Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws

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I. INTRODUCTION

This Article draws upon the authors' experiences in challenging sodomy laws to evaluate the effectiveness of previous strategies to overturn sodomy laws. This Article will suggest ways of improving those strategies in the future and developing new avenues for these challenges by incorporating domestic, international, and comparative law.[1]

The Introduction to this Article will first discuss the legal importance of challenging sodomy laws, even though those laws are rarely enforced. It will then discuss the importance of incorporating international and comparative law in formulating these challenges. In Section II, Professor Charlene Smith will discuss past and future strategies, focusing on the topics of equal protection, morality, and the difference (or lack thereof) between acts and status. In Section III, Professor Jim Wilets will explore incorporating international and comparative law into domestic challenges to U.S. sodomy laws.

It should be noted at the onset that sodomy statutes, although not widely enforced, have much greater consequences for the civil rights of gays and lesbians than "simply" criminalizing their sexual

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1. Professor Wilets notes, with considerable irony, that he initially relied upon his previous article, as the basis for his amicus brief in the litigation challenging the Kansas Sodomy Statute. *See generally* James Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in U.S. Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995). In part, this article is a result of his recognition of the limitations of his previous article in constructing the arguments in actual litigation.

relations.[2] The existence of these sodomy laws has been invoked by courts and legislatures to justify a wide range of human rights violations against gays and lesbians. These include violations of sexual minorities' rights to equal protection, free association, free speech, custody of their children, and a myriad of rights that heterogendered people take for granted.[3]

The authors consider the incorporation of these seemingly disparate domestic and international litigation strategies in one article as essential. The use of domestic law is obviously a prerequisite to any domestic litigation strategy, and certainly much has been written on the substantive aspects of constitutional law as it affects sexual minorities.[4] The Supreme Court's decision in *Romer v. Evans*,[5] in particular, has generated an enormous amount of literature on this subject.[6]

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2. *See generally id.* at 35. For example, claims by gays and lesbians based on equal protection have been rejected by courts based on the rationale that society has an interest in discouraging criminal activity. Padula v. Webster, 833 F.2d 97, 103 (D.C. Cir. 1987). The principle case discussed in this Article, a challenge to Topeka's municipal ordinance prohibiting solicitation to engage in same-sex relations, resulted from the arrest of a man for simply discussing the possibility of engaging in such activity. *See* City of Topeka v. Movsovitz, No. 77-332, slip op. (Kan. Ct. App. 1998).

3. *See generally* Wilets, *supra* note 1.

4. *See generally, e.g.*, Ruth Colker, *Sexual Orientation: Militarism, Moralism, and Capitalism*, 48 HASTINGS L.J. 1201 (1997); William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equity*, 74 IND. L.J. 1085 (1999); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387 (1994); Evan Wolfson & Robert S. Mower, *When Police Are in One Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against 'Sodomy' Laws*, 21 FORDHAM URB. L.J. 997 (1994).

5. 517 U.S. 620 (1996).

6. See the following law review articles for various interpretations of *Romer*: James E. Barnett, *Updating* Romer v. Evans: *The Implication of the Supreme Court's Denial of Certiorari in* Equality Foundation of Greater Cincinnati v. City of Cincinnati, 49 CASE W. RES. L. REV. 645 (1999) (the Court's vagueness in *Romer* will allow for future court hearings concerning gay-rights issues to read the case either broadly or narrowly); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purpose of Equal Protection Review?*, 87 GEO. L.J. 139 (1998) (statutes or policies that discriminate against people on the basis of sexual orientation lack the minimum degree of reasonableness required by the Equal Protection Clause and denote a radical departure from the rule of law); Matthew Coles, *Issue: Intersexions: The Legal & Social Construction of Sexual Orientation: The Meaning of* Romer v. Evans, 48 HASTINGS L.J. 1343 (1997) (true significance of *Romer* lies in the message by the Court that discrimination on the basis of sexual orientation is the moral ("if not legal") equivalent of racial and sexual discrimination); Jerome McCristal Culp, Jr., *Nothing and Everything: Race,* Romer, *and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229 (1997) (majority in *Romer* failed to recognize that the arguments concerning the rights of gays, lesbians, and bisexuals paralleled those made about slavery that America had prior to the Civil War and remain to have now); Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans, *Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271 (1999) (although *Romer v. Evans* was significant in fighting for gay rights, litigants and courts should seriously consider that discrimination on the basis of sexual orientation is a form of gender dis-

Nevertheless, some courts' tenaciousness in upholding legislation that clearly meets the constitutional standards of animus-motivated legislation indicates that there is a discrepancy between constitutional theory and the realities of litigation. Thus, there is need for a reassessment of the ways in which civil-rights practitioners use constitutional theory before recalcitrant and hostile courts.

The authors also firmly believe international and comparative law are essential elements of any effective litigation strategy. First, invoking United States obligations under international law is most effective when United States domestic law, particularly state law, is out of sync with those international legal obligations undertaken by the federal government. This Article will demonstrate that there is binding Supreme Court authority requiring all U.S. courts to respect, whenever possible, the international obligations of the United States federal government when interpreting federal and state law. This requirement, implicates the very structure of our federal form of government. Separation of powers principles require that the judiciary desist from interfering with the executive and legislative branches' conduct of foreign policy. Similarly, principles of federalism require that states refrain from preventing the federal government from speaking with one voice in its conduct of foreign policy. Article VI of the U.S. Constitution specifically provides that:

> all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[7]

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crimination); Caren G. Dubnoff, Romer v. Evans: *A Legal and Political Analysis*, 15 LAW & INEQ. 275 (1997) (in keeping the political system fair, the Court's decision in *Romer* was correct, in that Amendment 2 consciously singled out homosexuals and denied them the equal protection of the laws guaranteed by the Constitution.); Barbara J. Flagg, *Animus and Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833 (1998) (even under the rational basis test, the pluralist values that establish the equal protection guarantee mandate a doctrine that moral purposes in and of themselves never satisfy equal protection review); Joseph S. Jackson, Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997) (in striking down Amendment 2, the Court's decision was not a cold act of political will, but rather a judicial judgment, appropriately embedded in the core principles of the Equal Protection Clause); Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling, The Legacy of* Bowers v. Hardwick—Romer v. Evans, 116 S. Ct. 1620 (1996), 32 HARV. C.R.-C.L. L. REV. 225. (*Romer's* narrow holding lends skepticism to advocates of the immediate impact of *Romer* on homosexual rights litigation); and Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361 (1977) (in the final analysis, *Romer* can vigorously empower, but cannot itself deliver, a meaningful democratic equality for gays and lesbians).

7. U.S. CONST. art. VI.

Although this seemingly clear constitutional dictate has been somewhat weakened by the judicial doctrine of self-execution,[8] the U.S. Supreme Court understood the constitutional importance of international treaties in U.S. law when it held that domestic law should be interpreted, whenever possible, in accordance with the international obligations of the United States.

This Article will demonstrate that there is a clearly articulated federal policy, by both the Executive Branch and United States Senate, to respect and implement those international obligations that require the United States to decriminalize same-sex consensual sexual relations. Indeed, that policy is enshrined in the International Covenant on Civil and Political Rights,[9] to which the United States is a party.

Comparative law provides a normative reason why courts should feel comfortable interpreting state law in accordance with our international legal obligations. Currently, the United States is the only major industrialized nation with sodomy laws.[10] Thus, comparative law is useful for demonstrating to courts that this country is out of sync with those developed nations to which our courts like to compare the United States. Comparative law therefore supports the proposition that our international obligations are not simply a legal requirement; they reflect the now universal consensus of industrialized democratic nations that criminalization of same-sex relations is incompatible with a democratic legal order respecting individual rights.[11]

Professor Smith draws, in part, upon her extensive experience in challenging Kansas' sodomy statute to suggest several effective strategies for challenging sodomy laws under domestic law. Professor Wilets draws upon his experience in using international and comparative law in domestic litigation to suggest ways that international and comparative law can be integrated into an effective domestic litigation strategy.

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8. *See* discussion *infra* Part III.A., wherein the author discusses the doctrine of "self execution" in greater depth.

9. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966).

10. *See* discussion *infra* p. 75; Wilets, *supra* note 1, at 34.

