws in state criminal codes: "arbitrary definitions of criminal conduct, even if usually not enforced, needlessly impair liberty by their very existence."⁹⁹ In short, as federal courts have recognized, sodomy laws make gay men and lesbians feel persecuted.¹⁰⁰ This constant threat necessarily imposes psychological injury.¹⁰¹

son cannot live in an atmosphere of universal rejection, of widespread pretense, of a society that outlaws and banishes his activities and desires, of a social world that jokes and sneers at every turn, without a fundamental influence on his personality.").

⁹⁴ See *Baker*, 553 F. Supp. at 1121.

⁹⁵ *Id.* at 1147.

⁹⁶ *Id.* at 1143.

⁹⁷ *Id.* at 1130.

⁹⁸ Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 Wisc. L. REV. 187, 227 (footnote omitted).

⁹⁹ *Enforcement of Morality*, *supra* note 56, at 595.

¹⁰⁰ See, e.g., *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 142 n.12 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982).

¹⁰¹ Although the arrest of other gay citizens increases the perceived threat of one's own arrest, the perception of risk alone (as well as the knowledge that one is committing a criminal act) is sufficient to inflict emotional harm. In any case, even though the risk of arrest for committing private, consensual sodomy is extremely low, police routinely target and arrest gay men for solicitation to commit sodomy. See *infra* notes 154–219 and accompanying text. This presents a genuine threat of arrest that, not surprisingly, would trig-

Some scholars argue that the harms caused by sodomy laws also extend to heterosexual women by "reinforc[ing] the traditional gender arrangements that have been so oppressive to women."¹⁰² Since same-sex relationships rebut the presumption of heterosexuality and its patriarchal structure, sodomy laws impose "semi-criminal status upon lesbians and gays [because t]his status lessens the threat their sexual orientation poses to institutionalized heterosexuality."¹⁰³ Strict adherence to state sodomy laws would force all individuals into compulsory heterosexuality and would permit exactly one model of family.¹⁰⁴ This type of narrow-minded thinking lays the foundation for most forms of prejudice.¹⁰⁵

Second, since sodomy laws exist to punish and deter sexual activity deemed unacceptable, sodomy laws are further intended to chill sexual expression between same-sex couples.¹⁰⁶ If effective in deterring sexual expression, sodomy laws would interfere with healthy mental and emotional development. Medical research suggests that repressing the desire

ger the emotional response detailed in this section.

¹⁰² Law, *supra* note 98, at 228. Richard Mohr argues that accusations of homosexuals are used to keep people in the gender roles. See RICHARD D. MOHR, A MORE PERFECT UNION 3 (1994) ("The accusations 'fag' and 'dyke' serve in significant part to keep women in their place and to prevent men from breaking ranks and ceding away theirs.").

¹⁰³ Sandra J. Grove, *Constitutionality of Minnesota's Sodomy Law*, 2 LAW & INEQ. J. 521, 555 (1984). Grove argues that "[t]he social consequence of [Minnesota's sodomy law] is the delegitimization of lesbians and gays because they deviate from set gender roles. In effect, the statute punishes gay men for initiating sexual aggression toward other males. It punishes lesbians for refusing to be objects of male sexual aggression." *Id.* at 555-56.

¹⁰⁴ See Koppelman, *supra* note 59, at 160 (The view that homosexuals threaten the family "implies that the Court's consistent invalidation of laws that forcibly impose such roles has been a terrible mistake; that unless law continues to enforce rigid gender distinctions, people will no longer form stable units in which children can thrive."); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 800 (1989).

¹⁰⁵ See Law, *supra* note 98, at 221 ("Not surprisingly, negative attitudes toward lesbian and gay people correlate strongly with traditional, sexist concepts about the appropriate roles of men and women."). Conversely, William Eskridge has argued that society's condemnation of homosexuals was, in part, a response to women's gains in politics and the workplace. See WILLIAM N. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE 168 (1996).

¹⁰⁶ What opponents of sodomy laws refer to as a chilling effect, proponents would call "deterrence." Deterrence is a primary purpose of most statutes. See POSNER, *supra* note 30, at 233 ("Homosexual acts are punished in an effort, however futile, to destroy the inclination."). However, sodomy laws cannot affect sexual orientation, which is determined by biology, not statute. See generally DEAN HAMER & PETER COPELAND, THE SCIENCE OF DESIRE (1994); Chandler Brown, *Homosexuality & Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47. Empirically, sodomy laws do not effect the incidence of homosexuality. See POSNER, *supra* note 30, at 297 (effect of removing legal disabilities against homosexuals did not affect number of gay people in Sweden and the Netherlands). Thus, the most sodomy laws can hope to accomplish is deterring homosexuals from engaging in same-sex conduct. In the end, sodomy laws probably do not deter homosexual activity. See POSNER, *supra* note 30, at 205. See, e.g., Grove, *supra* note 103, at 525 ("Lesbians, gay men and heterosexuals alike almost universally disobey Minnesota's sodomy statute.").

It is not clear that sodomy laws do, in fact, deter sodomy. Given "the fundamental nature and strength of the sex drive in humans, it is unrealistic to think that fear of criminal sanction will effectively deter forbidden sexual conduct in private between consenting adults." APA/PHA Brief, *supra* note 88. Sodomy rates appear to be the same in jurisdictions that criminalize the conduct and those that do not. See *id.*

to engage in sodomy "can lead to dysfunction and pathology."¹⁰⁷ Because sexual expression is essential for stable relationships, whether same-sex or opposite-sex,¹⁰⁸ sodomy can help couples construct and reinforce meaningful relationships.¹⁰⁹ Analyzing the importance of sexual expression in same-sex couples, the American Psychological Association and the American Public Health Association argued in *Hardwick* that "[c]linical research also indicates that the freedom to engage in such conduct is important to the psychological health of individuals and of their most intimate and profound relationships."¹¹⁰ The Eleventh Circuit astutely recognized in *Hardwick* that "the sexual activity in question here serves the same purpose as the intimacy of marriage."¹¹¹ Interpersonal relationships, which supply the foundation of society, are often based on sexual expression.¹¹² In sum, prohibiting sexual expression thwarts proper mental and emotional development because the driving force behind sodomy laws is that "they enlist and redirect physical and emotional desires that we do not expect people to suppress."¹¹³

Third, sodomy laws deter some individuals who need psychiatric care from seeking it. Some self-proclaimed experts have asserted—with-

¹⁰⁷ APA/APHA Brief, *supra* note 88 (citing W. MASTERS & V. JOHNSON, HUMAN SEXUAL INADEQUACY (1970)). See also Anne B. Goldstein, *Bowers v. Hardwick: The Hidden Determinants*, 97 YALE L.J. 1073, 1094 (1988) (describing Professor Hart's position in England's famous Hart-Devlin debates).

¹⁰⁸ See APA/APHA Brief, *supra* note 88. Sodomy is also important for disabled heterosexual people who are physically unable to engage in vaginal intercourse:

Such individuals are encouraged by their therapists and rehabilitation specialists to use such behaviors as oral and anal stimulation to ensure the continuation of a pleasurable physical relationship with their loved ones. Such contact, in fact, has been shown to be a crucial determinant of survival itself for certain patients who may not be able to have intercourse and would otherwise terminate physical contact relationships.

Id. (citations omitted).

¹⁰⁹ See POSNER, *supra* note 30, at 111. Sodomy laws have perverted this general principle that encourages sexual expression, by limiting such expression to only type of activity, namely vaginal intercourse. Current American sodomy laws are more extreme than colonial sodomy laws in that the original sodomy laws only proscribed anal intercourse, not oral sex. See Goldstein, *supra* note 107; William N. Eskridge, Jr., *Hardwick and Historiography*, 99 U. ILL. L. REV. 631 (1999). The colonial laws applied equally to same-sex and opposite-sex sodomy. The breadth of sodomy laws was not expanded to include oral sodomy until after the Civil War. In short, there is extremely limited, if any, public policy rationale for proscribing oral sodomy, beyond the misconception that colonial America condemned such acts.

¹¹⁰ APA/APHA Brief, *supra* note 88.

¹¹¹ *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

¹¹² See Law, *supra* note 98, at 225 ("People have a strong affirmative interest in sexual expression and relationships The power of sexual experience is such that, in every culture, the basic units of human community, nurturing, acculturation, economic sharing, companionship and daily life are built around relationships of sexual expression and taboo.").

¹¹³ Rubinfeld, *supra* note 104, at 800.

out evidence—that the anxiety caused by sodomy laws will force gay citizens to seek psychiatric treatment and be “cured.”¹¹⁴ This view has long been rejected by the psychiatric profession.¹¹⁵ The district court in *Baker* noted that this argument “is not only preposterous—it, too, is contrary to the facts established by the credible evidence.”¹¹⁶ Indeed, it is the existence of the criminal law that prevents those in need from seeking psychiatric aid.¹¹⁷ In short, by treating homosexuals as criminals, sodomy laws are detrimental to the mental health of gay Americans.¹¹⁸

¹¹⁴ See generally *Baker v. Wade*, 553 F. Supp. 1121, 1132 (N.D. Tex. 1982).

¹¹⁵ See FRANK S. CAPRIO, *VARIATIONS IN SEXUAL BEHAVIOR* 298 (1955) (“Removing homosexuality from the criminal list will reduce blackmail while at the same time it may encourage homosexuals to seek psychiatric help.”).

¹¹⁶ *Baker*, 553 F. Supp. at 1132.

¹¹⁷ See Louis B. Schwartz, *Morals, Offenses, and the Model Penal Code*, 63 COLUM. L. REV. 669, 676 (1963); Brantner, *supra* note 8, at 501.

¹¹⁸ Sodomy laws may also be dangerous to physical health. Some people argue that sodomy laws proscribing homosexual conduct are necessary in the ex post facto rationalization that criminalizing consensual homosexual conduct is necessary to halt the spread of venereal diseases. See Eskridge, *supra* note 31, at 849. By criminalizing a primary means of HIV transmission, sodomy laws serve to limit the spread of AIDS. This argument is both a scare tactic and a red herring. Although the AIDS epidemic initially manifested itself in the gay community in this country, America is beginning to model the international pattern of AIDS spread as the disease takes greater hold in the heterosexual population. For example, the percentage of new AIDS cases attributed to men having sex with other men has decreased. See Luran Neergaard, *New Indicators Show AIDS #1 Killer of Men*, 25-44, ASSOCIATED PRESS, Oct. 28, 1993. Between 1990 and 1991 alone, the percentage of AIDS cases in the United States attributed to heterosexual contact increased by 21%. See CDC QUARTERLY HIV/AIDS SURVEILLANCE REPORT (June 30, 1993).

If sodomy laws have any significant relationship to the AIDS epidemic, it is to interfere with the fight against the virus and to increase the spread of AIDS. Firstly, sodomy laws create and reinforce internalized homophobia among certain gay men. See *supra* notes 90-93. See also APA/HPA Brief, *supra* note 88 (“By contributing to imposing internalized homophobia, criminal sodomy statutes also harm the effort to combat AIDS.”). Secondly, sodomy laws prevent the dissemination of safe-sex information. See APA/HPA Brief, *supra* note 88; Brantner, *supra* note 8, at 501 (state officials have censored educational safe-sex materials because they encouraged “lawlessness” in states that maintained sodomy laws); John Gallagher, *Refusal to Rule*, ADVOCATE, Feb. 22, 1994, at 24, 26 (officials in Texas have relied on that state’s sodomy law to deny funding for AIDS education programs for gay men). Thirdly, sodomy laws interfere with data collection and distort medical research. See Law, *supra* note 98, at 193 n.30 (“Reliable data on the incidence of homosexual orientation are difficult to obtain due to the obvious problems of criminal penalties and social stigma and the more subtle definitional problem.”); GAY & LESBIAN STATS 7, (Bennett L. Singer & David Deschamps eds., 1994) [hereinafter STATS] (“With sanctions against same-sex activity in 20 states and widespread discrimination against homosexuals, many gay men and lesbians may fear that revealing their homosexuality to researchers would cause problems socially and professionally.”). See also APA/HPA Brief, *supra* note 88. Fourthly, sodomy laws discourage gay men from reporting venereal diseases to their doctors and public health authorities. See APA/HPA Brief, *supra* note 88 (“The threat of prosecution actually harms the public health effort [against AIDS] by driving the disease underground where it is more difficult to study and contain . . .”) (emphasis in original). See also *Commonwealth v. Wasson*, 842 S.W.2d 487, 489-90 (Ky. 1992) (inaccurate reporting has been instrumental in the spread of AIDS); *State v. Saunders*, 381 A.2d 334, 342 (N.J. 1977) (criminal statutes can deter voluntary participation in treatment programs). See generally *Campbell v. Sundquist*, 926 S.W.2d 250, 263-64 (Tenn. App. 1996) (Fear of prosecution causes some homosexual individuals to avoid medical

3. Anti-Gay Violence

In American communities, both rural and urban, gay men and lesbians are routinely brutalized by their fellow Americans. The U.S. Department of Justice has reported that gay citizens "are probably the most frequent victims" of hate crimes in the country.¹¹⁹ Like much hate crime, violence against gay victims is qualitatively more severe than violence associated with non-bias crimes; gay victims are more likely to be mutilated, repeatedly stabbed, and otherwise subjected to "overkill" than other attack victims.¹²⁰

The individual target of a homophobic attack is not the sole casualty. Bias crimes against individual gay men and lesbians victimize the entire class of gay men and lesbians.¹²¹ Professor Kendall Thomas likens anti-gay violence to terrorism: "[M]uch of the force of violence against gay men and lesbians lie[s] in its randomness," which is intended to threaten the entire gay population.¹²² In fact, the effects of anti-gay violence are not limited to gay men and lesbians. The collateral damage often spills over to heterosexuals. Despite stereotypes to the contrary, sexual orientation is not readily discernible; many of the victims of anti-gay violence are actually heterosexuals who are mistakenly perceived as gay.¹²³

treatment, and others to avoid being tested for infection.); see POSNER, *supra* note 30, at 165.

¹¹⁹ NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, *THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY REVIEW* (1987). See *SEXUAL ORIENTATION AND THE LAW* 31 (Harvard Law Review eds., 1989) [hereinafter *SEXUAL ORIENTATION AND THE LAW*]. See also MOHR, *supra* note 102, at 5:

Annual studies by the National Gay and Lesbian Task Force have consistently found that over 90% of gay men and lesbians have been victims of violence or harassment in some form on the basis on their sexual orientation. Greater than one in five gay men and nearly one in ten lesbians have been punched, hit, or kicked; a quarter of all gays have had objects thrown at them; a third have been chased; a third have been sexually harassed, and 14% have been spit on, all just for being perceived to be gay.

¹²⁰ See Brian Miller & Laud Humphreys, *Lifestyles and Violence: Homosexual Victims of Assault and Murder*, 3 QUALITATIVE SOC. 169, 179 (Fall 1980) ("That intense rage is present in nearly all homicide cases with homosexual victims is evident. A striking feature of most murders . . . is their gruesome, often vicious nature. Seldom is a homosexual victim simply shot. He is more apt to be stabbed a dozen or more times, mutilated, and strangled."). See also Michael D. Bell & Raul I. Vila, *Homicide in Homosexual Victims*, 17 AM. J. FORENSIC MED. & PATHOLOGY 65, 68 (1996); Chris Bull, *Connect the Dots*, ADVOCATE, Aug. 31, 1999, at 26 ("[t]he vast majority of attacks on gay men are exceptionally violent and random") (quoting Jack Levin, director of the Brudnick Center on Violence at Northeastern University); Chris Bull, *The State of Hate*, ADVOCATE, Apr. 13, 1999, at 24 ("In ordinary crimes people are beaten or shot. That doesn't seem to be enough for these killers of homosexuals. They have to break every bone in their face or stab them 30 times.") (quoting Mark Potok of the Southern Poverty Law Center).

¹²¹ See *SEXUAL ORIENTATION AND THE LAW*, *supra* note 119, at 31.

¹²² Thomas, *supra* note 68, at 1465.

¹²³ See David Chang, *Beyond Uncompromising Positions: Hate Crimes Legislation and the Common Ground Between Conservative Republicans and Gay Rights Advocates*, 21 FORDHAM URB. L.J. 1097, 1101 (1994). See, e.g., Victoria Scanlan Stefanakos, *Firsthand Hate*, THE ADVOCATE, Jan. 19, 1999 (gay-basher who mistook heterosexual man as gay

Violence against gay men and lesbians does not occur in a vacuum. Social mores, religious indoctrination, and the legal environment, such as the maintenance of sodomy laws, all create an environment conducive to anti-gay assaults and killings. Sodomy laws facilitate anti-gay violence in four ways.

First, sodomy laws create the milieu that informs society, especially adolescents, that the lives of gay people are not worthy.¹²⁴ The American Psychological Association and the American Public Health Association, in its amicus brief in *Bowers v. Hardwick*, noted that "[i]n part because their behavior is punishable by criminal law, homosexuals become stigmatized as 'deviants' and are viewed in terms of undesirable stereotypes."¹²⁵ Professor Thomas emphasizes that "the criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another."¹²⁶ Some commentators argue that the decision in *Hardwick* translates into anti-gay violence, and, more notably, that the Court knew it would.¹²⁷ The fact that reports of violence against gay men and lesbians tripled after Colorado passed Amendment Two, which precluded cities from banning discrimination based on sexual orientation, illustrates how the law sends signals to the general populace.¹²⁸ The harm wreaked by

called him a "faggot," repeatedly kicked his head against a concrete curb, resulting in broken facial bones and partial loss of vision); Joan Smith, *A Gay Basher Asks: Why?*, S.F. EXAMINER, June 7, 1989.

¹²⁴ See GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 136 (1991) ("Legislation restricting sexual choice could legalize or more pointedly sanction anti-gay/lesbian violence."). See also Reinig, *supra* note 32, at 898 ("Sodomy legislation has the effect of reinforcing and perpetuating this stigmatization of gay people and, consequently, the prejudices and hatred of homophobes and queer-bashers.").

¹²⁵ APA/APHA Brief, *supra* note 88. See also Thomas, *supra* note 68, at 1475 ("One need look no further than the facts of *Hardwick* to appreciate that homosexual sodomy statutes are constitutionally suspect because they legitimize acts of homophobic violence that threaten the very existence of the human beings who are caught within their statutory net.").

¹²⁶ Thomas, *supra* note 68, at 1490.

¹²⁷ See Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE L. REV. 1, 16 n.34 (1994).

¹²⁸ See NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION AND DEFAMATION IN 1992 (1993). See also Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment*, 32 WASHBURN L.J. 367, 369 (1993):

In Denver, Colorado, the passage of Amendment 2 fueled violence. Prior to the passage of Amendment 2, the monthly average of reported hate crimes against gays and lesbians was twelve. After the vote in November, forty-five incidents of "gay-bashing" were reported, and thirty-five incidents were reported in December. These numbers include four gay men who were beaten to death near the state capital.

See also Note, *Constitutional Limits on Anti-Gay Initiatives*, 106 HARV. L. REV. 1905, 1911-12 (1993) [hereinafter *Constitutional Limits*] ("Within days of Amendment Two's passage, numerous gay-affiliated groups were subjected to anonymous phone threats, bomb threats, and property damage.").

sodomy laws provides an analogous link between legislation and violence.¹²⁹

Second, perpetrators of violence against gay men and lesbians rationalize their violence as vigilante enforcement of sodomy laws.¹³⁰ Historically, private societies obsessed with the "vice of homosexuality," such as New York City's Committee of Fourteen and the Society for the Suppression of Vice, devoted significant private resources to monitoring homosexuals.¹³¹ These societies employed agents to infiltrate gay meeting spaces in order to help orchestrate police raids and to serve as witnesses.¹³² Yesterday's moral reformers have been replaced by today's gangs who have taken over both the monitoring and enforcement responsibilities, often beating, torturing, and killing gay men and lesbians. Many anti-gay attackers perceive themselves as performing legitimate law enforcement by bashing gay people who elude prosecution under state sodomy laws.¹³³ In one incident in which four young men beat a man to death because they perceived him to be gay, a police inspector reported that the murderers "seem to regard the beating-up of whomever they consider sex deviates as a civic duty."¹³⁴ By criminalizing the socially interpreted defining characteristic of gay men and lesbians, the criminal justice system permits perpetrators of violence "to lay the blame for their brutality at the feet of their victims."¹³⁵

Some scholars suggest that sodomy laws deliberately encourage "private enforcement" through violence. Professor Thomas argues that "homosexual sodomy statutes express the official 'theory' of homophobia; private acts of violence against gay men and lesbians 'translate' that theory into brutal 'practice.' In other words, private homophobic violence punishes what homosexual sodomy statutes prohibit."¹³⁶ Thus, sodomy laws represent "constructive delegation of governmental power" to those citizens who use violence against gay men and lesbians as a means of enforcing those laws.¹³⁷ Many law enforcement officials appear less than

¹²⁹ Sodomy laws are similar to anti-gay rights initiatives. The latter block the passage of gay rights laws and "affirmatively encourage and facilitate public and private discrimination against lesbians and gay men." *Constitutional Limits*, *supra* note 128, at 1910.

¹³⁰ See Thomas, *supra* note 68, at 1477.

¹³¹ See CHAUNCEY, *supra* note 30, at 145-46.

¹³² See *id.* at 145-46, 148.

¹³³ See Kogan, *supra* note 49, at 233 (noting that homosexuals are viewed as outlaws "whose crime escapes state punishment"). See also Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 212 (1996).

¹³⁴ COMSTOCK, *supra* note 124, at 183 n.54.

¹³⁵ Thomas, *supra* note 68 at 1483.

¹³⁶ *Id.* at 1485-86.

¹³⁷ *Id.* at 1481-82. Because of this state-accepted, private enforcement of sodomy laws, some scholars argue there is a sound basis for challenging sodomy laws as cruel and unusual punishment, even in the absence of criminal prosecutions. Professor Thomas argues that the Eighth Amendment applies not only to court-imposed punishments but also bars the "state from effecting the enforcement of [sodomy] laws by instigating, encouraging, or permitting private attacks on gay men and lesbians." *Id.* at 1487.

eager to prosecute acts of anti-gay violence, a fact consistent with this explanation. Professor Thomas explains that "the lived experience of gay men and lesbians under the legal regime challenged and upheld in *Bowers v. Hardwick* is one in which government not only passively permits, but also actively protects, acts of violence directed toward individuals who are, or taken to be, homosexual."¹³⁸ Indeed, the sympathy, if any, appears to be with the perpetrators of violence against gay men and lesbians, as opposed to the victims.¹³⁹

Third, sodomy laws deter gay people from reporting crimes committed against them, especially those anti-gay in nature.¹⁴⁰ An estimated 80% of bias violence committed against gay men and lesbians is never reported to police,¹⁴¹ and, as a result, the vast majority of anti-gay incidents result in no arrest.¹⁴² This underreporting, and the consequent lower risk of arrest, encourages attacks against gay citizens; due to "their reluctance to report crimes, and their distrust of the criminal justice system, gay men and lesbians are more attractive victims for perpetrators of bias crime."¹⁴³ This vicious cycle has continued for over a century. As early as the 1890s, brutal youth have preyed upon gay men because they "were considered 'outlaws' by the authorities and thus would not dare complain to the police for fear of drawing attention to themselves."¹⁴⁴ Since then, the cycle of violence has evolved and expanded. For example, within the context of abusive same-sex relationships, sodomy laws protect attackers by discouraging victims of domestic violence from reporting abuse.¹⁴⁵ Across time and contexts, this reluctance to report attacks is a rational response to the possibility that a victim's admission of homosexual activity to police may result in arrest under a state sodomy statute.¹⁴⁶

¹³⁸ *Id.* at 1461.

