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The Beginning of the End for Women in the Military

Diane H. Mazur

SAUCE FOR THE GOOSE: SOME THOUGHTS ON GAY SEX AND EQUAL PROTECTION

Joseph S. Jackson[*]

> "What [protects us from oppressive laws] . . . is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."[1]

A careless reading of *Bowers v. Hardwick*[2] might lead one to claim that criminalizing gay sex is unassailably constitutional. Dissenting in *Romer v. Evans*,[3] Justice Scalia makes this claim, and uses it to mount a defense of Colorado's Amendment 2, which prohibited the state from enacting laws protecting gays and lesbians from discrimination.[4] However, *Bowers* held only that criminalizing homosexual sodomy did not violate the Due Process Clause.[5] The Court expressly noted that other constitutional objections to the statute, including those based on the Equal Protection Clause, were not at issue.[6] Thus, *Romer*'s "holding

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* Fellow, Institute of Law, Psychiatry, and Public Policy, University of Virginia School of Law. A.B. 1979, Princeton University; J.D. 1982, University of Florida College of Law. I wish to thank Thomas E. Cotter, Diane H. Mazur, Sharon E. Rush, and especially Elizabeth McCulloch for their helpful comments and suggestions. All errors are mine.

1. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

2. 478 U.S. 186 (1986).

3. 116 S. Ct. 1620 (1996).

4. *See id.* at 1631-32 (Scalia, J., dissenting). I discuss the flaws in Justice Scalia's defense of Amendment 2 in Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. (forthcoming Dec. 1997). Thought-provoking analyses of *Romer* include Akhil R. Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996); Louis M. Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67 (1997); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 53-71 (1996).

5. *See Bowers*, 478 U.S. at 195-96.

6. *Id.* at 196 n.8. As Akhil Amar has noted, the Court's refusal in Bowers to address the equal protection issue makes its judgment upholding the Georgia statute "highly dubious":

> Either male-female anal sex can be criminalized or it cannot. If it can, how exactly are the principles of *Eisenstadt* [v. Baird, 405 U.S. 438 (1972)] and now [Planned Parenthood v.] *Casey* [505 U.S. 833 (1992)] to be distinguished away? If it cannot, then doesn't criminalization of male-male—but not male-

that homosexuality cannot be singled out for disfavorable treatment" does not contradict *Bowers*, as Justice Scalia asserts.[7] Indeed, the "singling out" of homosexual conduct is precisely what *Bowers* did not address.[8]

Whether the government may constitutionally single out homosexual conduct for disfavorable treatment is an important question. The anti-sodomy laws of seven states explicitly apply only to homosexual conduct and the anti-sodomy laws of others have been construed not to apply to heterosexual acts.[9] In addition, the "Don't Ask, Don't Tell" policy excluding gays and lesbians from the military[10] constitutes precisely this kind of discriminatory treatment. If discrimination against homosexual conduct violates the Equal Protection Clause, gays and lesbians can vindicate their right to serve in the armed forces without resorting to the unfortunate "status/conduct" distinction that has plagued litigation concerning that exclusionary policy and its predecessors.[11]

Laws singling out homosexual conduct for disfavorable treatment may take one of two forms. The anti-sodomy statute considered in *Bowers* was facially neutral—it barred "any sexual act involving the sex organs of one person and the month or anus of another."[12] However, the statute was selectively enforced against persons of the same sex: plaintiffs "John and Mary Doe" could not show a sufficient threat of prosecution under the statute to establish standing,[13] and Georgia sought to defend the statute only as applied to homosexual acts.[14] By contrast, the military's exclusion of gays and lesbians explicitly incorporates a sex-based classification as part of the statutory definition of the proscribed conduct: " 'homosexual act' means . . . any bodily

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female—sodomy constitute de jure sex discrimination, in the same way antimiscegenation laws constituted de jure race discrimination?

Amar, *supra* note 4, at 231-32 (footnotes omitted).

7. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

8. For a cogent explanation of the fundamentally different analyses required under the due process and equal protection clauses, which comments specifically on the inapplicability of Bowers to equal protection claims of gays and lesbians, see Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

9. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 38-39 & nn.d-f (1997).

10. *See* 10 U.S.C.A. § 654 (1997); *see also infra* note 15 and accompanying text.

11. *See generally* Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 232-49 (1996).

12. *Bowers*, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

13. *Id.* at 188 n.2.