11. *Id.*

II. DOMESTIC STRATEGIES FOR OVERTURNING SODOMY LAWS

A party arguing domestic law to oveturn sodomy law in the courts of the United States has to confront four obstacles: (1) the success of any direct challenge to a state's sodomy law on the basis of the federal right to privacy is rendered improbable by the existence of *Bowers v. Hardwick*;[12] (2) in scrutinizing state legislation courts will employ the lowest threshold of the three tier system of scrutiny; i.e., "rational basis" analysis; (3) courts will recognize morality as a legitimate justification for sodomy laws; and (4) courts will often hold that sodomy laws are aimed at acts rather than status, and thus do not implicate equal protection. There are at least three strategies for addressing these obstacles.

Before discussing these strategies, it should first be noted that there is no need to necessarily undertake a frontal attack on *Bowers v. Hardwick*. *Bowers* simply held that the federal right to privacy does not preclude states from enacting sodomy laws.[13] *Bowers* does not preclude an attack on state sodomy laws on the basis of the federal Equal Protection Clause or on the basis of state rights to privacy and equal protection.

The strategies presented below permit parties to overcome substantive obstacles that they may encounter while litigating in state and federal courts. This Article assumes that parties challenging sodomy statutes have already chosen to rely only on the federal right to equal protection and state rights to privacy and equal protection. It should nevertheless be noted that many of the arguments contained in this Article could be used in any attempt to directly challenge *Bowers v. Hardwick* in federal court.

The first strategy is to demonstrate to the court that courts have been willing, on occasion, to disregard the three-tier system when the legislation in question has been motivated primarily by animus against a particular group. It is especially helpful to use Justice Scalia's past opinions to demonstrate that even the conservative wing of the Supreme Court has abandoned, in substance, the rigid three-tier approach under certain circumstances.[14] Since Scalia constitutes the most vociferously antigay member of the Supreme Court, using his own reasoning in past cases can be particularly effective. Indeed, a consistent application of even the conservative approach to equal pro-

12. 478 U.S. 186 (1986).

13. *See generally id.* at 186.

14. *See infra* note 39 and accompanying text.

tection analysis leads to the application of, at a minimum, a "rational basis with bite" in reviewing the constitutionality of sodomy statutes.[15]

The second strategy is to argue that morality alone cannot be used as a justification to strike down or uphold a law. This strategy questions the court's ability to apply objective criteria to determine whether the morality upon which the legislation is based represents a legitimate governmental purpose, or whether it simply represents the illegitimate biases of society towards a particular disfavored group.[16]

Finally, the third strategy is to demonstrate to the court that Scalia' is correct in observing that status and acts cannot be severed,[17] a strategy that admittedly contains its own risks. The following discussion presents these three strategies.

A. Abandoning the Three-Tier System When Prejudice Is Shown

With the exception of Kansas, recent court challenges have resulted in declaring same-sex sodomy statutes unconstitutional.[18] In

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15. *See infra* note 45 and accompanying text.

16. *See* Romer v. Evans, 517 U.S. 630, 634-35 (1996) (antihomosexual bias does not constitute a legitimate governmental purpose).

17. These suggestions do not mean that the authors are claiming these as the only arguments that can be made using domestic law. For articles that inform an attorney as to how to argue that same-sex sodomy statutes can be seen as sex discrimination, see Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON U. CIV. RTS. L.J. 1 (1998); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); James Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997); Anne B. Brown, Note, *The Evolving Definition of Marriage*, 31 SUFFOLK U. L. REV. 917 (1998); and Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994). For articles that inform an attorney as to how to argue state constitutional protections, see Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189 (1999); Nancy J. Feather, *Emerging Issue in State Constitutional Law Defenses of Marriage Acts: An Analysis Under State Constitutional Law*, 70 TEMP. L. REV. 1017 (1997); Lisa M. Farabee, Note, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237 (1996); and Elizabeth A. Leveno, Comment, *New Hope for the New Federalism: State Constitutional Challengers to Sodomy Statutes*, 62 U. CIN. L. REV. 1029 (1994).

18. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998) (sodomy statute violated the right to privacy as guaranteed by the Georgia Constitution's due process clause); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (sodomy statute violated the right to privacy and equal protection guarantees of the Kentucky Constitution); Williams v. State, (Baltimore City Ct., January 14, 1999); Gryczan v. Montana, 942 P.2d 112 (Mont. 1997) (private, same gender, consensual, noncommercial sexual conduct is protected by state constitutional right to individual privacy; the statute constituted governmental intrusion onto that right; public health goal attributed to statute was not a compelling state interest to warrant that infringement on privacy rights; and the state's interest in protecting morals was not a compelling state interest sufficient to warrant governmental intrusion into fundamental privacy rights); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (provision of Penal Law that criminalizes consensual sodomy or deviate sexual intercourse between persons not married to each other violates federal constitutional rights); Commonwealth

the Kansas challenge, the defendant was arrested by an undercover police officer for violating a city ordinance that prohibited solicitation to engage in same-gender sexual relations. In that case, the defendant was arrested for agreeing to, but not participating in, an act of sodomy.[19] The underlying authority for the city ordinance[20] is the Kansas sodomy statute, which prohibits sodomy only between those of the same sex.[21] The case was heard at the municipal level, the district court level,[22] and finally at the appellate court level.[23] The defendant

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v. Bonadio, 415 A.2d 47 (Pa. 1980) (voluntary deviated sexual intercourse statute exceeded valid bounds of police power and infringed right to equal protection. (The state legislature later repealed the law in 1995)); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. 1996) (adult's right to engage in consensual and noncommercial sexual activities in privacy of adult's home is matter of intimate personal concern at heart of state's protection of right to privacy).

Maryland had two laws criminalizing private adult sex. The "Unnatural and Perverted Sexual Practice Act" made oral sex between people of the same gender a crime, while Maryland's sodomy law prohibited anal sex. The oral sex statute was struck down in October of 1998 as a result of an American Civil Liberties Union lawsuit. In order to end the lawsuit, the State agreed that the sodomy law should be struck down as well. A final judgment prohibiting the State from enforcing either law for private sex acts was entered in January of 1999. Accordingly, both laws are now invalid and unenforceable.

19. City of Topeka v. Movsovitz, No. 77-332, slip op. 2-3 (Kan. Ct. App. 1998).

20. TOPEKA, KAN. CODE § 54-133(a) (1995 Supp.)

21. KAN. STAT. ANN. § 21-3505(a)(1) (1995).

(a) Criminal sodomy is:
  (1) Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal;
  (2) sodomy with a child who is 14 or more years of age but less than 16 years of age;
  (3) causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with any person or animal.

(b) It shall be a defense to a prosecution of criminal sodomy as provided in subsection (a)(2) that the child was married to the accused at the time of the offense.

(c) Criminal sodomy as provided in subsection (a)(1) is a class B nonperson misdemeanor. Criminal sodomy as provided in subsection (a)(2) and (a)(3) is a severity level 3, personal felony.

Id.

22. City of Topeka v. Movsovitz, No. 95-MC-21, slip op. (D. Kan. 1996). Judge James P. Buchele issued the decision. He said, "The court appreciates that homosexuals have been historically discriminated against generally and are victims of vile protests and hate crimes." *Id.* at 2. Regardless, he maintained the district court was not a place to change the law or make "novel interpretations of constitutional provisions." Thus, he drew the conclusion that since the defendant violated the law and the City had a "legitimate interest in prohibiting solicitation of illegal sex acts in public places," the defendant was guilty. *Id.* at 6.

23. City of Topeka v. Movsovitz, No. 77-332 (Kan. Ct. App. 1998) (before Chief Justice Brazil, Justice Green and District Court Judge K. Anderson). The court of appeals argument is followed in the text of this article. Matthew Coles from the American Civil Liberties Union Foundation, who represented the defendant ably, argued privacy, equal protection, and free speech in the briefs submitted to the court. Additionally, there were excellent *amicus* briefs. Karen Eager, for The Washburn Law School Gay & Lesbian Network, wrote one focusing on Kansas constitutional law. Another was written by Charlene Muehlenhard for the Scientific Study of Sexuality and signed by many well known psychologists, psychiatrists and social workers. It gave an overview of the nature of sexual orientation. The third *amicus* was written by the

lost in all cases. After the court of appeals case, the defendant filed a petition for review to the Kansas Supreme Court. The Kansas Supreme Court denied review.[24]

In addition to Kansas, there are four states remaining with same-sex sodomy statutes.[25] For these five states, there is a new analysis

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Inter-American Center for Human Rights. That brief raised issues regarding the state's legally binding obligations under international law. Unfortunately, the Kansas court of appeals never cited or referred to any of the *amicus* briefs.

