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Sodomy and Public Morality Offenses under U.S. Immigration Law: Penalizing Lesbian and Gay Identity

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Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity

Until 1990, the United States was the only country in the world with an explicit policy of excluding visitors and potential immigrants because of their sexual orientation.[1] Although the word "homosexual" has never appeared in U.S. immigration law, from 1952 to 1990 most U.S. courts interpreted the provision excluding persons "afflicted with a psychopathic personality"[2] to require the exclusion of any person identified as homosexual or who engaged in homosexual acts.[3] Countless individuals have been excluded at the border, deported, or denied naturalization under this provision.[4] After years of lobbying by openly gay Congressperson Barney Frank and others,[5] and in the wake of increas-

1. For a discussion of the singularity of U.S. policy, see *Exclusion and Deportation Amendments of 1983: Hearing on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 193 (1984) [hereinafter *Exclusion and Deportation Amendments of 1983*] (testimony of Vickey Monrean, executive director, National Gay Rights Lobby); and Richard Green, *"Give Me Your Tired, Your Poor, Your Huddled Masses" (of Heterosexuals): An Analysis of American and Canadian Immigration Policy*, 16 ANGLO-AM. L. REV. 139, 157 (1987) (citing Record of the Association of the Bar of New York).

2. The Immigration and Nationality Act of 1952 excluded "[a]liens afflicted with a psychopathic personality, epilepsy, or a mental defect." In 1965, Congress eliminated epilepsy and added "sexual deviation." Immigration and Nationality Act of 1952, § 212(a)(4), Pub. L. No. 414, 66 Stat. 163, 182, *amended by* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified as amended at 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990)). The entire provision was eliminated by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

3. *See infra* Section II.

4. It is difficult to state precisely the number of persons affected by the provision because the Immigration and Naturalization Service (INS) does not keep statistics on the disposition of cases involving homosexuals. The number of exclusions are especially hard to track because most excludable aliens are denied visas by U.S. consular officials abroad, and no public records of these denials are kept. *See* THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 115-16 (2d ed. 1991) (summarizing visa issue process). *See also Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 191-92 (testimony of Donald C. Knutson of National Gay Rights Advocates, noting that statistics fail to reflect the number of lesbians and gay men excluded at the border).

5. Frank had introduced bills revising the grounds for exclusion and deportation since 1983. *See Exclusion and Deportation Amendments of 1983*, *supra* note 1; H.R. REP. No. 882, 100th Cong., 2d Sess. 23-24 (1988) [hereinafter 1988 HOUSE REPORT].

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ingly tangled litigation challenging the exclusion of lesbians and gay men,[6] Congress eliminated the "psychopathic personality" exclusion in 1990 as part of a general reform of the old exclusion grounds.[7] Under the 1990 Act, lesbians and gay men are no longer automatically barred from entering or immigrating to the United States.

The elimination of the provision used to exclude lesbians and gay men significantly redressed the homophobic bias of U.S. immigration law.[8] Even after the 1990 Act, however, lesbians and gay men convicted of sodomy or of a public morality offense[9] are at risk of exclusion or deportation under the "crimes involving moral turpitude" exclusion,[10] and may be denied citizenship under the "good moral character" requirement.[11] Both within the United States and internationally, lesbians and gay men are prosecuted under sodomy and public morality statutes which are often used to target lesbians and gay men by penalizing the expression of lesbian and gay identity, especially when that expression is deemed "public."[12] Public expressions of heterosexual identity are not similarly policed or criminalized.[13] Although the 1990 Act eliminated the rationale for doing so, the Immigration and Naturalization Service (INS) and the courts continue to exercise their discretion to use

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Others who have attempted to repeal the provision include Representative Julian Dixon, H.R. 2815, 98th Cong., 1st Sess. (1984); Senator Alan Cranston, S. 1086, 98th Cong., 1st Sess. (1984); and Representative Edward Roybal, H.R. 4909, 98th Cong., 2d Sess. (1984). *See also* Peter Fowler & Leonard Graff, *Gay Aliens and Immigration: Resolving the Conflict Between Hill and Longstaff*, 10 U. DAYTON L. REV. 621, 639-40 (1985) (summarizing legislative attempts to repeal the provision through 1985).

6. *See infra* notes 56-72 and accompanying text.

7. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. §§ 1101-1524 (1988 & Supp. II 1990)). The 1990 Act modified, regrouped, and condensed the old grounds of exclusion into nine classes of excludable aliens, now grouped together in Immigration and Nationality Act (INA) § 212(a), 8 U.S.C. § 1182(a) (1988 & Supp. II 1990).

8. Now that the categorical exclusion of homosexuals has been eliminated, this bias is perhaps most evident in the fact that the INA provides no way for lesbians and gay men to bring their non-U.S. citizen partners into the United States on a permanent basis. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (refusing to admit the partner of a gay U.S. citizen, even though the court assumed the marriage between the two men was valid under state law). *See also* Sandra E. Lundya, *"I Do, But I Can't": Immigration Policy and Gay Domestic Relationships*, 5 YALE L. & POL'Y REV. 185 (1986).

9. Throughout this Note, I use the phrase "public morality offenses" as a catch-all term that encompasses a variety of statutes that target the public expression of lesbian and gay identity. Some of these statutes are specifically designed to target lesbians and gay men. Examples of this type include statutes that criminalize the solicitation of homosexual sex, "indecency between men," and "procuring others to commit a homosexual act." The majority of public morality offenses were neither specifically designed nor intended to target lesbians and gay men, but are frequently used to do so. Examples of this type include public indecency, public lewdness, and disorderly conduct statutes. *See infra* Section III.

10. INA §§ 212(a)(2)(A)-(B), 8 U.S.C. §§ 1182(a)(2)(A)-(B) (1988 & Supp. II 1990).

11. INA § 316(a), 8 U.S.C. § 1427(a) (1988 & Supp. II 1990).

12. *See infra* notes 211-64 and accompanying text.

13. *Id.*

these statutes to exclude and deport gays and lesbians from the country, and to deny them citizenship and other benefits and privileges.[14]

This Note argues that the discriminatory impact of sodomy and public morality offenses on lesbians and gay men under current U.S. immigration law is an anomalous and irrational vestige of the pre-1990 law, and violates both the Constitutional "uniform rule of naturalization" requirement and the intent of Congress, as expressed in the 1990 Act, to place homosexual and heterosexual immigrants on an equal footing. Part I provides a brief overview of U.S. immigration law procedures and of the historical exclusion of lesbians and gay men under U.S. immigration law, up to the 1990 reform. Part II analyzes the case law that has invoked the "crimes involving moral turpitude" exclusion and the "good moral character" requirement against lesbians and gay men convicted of sodomy or of public morality offenses. Part III describes the harassment of lesbians and gay men under these statutes, both within the United States and internationally, and the growing opposition to this harassment among international human rights organizations. Part IV argues that the discriminatory impact of these statutes on lesbians and gay men in the U.S. immigration system violates both the Constitutional "uniform rule of naturalization" clause and the 1990 Act.

I. U.S. Immigration Law

A. Immigration Agencies and Procedures

Immigration into the United States is governed by the Immigration and Naturalization Act (INA).[15] The INA distinguishes between immigrants who enter as longterm or permanent residents, and non-immigrants who enter on a temporary basis for a specific purpose such as study, tourism, or temporary work.[16] The INA specifies the criteria for admission for each category,[17] lists the grounds on which individuals can be excluded and deported from the country,[18] and sets out the conditions for becoming a citizen.[19]

Immigrants, or those who seek to become permanent U.S. residents, must qualify under the admissions criteria in order to enter. Currently, the primary criteria for admission are family ties and employer sponsorship.[20] Both immigrants and non-immigrants are subject to the statutory grounds for exclusion and deportation.[21] The grounds for

14. *See infra* Section II.

15. Pub. L. No. 820-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1554 (1988 & Supp. II 1990)).

16. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988 & Supp. II 1990).

17. INA § 203, 8 U.S.C. § 1153 (1988 & Supp. II 1990) (admission criteria for immigrants). INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988 & Supp. II 1990) (admission criteria for non-immigrants, in the form of preference categories).

18. INA § 212, 8 U.S.C. § 1182 (1988 & Supp. II 1990) (grounds of exclusion). INA § 241, 8 U.S.C. § 1251 (1988 & Supp. II 1990) (grounds of deportation).

19. INA §§ 310, 335, 336, 8 U.S.C. §§ 1421, 1446, 1447 (1988 & Supp. II 1990).

20. INA §§ 201-203, 8 U.S.C. §§ 1151-1153 (1988 & Supp. II 1990).

21. INA §§ 212, 241, 8 U.S.C. §§ 1182, 1251 (1988 & Supp. II 1990).

exclusion specify actions and conditions that bar an alien from entering the United States in the first place.[22] The grounds for deportation specify actions and conditions that can be used to subsequently expel an alien after she has entered.[23] Persons who enter as immigrants become eligible for naturalization after five years of residence. Persons who enter as non-immigrants may become eligible under certain limited circumstances (the most common is marriage to a U.S. citizen) for "adjustment of status" to that of immigrant.[24]

The immigration system is administered by the State and Justice Departments. Consular officers stationed in foreign countries are State Department officials responsible for issuing visas to aliens who petition for non-immigrant visas and who demonstrate their qualifications to enter.[25] For persons who wish to enter as immigrants, a U.S. citizen or a lawful permanent resident must file a "visa petition" on the alien's behalf, the alien must meet all of the requirements for the type of visa under which she seeks to enter, and there must be a visa of that type available.[26]

The Justice Department assumes responsibility for enforcing and administering the remainder of the immigration law.[27] The Attorney General delegates authority to two major units within the Justice Department, the Immigration and Naturalization Service (INS) and the Executive Office of Immigration Review (EOIR).[28] The INS has a central office in Washington D.C., four regional offices, and 34 district offices which are staffed by immigration examiners who rule on visa petitions and a variety of other matters, and by INS inspectors who examine persons arriving at designated ports of entry.[29] The EOIR is the adjudicative branch and consists of immigration judges and the Board of Immigration Appeals (BIA).[30] Immigration judges are primarily responsible for hearing exclusion and deportation cases brought by the INS. Decisions of the immigration judges are appealable to the BIA, a five-member body appointed by the Attorney General.[31] BIA decisions, in turn, are appealable in the regular federal court system.[32]

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22. INA § 212, 8 U.S.C. § 1182 (1988 & Supp. 1990).
23. INA § 241, 8 U.S.C. § 1251 (1988 & Supp. II 1990).
24. INA § 245, 8 U.S.C. § 1255 (1988 & Supp. II 1990).
25. INA §§ 104, 221, 222, 8 U.S.C. §§ 1104, 1201, 1202 (1988 & Supp. II. 1990). *See also* ALEINIKOFF & MARTIN, *supra* note 4, at 115-17.
26. INA §§ 204-206, 8 U.S.C. §§ 1154-1156 (1988 & Supp. II 1990). *See also* ALEINIKOFF & MARTIN, *supra* note 4, at 391-94.
27. INA § 103, 8 U.S.C. § 1103 (1988 & Supp. II 1990).
28. ALEINIKOFF & MARTIN, *supra* note 4, at 101-04.
29. *Id.*
30. *Id.*
31. *Id.* at 111-14.
32. *Id.*

B. The Exclusion of Lesbians and Gay Men: Legislative History Prior to the 1990 Act

From the colonial period until well into the nineteenth century, immigration into the United States was largely unrestricted, subject only to the exclusion of those deemed criminal or unable to provide for themselves.[33] Starting in the 1880's, Congress enacted a series of explicitly racist and restrictive admissions statutes, which sought to control both the number and, for the first time in the nation's history, the racial and cultural type of immigrants who could enter the country.[34] Several statutes barred immigrants of a particular racial or national origin.[35] National origins quotas governed immigration from countries that were not barred. The 1921 Quota Act and the 1924 National Origin Act established a national origins quota system that gave preference to immigrants who were perceived as easily assimilable into Anglo-Saxon culture.[36] The McCarran-Walter Act of 1952 consolidated this restrictive policy by setting permanent quotas that allocated the great majority of available immigrant slots to the United Kingdom, Germany, and Ireland.[37] The United States maintained a racially-based policy until 1965 when Congress abolished the national origins quota system in favor of admissions criteria that emphasized family unity and occupational skills.[38] The 1990 Act retained the 1965 admission criteria but shifted the balance between family-based and employment-based immigration by tripling the number of immigrants granted entry because of their occupational and educational status.[39]

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33. *See* HOUSE COMM. ON THE JUDICIARY, 100TH CONG., 2D SESS., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS, 5-6 (Comm. Print 1988) [hereinafter GROUNDS FOR EXCLUSION].

34. GROUNDS FOR EXCLUSION, *supra* note 33, at 6-27; MILTON R. KONVITZ, CIVIL RIGHTS IN IMMIGRATION 1-28 (1953); SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY (SCIRP), U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT 92, 161-216 (1981) [hereinafter SCIRP STAFF REPORT].

35. Chinese Exclusion Acts, ch. 141, 18 Stat. 477 (1875), ch. 126, 22 Stat. 58 (1882), ch. 376, 22 Stat. 214 (1882) (prohibiting immigration from China); Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (excluding persons from India, parts of Russia, Arabia, Afghanistan, Siam, and the East Indian Islands); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (excluding Japanese immigrants and immigrants from Korea, Burma, Malaysia, Polynesia, New Zealand, and Tahiti). *See also* KONVITZ, *supra* note 34, at 4-8 (discussing racially-based immigration laws); SCIRP STAFF REPORT, *supra* note 34.

36. Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5. Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153. *See also* KONVITZ, *supra* note 34, at 10-16; SCIRP STAFF REPORT, *supra* note 34.

37. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). *See also* KONVITZ, *supra* note 34, at 12; SCIRP STAFF REPORT, *supra* note 34.

38. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911. *See also* SCIRP STAFF REPORT, *supra* note 34.

39. INA §§ 201-203, 8 U.S.C. §§ 1151-1153 (1988 & Supp. II 1990). *See also* C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE, SPECIAL SUPPLEMENT: THE IMMIGRATION ACT OF 1990 8-10 (1991).