14. *Id.* at 201 (Blackmun, J., dissenting); *id.* at 218 n.10 (Stevens, J., dissenting).

contact, actively undertaken or passively permitted, *between members of the same sex* for the purpose of satisfying sexual desires. . . ."[15]

For equal protection purposes, it makes no difference whether the discriminatory result is achieved through an explicit classification or through the selective enforcement of a facially-neutral statute: "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with . . . an unequal hand, . . . the denial of equal justice is still within the prohibition of the Constitution."[16] Thus, the policy of selective enforcement effectively amends the Georgia statute; we must read it as though it proscribed contact between the sex organs of one person and the mouth or anus of another person *of the same sex.*

As these examples make clear, laws burdening or prohibiting homosexual sexual conduct tacitly or explicitly make use of a classification based on sex. Conduct is either proscribed or permitted depending on the sex of the person engaged in the conduct; the underlying conduct itself is the same: "The man who is engaged in cunnilingus is doing exactly the same things with exactly the same part of his body, and doing them to the same body parts of the woman, as the lesbian [who engages in cunnilingus]. The genitalia of the person performing an act of oral sex are simply not involved in that act. . . . "[17]

In short, there is no such thing as "homosexual sex."[18] Rather, there are various forms of sexual conduct, which may be engaged in by men and by women. To speak of a societal interest in discouraging homosexual conduct, as the Court did in *Bowers* and as Justice Scalia did in *Romer*, is to mask the root of the equal protection problem in the same way the concept of miscegenation masked the equal protection problem in *Pace v. Alabama*[19] by enabling the Court to treat interracial sex as a distinct offense from "garden variety" fornication.[20] In fact, however,

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15. 10 U.S.C.A. § 654(f)(3)(A) (1997) (emphasis added). Such acts constitute grounds for separation from military service. *Id.* § 654(b)(1).

16. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

17. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 157 (1996).

18. *See id.* ("The seeming puzzle of whether the man who has sex with a man is engaging in 'the same conduct' as the woman who has sex with a man is an artifact of the reification of a category: 'homosexual sex.' "). *But see* Seidman, *supra* note 4, at 119 (suggesting that viable distinctions might be drawn between gay sex and heterosexual sex).

19. 106 U.S. 583 (1883).

20. *See* McLaughlin v. Florida, 379 U.S. 184, 188-89 (1964) ("The opinion [in *Pace*] acknowledged that . . . [equal protection] implies that any person, 'whatever his race *** shall not be subjected, for the same offense, to any greater or different punishment.' . . . But taking quite literally its own words, '*for the same offense*' (emphasis supplied), the Court pointed out that Alabama had designated as a separate offense the commission by a white person and a Negro of the identical acts forbidden by the general [anti-fornication] provisions."). Andrew

fornication is fornication regardless of the racial identity of the participants, and to enact a statute that makes the imposition of sanctions dependant on the racial identity of the actors is impermissible. "[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*."[21]

One of the reasons the Constitution does not tolerate such classifications is that they enforce racial hierarchy and stigmatize non-whites as less than equal. For example, *Loving v. Virginia*[22] nullified Virginia's anti-miscegenation statute as an impermissible attempt "to maintain White Supremacy."[23] Kenneth Karst has pointed out how laws burdening gays and lesbians similarly enforce a social hierarchy, in this case the dominance of heterosexuals over gays and lesbians.[24] Andrew Koppelman has argued that these laws also enforce male domination over women.[25] On either ground, such laws implicate the principle of equal citizenship, which "presumptively insists that every individual is entitled to be treated by the organized society as a respected and responsible participant" and "forbids the organized society to stigmatize an individual as a member of an inferior or dependent caste."[26] Moreover, as discussed above, to the extent these laws classify on the basis of homosexual conduct, they tacitly or explicitly utilize a sex-based classification and, under standard equal protection doctrine, can be sustained only by " 'an exceedingly persuasive justification.' "[27]

But there is another aspect to these kinds of laws, another way to think about the constitutional problem they pose, that ties in to the core principle of equality before the law. That principle insists that who you are does not affect the legal rules you must obey; all persons are subject

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Koppelman has developed this argument at length. *See* KOPPELMAN, *supra* note 17, at 154-58; *see also* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 150-51 (1988); Andrew Koppelman, *Why Discrimination Against Lesbian and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208-12 (1994).

21. *Id.* at 198 (Stewart, J., joined by Douglas, J., concurring).

22. 388 U.S. 1 (1967).

23. *Id.* at 11.

24. *See* KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 31-37, 57-66, 124-37 (1993).

25. *See* KOPPELMAN, *supra* note 17, at 153-75.

26. KARST, *supra* note 24, at x. For elaboration and defense of this view, see KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 43-56 (1989) [hereinafter KARST, BELONGING TO AMERICA]; Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-17 (1977).