24. *Movsovitz*, No. 77-332, slip op. (Kan. Ct. App.) *reh'g denied*, (Kan. July 9, 1998).

25. Arkansas, Oklahoma, Missouri, and Texas are the remaining states with sodomy laws that target only same-sex acts. The corresponding statutes and applicable language are:

Arkansas:

(a) A person commits sodomy if such person performs any act of sexual gratification involving:
  (1) The penetration, however slight, of the anus or mouth of an animal or a person by the penis of a person of the same sex or an animal; or
  (2) The penetration, however slight, of the vagina or anus of an animal or a person by any body member of a person of the same sex or an animal.

(b) Sodomy is a Class A misdemeanor.

ARK. CODE ANN. § 5-14-122 (Repl. 1997)

Oklahoma:

> Any person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be guilty of a felony. Any person convicted of a second violation of this section, where the victim of the second offense is a person under sixteen (16) years of age, shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of this section, where the victim of the third or subsequent offense is a person under sixteen (16) years of age, shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole.

OKLA. STAT. ANN. Tit.21, § 886 (West 1983). Oklahoma's sodomy statute does not strictly identify homosexual sodomy, however, in *Post v. State*, Oklahoma's Court of Criminal Appeals found the statute to be unconstitutional as applied to heterosexuals. 715 P.2d 1105, 1151 (Okla. Crim. App. 1986).

Missouri:

1. A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex or he purposely subjects another person to sexual contact or engages in conduct which would constitute sexual contact except that the touching occurs through the clothing without that person's consent.
2. Sexual misconduct in the first degree is a class A misdemeanor unless the actor has previously been convicted of an offense under this chapter or unless in the course thereof the actor displays a deadly weapon in a threatening manner or the offense is committed as a part of a ritual or ceremony, in which case it is a class D felony.

MO. ANN. STAT. § 566.090 (West 1983)

Texas:

1. A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. TEX. PENAL CODE ANN. § 21.06 (West 1994)

The Texas Court of Appeals held this statute was unconstitutional in *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992), however, the Texas Supreme Court reversed the judgment. State v. Morales, 869 S.W.2d 941 (Tex. 1994). Currently two cases are challenging the "Homosexual Conduct" law in Texas; *Garner v. State*, No. 14-99-00111CR (Tex. Crim. App. 2000) and *Lawrence v. State*, No. 14-99-00109CR (Tex. Crim. App. 2000). In each case, the defen-

resulting from *Romer v. Evans*,[26] *United States v. Virginia*[27] and the considerably earlier case of *City of Cleburne v. Cleburne Living Center, Inc.*[28] These three cases stand for the proposition that when a particular group is singled out for unbridled animus or prejudice, the traditionally highly deferential rational basis standard of review is no longer the appropriate standard.[29] In that situation, legislation now must pass a much more vigorous review.[30]

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dant was arrested and charged with violating the Texas criminal statute for engaging in private, consensual sexual relations.

26. 517 U.S. 620 (1996).

27. 518 U.S. 515 (1996).

28. 473 U.S. 432 (1985).

29. Until the 1970s, the Equal Protection Clause was interpreted solely as a protection against discrimination based on race or national origin. The Court employed a two-tiered analytical approach. Nearly all classifications, except those based on "suspect" classifications such as race or national origin, were upheld as long as they were at all rationally related to a legitimate government purpose. The standard for determining a legitimate government purpose and what means were rationally related to that purpose, however, was extremely deferential. Government action assessed under this rational basis test was permissible if there was any conceivable basis for it. Most classifications were examined under this rationality standard; under such deferential review, invalidation of legislation was uncommon. Dubnoff, *supra* note 6, at 308. *See* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (striking down an Alabama tax scheme that favored its own residents). Nonetheless, no similar presumption of constitutionality existed when the government employed a classification that the Court had designated as suspect or when government action affected the exercise of a fundamental right. In those instances, the Court required the State to demonstrate that it had a compelling interest in the classification, and that the methods it selected were narrowly implemented to effect that interest. *See, e.g., In re* Griffiths, 413 U.S. 717, 721-22 (1973). The strict scrutiny standard has been described as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

The notion that some types of classifications may be "suspect" and require heightened scrutiny has its origin in *Korematsu v. United States*, 323 U.S. 214 (1944). Writing for the Court, Justice Black stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216. The Court went on, nonetheless, to uphold the removal of Japanese-Americans from designated military zones without requiring the evidence that strict scrutiny would seem to require. *Id.* at 219. Since *Korematsu*, the Court has been more rigorous in applying the strict scrutiny standard, invalidating almost all classifications that come under it. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (invalidating a Florida Court order awarding custody to the father of a child when the mother became involved in an interracial marriage).

This two-tiered analysis yielded to a more complicated system. During the 1970s, the Court created an intermediate level of review. Originating with gender classifications, the notion has been extended to other categories. For classifications falling within the intermediate category, the government must demonstrate an important interest and a substantial relationship of the classifications to the interest. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (striking down an Illinois law that prevented children born out of wedlock from inheriting from their fathers unless paternity had been acknowledged in a judicial proceeding prior to the father's death). Matt Coles of the ACLU Gay and Lesbian Project, who wrote the appellate brief in the Kansas challenge, argued that it was obvious the same-sex sodomy statute violated the Equal Protection Clause of the Constitution. He claimed that such a classification could not withstand even a rational basis analysis. Appellant's Brief at 7, City of Topeka v. Movsovitz, No. 77-332 (Kan.

Romer's test for the legitimacy of legislation is the progeny of the Supreme Court's analysis in *City of Cleburne*.[31] In *City of Cleburne*, a zoning ordinance prohibited the establishment of a group home for the mentally retarded.[32] According to the Supreme Court, the city, through its zoning requirements, could not avoid the Equal Protection Clause by claiming it was deferring to the wishes of some "faction of the body politic."[33] The Court decided that "a bare . . . desire to harm a politically unpopular group" is not a legitimate objective to justify a zoning ordinance.[34] Thus, negative attitudes or fear are not a permissible basis for treating the mentally retarded different from others.

One of the City's arguments to justify the zoning ordinance was that the home was located across the street from a junior high school and therefore the student body might be at risk. The Court dismissed this attempt at demonstrating a rational basis by stating that denying the home its permit would give credence to "vague, undifferentiated fears."[35] Further, the Court rejected, under rational basis scrutiny, all other reasons the City gave: avoiding a concentration of population, lessening the congestion of the streets, preventing fire hazards, preserving the serenity of the neighborhood, and avoiding dangers to other residents.[36] According to the Court, the City's decision to disallow the house was based solely on "irrational prejudice against the mentally retarded."[37]

In *City of Cleburne*, Justice Stevens advocates replacing the rigid 'three-tier system' with a question based approach. He suggests that instead of trying to fit equal protection cases into the three categories,

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Ct. App. 1998). Further, Coles said *Romer* stands for the proposition that when legislation imposes special disabilities against lesbian and gays, that the state must then offer a legitimate purpose for such legislation. *Id.* at 8. Obviously, Coles is correct. This argument can now be made stronger. Two cases now support the concept that the majority reacts negatively when prejudice is shown. Additionally, it is now possible to predict the escape routes courts will use in their attempt to downplay or distinguish *Romer*.

30. *Romer* can be read as a fundamental rights case based on *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965). This case states "that where fundamental liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose." *Id.* Strict scrutiny is therefore a heightened level of review, aimed at providing greater protection for fundamental rights. *See also* McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Graham v. Richardson, 403 U.S. 365 (1971). Similar supervision by the courts is due when state laws infringe on personal rights preserved by the Constitution. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

31. 473 U.S. 432.