In addition to establishing criteria for admission into the United States, immigration statutes from the colonial period through the 1990 Act have also listed an increasing number of grounds of exclusion on which aliens can be prohibited from entering or forced to leave the country.[40] The earliest colonial statutes prohibited the entry of criminals, paupers, and those with mental or physical debilities.[41] Subsequent statutes at the federal level expanded the list of excludables to include polygamists, anarchists, prostitutes, vagrants, persons convicted of crimes involving moral turpitude, persons with contagious diseases, and illiterates.[42]

Enacted in 1952 over President Truman's veto, the McCarran-Walter Act institutionalized McCarthy-era xenophobia and paranoia about the threat of political subversion by legislating the most dramatic expansion of the grounds for exclusion in the nation's history.[43] A major impetus behind the 1952 Act was the concern, as voiced by Senator McCarran, that "our present laws are shot through with weaknesses and loopholes, and . . . criminals, Communists, and subversives of all descriptions are even now gaining admission into this country like water through a sieve and we cannot under our present laws effectively exclude or deport them."[44] In response to this perceived crisis, the 1952 Act excluded narcotics laws violators, addicts, persons entering the country to engage in immoral sexual acts, persons entering under false statements, persons assisting illegal immigration, and, most notoriously, Communists and homosexuals.[45]

The 1952 Act excluded lesbians and gay men on medical grounds by placing homosexuals under the general category of "aliens afflicted

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40. *See generally* GROUNDS FOR EXCLUSION, *supra* note 33, at 5-27 (summarizing changing grounds of exclusion and deportation under U.S. immigration law).

41. *Id.* at 5-6. *See also* E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 390 (1981).

42. Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477 (excluding prostitutes and convicted felons); Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 (excluding "lunatics," "idiots," and those liable to become a public charge); Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084 (excluding polygamists, "persons suffering from a loathsome or a contagious disease," and "persons who have been convicted of a felony or other . . . crime or misdemeanor involving moral turpitude"); Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (excluding anarchists); Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 898-99 (excluding aliens convicted of a crime or misdemeanor involving moral turpitude); Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875-78 (excluding illiterates). *See* GROUNDS FOR EXCLUSION, *supra* note 33, at 6-16.

43. Immigration and Nationality Act of 1952, Pub. L. No. 82-414. *See* GROUNDS FOR EXCLUSION, *supra* note 33, at 26-27; SCIRP STAFF REPORT, *supra* note 34, at 723-97.

44. 98 CONG. REC. 8254 (1952).

45. Immigration and Nationality Act of 1952, INA § 212(a), Pub. L. No. 82-414, 66 Stat. 163, 182 (repealed 1990) (listing grounds for exclusion). *See especially* INA § 212(a)(4) (exclusion of "aliens afflicted with psychopathic personality, epilepsy, or a mental defect"), and INA §§ 212(a)(27)-(29) (ideological exclusions). *See also* GROUNDS FOR EXCLUSION, *supra* note 33, at 26-27 (summarizing exclusions under 1952 Act).

with a psychopathic personality, epilepsy or a mental defect."[46] This categorization reflected the contemporary dominant view that homosexuality was a mental illness.[47] It also had the advantage of investing what might otherwise have seemed an exercise in bigotry with the authority of medical science. Deferring to the medical expertise of the Public Health Service (PHS),[48] legislators abandoned an initial draft of the Act that had specifically named "homosexuals and sex perverts"[49] as an excludable class. The PHS voiced concern about the difficulty of diagnosing homosexuality.[50] It advised the legislature to use the more general language of "psychopathic personality or mental defect" to make the diagnosis of covert homosexuals easier.[51] Congress accepted this recommendation and adopted the more general language, but registered the caveat that "[t]his change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."[52]

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46. The 1952 Act, INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990), excluded "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect," and grouped homosexuality with six other medical grounds for exclusion: mental retardation; insanity; one or more attacks of insanity; narcotic drug addiction or chronic alcoholism; dangerous contagious disease; physical defect, disease, or disability that may affect ability to earn a living. INA §§ 212(a)(1)-(3), (5)-(7), 8 U.S.C. §§ 1182(a)(1)-(3), (5)-(7) (1988) (repealed 1990). In 1967, Congress amended the INA to replace epilepsy with "sexual deviation." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending 8 U.S.C. § 1182(4)) (repealed 1990).

47. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1952) (listing homosexuality as a type of "sociopathic personality disturbance"). For a general history of the characterization of homosexuality as a mental illness, see RICHARD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981).

48. The Public Health Service (PHS) is an agency in the Department of Health and Human Services, headed by the Attorney General. PHS doctors are authorized to examine entering aliens at ports of entry and overseas. *See* INA §§ 234, 236(d), 8 U.S.C. §§ 1224, 1226(d) (1988 and Supp. II 1990).

49. *See* S. REP. No. 1515, 81st Cong., 2d Sess. 345 (1950) (recommending that the category of "mental defectives" under the 1917 Act be amended to include "homosexuals and sex perverts"). *See also* S. 3455, 81st Cong., 2d Sess. (1950), and S. 716, 82d Cong., 2d Sess. (1951) (specifically excluding "homosexuals and sex perverts").

50. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis.

REPORT OF THE PUBLIC HEALTH SERVICE ON THE MEDICAL ASPECT OF H.R. 2379, H.R. REP. No. 1365, 82d Cong., 2d Sess., 46, 47 (1952) [hereinafter 1952 HOUSE REPORT], *reprinted in* 1952 U.S.C.C.A.N. 1653, 1701.

51. The PHS reasoned that this general language included homosexuals, and that "[i]n those instances in which the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect." *Id.* at 47.

52. S. REP. No. 1137, 82d Cong., 2d Sess. 9 (1952). *See also* 1952 HOUSE REPORT, *supra* note 50, at 42-48, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1701 (accepting PHS recommendation).

The 1952 Act also specified the procedure the INS was required to follow in order to exclude or deport individuals on one of the medical grounds. According to the statutory procedure, the INS referred any person suspected of homosexuality, or any other excludable mental or physical condition, to a PHS official for an examination.[53] The PHS official diagnosed the individual, certified the existence of a psychopathic personality or other condition, and issued a "Class A certificate" to the INS officer.[54] This certificate subsequently constituted the sole evidence for exclusion or deportation at the exclusion or deportation hearing.[55]

The original McCarran-Walter provision effectively served its exclusionary purpose until 1963 when the Ninth Circuit declared that the term "psychopathic personality" failed to provide sufficient notice that it included homosexuality.[56] Congress responded in 1965 by adding "sexual deviation" to the provision, apparently to avoid any ambiguity about its intention to exclude homosexuals.[57] In 1967, the Supreme Court in *Boutilier v. INS*[58] rendered this addition redundant by rejecting the argument that the term "psychopathic personality" was unconstitutionally vague. In a much-criticized decision,[59] the Court examined the legislative history of the provision and found a clear Congressional intent to exclude homosexuals.[60] Despite abundant evidence that Con-

53. INA §§ 232, 234, 8 U.S.C. §§ 1222, 1224 (1988).

54. INA § 234, 8 U.S.C. § 1224 (1988). There are three kinds of medical certificates. A Class A certificate constitutes a definite, as opposed to an inconclusive, diagnosis. *See* C. GORDON & H. ROSENFIELD, 1A IMMIGRATION LAW AND PROCEDURE §§ 3.15B, 3.15C (Rev. ed. 1982).

55. INA § 236(d), 8 U.S.C. § 1226(d) (1988) (stating that the decision of the immigration judge "shall be based solely upon such certification").

56. The court held that "the statutory term 'psychopathic personality', when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein." Fleuti v. Rosenberg, 302 F.2d 652, 658 (9th Cir. 1962), *rev'd on other grounds*, 374 U.S. 449 (1963).

57. Act of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 8 U.S.C. § 1182(a)(4) (repealed 1990). *See also* S. REP. No. 748, 89th Cong., 1st Sess. 18-19 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3337 (noting the 1962 decision that found "psychopathic personality" too vague to include homosexuality and stating that "[t]o resolve any doubt the Committee has specifically included the term 'sexual deviation' as a ground of exclusion"). As in 1952, however, Congress relied on the then-current psychiatric terminology of "sexual deviation" in lieu of naming homosexuality directly.

58. 387 U.S. 118 (1967).

59. *See id.* at 134-35 (Douglas, J., dissenting); William N. Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 651-59 (1990); Thomas A. Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 47-54 (1988); Peter N. Fowler & Leonard Graff, *Gay Aliens and Immigration: Resolving the Conflict Between Hill and Longstaff*, 10 U. DAYTON L. REV. 89, 628-29 (1985); and Samuel M. Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 306-08 (1984).

60. "The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals such as petitioner." *Boutilier*, 387 U.S. at 120.

gress had deferred to medical expertise in drafting the provision,[61] the Court held that "psychopathic personality" was a legal term of art independent of its clinical meaning in medical discourse, and, as such, clearly included homosexuality.[62]

A new difficulty with using the provision to exclude lesbians and gay men emerged in 1979 when the PHS, six years after the American Psychiatric Association had removed homosexuality from its official list of disorders,[63] informed the INS that it would no longer certify homosexuals as psychopathic personalities.[64] This new PHS policy placed the INS in an apparently insoluble dilemma. Because the INA required the INS to obtain official medical certification from the PHS before excluding an alien under the "psychopathic personality" provision,[65] INS officials were left with the choice of either no longer excluding lesbians and gay men, or of violating the mandated statutory exclusion procedure.

The Department of Justice reacted in 1980 by announcing that although it had "the legal obligation to exclude homosexuals from entering the United States," it would exercise that obligation "solely upon the voluntary admission by the alien that he or she is homosexual."[66] The Justice Department announced that it was directing INS inspectors to refrain from asking any questions about sexual orientation during initial entry inspections. Only if an alien volunteered the information that he or she was homosexual, or if a third party arriving at the same time identified the alien as a homosexual, was the inspector to deny the person entry.[67] In practice, firsthand reports by lesbians and gay men seeking to enter the country suggest that many INS inspectors continued both to question entering aliens about their sexual orienta-

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61. *Id.* at 121-22.

62. "We . . . conclude that the Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts." Congress "was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics." *Id.* at 122, 124.

63. American Psychiatric Association Press Release (Dec. 15, 1973) (stating that homosexuality "by itself does not necessarily constitute a psychiatric disorder"). In 1973, the APA removed homosexuality from the Diagnostic and Statistical Manual (DSM-III). *See* BAYER, *supra* note 47, at 101-78.

64. Memorandum from Julius Richmond, Assistant Secretary for Health, United States Department of Health, Education, and Welfare, to William Foege, Director, CDC, and George Lythcott, Administrator, HSA (Aug. 2, 1979), *reprinted in* 56 INTERPRETER RELEASES 398-99 (1979).

65. *See supra* notes 53-55 and accompanying text.

66. *Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual*, Press Release of the Department of Justice (Sept. 9, 1980) [hereinafter *Guidelines*]. *See also* 62 INTERPRETER RELEASES 166, 166-67 (1985), and C. GORDON & S. MAILMAN, 2 IMMIGRATION LAW AND PROCEDURE § 2.38B(1) at 2-274 (1989). The Office of Legal Counsel of the Department of Justice had informed the INS that it was legally obliged to enforce the exclusion of lesbians and gay men, despite the new PHS policy. Memorandum Opinion for the Acting Commissioner, INS (No. 79-85), 3 Op. Off. Legal Counsel 457 (1979).

67. *Guidelines*, *supra* note 66. *See also* GROUNDS FOR EXCLUSION, *supra* note 33, at 81.

tion, and to exclude persons appearing to be or suspected of being homosexual.[68]

The courts divided on the legality of relying on voluntary admissions as a solution to the dilemma created by the new PHS policy. In *Hill v. INS*, the Ninth Circuit ruled that exclusion under the "psychopathic personality" provision could only be effected through medical certification, in effect holding that the exclusion of lesbians and gay men was longer legally enforceable.[69] In *In re Longstaff*,[70] however, the Fifth Circuit disagreed, holding that medical certification was not a necessary prerequisite for exclusion as a psychopathic personality. The *Longstaff* court reasoned that because even PHS doctors would have to rely on the alien's own statements about his or her identity and behavior, a direct admission of homosexuality should suffice.[71] The court also relied on *Boutilier*'s holding that the phrase "psychopathic personality" is a legal rather than a medical term, and that Congress intended to exclude homosexuals regardless of their medical status.[72]

C. The 1990 Act

The Supreme Court had not resolved this conflict between the circuits when the 1990 Act eliminated the provision excluding those "afflicted with a psychopathic personality, sexual deviation, or a mental defect" altogether.[73] The terminology used in the provision was medically obsolete.[74] Moreover, the question of how to identify lesbians and gay

68. *See Exclusion and Deportation of Aliens: Hearing on H.R. 1119 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 352 (1987) [hereinafter *Exclusion and Deportation of Aliens*] (testimony by Robert Lundy that Canadian women traveling to yearly Michigan Women's Music Festival subject to "salacious questioning" about sexual orientation by U.S. immigration officials); *Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 185-86 (testimony of Donald C. Knutson regarding INS detention of Mexican dress designer as a suspected homosexual). *See also* Silvers, *supra* note 59, at 298 (arguing that the INS policy of relying on voluntary admissions is "open to great abuse and local prejudice").

69. 714 F.2d 1470 (9th Cir. 1983). "Congress' intent to require a medical examination and certification of all aliens excluded on medical grounds is apparent on the face of the statute, corroborated by the legislative history, and supported by an unbroken string of administrative and judicial decisions." *Id.* at 1480.

70. 716 F.2d 1439, 1448 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).

71. "To require the INS to disregard the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary." *Id.* at 1445.

72. *Id.* at 1443.

73. The Immigration Act of 1990, 8 U.S.C. §§ 1101-1524 (1988 & Supp. II 1990). The Act eliminated former INS § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988).

74. *Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 62 (statement by James Mason, Director of Centers for Disease Control, conceding that "the medical exclusions have become outdated"); *id.* at 208-10 (statement by John Talbot, president of American Psychiatric Association, noting that homosexuality is no longer considered a psychiatric disorder); *Exclusion and Deportation of Aliens*, *supra* note 68, at 266-67 (statement by Robert Paul Cabaj, president of Association of Lesbian and Gay Psychiatrists, noting that "there are absolutely no possible mental health diagnoses concerning homosexuality, nor any way to view homosexuality as pathological by cur-

men had become an increasingly vexed one, especially after the PHS ceased to view homosexuality as a medically certifiable condition. The INS's stated policy of relying on voluntary admissions drew an openly arbitrary line between lesbians and gay men who, perhaps unaware of the consequences, announced their homosexuality to INS inspectors and those who did not. The enforcement of the procedure was, as even the State Department and some INS officials admitted, uneven and arbitrary.[75] In short, the legal uncertainties and the administrative inconsistencies surrounding the exclusion had made an already controversial provision[76] increasingly difficult to justify. In the decade of hearings and Congressional discussion that preceded the 1990 Act, those who supported its elimination spanned a broad ideological range, including the Carter, Reagan, and Bush administrations,[77] the Select Commission on Immigration and Refugee Policy,[78] the American Psychiatric Association,[79] and numerous civil rights organizations.[80]

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rent psychiatric thinking"); GROUNDS FOR EXCLUSION, *supra* note 33, at 83-84 (noting that "psychopathic personality" not recognized by DSM-III); 1988 HOUSE REPORT, *supra* note 5, at 19-20 (noting that "psychopathic personality" is no longer a recognized medical category, and that the exclusion of homosexuals is "inconsistent with contemporary phychiatric [sic] theories"); H.R. REP. No. 723(I), 101st Cong., 2d Sess., 56 (1990) [hereinafter 1990 HOUSE REPORT] (noting that "homosexuality is not a medical condition").