¹³⁹ *See id.* at 1484 ("Because gay men and lesbians are seen as members of a criminal class, it is almost as though state governments view prosecution of those who commit crimes of homophobic violence as an invasion of the perpetrator's rights.").

¹⁴⁰ *See* SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 32. Many gay victims of crime believe that they will be victimized again by the police. *See* COMSTOCK, *supra* note 124, at 159-60. Thus, they suffer in isolation, which makes them attractive targets for subsequent attacks.

¹⁴¹ *See* Thomas, *supra* note 68, at 1464.

¹⁴² *See* STATS, *supra* note 118, at 71.

¹⁴³ SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 1542.

¹⁴⁴ CHAUNCEY, *supra* note 30, at 59. *See* COMSTOCK, *supra* note 124, at 19 (attackers "knew that the 'homosexual was totally vulnerable,' that 'all the cards were in [their] hands,' including the cooperation of the 'friendly cop'").

¹⁴⁵ *See* Patricia G. Barnes, *It's Just a Quarrel*, 84 A.B.A. J. 24 (Feb. 1998).

¹⁴⁶ This is precisely what happened in 1997 to Michael Simmons, who after reporting the theft of his wallet by a sexual partner, was arrested for violating Rhode Island's century-old sodomy law. Associated Press, *R.I. Dropping Sodomy Case Against 2 Men*, TELEGRAM & GAZETTE (Worcester, Mass.), Sept. 9, 1997, at A2; *see also* Marion Davis, *Sex Charges Dropped Against 2*, PROVIDENCE J. BULL., Sept. 9, 1997, at 1B.

Finally, homophobic legislators employ sodomy laws to argue that gay people are not entitled to enhanced legal protection against violence and bias crimes. In those states that maintain statutes against sodomy, state "legislators invoke the sodomy law in debate as a justification for denying legal protections to homosexuals, who get represented as immoral criminals deserving of punishment."¹⁴⁷ For example, in Utah, state representatives fighting against the inclusion of sexual orientation in Utah's bias crime legislation argued that homosexuality was distinguishable from all other protected categories because it is unlawful.¹⁴⁸ The representatives asked, "Why should we pass a law protecting someone who is breaking the law?"¹⁴⁹ Self-described pro-family conservatives argued that since sodomy is a crime in Utah, homosexuals should not be included in the hate-crime bill because the state "should not give privilege [sic] to those who actually violate our laws and are criminals."¹⁵⁰ Representatives concurred and argued that granting "special protection" to gay men and lesbians "would be contradictory under Utah law."¹⁵¹ Ultimately, sexual orientation was excluded from Utah's hate crime bill, which required the collection of hate crime statistics and provided for sentence enhancement for crimes committed with a hateful motive.¹⁵² Commentators have noted that the argument that homosexuality is a crime, "which is parasitic on the existence of a criminal sodomy statute in Utah, serves as the foundation for all of the other justifications against extending hate crimes protection to homosexuals."¹⁵³

State-sanctioned condemnation of a group of citizens through criminal law sends the clear message that this group is not entitled to the freedom from physical violence provided other citizens. Of course, the existence of sodomy laws does not provide a legal defense against prosecution for beating or killing a gay man or lesbian. What sodomy laws do is grant societal permission to commit acts of violence against gay men and lesbians. Sodomy laws are kept on the books to signal adults and teach teenagers that gay citizens should be condemned, that their lives and

¹⁴⁷ Kogan, *supra* note 49, at 232. Nonetheless, even in states without sodomy laws, conservative legislators may seek to block passage of hate crimes legislation. See Chang, *supra* note 123, at 1098-99 (arguing that due to the problem of bias-motivated violence, conservatives should embrace hate crimes legislation that includes sexual orientation subject matter). But sodomy laws provide the slender reed upon which the justification of discrimination often rests. Cf. Mohr, *supra* note 58, at 53 (arguing that opponents of civil rights legislation for gay people cite the existence of sodomy laws in opposing such legislated rights).

¹⁴⁸ See Kogan, *supra* note 49, at 217-19 & n.57.

¹⁴⁹ *Id.* at 217 n.51.

¹⁵⁰ *Id.* at 220 n.67.

¹⁵¹ *Id.* at 222.

¹⁵² See *id.* at 223.

¹⁵³ *Id.* at 227. See also PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE 67-68 (1999) [hereinafter HOSTILE CLIMATE 1999] (discussing how Arizona legislators invoked the state's sodomy law to deny domestic violence protections to same-sex couples).

bodies are somehow worth less than those of heterosexual—"normal"—citizens, and that gay men and lesbians have fewer rights and are entitled to less legal protection than are other citizens.

4. Police Harassment

For decades, the relationship between American police forces and gay communities has ranged from strained to a state of quasi-warfare. Since the postwar era began, gay and lesbian citizens have been subjected to unprovoked violence, harassment, and blackmail by police officers.¹⁵⁴ This harassment flourished in legal and illegal forms, both of which were practiced with zeal. Law enforcement officials have historically gone out of their way to target gay people. Employing the wisdom of Willie Sutton, a primary target of police harassment against gay men and lesbians has traditionally been gay bars and clubs. In the 1960s, the police targeted gay bars by sending in plainclothesmen to seduce older patrons into agreeing to violate state sodomy laws.¹⁵⁵ Sodomy laws were then used to justify police sweeps of gay bars and establishments.¹⁵⁶ When California maintained its sodomy law in the 1960s, popular forms of harassment by law enforcement officials included frequenting gay bars, checking patrons' identification every half hour, checking each patron for outstanding warrants, and filling out field investigation cards every time a suspect was questioned.¹⁵⁷ Once the police obtained enough investigation cards against an individual, they possessed sufficient evidence to commence a prosecution charging solicitation or engaging in lewd conduct.¹⁵⁸ Although California's sodomy statute was ostensibly gender-neutral, police only used these tactics in gay bars.¹⁵⁹ Some law enforcement agencies "admitted they use[d] harassment as an effective

¹⁵⁴ See *SEXUAL ORIENTATION AND THE LAW*, *supra* note 119, at 1542. Most of the reported incidents involve gay men, and some commentators suggest that historically, lesbians have been less subject to police harassment than gay men. See ROXANNA THAYER SWEET, *POLITICAL AND SOCIAL ACTION IN HOMOPHILE ORGANIZATIONS* 95 (1968). However, lesbians have nonetheless been frequent victims of police harassment. See, e.g., COMSTOCK, *supra* note 124, at 18; Eskridge, *supra* note 31, at 832.

¹⁵⁵ See D'EMILIO, *supra* note 53, at 183. Police entrapment of gay men in the 1950s "amounted to a financial and emotional lynching, in which an officer accused a gay man of making a sexual advance. Often the officer had engaged in no more than a glance; sometimes he encouraged advances to the point of full participation. (A joke from the time went, 'It's been wonderful, but you're under arrest.')." STUART TIMMONS, *THE TROUBLE WITH HARRY HAY* 164 (1990).

¹⁵⁶ See D'EMILIO, *supra* note 53, at 50-51.

¹⁵⁷ Compare Gallo, *supra* note 42, at 719. The UCLA Project dealt with "only those laws regulating adult, homosexual, consensual activities" and not "[c]rimes such as rape, fornication, lewd cohabitation, statutory rape, and any other heterosexual or homosexual act involving force, coercion, or juveniles." *Id.* at 658. Moreover, arrests for consensual same-sex conduct are infrequently made pursuant to a warrant. See *id.* at 709. In the UCLA Project, only 10 of the 493 felony arrests were made under a warrant. See *id.* at 709 n.149.

¹⁵⁸ See *id.* at 719.

¹⁵⁹ See *id.* at 720.

tool to deter suspected homosexuals from frequenting their bars.”¹⁶⁰ In the 1960s, sodomy laws served a role in suppressing a growing gay-rights movement as “[p]olice parked their squad cars in front of homosexual taverns to intimidate patrons. Every evening spent in a gay setting, every contact with another homosexual or lesbian, every sexual intimacy carried a reminder of the criminal penalties that could be exacted at any moment.”¹⁶¹ Furthermore, harassment was not limited to gay bars because “even the homes of gay men and women lacked immunity from vice squads bent on increasing their arrest records.”¹⁶² Throughout the sixties, American police arrested hundreds of gay men for committing consensual sodomy; many were convicted and imprisoned.¹⁶³

Although one might assume that the abuses of the 1950s and 1960s are relics, the persecution of gay people continues today. Sodomy laws facilitate police harassment of gay men and lesbians by providing legal justification for such actions.¹⁶⁴ As long as states maintain sodomy laws on their books, the states’ exercise of repressive power against gay men and lesbians is legitimated.¹⁶⁵ Sodomy laws invite and encourage police officers to intrude into the intimate lives of American citizens, a power police have exercised selectively against gay people.¹⁶⁶ Although gay men were arrested in the thousands for sodomy law violations during the pre-Stonewall era,¹⁶⁷ actual arrests for private, consensual sodomy are rare today. However, police departments still commonly entrap and arrest gay men for solicitation to commit private, consensual sodomy. Of course, solicitation to commit sodomy would not be a crime if private, consensual sodomy itself were not illegal.

An arrest for solicitation to commit sodomy can be devastating.¹⁶⁸ Although arrest is usually considered only the first step in a broader legal

¹⁶⁰ *Id.* at 723.

¹⁶¹ D’EMILIO, *supra* note 53, at 49.

¹⁶² *Id.*

¹⁶³ See Gallo, *supra* note 42, at 805–06.

¹⁶⁴ Moreover, police use other statutes besides sodomy laws in order to harass gay men, including vagrancy, lewdness, and disorderly conduct laws. See Eskridge, *supra* note 31, at 857. To the extent that these laws punish private, consensual conduct between adults, many of the arguments in this Article apply to these statutes as well. However, at the risk of using the terms in an overbroad fashion, this Article speaks only of “sodomy laws” and “sodomy statutes.”

¹⁶⁵ See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1589 (1993). See also D’EMILIO, *supra* note 53, at 49 (“The widespread labeling of lesbians and homosexuals as moral perverts and national security risks gave local police forces across the country a free rein in harassment.”).

¹⁶⁶ See Brantner, *supra* note 8, at 499.

¹⁶⁷ See D’EMILIO, *supra* note 53, at 50 (explaining how, in the District of Columbia alone, there were over one thousand arrests annually during the early 1950s). Police resorted to entrapment to reach and maintain these high numbers. See *id.*

¹⁶⁸ See MOHR, *supra* note 30, at 54–55 (“These solicitation laws frequently have devastating personal, social, and economic effects for those arrested, even though criminal penalties typically are slight and even if charges are ultimately dropped or a not-guilty verdict reached.”).

process that often includes arraignment, trial, conviction, sentencing, and jail time, in solicitation cases, the arrest itself is often the intended punishment. Professor Henry Louis Gates, Jr. explained this phenomenon in another context:

What we miss when we dwell on the rarefied workings of high court decision making is the way in which laws exert their effect lower down the legal food chain. It's been pointed out that when police arrest somebody for loitering or disorderly conduct, the experience of arrest—being hauled off to the station and fingerprinted before being released—often is the punishment.¹⁶⁹

The goal in these cases is to harass, intimidate, and belittle—not to convict.

Gay men who are arrested are often subject to physical and verbal assault by police and other inmates once their sexual orientation is disclosed.¹⁷⁰ Historically, the arrest process was sometimes drawn out to punish gay men even further.¹⁷¹ Furthermore, arrest reports are often published in local newspapers and other media. In the past, newspaper editors actually printed the names, addresses, and places of employment of the men and women who were arrested in raids of gay establishments.¹⁷² After outing-by-arrest, many gay men lose their jobs, friends, and family.¹⁷³ Even in the 1990s, local newspapers have printed names of

¹⁶⁹ Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 42. Writing about arrests for homosexual offenses in early twentieth century New York City, George Chauncey explained:

Arrests could have catastrophic consequences. Conviction often resulted in a sentence of thirty to sixty days in the workhouse, but the extralegal sanctions could be worse. An arrest could result in a man's homosexuality being revealed to family members, employer, and landlord, either because the police called to "confirm" a man's identity, employment, or residence or because the man himself had to explain his incarceration.

CHAUNCEY, *supra* note 30, at 198.

¹⁷⁰ See Brantner, *supra* note 8, at 498 n.29. See also *supra* note 18 (discussing police disclosure of Michael Hardwick's sexual orientation to other inmates).

¹⁷¹ For example, in the 1960s, when California enforced its sodomy law, arrested gay men had to stay in jail until an attorney could set bail through a judge, and in some cases "the time period required to have felony bails set and the inability of some defendants to raise bail result[ed] in the jail detention of many homosexual offenders before trial for intervals ranging from a few hours to a few weeks." Gallo, *supra* note 42, at 743–44. Even the purpose of bail in such cases is suspect given the fact that no man ever attempted to jump bail in the jurisdiction studied. See *id.* The legal bills alone are punishment for most gay men. See *id.* at 760.

¹⁷² See D'EMILIO, *supra* note 53, at 49.

¹⁷³ See Eskridge, *supra* note 41, at 1068–69. See also MOHR, *supra* note 102, at 20 ("[S]odomy laws are the engines that justify and legally prop up sexual solicitation laws, which are regularly enforced, especially against male homosexuals, who frequently, [and] in consequence, lose jobs and families—and sometimes commit suicide.").

those arrested for same-sex conduct. As a result, men have lost their jobs and had their homes vandalized.¹⁷⁴

Although all laws vest police and prosecutors with some degree of discretion, the vagueness of sodomy and related laws increases this discretion, thereby allowing police to exercise their prejudices.¹⁷⁵ Police have discretion over whom to target and how to target. With respect to whom, for example, "[p]olice do not patrol singles bars in search of adults willing to engage in heterosexual sodomy."¹⁷⁶ However, police routinely stake out and operate undercover in gay bars and pick-up places in order to find gay men willing to engage in oral sex.¹⁷⁷ Judge Posner has explained that underenforced sodomy laws "vest enforcement officials with enormous discretion, which invites discriminatory enforcement."¹⁷⁸

Local law enforcement personnel have abused the discretion vested in them by sodomy laws in a multitude of ways. Sodomy laws have been used to run gay men and lesbians out of town in order to render entire communities "No gay zones."¹⁷⁹ For example, a 1966 UCLA Project found that "[h]arassment is practiced by the smaller jurisdictions which have no interest in making arrests and are concerned only with getting the homosexual out of town. Seven of the fifteen enforcement agencies interviewed admitted using various types of harassment."¹⁸⁰ More recently, in May 1987, a Tennessee district attorney prosecuted two men for "crimes against nature," stating that he was trying to "make an example" of them in order to discourage gay men and lesbians from living there.¹⁸¹ Rogue sheriffs also use sodomy laws to harass gay men and lesbians against whom they carry grudges or have differences.¹⁸² The problem is probably greater in small and rural cities that do not have a significant visible gay and lesbian presence. For example, in 1995 in Mitchell County, North Carolina, the sheriff ordered his deputies illegally to tape the phone conversations of the local high school football coach, a

¹⁷⁴ See Nat Hentoff, *Sex in the Park*, WASH. POST, Feb. 19, 1991, at A17.

¹⁷⁵ See Gallo, *supra* note 42, at 652.

¹⁷⁶ Law, *supra* note 98, at 189.

¹⁷⁷ See, e.g., Eskridge, *supra* note 31, at 860.

¹⁷⁸ POSNER, *supra* note 30, at 207. See also HAW. REV. STAT. § 707-730 to -738 (1976) (repealed 1986) (noting that the limited enforcement of sodomy laws raises the specter of discriminatory enforcement). This abuse of discretion has been an ongoing problem for decades. Before Stonewall, Herbert Packer argued that the rarity of enforcement and difficulty of detection created arbitrary and undesirable police practices, selective prosecution, and extortion. See generally HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 304 (1968).

¹⁷⁹ Eskridge, *supra* note 41, at 1053.

¹⁸⁰ Gallo, *supra* note 42, at 719.

¹⁸¹ Brantner, *supra* note 8, at 515 n.172.

¹⁸² See Cain, *supra* note 165, at 1588. Although police often arrest gay men for solicitation, the preferred course of action has been simply to harass gay men because it forces gay men out of the community "without the publicity which attends arrest, trial, and conviction." Gallo, *supra* note 42, at 724.

gay man.¹⁸³ The sheriff threatened to release the tapes in order to force the man from his job.¹⁸⁴

Enforcement of sodomy laws means that limited police resources are expended on questionable practices.¹⁸⁵ Because of the private nature of sodomy and solicitation to commit sodomy, the most effective way to capture actual and potential sodomites is through police decoys.¹⁸⁶ Historically, some law enforcement agencies have been known to give broad discretion to decoys.¹⁸⁷ Some police officers can spend their time ordering drinks and engaging in conversation in gay bars;¹⁸⁸ others are much more brazen. For example, decoys engage in such conduct as standing outside of gay bars and licking their lips while rubbing their bodies.¹⁸⁹ Some police decoys displayed erections to entice men to proposition them.¹⁹⁰ Sometimes, an officer will allow the target to touch the officer's genitals before arresting him.¹⁹¹ Extreme cases reveal that some officers actually engaged in oral copulation before making an arrest.¹⁹² Those decoys working in bathhouses sometimes operated in the nude or semi-nude.¹⁹³ While some tactics may have changed, police departments still routinely use undercover officers in sodomy stings.¹⁹⁴ In many states, po-

¹⁸³ See PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE 40 (1998) [hereinafter HOSTILE CLIMATE 1998].

¹⁸⁴ See *id.*

¹⁸⁵ For example, in holding that New Jersey's fornication statute impermissibly impeded the liberty of both gay and straight adults, a New Jersey court observed that "[s]urely police have more pressing duties than to search out adults who live a so-called 'wayward' life." State v. Ciuffini, 395 A.2d 904, 908 (N.J. Super. Ct. 1978).

¹⁸⁶ See, e.g., New York v. Pleasant, 122 N.Y.S.2d 141 (City Magis. Ct. 1953). See also discussion *supra* note 31.

¹⁸⁷ See Gallo, *supra* note 42, at 706.

¹⁸⁸ See, e.g., Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992). See also Gallo, *supra* note 42, at 693; CHAUNCEY, *supra* note 30, at 341.

¹⁸⁹ See Gallo, *supra* note 42, at 706. One police officer acknowledged "quite frankly, the solicitation can't be made unless the officer participates to some extent or puts himself in the situation where a solicitation can be made." SWEET, *supra* note 154, at 152.

¹⁹⁰ CHARLES KAISER, THE GAY METROPOLIS 1940-1996 13 (1997).

¹⁹¹ See Gallo, *supra* note 42, at 696. In one case, the police decoy told his target that he had an erection and "wanted to be taken care of." *Id.* at 706.

¹⁹² See People v. Spaulding, 254 P. 614 (Col. Dist. Ct. App. 1927). See also JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 103-04 n.11 (1966) (discussing officer who "wait[s] to make his arrest until the offender has his hand, or in one case his mouth, on the officer's penis").

¹⁹³ See Gallo, *supra* note 42, at 693.

¹⁹⁴ See, e.g., Corstvet v. Boger, 757 F.2d 223, 225 (10th Cir. 1985); Christensen v. State, 468 S.E.2d 188 (Ga. 1996); Doe v. Attorney General, 686 N.E.2d 1007 (Mass. 1997); State v. Walsh, 713 S.W.2d 508 (Mo. 1986). See also Mubarak S. Dahir, *Sudden Visibility*, ADVOCATE, Apr. 15, 1997, at 35-36 (noting that police "queer patrols" routinely work to arrest gay men seeking consensual sodomy).

Historically, the use of questionable procedures and expenditure of scarce resources is made all the more suspect by the fact that ordinary citizens apparently would not make these same judgments. See Gallo, *supra* note 42, at 734. Police are operating on their initiative because citizen complaints are rare, even in the heyday of police activity against gay men in the 1960s. See *id.* at 723. Even at the height of solicitation decoys and arrests, there were few complaints to the police regarding unwanted solicitations. See *id.* at 698.

lice invest significant time working undercover in an attempt to seduce gay men, and then arrest these men for solicitation to commit the crime of sodomy.¹⁹⁵ For example, in Missouri, "police regularly solicit men for sex. The officer asks a man to go home with him and then arrests him. There doesn't even have to be any physical contact."¹⁹⁶ This practice is common in states with sodomy laws.¹⁹⁷

Deferential or nonexistent judicial oversight in sodomy-related cases affords police greater latitude in entrapping and mistreating gay citizens.¹⁹⁸ Meaningful judicial protection is lacking for several reasons. First, gay men are often deterred from demanding a trial because it is difficult, if not impossible, to defend oneself against a charge of solicitation to commit sodomy. As the UCLA Project observed: "No crime is easier to charge or harder to disprove than the sex offense."¹⁹⁹ This is hardly surprising given that most convictions rest solely on the testimony of the arresting officer who accuses the defendant of solicitation.²⁰⁰ The arresting officer rarely has corroboration because "[s]olicitations are usually made by gesture and quiet conversation, and the decoy's partner cannot get close enough to witness either the solicitation or the occasional lewd touching."²⁰¹ The risk always exists that the police decoy misconstrued ambiguous language or conduct.²⁰² And the testifying officer has every incentive to interpret all ambiguity as solicitation. One commentator observed:

Either subconsciously or consciously a decoy policeman may mistake the facts. Although unsuccessful prosecutions should not affect his job security, they may enter into efficiency ratings and affect his chance of promotion. In addition, the policeman whose assignment is to find homosexuals may have a distorted impression of the subtle interchange which occurred, since he

¹⁹⁵ See, e.g., *State v. Baxley*, 633 So. 2d 142 (La. 1994).

¹⁹⁶ Paul Reidinger, *Missouri Vice: Sodomy Ban Affirmed*, 72 A.B.A. J., Nov. 1, 1986, at 78 (quoting attorney Arlene Zarembka).