32. *Id.* at 448.

33. *Id.*

34. *Id.* at 447 (quoting U.S.D.A. v. Moreno, 412 U.S. 528, 543 (1973)).

35. *Id.* at 449.

36. *Id.* at 448-50.

37. *Id.*

a better approach is to determine what class is harmed by the legislation and whether that class has been subjected to a tradition of disfavor by our laws: "[w]hat is the public purpose that is being served by the law [and] [w]hat is the characteristic of the disadvantaged class that justifies the disparate treatment?"[38] Justice Stevens' approach is sometimes referred to as "rational basis with bite."

In the post-*Romer* case *United States v. Virginia*[39] Justice Scalia has suggested that the majority has abandoned the established standard for reviewing classifications.[40] There, the Virginia Military Institute (VMI), a state school, was a male-only institution designed to prepare young men for military service.[41] The Supreme Court, with Justice Ginsburg writing the majority opinion, decided that VMI's policy of not admitting women was based on prejudice regarding women's abilities and roles.[42] Thus, the state had to offer justifications that were "exceedingly persuasive."[43] According to Scalia, all the Court was supposed to do was inquire "whether the statutory classification is 'substantially related to an important governmental objective.'"[44] Instead, the majority discarded this rigid standard.

Thus, in light of *Virginia*, *Cleburne*, and *Romer*, it can be argued that, in substance, if not in form, when animus against a group is the motivating factor for legislation or governmental policy, the Supreme Court majority is willing to abandon its rigid three-tier approach and apply a less-deferential rational basis test. This modified approach is sometimes referred to as "rational basis with bite."[45] The government

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38. *Id.* at 453.

39. United States v. Virginia, 518 U.S. 515 (1996).

40. *Id.* at 520.

41. It is the mission of the school:

> to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

Id. at 521 (quoting MISSION STUDY COMMITTEE OF THE VMI BOARD OF VISITORS, Report, May 16, 1986)).

42. "The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed v. Reed*, 404 U.S. 71 (1971), we have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia, and relied upon by the District Court." Justice Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV 1546, 1551 (1991). "We have instructed that state actors controlling gates to opportunity, may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); United States v. Virginia, 518 U.S. at 541.

43. 518 U.S. at 533.

44. *Id.* at 570-71.

45. *See generally* Gayle Lynn Pettina, *Rational Basis with Bite: Intermediate Scrutiny by Any*

can no longer offer reasons rooted in prejudice, bias and fears. Instead, the government must demonstrate with actual facts that the legislation promotes the general welfare.

Not only can this line of reasoning be used to challenge sodomy statutes on the basis of equal protection, but Scalia notes that something else happens when a deferential test is used: *Bowers* is overruled.[46] As Scalia observes, "if it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is constitutionally permissible for a state to enact other laws merely disfavoring homosexual conduct."[47] Since the majority in *Romer* decided that legislation that was motivated only by animus against gays and lesbians did not have a legitimate state purpose, and therefore would fail under even the usually highly deferential rational basis test of the Equal Protection Clause, then it follows, according to Scalia, that *Bowers* must no longer be good law.[48] "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[49]

Although the majority in *Romer* does not cite to *Bowers*, Scalia argues that the majority's holding means that *Bowers* can no longer constitutionally stand for the principle that it is permissible to single out a group of people based on their innate characteristics and make those characteristics criminal. Since the Court in *Bowers* effectively held that a homosexual can be discriminated against based on innate characteristics, *Romer* overrules *Bowers* whether the majority explicitly says so or not. This is especially true because *Bowers* permitted state criminalization of homosexual acts, with the attendant possibilities of imprisonment.[50] *Romer*, on the other hand, involved simple discrimination against homosexuals.[51] According to Scalia, the impact of being

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Other Name, 62 IND. L.J. 779 (1982).

46. *Romer*, 517 U.S. at 643. The Supreme Court of Colorado stated: "We hold that the portions of Amendment 2 that would remain if only the provisions concerning sexual orientation were stricken are not autonomous and thus, not severable." Evans v. Romer, 882 P.2d 1335, 1349 (Colo. 1994). That statement was premised on on the proposition that "[the] four characteristics [described in the Amendment—sexual orientation, conduct, practices, and relationships] are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons." *Id.* at 1349-50. If the premise is true—if the entire class affected by the Amendment takes part in homosexual conduct, practices and relationships—*Bowers* alone suffices to answer all constitutional objections. Separate consideration of persons of homosexual orientation is necessary only if one believes (as the Supreme Court of Colorado did not) that that is a distinct class. It is also possible to analyze *United States v. Virginia* as abandoning the middle tier now used for sex discrimination cases.

47. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

48. *See id.*

49. *Id.* (quoting Padula v. Webster, 822 F.2d 97, 103 (1987)).

50. *See generally Bowers*, 478 U.S. 186.

51. *See generally Romer*, 517 U.S. 620.

criminalized is much greater than that of being discriminated against.[52] Thus, if lawmakers cannot utilize antigay animus as a legitimate state purpose in state legislation, then surely lawmakers cannot make one a criminal for engaging in the very actions that define the class against which animus is prohibited.

Thus, counsel possesses two new arguments in challenging a same-sex sodomy statute. The first is to stress that since these statutes single out homosexuals, they are based on nothing more than prejudice unless the state can otherwise justify the classification. Since prejudice is the motivating factor behind almost all sodomy laws, *particularly those targeting only same-gender sodomy*, sodomy laws should not pass constitutional muster under *Romer*. Second, states should be precluded from raising *Bowers* as a response to a "rational basis with bite" analysis. Scalia himself can be cited as indicating *Bowers* has been effectively overruled.[53]

B. Morality Cannot Be Used to Justify Sodomy Statutes

The Kansas court that declined to overturn the Kansas same-sex sodomy law reasoned that such statutes are justified merely on the basis of a general concept of morality held by a majority of the populace.[54] However, using morality as a basis for justifying discrimination

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52. *Id.* at 641.

53. *Id.*

54. City of Topeka v. Movsovitz, No. 77-332, slip op. 6-7 (Kan. Ct. App. 1998). *But see* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (involving arguments comparable to *Movsovitz*). In *Wasson*, the defendant was charged with soliciting deviate sexual intercourse. The issue before the Kentucky court was whether KY. REV. STAT. § 510.100 (1990), punishing "deviate sexual intercourse with another person of the same sex," was constitutional. *Id.* at 488. Just as in *Wasson*, the state of Kansas advanced morality as support for upholding KAN. STAT. ANN. § 21-3505, which defines criminal sodomy. Similar to the government's argument in the Kansas appeal,

> The thrust of the argument advanced by [Kentucky] as a rational basis for criminalizing consensual intercourse between persons of the same sex, when the same acts between persons of the opposite sex are not punished, is that the level of moral indignation felt by the majority of society against the sexual preference of homosexuals justifies having their legislative representatives criminalize these sexual activities. [Kentucky] believes that homosexual intercourse is immoral, and that what is beyond the pale of majoritarian morality is beyond the limits of constitutional protection.

Wasson, 842 S.W.2d at 490. Kentucky, unlike Kansas, did not find the morality argument to be adequate to uphold the sodomy statute.

The *Wasson* court found the Pennsylvania Supreme Court's holding in *Commonwealth v. Bonadio*, 415 A.2d 47 (1980), influential. In *Bonadio*, the Pennsylvania Supreme Court likewise considered the issue of upholding its sodomy statue on the basis of morality and the police power of the state.

The Montana Supreme Court also addressed the issue of morality in *Gryczan v. State*, 942 P.2d 112, 125 (1997), stating "it does not follow . . . that simply because the legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to

has been suspect at least since *Loving v. Virginia*.[55] Prior to *Loving*, the justification for prohibiting inter-racial marriage was morality.[56] It was 'unspeakable' to think of allowing blacks and whites to marry.[57]

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simply acquiesce." *Id.* (The Supreme Court of Montana ruled that private consensual, non-commercial sexual conduct is protected by Montana's constitutional right of individual privacy.)