75. In 1983, a State Department official noted that "[t]he Supreme Court's denial of certiorari for *Longstaff* leaves the law in this area in a confused state. We are concerned that whatever position we take may result in unfairness to some visa applicants." *Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 204 (testimony of Joan Clark, Assistant Secretary of State for Consular Affairs). *See also id.* at 178 (testimony of Vickey Monrean, citing statement by former INS General Counsel Charles Gordon that "[t]he INS policy presents a clear danger of unequal enforcement").

76. *See* GROUNDS FOR EXCLUSION, *supra* note 33, at 80 ("The exclusion of homosexuals under section 212(a)(4) . . . has been the most controversial aspect of the grounds of exclusion in this category"); *Groups Vow Legal Action if U.S. Bars Homosexuals At Border*, CHI. TRIB., June 10, 1990, at C22 (reporting controversy over whether INS would enforce the provision to exclude self-announced lesbians and gay men traveling to the United States to attend an international AIDS conference).

77. *See Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 89 (testimony in support of elimination by James Mason, Department of Health and Human Services); *id.* at 195 (letter from Joan Clark, Department of State, supporting legislative reform); *id.* at 205 (letter from John F. Scruggs, Department of State, noting that Reagan administration follows Carter administration in supporting elimination of the exclusion); 1990 HOUSE REPORT, *supra* note 74, at 56 (noting that elimination of the exclusion was "formally endorsed by Administration witnesses" in 1984 and 1987).

78. *Exclusion and Deportation of Aliens*, *supra* note 68, at 305-09 (letter from Lawrence H. Fuchs, former Executive Director of SCIRP, noting that SCIRP strongly supports elimination of the exclusion on grounds of privacy, anti-discrimination, efficiency and fairness).

79. *See Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 208-10; *Exclusion and Deportation of Aliens*, *supra* note 68, at 266-67.

80. *See Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 177, 182, 213 (Gay Rights Advocates, Gay Rights National Lobby, Lambda Legal Defense & Education Fund); *Exclusion and Deportation of Aliens*, *supra* note 68, at 322, 352 (Human Rights Campaign Fund, National Gay & Lesbian Task Force, and Michigan Organization for Human Rights).

Sponsors and supporters of the 1990 Act and of the legislative proposals that preceded it also articulated more principled reasons for getting rid of the exclusion. They hoped that the removal of the categorical exclusion would place lesbians and gay men on an equal footing with their heterosexual counterparts and eliminate the pressure on lesbians and gay men to conceal their sexual orientation. As Senator Cranston argued in 1985, the "inconsistent enforcement discriminates against the openly homosexual person and those who appear homosexual even though they may not be, and may reward those who choose to hide their homosexuality."[81] Cranston also criticized "the unwise and harshly discriminatory underlying law, which attempts to use private sexual orientation as a criterion for judging who does and who does not qualify for admission to the United States," and argued that the new legislation would "end a form of discrimination which has no valid scientific or medical basis and which violates traditional American respect for the privacy and dignity of an individual."[82] In 1988, the House Committee on the Judiciary agreed that "the continued existence of this ground for exclusion in the statute is an affront to basic notions of privacy . . . . The Committee strongly supports the notion that a person's sexual orientation should be a private matter, and that homosexuality should no longer have any relevance to immigration."[83] The House Report accompanying the 1990 Act specified that "in order to make it clear that the United States does not view personal decisions about sexual orientation as a danger to other people in our society, the bill repeals the 'sexual deviation' exclusion ground."[84]

Both for pragmatic and for principled reasons, the 1990 Act eliminated the provision that had been used to exclude lesbians and gay men. There is currently no language in the statute that excludes or provides for the deportation of aliens based on lesbian or gay sexual orientation. The 1990 Act did not, however, explicitly provide new guidelines or standards about how to interpret or apply the crimes involving moral turpitude exclusion or the good moral character requirement.[85] As before the 1990 Act, the INS and the courts retain nearly unfettered discretion as to how to interpret these provisions.[86] As a result, although U.S. immigration law no longer explicitly discriminates on the basis of lesbian or gay identity alone, the INS and the courts have not reevaluated their old policy of interpreting these provisions in a manner

81. 131 CONG. REC. (1985).
82. *Id.*
83. 1988 HOUSE REPORT, *supra* note 5, at 35-36.
84. 1990 HOUSE REPORT, *supra* note 74, at 56.
85. The 1990 Act retained unchanged the "crimes involving moral turpitude" ground of exclusion and the "good moral character" requirement. INA §§ 212(a)(2)(A)(i)(I) & 316(a)(3), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & 1427(a)(3) (1988 & Supp. II 1990).
86. *See infra* Section II.

that singles out lesbians and gay men for disparate treatment.[87]

II. Remaining Problems of Discrimination in United States Immigration Law

Two provisions in the current INA are used to exclude and deport individuals for consensual homosexual conduct and expression: the "crimes involving moral turpitude" exclusion,[88] and the requirement that an alien prove "good moral character" in order to become a citizen or to qualify for certain benefits such as voluntary departure.[89] An alien convicted of a crime of moral turpitude (or who admits to acts constituting such an offense) can be excluded or deported[90] under the crimes involving moral turpitude provision. Conviction of a crime involving moral turpitude automatically bars a finding of good moral character.[91] Neither of these provisions explicitly singles out homosexual sexual activity as such. It is only because the INS and most courts interpret sodomy and public morality offenses as crimes of moral turpitude that these provisions have a disparate impact on lesbians and gay men. This section provides a history of these two provisions and of their use against lesbians and gay men.

A. The "Crimes Involving Moral Turpitude" Exclusion

1. History of the Exclusion

The 1891 Act first used the term "moral turpitude" to exclude "persons who have been convicted of a felony or . . . crime or misdemeanor involving moral turpitude."[92] Subsequent statutes retained the exclu-

87. In testimony before Congress in 1983, Abby Rubenfeld of Lamdba Legal Defense & Education Fund anticipated this problem, expressing concern that even if the categorical exclusion of lesbians and gay men was abolished, the crimes involving moral turpitude provision would continue to be interpreted in a discriminatory fashion. *Exclusion and Deportation Amendments of 1983*, *supra* note 1, at 213-15.

88. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1988 & Supp. II 1990).

89. To be eligible for citizenship, a lawful permanent resident must prove good moral character for the five year period preceding her application. INA § 316(a), 8 U.S.C. § 1427 (a) (1988 & Supp. II 1990). Aliens must also prove good moral character to qualify for suspension of deportation and for voluntary departure, a form of relief that allows an alien to leave the United States without an order of deportation and thus to avoid the five year waiting period for re-entry imposed on those who have been formally deported. INA § 244(a) & (e)(1), 8 U.S.C. § 1254(a) & (e)(1) (1988 & Supp. II 1990). Good moral character is also required for registry, a form of relief from deportation available to certain aliens for whom there is no record of lawful admission. INA § 249(c), 8 U.S.C. § 1259(c) (1988 & Supp. II 1990).

90. INA §§ 212(a)(2)(A)(i)(I) (exclusion) & 241(a)(2)(A)(i)-(ii) (deportation), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & 1251(a)(2)(A)(i)-(ii) (1988 & Supp. II 1990) (1988 & Supp. 1990).

91. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (1988 & Supp. 1990) lists conviction or admission of a crime of moral turpitude among the factors that automatically bar a finding of good moral character.

92. Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084.

sion,[93] and the 1952 Act expanded it to cover individuals who admitted to acts that constituted a crime involving moral turpitude, even in the absence of a conviction.[94] The 1990 Act retained moral turpitude as a ground of exclusion, barring the entry of any alien who commits or admits to acts constituting a crime of moral turpitude for which the maximum penalty is at least one year, or which resulted in a sentence of at least six months.[95]

The concept of crimes involving moral turpitude is also important for deportation purposes. Since 1891, persons who were excludable at the time of entry are also subject to deportation.[96] Under current law, any person who was excludable under the crimes involving moral turpitude exclusion at the time of entry is subject to deportation at any time thereafter, with no statute of limitations.[97]

Since 1917, U.S. immigration law has also included additional specific deportation provisions based on crimes involving moral turpitude.[98] Under both the 1952 and the 1990 Acts, persons who commit a crime of moral turpitude before entering the country are excludable.[99] If they manage to avoid exclusion and gain entry, they are deportable at any time and remain so indefinitely, with no statute of limitations. Those who commit even a single crime of moral turpitude within five years of entering the United States are deportable.[100] Those who com-

93. *See* Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213; Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898; and Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889.

94. The 1952 Act excluded "[a]liens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime." INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1988). The Senate Report noted that "[u]nder this change, immigration officers charged with administering the law will be able to determine from the information supplied by the alien whether he falls within the 'criminal' category of excludables, notwithstanding the fact that there may be no record of conviction or admission of the commission of a specific offense." S. REP. No. 1137, 82d Cong., 2d Sess. 9 (1952).

95. INA §§ 212(a)(2)(A)(i)(I) & (ii)(II), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & (ii)(II) (1988 & Supp. II 1990).

96. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

97. INA § 241(a)(1)(B), 8 U.S.C. 1251(a)(1)(B) (1988 & Supp. II) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable").

98. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889 (providing for deportation of any alien sentenced to a prison term of a year or more for the conviction "of a crime involving moral turpitude committed within five years after . . . entry" or sentenced more than once to such a term for conviction "of any crime involving moral turpitude, committed at any time after entry").

99. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1988 & Supp. II 1990).

100. INA § 241(a)(2)(A)(i)-(ii), 8 U.S.C. § 1251(a)(2)(A)(i)-(ii) (1988 & Supp. II 1990) provides for the deportation of any alien who "is convicted of a crime involving moral turpitude committed within five years after the date of entry, and either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer."

Under the so-called "re-entry doctrine," the word "entry" in the INA refers to every entry, not just to the first one. Thus, every alien (including those who are permanent residents) is subject to the grounds of exclusion every time she leaves the

mit more than one crime of moral turpitude after entry are deportable at any time, again with no statute of limitations.[101]

The decision as to whether a particular offense involves moral turpitude is almost wholly within the discretion of the INS and the courts. U.S. immigration law has never defined or provided guidelines to identify a crime of moral turpitude.[102] Although the concept of moral turpitude has a long legal history and appears in a variety of legal contexts,[103] it has no fixed content. As a leading immigration treatise notes, "[m]oral turpitude hardly can be characterized as a precise and easily defined term. Indeed, its flexibility apparently evinces a design to accomodate the legislative command of changing norms of behavior."[104] In 1950, the Senate Judiciary Committee considered and ultimately rejected the argument that the concept of moral turpitude gives judges and immigration officials, especially consular officers, too much discretion in determining which crimes involve moral turpitude.[105] In 1951, the Supreme Court also rejected the argument that the term is so

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country and returns to the U.S. United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933). There is an exception to the re-entry doctrine if the alien's absence from the U.S. was "brief, casual and innocent," and did not "meaningfully interrupt his continuous physical presence." Rosenberg v. Fleuti, 374 U.S. 449 (1963). The interaction of the re-entry doctrine and the crimes involving moral turpitude exclusion means that an alien in the United States who commits a crime of moral turpitude, subsequently leaves the country and then attempts to re-enter would be excludable.

101. INA § 241(a)(2)(A)(ii), 8 U.S.C. § 1251(a)(2)(A)(ii) (1988 & Supp. II 1990) provides that "[a]ny alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."

102. *See* ALEINIKOFF & MARTIN, *supra* note 4, at 513-17 (discussing statutory history of moral turpitude and noting that lack of statutory definition has left interpretation to the courts).

103. Moral turpitude is used as a standard of conduct in the disbarment of attorneys, revocation of licenses, impeachment of witnesses, and termination of municipal employment. The definition and use of the term in any of these contexts, however, is not necessarily binding in an immigration law context. *See* ALEINIKOFF & MARTIN, *supra* note 4, at 522.

104. C. Gordon & H. Rosenfeld, 1A IMMIGRATION LAW AND PROCEDURE 4 (rev. ed. 1987). The *Foreign Affairs Manual* defines moral turpitude as:

> [A]nything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. It must not be merely mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.

9 FAM 40.7(a)(9), N4.2.

105. The American consul at Marseille, France, stated that while the visa instructions define moral turpitude as an act which in itself is one of baseness, vileness, or depravity, the applicability of the excluding provision often depends on what the individual officer considers to be baseness, vileness, or depravity. He suggested that there be a listing of crimes and circumstances comprehended within the meaning of moral turpitude.

S. Rep. No. 1515, 81st Cong., 2d Sess. 351 (1950).

vague and meaningless that it constitutes a violation of due process.[106] The 1952 Act incorporated the concept and the 1990 Act retained it without further discussion.[107]

Despite the uncertainty surrounding the definition of moral turpitude, certain aspects of its application in the immigration context are settled. State Department regulations specify that the acts in question must be criminal in the jurisdiction in which they took place.[108] Conversely, a foreign conviction can serve as a basis for a finding of moral turpitude only if the underlying conduct is also criminal by U.S. standards.[109] State Department regulations also stipulate that "[a] determination that a crime involves moral turpitude shall be based upon the moral standards generally prevailing in the United States."[110] How to identify and define these moral standards is left to the courts, who must determine whether or not an offense involves conduct that is inherently immoral. As the BIA recently reaffirmed, "[m]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[111]

It is also well settled that the circumstances surrounding the commission of the offense are not relevant to a finding of moral turpitude. The relevant issue is whether the

> law inherently involves moral turpitude . . . If we find that the violation of the law under any and all circumstances involves moral turpitude, we *must* conclude that *all* convictions under that law involved moral turpitude although 'the particular acts evidence no immorality.' If, on the other hand, we find that the law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, we *must* rule that *no* conviction under that law involves moral turpitude, although in the particular instance conduct was immoral.[112]

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106. Jordan v. De George, 341 U.S. 222 (holding that case law provides the term with sufficient definiteness).

107. *See supra* notes 94-101 and accompanying text.

108. [B]efore a finding of ineligibility under INA § 212(a)(9) may be made because of an admission of the commission of acts which constitute the essential elements of a crime involving moral turpitude, it must first be established that the acts constitute a crime under the criminal law of the jurisdiction where they occurred.

22 CFR 40.7(a)(9)(i).

109. Matter of Ramirez-Rivero, 18 I. & N. Dec. 135 (BIA 1981).

110. 22 CFR 40.7(a)(9)(i).