¹⁹⁷ See, e.g., *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Sawatzky v. City of Oklahoma City*, 906 P.2d 785 (Okla. Crim. App. 1995), *cert. denied*, 517 U.S. 1156 (1996).

¹⁹⁸ Ironically, the fewer arrests police make, the greater discretion they have to harass, abuse, and extort gay men. See Harold Jacobs, Note, *Decoy Enforcement of Homosexual Laws*, 112 U. PA. L. REV. 259, 284 (1963) (because of the questionable techniques used to enforce sodomy laws, "some prosecutions are necessary to provide judicial supervision of police practices").

¹⁹⁹ Gallo, *supra* note 42, at 695.

²⁰⁰ See *id.* at 694-95.

²⁰¹ *Id.* at 695.

²⁰² See Jacobs, *supra* note 198, at 279; Gallo, *supra* note 42, at 695.

knows that he must fully justify his decision to make an arrest.²⁰³

Yet any defendant would be hard-pressed to prove in open court the meaning of subtle gestures or phrases. "When prosecutions are limited to credibility contests between defendants and arresting officers the likelihood of miscarriages of justice is evident," the UCLA Project concluded.²⁰⁴ In short, courts appear deferential to police practices used to enforce state sodomy laws.²⁰⁵

Furthermore, many gay men are reticent to pursue their legal rights or defend themselves against trumped up charges because a trial would invite notoriety and most gay men are "too frightened of publicity to demand a jury trial to challenge the charges."²⁰⁶ Because many men who are arrested for consensual sex crimes are married or have jobs to protect, they feel compelled to plea bargain.²⁰⁷ Ultimately, most gay victims of police harassment do not press their legal rights.²⁰⁸ Fear of additional

²⁰³ Jacobs, *supra* note 198, at 278.

²⁰⁴ Gallo, *supra* note 42, at 695.

²⁰⁵ For example, when some gay citizens sued the Fort Worth police department for violating their civil rights, the court, in denying the defendants' motion to dismiss, noted that the gay plaintiffs would have difficulty proving that the police surveillance and harassment of gay establishments and citizens was unconstitutional, because these police efforts were related to enforcing Texas' sodomy law. *See Cyr v. Walls*, 439 F. Supp. 697 (N.D. Tex. 1977).

Similarly, when a litigant argued that Washington, D.C.'s facially neutral sodomy statute was targeted disproportionately at homosexuals, the court found that the enforcement disparities were explained away by "the lack of knowledge by the police concerning heterosexual sodomitic acts." *Stewart v. United States*, 364 A.2d 1205, 1208 (D.C. 1976). This would be ironic indeed if the police knew more about homosexual sex practices than heterosexual sex practices.

²⁰⁶ Cain, *supra* note 165, at 1565. Moreover, even when convicted, gay men have historically been too intimidated to appeal their convictions. *See CHAUNCEY*, *supra* note 30, at 172.

²⁰⁷ *See Goldstein*, *supra* note 107, at 1791-92 n.54. This was the situation for Michael Hardwick's sexual partner. *See IRONS*, *supra* note 11, and accompanying text. Indeed, in many cases gay defendants are so afraid of being outed to their wives or employers that they sometimes seek a waiver of a probation report and instead request immediate imposition of sentence. *See Gallo*, *supra* note 42, at 776. Historically, many gay men have pled guilty to trumped up vagrancy and lewdness charges because it was safer to pay "large fines rather than spend time in jail, where they would be singled out for beatings and rape." *TIMMONS*, *supra* note 155, at 164. These threats compelled many men to plead guilty and pay a fine. *See id.*

²⁰⁸ Many gay men and lesbians are also reluctant to press their rights because of the perception that many courts are anti-gay. *See Rhonda R. Rivera*, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799 (1979); *MOHR*, *supra* note 30, at 28 ("In 1984, a District of Columbia judge handed suspended sentences to queerbashers whose victim had been stalked, beaten, stripped at knife point, slashed, kicked, threatened with castration, and pissed on, because the judge thought the bashers were good boys at heart—after all they went to a religious prep school."). Again, sodomy laws play a hand in this vicious cycle by encouraging judges to treat gay litigants and defendants as less deserving of protection than other citizens. *See id.* at 55-56 ("The existence of sodomy laws also significantly affects the way in which judges—who are aware of their existence—apply the law [to gay people] in general.")

notoriety forces guilty pleas even when there is insufficient evidence to convict.²⁰⁹ Thus, gay men are unlikely to obtain judicial redress for police harassment associated with the enforcement of sodomy laws.²¹⁰

Finally, by vesting police with significant discretion and minimal judicial oversight, sodomy laws also provide the opportunity for illegal harassment of gay men by police officers, primarily through blackmail.²¹¹ Sodomy laws make gay Americans vulnerable to extortion by providing a mechanism for corrupt and homophobic law enforcement officials to coerce homosexuals.²¹² For decades, policemen have raided homosexual gatherings or encouraged gay men to request sex in order to blackmail them: pay the officer or get arrested for sodomy (or, more likely, solicitation to commit sodomy). These are not merely historic artifacts; they are weapons that continue to be used as police continue to extort money from gay men.²¹³

Police are not alone in using sodomy laws as leverage to blackmail gay men. In many cases, civilian extortionists pose as plainclothes detectives, engage gay men in sexual talk, and then threaten to arrest them if they did not pay "a bribe."²¹⁴ Over the decades thousands of people have made a habit, and many a living, out of blackmailing gay men with the threat of prosecution under a state sodomy statute.²¹⁵ Due to the nature of

(emphasis in original).

²⁰⁹ See D'EMILIO, *supra* note 53, at 14-15 ("Court proceedings seemed designed to instill feelings of shame and obliterate self-esteem."). Gay men are sometimes forced to plead guilty to charges unrelated to sexual orientation upon the threat that if they fight the case, their homosexuality will be exposed in open court, with the attendant consequences. See *People v. Dayter*, 33 A.D.2d 1055 (N.Y. App. 1970). See also Gallo, *supra* note 42, at 763 (noting that only 11% of the defendants availed themselves of jury trials in the UCLA project). Gallo, *supra* note 42, at 763. As a rule, prosecutions for homosexual solicitation are not appealed. See *id.* at 691 n.35.

²¹⁰ This further emboldens police to engage in such questionable practices, such as entrapment. See D'EMILIO, *supra* note 53, at 14-15.

²¹¹ Police have traditionally used sex laws to extort money from gay bars. See D'EMILIO, *supra* note 53, at 183.

²¹² See Terry Calvani, *Homosexuality and the Law—An Overview*, 17 N.Y. L. FORUM 273, 291 (1971); Jacobs, *supra* note 198, at 278. See also CHAUNCEY, *supra* note 30, at 347 (police demanded bribes in return for not shutting down gay bars).

²¹³ See, e.g., *United States v. Box*, 50 F.3d 345 (5th Cir. 1995); HOSTILE CLIMATE 1998, *supra* note 183, at 112-13 (documenting extortion by former D.C. police lieutenant of customers of gay bar); Schwartz, *supra* note 117, at 676 ("Capricious selection of a few cases for prosecution, among millions of infractions, is unfair and chiefly benefits extortioners and seekers of private vengeance.").

²¹⁴ D'EMILIO, *supra* note 53, at 51. See also GEBHARD, *supra* note 53, at 354-55 ("[E]ntrapment breeds many imposters who go through the procedure, 'arrest' the offender, and subsequently extort money from him to 'forget the case' or to 'fix' law-enforcement officials. Some of these imposters are remarkably bold, sometimes putting the 'arrested' man in a car and driving him to the precinct station where he is offered a last chance to pay them off—a chance that is virtually always accepted."). In the early 1950s, the Senate Subcommittee on Investigations noted that "blackmailers often impersonate police officers in carrying out their blackmail schemes" against homosexuals. KAISER, *supra* note 190, at 78-79.

²¹⁵ The tandem threats of social and criminal sanctions "make the homosexual a prime

the charge, the frightened target rarely demands identification, calls the police station, or summons his lawyer. In more extreme cases, police and civilian blackmailers jointly run nationwide rings to blackmail gay people with the threat of arrest.²¹⁶ In one historic episode, the police extortionists worked with two attorneys, whereby the police would arrest men for soliciting other men and put them in jail, refusing any requests to make a phone call or contact their families or attorneys.²¹⁷ Out of the blue, the attorneys would show up at the prisoners' cells and offer to represent the arrestees for an exorbitant fee. After the fees were paid, the charges were dropped, and the "attorneys' fees" would then be divided among the attorneys and their police accomplices. In the early 1970s, New York City Investigation Commissioner Robert K. Ruskin called for the repeal of all state criminal laws regulating private sexual conduct between consenting adults, reasoning that these created a climate of corruption. He cited cases he had investigated in which both corrupt police officers and private citizens posing as police had threatened arrest in order to blackmail gay men.²¹⁸

The net result is that "in many areas of the country [gay men and lesbians] continue to be taunted, harassed, and even physically assaulted by the very people whose job it is to protect them."²¹⁹ Sodomy laws play a critical role in this police harassment.²²⁰

III. Enforcing Sodomy Laws Through Discrimination

Part Two discussed what may be described as the "extra-legal" effects of the criminal classification, primarily through homophobia, both

target for extortionists and robbers." Gallo, *supra* note 42, at 724 n.223. The blackmailers include professional criminals, children, and organized crime families. See *id.*; Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1749 (1969) (citing P. & B. WYDEN, *GROWING UP STRAIGHT* 213-14 (1968)) [hereinafter *Employment Disabilities*].

²¹⁶ D'EMILIO, *supra* note 53, at 51.

²¹⁷ See *In re Goodman*, 36 N.E.2d 259 (Ill. 1941); *In re Harris*, 50 N.E.2d 441 (Ill. 1943).

²¹⁸ See Calvani, *supra* note 212, at 293 n.80.

²¹⁹ *Anti-Gay Violence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 108 (1986) (statement of Robert M. Morgenthau, District Attorney for New York County). Following the Rodney King riots in Los Angeles, the Christopher Commission was appointed to study and report the conduct of the Los Angeles Police Department ("LAPD") regarding its treatment of various groups, including gay men and lesbians. It reports that the LAPD "has a well-documented prior history of discrimination against gay men and lesbians." This discrimination takes the form of harassment and abuse. "Both gay and heterosexual officers have noted that police are far more aggressive in enforcing minor infractions against suspected homosexuals than against presumed heterosexuals." *The Christopher Commission on Tuesday Issued a 228 Page Report on the Activities of the Los Angeles Police Department*, L.A. TIMES, July 10, 1991, at A12. "Bias against lesbians and gays also contributes to excessive use of force. As one LAPD officer put it: 'It's easier to thump a faggot than an average Joe. Who cares?'" *Id.*

²²⁰ See Eskridge, *supra* note 31, at 839 & n.75.

internalized and external. Part Three lays out the many ways in which sodomy laws are invoked on an official level. It explains how legislators, police officers, and judges all explicitly rely on the presumptive criminality of homosexual citizens to justify a wide range of official discrimination against gay men and lesbians.

When courts and commentators state that sodomy laws are not enforced, what they mean is that sodomy laws are not enforced through criminal prosecutions. This shorthand fails to recognize that criminal laws can be enforced by mechanisms short of criminal prosecution, conviction, and imprisonment. This section discusses the many ways in which sodomy statutes are enforced indirectly, not through the criminal justice system, but through state-sponsored discrimination.

Although sodomy laws do not necessarily mandate discrimination, the maintenance of sodomy laws encourages and facilitates discrimination.²²¹ Sodomy laws provide the clear message that gay men and lesbians are less than full citizens and are therefore entitled to less than equal rights.²²² The state government tells the individual employer, judge, landlord, and citizen that discrimination against gay men and lesbians is desirable.²²³

Sodomy laws operate to ensure the denial of effective remedies to gay men and lesbians who suffer discrimination. When these victims seek vindication in the courts, some judges find that the discrimination was permissible because their state maintains a sodomy law. More importantly, sodomy laws make it less likely that victims of anti-gay and anti-lesbian discrimination will ever report such discrimination. This is true for two reasons. First, by reporting such discrimination, one officially acknowledges one's homosexuality. This subjects the reporter of discrimination to yet more discrimination.²²⁴ Second, many victims of discrimination believe that they are unlikely to find vindication in American courts.²²⁵ Judges and juries are often perceived as anti-gay and anti-lesbian, and with good reason.²²⁶ Thus, the potential negative consequences of reporting discrimination coupled with the perceived futility of seeking justice through the American judicial system creates a situation

²²¹ See Law, *supra* note 98, at 190 ("[T]he central effect of [sodomy laws] is to sanction and encourage other . . . forms of state disapprobation of homosexuals, rather than to deter sexual behavior with the threat of criminal prosecution.").

²²² State sodomy statutes serve "to legitimate and enforce homophobia and discrimination against lesbians and gay men because people assume that the statute censors only homosexual acts and that its enforcement tends to discourage same-sex orientation." Grove, *supra* note 103, at 521.

²²³ See Koppelman, *supra* note 59, at 145 ("By branding all gays as criminals, the sodomy prohibition provides a justification for other forms of discrimination . . . in such areas as employment, professional licensing, free speech, immigration, adoption, and child custody.").

²²⁴ See Eskridge, *supra* note 31, at 906-07.

²²⁵ See Eskridge, *supra* note 41, at 1027.

²²⁶ See generally Rivera, *supra* note 208.

in which many gay men and lesbians consciously decide to suffer their wounds in private humiliation.

This part discusses five principal areas in which sodomy laws are used to facilitate discrimination against gay men and lesbians: employment discrimination; custody discrimination; discrimination against gay organizations; discriminatory enforcement of solicitation statutes; and immigration discrimination.

A. *Employment Discrimination*

1. *Historical Discrimination*

America has a long history of employment discrimination against gay men and lesbians.²²⁷ In many cases, sodomy laws have played an instrumental role in denying employment opportunities to gay workers. This discrimination reached its height during the McCarthy era when discrimination against gay men and lesbians was the official policy of the American government. Senator Joseph McCarthy attacked homosexuals as vociferously as he attacked Communists. Indeed, the Republican party national chairman loudly claimed that homosexuals were "perhaps as dangerous as the actual Communists."²²⁸ Sodomy laws facilitated McCarthy's witchhunts against gay men and lesbians because the criminality of homosexual acts helped drive the Senate's stance that such Americans were "outcasts," unsuitable for government service.²²⁹

During the attacks on homosexuals committed under the banner of McCarthyism, a Senate Subcommittee directed "an investigation into the employment by the Government of homosexuals and other sex perverts."²³⁰ The Subcommittee concluded that homosexuals did not constitute "proper persons to be employed in Government for two reasons; first, they are generally unsuitable, and second, they constitute security risks."²³¹ The tag "general unsuitability" was used to convey the fact that homosexual behavior constituted criminal conduct.²³² The reason that gay people were security risks was that, as criminals, they were subject to blackmail. Thus, the two arguments "were related in the sense that the

²²⁷ See Eskridge, *supra* note 31, at 911 ("In 1961, virtually all state and federal government agencies discriminated against employees thought to be gay or lesbian, a discrimination aped by the private sector").

²²⁸ D'EMILIO, *supra* note 53, at 41. The State Department fired more than twice as many homosexuals as suspected Communists during the early 1950s. See KAISER, *supra* note 190, at 80.

²²⁹ D'EMILIO, *supra* note 53, at 42.

²³⁰ Cain, *supra* note 165, at 1565-66 (quoting SUBCOMM. FOR COMM. ON EXPENDITURE IN THE EXEC. DEPT.'S EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. Doc. 241, 81st Cong. 2d Sess 1 (1950) [hereinafter INTERIM REPORT]).

²³¹ INTERIM REPORT, *supra* note 230, at 3.

²³² Cain, *supra* note 165, at 1565-66.

criminality and immorality of the conduct forced homosexuals to hide their behavior; they were thus thought to be vulnerable to blackmail.”²³³ Ultimately, sodomy laws formed the foundation of the McCarthyites’ case against homosexuals because “[t]he 1950 Senate Subcommittee report recommending that all homosexuals be dismissed from government service relied in large part on the fact that same-sex sexual conduct was both criminal and immoral.”²³⁴ McCarthy and his allies succeeded in enacting legislation that provided certain governmental department heads the power to summarily suspend and permanently dismiss homosexual employees, among others.²³⁵ These termination decisions were unreviewable, exempt from the traditional right to appeal to the Civil Service Commission.²³⁶

Fueling the fire, the Executive Branch enacted Executive Order 10450, which expanded the congressional policy against homosexuals government-wide. The Order demanded that all federal agencies and departments investigate civilian officers and employees, gathering information on, among other things, “[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.”²³⁷ By identifying homosexuals as sexual criminals, and therefore security risks, the Order sought to expunge homosexuals from all levels of the federal government.²³⁸

In harmony with the anti-gay animus enunciated by Congress and the Executive, the FBI initiated investigations into the sex lives of gay and lesbian government workers. During the 1950s, the FBI supplied the Civil Service Commission with background checks on applicants and employees. Following the McCarthyite policy, the FBI

took the initiative of establishing liaisons with police departments throughout the country. Not content with acting only on requests to screen particular individuals, it adopted a preventive strategy that justified widespread surveillance. The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued.²³⁹

²³³ *Id.* at 1566.

²³⁴ *Id.* at 1587.

²³⁵ See 5 U.S.C. § 22-1 (1950). See also *Cole v. Young*, 351 U.S. 536, 538 (1956).

²³⁶ See *Cole*, 351 U.S. at 538-41.

²³⁷ Exec. Order No. 10450, Sec. 8, 18 Fed. Reg. 2489 (1953).

²³⁸ The Supreme Court dramatically curtailed the reach of Executive Order 10450 in *Cole*, in which the Court held that the Order could apply only to those positions related to “national security.” *Cole*, 351 U.S. at 556.

²³⁹ D’EMILIO, *supra* note 53, at 46.

The FBI could then reveal the names of suspected homosexuals to the U.S. Civil Service Commission, which used the information to terminate gay employees.²⁴⁰

The federal government most aggressively invoked sodomy laws to deny employment to gay men and lesbians in jobs requiring security clearances.²⁴¹ The government justified denying gay people security clearances because of the belief that homosexuality demonstrated a "lack of regard for the laws of society."²⁴² The military, in particular, has historically denied security clearances to homosexuals because homosexual sodomy is criminal in many jurisdictions. To the government, the very existence of sodomy laws precluded gay men and lesbians from gaining security clearances, yet convictions for other crimes did not bar heterosexuals from receiving security clearances.²⁴³

Sodomy laws also facilitated discrimination in occupations requiring a license or certification. Such discrimination affected many professionals, including doctors,²⁴⁴ attorneys,²⁴⁵ and teachers.²⁴⁶ Sodomy laws played a critical role in denying employment opportunities in education to homosexuals. First, schools have denied teaching positions to qualified gay men and lesbians because school officials "[were] reluctant to hire 'criminals.'"²⁴⁷ A school board member testifying in the *Baker* case asserted that teachers would be fired if they were suspected of violating the state's sodomy law.²⁴⁸

Second, gay men and lesbians who do find work are at constant risk of being exposed and fired.²⁴⁹ An apt example is Michael Hardwick's

²⁴⁰ See KEEN & GOLDBERG, *supra* note 34, at 84.

²⁴¹ For example, in *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), the court held that the government could fire a man who had allegedly had a handful of sexual experiences with other men before he started his job with the Civil Aeronautics Authority because under government "regulations pre-employment conduct of a criminal or immoral nature was a sufficient cause for removal of any employee." *Id.* at 586. The court cited the North Carolina sodomy statute for support. *See id.* at 586 n.8. *See also* Gayer v. Schlesinger, 490 F.2d 740, 745 n.9 (D.C. Cir. 1973) (employee denied security clearance based on existence of sodomy laws).

²⁴² *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1363, 1365 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990).

²⁴³ See Kathleen M. Graham, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 413 (1973) ("But in the case of homosexual conduct, the mere existence of a law—however close to extinction or little enforced—is used as a supporting rationale for an adverse determination against an individual who has not been convicted of violating that law.").

²⁴⁴ See, e.g., CAL. BUS. & PROF. CODE § 2383 (1954) (repealed 1980) (current version at CAL. BUS. & PROF. CODE § 2236 (1994)).

²⁴⁵ See, e.g., *Florida Bar v. Kay*, 232 So. 2d 378, 379 (Fla. 1970); *State ex rel. Florida Bar v. Kimball*, 96 So. 2d 825, 825 (Fla. 1957) (disbarring of an attorney based, in part, on existence of state sodomy law).

²⁴⁶ See, e.g., CAL. EDUC. CODE §§ 13202, 13207, 13209 (Deering 1960).

²⁴⁷ *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982).

²⁴⁸ *See id.* at 1128 n.9.

²⁴⁹ For example, when California had a sodomy law, police were statutorily required to notify the State Department of Education whenever any teacher was arrested for same-sex

partner in sodomy, who upon arrest quietly paid a fine and retreated to the closet, so that he would not risk his position as a school teacher by being exposed.²⁵⁰ In sum, "[t]he task of gaining employment and securing occupational and professional licenses becomes burdensome indeed if a person has an arrest record for homosexual offenses."²⁵¹

In both federal and general employment discrimination against gay citizens, sodomy laws provided the critical linchpin. It was only by virtue of the fact that sodomy was illegal that investigations about a person's sexuality could follow, and that arrest records could be created and maintained for discriminatory purposes.²⁵² The case of Clifford Norton is illustrative. Following an arrest for a traffic violation, police questioned Norton about his sexual history after the passenger in his car told the police that Norton had placed his hand on the passenger's leg.²⁵³ The information was provided to his employers at NASA, who subsequently fired Norton based on the information from the police investigation. The reason that the police were allowed to ask these questions in the first place is because they were investigating a crime—consensual sodomy.²⁵⁴

2. Continuing Discrimination

The legacy of McCarthyism lingers today for many gay men and lesbians in America's workforce. The fact is that most gay men and lesbians experience some form of job discrimination, including "termination, harassment, failure to promote, denial of benefits for domestic partners, and job refusal."²⁵⁵ In 1987, 66% of major-company CEOs re-

conduct. See Gallo, *supra* note 42, at 740 n.333. See, e.g., Board of Educ. v. Calderon, 110 Cal. Rptr. 916 (Cal. Ct. App. 1973), *cert. denied*, 419 U.S. 807 (1974); Sarac v. State Bd. of Ed., 57 Cal. Rptr. 69, 71 (Cal. Ct. App. 1967) (a teacher's license was revoked after he was arrested for soliciting a police decoy).

²⁵⁰ See IRONS, *supra* note 11, at 396.