Those who challenged the Tennessee sodomy statute successfully argued that the moral values of Tennessee citizens are unsubstantiated and that the majoritarian morality is not a valid basis for diminishing the conduct of an unpopular minority in the absence of any evidence that the actions of the minority harm other members of society. Campbell v. Sundquist, 926 S.W.2d 250, 264 (Tenn. Ct. App. 1996). The court cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the United States Supreme Court stated, "A way of life that is odd or even erratic, but interferes with no rights or interests of others, is not to be condemned because it is different." *Id.* at 613. The Tennessee court also quoted the majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), in which the Court stated that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States." *Id.* at 113 (quoting Lochner v. New York, 198 U.S. 45, 76. (Holmes, J., dissenting)).

55. Loving v. Virginia, 388 U.S. 1 (1967). In *Loving*, a white male and a black female, both Virginia residents, were legally married in the District of Columbia. *Id.* at 2. Upon returning to Virginia, they were convicted of violating a state statute prohibiting interracial marriage. *Id.* at 2-3. The Court unanimously reversed the convictions, holding that the statute was unconstitutional because it was based on invidious racial discrimination in violation of the Fourteenth Amendment. *Id.* at 12. Rejecting the State's contention that the statute did not constitute an invidious discrimination because it applied equally to blacks and whites, the Court maintained that a racial classification must still be subjected to strict scrutiny. *Id.* at 8-9. The Court then concluded that no legitimate purpose existed to support the racial classification. *Id.* at 11. "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12.

56. *See* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) (using antimiscegenation doctrine to illustrate the invidious harm purpose of sodomy laws).

> The purity of public morals, the moral and physical development of both races, the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and the connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 869 (1878).

See Davis, *Intermarriage in Caste Societies*, 43 AM. ANTHROPOLOGIST 376, 389 (1941) (since marriage between races would create mixed-race heirs, 'either intermarriage must be strictly forbidden or racial caste abandoned'); Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1190 (1966) (providing a historical framework of Virginia's miscegenation laws and its obstacles); Sidney L. Moore, Note, 19 MERCER L. REV. 255, 257 (1968) (calculating that *Loving* stands for a basic change in social philosophy that will seemingly endure for many years).

57. Evidently, the first public record of punishing sexual relations between blacks and whites is noted in colonial Virginia in 1630, where a white man was "to be soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians by defiling his body in lying with a Negro; which fault he is to acknowledge next Sabbath day." Wadlington, *supra* note 56, at 1191, n.9. For a historical analysis of miscegenation statutes in the United States as well as the Supreme Court's approach in addressing equal

Ultimately, the United States Supreme Court realized that the moral rhetoric did nothing more than disguise society's bias against African-Americans. When the Court declared there "was patently no legitimate overriding purpose" to the miscegenation statute, it made a significant step towards requiring a legitimate public purpose behind legislation other than mere majoritarian morality.[58]

If majoritarian morality is used as a justification, counsel should bring to the court's attention that Justice Kennedy recognized the invidiousness of prejudice disguised as morality in *Romer*. It is not accidental that the majority decision in *Romer* starts with a quote from *Plessy v. Ferguson*.[59] Kennedy reasoned that the legislation in question in *Romer*, like that in *Plessy*, was rooted in bare prejudice disguised as morality.[60] Clearly, *Romer* stands for the proposition that any time morality is used as a justification, there must be a legitimate public purpose other than the mere recitation of majoritarian morality.[61] The Court states:

> Even in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the relation between the classification adopted and the object to be obtained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sort of law it can pass; and it marks the limit of our own authority.[62]

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protection issues as described in *Loving v. Virginia*, see Laurence C. Nolan, *The Meaning of* Loving*: Marriage, Due Process and Equal Protection (1967–1990) as Equality and Marriage, from* Loving *to* Zablocki, 41 HOW. L.J. 245 (1998).

58. *Loving*, 388 U.S. at 11. A later episode in the constitutional history of miscegenation came in *Palmore v. Sidoti*, 466 U.S. 429 (1984), where the Court reversed a state court's decision to strip a white mother of the custody of her child because of her remarriage to a black man. The Court left undisturbed the lower court's finding that the child, if raised by the interracial couple, would suffer from 'social stigmatization.' *Id.* at 431 (emphasis deleted). It held, nonetheless, 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.' *Id.* at 433. *But cf.* Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) (reversing custody award to mother, where living in same house with her lesbian lover would have caused children to 'suffer from the slings and arrows of a disapproving society').

59. *Id.* (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Kennedy, J., dissenting)).

60. *Id.*

61. *See id.* at 623.

62. *Id.* at 632.

C. Sodomy Statutes Cannot Be Justified on the Separation of Status and Acts

The Kansas Court of Appeals attempted to limit *Romer* to the status or condition of being queer,[63] rather than the act of engaging in same-sex intimate relations. The court claimed, moreover, that the Kansas sodomy statute only governed the *acts* of homosexuals, not the status of being a homosexual.[64] Thus, according to the Kansas Court of Appeals, the sodomy statute was not inconsistent with *Romer* and was constitutional.[65] Counsel should argue that this interpretation is not plausible. First, to suggest that one's identity is separated into status and acts is to misunderstand what it means to be human. Ironically, in *Romer*, Justice Scalia adopts exactly this position.[66] As Scalia observes, attempting to divide homosexuals into those with an orientation or status as distinct from those who act upon their orientation is a distinction without a difference.[67] Scalia quotes two court decisions

63. City of Topeka v. Movsovitz, No. 77-332, slip. op. (Kan. Ct. App. 1998).

64. *Id.* at 15.

65. *Id.*

66. 517 U.S. at 640-41.

67. *Id.* The genesis of the split between status and conduct can be seen in Bowers, where the court made an internally inconsistent attempt to distinguish conduct and status. A more recent illustration of a court using this distinction to *strike down* antigay federal action can be seen in *Cammermeyer v. Perry*, 97 F.3d 1235, 1237 (9th Cir. 1996), which discussed the relationship between homosexual status and homosexual conduct. In *Cammermeyer*, Colonel Margarethe Cammermeyer was a decorated nurse who had served in the Army, Army Reserve, and National Guard. She had received many awards and honors, including the Bronze Star for distinguished service in Vietnam, and had held the position of Chief Nurse at a number of military hospitals. While seeking admission to the Army War College, Cammermeyer was interviewed by the Defense Investigative Service in order to acquire a Top Secret security clearance. During the interview, she was asked about her sexual orientation. In a statement signed during the interview, she wrote, "I am a Lesbian. Lesbianism is an orientation I have, emotional in nature, towards women. It does not imply sexual activity." *Id.* at 1236.

At the time these statements were made, Cammermeyer was serving as member of the Washington State National Guard. The Guard permitted Cammermeyer to retain her position, stating that it would not pursue her discharge unless forced to do so by the Department of the Army. Six months later, the United States Army launched proceedings to withdraw Cammermeyer's federal recognition and thereby rendered her ineligible for military service. While these proceedings were pending, Washington Governor Booth Gardner sought to intervene on Cammermeyer's behalf, writing a letter to then-Secretary of Defense Dick Cheney protesting "a senseless end to the career of a distinguished, long-time member of the armed services." *Id.* at 1236. Notwithstanding uniform and resounding praise for Cammermeyer's abilities, both as a nurse and a leader, the Army ultimately withdrew Cammermeyer's federal recognition, causing her to be discharged from the National Guard. *See* Cammermeyer v. Aspin, 850 F. Supp. 910, 929-30 (W.D. Wash. 1994). The district court then ordered that Cammermeyer be reinstated, that all of defendants' records concerning Cammermeyer's sexual orientation be expunged, and that defendants be enjoined from taking any action against Cammermeyer on account of her homosexual status. *Id.* at 929. The district court also declared that Cammermeyer's discharge exclusively on the basis of her sexual orientation was unconstitutional, and that Army Reg. 135-175, which allowed for discharge on that basis, was unconstitutional as well. *Id.* Pending appeal,

to make this point. In the first, a federal district court decision, the court says, "it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular conduct."[68] Further, according to Scalia, the Supreme Court of Colorado also comes to the same conclusion.[69] That court says that attempting to divide a class of people into sexual orientation, conduct, practices, and relationships is just a way of identifying a class of persons who are gay.[70] "These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons."[71] These observations by Scalia give counsel ample ammunition to challenge a court's attempt to divide status from act.