111. Matter of Short, Int. Dec. 3125 (BIA 1989).

112. Matter of R., 6 I. & N. Dec. 444, 448 (BIA 1954) (emphasis in original). In Castle v. INS, 541 F.2d 1064, 1066 n.5 (4th Cir. 1976), the court explained:

> Congress did not intend to saddle the Immigration Service and the courts with the extremely difficult and time-consuming burden of developing the facts surrounding the commission of the crime for which the alien was convicted. An alien is subject to deportation under the statute for his conviction of a crime involving moral turpitude, not for his commission of an act involving moral turpitude. The focus of the statute is on the type of crime commit-

Only when a statute encompasses some offenses that involve moral turpitude and some that do not may the court inquire into the facts and circumstances of the conviction. And even then, the court may only consult the record of conviction to determine the specific offense committed.[113]

2. *Impact on Lesbians and Gay Men*

Since the 1952 Act introduced language specifically designed to exclude homosexuals,[114] judicial interpretation of the crimes involving moral turpitude exclusion has been heavily influenced by the categorical exclusion of lesbians and gay men under the 1952 Act. In theory, the requirement that every possible offense under a statute must involve moral turpitude is a demanding standard.[115] In practice, however, when confronted with broad public morality statutes that criminalize a wide range of conduct, courts have routinely held that only those offenses that involve homosexual conduct are crimes of moral turpitude. In a 1959 case, for example, the Second Circuit upheld the deportation of a man convicted of homosexual solicitation under a New York disorderly conduct statute that also encompassed many other specific offenses.[116]

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ted rather than on the factual context surrounding the actual commission of the offense.

See also U.S. v. Neelly, 208 F.2d 337 (7th Cir. 1953); Okabe v. INS, 671 F.2d 863 (5th Cir 1982); Matter of Esfandiary, 16 I. & N. Dec. 659 (BIA 1979); Matter of Short, Int. Dec. 3125 (BIA 1989).

113. Matter of Esfandiary, 16 I. & N. Dec. 659 (BIA 1979); Matter of Short, Int. Dec. 3125 (BIA 1989).

114. *See supra* notes 45-52 and accompanying text.

The 1917 Act excluded persons of "constitutional psychopathic inferiority," but this provision does not seem to have been drafted with homosexuality in mind and was not used to exclude lesbians or gay men before 1952. Pub. L. No. 64-301, § 3, 39 Stat. 874-75 (1917). In a 1946 case, for instance, a permanent resident who entered the United States from Canada in 1926 was convicted of "committing an unnatural and lascivious act with a male person" in Massachusetts in 1938, and with "open and gross lewdness and lascivious behavior in the presence of two males" in Massachusetts in 1943. On the basis of these two convictions, he was ordered deported under the 1917 Act, "on the ground that he has been sentenced more than once to imprisonment for a term of 1 year or more for the commission subsequent to entry of a crime involving moral turpitude." The possiblity that he might be deportable under the "constitutional psychopathic inferior" provision was not raised. Matter of J., 2 I. & N. Dec. 533 (BIA 1946). *See also* Matter of W., 5 I. & N. Dec. 578 (1953) (deporting alien under 1917 Act for admission to crime of gross indecency); Note, *The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority Over Medical Exclusions*, 17 U. MICH. J. L. REF. 331, 333-34 (1984) (noting BIA's exclusive reliance on "moral turpitude" provision to exclude homosexuals prior to 1952).

After 1952, some courts retroactively interpreted the 1917 Act to exclude homosexuals who entered the country before 1952. *See infra* notes 123-34, 135 and accompanying text.

115. *See supra* notes 112-13 and accompanying text.

116. Babouris v. Esperdy, 269 F.2d 621, 621-22 (2d Cir. 1959). The New York Penal Code provided in relevant part that anyone who "[f]requents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness; . . . shall be deemed to have committed the offense of disorderly conduct." *Id.* at 621.

"We do not hold . . . or even suggest or intimate," the concurrence specified, "that a conviction for violation of any of the other paragraphs of this broad state statute . . . is a ground for deportation under the Federal Act."[117]

Similarly, because the "psychopathic personality" provision authorized exclusion based on sexual orientation alone, courts have readily found evidence of moral turpitude in convictions involving homosexual conduct even when offenders were charged under vague statutes that did not define the proscribed behavior and even when the conduct criminalized lacked the elements of violence or abusiveness present in other sexual crimes deemed to involve moral turpitude. In a 1956 case, for instance, a permanent resident who entered the country in 1947 had been convicted of "gross indecency" in Toronto in 1940.[118] Reversing the immigration judge's order of deportation, the BIA initially held that he could not be denied admission for committing a crime of moral turpitude because the statute failed to provide any definition of "gross indecency."[119] In fact, neither the statute nor the record of arrest revealed anything about the acts involved beyond the fact that they took place between the defendant and another man.[120]

On appeal, however, the INS argued that, regardless of whether the statute defined an offense of moral turpitude, the conviction "provided a substantial basis for concluding that the respondent was inadmissible on medical grounds" as a homosexual.[121] Although the BIA did not endorse this argument directly, it reversed its earlier decision and reinstated the order of deportation, summarily concluding that because all reported cases under the offense of gross indecency involved moral turpitude, it was permissible to assume that the case at issue did so as well. Remarkably, the BIA did not discuss the fact that all of the reported cases cited involved acts of sexual assault against children or minors.[122]

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117. *Id.* at 622-23. *Accord* Hudson v. Esperdy, 290 F.2d 879 (2d Cir. 1961) (citing *Babouris* to uphold deportation of two men convicted of homosexual solicitation under New York disorderly conduct statute), *cert. denied*, 368 U.S. 918 (1961); Wyngaard v. Kennedy, 295 F.2d 184 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926 (1961); Matter of P., 9 I. & N. Dec. 293 (BIA 1961) (citing *Babouris* to order deportation of individual convicted of disorderly conduct for homosexual acts under New York statute); Matter of Alfonso-Bermudez, Int. Dec. 1733 (BIA 1967) (holding that disorderly conduct conviction for homosexual acts under similarly broad California disorderly conduct statute involved moral turpitude).

118. Matter of H., 7 I. & N. Dec. 359, 359-60 (BIA 1956).

119. *Id.* at 360. In so holding, the BIA was following its own precedent in a 1945 case involving the same homosexual offense under the same Canadian statute. Matter of Z., 2 I. & N. Dec. 316, 316-17 (BIA 1945) (no crime of moral turpitude because statute does not define "gross indecency"). Ordinarily, the terms of the offense as defined in the statute are alone dispositive of whether or not a crime involves moral turpitude. *See supra* notes 112-13 and accompanying text.

120. Matter of H., 7 I. & N. Dec. 359 at 360 (noting that "the record of conviction was of no assistance in ascertaining the exact act of gross indecency which was involved").

121. *Id.* at 360.

122. *Id.* at 360-61.

Given the legislative exclusion of lesbians and gay men under the "psychopathic personality" provision, the equation of homosexuality and child abuse required no further justification.

As this case suggests, the "crimes involving moral turpitude" provision and the categorical exclusion of homosexuals were mutually reinforcing—if the evidence supporting one provision was insufficient, the same evidence could often be used to mobilize the other in its stead. In cases involving a homosexual offense, as the *Flores-Rodriguez*[123] case made clear in 1956, the INS could use the conviction as a crime of moral turpitude, as evidence of homosexuality, or as both. Roberto Flores-Rodriguez had twice been convicted of disorderly conduct (specifically, of soliciting sex with men in a public place) in New York City.[124] The case turned on whether his concealment of these convictions in a visa application was material to his admissibility under the 1917 Act, the law in effect at the time of his entry.[125] "We hold," the majority opinion concluded, "that by the defendant's untrue answer . . . the [consular officer] was not put on notice to investigate, and we think an investigation could have proved that the immigrant was within one of the excluded classes."[126]

The majority held Flores-Rodriguez excludable under crimes of the moral turpitude provision, rejecting his argument that New York State's characterization of the act as an "offense" rather than a "crime" exempted him from the provision.[127] Less predictably, the majority also held him excludable under the "constitutional psychopathic inferior" and "mental defective" exclusions of the 1917 Act.[128] The opinion acknowledged the absence of any evidence that the drafters of the 1917 Act meant to include homosexuality under either category.[129] Nonetheless, repelled by what it deemed "the defendant's exhibitionistic antisocial proclivities," the majority equated the meanings of the 1917 and 1952 Acts and analyzed the defendant's conduct in terms of the contemporary psychiatric theories embodied in the 1952 "psychopathic personality" provision.[130] "It cannot be supposed," the majority concluded, "that Congress did not intend to include such undesirables within the excluded classes of immigrants."[131]

In an influential opinion,[132] the concurrence took issue with the majority's conflation of the 1917 and 1952 Acts, and with its reliance on psychiatric texts instead of legislative history. Anticipating the 1967

123. 237 F.2d 405 (2nd Cir. 1956).
124. *Id.* at 407.
125. *Id.* at 408-09.
126. *Id.* at 409.
127. *Id.* at 409-10.
128. *Id.* at 410-12.
129. *Id.* at 410.
130. *Id.* at 410-12.
131. *Id.* at 412.
132. *See infra* notes 136-40 and accompanying text.

Supreme Court holding in *Boutilier*,[133] the concurrence was alert to the potential dangers of tying the legal meaning of homosexuality in U.S. immigration law too closely to its far more complex and elusive meaning in psychiatric discourse. Regardless of psychiatric terms and theories, the concurrence argued, the legislative history of the 1952 Act clearly evinced an intent to exclude homosexuals. In its haste to find an underlying psychiatric rationale that would exclude homosexuals under the language of both the 1917 and the 1952 Acts, the majority ran the risk of placing the legal interpretation of the Act at the mercy of shifts in psychiatric theory.[134]

Ironically, the disagreement between the majority opinion and the concurrence in *Flores-Rodriguez* allowed courts greater flexibility in interpreting the two Acts and actually made the exclusion of homosexuals easier. In cases governed by the pre-1952 law, courts could cite the majority opinion's psychiatric rationale to authorize using a homosexual offense as evidence of "constitutional psychopathic inferiority" under the 1917 Act.[135] In cases governed by the 1952 Act, courts could cite the concurrence to bypass the ambiguities of clinical discourse about homosexuality and use convictions of homosexual offenses as proof of a "psychopathic personality" under the 1952 law.

In *Matter of S.*,[136] for example, a lawful permanent resident who entered in 1952 was arrested and convicted in 1958 for soliciting a male police officer. The immigration judge found him deportable under the "crimes involving moral turpitude" provision, but not under the "psychopathic personality" provision.[137] The BIA, however, found him deportable on both counts despite conflicting expert testimony as to his homosexual tendencies. The PHS psychiatrist certified him as a "psychopathic personality with pathologic sexuality," but his own treating psychiatrist argued that he should be classifed as neurotic rather than psychopathic.[138] The Board cited the concurrence from *Flores-Rodriguez* in support of its conclusion that courts need not become entangled in the subtleties of psychiatric disputes about the origin and treatment of homosexuality.[139] Under the 1952 Act, the fact that he was convicted of a homosexual offense and admitted to a history of homosexual acts was enough to bring him within the legal meaning of "psychopathic

133. *See supra* notes 58-62 and accompanying text.

134. *Flores-Rodriquez*, 237 F.2d at 412-16 (Frank, J., concurring):

> I think it a mistake for my colleagues needlessly to embark—without a pilot, rudder, compass or radar—on an amateur's voyage on the fog-enshrouded sea of psychiatry .... [T]he government ... asks us to read into the 1917 Act the definitions which Congress adopted 35 years later—of the new language of the 1952 Act. This, of course, we cannot do.

135. *See, e.g.*, Matter of Rochelle, 11 I. & N. Dec. 436 (BIA 1965) (holding that "constitutional psychopathic inferiority" includes homosexuality).

136. 8 I. & N. Dec. 409, 410 (BIA 1959).

137. *Id.* at 409-10.

138. *Id.* at 410-15.

139. *Id.* at 414-15 (citing *Flores-Rodriguez* concurrence).

personality."[140]

In sum, although the 1990 Act eliminated the provision used to exclude lesbians and gay men because of their sexual orientation, judicial interpretation of the crimes of moral turpitude exclusion has been deeply marked by the 1952 Act, and the assumption that sodomy and public morality offenses are crimes of moral turpitude has become embedded in existing case law. Courts have interpreted the crimes of moral turpitude exclusion in the harsh light of the categorical exclusion of lesbians and gay men under the 1952 Act, interpreting convictions of homosexual offenses both as crimes of moral turpitude and as shorthand proof of "psychopathic personality."

B. "Good Moral Character" Requirement

1. History of the Requirement

The requirement that an alien seeking citizenship prove that he or she is of "good moral character" has been a constant feature of U.S. immigration law since the first naturalization statute of 1790.[141] A finding of good moral character is also a prerequisite to voluntary departure and other benefits under U.S. immigration law.[142] The burden of proving good moral character is on the alien.[143] Congress has offered only very sketchy guidance about how to define good moral character, and, as with "moral turpitude," the courts have interpreted the term at their own discretion.[144]

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140. As the court noted:

> The record shows that respondent is definitely within the class of 'homosexuals,' as the term is commonly understood, and within the contemplation of the law. Within Dr. A__'s psychiatric parlance respondent may not be a true homosexual, but . . . . If this man is not a homosexual, we would find it difficult to hold that anyone is a homosexual.

Id. at 415. *Accord*, Quiroz v. Neelly, 291 F.2d 906 (5th Cir. 1961) (deporting lesbian as "a psychopathic personality" despite testimony from two psychiatrists that she was not "psychopathic").

The use of homosexual offenses or admissions of homosexual acts as proof of homosexuality and thus of excludability was further solidified when the Supreme Court endorsed the position of the *Flores-Rodriguez* concurrence in *Boutilier*, *supra* notes 58-62 and accompanying text. *See, e.g.*, Lavoie v. INS, 418 F.2d 732 (9th Cir. 1969) (citing *Boutilier* to uphold deportation of man convicted of "a lewd, obscene, and indecent act" as a homosexual, despite court's recognition that he might not be classified as a homosexual under "scientific psychological standards").

141. More precisely, the 1790 Act required that an alien be of "good character." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103. The 1795 Act required "good moral character," the language that has been used ever since. Act of Jan. 29, 1795, ch. 20, §§ 1-2, 1 Stat. 414. *See* INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (1988 & Supp. II 1990) (requiring proof of good moral character in the five year period preceding the naturalization petition).

142. *See supra* note 89.