²⁵¹ *Calvani*, *supra* note 212, at 279. See also Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (upholding termination of school counselor who mentioned her bisexual orientation at school), *cert. denied*, 470 U.S. 1009 (1985).

²⁵² Under the civil service regulations of the 1960s, a person could be disqualified from employment for criminal conduct. See Cain, *supra* note 165, at 1575. Not until 1975 did the federal government lift its employment ban on gay men and lesbians. See Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 35 (D.C. Cir. 1987).

²⁵³ See Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

²⁵⁴ Similarly, in *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965), sodomy laws played a critical role in disqualifying Bruce Scott from public employment. Two previous arrests possibly related to homosexual activity, one of them fifteen years earlier for loitering, formed the basis for inquiry into Scott's sexual orientation, for which he was ultimately disqualified from civil service. See *id.* at 183. The *Scott* court recognized that once a man is disqualified from government employment due to homosexual activity, the attaching stigma follows him and "jeopardize[s] his ability to find employment elsewhere." *Id.* at 184. Indeed, after being fired from a government job for homosexuality, it was functionally impossible for Scott to find subsequent meaningful employment. See Cain, *supra* note 165, at 1574-75.

²⁵⁵ David E. Morrison, *You've Built the Bridge, Why Don't You Cross It? A Call for State Labor Laws Prohibiting Private Employment Discrimination on the Basis of Sexual*

sponding to a *Wall Street Journal* survey said they would be reluctant to allow a homosexual on management committees.²⁵⁶ The legal position of gay men and lesbians, while improved, is not protected in most cases, which allows anti-gay job discrimination to continue in most jurisdictions.²⁵⁷ At the 1997 congressional hearings for the Employment Non-Discrimination Act ("ENDA"), which would provide protections against employment discrimination based on sexual orientation, several witnesses testified about how they had been terminated or denied employment or promotions because they were gay.²⁵⁸

Sodomy laws continue to facilitate employment discrimination on several levels. In the first instance, sodomy laws invite employers to discriminate against gay and lesbian workers.²⁵⁹ Relying on the legal presumption that gay men and lesbians "engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals."²⁶⁰ Similarly, conservative lobbyists have invoked the illegality of sodomy in successfully lobbying against same-sex partner benefits.²⁶¹ Thus, the Virginia Attorney General issued an opinion that Arlington County's attempt to extend health insurance benefits to domestic partners was in contravention of the state's sodomy law.²⁶² Sodomy laws still prevent openly gay people from entering many professions, such as the judiciary,²⁶³ because of the "natural reluctance, given the strong (possibly

Orientation, 26 U. MICH. J.L. REFORM 245, 258-59 (1992).

²⁵⁶ See Thomas A. Stewart, *Gay in Corporate America*, FORTUNE, Dec. 16, 1991, at 42, 45.

²⁵⁷ For while some courts have held that the civil service cannot fire a government employee based solely on sexual orientation, see, e.g., *Scott v. Macy*, 402 F.2d 644 (D.C. Cir. 1968), others have held to the contrary. Cf. *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), cert. denied, 393 U.S. 1041 (1969). And while a handful of states and localities have instituted legal protections, gay men and lesbians are not protected from employment discrimination under Title VII. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979). But cf. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (holding same-sex sexual harassment can violate Title VII).

²⁵⁸ See HOSTILE CLIMATE 1998, *supra* note 183, at 26.

²⁵⁹ A related issue to the denial of employment is the denial of employment benefits; sodomy laws may prevent gay dependents from getting benefits. See Heidi A. Sorensen, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2127 (1993) (noting that the repeal of California's sodomy laws facilitated the receipt of benefits by gay dependents).

²⁶⁰ Cain, *supra* note 165, at 1588. See *infra* notes 461-465 and accompanying text (discussing how the legal presumption that gay and lesbian employees engage in sodomy is used to justify discrimination).

²⁶¹ See HOSTILE CLIMATE 1998, *supra* note 183, at 37-38 (discussing Maryland's Montgomery County Human Relations Commission's vote to reject domestic partner benefits).

²⁶² See *id.* at 44 (discussing a state delegate's opinion that providing health insurance would "grant a benefit to an employee that's predicated on a violation of state criminal law").

²⁶³ See Stephen Reinhardt, *The Court and the Closet*, WASH. POST, Oct. 31, 1993, at C3. For example, in Minnesota, an openly gay judge was removed from the bench because he presumptively "openly contemplated future violation of [Minnesota's sodomy law] in mature homosexual relationships with his adult male peers." Grove, *supra* note 103, at 534.

much exaggerated) belief in the effect of 'role models' on behavior, to appoint to judicial positions people who have committed hundreds or even thousands of criminal acts simply because they are homosexuals living in states in which sodomy is a crime."²⁶⁴ Eliminating sodomy laws removes one reason for excluding gay people from professional positions.²⁶⁵

In the second instance, sodomy laws are used to insure that gay men and lesbians have no legal recourse when discriminated against in employment matters.²⁶⁶ Federal appellate courts have reasoned that because the Supreme Court upheld laws that criminalize the conduct defining gay men and lesbians as a class, "it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."²⁶⁷ Courts appear to reason that state legislatures can criminalize that which defines the class; therefore, state governments can also engage in any form of discrimination short of throwing the entire class in prison.²⁶⁸ Thus, because the state can throw a gay man in prison for sodomy, the state can also deny him any employment opportunity.²⁶⁹

Furthermore, without sodomy laws, gay men and lesbians would be protected in those states that have laws preventing employers from firing employees for engaging in legal activities while not on the job.²⁷⁰ The

The Minnesota Supreme Court held that the constitutional article giving the Minnesota legislature the power to provide for the removal or other discipline of judges, as well as the state providing for the disqualification of a judge while there is a pending indictment or any information charging him with a felony, did not diminish the Supreme Court's inherent discretionary power to suspend a judge. See *In re Kirby*, 350 N.W.2d 344, 348-49 (Minn. 1984). See also *HOSTILE CLIMATE* 1999, *supra* note 153, at 186 (discussing controversy of North Carolina judge who after acknowledging his homosexuality was accused of creating a "conflict between being a judge in North Carolina and openly breaking the sodomy laws of the state.").

²⁶⁴ POSNER, *supra* note 30, at 311.

²⁶⁵ See *id.*

²⁶⁶ Sodomy laws decrease the likelihood of employees complaining about discrimination based on sexual orientation. As with physical violence, see *supra* notes 147 to 153 and accompanying text, reporting the misdeeds of others is self-incriminating. See MOHR, *supra* note 102, at 4.

²⁶⁷ *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

²⁶⁸ See *Romer v. Evans*, 517 U.S. 620, 642-43 (1996) (Scalia, J., dissenting).

²⁶⁹ Of course, this reasoning extends to states that do not currently maintain sodomy laws. For example, California does not have a sodomy law but it is permitted to deny state employment to gay men because it is less drastic than criminalizing gay conduct, which was deemed constitutional in *Hardwick*. See *Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting).

Although the Supreme Court limited a state's ability to pass sweeping anti-gay initiatives that make a gay citizen "a stranger to its laws," *id.* at 635, it is unclear what effect, if any, the decision will have on a public or private employer's ability to discriminate against gay employees.

²⁷⁰ Many states, including Illinois, Indiana, Maine, New York, Oregon, South Dakota, West Virginia, and Wyoming, have such laws. See Morrison, *supra* note 255, at 271.

Colorado case of *Borquez v. Robert C. Ozer, P.C.* highlights this proposition.²⁷¹ Colorado repealed its sodomy law in 1972.²⁷² Later, Colorado passed a law that forbade employers from terminating employees for engaging in any lawful activity off the work premises during non-working hours.²⁷³ Subsequent to the repeal of the sodomy law, Robert Borquez, an attorney in a law firm run by Robert Ozer, disclosed his sexual orientation to Ozer. He was fired within the week, despite having received a merit-based raise just eleven days prior. Borquez sued Ozer for, inter alia, wrongful discharge, relying on Colorado's lawful activities statute. The jury found for Borquez²⁷⁴ and the Colorado Court of Appeals affirmed, ruling that Borquez was protected by the Colorado law because his conduct was legal.²⁷⁵ If sodomy were illegal in Colorado, Borquez could not have recovered because his conduct would not have been covered by the lawful activities statute. *Borquez* illustrates the point that the absence of sodomy laws can, in some instances, provide a basis for employment protection.

The fact that sodomy laws continue to be used to justify employment discrimination against gay men and lesbians is best exemplified in one particular area of employment: law enforcement. The clearest examples of how sodomy laws are used to discriminate against gay people can be found in police departments and prosecutors' offices.

a. Police Departments

Police departments traditionally discriminate against gay men and lesbians both in hiring and promotion decisions in ways that affect both police officers and administrators. The case of Stephen Childers illustrates how sodomy laws can play a critical role in facilitating this discrimination.²⁷⁶ Childers began working his way up the civil service ladder in the Dallas Police Department. Childers received the highest score on the civil service examination for advancement of anyone who had taken

²⁷¹ 923 P.2d 166 (Colo. App. 1995), *aff'd in part and rev'd in part*, 940 P.2d 371 (Colo. 1997).

²⁷² ALYSON ALMANAC 259 (1994).

²⁷³ COLO. REV. STAT., § 24-34-402.5 (1) (1995 Cum. Supp.).

²⁷⁴ The jury awarded Borquez \$30,841 for lost wages on the wrongful discharge claim, \$20,000 for a separate privacy tort, and \$40,000 as exemplary damages. *See Borquez*, 923 P.2d at 171.

²⁷⁵ *See id.* The Colorado Supreme Court subsequently reversed based on inadequate jury instructions. *See Borquez v. Robert C. Ozer, P.C.*, 940 P.2d 371 (Colo. 1997). However, the Court did not suggest that the lawful activities statute could not be used in such a scenario. *See id.* at 376. ("Although the evidence presented at trial . . . may have supported a finding that Borquez was discharged because he engaged in lawful activity away from the Ozer law firm's premises during non working hours, the jury was not instructed to make such a finding in deciding Borquez' wrongful discharge claim.").

²⁷⁶ *See Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.* 669 F.2d 732 (5th Cir. 1982).

the examination during that administration.²⁷⁷ His personnel records with the city showed Childers "to have been a satisfactory and in some respects a superior employee."²⁷⁸ Because of his high test score and good work record, Childers was eligible for and applied for a position as storekeeper for the property storeroom of the Dallas Police Department. During the employment interview, Childers mentioned his sexual orientation when asked about his affiliation with the Metropolitan Community Church, a Christian church that ministers to the gay community.

The interviewing sergeant, who had the final word regarding employment, disqualified Childers on the grounds that he was a "habitual lawbreaker" due to the fact that "his sexual practices violated state law."²⁷⁹ Since police department regulations permitted discharge of employees who violate state law, anyone who engages in the same-sex conduct proscribed by Texas' "unenforced" sodomy law is automatically in violation of police department rules and subject to disciplinary action, including discharge. The district court explained that "[t]he overriding reason that the Plaintiff was not hired was because he admitted to engaging in homosexual conduct prohibited by Texas penal statutes and was thereby in violation of police department regulations."²⁸⁰ Although there was no proof of criminal sodomy in *Childers*, let alone a conviction,²⁸¹ the court asserted that Childers' "conduct was in flagrant violation of police regulations."²⁸² Both the district court and the Fifth Circuit upheld the police department's refusal to hire Childers.²⁸³ In sum, Childers was denied the job because Texas maintained a sodomy law on its books—one that it "never enforced."

In the wake of *Childers*, other police departments have been given permission to refuse to hire or to terminate gay and lesbian employees.²⁸⁴

²⁷⁷ See *id.* at 137.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 138 (quotations indicate the court's language, not necessarily that of the Police Department).

²⁸⁰ See *id.* at 142-43 n.13.

²⁸¹ Although the court asserts that Childers was "a homosexual in both practice and preference," *Childers*, 513 F. Supp. at 136, this does not mean that Childers actually violated the Texas sodomy law. The "practice" could simply refer a loving relationship, hugging, kissing, mutual masturbation or any other same-sex intimacy that does not constitute sodomy. See Cain, *supra* note 165, at 1601.

²⁸² *Childers*, 513 F. Supp. at 146.

²⁸³ After accusing Childers of "advocating homosexuality," the district court "emphasize[d] that Plaintiff is in no way being denied the opportunity to associate whenever and with whomever he pleases. He is denied only the opportunity to work in the property room of the police department." *Id.* at 142. This argument is specious because all employers could adopt regulations that permit the discharge of employees who violate state law and effectively prevent gay men and lesbians from securing employment. The right to associate is meaningless if the government can exact a penalty as a result of your associations and blithely claim that, aside from that penalty, you are not punished.

²⁸⁴ See, e.g., Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988); Truesdale v. University of North Carolina, 371 S.E.2d 503, 509 (N.C. App. 1988) (a university security officer who refused to take a polygraph test that included questions about homosexual conduct,

Until 1993, when a Texas court declared its policy unconstitutional, the Dallas Police Department continued to refuse to hire lesbians and gay men because the Texas sodomy law criminalized same-sex conduct.²⁸⁵ It is worth pondering how many gay men and lesbians simply do not apply to be police officers or work for police departments in states like Texas because of the sodomy laws.

b. Prosecutors' Offices

In addition to their effect on employment in police departments, sodomy laws also effectively bar homosexuals from work in some prosecutors' offices. The case of Robin Shahar is prophetic. Shahar worked for a summer during law school at the Georgia Attorney General's office and accepted a permanent job offer to be a Staff Attorney. After graduating sixth in her class from Emory Law School, Shahar began studying for the bar. During her summer of bar study, she visited the Attorney General's office and invited some of her work colleagues to her upcoming commitment ceremony to another woman. Upon learning of Shahar's imminent wedding and her sexual orientation, Georgia's Attorney General, Michael Bowers—the man who argued *Bowers v. Hardwick* before the Supreme Court—"rescinded" the already-accepted offer of permanent employment.

When Shahar sued and argued that the Attorney General had violated her constitutional right to association, Bowers argued that a lesbian's presence on his staff would have disrupted the office's defense of the state's sodomy law.²⁸⁶ Although concluding that the constitutional right of association included private gay relations, the district court upheld Bowers' termination of Shahar as reasonable.²⁸⁷ After Shahar appealed, an en banc panel of the Eleventh Circuit affirmed.²⁸⁸

based on a fear of self-incrimination, was subsequently dismissed). See also Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 *FORDHAM URB L.J.* 997, 1035 & n.39 (1994) (discussing *Woodward v. Gallagher*, No. S9-5776 (Orange Co., Fla. Cir. Ct., filed June 9, 1992), where the county sheriff relied on the state's sodomy law to fire a deputy when his sexual orientation was discovered).

²⁸⁵ See *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993) (holding that the Dallas Police Department's policy making gay men and lesbians ineligible for employment was unconstitutional). See generally STEPHEN LEINEN, *GAY COPS* (1993).

²⁸⁶ See Peter Mantius, *Bowers Actions Are Defended in Job-Offer Case*, *ATLANTA J. & ATLANTA CONST.*, Dec. 2, 1994, at E2.

²⁸⁷ The district court applied a balancing test and ruled that Georgia state's interest in preserving its image and ability to defend a law it officially did not enforce outweighed Shahar's constitutional right to associate with her life partner. See *Bowers's Anti-Gay Crusade*, *ATLANTA J. & CONST.*, Oct. 15, 1993, at A10 ("The judge ruled that Shahar's presence on Bowers's payroll would undercut the Attorney General's ability to prosecute Georgia's infamous sodomy law?"). This reasoning is suspicious given the fact that the Attorney General did not show that any disruption had occurred or was likely to occur.

²⁸⁸ See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc).

Bowers invoked Georgia's sodomy law to justify terminating Shahar.²⁸⁹ First, the Georgia Attorney General argued that same-sex marriages violated his state's sodomy law.²⁹⁰ The Eleventh Circuit was persuaded by this conflation of same-sex marriage and same-sex sodomy:

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 Shahar'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).²⁹¹

Second, the rescission of Shahar's job offer was based, in part, on the presumption that lesbians are more likely than other citizens to violate sodomy laws.²⁹² The Attorney General argued that allowing Shahar to work as an attorney would undermine his office's credibility in enforcing the state's sodomy law.²⁹³ The argument is specious on several levels. Bowers admitted in his deposition that he had no knowledge of Shahar's sexual conduct.²⁹⁴ Furthermore, Georgia's sodomy law was gender neutral and applied equally to same-sex and opposite-sex couples. There was no evidence presented that same-sex couples commit sodomy in greater numbers than heterosexual couples. Moreover, it was never explained why the relative numbers matter if both groups do in fact violate this unenforced statute in large numbers. Nevertheless, the judge

was persuaded by the attorney general's argument that should the state attempt to enforce the law against sodomy, for example, the private conduct of attorneys for the state could be placed at

²⁸⁹ The Georgia Supreme Court has subsequently invalidated Georgia's sodomy law. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

²⁹⁰ See *Atlanta Almanac*, ATLANTA J. & ATLANTA CONST., Sept. 23, 1994, at D2.

²⁹¹ *Shahar*, 114 F.3d at 1105 n.17.

²⁹² See Mantijs, *supra* note 286, at E2.

²⁹³ The district judge bought the state's argument that the Attorney General's credibility "would be undermined by employing an attorney who had engaged in a same-sex marriage ceremony, because Georgia law prohibits consensual sodomy and does not recognize same-sex marriages." Arthur S. Leonard, *District Judges Rule on Intimate Associations of Public Employees*, EMPL. TESTING (UNIV. PUB. AM.), Dec. 1993, at 198. The existence of Georgia's sodomy law seems more critical than Shahar's marriage to another woman because a same-sex marriage ceremony does not violate Georgia law. Georgia chooses not to recognize such marriages, but they are not illegal as such. The state's argument that gay Americans are more likely to violate sodomy laws implicates illegal conduct in a way that gay marriage does not.

²⁹⁴ See *Shahar v. Bowers*, 70 F.3d 1218, 1233 n.20 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part).

issue. The attorney general cited a case in which the counsel of a heterosexual couple being prosecuted for allegedly violating the sodomy law requested that all state attorneys who also may have violated the law be disqualified.²⁹⁵

This anecdote actually supports the anti-discrimination position because while the defendants in the sodomy prosecution advanced this argument, the court dismissed it as a red herring and the private conduct of the attorney general's staff was never actually put at issue.

Third, Bowers argued that credibility on the issue of sodomy was critical because the Law Department often defends Georgia's sodomy law.²⁹⁶ This is simply not true. The Supreme Court in *Bowers v. Hardwick* noted that Georgia's sodomy law had not been enforced for over forty years before the arrest of Michael Hardwick in his bedroom.²⁹⁷ Thus, a state sodomy law that Michael Bowers represented to the United States Supreme Court was not enforced against private, consensual sodomy was used to deny employment to a woman based on Bowers' assumption that she engaged in private, consensual sodomy.

B. Custody Discrimination

One of the most enduring myths about homosexuality is that gay men and lesbians are not parents. As of 1987, three million gay men and lesbians were raising between eight and ten million children in the United States.²⁹⁸ Since then, these numbers have increased.²⁹⁹ These numbers should not be surprising given the vast body of research showing that gay men and lesbians have the requisite parenting skills to raise healthy children and, in many important areas, have superior parenting abilities.³⁰⁰ Yet, despite the number of successful gay parents and the fact that children raised by gay and lesbian parents tend to experience normal

²⁹⁵ *Court Denies Lesbian Lawyer's Claim Over State's Withdrawal of Job Offer*, GOV'T EMPL. REL. REP. (BNA), Oct. 25, 1993, at 1414.

²⁹⁶ See *id.* The irony (and hypocrisy) of the Attorney General's credibility argument is that in announcing his candidacy for governor, Bowers admitted that he engaged in a decade-long affair with a woman who had worked in his office. See Kevin Sanck, *Georgia Candidate for Governor Admits Adultery and Resigns: Commission in Guard*, N.Y. TIMES, June 6, 1997, at A29. Like sodomy, adultery is a crime in Georgia.

²⁹⁷ See *Bowers v. Hardwick*, 478 U.S. 186, 219 (1986) (Stevens, J., dissenting). This statement is an oversimplification. It is more accurate to say that the law had not been used against private, consensual sodomy between adults. The same sodomy law that forbids private, consensual sodomy had been enforced against public sodomy, forcible sodomy, and sodomy involving a minor.

²⁹⁸ See *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 FAM. L. REP. (BNA) 1512, 1513 (Aug. 25, 1987).

²⁹⁹ See Kelli K. Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE L. REV. 67, 96 (1994).

³⁰⁰ See David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 349-51 (1994).

psychological development and health,³⁰¹ gay parenting remains controversial. As a result, child custody issues are among the most litigated issues affecting gay men and lesbians.³⁰²

Courts often deny custody to gay and lesbian parents for no other reason than their sexual orientation.³⁰³ Courts regularly deny custody to (and restrict the visitation rights of) gay and lesbian parents based on state sodomy laws.³⁰⁴ By legitimizing and, in some cases, dictating judicial rulings against gay and lesbian parents, sodomy laws facilitate the devastation of families headed by gay parents. This is done in several ways. First, sodomy laws provide a heterosexual parent an effective basis from which to attack their former spouse in front of the trier of fact. In a Tennessee case, for example, a lesbian mother was branded a criminal in open court by her husband's counsel, undermining the expert testimony

³⁰¹ See *id.* at 355–59. Studies also indicate that being raised by a gay parent does not affect one's sexual orientation. See generally RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 18–23 (1992). At least one court has recognized that taking children away from gay parents harms the children because it instills in them a sense of shame and because “[i]nstead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience.” *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. 1979).

³⁰² See Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 *DRAKE L. REV.* 311, 327 (1981).

³⁰³ See Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 *HARV. L. REV.* 617 (1989) [hereinafter *Custody Denials*]; see, e.g., *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. Ct. App. 1979).

³⁰⁴ See, e.g., *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982); *In re J.S. & C.*, 324 A.2d 90, 97 (1974) (restricting visitation), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976). Sodomy laws are one of four general justifications advanced by courts to take children away from their gay parents. The others are “that the child might be harassed or stigmatized, that the child's sexual orientation might be affected, that the child's moral development might be harmed . . .” *Custody Denials*, *supra* note 303, at 630. Sodomy laws will become more important in denying custody to gay parents as more social science research proves that the so-called mental health arguments against gay parenting are without foundation. For example:

[t]he research literature on outcomes in these children [raised by gay and lesbian parents] has measured everything from gender identification to personal development to peer relations to self-esteem to future sexual orientation, and has uniformly found that children raised by gay or lesbian adults do not turn out any differently from their counterparts raised by heterosexual adults. There is simply no factual basis for a conclusion that a parent's gay or lesbian lifestyle harms a child.