27. United States v. Virginia, 116 S. Ct. 2264, 2274 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

to the same laws. In a certain limited sense, anti-miscegenation statutes satisfy this requirement because all are bound by the prohibition against marrying outside one's race, but in a different sense, such laws create one rule for whites, and another for non-whites. The latter, but not the former, may be punished for marrying a white person. Seen in this light, anti-miscegenation statutes violate the principle of equality before the law; they impose different rules for different people.[28]

The Equal Protection Clause serves to protect us from laws that are substantively oppressive by "requir[ing] the democratic majority to accept for themselves and their loved ones what they impose on you and me."[29] This protective function is lost when the democratic majority is free to define offenses in a way that "makes the criminality of an act depend upon the race of the actor."[30] It is similarly lost when sexual acts are proscribed or permitted depending on whether they are performed by homosexuals or heterosexuals. Indeed, the military's "Don't Ask, Don't Tell" policy shows just how oppressive non-universal laws may be: one can hardly conceive that a voluntary army could be maintained in the face of an *even-handed* ban on "any bodily contact, actively undertaken or passively permitted . . . for the purpose of satisfying sexual desires."[31] In short, "homosexual sex," like "interracial sex," incorporates a restriction on who is engaging in the conduct into the very definition of the conduct itself, so that a law proscribing such conduct, while appearing to be universally applicable, in fact imposes different rules for different people.

Suppose a state, in order to reduce traffic congestion, enacted a law revoking the driver's licenses of gays and lesbians, or of women, or of persons whose last name begins with K. Though such a law would further the legitimate objective of reducing traffic congestion, it clearly would violate the Equal Protection Clause: no legitimate justification could plausibly explain the decision to make this class of people, but not

28. It might be objected that any law which classifies on the basis of a trait imposes different rules for different people in this sense. For example, laws barring those over the age of 50 from employment as police officers, or barring the blind from driving cars, do so. What distinguishes these types of classifications, which do not appear to undermine the safeguards the Equal Protection Clause provides against oppressive laws, is that a given age and physical disability are characteristics that "the democratic majority" and its "loved ones" may one day share. *See infra* notes 36-38 and accompanying text.

29. *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring).

30. McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

31. *See* 10 U.S.C.A. § 654(f)(3)(A) (1997); *see also supra* note 15 and accompanying text.

others, bear the burden of meeting this objective.[32] The law would be unconstitutionally underinclusive.

Laws criminalizing or otherwise burdening same-sex sexual acts but not different-sex sexual acts presumptively suffer from the same constitutional problem. If the goal of such legislation is to "preserve traditional sexual mores"[33] the legislation appears just as underinclusive as the driver's license revocation laws posited above because those mores proscribe different-sex as well as same-sex sodomy.[34] The same sort of underinclusiveness belies the high-minded claims of those who seek to discriminate against gays and lesbians in housing and employment on religious or moral grounds. Unless these people would also refuse to rent their property to or employ heterosexuals who engage in oral or anal (or indeed, any non-marital) sex, their claim of high moral ground is sheer hypocrisy, prejudice masquerading as principle.[35]

The reason these laws raise the concern that the democratic majority has imposed on others burdens they would not tolerate "for themselves and their loved ones"[36] is that, like race and sex, sexual orientation is a fixed characteristic: "[w]e are not all equally likely to wake up tomorrow and feel gay."[37] By contrast, the democratic majority know that they, or their descendants, may one day have to bear the burdens they impose on the basis of age or physical disability.[38]

It might be objected that this argument proves too much and calls into question laws barring incest and sex with children. After all, these laws also criminalize sex on the basis of the identity of the participants.

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32. *See* Heller v. Doe, 509 U.S. 312, 321 (1993) (noting that legislative classifications, even under the standard of "rationality . . . must find some footing in the realities of the subject addressed by the legislation"); James v. Strange, 407 U.S. 128, 140 (1972) ("[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out.' ") (quoting Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966)).

33. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

34. *See Bowers*, 478 U.S. at 215 & nn.4 & 5 (Stevens, J., dissenting) (observing that the "condemnation [of sodomy is] equally damning for heterosexual and homosexual sodomy").

35. *Compare, e.g.*, *Leviticus* 18:22, 20:13 (homosexual conduct) *with Leviticus* 18:20, 20:10 (adultery); *see also Exodus* 20:14 (adultery); *Deuteronomy* 5:18, 22:22 (same); *Matthew* 19:18 (same); *Mark* 10:19 (same); *Luke* 18:20 (same); *Romans* 13:9 (same); 1 *Corinthians* 6:9-10, 13, 15-18 (fornication); 1 *Thessalonians* 4:3 (same); *Deuteronomy* 22:25 (rape).