143. United States v. Schwimmer, 279 U.S. 644 (1929); Berenyi v. District Director, 385 U.S. 630 (1967).

144. In 1952, Congress attempted to clarify the good moral character requirement by providing a non-exhaustive list of persons automatically barred from proving good moral character. This list did not include homosexuals, but it did include per-

Since the 1950s, most courts have adopted the "common conscience" test developed by Judge Learned Hand in the 1930's and 40's.[145] Rejecting an earlier standard that denied a finding of good moral character to anyone convicted of criminal conduct under state or federal law,[146] Judge Hand sought to achieve more consistency in the enforcement of U.S. immigration law by judging good moral character according to a uniform national standard, defined as a national moral consensus or "the moral feelings, now prevalent generally in this country."[147] Some other courts have chosen to locate the relevant "common conscience" at the state or local community level.[148] Regardless of how the relevant community is defined, however, courts retain enormous discretion in defining and applying the "common conscience" standard.[149] The result, despite Judge Hand's intention to create more uniformity, has been an unpredictable patchwork of conflicting caselaw.[150]

2. Relation to Crimes Involving Moral Turpitude Provision

The crimes involving moral turpitude provision and the good moral character requirement are closely related. In 1952, Congress drafted a non-exhaustive list of behaviors that automatically barred a finding of good moral character, including conviction of a crime involving moral turpitude.[151] As a result, an alien convicted of a crime involving moral turpitude is also barred from a finding of good moral character, although the conviction must take place within the statutory five year

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sons convicted of a crime of moral turpitude. INA §§ 101(f)(1)-(8), 8 U.S.C. §§ 1101(f)(1)-(8) (1988).

145. Judge Hand first used the term "common conscience" in Schmidt v. United States, 177 F.2d 450-51 (2d Cir. 1949). *See also* Posusta v. United States, 285 F.2d 533, 535 (2d Cir. 1961) (Learned Hand, J.) (determining good moral character according to the "ethical standards current at the time" of the application). On the adoption of Judge Hand's standard by other courts, *see* Note, *Naturalization and the Adjudication of Good Moral Character: An Exercise in Judicial Uncertainty*, 47 N.Y.U. L. REV. 545, 551-57 (1972) [hereinafter *Judicial Uncertainty*]; Steven L. Strange, *Private Consensual Sexual Conduct and the "Good Moral Character" Requirement of the Immigration and Nationality Act*, 14 COLUM. J. TRANSNAT'L L. 357, 361-65 (1975).

146. *See, e.g.*, Estrin v. United States, 80 F.2d 105 (2d Cir. 1935) (denying naturalization to petitioner who had committed adultery in violation of state law and local community standards). For a summary of the case law using this standard, see Note, *Good Moral Character in Naturalization Proceedings*, 48 COLUM. L. REV. 622, 623-24 (1948).

147. United States v. Francisco, 164 F.2d 163 (2d Cir. 1947).

148. *See, e.g.*, Petition of B., 154 F. Supp. 633, 633-34 (D. Md. 1957).

149. As Judge Hand readily acknowledged, "it is a test incapable of exact definition; the best we can do is improvise the response that the 'ordinary' man or woman would make, if the question were put whether the conduct was consistent with 'good moral character'." *Posusta*, 285 F.2d at 535.

150. Numerous commentators have criticized the subjectivity and inconsistency of the caselaw on good moral character. *See* Strange, *supra* note 145; *Judicial Uncertainty*, *supra* note 145; Lisa H. Newton, *On Coherence in the Law: A Study of the "Good Moral Character" Requirement of the Naturalization Statute*, 46 TEMP. L.Q. 40 (1972); Comment, *Morality Under Naturalization and Immigration Acts*, 1 DEPAUL L. REV. 125 (1951).

151. *See supra* note 144.

period preceding the petition for naturalization.[152] The converse, however, is not true for even criminal behavior that bars a finding of good moral character is not necessarily deemed morally turpitudinous.[153]

3. Impact on Lesbians and Gay Men

When the courts adopted Judge Hand's common conscience standard, they also tended to adopt his relatively liberal view of private sexual conduct.[154] In the late 1940s and early 1950s, Judge Hand ruled that neither "promiscuous" sexual activity between unmarried heterosexuals nor adulterous heterosexual relationships necessarily barred a finding of good moral character,[155] and most courts readily followed his lead. In general, courts took the position that only private sexual behavior that threatened social institutions such as marriage and the family should bar a finding of good moral character.[156] The guiding principle was "to admit as citizens those who are likely to prove law-abiding and useful."[157] The judge in a 1958 California case summed up the increasingly liberal judicial view of private sexual conduct as follows:

> The satisfaction of sexual appetite is a peculiarly private matter, ordinarily concerning only the participants in the sexual act. It becomes a matter of official concern when some statute of the United States or of a State is violated. Otherwise, it will be treated by courts as an act of immorality if it be commercialized, as in the case of prostitution, or if illegitimate children are begotten. Likewise, open [sic] flaunting publicly what should

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152. INA § 101(f)(3), 8 U.S.C. 1101(f)(3) (1988 & Supp. II 1990) (stating that the offense must have taken place within the five year period preceding the naturalization petition).

153. *E.g.*, INA § 101(f)(4)-(5), 8 U.S.C. § 1101(f)(4)-(5) (1988 & Supp. 1990) states that any person "whose income derives primarily from illegal gambling activities" or "who has been convicted of two or more gambling offenses" is barred from a finding of good moral character, but the BIA has held that gambling is not a crime of moral turpitude. Matter of Gaglioti, 10 I. & N. Dec. 719 (BIA 1964); Matter of S., 9 I. & N. Dec. 688 (BIA 1962).

154. *See, e.g.*, Petition of Anzalone, 107 F. Supp. 770, 770-71 (D.N.J. 1952) (noting that "[a] more liberal view of sexual behavior has been taken by the courts in the past decade when passing on the moral character of petitioners for naturalization").

155. Schmidt v. United States, 177 F2d. 450, 452 (9th Cir. 1949)

> (We have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a 'good moral character'; but, . . . those were cases of continuous, though adulterous, union. We have now to say whether it makes a critical difference that the alien's lapses are casual, concupiscent and promiscuous, but not adulterous . . . . so far as we can divine anything so tenebrous and impalpable as the common conscience, these added features do not make a critical difference.);

Petitions of Rudder, 159 F.2d 695, 697-98 (2d Cir. 1947) (granting naturalization in a series of cases in which the petitioners were in longterm adulterous relationships because of failure or inability to adjust previous marital status through divorce). *See also infra* notes 296-98 and accompanying text.

156. *See, e.g.*, Petition of Anzalone, 107 F. Supp. at 771 (noting that "we must not forget that our civilization is built around a family relation which should be held as sacred as possible if we are not to become an amoral people").

157. Posusta v. United States, 285 F.2d 533, 536 (2d Cir. 1961) (Learned Hand, J.).

> be a private matter of promiscuity might adversely affect a petitioner's standing as a moral person.[158]

Before the early 1970's, however, courts were not willing to extend this liberal view to include private homosexual behavior. In part, this unwillingness stemmed from the fact that most states had sodomy statutes that criminalized sex between persons of the same gender. Illegality aside, however, courts also held that homosexuality in and of itself barred a finding of good moral character. In 1968, for instance, a New York court applied Judge Hand's standard to a lesbian seeking naturalization after living and working in the United States for fourteen years. The woman testified to having had a series of sexual relationships with women, both before her entry into the country and after. Citing a New Jersey court that found "[f]ew behavioral deviations . . . more offensive to American mores than . . . homosexuality," the New York court dismissed the woman's petition for citizenship despite the fact that her behavior was private and violated no law.[159]

Beginning in the early 1970's, however, a series of landmark cases held that private homosexual activity did not bar a finding of good moral character for immigration purposes. In 1971, a district judge in New York applied Judge Hand's test of "the ethical standards current at the time" to the case of Manuel Labady, an openly gay Cuban man petitioning for naturalization.[160] The court emphasized that

> all of his sexual acts have taken place in privacy, behind locked doors in hotel rooms. He has never engaged in such activity in any park, theatre, subway station, or any other public or semi-public place . . . . There is no suggestion that his homosexual activities could harm a marriage relationship.[161]

Citing the recent extension of the constitutional right of sexual privacy in *Griswold*,[162] the court held that

> the most important factor to be considered is whether the challenged conduct is public or private in nature. If it is public or if it involves a large number of other persons, it may pose a threat to the community. If, on the other hand, it is entirely private, the likelihood of harm to others is

158. *In re* Kielblock, 163 F. Supp. 687, 687-88 (S.D. Cal. 1958) (refusing to deny a finding of good moral character to woman who had sexual relationship with married man).

159. *In re* Schmidt, 56 Misc. 2d 456, 459-60 (N.Y. Sup. Ct. 1961)

> (Although the conduct of petitioner was not such as to be violative of any criminal statute, and although her activities were confined to her home and with persons with whom she lived, her admitted practices of these sexual deviations continually during the five years preceding the filing of her petition, are not, in the court's opinion, consistent with good moral character as the 'ordinary man or woman sees it.)

The court also cited the 1965 amendment to the INA excluding "sexual deviates." *Id.* at 459.

160. *In re* Labady, 326 F. Supp. 924, 926 (S.D.N.Y. 1971).

161. *Id.* at 926.

162. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that states may not prohibit sale of contraceptives).

> minimal and any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights.[163]

The court explicitly rejected the INS's argument that Labady had admitted to acts that violated the New York State sodomy law, and that this violation should bar a finding of good moral character.[164] The court argued that the New York statute probably applied only to public sex,[165] and noted that, in any event, the seriousness of his offense was comparable to heterosexual fornication, which did not bar a finding of good moral character despite its illegality in many states.[166] Private consensual sodomy, the court concluded, was no more "a violation of public morality" than its heterosexual analogue.[167] The court also surveyed "public attitudes toward private homosexual conduct," and noticed a growing reluctance to punish private homosexual behavior.[168]

In 1973, the Second Circuit cited *Labady* in support of its refusal to bar an alien petitioning for citizenship on the basis of his homosexuality, which was demonstrated by a string of past arrests for homosexual offenses (disorderly conduct and loitering).[169] Initially, the two cases seem quite different. *Labady* involved purely private and, at least in the court's opinion, legal behavior.[170] *Kovacs* involved a series of arrests for public sex. Labady had consistently admitted his homosexuality,[171] whereas Kovacs lied to the naturalization examiner about his past sexual conduct.[172] On these facts alone, *Kovacs* seems a startling expansion of the *Labady* holding, protecting public as well as private expression of homosexual identity.

The crucial additional fact, however, is that "there was no proof that Kovacs had engaged in any homosexual acts, public or private, within the statutory five year period of residence immediately preceding his petition."[173] Because of this absence of public offenses within the relevant five year period, the original hearing examiner recommended naturalization despite his suspicion that Kovacs had lied about his "homosexual proclivities" in the past.[174] At the final hearing, the immigration judge rejected the recommendation and denied the petition, cit-

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163. *Labady*, 326 F. Supp. at 927.
164. *Id.* at 928.
165. *Id.*
166. *Id.* at 929.
167. *Id.*
168. *Id.* at 929-30.
169. Kovacs v. United States, 476 F.2d 843 (2d Cir. 1973).
170. *See supra* notes 160-68 and accompanying text.
171. *Labady*, 326 F. Supp. at 925-26 ("Petitioner was a homosexual in Cuba and made this fact known to the Service authorities when he entered this country at the age of 14.").
172. *Kovacs*, 476 F.2d at 843-44.
173. *Id.* at 844. The statute provides that an alien need only prove good moral character for the five-year period preceding his petition for naturalization. *See supra* note 141.
174. *Kovacs*, 476 F.2d at 844.

ing Kovac's "lack of candor." The Second Circuit upheld the denial, but carefully noted that

> [p]etitioner is not being denied naturalization for his sexual activities—but rather for his lack of candor under oath. . . . if his apparently exemplary *public* behavior continues, a greater exhibition of candor at a later date might well lead to a different result in his efforts to become a citizen.[175]

In the end, *Kovacs* reaffirmed the emerging position that protection should be afforded only to private homosexual behavior.

In 1975, the Oregon District Court agreed in *In re Brodie* that private homosexual behavior did not violate the "common conscience" of the local community and thus did not automatically bar a finding of good moral character.[176] The court stressed that Brodie's homosexual identity was a private one, and emphasized the similarity between his behavior and that of similarly situated heterosexuals.[177] The court cited evidence of growing acceptance of homosexuality in Oregon, and held that "the community regards homosexual behavior between consenting adults with tolerance, if not indifference."[178]

One circumstance that had not yet been directly raised in this line of cases was that in which the alien seeking naturalization had been convicted or admitted to acts constituting a violation under a state sodomy law. The *Labady* court avoided this issue by holding that the New York statute did not apply to private consensual behavior.[179] In *Kovacs*, there had been no conviction of any homosexual offense during the five-year residence period relevant under the naturalization statute.[180] In *Brodie*, Oregon had decriminalized consensual sodomy.[181] A gay or lesbian alien who sought naturalization in a state with an enforceable sodomy statute, especially one that made sodomy a felony, would directly raise the issue of whether consensual homosexual sex was a crime involving

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175. *Id.* at 845 (emphasis added).

176. *In re* Brodie, 394 F. Supp. 1208 (D. Or. 1975). The case concerned the naturalization petition of a gay man honorably discharged from the U.S. military for "homosexual acts." The INS argued that Brodie would have been excludable under § 212(a)(4) when he entered the country, and that he could therefore not possibly meet the burden of proving good moral character. The court held that excludability at the time of entry did not automatically bar a finding of good moral character, and held itself bound to make an "independent factual determination of good moral character." *Id.* at 1208-09. Citing *Kovacs* and *Labady*, the court had "little difficulty finding that Brodie's conduct is acceptable by the ethical standards of the year 1975." *Id.* at 1209-10.

177. *Id.* at 1209-10:

> Although his partners have been men, his social and sexual behavior has not otherwise differed from that of many other persons 28 years old. Like most people, he is not sexually involved with minors. He does not use threat or fraud. He does not take or give money. Nor does he engage in sexual activity in parks, theaters, or any public places.

178. *Id.* at 1210.

179. *See supra* note 165.

180. *See supra* notes 173-75 and accompanying text.

181. *In re* Brodie, 394 F. Supp 1208, 1210 (D. Or. 1975).

moral turpitude that would bar a finding of good moral character. The 1980 case of *Nemetz v. INS*[182] finally brought this issue to the fore.