Stephen B. Pershing, *Entreat Me Not to Leave Thee: Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 *WM. & MARY BILL RTS. J.* 289, 316–17 (1994) (internal citations omitted). Empirically, it appears more likely that courts will not take children away from gay or lesbian parents in states without sodomy laws. See, e.g., *M.P.*, 404 A.2d at 1257. State authorities have also invoked sodomy laws to prevent gay adults from adopting children. See *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830, 835 (Ariz. Ct. App. 1986); see also Sam Howe Verhovek, *Homosexual Foster Parent Sets Off a Debate in Texas*, *N.Y. TIMES*, Nov. 30, 1997, at A10; *HOSTILE CLIMATE* 1999, *supra* note 153 at 71 (discussing attempts to prevent gay and lesbian adults from serving as foster parents in Arkansas).

as to her fitness as a mother.³⁰⁵ Courts in states that outlaw sodomy often liken gay and lesbian parents to criminals.³⁰⁶

Second, courts have justified their decisions to deny custody to gay parents based on state sodomy laws by asserting that such statutes "embody a state interest against homosexuality."³⁰⁷ For example, an Arkansas appellate court denied a lesbian mother custody of her children relying, in part, on the fact that sodomy was proscribed by Arkansas law.³⁰⁸ One judge reasoned that "[t]he people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases. . . ."³⁰⁹

Third, and most importantly, courts use sodomy laws to take children away from their gay parents by holding that gay parents are criminals and, therefore, must not be given custody of their children.³¹⁰ For example, the Alabama Supreme Court recently declared that even without evidence of any adverse effects, children could be taken away from their lesbian mother because "the conduct inherent in lesbianism is illegal in Alabama. [The mother] is continually engaging in conduct that violates the criminal law of this state."³¹¹ Custody of the children was awarded to their father, a man with "a history of serious alcohol abuse and violence," who had threatened to kill the children.³¹²

In depriving gay parents custody or visitation rights, courts often presume that all gay men and lesbians engage in illegal sodomy despite the fact that "in the typical child custody case in which a gay or lesbian parent is a party, no criminal charge of sodomy or other illicit sexual conduct is asserted or proved."³¹³ Factually, this "assumption that the gay parent has engaged in criminal conduct is . . . insupportable. In many of the child custody cases relying on sodomy statutes, no evidence exists that the parent in question actually participated in any statutorily prohibited conduct or that the other parent did not."³¹⁴ In fact, this is true in

³⁰⁵ See Cain, *supra* note 165, at 1588.

³⁰⁶ See Steve Susoeff, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 886-87 (1985).

³⁰⁷ *Custody Denials*, *supra* note 303, at 620-21 (citing Chaffin v. Frye, 119 Cal. Rptr. 22, 26 (Cal. Ct. App. 1975)); see also Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985); L. v. D., 630 S.W.2d 240, 243 (Mo. Ct. App. 1982).

³⁰⁸ See Thigpen v. Carpenter, 730 S.W.2d 510 (Ark. Ct. App. 1987).

³⁰⁹ *Id.* at 514 (Cracraft, J., concurring).

³¹⁰ Sodomy laws provide a legal rationale for taking children away from fit parents. Such laws enable judges to mask bench bigotry by relying on the existence of statutory authority to legitimate decisions that would otherwise have little rationale beyond naked hatred. Moreover, judges who bear no animus toward gay men and lesbians may nonetheless believe that sodomy laws necessitate legal rulings against gay and lesbian litigants.

³¹¹ *In re R.W. v. D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (internal citations omitted); see also *In re J.B.F. v. J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998).

³¹² *D.W.W.*, 717 So. 2d at 797 (Kennedy, J., dissenting).

³¹³ Pershing, *supra* note 304, at 294.

³¹⁴ *Custody Denials*, *supra* note 303, at 634-35.

most cases.³¹⁵ This presumption of violating sodomy laws should be impermissible. Courts should not be able to create an irrebuttable presumption regarding criminal activity and then punish accordingly. Yet that is precisely what judges who invoke sodomy laws in custody cases regularly do.³¹⁶ As a result, gay parents who have their children taken away from them are punished for violating criminal laws without having been afforded any of the procedural protections normally guaranteed to criminal defendants.³¹⁷

Use of sodomy laws in custody cases is best illustrated by decisions coming out of the Virginia courts. In *Roe v. Roe*,³¹⁸ a mother sought sole custody of her daughter, who was currently living with her father, the plaintiff's former husband. The father was a gay man, living with another man in a committed relationship. The mother never suggested that the father abused, neglected, or mistreated their daughter. The trial court found that the child was happy, outgoing, intelligent, and well adjusted.³¹⁹ The trial court granted joint physical custody, conditioned upon the father not sharing his bed or bedroom with another man while his daughter was present in the home.³²⁰ The mother appealed the decision to the Virginia Supreme Court. To prove that her child should not be exposed to a same-sex relationship, the mother argued that the father's relationship constituted a felony in Virginia. Not only did the Virginia Supreme Court accept this argument wholesale, it elaborated that because the father was living in a same-sex relationship, "the conditions under which this child must live daily [are] unlawful."³²¹

The import of *Roe* is found in subsequent cases where trial judges have held that, under *Roe*, gay parents are unfit custodians as a matter of law, thus mandating the seizure of children from their parent for placement with a (heterosexual) nonparent.³²² This was the result in *Bottoms v. Bottoms*.³²³ In *Bottoms*, sodomy laws played the central role in the trial court's determination to abolish Sharon Bottoms' custody of her son. Sharon Bottoms was raising her son with the help of her live-in partner when Sharon Bottoms' mother sued for custody of her grandson. The

³¹⁵ See SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 130.

³¹⁶ See *infra* note 338 and accompanying text.

³¹⁷ But see *People v. Brown*, 212 N.W.2d 55, 58-59 (Mich. Ct. App. 1973) (holding that the record must contain sufficient evidence of homosexual conduct to warrant infringement of parental rights).

³¹⁸ 324 S.E.2d 691 (Va. 1985).

³¹⁹ See *id.* at 692.

³²⁰ See *id.* at 691.

³²¹ *Id.* at 694. After asserting that gay parents expose their children to criminality and social condemnation, the court concluded that "[t]he father's unfitness is manifested by his willingness to impose this burden upon [the child] in exchange for his own gratification." *Id.* This so-called reasoning creates an untenable Catch-22 for gay parents since the fact that a parent wants custody is taken as proof of unfitness.

³²² See *Pershing*, *supra* note 304, at 290.

³²³ 457 S.E.2d 102 (Va. 1995).

trial court relied almost exclusively on Virginia's sodomy law to justify taking away the children of gay parents. The trial judge opined:

I will tell you first that the mother's conduct is illegal. It is a Class 6 felony in the Commonwealth of Virginia. I will tell you that it is the opinion of this Court that her conduct is immoral. And it is the opinion of this Court that the conduct of Sharon Bottoms renders her an unfit parent.³²⁴

The criminality of sodomy was the most important factor in taking Sharon Bottoms' son away from her. As the appellate court explained: "the open lesbian relationship and illegality of the mother's sexual activity are the only significant factors that the [trial] court considered in finding Sharon Bottoms to be an unfit parent."³²⁵

After the Virginia appellate court disagreed with the trial court and held that Sharon Bottoms should retain custody of her son,³²⁶ the Virginia Supreme Court reversed the appellate court, holding that Sharon Bottoms' son should be taken away from her.³²⁷ In addition to citing evidence of unfitness that the trial court did not cite in its opinion, the Virginia Supreme Court invoked the state's sodomy law as an important factor in taking away Sharon Bottoms' son. While the court acknowledged that it had held in *Roe* that homosexuality does not in itself render a parent unfit, the court nonetheless claimed that the "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody."³²⁸

The ultimate result demonstrates how "unenforced" sodomy laws are applied selectively. The Virginia courts invoked the state's sodomy law to take away Sharon Bottoms' son and grant custody to the child's grandmother. Yet the court never discussed the grandmother's sexual conduct, despite the fact that, until shortly before the trial court hearing, she cohabited with her boyfriend, which is illegal under Virginia law,³²⁹ as is fornication outside of marriage.³³⁰ Furthermore, the court's concern about the child "becoming" homosexual was flawed. It was the grandmother

³²⁴ *Id.* at 109 (Keenan, J., dissenting) (noting that the trial court essentially held—in contravention of Virginia case law—that gay parents are unfit per se).

³²⁵ *Bottoms v. Bottoms*, 444 S.E.2d 276, 281 (Va. Ct. App. 1994).

³²⁶ *See id.* at 284. However, even in so holding, the appellate court equated lesbianism with criminality. *See* Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J. L. & FEMINISM 341, 365–67 (1995).

³²⁷ *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

³²⁸ *Id.* at 108. Note that the Virginia Supreme Court did not merely state that sodomy was illegal, but rather came close to equating lesbianism itself with illegality.

³²⁹ *See* VA. CODE ANN. § 18.2-345 (Michie 1996).

³³⁰ *See* VA. CODE ANN. § 18.2-344 (Michie 1996) (forbidding any unmarried person from voluntarily engaging in sexual intercourse with another person).

who raised a lesbian daughter, Sharon. But it was Sharon who was claimed unfit to parent. Finally, although it may not seem unusual that a court would award custody of a child to his grandmother, in non-gay cases Virginia courts are extremely reluctant to award custody of a child to its grandparents. For example, instead of granting custody to a grandparent, Virginia courts have granted custody to parents and step-parents who have killed the child's natural parent,³³¹ killed a spouse,³³² and abandoned their children.³³³ The heavy presumption that children stay with their parents and not live with grandparents applies to killers and absentee parents, but not to gay and lesbian parents.

Loving gay and lesbian parents often have their children taken away from them because they are labeled criminals for violating a law that is "not enforced." For example, before *Roe*, Virginia had not enforced its sodomy statutes against consenting adults since 1923.³³⁴ These Virginia cases are just the tip of the iceberg. Many of the cases where parents have their children taken away from them based on their criminal status as homosexuals are not reported.³³⁵

Finally, courts have even used sodomy laws to justify taking children away from their parents in states that do not have sodomy laws. In *Constant A. v. Paul C.A.*,³³⁶ a Pennsylvania court held that a lesbian mother should not receive custody of her child because, even though Pennsylvania had repealed its sodomy law, the mother could be subject to arrest if she ever traveled to a state that did have a sodomy law on its books.³³⁷ Similarly, a Mississippi court denied a California father custody of his son based on Mississippi's sodomy statute.³³⁸ The judge condemned the father for having the "audacity . . . to admit [in response to the judge's questions] to engaging in felonious conduct on a regular basis."³³⁹ Of course, the father had committed no felony because he lived in California, a state without a sodomy law.³⁴⁰

³³¹ See *Mason v. Moon*, 385 S.E.2d 242 (Va. Ct. App. 1989).

³³² See *Walker v. Fagg*, 400 S.E.2d 208 (Va. Ct. App. 1991).

³³³ See *Elder v. Evans*, 427 S.E.2d 745 (Va. Ct. App. 1993).

³³⁴ See *Pershing*, *supra* note 304, at 296 & n.26.

³³⁵ See, e.g., *Cain*, *supra* note 165, at 1588.

³³⁶ 496 A.2d 1 (Pa. Super. Ct. 1985).

³³⁷ See *id.* at 5.

³³⁸ See Susan Biemesderfer, *Tales from the Front Line*, *ADVOCATE*, Oct. 27, 1998, at 44. The father had been divorced for 10 years, was in a stable eight-year relationship, and lived in Southern California. The son lived with his mother and stepfather, a convicted felon who drank and beat the child's mother.

³³⁹ *Id.*

³⁴⁰ See also *HOSTILE CLIMATE* 1998, *supra* note 183, at 72 (discussing case of lesbian mother who lived in Washington state, which does not have a sodomy law, and her ex-husband who lived in Texas, a state with a sodomy statute, and who would not return the children).

*C. Discrimination Against Gay Organizations**1. Historical Discrimination*

Sodomy laws have been used to blunt the development of a gay rights movement in the United States. Sodomy laws have historically been used to isolate gay men and lesbians from society and from each other. Gay men and lesbians should not be allowed to talk to each other, or indeed anyone, the argument goes, because such discussion would facilitate the commission, or solicitation, of crime under a state's sodomy law. Law enforcement officials, legislators, and school officials have invoked this argument from the beginnings of the nascent gay rights movement until the present day.

Early gay organizations were short-lived because of the difficulty of attracting law-abiding citizens to join a civil rights organization that had the taint of criminality due to sodomy laws. The first gay rights organization in the United States was the Society for Human Rights, which was founded in Chicago in 1924 and collapsed shortly thereafter. Its founder, Henry Gerber, attributed the organization's downfall to "the reluctance of reputable persons to associate with presumed criminals such as homosexuals."³⁴¹ There were no comparable attempts at the creation of a gay rights organization until the post-World War II era. Because the war environment created a new milieu for many gay men who served in close quarters and those lesbians who worked in factories or joined the Women's Auxillary Corps, the postwar environment witnessed a greater demand for same-sex venues.³⁴²

Yet in the postwar era, sodomy laws forced gay and lesbian groups to make a hard choice over how to define their purpose. In the 1950s, the nascent gay rights movements was based on a philosophy of assimilation, but the fact that homosexual behavior constituted a violation of criminal law left the movement "with little room in which to act."³⁴³ The two primary organizations at the time were the Mattachine Society and the Daughters of Bilitis ("DOB") for gay men and lesbians, respectively.³⁴⁴ "Since laws in every state prohibited homosexual behavior, Mattachine and DOB avoided anything that smacked of advocating illegal activity."³⁴⁵ But this meant that there was little, if any, turf on which these organizations could act. On the one hand, organizations eschewed a social pur-

³⁴¹ Cain, *supra* note 165, at 1556. Also contributing to the group's demise was a police raid and subsequent arrest of Gerber and some members. See Eskridge, *supra* note 41, at 1082.

³⁴² See ALAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990).

³⁴³ D'EMILIO, *supra* note 53, at 84.

³⁴⁴ Other smaller organizations also developed. See generally SWEET, *supra* note 154, at 120-27.

³⁴⁵ D'EMILIO, *supra* note 53, at 111.

pose: "Mattachine had vigorously denied that it was a social organization, a place where male homosexuals could meet, out of fear that its purposes would be construed as encouraging illegal sexual behavior."³⁴⁶ Yet the Mattachine Society was also stymied from organizing around political issues. When the Boston chapter of Mattachine considered working for the repeal of Massachusetts' sodomy statute, the proposal was vetoed "because of the alleged danger involved."³⁴⁷ Concerned about the threat posed by state sodomy laws, gay men were scared even to attend a meeting of a gay rights organization because they were "petrified that the government might get a list of their names and fully expected that the cops would come barging in and arrest everybody."³⁴⁸ These fears were not unfounded. The FBI did, in fact, spy on gay and lesbian rights organizations from the fifties until the seventies, compiling lists of names.³⁴⁹ In short, sodomy laws significantly impeded the development of gay organizations³⁵⁰ and contributed to their demise.³⁵¹

Not only did sodomy laws thwart the formation of political and social clubs, they also prevented gay men and lesbians from congregating

³⁴⁶ *Id.* at 190.

³⁴⁷ *Id.* at 125. In contrast to the Boston chapter, the Mattachine chapters in New York and Washington, D.C. became more outspoken in the 1960s. See Eskridge, *supra* note 31, at 820. Furthermore, even when gay groups were formed, the threat of legal persecution often overshadowed other pressing issues. See TIMMONS, *supra* note 155, at 155.

³⁴⁸ D'EMILIO, *supra* note 53, at 67 (internal quotations omitted). See Eskridge, *supra* note 31, at 866 ("[M]embers were so frightened of publicity that they often used pseudonyms even with the organizations."). Extreme security measures had to be taken lest police find the location of nascent gay rights organizations. New members and guests had to be met in public places and driven on circuitous routes to prevent police from discovering meeting places. "The very real possibility of a police raid and legal persecution required that their meetings always be held in secret." TIMMONS, *supra* note 155, at 146.

³⁴⁹ See *Data Said to Show U.S. Spied on Homosexual Rights Units*, N.Y. TIMES, Sept. 9, 1982, at D26. Thus, from the inception of the gay community, sodomy laws have forced gay people underground. See D'EMILIO, *supra* note 53, at 13; see also Eskridge, *supra* note 31, at 386.

³⁵⁰ Sodomy laws helped prevent politically active gay men and lesbians from establishing any critical mass because law enforcement officials have viewed such concentrations of homosexuals as criminal. See SWEET, *supra* note 154, at 8. Gay groups were prevented from organizing and fending for themselves, and other civil rights organizations were unwilling to champion gay rights. The near total isolation of gay citizens from the general populace is illustrated by the fact that, in 1957, even the ACLU board of directors adopted a national policy statement that sodomy statutes were constitutional. See D'EMILIO, *supra* note 53, at 156. Of course, as gay men and lesbians came out of the closet and developed a critical mass, such as they did in California, more gay organizations emerged. See Eskridge, *supra* note 31, at 821. But, even so, criminal laws posed an ever present threat. See *id.* at 837 ("During the 1950s and 1960s, San Francisco was both a gay mecca and a gay hell. The thriving gay and lesbian subculture provoked repeated official bashing in the form of police raids on gay clubs, massive entrapment squads, and constant pressure to close gay bars.").

³⁵¹ See Eskridge, *supra* note 31, at 874-75 (describing police raids of gay rights organizations). In the past, the Internal Revenue Service has denied tax exempt status to gay rights organizations because of sodomy laws. See *id.* at 879. Federal legislators have tried to prevent gay organizations from soliciting funds, based in part on the existence of state sodomy laws. See *id.* at 876.

in many business establishments.³⁵² From the inception of a gay community, bars have served as an important meeting place for gay men and lesbians. Before and during Prohibition, gay bars were sporadically targeted for police raids. Ironically, the demise of Prohibition brought even greater pressure on gay bars. As part of the political compromise to get rid of Prohibition, all bars were subject to enhanced regulation and oversight by governmental bodies and agents, such as New York's State Liquor Authority ("SLA"). Armed with the authority to close down bars, the SLA set out to revoke the license of any bar that served drinks to suspected homosexuals.³⁵³ Merely tolerating homosexual patrons was sufficient grounds for license revocation.³⁵⁴ The SLA succeeded in "clos[ing] literally hundreds of bars that welcomed, tolerated, or simply failed to notice the patronage of gay men or lesbians."³⁵⁵ The liquor licensing policies and enforcement actions served to prevent homosexuals from assembling in public.³⁵⁶ In addition to applying pressure to bar owners, police raids deterred customers from frequenting gay bars because the police would report the arrestees' names to the local newspaper.³⁵⁷ To the extent that individual businesses survived, most moved underground where gay people were isolated from the rest of society.³⁵⁸ Criminalizing homosexual conduct—and, in essence, the homosexual—provided the legal underpinnings to drive gay men and lesbians from public areas. A Florida court upheld that state's prohibition on gay men entering bars as a justified attempt "to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal."³⁵⁹

These policies continued beyond the 1950s. In the late 1960s, many large American cities invoked the criminality of homosexual conduct in

³⁵² Sodomy laws have operated to exclude gay men and lesbians from participating in many of the social and commercial activities that others take for granted by providing a basis for denying gay organizations the ability to incorporate or claim nonprofit tax status. See Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979); cf. *State v. Brown*, 313 N.E.2d 847, 848 (Ohio 1974) (Ohio's Secretary of State refused to accept gay organization's articles of incorporation as contrary to the state's public policy, even though Ohio had revoked its sodomy law).

³⁵³ See CHAUNCEY, *supra* note 30, at 337; see also Eskridge, *supra* note 31, at 869–71.

³⁵⁴ See CHAUNCEY, *supra* note 30, at 337–47. The police encouraged bar owners to drive away homosexual customers by refusing to serve them or by putting salt in their drinks. See *id.* at 340–41; see also Eskridge, *supra* note 31, at 867. Courts have generally upheld these measures. See *id.* at 869 (explaining how state courts had upheld measures by state liquor authorities to "bust up" gay bars). But see *id.* at 872–73 (describing several state court decisions preventing the closing of establishments solely because their clientele was gay and requiring, instead, a showing of actual lewd or disruptive behavior).

³⁵⁵ CHAUNCEY, *supra* note 30, at 339.

³⁵⁶ See *id.* at 347.

³⁵⁷ See Eskridge, *supra* note 31, at 1083.

³⁵⁸ See CHAUNCEY, *supra* note 30, at 351. Similarly, police extorted money from gay establishments in 1930s Los Angeles in exchange for not closing them down. See TIMMONS, *supra* note 155, at 63.

³⁵⁹ *Inman v. City of Miami*, 197 So. 2d 50, 52 (Fla. Ct. App. 1967).

order to prohibit gay men and lesbians from assembling in places that served liquor.³⁶⁰ For example, Miami enacted an ordinance to prohibit liquor licensees from employing or selling liquor to a known homosexual, and from permitting two or more homosexuals to congregate.³⁶¹ These laws were essentially an indirect method of enforcing sodomy laws.³⁶² In some jurisdictions, such as southern California, courts often forbade gay men arrested for violating the state's sodomy or lewdness laws from congregating with other gay men or drinking alcohol as a condition of probation.³⁶³ Homosexuals were terrified to visit gay establishments out of fear that law enforcement officials were making lists of gay patrons for future arrests.³⁶⁴ For the same reason that sodomy laws thwarted the proliferation of gay rights organizations, they interfered with the development of businesses that served the gay community.

2. *Continuing Discrimination*

Even though sodomy laws are not now enforced as rigorously as in the 1950s and 1960s, they still impede the practical ability of many gay men and lesbians to associate with one another. As Judge Posner has explained:

The underenforcement of laws forbidding sexual misconduct makes it tempting to argue that they have so little practical impact as to vitiate the normal incentives for eliminating legislative anachronisms Even when no active efforts (comparable to the "sting" operations used against drug rings and public corruption) are made to enforce victimless crimes, such as consensual sodomy . . . criminal law can suppress the public, organized, institutional manifestation of the forbidden practice. Laws forbidding homosexual conduct have rarely been enforced

³⁶⁰ See D'EMILIO, *supra* note 53, at 201; see also Theresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1149 (1996) ("Police justified their raids on gay bars in the 1950s and 1960s, for example, on the ground that criminal activity might result from homosexual association.").

³⁶¹ See Cain, *supra* note 165, at 1572.

³⁶² See, e.g., *Inman*, 197 So. 2d at 51. Similarly, in one southern California jurisdiction in the 1960s, a bathhouse could have its operating license revoked if a felony arrest were made on the premises. See Gallo, *supra* note 42, at 731. Sodomy was, of course, a felony.

³⁶³ See Gallo, *supra* note 42, at 778 n.54.