Second, it is possible to argue that some sodomy cases are really focused on status, not acts. It is not unusual to find sodomy cases that are the product of police sting operations.[72] Cops cruise parks until

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Cammermeyer was reinstated, and Army Reg. 135-175 and Department Defense Directive 1332.30 were replaced with 10 U.S.C. § 654 and a new version of Department of Defense Directive 1332.30. These new regulations implemented the "don't ask/don't tell policy." *Id.* at 920, 924.

In *Meinhold v. United States Department of Defense*, 34 F.3d 1469, 1479 (9th Cir.1994), it was held that regulations identical to Army Reg. 135-175 did not require discharge on the basis of statements merely expressing one's status as a homosexual. *Id.* at 1479-80. Rather, the regulations required discharge only for statements "that show a concrete, fixed, or expressed desire to commit homosexual acts." *Id.* at 1479. In light of *Meinhold*, defendants conceded that Cammermeyer should not have been separated solely on the basis of her statements. Defendants argued, however, that, under the reasoning of *Meinhold*, the district court should not have reached Cammermeyer's constitutional claims. *Id.* at 1474.

Cf. Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510 (N.D. Cal. 1996). The district court, ordering the reinstatement into the California National Guard of First Lt. Andrew Holmes, saw the "don't ask, don't tell policy in a similar vein. *Id.* at 1534. The court in its view of that case observed that the drafters of the "don't ask, don't tell policy "merged the concepts of status and conduct in an attempt to circumvent the constitutional proscriptions." *Id.*

68. Steffan v. Perry, 41 F.3d 677, 689-93 (D.C. 1994).

69. The Supreme Court of Colorado stated: "We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable." Evans v. Romer, 882 P.2d. 1335, 1349 (Colo. 1994). That statement was premised, however, on the proposition that "[the] four characteristics [described in the Amendment—sexual orientation, conduct, practices, and relationships] are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons." *Id.* at 1349-50.

70. *Id.*

71. *Id.*

72. *See* Laurence Hammack, *Jury Acquits Man of Sex Solicitation He Was the 2nd Person Charged in Police's Effort at Wasena Park*, ROANOKE TIMES & WORLD NEWS, Aug. 13, 1999, at B1 ("After hearing how a detective posing as a homosexual 'cruiser' in Wasena Park spent more than two hours trying to get Huffman to say something incriminating, a circuit Court jury found the 28 year old not guilty of soliciting the officer for oral sex."); Peter S. Goodman, *Anti-Gay Bias Alleged in Md. Sex Law; ACLU Suit Demands Equal Treatment Under Criminal Statutes*,

they finally persuade gay men to talk to them. The conversations are typically as follows:

Cop: Nice day, what's your name?

Man: Max. What do you do?

Cop: I go to the university, etc., etc. (then after casual conversation)

Cop: What would you do for me?

Man: Sex-wise?

Cop: Yes.

Man: Nothing in the park, it's illegal.

Cop: But, what would you do?

Man: Well, I like oral sex.

Cop: You're under arrest, etc.[73]

These words are not acts; they are purely speech, nothing more, nothing less. So, if the courts say the legislation can make such conversations criminal, the criminality is based purely on the status of the person. In other words, if the acts of sodomy themselves are criminal when committed by members of the same sex, but not criminal when committed by heterosexuals, then the criminalization of the speech as, presumably, a conspiracy to commit sodomy, is based on the gender of the persons speaking, not the acts that they are conspiring to commit. No act has taken place. A fundamental principle of criminal law is that a person will not be punished for what he or she thinks or says.[74]

WASH. POST, Feb. 6, 1998, at D05 ("The ACLU became interested in the case when it was contacted by Stephen B. Mercer, an attorney for an Arundel County man who was arrested for allegedly propositioning an undercover police officer. According to Mercer, the man merely discussed oral sex with the officer, and not for money. They were on their way to the man's apartment when the officer arrested him."); Editorial, *The Wrong Way to Deter Sex in the Parks*, ROANOKE TIMES & WORLD NEWS, Nov. 24, 1998, at A12 ("The state law, of course, is rarely enforced. Imagine the uproar if police were breaking into homes and arresting married couples for having oral sex subjecting them to up to five years in prison if convicted. Imagine how much greater the outrage if police were arresting heterosexuals for simply discussing oral sex with each other. Yet this hypocritical state law is the basis for the arrests of those 18 men, and if that is not targeting homosexuals, it is wrongful use of a law that should have been repealed years ago.").

73. Interview with Max Movsovitz, named defendant in City of Topeka v. Movsovitz (notes on file with the author).

74. One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of an act, or an omission to act where there is a legal duty to act, is required too. The common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined. A statute purporting to criminalize the act of thinking bad thoughts would, in the United States, be held unconstitutional. *See* LAFAVE & SCOTT, CRIMINAL LAW, (West 2d ed. 1986). *E.g. In re* Leroy T., 403 A.2d 1226 (Md. 1979); *Ex parte* Smith, 36 S.W. 628 (Mo. 1896); State v. Labato, 80 A.2d 617 (N.J. 1951); Proctor v. State, 176 P. 771 (Okla. 1918); Lambert v. State, 374 P.2d 783 (Okla. Crim. App. 1962); Note, 30 YALE L.J. 762 (1921).

The few exceptions to this rule do not apply to these types of sodomy cases.[75]

In the context of police enforcement of sodomy laws in the manner discussed above, a somewhat different strategy is called for in states that do not legislatively distinguish between heterosexual and homosexual sodomy. In those states, the act of sodomy is illegal, no matter who commits it. In those states, however, the laws against sodomy are almost never, if ever, enforced against heterosexuals. This difference in enforcement of the laws can also give rise to an equal protection claim.

Counsel, in considering the strategies discussed herein, must always weigh the practicalities of making arguments that, while eminently logical and consistent with equal protection, are at odds with existing case law such as *Bowers v. Hardwick*. Fortunately, as Justice Scalia has so wisely observed, *Bowers* has been rendered largely irrelevant to the extent a challenge to a sodomy statute is based on equal protection and not privacy.[76] Nevertheless, as Kansas has unfortunately demonstrated, the recent successes in Kentucky, Tennessee, and Montana do not signal the final death of *Bowers*.

The logical inconsistencies in United States jurisprudence in the area of same-sex criminalization can also be highlighted through the use of comparative and international law. As noted in the Introduction, international law provides compelling reasons why United States judges are obligated to interpret United States laws consistently with our country's international obligations whenever possible. The use of international law and comparative law, however, also helps demonstrate that our country's jurisprudence is now seriously in conflict with the jurisprudence of the international community and the domestic laws of the countries with which our courts like to compare the United States.

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75. *See generally* 18 U.S.C.A. § 871 (1994).

> Threats against the President and successors to the Presidency (a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

Id.

76. *Romer*, 517 U.S. at 641.

III. INTERNATIONAL AND COMPARATIVE STRATEGIES TO CHALLENGE U.S. SODOMY LAWS

A party arguing international and comparative law in United States courts must confront two obstacles: (1) the nonbinding nature of much of the international law to which the United States is a party, and (2) the skeptical manner in which many judges view international and comparative law. There are at least two strategies for addressing these obstacles.

The first strategy addresses the obstacles to using nonbinding international law, such as non self-executing treaties,[77] in domestic courts. This first strategy consists of a separation of powers and federalism argument using well-settled Supreme Court precedence that judges should, whenever possible, interpret domestic law in accordance with the federal government's international law obligations.[78] To do otherwise would place the judiciary in the position of subverting the federal government's conduct of foreign policy. To some extent, this is a separation of powers argument that judges should not interfere with the federal government's conduct of foreign policy. In the context of state court litigation, federalism requires that states, and state courts, refrain from interfering with the ability of the United States to speak with one voice in its conduct of foreign affairs.

The second strategy is to demonstrate to the court that, with the exception of certain states in the United States, all of the industrialized democratic nations of the world, including culturally disparate countries such as Japan, Taiwan, Australia, Canada, South Africa, and Russia, reject the criminalization of same-sex consensual sexual relations.[79] The United States, as a self-proclaimed political leader of these democratic nations and a self-proclaimed subscriber to fundamental human rights norms, can do no less.