Horst Nemetz was a West German citizen who entered the United States in 1967 as a lawful permanent resident of Virginia, and who had owned and operated a successful business for several years.[183] When he petitioned for naturalization in 1976, the INS examiner questioned him extensively about his sexual activities with his male roommate. Nemetz revealed that he had sex with his roommate, but that he had never had or solicited sex in public.[184] Although Nemetz refused to answer questions about specific sexual acts, the INS examiner inferred that he had violated Virginia's sodomy statute, and had therefore committed a crime involving moral turpitude.[185] The district court and the Court of Appeals both accepted this inference.[186]

The Court of Appeals focused on the relatively unique status of private consensual sodomy as behavior that is criminalized in some states and perfectly legal in others.[187] Applying the "common conscience" standard, the court defined the issue as the appropriateness of using Virginia state law "to determine whether Nemetz had committed a crime of moral turpitude, that is, whether it is appropriate to look to state law to determine the issue of good moral character in naturalization matters."[188] The court of appeals did not merely argue that the common conscience standard must be sought at the national rather than the state or local level. More radically, it contended both that a federal standard should prevail, and that the federal standard should not take matters of private sexual morality into account. Citing the constitutional requirement of a "uniform rule of naturalization," the court held this requirement to mean that "whether a person is of good moral character for purposes of naturalization is a question of federal law."[189]

Ordinarily, immigration judges look to state criminal law, and the court acknowledged that, practically speaking, deference to state law would continue to be appropriate in most cases. "When use of state law defeats the uniformity requirement, however, the court must devise a federal standard by other means."[190] The court emphasized how rarely this circumstance will occur, given that state laws define most crimes in a fairly uniform manner. "The difficulty arises," the court noted, "primarily with respect to private acts which are the subject of radically different legislative treatment by the states."[191] The court denied, in other

182. 647 F.2d 432 (4th Cir. 1981).
183. *Id.* at 433, 437.
184. *Id.* at 433-34.
185. *Id.* at 434-35.
186. *Id.* at 435.
187. *Id.* at 436.
188. *Id.*
189. *Id.* at 435-36.
190. *Id.* at 436.
191. *Id.* In practice, the only two crimes for which this is the case are sodomy and adultery. *See infra* notes 296-305 and accompanying text.

words, that there is any federal interest in regulating private sexual behavior, and argued that "[t]he appropriate test in such cases is therefore whether the act is harmful to the public or is offensive merely to a personal morality."[192] In short, the court responded to the lack of consensus about the morality of private homosexual behavior by removing it from the purview of federal immigration law.

4. The Limits of Nemetz

The reach of *Nemetz* and the cases that preceded it was obviously limited by the exclusion of homosexuals under the "psychopathic personality" provision of the 1952 Act.[193] In each case, only a technicality protected the alien petitioning for naturalization from deportation under this provision as a person excludable at time of entry. In *Labady*, the fact that the petitioner had freely admitted his homosexuality to the INS when he entered the country at the age of fourteen estopped the INS from attempting to deport him later.[194] The petitioner in *Brodie* was exempt from deportation under a provision that gave special protection to individuals who had served a certain amount of time in the Armed Forces and received an honorable discharge.[195] In *Kovacs*, a PHS psychiatrist had already examined and certified Kovacs as a "psychopathic personality," and the INS had initiated deportation proceedings.[196] The INS discontinued the proceedings when the Ninth Circuit held the term "psychopathic personality" void for vagueness in *Fleuti v. Rosenberg*.[197] In *Nemetz*, the INS produced no conclusive evidence that Nemetz had been a certifiable homosexual at the time of his entry.[198] In sum, the exemption of private homosexual behavior from the good moral character analysis only came into play in the relatively infrequent case in which the alien had managed to avoid exclusion or deportation as a "psychopathic personality."

The reach of *Nemetz* was also limited in another respect as well, protecting the expression of lesbian and gay identity only within a very narrowly defined sphere of "privacy." *Nemetz* explicity held that the federal government has no interest in the private sexual behavior of homosexuals, and that such behavior is irrelevant to an analysis of good moral character.[199] In delimiting a highly circumscribed sphere of protected private activity, however, *Nemetz* simultaneously defined activity in the

192. *Nemetz*, 647 F.2d at 436.
193. *See supra* notes 45-52 and accompanying text.
194. 326 F. Supp. 924, 926 (S.D.N.Y. 1971).
195. 394 F. Supp. 1208 (D. Or. 1975) (citing 8 U.S.C. § 1427). The court also rejected the argument that "the standards for exclusion are congruent with those for naturalization" and held itself bound "to make an independent factual determination of good moral character." *Id.* at 1208.
196. 476 F.2d 843-44 (2d Cir. 1973).
197. *Id. See also supra* notes 56-62 and accompanying text.
198. Nemetz testified that he had dated women in Germany prior to his entry into the United States. 647 F.2d 432, 434-35 (4th Cir. 1981).
199. *See supra* notes 182-92 and accompanying text.

public sphere as unprotected, and thereby at least implicitly endorsed the punishment of public behavior. In practical terms, the message to lesbian and gay immigrants was to keep their sexual identities strictly closeted.

The draconian terms of this trade-off are apparent in the extent to which *Nemetz* and the cases that precede it emphasized the necessity of hiding one's homosexual identity from public view to merit protection. Horst Nemetz was allowed to proceed with his petition for naturalization only after testifying in response to extensive, persistent, and intrusive questioning, that he had never "committed a homosexual act in public," never "recruited for any type of sexual activities in public," never "been arrested or been questioned by the police."[200] Translated from legal jargon, his denial of public activity means that he never made love on a beach, in a car, in a park, or in any of the other quasi-public places in which heterosexual couples occasionally engage in sexual relations. His denial of "recruiting" means that he never sexually propositioned a man in a bar, at a party, on the street, or anywhere outside of his home. His denial of ever being arrested or questioned by the police means either that he was fortunate, or that he avoided gay bars, gay bathhouses, gay cruising areas in parks and bathrooms, and other places that gay men informally gather and socialize. It also means that he never had the misfortune of expressing sexual interest to an undercover police officer posing as a gay man. Nemetz also claimed to have had only one sexual partner since entering the country. It is only because his sexual behavior was such a model of discretion and circumspection that the court held that that his "homosexual activity cannot serve as the basis for a denial of a finding of good moral character because it has been purely private, consensual and without harm to the public."[201]

The portrait of the acceptable lesbian or gay immigrant that emerges from *Nemetz* and other cases is one who pursues a life of outward normality, and who passes for straight in his or her public life. In *Labady*, the court described the petitioner as a paragon of outward normalcy. Not only have "all of his sexual acts taken place in private behind locked doors in hotel rooms," the INS stipulated that "he had never been in trouble, and, as his employer testified, he is highly regarded at his place of employment."[202] The court also cited with approval the Civil Service Commission policy of excluding only known or public homosexuals.[203] In harmony with the principle behind this policy, Labady received a finding of good moral character because he was a straight-acting man who did not make his sexual orientation "known," and who confined the expression of his sexual identity to secretive sexual encounters in locked hotel rooms.[204]

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200. *Id.* at 433-34.
201. *Id.* at 436.
202. 326 F. Supp. 924, 926 (S.D.N.Y. 1971).
203. *Id.* at 929-30.
204. *Id.* at 925, 927.

Finally, *Nemetz* is also limited by the fact that not all courts have accepted its analysis of moral turpitude and good moral character. In *Longstaff*, the Fifth Circuit rejected this analysis explicitly, excluding a fifteen year Houston resident who had merely admitted to acts that violated the Texas sodomy statute under the crimes of moral turpitude exclusion.[205] The court did not consider relevant the fact that Longstaff had never been convicted, or that his sexual activity had taken place in private.[206] The court explicitly rejected the holding in *Nemetz* that "it was inappropriate to look at state law to determine the issue of good moral character in naturalization matters. . . . We do not disagree with the idea of a uniform rule. Rather, we hold that the uniform rule is . . . that of 'good moral character'."[207]

C. Effect of the 1990 Act

The 1990 Act sliced through the symbiotic relationship between the "crimes involving moral turpitude" exclusion and the "psychopathic personality" exclusion by eliminating the latter altogether.[208] No longer can conviction of a sodomy or public morality offense be used as evidence of homosexual orientation and thus as a means to exclude or deport an individual on the basis of his or her sexual orientation alone. Exclusion or deportation must now be based solely on the offense itself, under the "crimes involving moral turpitude" exclusion.

Before the 1990 Act, some courts adopted a distinction between private and public expressions of sexual identity, and invested that distinction with controlling significance on the issue of whether a particular offense constitutes moral turpitude for the purposes of determining good moral character. Thus, according to the test articulated by the Fourth Circuit in 1980 in *Nemetz*, federal immigration law will no longer scrutinize purely private homosexual behavior, even when that behavior results in a conviction under state law. Only public morality offenses that target public or quasi-public behavior will be scrutinized to determine whether or not they involve moral turpitude.[209]

Now that the 1990 Act has eliminated the provision used to exclude individuals on the basis of their sexual orientation, the rationale behind this public-private distinction has disappeared. So long as U.S. immigration law refused to admit openly lesbian and gay people, distinguishing between individuals who concealed their sexual identity and those who did not represented an intelligible, humane, and within obvious limits, principled attempt to soften the homophobic bias of the law without violating its letter. But now that Congress has lifted the ban on lesbian and gay immigrants, the distinction between private and public offenses has become an irrational vestige of the pre-1990 law, and

205. 538 F. Supp. 589, 591-92 (N.D. Tex. 1982).
206. *Id.* at 592.
207. *Id.* at 591, n.1.
208. *See supra* note 73.
209. *See supra* notes 182-92 and accompanying text.

should no longer be used to penalize lesbians and gay men who are convicted for public expressions of their sexual identity.

III. Sodomy and Public Morality Offenses

To appreciate the irrationality of treating sodomy and other homosexual offenses as crimes of moral turpitude or as bars to a finding of good moral character, it is crucial to understand that, both in the United States and in many countries across the world, prosecution of lesbians and gay men under these statutes serves no purposes other than those of harassment, discrimination, and, in some cases, state-sponsored violence[210] against lesbians and gay men. This section will provide an overview of the discriminatory misuse of these statutes against lesbians and gay men in the United States and internationally.

A. Sodomy Statutes in the United States and Worldwide

Within the United States, consensual sodomy is still a crime in twenty-two states and the District of Columbia.[211] The precise acts proscribed vary from statute to statute, although most focus on oral-genital and/or anal-genital contact.[212] Others are extremely open-ended, referring only to "crimes against nature" or to "unnatural and lascivious acts" in lieu of naming specific acts.[213]

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210. *See infra* notes 231, 262-64, 270 and accompanying text.

211. Ala. Code § 13A-6-65(a)(3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411-1412 (Supp. 1988); Ark. Stat. Ann. § 5-14-122 (1987); D.C. Code Ann. § 22-3502 (1981); Fla. Stat. §§ 800.02 (1987); Ga. Code Ann. § 16-6-2 (1988); Idaho Code § 18-6605 (1987); Kan. Stat. Ann. § 21-3505 (Supp. 1987); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Code Ann. art. 27, §§ 553-554 (1987); Mich. Comp. Laws §§ 750.158, 750.338-.338(b) (1979); Minn. Stat. § 609.293 (1988); Miss. Code Ann. § 97-29-59 (1972); Mo. Rev. Stat. § 566.090 (1986); Mont. Code Ann. §§ 45-2-101, 45-5-505 (1987); Nev. Rev. Stat. § 201.190 (1987); N.C. Gen Stat. § 14-177 (1986); Okla. Stat. tit 21, § 886 (1981); R.I. Gen. Laws § 11-10-1 (1986); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Tenn. Code Ann. § 39-2-612 (1982); Utah Code Ann. § 76-5-403 (Supp. 1988); Va. Code Ann. § 18-2-361 (1988).

In 1986, the Supreme Court held that the criminalization of lesbian and gay sex under state sodomy statutes does not violate the constitutional right to privacy. Bowers v. Hardwick, 478 U.S. 186 (1986).

212. *See* Alabama, Arkansas, D.C., Delaware, Georgia, Idaho, Kansas, Maryland, Minnesota, Mississippi, Missouri, Montana, Rhode Island, South Carolina, Virginia, and Utah statutes, *supra* note 211. In addition, some states have separate statutes that criminalize oral-genital contact as a "lewd and lascivious act" or "sexual misconduct." *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1412 (Supp. 1988).

213. *See* Arizona, Idaho, Lousiana, Michigan, Nevada, North Carolina, Oklahama, and Tennessee statutes, *supra* note 211, ("crimes against nature"), and Florida statute, *supra* note 211, ("unnatural and lascivious act" and "the abominable and detestable crime against nature").

The Supreme Court has twice upheld the constitutionality of open-ended sodomy statutes against vagueness challenges. Rose v. Locke, 423 U.S. 48 (1975) (per curiam) (upholding Tenn. Code Ann. § 39-2-612 (1980)); Wainwright v. Stone, 414 U.S. 21 (1973) (per curiam) (upholding Fla. Stat. § 800.02 (1987)).

In many states, the government need not specify the acts supporting the indictment. *See, e.g.*, D.C. Code § 22-3502 (1981) (stating that "it shall not be necessary to set forth the particular unnatural or perverted sexual practice with the commission of

Different statutes also affect different classes of persons. Some apply only to men, while others either specifically include both men and women,[214] or have been interpreted by courts to include acts by either gender.[215] Although several states criminalize acts of homosexual sodomy only, the majority of statutes apply to heterosexual and homosexual acts alike.[216] In practice, however, even facially neutral statutes are enforced disproportionately against gay men and lesbians.[217]

Because private sexual behavior is difficult to police, especially without violating Fourth Amendment protections against unreasonable searches and seizures, sodomy statute violations between consenting adults are rarely prosecuted in the United States.[218] The primary function of sodomy statutes is to justify other types of discrimination against gay men and lesbians, such as denial of employment and interference with parental rights,[219] and to legitimate the enforcement of homosexual solicitation and other public morality laws.[220]

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which the defendant may be charged, nor to set forth the particular manner in which said unnatural or perverted practice was committed"). *See also* RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW, 48-54 (1992) (discussing lack of specificity in sodomy statutes and case law).

214. *See* ROBSON, *supra* note 213, at 47-59 (discussing the 22 state sodomy statutes that apply to lesbians as well as gay men).

215. *See, e.g.*, ROBSON, *supra* note 213, at 53 (citing Saylers v. State, 755 P.2d 97 (Okla. Crim. App. 1988)).

216. Arkansas, Kansas, Missouri, Montana, and Nevada prohibit only same-gender sodomy, *see supra* note 211. The sodomy statutes of some other states apply only to homosexuals because courts have invalidated the statute as applied to heterosexuals. *See, e.g.*, Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 864 (1977); State v. Pilcher, 242 N.W.2d 348 (Iowa 1979).

217. *See* Pearson, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 846 & n.228 (1984); Shelley R. Weick, *Constitutional Challenges to Sodomy Statutes in the Context of Homosexual Activity After Bowers v. Hardwick*, 32 S.D. L. REV. 323, 331 & n.77 (1987). Although sodomy statutes are less frequently used to prosecute lesbians than gay men, the extent to which lesbians are prosecuted is often significantly understated. *See* Louis Crompton, *The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791*, 6 J. HOMOSEXUALITY 11 (1980-81); Ruthann Robson, *Lesbianism in Anglo-European Legal History*, 5 WISC. WOM. L. J. 1 (1990); ROBSON, *supra* note 213, at 47-59.