³⁶⁴ See CHAUNCEY, *supra* note 30, at 348-49 ("While many men patronized gay bars, others were unwilling to do so, at least during crackdowns, for fear of being caught in a raid, which might result in their being arrested or at least being forced to divulge their names and places of employment."); D'EMILIO, *supra* note 53, at 14 ("Gay men who made assignations in public places, lesbians and homosexuals who patronized gay bars, and occasionally even guests at gay parties in private homes risked arrest.").

with much energy, yet they probably delayed the emergence of a homosexual subculture. . . .³⁶⁵

Nowhere is the use of sodomy laws to interfere with associational rights more clear than in the context of student organizations.³⁶⁶ Sodomy laws are used to exclude gay student groups from participating in campus life because, "in jurisdictions with sodomy statutes, school officials have argued that recognition or support of gay and lesbian student organizations will encourage or facilitate violations of those statutes."³⁶⁷ University officials sometimes object to social and political events sponsored by gay and lesbian student organizations on the theory that such events will lead to criminal activity, in the form of consensual sodomy.³⁶⁸ State legislatures and schools officials use sodomy laws to justify denying funds to these organizations.³⁶⁹

The use of sodomy laws by university officials to discriminate against gay and lesbian students is illustrated in *Gay Lib v. Univ. of Missouri*.³⁷⁰ In the 1970s, the University of Missouri refused to recognize the gay and lesbian student organization, Gay Lib, "on the ground that recognition . . . would probably result in the commission of felonious acts of sodomy in violation of Missouri law."³⁷¹ The Eighth Circuit struck down the University policy on First Amendment grounds. When the Supreme Court denied certiorari, (then) Justice Rehnquist dissented, arguing that there is no constitutional barrier to denying "recognition to an organiza-

³⁶⁵ POSNER, *supra* note 30, at 80–81. Sodomy laws also continue to inhibit the ability of politically active gay and lesbian citizens to communicate in traditional political fora. For example, the Texas Republican party refused to let Log Cabin Republicans, a gay Republican organization, set up an exhibit booth at the state Republican convention because sodomy is a crime in Texas. See PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE 101 (1997) [hereinafter HOSTILE CLIMATE 1997].

³⁶⁶ The problem is present in both secondary and university education. However, courts have intervened to protect student organizations at the university level.

³⁶⁷ SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 82. See also *Gay Student Serv. v. Texas A & M Univ.*, 737 F.2d 1317, 1323 (5th Cir. 1984); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267, 1269 (M.D. Tenn. 1979); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

³⁶⁸ See, e.g., *Gay Students Organization of Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974); *Wood v. Davison*, 351 F. Supp. 543, 546 n.5 (N.D. Ga. 1972).

³⁶⁹ The Georgia House of Representatives passed legislation that would deny state funds to any college that permitted conduct forbidden under the state's sodomy law. See Bill Maxwell, *Trampling the Rights of Gays and Lesbians*, ST. PETERSBURG TIMES, Apr. 28, 1996, at 1D. The measure was rejected by the Georgia Senate. Similarly, the Alabama legislature passed a law to ban "public funding of any student group 'that fosters or promotes a lifestyle or actions prohibited by the [state's] sodomy and sexual misconduct laws.'" Halley, *supra* note 31, at 1735–36. See also ALA. CODE § 16-1-28 (Supp. 1992). After the federal court invalidated the law, a state senator drafted a bill asking the state attorney general to prevent all campus activities interpreted as violating the state's sodomy law. See Maxwell, *supra*, at 1D.

³⁷⁰ 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom. Ratchford v. Gay Lib*, 434 U.S. 1080 (1978).

³⁷¹ *Gay Lib*, 558 F.2d at 850.

tion the activities of which expert psychologists testify will in and of themselves lead directly to violations of a concededly valid state criminal law."³⁷² Justice Rehnquist, siding with the University, reasoned that "the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined."³⁷³ He argued that homosexuality is a criminal contagion and sodomy laws are a perfectly valid weapon to isolate gay men and thereby quarantine that contagion. While Justice Rehnquist's position did not prevail in the Supreme Court, it nonetheless represented the policy of many universities. Despite the success of several gay rights groups in court, conservative legislators, students, and universities continue to target gay student organizations.³⁷⁴

Courts have also reasoned that because sodomy laws criminalize homosexual conduct, student newspapers should not advertise meetings for homosexuals, in the same way that newspapers should not carry advertising for prostitutes.³⁷⁵ Even when gay organizations attempt to advertise discussions of *legal aid*, courts have argued that "[s]uch an offer is open to various interpretations, one of which is that criminal activity is contemplated, necessitating the aid of counsel."³⁷⁶ Thus, some conservatives use sodomy laws to deny homosexual organizations the same press freedoms that other organizations take for granted. In short, as long as sodomy is criminalized and all homosexuals are defined as a criminal class, gay student organizations are vulnerable.

When sodomy laws are used to deny equal treatment to gay and lesbian students, students are affected on several levels. First, like sodomy laws themselves, the school's policy reflects official condemnation of gay men and lesbians and legitimizes discrimination against them. Commentators have explained that "the denial of official recognition may harm gay and lesbian student groups by differentiating and stigmatizing them for their 'unrecognized' status."³⁷⁷ As Judge Ferrened recognized in his partial dissent in *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*,³⁷⁸ allowing "separate but equal" treatment for gay student

³⁷² *Ratchford*, 434 U.S. at 1084 (Rehnquist, J., dissenting).

³⁷³ *Id.*

³⁷⁴ See HOSTILE CLIMATE 1998, *supra* note 183, at 83 (discussing attempts of conservative student senators at the University of Florida, Gainesville to deny funding for the school's gay-lesbian-bisexual student organization).

³⁷⁵ See, e.g., *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1076 n.4 (5th Cir. 1976). Although the case dealt with a scenario involving a student newspaper, Judge Coleman of the Fifth Circuit noted that he would extend this analysis to all newspapers. See *id.*

³⁷⁶ *Id.*

³⁷⁷ SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 160.

³⁷⁸ 536 A.2d 1 (D.C. 1987).

groups constitutes "an obvious affront to human dignity, amounting to a form of discrimination at least as intolerable as the denial of tangible facilities and services."³⁷⁹ This contributes to the hostile climate faced by gay and lesbian students on many university and secondary school campuses. Such hostility often results in violence and harassment.³⁸⁰

Second, using state sodomy laws to quell student gathering undermines one of the few available fora for gay men and lesbians to meet and learn that they are not alone. Gay and lesbian youth face a tremendous sense of isolation.³⁸¹ The First Circuit recognized the critical role of gay student associations when it held that, "[c]onsidering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgment of associational rights, even if assumed to be an indirect one."³⁸²

While gay and lesbian litigants have been largely successful in freedom of association cases, the system still only works for those gay and lesbian students with sufficient money, resources, stamina, and courage to attack a system that condemns them as criminal. The emotional and financial costs of outing oneself in order to pursue one's rights can be prohibitively high. Gay visibility forces people to risk losing their family, friends, and jobs. In the fishbowl of college life, many gay and lesbian students may not challenge a university's decision to deny them equal recognition and access to facilities afforded to other groups. The same reasons that make it less likely that gay people will report crimes against them make it less likely that gay men and lesbians will seek legal redress of wrongs committed against them by their universities, local governments, or secretaries of state. In the end, it is astounding that students who attend university to study "must spend much of their time fending off assaults from their elected officials."³⁸³ Sodomy laws provide the foundation for these official assaults on gay students.

Although much less studied (let alone litigated), sodomy laws also prevent gay organizations on the high school level. For example, the Utah legislature attempted to allow school districts in the state to ban student organizations for gay students by banning student organizations that en-

³⁷⁹ *Id.* at 49-50 (Ferrene, J., dissenting in part).

³⁸⁰ For example, the National Coalition of Anti-Violence Programs found a 34% increase in anti-gay hate crimes in schools and colleges. See *HOSTILE CLIMATE* 1998, *supra* note 183, at 17.

³⁸¹ This isolation is magnified when sodomy laws are used to justify the denial of a counselor for gay students. See *HOSTILE CLIMATE* 1997, *supra* note 365, at 107 (citing George Mason University in Virginia as an example of this policy).

³⁸² *Gay Students Org. v. Bonner*, 509 F.2d 652, 659-60 (1st Cir. 1974).

³⁸³ Maxwell, *supra* note 369, at 1D. See also *HOSTILE CLIMATE* 1998, *supra* note 183, at 93. Even in those specific cases in which courts have eventually upheld the rights of student organizations, the process took years and students had to bring lawsuits in order to obtain the recognition that other groups obtain in days.

courage criminal behavior, which in Utah includes sodomy.³⁸⁴ Similarly, policymakers in Louisiana have used that state's sodomy law to justify censoring any discussions of homosexuality from textbooks used in public schools.³⁸⁵

While university students may have the resources and emotional wherewithal to fight for their rights, high school students are much more vulnerable. First, gay high school students are less likely to be personally comfortable with their sexual orientation and are more likely to be victimized by their peers for speaking out. Thus, they are less prone to defend themselves from attacks by a homophobic administration.³⁸⁶ Second, high school students are afforded less constitutional protection than university students.³⁸⁷ High school students are more often treated as wards than as adults. Thus, school administrators have used sodomy laws to prevent classroom discussions of homosexuality,³⁸⁸ to remove advertisements for a gay and lesbian support group from a high school newspaper,³⁸⁹ and to attempt to exclude gay and lesbian teachers.³⁹⁰ Therefore, even though gay university students boast an excellent record in the federal courts, these gains do not necessarily translate into protection for gay and lesbian high school students. In sum, sodomy laws help fuel the isolation that most gay youth endure.³⁹¹

1. Net Effect: Isolation

An inquiry into the meager historical records regarding the demise of many gay organizations and business establishments that was facilitated by sodomy laws does not even consider all of those people and entities that never had the chance to create a record. For every organization or business shut down based on a sodomy law-related justification, there were many potential organizations and businesses that were never realized because of the threat represented by sodomy laws.

³⁸⁴ See *Briefing*, SALT LAKE TRIB., Apr. 10, 1996, at A2.

³⁸⁵ See Gallagher, *supra* note 118, at 24, 26.

³⁸⁶ Indeed, one effect of the institution's attack on its gay pupils is to encourage other students to bash their gay colleagues. See HOSTILE CLIMATE 1998, *supra* note 183, at 122.

³⁸⁷ See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988).

³⁸⁸ See HOSTILE CLIMATE 1999, *supra* note 153, at 209.

³⁸⁹ See HOSTILE CLIMATE 1997, *supra* note 365, at 67.

³⁹⁰ See HOSTILE CLIMATE 1999, *supra* note 153, at 190-91.

³⁹¹ This isolation can be devastating for gay adolescents. Studies suggest that gay youth are three times more likely to attempt suicide and that suicide is the number one cause of death among gay and lesbian adolescents. See Armstrong, *supra* note 299, at 75. Twenty to thirty percent of gay youth attempt suicide. See DEATH BY DENIAL: STUDIES OF SUICIDE IN GAY AND LESBIAN TEENAGERS 7 (Gary Remafedi ed., 1994). Of course, this does not mean that sodomy laws directly cause teenage suicide. Instead, sodomy laws create an atmosphere in which all of society, both gay and straight, is taught to diminish gay people. Gay teenagers, who already carry the baggage of teenage insecurity, feel the impact of this message most acutely.

This exemplifies the true, unmeasureable cost of sodomy laws: some individuals have been forced to live their lives in total isolation, lest the secret of their criminal nature leak out.³⁹² In addition to limiting the development of formal organizations and businesses that advance gay causes, sodomy laws inhibit the development of informal social networks.³⁹³ Acknowledging one's sexuality to another person increases the risk of being treated as a criminal. In those states with sodomy laws, to admit to homosexual conduct is to confess one's status as a felon. Rather than admitting felonious conduct or intent, many gay men and lesbians effectively plead the Fifth Amendment by concealing their identity and living in the closet.³⁹⁴ Many gay Americans believe that exposing one's same-sex orientation creates the risk of arrest.³⁹⁵ What is casually referred to as being "in the closet" is ultimately the most severe form of self-censorship, the denial of one's identity.

While perhaps seeming paranoid, this fear of exposure is well founded. In the postwar era, American law enforcement has routinely started and participated in mass witchhunts against gay citizens. Police will arrest one homosexual on a charge of, for example, solicitation to commit sodomy. Often as a variant of good cop/bad cop, the sympathetic police officer agrees to tread lightly if the accused will turn over the names of other homosexuals.³⁹⁶ For decades, the American military has engaged in such witchhunts, entrapping and harassing homosexual service members and coercing them to betray their friends and acquaintances.³⁹⁷ Perhaps the most dramatic example of such a witchhunt oc-

³⁹² Unlike racial minority groups, gay people are isolated from each other as well as society at large. See SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 23 (1988); Eskridge, *supra* note 31, at 825 ("[T]he gay ghetto was harder to organize than the black one.").

³⁹³ Indeed, one purpose of gay organizations was to end the isolation that individual gay men and lesbians felt. See TIMMONS, *supra* note 155, at 14. To the extent that sodomy laws slowed the development of gay political and social groups, the laws increased this sense of isolation.

³⁹⁴ See Carol Warren, *Homosexuality and Stigma*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL*, 123, 130 (Judd Marmor ed., 1980) ("[T]he most common way of dealing with the stigma [is] to remain secret and pass as a heterosexual: to become part of the homosexual invisible minority.").

³⁹⁵ See SWEET, *supra* note 154, at 73. Some gay men have been too scared to enter relationships, which create the risk of exposure. See, e.g., TIMMONS, *supra* note 155, at 92.

³⁹⁶ See Eskridge, *supra* note 41, at 1104.

³⁹⁷ The debate over gay people in the military was the hot political topic following President Clinton's inauguration in 1993. Although the exclusion of gay and lesbian service members was largely a function of general animus and stereotypes, sodomy laws provided a fig leaf to justify the government and military's anti-gay policies. See POSNER, *supra* note 30, at 81; see also *Statement of Charles R. Jackson, Executive Vice President, Non-Commissioned Officers Association Before the Republican Study Committee on Homosexuals in the Armed Forces*, FED. NEWS SERVICE, Dec. 9, 1992 ("NCOA suggests to the committee that prior to any change in current policy [on gay people in the military], efforts must be redirected to making homosexual conduct legal in all states . . ."). Thus, the argument was made that so long as state sodomy laws remain on the books, it should be permissible for the military to exclude gay men and lesbians from serving their country.

curred in Boise, Idaho in the 1950s. Following allegations that a local man was having sexual relations with three teenagers, the police "interrogated 1,400 residents of Boise, forcing gay people to name names of friends" who were gay.³⁹⁸

Given both the historical and current use of sodomy laws and other anti-gay policies to implement anti-gay witchhunts, closeted gay people are rational to believe that revealing their inner-most feelings to another represents a serious threat that their privacy will be compromised. The self-imposed isolation applies to men and women from all socioeconomic classes, ages, and regions, from urban professionals to rural workers.³⁹⁹ While their backgrounds vary greatly, they often share common injuries, such as loneliness, isolation, depression, and desperation.

D. Discriminatory Enforcement of Solicitation Statutes

In the area of speech, it is well-recognized that a statute on the books has consequences even without enforcement. Sodomy laws affect free speech rights in three ways: by punishing solicitation, by punishing gay men and lesbians who discuss their sexuality, and by preventing members of society from discussing the sexuality of other people.

Sodomy laws infringe on the free speech rights of gay men and lesbians by criminalizing so-called solicitation. Sodomy laws have often been enforced indirectly through solicitation statutes.⁴⁰⁰ Although public sodomy should be criminalized, sodomy laws provide the foundation for prosecutions of both public and private proposals.⁴⁰¹ In theory, a man cannot ask another man out on a date because such speech constitutes solicitation to commit the crime of sodomy.⁴⁰² And if a man were actually

The military has traditionally excluded gay people from its ranks by asserting that they are security risks because they are susceptible to blackmail. The primary reason that gay people may be subject to blackmail, however, was created by the Defense Department's anti-gay regulations themselves, which provide leverage to any would-be blackmailer. Independent of the military's ill-conceived and potentially self-fulfilling prophecy, the military has historically claimed that a ban on gay men and lesbians is necessary because "even the professed homosexual is subject to criminal prosecution for a given act and is therefore susceptible to blackmail." *Employment Disabilities*, *supra* note 215, at 1750. The Defense Department has even applied this rationale to men living in states without sodomy laws. *See id.* at 1750 n.62.

³⁹⁸ KEEN & GOLDBERG, *supra* note 34, at 87 (quoting George Chauncey's testimony before the trial court in *Evans v. Romer*). *See generally* JOHN GERASSI, *THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY* xv-xvii (1966).

³⁹⁹ *See* SWEET, *supra* note 154, at 71-73.

⁴⁰⁰ *See* Eskridge, *supra* note 31, at 840.

⁴⁰¹ *See* *United States v. Carson*, 319 A.2d 329 (D.C. App. 1974).

⁴⁰² *See* Jacobs, *supra* note 198, at 261. By way of comparison, it is interesting to note that, in Nicaragua, the judiciary has validated a criminal statute that provides for a three-year prison sentence for anyone who "induces, promotes, propagandises or practices this scandalous form of concubinage between two people of the same sex." Ryan Goodman, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, 105 YALE L.J. 255, 264 (1995).

to invite sex, he could soon find himself with a criminal record. The case of *Christensen v. State* is instructive.⁴⁰³ In *Christensen*, a sheriff's department set up an undercover operation at a public rest stop to arrest men soliciting sodomy.⁴⁰⁴ An undercover officer waited in his car until the defendant made eye contact and nodded his head, which the officer took as an invitation to approach. The two engaged in brief conversation and the defendant asked the undercover officer what he was looking for. After the officer stated that he was open minded, the defendant said that he wanted a "blow job."⁴⁰⁵ The defendant agreed to follow the officer, each man in his own car, to a motel. Christensen was arrested en route. No public sodomy was ever contemplated. The solicitation was not made in earshot of any other individuals. Yet, Christensen was convicted and sentenced to probation for twelve months because he asked another adult—the officer who had both approached him and had been receptive to his advances—for oral sex.

The fact that solicitation to commit sodomy is a crime is particularly inappropriate because "[c]ertain persons who make solicitations have no intent to engage in the act solicited but derive satisfaction from the fact of the solicitation alone."⁴⁰⁶ This makes sexual solicitation different from other forms of criminal solicitation. Those who conspire to fix prices generally intend to follow through on the solicitation. In the case of sexual speech, solicitation is not necessarily a precursor to a criminal act; rather, sometimes it is the entire act, an act of pure speech.⁴⁰⁷

(quoting Peter Tatchell, *Theological Succor for Bigots Everywhere*, INDEPENDENT (London), May 31, 1994, at 15).

⁴⁰³ 468 S.E.2d 188 (Ga. 1996).

⁴⁰⁴ See also *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (showing how sodomy laws are used to criminalize mere solicitation to engage in consensual sexual activity, even when that activity never occurs).

⁴⁰⁵ 468 S.E.2d at 189.

⁴⁰⁶ Gallo, *supra* note 42, at 697. But see Jacobs, *supra* note 198, at 265 ("In fact, less clarity might be required for homosexual as opposed to heterosexual attempts, since homosexual overtures are seldom made to adult strangers without serious intent.").

⁴⁰⁷ In addition to the associational rights of the First Amendment, sodomy laws also curtail speech rights by punishing individuals who acknowledge their homosexuality. See generally David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

Sodomy laws can also inhibit speech through the law of slander and libel. While free speech is protected by the First Amendment, there are well-defined exceptions to those protections. One of these is libelous and slanderous speech. Sodomy laws affect free speech rights and the phenomenon of outing because courts in states with sodomy laws have found that referring to someone as "queer" is slanderous *per se* because it imputes the crime of sodomy. See, e.g., *Head v. Newton*, 596 S.W.2d 209 (Tex. Ct. App. 1980). In contrast, states without sodomy laws have ruled that false allegations that someone is gay are not slander *per se*. See, e.g., *Hayes v. Smith*, 832 P.2d 1022 (Colo. App. 1991).

Sodomy laws also inhibit public discussions about sexual orientation. See Reinig, *supra* note 32, at 892-93 ("State sodomy legislation perpetuates a religiously-based moral stigma against gay Americans and effectively contributes to the curtailment of any meaningful political participation for them in democratic processes."); see also WARREN JO-

E. Immigration Discrimination

For most of the twentieth century, state sodomy laws have played a significant role in excluding and deporting homosexuals from the United States. In the first major immigration reform of the century, the Immigration Act of 1917, homosexuals were prohibited from entering the United States pursuant to an exclusion for "persons of constitutional psychopathic inferiority."⁴⁰⁸ Homosexuality was not itself specifically identified as grounds for exclusion, but courts and immigration authorities routinely deported homosexuals based on their "constitutional psychopathic inferiority."⁴⁰⁹ In addition to the "constitutional psychopathic inferiority" provision, the 1917 Act retained the language of the 1891 immigration reform that provided for the exclusion of persons convicted of any "crime or misdemeanor involving moral turpitude."⁴¹⁰ The 1917 Act provided for the deportation of any alien sentenced to a prison term of one year or more for such a crime within five years of entry into the United States or sentenced more than once for any such crime at any time after entry.⁴¹¹ A conviction for solicitation to commit sodomy could be a sufficient predicate criminal act to justify deportation.⁴¹² But no actual conviction for any crime was necessary because by "just admitt[ing] conduct amounting to [sodomy or gross indecency or public lewdness], noncitizens could be excluded or deported for having committed 'crimes of moral turpitude.'"⁴¹³

The next major immigration reform, the Immigration Act of 1952, was a product of the McCarthy era paranoia about political subversives and sexual perverts.⁴¹⁴ Not surprisingly, the 1952 Act continued the anti-

HANSSON & WILLIAM A. PERCY, *OUTING: SHATTERING THE CONSPIRACY OF SILENCE* 200 (1994) ("In a certain respect, outing threatens the established morality far more than does sodomy law repeal."); CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 30 (1995) ("The erasure of a gay identity from the dominant discourse is understandable because of its threat to the naturalness of the universal heterosexual subject. If homosexuality is allowed to speak openly, then the universal and univocal heterosexual subject begins to lose a modicum of its priority.").

⁴⁰⁸ GREEN, *supra* note 301, at 87. This was essentially an extension of the nineteenth-century policy of excluding lewd and "degenerate people" from entering the country. See Eskridge, *supra* note 41, at 1045-46.

⁴⁰⁹ See, e.g., *In re Matter of Steele*, 12 I. & N. Dec. 302 (B.I.A. 1967); see also *In re Matter of Fleuti*, 12 I. & N. Dec. 308, 309 (B.I.A. 1965) ("Under the immigration laws, a person of constitutional psychopathic inferiority may be one whose history reveals a pattern of anti-social conduct or conflict with authority or it may be one who is a sex pervert such as a homosexual.").