36. *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring).

37. Amar, *supra* note 4, at 233. *But see* Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 244-46 (1996) (questioning the fixed nature of sexual orientation).

38. Classifications based on mental illness or developmental disabilities present a more difficult question. To the extent legislators believe anyone might possess these characteristics, the characteristics are more like age and less like race or sex. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) (discussing a "veil of ignorance" as to individual characteristics under which fair laws might be enacted).

But age-based classifications that bar sex with children are universal in a way that race- and sex-based classifications are not.[39] Moreover, because incest and sex with children raise legitimate concerns as to absence of meaningful consent, laws barring these activities are clearly distinguishable from laws barring consensual same-sex sodomy.[40]

It is important not to overstate the claims justified by the foregoing analysis. In particular, it does not establish any right to engage in sexual conduct of any kind. Rather, it suggests that if a state wishes to proscribe certain sexual acts, it may not do so in a way that burdens only gays and lesbians, at least not without some exceedingly persuasive justification.[41] To conclude otherwise would eviscerate the protection the Equal Protection Clause provides against substantively oppressive laws, a protection traceable to the core requirement of equality before the law.

Legislators seeking to impose different rules on gays and lesbians than those everyone else has to obey, and hoping to avoid the thrust of the foregoing analysis, might draw classifications on the basis of sexual orientation rather than enacting a classification that is explicitly sex-based. Under *Romer*, however, laws classifying on the basis of sexual orientation will be scrutinized for "animus" toward gays and lesbians.[42] If such laws are based on negative attitudes, fear or irrational prejudice they will be found to be "rooted in considerations that the Constitution will not tolerate."[43] Moreover, by focusing on a personality or character trait rather than on conduct, such laws may run afoul of the constitutional values embodied in the bill of attainder clauses,[44] and because this trait is so closely bound up with our sense of personal identity,[45] such

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39. *See* Amar, *supra* note 4, at 233.

40. *See Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) ("Society . . . may prohibit an individual from imposing his will on another to satisfy his own selfish interests."); *id.* at 209 n.4 (Blackmun, J., dissenting) ("[T]he nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted.").

41. *See* United States v. Virginia, 116 S. Ct. at 2274 (holding that any law discriminating on the basis of sex must have a "exceedingly persuasive justification" to pass constitutional muster).

42. *See Romer*, 116 S. Ct. at 1627, 1628-29. *See generally* Jackson, *supra* note 4.

43. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985); *see also* Sunstein, *supra* note 4, at 62 (arguing that laws "discriminating against homosexuals . . . [are] likely to reflect sharp 'we-they' distinctions and irrational hatred and fear").

44. U.S. CONST. art. I, §§ 9, 10. *See generally* Amar, *supra* note 4; Jackson, *supra* note 4.

45. At least in our culture, sexual orientation is an identity-defining characteristic. *See* Terry S. Stein, *Overview of New Developments in Understanding Homosexuality*, 12 REV. PSYCHIATRY 9, 20-23 (1993); *see also* John C. Gonsiorek & James D. Weinrich, *The Definition*

laws are particularly likely to violate the principle of equal citizenship.[46]

In the final analysis, there is no easy solution for legislators seeking to discriminate against gays and lesbians. *Romer* poses an obstacle to classifications based on sexual orientation, and equal protection principles preclude criminalizing an act based on the sex of the actor. The foregoing analysis therefore has practical implications for the legal protection of gays and lesbians, and provides a useful tool in the quest for gay rights.

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and Scope of Sexual Orientation, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 1, 1-2 (John C. Gonsiorek & James D. Weinrich eds., 1991); John C. Gonsiorek & James D. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events, in* RESEARCH IMPLICATIONS FOR PUBLIC POLICY, 161, 164-65 (1991); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 134 & n.2 (1991).

46. As Kenneth Karst has noted, "the essence of any stigma lies in the fact that the affected individual is not treated as an equal. Inequities that stigmatize 'belie the principle that people are of equal ultimate worth.' " KARST, BELONGING TO AMERICA, *supra* note 26, at 25-26. Because sexual orientation is an identity-defining characteristic, laws imposing disadvantages based on one's sexual orientation are particularly likely to impugn one's worth as a person. *See* Sunstein, *supra* note 4, at 62 ("[S]ocial antagonism [toward gays is] connected not only with their acts but also with their identity.").