218. The Editors of the Harvard Law Review, SEXUAL ORIENTATION AND THE LAW, 10-11 (1990) [hereinafter SEXUAL ORIENTATION] (noting, however, that "military regulations prohibiting sodomy . . . are enforced against military personnel, some of whom are currently in prison for private, consensual, same-sex sexual conduct"). For an exhaustive account of the prosecution of U.S. servicepersons for acts of consensual sodomy under the Uniform Code of Military Justice, ch. 47 art. 10, § 925 (codified at 10 U.S.C. § 925 (1983)), see RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF 373-735 (1993).

219. See SEXUAL ORIENTATION, *supra* note 218, at 11; RICHARD MOHR, GAYS/JUSTICE 51 n.9 (1988).

220. MOHR, *supra* note 219, at 54-55. *See, e.g.*, ADVOC., Nov. 20, 1990, at 27 ("Larry Fox, the principal of Dodge City High School, was suspended from his job without pay Oct. 11 after being charged with sodomy and lewd and lascivious behavior for allegedly having sex with another man in the back row of a movie theater in Wichita [Kansas]").

Worldwide, at least 67 countries criminalize sex between men, and at least 27 criminalize sex between women.[221] Some of these countries follow the U.S. pattern and retain sodomy laws on the books but rarely investigate or prosecute violations.[222] In many countries, however, laws criminalizing lesbian and gay sex are rigorously enforced, and the punishments imposed are extremely severe, ranging from the death penalty[223] to imprisonment[224] and involuntary psychiatric treatment.[225] Laws against homosexuality tend to be most severe in African,[226] Asian,[227] Middle Eastern,[228] and Oceanic[229] countries. Most European states have decriminalized private consensual sodomy,[230] with the

221. *See* THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY OPPRESSION 249-342 (Aart Hendriks et al. eds., 1993) [hereinafter PINK BOOK]; COMING OUT: AN ANTHOLOGY OF INTERNATIONAL GAY AND LESBIAN WRITINGS 6-116 (Stephan Likosky ed., 1992) [hereinafter COMING OUT].

222. *See* PINK BOOK, *supra* note 221, at 249-342 (noting infrequent enforcement of sodomy laws in Barbados, Bhutan, Croatia, Ireland, Tanzania, Tasmania, and Uganda, among others).

223. In Afghanistan, Bahrain, Bangladesh, Iran, Kuwait, Libya, Malaysia, Mauritania, Yemen and other Islamic countries that enforce the Islamic Sharia code, homosexuality is punishable by death, although in practice lesser punishments ranging from flogging to imprisonment are usually imposed. Many Islamic countries punish homosexuality under both religious and civil law. *See* PINK BOOK, *supra* note 221, at 249-342; COMING OUT, *supra* note 221, at 102-14; AMNESTY INTERNATIONAL, THE 1993 REPORT ON HUMAN RIGHTS AROUND THE WORLD 162 (1993) (noting the execution of an Iranian man accused of homosexuality).

224. States that actively prosecute under sodomy laws that impose prison sentences include the following: Cyprus (up to 5 years); Ghana; Guyana (up to life imprisonment); Lithuania (up to 8 years); Romania (up to five years); and South Africa. *See* PINK BOOK, *supra* note 221, at 272, 283, 287, 301, 318, 325. *See also Romania's Article 200: Gay Means Guilty*, THE WARSAW VOICE, June 27, 1993 (reporting arrest in Romania of two gay men detained and "beaten for ten hours with rubber truncheons, horsewhips and fists by police hoping to force confessions").

225. *See* PINK BOOK, *supra* note 221, at 48, 318 (China and Romania); COMING OUT, *supra* note 221, at 82-101 (Cuba); PETER TATCHELL, OUT IN EUROPE: A GUIDE TO LESBIAN AND GAY RIGHTS IN 30 EUROPEAN COUNTRIES 24 (1992) (noting subjection of lesbians and gay men in Romania to forcible drug treatment, electric shock therapy, and castration).

226. *See* PINK BOOK, *supra* note 221 (African states criminalizing homosexual acts include Algeria, Benin, Cape Verde, Ethiopia, Ghana, the Ivory Coast, Kenya, Libya, Madagascar, Mauritania, Mauritius, Mozambique, Nigeria, Seychelles, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe). *See also Zimbabwe: Gays Protest Discrimination*, INTER PRESS SERVICE, Feb. 16, 1993, at 21; *Lesbian and Gay Rights in Namibia: Life in the Kalahari Closet*, ILGA BULLETIN, May 1992, at 14. *But see* Gerben Potman & Huub Ruijgrok, *Male Homosexuality in West Africa*, in PINK BOOK, *supra* note 221, at 168 (noting that threat of enforcement of sodomy laws in most African nations is remote).

227. *See* PINK BOOK, *supra* note 221 (states criminalizing homosexual acts include Bangladesh, India, Pakistan, and Sri Lanka in South Asia; China and Singapore in East Asia; Malaysia in Southeast Asia).

228. *See* PINK BOOK, *supra* note 221 (states criminalizing homosexual acts include Bahrain, Iran, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Syria, and the United Arab Emirate).

229. *See* PINK BOOK, *supra* note 221 (states criminalizing homosexual acts include Fiji, Kiribati, Niue, Papua New Guinea, the Solomon Islands, Tonga, and Toualu).

230. *See* TATCHELL, *supra* note 225, at 12-34. Many states in Eastern Europe and in the former Soviet Union have recently abolished their sodomy laws, including

exception of Ireland, Cyprus, Lithuania, Romania, and the former Yugoslavian republics of Bosnia, Macedonia, and Serbia.[231] In Latin America, the legal status of homosexuality varies widely from country to country.[232]

B. Public Morality Offenses

The presence or absence of sodomy laws, however, is not the only or even the most meaningful index of legal discrimination against the expression of lesbian and gay identity. As lesbian and gay activists and commentators have long noted, the repeal of sodomy laws fails to address the fact that most direct harassment and prosecution of lesbians and gay men is accomplished through the abusive enforcement of a variety of statutes aimed at "public" and quasi-"public" activity. A 1974 study of homosexuality in New York, San Francisco and Northern Europe, for example, noted that:

> [T]he enforcement of sodomy laws is sporadic and rare, and the greatest involvement of homosexuals with the criminal law occurs under misdemeanor statutes. These statutes proscribe solicitation, disorderly conduct, lewd and lascivious behavior, and vagrancy, all of which are used ostensibly to control the homosexual's sexual behavior and the public pursuit of sexual partners. Often the 'disorderly conduct' laws are used to arrest persons for acts for which no other punishment is provided in the code. 'Lewd and lascivious behavior' provisions are used to punish acts which range from dancing and hand holding to more explicit sexual behavior. 'Vagrancy' laws are a convenient catchall used in a variety of instances to harass homosexuals.[233]

The rationale behind the use of public morality statutes against lesbians and gay men was most fully articulated in the 1957 Wolfenden Report on Homosexuality and Prostitution, commissioned by the English Parliament to study and make recommendations with regard to

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Slovakia (1990), Czechia (1990), Russia (1993), Estonia (1992), Latvia (1992), and Ukraine (1991). *See* PINK BOOK, *supra* note 221, at 208, 273, 277, 299, 324, 336; *Russia Revokes Law Punishing Gay Sex*, L.A. TIMES, May 29, 1993, at A5 (noting repeal of Article 121.1 of the Russian Criminal Code punishing sexual relations between men by up to 5 years imprisonment).

231. PINK BOOK, *supra* note 221 at 263, 272, 292, 301, 302, 318, 322. *See also Serbia's War on Gays*, ILGA BULLETIN, May 1992, at 5-6 (describing government anti-homosexual campaign and rising levels of police and gang violence against lesbians and gay men).

232. *See* International Gay and Lesbian Human Rights Commission, *Queer Latin America*, TEMA: INTERNATIONAL, Spring 1992, at 15-18 [hereinafter *Queer Latin America*] (Latin American states that criminalize homosexuality include the Bahamas, Barbados, Bermuda, Chile, Cuba, Ecuador, Guyana, Jamaica, St. Lucia, Trinidad and Tobago).

233. Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, COLUM. HUM. RTS. L. REV. 159, 164 (1980-1981) (citing M. Weinberg & C. Williams, MALE HOMOSEXUALS 23 (1974)). *See also* Evan Wolfson & Brad Sears, *Public Lewdness Cases: Fighting Entrapment and Stereotypes*, 8 LAMBDA UPDATE 22 (1991) (noting that "loitering, lewdness, and solicitation statutes provide the principal weapons for the regulation of gay sexual activity"); MARTIN HOFFMAN, THE GAY WORLD: MALE HOMOSEXUALITY AND THE CREATION OF EVIL 97-99 (1968).

homosexuality and prostitution in the United Kingdom.[234] Although the authors of the Report accepted the premise that homosexuality is a social and moral evil, they recommended abolishing laws criminalizing private homosexual behavior,[235] on the ground that purely private behavior was beyond the proper reach of legal intervention:

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.[236]

The proper role of the law, the Report concluded, was to remove itself from policing purely private behavior, and to concentrate instead on eliminating any public expression of homosexual identity.[237] The necessary counterpart to the decriminalization of private homosexual behavior, in other words, was an increased policing of public spaces and public behavior. "It is important," the Report cautioned, "that the limited modification of the law which we propose should not be interpreted as an indication that the law can be indifferent to other forms of homosexual behavior, or as a general license to adult homosexuals to behave as they please."[238] Specifically, the Report advocated stringent police surveillance of public spaces, such as lavatories and parks,[239] harsh penalties for procurement[240] and public solicitation,[241] a higher age of consent for homosexual than for heterosexual sex,[242] and increased discrimination against homosexuals in certain areas of employment.[243] In essence, the strategy behind the Wolfenden Report was to contain

234. The Committee on Homosexual Offenses and Prostitution, THE WOLFENDEN REPORT (Amer. ed. 1963) [hereinafter WOLFENDEN REPORT].

235. *Id.* at 42-48 (concluding that "moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behavior," and that "homosexual acts between consenting adults in private should cease to be criminal offenses").

236. *Id.* at 48.

237. *Id.* at 42 ("It is . . . part of the function of the law to preserve public order and decency. We therefore hold that when homosexual behavior between males takes place in public it should continue to be dealt with by the criminal law."). *See also* GARY KINSMAN, THE REGULATION OF DESIRE 139-44 (1987) (critizing the Wolfenden Report's reliance on a public/private distinction).

238. WOLFENDEN REPORT at 77.

239. *Id.* at 49, 73, 128.

240. *Id.* at 73 (recommending that "it should continue to be an offense, punishable with a maximum of two years' imprisonment, for a third party to procure or attempt to procure an act of gross indecency between male persons, whether or not the act to be procured constitutes a criminal offense").

241. *Id.* at 73-75.

242. *Id.* at 51-52.

243. *Id.* at 128 (urging that "more care should be taken by those responsible for the appointment of teachers, youth leaders and others in similar positions of trust, to ensure that men known to be, or suspected of being, of homosexual tendencies, should be debarred from such employment").

homosexuality within a strictly confined sphere and to prohibit any public expression of lesbian or gay identity.

Public lewdness, solicitation and other public morality statutes are the primary tools through which this strategy of containment is enforced. These statutes are "invoked against sexual expression—including loitering, flirtation, solicitation, and actual sexual encounters—outside the home. While such laws do not [usually] refer to gay sex specifically, they are enforced almost exclusively against people perceived to be gay."[244] Similarly, although the official rationale behind these statutes is the need to protect the public against offensive or annoying behavior,[245] they are actually enforced against conduct that is public in name only,[246] and that is almost always discovered only through undercover police activity[247] or hidden video surveillance.[248] As Arthur Warner has pointed out:

> the very methods which have to be employed by the police to apprehend persons for homosexual soliciting is proof of the inoffensiveness of the conduct . . . . these are certainly not the methods customarily required to apprehend persons whose conduct is alleged to be so open and blatant

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244. Gabriel Rotello & Evan Wolfson, *Fighting Back: Rest Stop Arrests, Police Abuse, and the Gay and Lesbian Community*, LITTLE BLACK BOOK 4 (1992).

245. *See supra* notes 237-44 and accompanying text; *see also* Arthur C. Warner, *Non-Commercial Sexual Solicitation: The Case for Judicial Invalidation, reprinted in* 6 HOMOSEXUALITY: DISCRIMINATION, CRIMINOLOGY, AND THE LAW, 551 (Wayne R. Dynes & Stephen Donaldson eds., 1992) (originally submitted as an *amicus curiae* brief in Pryor v. Municipal Court, 599 P.2d 636 (1979) (invalidating California solicitation statute on due process grounds)).

246. *See* Warner, *supra* note 245, at 552:

> Evidence abounds that homosexual solicitation is extremely circumspect and cautious in character, and that, with few exceptions, the conduct is so subtle in its use of indirection, innuendo, and subterfuge, that only the cognoscenti are aware of what is going on . . . . the stereotype . . . of a brazen and flagrant homosexual accosting and affronting defenseless respondents who are repelled by his conduct is largely myth, which, like other myths regarding homosexuals and homosexuality, is frequently repeated to justify repressive and unjust laws.

Rotello & Wolfson, *supra* note 244, at 4 (noting that "many so-called 'public' areas are in fact quite often private, for example, secluded woods or parks, beaches, 'lovers' lanes', rest rooms, and highway rest stops"); Ruthann Robson, *Lifting Belly: Privacy, Sexuality & Lesbianism*, 12 WOM.'S RTS. L. RPTR. 177 (1990) (discussing arbitrary definitions of public and private in public sex caselaw).

247. People are almost never arrested because someone else saw them having sex, was offended, and called the police. Rather, they are almost always arrested because a police officer spent hours hanging around a targeted area pretending to be interested in sexual contact, engaged in flirtatious behavior or conversation, and then sprang the trap.

Rotello & Wolfson, *supra* note 244, at 5-6. *See also* Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 691 (1966); Thomas E. Lodge, *There May Be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine*, 30 CASE WEST. L. REV. 461, 479-85 (1980); WOLFENDEN REPORT, *supra* note 234, at 75 ("This particular offense necessarily calls for the employment of plain-clothes police if it is to be successfully detected.").