⁴¹⁰ Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084. See Eskridge, *supra* note 41, at 1046.

⁴¹¹ See Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889.

⁴¹² See *In re Matter of K*, 3 I. & N. Dec. 575 (B.I.A. 1949) (1935 conviction for solicitation to commit sodomy was sufficient, when coupled with 1947 larceny conviction, to establish two separate offenses under the Immigration Act of 1917).

⁴¹³ Eskridge, *supra* note 41, at 1048.

⁴¹⁴ See *In re Matter of Lavoie*, 12 I. & N. Dec. 821 (B.I.A. 1968). The exclusion of

gay policies of the previous regime and relied, in part, on sodomy laws. As under the 1917 Act, there were two separate, but interrelated, mechanisms for excluding and deporting homosexuals. First, the 1952 Act made a minor change in nomenclature,⁴¹⁵ replacing the phrase "constitutional psychopathic inferiority" with "psychopathic personality."⁴¹⁶ Although some applicants argued that the phrase "psychopathic personality" did not include homosexuals,⁴¹⁷ the Supreme Court in *Boutilier v. INS*⁴¹⁸ effectively quashed this argument by holding that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals"⁴¹⁹ Thus, homosexuals continued to be deported under the new rubric of the 1952 Act.⁴²⁰ In short, any applicant who admitted committing homosexual acts was excludable or deportable as a psychopathic personality.

Second, independent of the "psychopathic personality" provision, homosexuals could be excluded or deported for committing crimes of

homosexuals was based in part on the contagion argument. See *In re Matter of P.*, 7 I. & N. Dec. 258, 263 (B.I.A. 1956) ("The existence of a society of homosexuals in every large city, where the adolescent or the curious may be influenced, is, therefore, a definite consideration, since homosexuality is to a large extent an acquired abnormality.").

⁴¹⁵ See Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439 (1994).

⁴¹⁶ Although, in 1950, the Senate wanted specifically to exclude from immigration "aliens who are homosexuals or sex perverts," the Public Health Service prevailed in its position that such persons were already excluded and thus no change was warranted. See GREEN, *supra* note 301, at 88.

⁴¹⁷ After the Ninth Circuit ruled that "psychopathic personality" did not include homosexuals in *Flauti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), Congress amended the Immigration Act specifically to include "sexual deviates." Act of Oct. 3, 1965, §15 (G), 1965 U.S.C.A.N. (79 Stat. 919) 3328. The amendment would prove unnecessary when the Supreme Court subsequently held that the 1952 Act excluded homosexuals from immigrating.

⁴¹⁸ 387 U.S. 118 (1966).

⁴¹⁹ *Id.* at 120. See also *id.* at 122; *In re Matter of Lavoie*, 11 I. & N. Dec. 224, 227 (B.I.A. 1965) ("The words, 'psychopathic personality' have become words of art which, whatever else they might mean, include homosexuality and sex perverts and the term is applied as it is commonly understood."); SENATE COMM. REP. NO. 1137 (82d Congress., 2d sess., Jan. 29, 1952):

The provisions of S.716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change in nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.

(quoted in *In re Matter of S.*, 8 I. & N. Dec. 409, 412 (B.I.A. 1959)).

⁴²⁰ This is not to suggest that all immigration claims by homosexuals have failed. See, e.g., *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981) (holding that whether or not a person is of good moral character is question of federal law, not state law); *In re Petition for Naturalization of Manuel Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971) (holding gay immigrant not deportable because all sexual conduct was private, and therefore not a public harm).

moral turpitude.⁴²¹ Because state law was used to determine such crimes,⁴²² state sodomy laws were often fundamental in excluding and deporting homosexuals from the United States.⁴²³ A conviction on sodomy grounds was not required in order to deport immigrants; rather, the applicant was treated as a criminal if he simply admitted to the "essential elements of the crime."⁴²⁴ According to the INS, an admission of homosexual conduct, even without conviction, was sufficient:

[T]he statement itself constitutes the very grounds for deportation. That is the effect of this peculiar provision of the immigration laws. The subsection providing for the "admission of the commission of a crime" was present in the 1907 act and was carried over into the 1910, 1917 and 1952 acts. The 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 crime which he admits, may be unique and seem severe, but it has been part of the immigration statutes for many years.⁴²⁵

As the 1950s policy carried into the 1980s, homosexuals continued to be deported for committing crimes of moral turpitude, namely violating state sodomy statutes, even if they were never convicted for violating any specific sodomy law.⁴²⁶ Even when the crime of moral turpitude provision was not the stated reason justifying deportation, sodomy laws have influenced deportation decisions by identifying gay men. For example, although the courts relied on the "psychopathic personality" provision to deport Boutilier,⁴²⁷ the INS and the courts knew of Boutilier's homosexuality because he had been arrested for sodomy eight years earlier. *Boutilier* reveals how sodomy laws have become the thin end of the wedge in attacking gay immigrants. Thus, even when an immigrant is found not guilty of soliciting sodomy, any arrest alerts the INS that the immigrant

⁴²¹ See Eskridge, *supra* note 41, at 1048.

⁴²² See *Velez-Lozano v. INS*, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (holding that state sodomy statute proscribes crime of moral turpitude).

⁴²³ See *In re Schmidt*, 289 N.Y.S.2d 89, 92 (N.Y. Sup. Ct. 1968) (denying a woman's petition for naturalization because she admitted to a monogamous, sexual relationship with another woman, and thus to violating New York's sodomy law). See also *In re Matter of Leyva*, 16 I. & N. Dec. 118 (B.I.A. 1977) (defining oral sex as a crime involving moral turpitude).

⁴²⁴ *In re Matter of S.*, 8 I. & N. Dec. 409, 415 (B.I.A. 1959); *In re Matter of W.*, 5 I. & N. Dec. 578, 579 (B.I.A. 1953).

⁴²⁵ *In re Matter of S.*, 8 I. & N. Dec. at 417 (citation omitted). Similarly, the immigrant need not have served any time in prison to be deportable for committing a crime of moral turpitude. See *In re Matter of P.*, 8 I. & N. Dec. 424 (B.I.A. 1959) (concerning respondent's deportation based on conviction for lewd and lascivious behavior).

⁴²⁶ See *In re Petition for Naturalization of Richard John Longstaff*, 538 F. Supp. 589, 590-92 (N.D. Tex. 1982).

⁴²⁷ See generally *Boutilier v. INS*, 387 U.S. 118 (1966).

is homosexual and therefore deportable, whether innocent of any specific allegation of sodomy or not.⁴²⁸

Finally, the existence of sodomy laws has been used to support other bases for justifying the deportation of homosexuals. For example, in *Longstaff v. INS*, the federal judge first held that the plaintiff had not been "lawfully admitted to the United States" by virtue of the fact that he had committed sodomy in England and, consequently, was a "psychopathic personality."⁴²⁹ Furthermore, the judge held that the plaintiff had not sustained his burden of proving "good moral character," as required by the Immigration and Nationality Act,⁴³⁰ because, among other reasons, he had engaged in violations of section 21.06 of the Texas sodomy statute.⁴³¹

After significant debate in the 1970s and 1980s,⁴³² the 1990s witnessed an important policy shift in American immigration policy against gay men and lesbians. With the Immigration and Nationality Act of 1990,⁴³³ Congress abandoned the "psychopathic personality" provision as a mechanism to exclude and deport homosexuals automatically.⁴³⁴ While this represents significant progress, it increases the import of state sodomy laws as a weapon to discriminate against gay and lesbian immigrants.⁴³⁵ Despite the elimination of the "psychopathic personality" provision, there is no legal impediment to deporting homosexual aliens as criminals committing crimes of moral turpitude.⁴³⁶ Since in many states

⁴²⁸ See *In re Matter of LaRochelle*, 11 I. & N. Dec. 436, 437 (B.I.A. 1965); *In re Matter of S.*, 8 I. & N. Dec. at 410 (concerning immigrant who solicited police officer for oral sex). The role of a sodomy arrest to identify sexual orientation is detrimental because an immigrant's attempt to conceal an arrest for homosexual activity is itself grounds for exclusion or deportation. See *In re Matter of F.R.*, 6 I. & N. Dec. 813 (B.I.A. 1955).

An arrest for charges related to sodomy or homosexuality could cause understandable panic for a gay immigrant. For example, following his arrest in a police raid on a gay bar, just months after the 1969 Stonewall riot, a Venezuelan immigrant leapt from the second-story window of a police station because he feared the arrest would result in his deportation. See KEEN & GOLDBERG, *supra* note 34, at 93.

⁴²⁹ *In re Longstaff*, 538 F. Supp. at 589. But see Lesbian/Gay Freedom Day Committee, Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982).

⁴³⁰ 8 U.S.C. 1427(e) (1990).

⁴³¹ Tx. CODE ANN. tit. 5 Ch. 21 § 21.06 (Vernon 1994). See *In re Longstaff*, 538 F. Supp. at 591-92. But see *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981); *In re Petition for Naturalization of Manuel Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971).

⁴³² See Foss, *supra* note 415, at 457-59.

⁴³³ Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. (1990)).

⁴³⁴ See *id.*

⁴³⁵ See MOHR, *supra* note 30, at 109 ("People who call for the retention of immigration discrimination against gays use as their main rationale that gays have to be kept out of the country lest they break state sodomy laws.").

⁴³⁶ See Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 772 (1993) ("Even after the 1990 Act, however, lesbians and gay men convicted of sodomy or of a public morality offense are at risk of exclusion or deportation under the 'crimes involving moral turpitude' exclusion . . ."); *id.* at 818 ("Currently, conviction or admission of same-gender public morality offenses triggers the 'crimes involving moral turpitude exclusion . . .'").

private, consensual sodomy is technically a crime, homosexuals can be guilty of a crime of moral turpitude without being arrested or convicted. Thus, the exclusion and deportation of homosexuals can be justified by invoking laws that are "never enforced."⁴³⁷ This raises the specter of continued discriminatory application of the "crimes of moral turpitude" provision to exclude gay people.⁴³⁸

It would be misleading to paint too bleak a picture of immigration issues affecting gay men and lesbians. Significant progress has been made in the area of asylum law. Some gay refugees have been able to establish successful asylum claims by proving that homosexuals are persecuted in their homeland.⁴³⁹ Nonetheless, state sodomy laws remain a threat that could be used to prevent asylum.⁴⁴⁰ Similarly, sodomy laws constitute a ready rationale to deny immigration benefits to same-sex couples such as visa privileges for one's same-sex partner, which are readily available for opposite-sex couples.⁴⁴¹

Ultimately, state sodomy laws have been critical in justifying discriminatory treatment of gay men and lesbians. As long as sodomy laws remain on the books of certain states, such laws may continue to haunt gay and lesbian immigrants.

IV. Status Versus Conduct

Although men and women have practiced homosexual conduct for millennia, homosexuality as a status is of relatively recent vintage. Not until the mid- to late nineteenth century did Western society conceive of the homosexual as a distinct entity.⁴⁴² The emerging field of sexology

⁴³⁷ Eskridge, *supra* note 31, at 933.

⁴³⁸ By way of comparison, the fact that sodomy laws are invoked for discriminatory purposes is indicated by the fact that, while homosexuality was a bar to "good moral character," heterosexual adultery was not. *See, e.g., In re Edgar*, 253 F. Supp. 951 (E.D. Mich. 1966) ("there is no automatic equating of adultery with bad moral character"). *But see Velez-Lozano v. INS*, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (man deported for consensual, heterosexual sodomy).

⁴³⁹ *See, e.g., In re Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

⁴⁴⁰ *See* John A. Russ, IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 U.C. DAVIS J. INT'L L. & POL'Y 29, 58 (1998). However, the asylum gains of gay immigrants are by no means permanent. The crime of moral turpitude provision still exists, and state sodomy laws still constitute a crime of moral turpitude. In short, sodomy laws can still facilitate immigration discrimination against homosexuals.

⁴⁴¹ *See* Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUMAN RTS. L. REV. 97, 126 (1996) ("the INS can fairly point to a tension between lawful same-sex marriages and criminal sodomy laws in order to refuse granting immigration benefits to same-sex couples"). Similarly, under general amnesties, sodomy laws can potentially be used collaterally against immigrants. *See also* Dan Woog, *'Til Uncle Sam Do Us Part*, ADVOCATE, Sept. 14, 1999, at 24-32 (discussing immigration difficulties of same-sex couples).

⁴⁴² *See* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Vintage Books 1990) ("As defined by the ancient civil or canonical codes, sodomy was a

defined the status of individuals by their sexual conduct, converting conduct into identity.⁴⁴³ Thus started the emergence of sexuality as status and the conflation of status and conduct. This section examines the interplay between the two.

It is well-established that states may criminalize conduct, but not status. In *Robinson v. California*,⁴⁴⁴ the Supreme Court invalidated a California law that made it a criminal offense to be addicted to narcotics. The Court held that being addicted to narcotics was a status, not an act, and that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."⁴⁴⁵ Applying this reasoning to homosexuality, the Fourth Circuit has noted that "a statute criminalizing such [homosexual] status and prescribing punishment therefor would be invalid."⁴⁴⁶ Consequently, if sodomy laws were found to punish status, and not merely conduct, they would be vulnerable to constitutional attack.⁴⁴⁷ However, in response to status-based arguments against sodomy laws, courts have held that a sodomy "statute punishes conduct, not status. An avowed homosexual is not punishable under the statute unless the prohibited acts are performed."⁴⁴⁸ This section argues that such reasoning ignores the manner in which sodomy laws are actually enforced.

A. Criminality as a Function of Status, Not Conduct

Judges have conflated sexual orientation with the criminal conduct of sodomy by holding that homosexuality is a "status defined by conduct."⁴⁴⁹ Courts have repeatedly held that an individual's acknowl-

category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage The sodomite had been a temporary aberration; the homosexual was now a species.").

⁴⁴³ See Eskridge, *supra* note 41, at 1022.

⁴⁴⁴ 370 U.S. 660 (1962).

⁴⁴⁵ *Id.* at 667.

⁴⁴⁶ *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976). See KARST, *supra* note 67, at 203 ("There is little doubt that a state law explicitly making criminal the status of being homosexual would be unconstitutional").

⁴⁴⁷ The status versus conduct argument has been most thoroughly debated in the context of the military's ban on homosexual service members. See, e.g., *Meinhold v. U.S. Dep't of Defense*, 123 F.3d 1275, 1284 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915, 950 (4th Cir. 1996) (Hall, J., dissenting); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 380 (9th Cir. 1990); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 919 (W.D. Wash. 1994).

⁴⁴⁸ *United States v. Lemons*, 697 F.2d 832, 838 (8th Cir. 1983).

⁴⁴⁹ *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). For conflation of status and conduct, see generally Cain, *supra* note 165. Courts have used the conflation of status and conduct to hold that homosexuals cannot be a protected class. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571-72 n.6 (9th Cir. 1990) (homosexuality is "behavioral and hence is fundamentally different from traits such as race, gender,

ment of homosexual orientation operates as an admission that one has committed sodomy.⁴⁵⁰ Justice Scalia explicitly conflated conduct with status in his dissent in *Romer v. Evans* when he opined that "[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct."⁴⁵¹ Scalia's limitation that such conflation is limited to instances not involving criminal sanctions provides scant relief in cases involving non-criminal sanctions (e.g., termination or refusal of state employment), in which courts have treated gay and lesbian citizens as criminals because of the existence of sodomy laws in state criminal codes. For example, one Texas court succinctly noted: "Donald Baker is a homosexual. . . . Therefore, *Donald Baker is also a criminal* under § 21.06 of the Texas Penal Code."⁴⁵² Even those courts that have sought to protect the equal rights of gay men and lesbians have reasoned that the terms "orientation" and "conduct" "provide[] nothing more than a different way of identifying the same class of persons."⁴⁵³ In short, "judges equate homosexuality with sodomy."⁴⁵⁴

This conflation is proven by the fact that indirect enforcement of sodomy laws is guided by status, not conduct. Part Three demonstrated the several ways in which sodomy laws are enforced indirectly. Each of these areas shows that, in determining whether to discriminate against gay men and lesbians based on sodomy laws, courts rarely ask whether the illegal conduct even took place. Rather, judges start with the premise that homosexuals are criminals.

The postwar purges of gay and lesbian employees from the federal government defined homosexuals as criminals without any proof of sodomitical conduct. The McCarthyite policy punished homosexuals based on their beliefs and feelings, in much the same way that communist sympathizers were punished for their thoughts and leanings. For

or alienage, which define already existing suspect and quasi-suspect classes The behavior or conduct of such already recognized classes is irrelevant to their identification"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that homosexuals are not suspect nor quasi-suspect class because "[t]he conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups" whereas "homosexuality is primarily behavioral in nature.").

⁴⁵⁰ See, e.g., *ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (holding that servicewoman's sexual orientation "is compelling evidence that [she] has in the past and is likely to again engage in [homosexual] conduct"); *Gaylord v. Tacoma Sch. Dist.*, 559 P.2d 1340, 1343-45 (Wash. 1977) (asserting that "sexual gratification with a member of one's own sex is implicit in the term 'homosexual'").

⁴⁵¹ *Romer v. Evans*, 517 U.S. 620, 642 (1996) (Scalia, J., dissenting).

⁴⁵² *Baker v. Wade*, 553 F. Supp. 1121, 1126 (N.D. Tex. 1982) (interpreting TX. CODE ANN. tit. 5, Ch. 21, § 21.06 (Vernon 1994)).

⁴⁵³ *Evans v. Romer*, 882 P.2d 1335, 1349-50 (Colo. 1994), *aff'd on other grounds*, 517 U.S. 620 (1996).

⁴⁵⁴ SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 168.

those homosexuals denied licenses to practice their profession, it was no defense that they had not committed sodomy, as defined by the state's criminal code. One's criminal status was proven by one's homosexual status even though criminality was theoretically a function of conduct. This reasoning is clear in the modern cases of *Childers*⁴⁵⁵ and *Shahar*.⁴⁵⁶ The Dallas Police Department denied Stephen Childers a job because he was a felon, a "habitual lawbreaker."⁴⁵⁷ But there was no evidence that Childers committed any of the specific acts that constituted sodomy under the Texas criminal code; rather, illegal conduct was presumed from Childers's status as a gay man. Similarly, the Eleventh Circuit upheld the termination of Robin Shahar based on the argument that she had committed felonious sodomy despite the fact that Bowers, the Georgia Attorney General who terminated her, admitted under oath that he had no knowledge whether Shahar had ever committed sodomy.⁴⁵⁸ Because of her status as a lesbian, both the state attorney general and the federal appellate court imposed an irrebuttable presumption that Shahar engaged in felonious conduct.⁴⁵⁹ In short, employers conflate status with conduct in order to terminate gay employees, and courts validate this conflation by treating an admission of homosexuality as a confession of felonious conduct without inquiring into the actual conduct of the individuals before the court.

In custody battles, courts again conflate status and conduct by holding that gay and lesbian parents are criminals under state sodomy laws without any evidence of felonious conduct.⁴⁶⁰ Implicit in the courts' calculus is that while all gay people engage in sodomy, all heterosexual people do not. Courts use sodomy laws to impose a double standard, in that judges do not require heterosexual parents in custody disputes to represent or prove to the court that they do not engage in illegal consensual sexual conduct.⁴⁶¹ Indeed, there is apparently no reported judicial

⁴⁵⁵ *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982). See *supra* notes 276-283 and accompanying text.

⁴⁵⁶ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc). See *supra* notes 286-297 and accompanying text.

⁴⁵⁷ *Childers*, 513 F. Supp. at 138.

⁴⁵⁸ See *Shahar v. Bowers*, 70 F.3d 1218, 1233 n.20 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part).

⁴⁵⁹ Again, this presumption of felonious sodomy was not applied to heterosexual employees even though heterosexual sodomy was equally felonious under the Georgia sodomy statute. See GA. CODE § 16-6-2 (1997).

⁴⁶⁰ See, e.g., Pershing, *supra* note 304, at 294 ("Judges who use the 'illegality' rationale to disfavor a homosexual for child custody . . . incorporate[], in a civil case, a judgment of criminal liability rendered without charge, without proof of the violation sufficient to meet an appropriate burden, and without criminal conviction and its attendant rights of direct and collateral review.").

⁴⁶¹ See *In the Matter of the Appeal in Pima County*, 727 P.2d 830, 841-42 (Az. Ct. App. 1986) (Howard, J., dissenting) (arguing that if bisexuals cannot adopt because they are presumed to have violated the state's sodomy law, then the juvenile courts should similarly inquire into the sex lives "of every applicant, regardless of marital status and

opinion in which a heterosexual has been denied custody, visitation, or other parental right based on a sodomy statute,⁴⁶² despite the fact that most sodomy statutes are gender neutral and most heterosexuals violate them.⁴⁶³ In fact, courts often affirmatively refuse to consider the illegal sexual conduct of heterosexual parents.⁴⁶⁴ In the end, "an 'illegality' distinction between rival custodians based on sexual orientation manifestly lacks a factual basis."⁴⁶⁵

Even courts that claim to recognize the distinction between status and conduct ultimately conflate the two. For example, in *In the Matter of the Appeal in Pima County*,⁴⁶⁶ the court acknowledged that "[t]he fact that appellant is bisexual is not unlawful nor, standing alone, does it render him unfit to be a parent. It is homosexual conduct which is proscribed."⁴⁶⁷ The language sounds promising until the court conflates conduct and status by declaring "[i]t would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model"⁴⁶⁸ Thus, it is not merely the conduct that is proscribed, but the individual.

Law enforcement agencies and school officials have sought to shut down, inhibit, or deny recognition to gay businesses and organizations, relying on the criminality of homosexuality. Businesses, clubs, and organizations that have homosexual customers or members are targeted because they are deemed havens for criminals. Again, this presumption of criminal conduct was not applied to comparable heterosexual establishments. For example, despite the fact that there is no evidence that gay youth are more likely to commit sodomy than straight youth, high schools in Utah prohibited gay organizations because of Utah's gender-neutral sodomy law. Even though members of the school band might date each other and engage in various acts of sodomy, legislators and school officials never suggested that such extracurricular activities should be shut down because they facilitate violations of the state sodomy law. The reason is that heterosexual people might engage in inappropriate (even technically criminal) acts, but gay people *are* criminals.⁴⁶⁹ And, most importantly, homosexuals are criminals for all purposes, not just sexual.

sexual preference, to determine whether his or her sexual practices violate" the Arizona sodomy statute); Pershing, *supra* note 304, at 294.

⁴⁶² See Pershing, *supra* note 304, at 296.

⁴⁶³ See *infra* notes 481-488 and accompanying text.

⁴⁶⁴ See, e.g., *Moore v. Moore*, 183 S.E.2d 172 (Va. 1971) (granting custody to mother who left husband and cohabited with cleric).