The following discussion presents the first strategy.

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77. This Article will not address the use of international law that is binding on domestic United States courts, such as self-executing treaties and customary international law. Self-executing treaties are not addressed because they have the same force in United States domestic law as domestic statutes and are treated similarly by United States courts. Accordingly, there are no particular obstacles to their use in domestic litigation. Customary international law, which is also binding on United States domestic courts, will not be addressed since there is little authority that the criminalization of same-gender relations would, at the present time, constitute a violation of customary international law, although some commentators have argued that it does, or at least should. This is not to say that sodomy law will definitely not be considered a violation of customary international law at some point in the future. It does not appear, however, that the norm has yet matured into a binding rule of international law.

78. *See infra* notes 96-97 and accompanying text.

79. *See generally* Wilets, *supra* note 1, at 34.

A. *Arguing the Inconsistency Between State Sodomy Laws and United States Obligations Under International Law*

Counsel's first argument should be that a court's upholding of a state sodomy law would violate established principles of international law, including a treaty to which the United States is a party, and contravenes explicit federal policy regarding our nation's compliance with these international norms.

State sodomy statutes clearly contravene the obligations of the United States under the International Covenant on Civil and Political Rights, as well as under international law generally.[80] In 1992, the United States became a party to the International Covenant on Civil and Political Rights (ICCPR).[81] The United States has declared that certain provisions of the ICCPR are not self-executing, in the sense that the terms of the ratification of the treaty do not provide for an independent cause of action in domestic courts for enforcement of its provisions.[82] The doctrine of self-execution is itself a judicially created exception to the clear words of Article VI of the United States Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[83]

Nevertheless, the discussion below demonstrates that federal and state law should be interpreted in accordance with the United States' international obligations under international law, including treaties to which the United States is a party but which are not self-executing, such as the ICCPR.

In 1994, the United Nations Human Rights Committee (Committee), the body charged with interpreting the ICCPR, ruled that a sodomy statute in the Australian state of Tasmania violated the nondiscrimination and privacy provisions of the ICCPR.[84] This ruling confirmed a trend already present in international law. In three separate opinions, the European Court of Human Rights, with jurisdiction

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80. *See infra* note 84 and accompanying text.

81. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966).

82. *Id.*

83. U.S. CONST. amend. VI.

84. *See* Toonen v. Australia, Comm. No. 488/1992 U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/c/50/D/488/1992 (1994).

over all countries in the Council of Europe, has ruled that sodomy laws violate the "right to privacy" under the European Convention for the Protection of Human Rights.[85]

In *Toonen v. Australia*, the Committee addressed the Australian State of Tasmania Criminal Code §§ 122(a), (c) and 123, which criminalized various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private.[86]

In its decision, the Committee ruled that Tasmania's sodomy law violated Articles 2(1) and 17 of the ICCPR which state respectively:

> Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.[87]

In its opinion, the Committee declared that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy' . . ."[88] Relying on General Comment [16] 32 to interpret Article 17 of the ICCPR, the Committee stated that "interference provided for by the law should be . . . in any event, reasonable in the circumstances."[89] In reaching its conclusion that the infringement of Toonen's right to privacy was not reasonable, the Committee interpreted "the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be

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85. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *amended by* Protocols Nos. 3 and 5, *entered into force* Sept. 21, 1970, and Dec. 21, 1971 respectively; *see also* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1991); Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993).

86. *See generally* Toonen v. Australia, Comm. No. 488/1992 UN. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/c/50/D/488/1992 (1994).

87. International Covenant on Civil and Political Rights, *supra* note 81.

88. *Toonen*, ¶ 8.2.

89. *Id.* ¶ 8.3 (citing *General Comment* 16, [32], 4 U.N. Hum. Rts. Comm., at 19-20, U.N. Doc. CCPR/C/21/Rev.1 (1989)).

necessary in the circumstances of any given case."[90] The Committee found that the arbitrary nature of the Tasmanian sodomy statute violated this reasonableness requirement.[91]

In finding the Tasmanian sodomy statute violative of the nondiscrimination provision of the ICCPR, *the Committee specifically rejected Tasmania's argument that the statute did not discriminate between classes of citizens, but merely identified acts that are unacceptable to the community.*

The United Nations Human Rights Committee's decision reflects an authoritative interpretation of the ICCPR, with respect to statutes criminalizing same sex relations. This ruling strongly suggests that a court's upholding of a state's sodomy law would place the United States in breach of its international obligations under the ICCPR.

B. The Effect of Rules of Judicial Construction

Rules of judicial construction provide that federal and state law, wherever possible, should be interpreted in accordance with the international obligations of the United States. This rule of construction is particularly strengthened where the United States has committed itself to conform its state and federal laws with its ICCPR obligations. The United States government has committed itself to implement, at all levels of the United States government, the rights guaranteed under the ICCPR. The ICCPR, and the pledge of the United States government to implement the provisions of that treaty, constitute federal policy.

The United States Senate, in its advice and consent to the ICCPR's ratification, stated:

> The United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the states and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[92]

The United States, in its official report to the Committee on its compliance with the ICCPR, reiterated its commitment to bring the

90. *Id.* ¶ 8.3.
91. *Id.*
92. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

laws of its respective states into compliance with United States obligations under the ICCPR.[93] This included those provisions of the ICCPR invoked by the Committee in *Toonen*.[94]

Two of the comments by the Human Rights Committee, made in response to the reports submitted by the United States, on its compliance with the ICCPR, are particularly relevant to the issues this Article raises. Comments nine and eleven of the Committee's response to the United States report state:

> 9. The Committee welcomes the efforts of the Federal Government to take measures at the *legislative, judicial and administrative levels* to ensure that *the States of the Union* provide human rights and fundamental freedoms. It further appreciates the *expression of readiness by the Government to take such measures as may be necessary to ensure that the States of the Union implement the rights guaranteed by the Covenant.*
>
> 11. The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the United States, courts of the United States are not prevented from seeking guidance from the Covenant in interpreting United States law.[95]

It is a well settled principle of judicial construction that state and federal law, where fairly possible, should be interpreted in accordance with the international obligations of the United States, including those obligations that arise under treaties to which the United States is a party.[96] This rule of judicial construction applies even when a treaty is not self-executing in the United States.[97] In *Moore v. Ganim*, the Connecticut Supreme Court observed that "even a non-self-executing treaty of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be a federal policy and therefore would supersede state law or policy."[98] This rule of construction is rendered all the more applicable in the case of the

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93. *Initial Report of the United States of America*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/81/Add.4 (1994) and HR1/CORE/1/Add.49 (1995).

94. *Id.*

95. *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant*: Comments of the Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53rd Sess., U.N. Doc. CCPR/C/79/Add.50 (1995) (emphasis added).

96. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114.

97. *See* 6 U.S. (2 Cranch) at 66. *Cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987).

98. Moore v. Ganim, 660 A.2d 742, 780-82 (Conn. 1995) (Peters, C.J., concurring) (relying on international treaties' guarantees of right to a minimum standard of subsistence in interpreting Connecticut Constitution's preamble and "social compact" clause).

International Covenant on Civil and Political Rights because the United States Senate has explicitly acknowledged that the ICCPR provides guidance for courts when interpreting United States domestic law.[99]

This rule of construction arises because non-self-executing treaties create binding international obligations for the United States with regard to other countries and the international community at large, even if they are not binding as such on United States courts. Courts should be reluctant to interpret the Constitution or statutes in a manner that creates problems for the federal government in conducting foreign affairs.[100]

As Justice Linde of the Oregon Supreme Court points out, "if [a] court were not to accept this view, then [a] court might well find itself running afoul of national policy as expressed by the United States government through its participation in international human rights activities and declarations."[101] These statements strongly suggest that the United States views its treaty obligations as making up part of the United States "federal policy" which, consistent with the Supremacy Clause, may "supersede state law or policy."[102]

C. *Using Foreign Comparative Law as Persuasive Authority*

When interpreting the rights to privacy and equal protection under state constitutions, counsel is advised to utilize foreign comparative law as persuasive support. Many state courts, when responding to challenges to state sodomy laws, decline to follow the reasoning of the *Bowers* majority and find their states' sodomy statutes unconstitutional under their respective constitutions. Examples include Kentucky, Montana, New Jersey, New York, Pennsylvania, Tennessee, and Texas.[103] In doing so, state courts frequently rely upon a wide range of persuasive authority in explaining this departure from *Bowers*.