⁴⁶⁵ Pershing, *supra* note 304, at 295.

⁴⁶⁶ 727 P.2d 830 (Ariz. Ct. App. 1986) (denying a bisexual man the opportunity to adopt).

⁴⁶⁷ *Id.* at 835.

⁴⁶⁸ *Id.*

⁴⁶⁹ By contrast, in the university context, just as courts have held that the First Amendment applies to gay student organizations, many courts have clearly recognized the status/conduct distinction. See *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166

Following the lead of the federal government, courts, and school officials, the police also interpret and enforce sodomy laws as broad proscriptions on homosexual status. Police interpret gender-neutral sodomy laws as applying to only same-sex sodomy. In enforcing sodomy laws through solicitation arrests, police never target heterosexual sodomy, even though it is felonious under most current sodomy statutes.⁴⁷⁰ For example, after arresting a man for soliciting sodomy because he propositioned another man for oral sex, the spokesperson for the Virginia police department conceded that the man would not have been arrested if he had propositioned a woman, even though Virginia's sodomy law is gender neutral.⁴⁷¹ Police routinely use sodomy laws to target gay men because they view the statutes as weapons against gay men, not against sodomy.⁴⁷² Furthermore, by enforcing sodomy laws through solicitation statutes decoy police officers are essentially punishing status since the solicitation statutes are often used to criminalize "any clear communication of homosexual willingness."⁴⁷³

Many of America's historic anti-gay immigration restrictions made no pretense of separating conduct from status. Homosexual status rendered one a "psychopathic personality" who should be excluded from the United States. However, other mechanisms to exclude homosexuals, such as the crime of moral turpitude provision, theoretically relied on the immigrant's illegal conduct. Under the crime of moral turpitude provision, an immigrant could be deported or denied entry by admitting the "essential elements" of the crime of sodomy.⁴⁷⁴ However, the essential element appears to have been homosexual status. If you were a homosexual, that was the end of the inquiry, not the beginning of an investigation into your actual conduct. Immigration authorities did not ask immigrants in what precise homosexual conduct they had engaged. Thus, even when explic-

(4th Cir. 1976):

There is no evidence that GAS is an organization devoted to carrying out illegal, specifically proscribed sexual practices. While Virginia law proscribes the practice of certain forms of homosexuality, VA. CODE ANN. § 18.2-361 (Michie 1996), Virginia law does not make it a crime to be a homosexual. Indeed, a statute criminalizing such status and prescribing punishment therefor would be invalid.

⁴⁷⁰ See *supra* notes 39–51 and accompanying text.

⁴⁷¹ See Jacobson, *supra* note 64, at 2467 (citing Lou Chibbaro, Jr., *Fairfax County Man Charged with Violating Virginia's Sodomy Law*, WASH. BLADE, July 11, 1997, at 5). Maryland's assistant attorney general has made a similar concession. See Jacobson, *supra* note 64, at 2467 (citing Lisa Keen, *Judge to Drop Sodomy Laws*, WASH. BLADE, Jan. 15, 1999, at 1).

⁴⁷² See COMSTOCK, *supra* note 124, at 156.

⁴⁷³ Jacobs, *supra* note 198, at 262. Legal hair splitting is inherently necessary and particularly troubling because "[w]hen prosecutions do occur, the distinction between innocent conversation and homosexual overtures requires unusually close attention to the factual situation." *Id.* at 284. To understand the problems of proof in gay decoy cases, see *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952).

⁴⁷⁴ See *supra* notes 422–426 and accompanying text.

itly using state sodomy laws as the basis for exclusion, the government ultimately required no proof of the prohibited acts in order to justify exclusion.

Despite numerous instances of courts explicitly conflating identity and conduct, it is still common for people to blithely assert that "[n]o state sodomy statute punishes the status of being a homosexual, but only the physical act of sodomy."⁴⁷⁵ Perpetuating this misconception, courts have held that sodomy laws do not constitute cruel and unusual punishment because they punish conduct, not status.⁴⁷⁶ At conference behind closed doors in *Hardwick*, Chief Justice Burger argued that sodomy laws are irrelevant to status because they only criminalize the act of sodomy.⁴⁷⁷ Burger posited the analogy that, if sodomy were considered status rather than act, incest and rape would have to be treated similarly.⁴⁷⁸ But this ignores *how* sodomy laws are interpreted and enforced in the United States.⁴⁷⁹ Burger's analogy would only be apt if society criminalized incest but then created a legal presumption that all fathers commit incest and that all mothers do not. Despite the legitimacy of criminalizing incest, the courts would never permit such an interpretation and enforcement scheme whereby fathers could be denied employment or custody of their children because all fathers are presumptively guilty of incest. Although incest is clearly conduct, the method of enforcement would be based on status, namely whether a man has ever fathered children. Presuming that all fathers (a status) commit incest (which is felonious conduct) would be constitutionally unacceptable. Yet this is precisely how sodomy laws are often applied: status (sexual orientation) is irrefutable proof of criminal conduct (sodomy). Like the unconstitutional statute in *Robinson v. California*, sodomy laws criminalize status because they are often used to punish a gay man "even though he has never touched any [other man] within the State or been guilty of any irregular behavior there."⁴⁸⁰

B. Improper Conflation of Status and Conduct

Conflating homosexual status and sodomitical conduct is not only legally suspect, but factually inaccurate. Defining the criminal class of sodomites as gay men and lesbians is necessarily both underinclusive and overinclusive. The class is underinclusive because it excludes hetero-

⁴⁷⁵ Page, *supra* note 31, at 371 n.22.

⁴⁷⁶ See, e.g., *Neville v. State*, 430 A.2d 570, 581 (Md. 1981); *People v. Stevenson*, 184 N.W.2d 541, 543 (Mich. Ct. App. 1970).

⁴⁷⁷ See JEFFRIES, *supra* note 24, at 523.

⁴⁷⁸ See *id.*

⁴⁷⁹ See discussion *supra* Part III.

⁴⁸⁰ 370 U.S. 660, 667 (1962).

sexuals who commit consensual sodomy.⁴⁸¹ Sodomy laws are widely misinterpreted as not applying to consensual heterosexual sodomy.⁴⁸² Although most sodomy statutes are facially neutral, they are selectively enforced against gay men and interpreted by courts and citizens as proscribing only same-sex conduct.⁴⁸³ For example, in *Hardwick*, Justice White defined Georgia's sodomy statute as a "homosexual sodomy statute," despite the fact that Georgia defined sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another."⁴⁸⁴ Research indicates that the vast majority of heterosexual couples violate these sodomy laws.⁴⁸⁵ According to Kinsey, "95 percent of white American males had violated the law in some way at least once along the way to an orgasm."⁴⁸⁶ The sexual conduct criminalized by state sodomy laws "is commonplace among predominantly heterosexual people."⁴⁸⁷ Nonetheless, courts often create and impose a presumption that gay men and lesbians violate state sodomy statutes while never presuming that heterosexuals violate these same laws.⁴⁸⁸

Because identity and conduct are conflated, the contours of the criminal class are also overinclusive in several ways. First, not all gay men and lesbians violate sodomy laws because a substantial number of gay men and lesbians are celibate. Celibacy is becoming increasingly popular in the age of AIDS.⁴⁸⁹ Others are virgins. Desire precedes action.⁴⁹⁰ In the same way that heterosexual teenage boys are heterosexual even before they lose their virginity, gay youth are, by the same standard, gay even if they have never acted upon their same-sex attraction.⁴⁹¹ In short, sexual identity is broader than sexual conduct, particularly for

⁴⁸¹ This argument only applies to those sodomy laws that are gender neutral, which represent a majority of sodomy laws still on the books.

⁴⁸² See *supra* notes 38-50 and accompanying text.

⁴⁸³ See Halley, *supra* note 31, at 1732-33 n.37; *supra* notes 38-50 and accompanying text.

⁴⁸⁴ GA. CODE ANN. § 16-6-2 (1984).

⁴⁸⁵ See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES*, 236 fig. 37 (1983); ESKRIDGE, *supra* note 105, at 136.

⁴⁸⁶ D'EMILIO, *supra* note 53, at 35.

⁴⁸⁷ APA/APHA Brief, *supra* note 88.

⁴⁸⁸ See David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 138 n.102 (1994) ("By contrast, an assertion that one is heterosexual does not create any presumption that one has engaged in prohibited heterosexual conduct (sodomy), despite statistics suggesting that the vast majority of heterosexuals have engaged in oral or anal sex."); Koppelman, *supra* note 59, at 145 n.5 ("Like heterosexuals, not all homosexuals engage in sexual intercourse. But courts have frequently overlooked this fact, invoking the sodomy statutes to justify a broad range of discriminations against gays without requiring evidence that the particular party before them had violated any law.").

⁴⁸⁹ See John L. Martin, *The Impact of AIDS on Gay Male Sexual Behavior Patterns in New York City*, 77 AM. J. PUB. HEALTH 578, 580 (1987).

⁴⁹⁰ See MOHR, *supra* note 102, at 60.

⁴⁹¹ In general, homosexuality is defined in terms of desire, propensity, and inclination, not conduct. See *id.*

celibate and nonpracticing homosexuals.⁴⁹² Thus, sodomy laws define a criminal class that includes members who do not engage in the proscribed conduct.

Second, even gay men and lesbians who are sexually active do not necessarily violate sodomy laws.⁴⁹³ There are many forms of same-sex activity that do not constitute sodomy.⁴⁹⁴ Commentators to gay custody cases have observed that

although state statutes often criminalize certain sexual acts, and occasionally levy their sanction based on the gender of the persons taking part, they do not, of course, forbid persons of either gender from sharing living space, experiencing feelings of love, embracing one another or otherwise displaying affection in public or private places, or—most importantly—announcing, to intimate associates or to the world, a non-heterosexual orientation.⁴⁹⁵

Furthermore, most forms of so-called safe-sex activity do not violate sodomy statutes.⁴⁹⁶ So, a gay man or lesbian can be sexually active and still not engage in proscribed conduct.

Third, sodomy laws are sometimes used to impose the criminal label on gay men and lesbians who do not reside in states with sodomy laws and, thus, clearly are violating no law. The perception of gay men and lesbians as a criminal class persists in those states that no longer have sodomy laws on their books through a spillover effect from states that continue to criminalize same-sex conduct.⁴⁹⁷ This is particularly clear in cases where courts in states without sodomy laws have used other states' sodomy laws as justification for penalizing gay and lesbian litigants.

Fourth, the class is overinclusive to the extent that it sometimes includes heterosexuals mistakenly perceived to be gay or lesbian. For example, heterosexual men who are effeminate or satisfy some other

⁴⁹² See Cain, *supra* note 165, at 1625 n.395; Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 J. HOMOSEXUALITY 47 (1982) (citing study where 18% of men who identified themselves as gay reported that they had had no sexual experience with men).

⁴⁹³ For example, a significant percentage of lesbians (23%) rarely or never engage in cunnilingus. See BLUMSTEIN & SCHWARTZ, *supra* note 485, at 236 fig.37.

⁴⁹⁴ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990) ("Nor does Hardwick address such issues as whether lesbians and gay men have a fundamental right to engage in homosexual activity such as kissing, holding hands, caressing, or any number of other sexual acts that do not constitute sodomy under the Georgia statute."); SEXUAL ORIENTATION AND THE LAW, *supra* note 119, at 11 n.11.

⁴⁹⁵ Pershing, *supra* note 304, at 309.

⁴⁹⁶ See *Baker v. Wade*, 553 F. Supp. 1121, 1134 (1982) (stating that Texas sodomy law "did not prohibit homosexuals from kissing or sexually stimulating their partners with hands and fingers."); ESKRIDGE, *supra* note 105, at 251 n.37.

⁴⁹⁷ See Thomas, *supra* note 68, at 1484 n.189.

stereotype are often labeled "faggots" and treated accordingly. Once labeled, it is difficult to prove the absence of same-sex desire.

In sum, using sodomy statutes as a mechanism to punish homosexuality per se has the dual failure of being both over- and underinclusive because not all homosexuals engage in sodomy, and a significant percentage of heterosexuals do.⁴⁹⁸ Ultimately, because of this conflation of act and identity, sodomy laws punish the status of being homosexual.⁴⁹⁹ Thus, even unquestionably law-abiding citizens are nonetheless labeled criminal and treated accordingly.

C. Exporting Discrimination

All gay men and lesbians are harmed by sodomy laws. Even those gay men and lesbians who do not reside in states with sodomy laws are affected by their maintenance on the books in other states. First, the right to travel is implicated.⁵⁰⁰ Because many police forces and even judges equate homosexuality with sodomy, gay men and lesbians have to think twice about driving from Los Angeles to New York, lest they traverse hostile states. If they have telltale bumper stickers and other perceived indicia of homosexuality, they are at increased risk. Such regalia may make them the targets of surveillance or harassment under the justification of enforcing the state's sodomy laws.

Second, the federal and state governments—including agencies and courts—use sodomy laws to discriminate against people who live in states without sodomy laws. For example, the FBI declined to hire a lesbian because it claimed that it could not transfer her to any state with a sodomy law.⁵⁰¹ The military has used the same argument in justifying its discrimination against all gay men and lesbians, regardless of their state of residence.⁵⁰² Finally, courts have used sodomy laws to justify taking

⁴⁹⁸ See Halley, *supra* note 31, at 1722.

⁴⁹⁹ In other contexts, the Supreme Court has repeatedly explained that this is impermissible: "Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it." *Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring).

⁵⁰⁰ Cf. Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407, 455–56 (1998); Nicholas Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 447–50 (1997) (arguing that limitation of local antidiscrimination laws could raise right to travel concerns).

⁵⁰¹ See *Gays Accuse U.S. Agencies of Bias*, CHI. TRIB., May 2, 1993, § 1, at 1.

⁵⁰² "Department [of Defense] spokesmen have indicated that clearance will be denied to a professed homosexual who resides in Illinois, even though consensual homosexual acts between adults are not criminal in that state" based on the argument "that clearance is granted on a nationwide basis and the Illinois resident who moved to another state would be susceptible to blackmail there" because of state sodomy laws. *Employment Disabilities*,

children away from gay parents even when they live in a state without sodomy laws.⁵⁰³ These examples serve to show that sodomy laws can be used to discriminate against all gay Americans.

Sodomy laws provide legal and societal permission to hate, discriminate against, and physically attack gay men and lesbians. The fact that many states maintain laws on their books that codify hatred and legitimize discrimination against gay citizens provides a legal hook on which to hang bigotry's hat. It is far easier to catalog the injuries that sodomy laws inflict than to define meaningfully the so-called injuries that sodomy laws are supposed to prevent.⁵⁰⁴

Conclusion

Although it is commonly believed that sodomy laws are not enforced, this is a vast oversimplification. While sodomy laws are not routinely enforced by means of criminal prosecution, they are nonetheless enforced through a system of collateral enforcement. Sodomy laws provide the underlying justification for much physical violence, harassment, and discrimination by civilians and police. This indirect enforcement occurs through both legal and extralegal means. "Legal" enforcers of sodomy laws include police (e.g., when enforcement is through arrests for solicitation to commit sodomy) and the courts (e.g., when judges deny custody to gay parents based on sodomy laws). Examples of extralegal enforcement include employment discrimination by private actors (when based on the illegality of sodomy), vigilante gay bashing, and police harassment, including blackmail. Even in the absence of enforcement through criminal prosecution, the overall effect of this harassment, violence, and discrimination is to put gay citizens under siege, which weighs heavily on the individual psyche and inhibits the growth of meaningful community in some regions. Thus, in response to the discrimination facilitated by sodomy laws, many gay people are forced into the closet, isolating them from society and from each other.

This Article has documented both the past and ongoing harms inflicted by "unenforced" sodomy laws. The maintenance of these laws also affects the future of the effort to obtain civil rights for gay and lesbian citizens. Although there is no such animal as the "homosexual agenda," there are many areas of law and society in which gay people are denied equal treatment and which therefore require reform. In each area, the criminality of same-sex sodomy serves as a major obstacle to achieving genuine equality. For example, it is difficult to argue that states with sod-

supra note 215, at 1750, n.62.

⁵⁰³ See *supra* notes 336-340 and accompanying text.

⁵⁰⁴ This is in large part because truly private consensual activity cannot cause harm to society, but laws can, whether or not they are actively enforced. See *Enforcement of Morality*, *supra* note 56, at 590.

omy laws should recognize same-sex marriage, since the consummation of such a union entails felonious conduct.⁵⁰⁵ Similarly, many lawmakers have been reluctant to include sexual orientation in hate crimes statutes because same-sex conduct is illegal.⁵⁰⁶ Along the same lines, the military justifies the exclusion of gay and lesbian service members based, in part, on state sodomy laws.⁵⁰⁷ Finally, sodomy laws inhibit progress on the health care front, both in terms of addressing the AIDS crisis,⁵⁰⁸ and se-

⁵⁰⁵ Indeed, sodomy laws currently facilitate the unequal treatment of gay and straight couples. While heterosexuals generally take it for granted that they can legally marry the person of their choosing (assuming that the object of their desire is consenting, of age, and not a close relative), gay men and lesbians are legally forbidden from marrying the person whom they choose. While there is some debate within the gay and lesbian community about the value of marriage, commentators argue that the union "is the highest public recognition of our personal integrity. Denying it to gay people is the most public affront possible to their civil equality." Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24, 37. Independent of the symbolic importance of same-sex marriage, the unavailability of such unions denies gay and lesbian couples significant marital rights and benefits that heterosexuals enjoy. See ESKRIDGE, *supra* note 105, at 66-67 (listing fifteen significant marital rights and benefits denied to same-sex couples). Sodomy laws contribute to a self-perpetuating cycle in the area of marriage because courts have reasoned that gay people cannot marry because of sodomy laws and that sodomy laws are permissible because gay people cannot marry. See Norman Vieira, *Hardwick and the Right to Privacy*, 55 U. CHI. L. REV. 1181, 1183 (1988). Even if one state, such as Vermont, were to recognize same-sex marriage, other states may not follow suit. States with criminal sodomy laws are clearly the least likely to recognize out-of-state, same-sex marriages. See Anthony D. D'Amato, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911, 939 (1995).

Some courts have argued that sodomy laws preclude recognition of same-sex marriages in order to consummate the marriage, the couple would have to commit a crime. See *Dean v. Barry*, No. C.A. 90-13892, slip op. at 13 (D.C. Super Ct. Dec. 30, 1991) (cited in D'Amato, *supra*, at 926). Indeed, the Georgia Attorney General made this argument in his deposition for the litigation after he withdrew the offer of employment to Robin Shahar. See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1659 (1993) (citing Memorandum in Support of Defendant's Motion for Summary Judgment at 32, *Shahar v. Bowers*, (N.D. Ga. filed Oct. 5, 1991) (No. 1:91-CV-2397-RCF)) [hereinafter Memorandum]. See also *Shahar v. Bowers*, 70 F.3d 1218, 1233 n.20 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part). Bowers asserted that same-sex marriages are "inconsistent with the state laws prohibiting sodomy between partners of the same sex." Cain, *supra* note 165, at 1637 (quoting Memorandum at 32).

Other commentators have warned that criminalization is "the strongest possible expression that an act violates the public policy of a state, and a court may very well use the existence of a state sodomy law as a basis for ruling that same-sex marriages violate a strong public policy of the state." D'Amato, *supra*, at 926 (quoting Harry Krause). When the federal government adopted the so-called Defense of Marriage Act—which officially defined marriage as an institution between one man and one woman, thereby precluding the federal government from recognizing same-sex marriage and extending spousal benefits to same-sex partners—some politicians relied in part on sodomy laws. See Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A6 (Senator Coats of Indiana argued that same-sex marriage "would give the stamp of Federal approval to activities still considered illegal in many states").

⁵⁰⁶ See *supra* notes 147-153 and accompanying text.

⁵⁰⁷ See *supra* note 243 and accompanying text.

⁵⁰⁸ See *supra* note 118 and accompanying text.

curing health benefits for same-sex partners.⁵⁰⁹ Thus, on many levels, sodomy laws distort public policy against gay interests and thwart progress toward true equality between gay and straight citizens.

But to catalog the ways in which sodomy laws create a status-based criminal class is not to suggest that sodomy laws are the sole cause of the injuries discussed in Parts II and III above. There are many types of anti-gay discrimination; sodomy laws are but one cited rationale for treating gay citizens with contempt. It is difficult to disaggregate the negative effects of social disapproval from the negative implications of the legal condemnation represented by sodomy laws. As with any complex social problem, multiple factors contribute, and each causal factor must be addressed.

Efforts to address racial prejudice in the United States serve to illuminate such a process of social change. Clearly, racial prejudice has a multitude of manifestations and causes. No one policy prescription could have cured the nation's racial woes. A multi-pronged approach represented the only meaningful path to equality. *Brown v. Board of Education*⁵¹⁰ did not eliminate racism or its manifestations in the form of verbal harassment, physical violence, and overt discrimination in employment and housing. Neither did the Civil Rights Act of 1964. But it would be foolish to suggest that these milestones in the civil rights movement are without legal or social significance. Each incremental step brings society closer to genuine equality. These lessons are well applied to the struggle for equal rights for gay and lesbian citizens. Incremental progress *is* progress. Depending on where it is located, removing one brick from the wall may simply make the wall shorter (and easier to traverse or at least see over) or may cause the wall to collapse altogether into a heap of rubble. Removing sodomy laws may not be sufficient, but it is a necessary component in the battle against both homophobia and the creation of a criminal underclass. Gay men and lesbians can never be truly equal citizens so long as sodomy laws officially place them in a second class caste.

The analogy to Jim Crow laws not only shows the inherent unfairness of using law to enforce societal divisions, but also demonstrates that progress can be made toward eliminating these divisions once the imprimatur of the law is removed. Without statutory endorsement of bigotry, instances of overt racism have diminished. Social ordering is not necessarily irreversible. As the late Justice Thurgood Marshall observed, without the validation of legal strictures "what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."⁵¹¹

⁵⁰⁹ See *supra* notes 259-262 and accompanying text.

⁵¹⁰ 347 U.S. 483 (1954).

⁵¹¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

In short, it is impossible to say that but for sodomy laws, gay men and lesbians would be truly equal citizens. There are too many other causes and cited justifications for the mistreatment of gay citizens. Sodomy laws contribute to a hostile climate and create a culture where anti-gay abuse is accepted and often encouraged. Eliminating sodomy laws will not automatically create tolerance, but it would at least send the correct message. Value inculcation takes a long time whether society is teaching intolerance or acceptance. The road to a truly tolerant and pluralistic society is long and often unpaved. But that does not mean that the journey should be forgone. Nor does it mean that the first miles of the journey—which may not have immediate effects—are traveled in vain.