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99. *See* 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

100. *See* Oyama v. California, 332 U.S. 633, 650 (1948) (Black & Douglas, J.J., concurring) ("[How could the United States] be faithful to [its] international pledge [under the U.N. Charter] if state laws which bar ownership and occupancy by aliens on account of race are permitted to be enforced?"). *Cf.* Edye v. Robertson, 122 U.S. 580, 598 (1884) (the *Head Money Cases*) (a "non-self executing treaty . . . depends for the enforcement of its provisions on the interest and the honor of governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations").

101. Hans A. Linde, *Comments*, 18 INT'L LAW. 77, 80-81 (1984).

102. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987) ("[E]ven a non-self-executing treaty of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be a federal policy and therefore would supersede state law or policy").

103. Such courts include those in Kentucky (Commonwealth v. Wasson, 842 S.W.2d 487, 492 (1992)); New Jersey (State v. Ciuffini, 395 A.2d 904 (N.J. 1978)); New York (People v. Onofre, 51 N.Y.2d 476 (1980)), *cert. denied*, 451 U.S. 987 (1981); Pennsylvania, (Common-

As the Kentucky Supreme Court stated in *Commonwealth v. Wasson*,[104] with respect to interpreting the application of Kentucky's right to privacy to private, consensual homosexual relations, "Contrary to popular belief, the Bill of Rights in the United States Constitution represents neither the primary source nor maximum guarantee of state constitutional liberty."[105] State and federal courts have used comparative law from other countries as persuasive authority for determining the appropriate scope of constitutional protection of individual freedom. For example, in *Thompson v. Oklahoma*,[106] a plurality of the United States Supreme Court endorsed consideration of "the views of the international community in determining whether a punishment is cruel and unusual."[107] The plurality opinion in that case stated that:

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[108]

Furthermore, international comparative law provides compelling, persuasive support for Kansas courts to follow the reasoning of those state courts that have interpreted their state's constitutional right to privacy as protecting same-gender private consensual sexual relations,[109] rather than the reasoning of the United States Supreme Court in *Bowers*.[110]

The United States is the only major industrial democracy where same-sex relations continue to be illegal in a significant part of the country. No jurisdiction in Europe, with the exception of Moldova, Romania, and certain countries of the former Soviet Union, prohibit private consensual homosexual relations.[111] As discussed previously in

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wealth v. Bonadio, 415 A.2d 47 (1980)); Tennessee (Campbell v. Sundquist, 1996 Tenn. App. LEXIS 46, *32 (Jan. 26, 1996)); and Texas (City of Dallas v. England, 846 S.W.2d 957 (Tx. App. 1993)). *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

104. Commonwealth v. Wasson, 842 S.W.2d 487, 492 (1992).

105. *Id.*

106. 487 U.S. 815 (1988).

107. *Id.* at 830, n.31.

108. *Id.* at 830-31. *See also* Humphers v. First Interstate Bank, 696 P.2d 527, 531 n.7 (Or. 1985) (wherein the court discussed the right to privacy found in the European Convention on Human Rights as part of a general discussion of a proposed common law tort of violation of privacy).

109. *See supra* note 102.

110. *Bowers*, 478 U.S. at 186.

111. *See* Wilets, *supra* note 1, at 34.

this article, the European Court of Human Rights, with jurisdiction over all countries in the Council of Europe,[112] has ruled on three separate occasions that sodomy laws violate the right to privacy under the European Convention for the Protection of Human Rights.[113] The decisions were based, in part, on the preexisting comparative law of the European community. As early as 1981, in its opinion in *Dudgeon*,[114] the European Court of Human Rights noted:

> As compared with the era when [sodomy] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member states of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the court cannot overlook the changes that have occurred in this regard in the domestic law of the members states.[115]

In North America, neither Canada nor Mexico has a sodomy law, and a recent Canadian court decision interpreted its Charter of Rights and Freedoms as specifically prohibiting discrimination against gays and lesbians.[116]

Japan, Taiwan, South Korea, and Hong Kong have no laws criminalizing consensual same-sex relations.[117] In Australia, the only state or province with a sodomy law was Tasmania, and that sodomy law has been rendered unenforceable as a result of federal legislation passed in response to the *Toonen* decision.[118] Moreover, the Australian federal government, as well as most Australian states and territories, have laws that prohibit discrimination against gay people.[119] New

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112. For a list of the members of the Council of Europe, *see* <http://www.coe.int/portal.asp?L=E&M=$t/001-00-00-2/02/EMB,1,0,0,2,Map.stm>.

113. Dudgeon v. Great Britain, 4 Eur. H.R. Rep. 149 (ser. A) (1981); Norris v. Ireland, 13 Eur H.R. Rep. 186 (ser. A) (1991); Modinos v. Cyprus, 16 Eur. H.R. Rep. 485 (ser. A) (1993).

114. 45 Eur. Ct. H.R. (ser. A) (1981).

115. *Id.* at 23-24.

116. *See* Egan v. Canada [1995] 2 S.C.R. 513.

117. *See* Wilets, *supra* note 1, at 34 n.6.

118. In response to the Tasmanian government's refusal to repeal its law, the Australian Federal Government enacted the Human Rights (sexual conduct) Act of 1994, which invalidates laws that constitute an "arbitrary interference with privacy." The words of the act track the language of the *Toonen* decision and were intended to implement the Committee's recommendation. *See* Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda* 31 (May 25, 1995) (Draft manuscript on file with author).

119. *See* Wilets, *supra* note 1, at 1027.

Zealand has no sodomy law and has one of the most far-reaching anti-discrimination laws in the world.[120]

The reliance by the majority in *Bowers* on comparative law to support its decision appears highly misplaced, given that the vast majority of the jurisprudence in the industrialized democracies has reached a conclusion contrary to *Bowers*.[121] Justice Burger's concurring opinion that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization,"[122] is rendered particularly nonsensical in light of *Dudgeon* and the cases that have been decided subsequently in Europe, Canada, and Oceania, all countries that share the jurisprudential tradition of the United States and that certainly qualify as an integral part of "Western Civilization." Even Justice Powell conceded that "the dissent had the better of the arguments."[123] If even the crucial fifth vote for the majority in *Bowers* concedes that the majority's reasoning was weak, the decision in *Bowers* is rendered all the more questionable in light of the comparative jurisprudence upon which the majority at least partially, and incorrectly, relied in its decision.

IV. CONCLUSION

On a substantive level, state courts, as a matter of law, should find their sodomy statutes unconstitutional under the right to privacy and equal protection clauses in their state constitutions. State and federal courts may also, as a matter of law, find the statute unconstitutional under the federal Equal Protection Clause.

On a procedural level, courts should no longer be deferential to same-sex sodomy statutes. To do so ignores federal equal protection analysis when animus is shown, and a growing number of state court have overturned their state's sodomy laws under their own state constitutions using a less deferential approach. General majoritarian concepts of morality, with nothing more, are not sufficient state justifications for such statutes. Finally, counsel should aggressively argue against the very validity, or at least applicability, of *Bowers* as valid precedent. Doing so greatly undermines states' efforts to draw a distinction between acts and status. If even Justice Scalia is willing to

120. *Id.*

121. *See* Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 861 (1989) ("If *Dudgeon* had been relied upon, Justice White might not have characterized Mr. Bowers' claim that his right was 'implicit in the concept of ordered liberty' as being 'at best facetious.'").

122. *Bowers*, 478 U.S. at 196.

123. *Id.* at 186.

recognize that *Bowers* is no longer valid because of the acts/status distinction, so should state and federal courts.

Counsel should also remind the court that its decision to overturn a state's sodomy statute would conform that state law to federal policy, international law, the overwhelming jurisprudence of the democratic world, and the binding rules of judicial construction. On the other hand, to find the statute constitutional would be inconsistent with federal public policy, the international commitments and obligations of the United States government, and the United States Constitution itself.