248. Frederick J. Desroches, *Tearoom Trade: A Law Enforcement Problem*, 33 CAN. J. OF CRIMINOLOGY 1, 4-10 (1991).

that it constitutes an affront to public decency.[249]

Despite its inconsistencies, however, the Wolfenden perspective on the public expression of lesbian and gay identity has profoundly influenced the repeal of sodomy laws in Canada, the United States, Europe, and Latin America.[250] In practical terms, the effect of the Wolfenden strategy in states and countries that have adopted it has been to increase dramatically police surveillance, harassment, and prosecution of lesbians and gay men under public morality statutes. In the four years after England abolished its sodomy law in 1967, prosecutions for homosexual offenses increased by 160 percent.[251] A similar increase in police surveillance and prosecution resulted when Canada decriminalized sodomy in 1969, and when Northern Ireland abolished its sodomy laws in 1982.[252]

Currently, laws and government policies that target the public expression of lesbian and gay identity continue to pose the primary legal threat to many lesbians and gay men worldwide. In countries influenced by the Wolfenden perspective, the privacy rationale has been used to justify the legal harassment of lesbians and gay men, and to reinforce the view that homosexuality is immoral and socially objectionable and should be severely restrained. In the United Kingdom, for instance, the legal status of lesbians and gay men has deteriorated significantly in recent years. From 1980 to 1988, 10,476 gay men were prosecuted under public indecency statutes, for conduct ranging from kissing and hugging to sexual contact.[253] Clause 25 of the Criminal Justice bill, passed in 1991, imposes the same punishment on men caught having sex in bathrooms or other public places as on those who rape.[254] Police have also increasingly used Section 5 of the Public Order Act, originally intended to prevent street violence, to convict lesbians and gay men for kissing and other public displays of affection.[255]

Lesbians and gay men in the United States and Canada have experienced a similar escalation of police harassment. "In the past several

249. Warner, *supra* note 245, at 552.

250. *See* KINSMAN, *supra* note 237, at 139-72; BARRY ADAM, THE RISE OF A LESBIAN AND GAY MOVEMENT (1987); Daniel J. Kane, *Homosexuality and the European Convention on Human Rights: What Rights?*, 11 HASTINGS INT'L & COMP. L. REV. 447, 448-464 (1988) (analyzing the extent to which the European Court of Human Rights has been limited in its adjudication of cases dealing with homosexuality by relying on a privacy rationale that "give[s] subtle credence to . . . the notion that homosexuality is inherently immoral"); *Anti-Gay Bill in Nicaragua Opposed in S.F.*, S.F. CHRON., Jul. 10, 1992, at A17 (reporting passage in Nicaragua of legislation decriminalizing sodomy, but imposing up to 3 years imprisonment on anyone who "induces, promotes, propagandizes or practices in a scandalous manner, the cohabitation between individuals of the same sex").

251. KINSMAN, *supra* note 237, at 143.

252. *Id.* at 143-46. *See also* HOFFMAN, *supra* note 233, at 97-98 (noting increase in police harassment of homosexuals after Illinois became the first U.S. state to abolish its sodomy law in 1961).

253. TATCHELL, *supra* note 225, at 29.

254. OUTWEEK, Jan. 16, 1991, at 43.

255. TATCHELL, *supra* note 225, at 30.

years," notes a recent study, "numerous police forces across Canada have . . . launched full-scale criminal investigations in response to a minor criminal offence common to urban areas—the use of public washrooms (tearooms) for impersonal sex."[256] In the early 1980's, hundreds of men in Toronto alone were arrested for "indecent acts" and "gross indecency."[257] In the United States, lesbian and gay publications abound with reports of threats, arrests and raids on parks, clubs, theatres, bathrooms, roadside reststops and other places known to be frequented by lesbians and gay men.[258]

Although relatively few Latin American states explicitly criminalize lesbian or gay sex,[259] many of these states use public morality laws to harass, arrest, and intimidate lesbians and gay men, and to prevent them from organizing politically.[260] In Mexico, plans to hold an international gay conference in Guadalajara in 1991 had to be canceled because of threats by local officials to arrest those attending.[261] Until a democratic regime was recently installed in Argentina, police conducted an ongoing campaign of harassment that led, in 1990, to the arrest of an estimated thirty men per night for offenses ranging from "sexual promiscuity in public" to wearing "improper clothes."[262] In 1992, Canada granted political asylum to an Argentinian gay man who had been repeatedly detained, threatened and tortured by Argentinian police.[263] In Colombia and Costa Rica, official violence has reached similar extreme levels with hundreds of gay men and transvestites reported murdered or miss-

256. Desroches, *supra* note 248, at 1.

257. KINSMAN, *supra* note 237, at 210.

258. *See, e.g.*, Wolfson & Sears, *supra* note 233, at 22 (noting arrest of more than 540 men for "public lewdness" at a single rest stop on the New Jersey Turnpike from February, 1988 to October, 1989); OUTWEEK, Nov. 14, 1990, at 26 (reporting arrest of two men in Cincinatti for "disorderly conduct by creating an offensive condition" for sitting inside a parked car holding hands); OUTWEEK, Nov. 28, 1990, at 14-15 (reporting conviction of two pairs of men in Idaho for "indecent exposure" for having sex in parked cars at night outside of a gay bar); OUTWEEK, Sept. 12, 1990, at 21-22 (reporting arrest of 41 patrons of gay bar in Lima, Ohio for "visiting a disorderly house"); ADVOCATE, Sept. 24, 1991, at 56-57 (reporting arrest by plainclothes officers of 39 men in a Fayetteville, Arkansas park on charges ranging from loitering to soliciting sodomy); NYQ, Mar. 1, 1991, at 20-21 (reporting arrest for sodomy of 14 men at two gay clubs in D.C.).

259. *See supra* note 232.

260. *Repression Way of Life for Gays in Latin America*, ORLANDO SENTINEL TRIB., Feb. 13, 1992, at A8:

> In Latin America, military regimes that governed much of the region during most of the last 50 years either outlawed homosexuality or made it difficult for gays to act openly by allowing police to detain them for violating vague laws that prohibit everything from 'offending public morality' to having 'immoral purposes'. . . .

Queer Latin America, *supra* note 232, at 16-17 (stating that states using public morality laws to arrest homosexuals include Argentina, Dominican Republic, Paraguay, and Peru).

261. *Gays Call Off Big Meeting in Mexico*, S.F. CHRON., June 13, 1992, at A23.

262. OUTWEEK, Jul. 25, 1990, at 28; OUTWEEK, Dec. 5, 1990, at 21-22.

263. Matter of Inaudi, No. T91 04459 (Immigration and Refugee Board 1992).

ing as a result of police brutality and state-sponsored death squads.[264]

As this overview demonstrates, governments worldwide use public morality laws to force lesbians and gay men to conceal their sexual orientation, to stigmatize and discourage homosexuality, and to punish political dissent and social nonconformity. In recent years, the European Court of Human Rights,[265] the Council of Europe,[266] the United Nations (U.N.), and other international human rights organizations have increasingly recognized and condemned this worldwide harassment and abuse. In 1993, two lesbian and gay human rights groups, the New York-based Human Rights Watch and the Brussels-based International Lesbian and Gay Association were granted formal recognition by the Economic and Social Council, the U.N. body responsible for monitoring violations of international human rights agreements.[267] The U.N. Human Rights Commission has shown an increasing willingness to recognize the claims of lesbian and gay men,[268] and Amnesty International now recognizes lesbians and gay men imprisoned under sodomy and public morality statutes as prisoners of conscience.[269] A growing number of countries, including the United States, have granted political asylum to lesbians and gay men persecuted in their country of origin.[270]

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264. PINK BOOK, *supra* note 221, at 286 (noting that lesbians and gay men "are often subjected to official and police harassment and violence"); AMNESTY INTERNATIONAL 1993 REPORT, *supra* note 223, at 99, 103-04 (noting murder of homosexuals in Colombia and of transvestites in Costa Rica by government-sponsored "death squads").

265. In 1982, the European Court of Human Rights ruled that a Northern Ireland sodomy statute criminalizing homosexuality violated the European Convention of Human Rights. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1982); Dudgeon II, 45 Eur. Ct. H.R. (ser. A) (1982).

266. *See* Resolution 756 and Recommendation 924, 1981 Y.B. EUR. CONV. ON H.R. 82 (asking World Health Organization to remove homosexuality from its international classification of mental disorders and affirming that all individuals have the right of sexual self-determination); 2 EUR. CONV. ON H.R., TEXTS & DOCUMENTS 136-38 (1984) (calling on member states of the Council of Europe to abolish all forms of discrimination against homosexuals). *See also* Kane, *supra* note 250, at 464-66 (discussing the Council of Europe's recognition of the right of sexual self-determination).

267. *United Nations: Gay Group, Human Rights Body Gain a Place at U.N.*, INTER PRESS SERVICE, Mar. 30, 1993. Human Rights Watch was granted "consultative status," which gives it the right to participate in U.N. conferences, submit statements as official U.N. documents, and introduce oral and written statements at ECOSOC meetings. The International Lesbian and Gay Association was granted "roster status," which allows it to submit written statements only.

268. *U.N. Investigates Human Rights Violations*, INT'L LESBIAN & GAY ASS'N BULL., Jan. 1993, at 21 (reporting that the U.N. Human Rights Commission has accepted a complaint arguing that a Tasmanian law prohibiting homosexual acts violates the U.N. Human Rights Convention).

269. *See* GUIDELINES: AMNESTY INTERNATIONAL'S WORK ON BEHALF OF IMPRISONED HOMOSEXUALS (1992).

270. *See, e.g.*, Matter of Toboso, No. A23 220 644 (BIA 1990) (withholding deportation of gay Cuban man because of persecution of gays in Cuba); Matter of Inaudi, No. T91 04459 (Immigration and Refugee Board 1992) (Canadian decision granting asylum to Argentinian gay man repeatedly detained and tortured by Argentinian police); *Gay Couple Escapes Mainland Repression*, SOUTH CHINA MORNING POST, Oct. 25,

Ironically, however, the INS and many U.S. courts persist in recognizing discriminatory convictions under public morality statutes as crimes of moral turpitude.[271] Because the INS and the courts have not reevaluated their irrational and anachronistic interpretation of these provisions, individuals who have ever been convicted of or who admit to a public same-gender sex offense, including those who may be seeking refuge from homophobic persecution in their country of origin, may be precluded from visiting or immigrating to the United States under the provision for crimes involving moral turpitude, or barred from citizenship under the good moral character requirement.

IV. Analysis

A. The Status of *Nemetz* After *Bowers v. Hardwick* and the 1990 Act

Nemetz barred courts that adopted its analysis from using evidence about private homosexual activity to evaluate good moral character.[272] *Nemetz* also dramatically affected the crimes involving moral turpitude exclusion. Only acts "harmful to the public" can trigger the exclusion; private consensual acts, even if they result in a felony under state or national law, cannot.[273] In practice, however, the holding in *Nemetz* was quite limited in terms of the behavior it protected. Only private homosexual acts that are rarely prosecuted anyway came within its holding.[274] The major effect of *Nemetz* was to prevent INS officials from using an individual's homosexual identity to infer an automatic violation of the crimes involving moral turpitude provision, or an automatic bar of good moral character. As long as the categorical exclusion was in place, the INS could still use sodomy convictions or other evidence of homosexual identity to exclude gay and lesbian entrants. *Nemetz* opened up a narrow space in which homosexual aliens who had managed to avoid exclusion could squeeze past the crimes involving moral turpitude deportation provision and the good moral character requirement for naturalization.

Despite the appearance of a direct conflict, *Bowers v. Hardwick* did not pose a serious challenge to the *Nemetz* holding that there is no federal interest in regulating private homosexual behavior.[275] In *Bowers*, the Supreme Court rejected a substantive due process challenge to the constitutionality of a Georgia sodomy statute that was enforced against a gay man for private behavior in his own home.[276] The Court explicitly ruled that homosexuals do not possess a constitutionally protected right

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1992, at 7 (reporting Australian decision to grant asylum to a gay couple from China).

271. *See supra* Section II.

272. 647 F.2d 432, 436-37 (4th Cir. 1981). *Nemetz* has not, however, been universally accepted. *See In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).

273. *Nemetz*, 647 F.2d at 436.

274. *See supra* note 218 and accompanying text.

275. Bowers v. Hardwick, 478 U.S. 186 (1986).

276. *Id.* at 191-96.

of privacy.[277] Although this holding authorized states to pass or to continue to enforce sodomy statutes that single out homosexual activity, this did not threaten the *Nemetz* doctrine. The *Nemetz* court itself recognized that states could regulate and criminalize private sexual behavior.[278] The *Nemetz* court merely held that private sexual behavior is irrelevant in the context of federal immigration law, so long as it has no harmful public impact.[279] Both cases, albeit for very different reasons, actually reinforce the doctrine that regulating sexual morality is uniquely a state and not a federal prerogative.

Moreover, the 1990 Act has offset the one respect in which *Bowers* undercuts the rationale behind *Nemetz* and its predecessors. By exempting private consensual homosexual conduct from the scrutiny of federal immigration law, *Nemetz* and other cases relied in part on the argument that legal regulation of such behavior violated the federal constitutional right to privacy,[280] an argument that *Bowers* has now demolished. Nonetheless, by repealing the categorical exclusion of lesbians and gay men, Congress signaled its intention to eliminate sexual orientation and consensual sexual behavior as a factor in immigration policy.[281] The absence of a constitutional right to privacy for homosexuals does not prevent Congress from acting on its own to shield sexual behavior from the scrutiny of the immigration law.[282]

B. Expanding *Nemetz*

1. Equal Protection

Now that the 1990 Act has bolstered the holding in *Nemetz*, the challenge is to expand the argument in *Nemetz* to include public as well as private same-gender sexual offenses, and thus to place homosexual and heterosexual aliens on more equal footing with respect to the "crimes involving moral turpitude" and the "good moral character" provisions. Although the disparate impact of sodomy and public morality offenses on gays and lesbians under U.S. immigration law seems tailor-made for an equal protection challenge, there are two reasons why such a challenge probably cannot succeed. The first is that most federal courts have been unwilling to consider gays and lesbians a suspect class, and thus they have been unwilling to subject laws that discriminate on the

277. *Id.*

278. Nemetz v. INS, 647 F.2d 432, 435 n.3 (4th Cir. 1981) ("We point out that nothing in this opinion interferes with a state's right to set legislative standards of morality for its own purposes.").

279. *Id.* at 436-37. *See* discussion *supra* notes 182-92 and accompanying text.

280. *Nemetz*, 647 F.2d 432, 434 (4th Cir. 1981); *In re* Labady, 326 F. Supp. 924, 927 (S.D.N.Y. 1971) (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Stanley v. Georgia, 374 U.S. 557 (1969)).

281. *See supra* notes 81-84 and accompanying text.

282. As Congress has also done with respect to adulterers. *See infra* notes 296-308 and accompanying text.

basis of sexual orientation to more than rational basis review.[283]

The second reason is that most constitutional arguments are of little or no avail in the immigration context anyway. In no other area have the courts shown such deference to the plenary power of Congress and the Executive to define and administer the law without interference from the judiciary.[284] Even if the Supreme Court in *Bowers* had declared the Georgia statute an unconstitutional violation of due process, Congress would still have plenary power to exclude persons for committing sodomy, just as Congress now has plenary power to exclude persons based on race or national origin.[285] Courts review equal protection challenges to U.S. immigration law, whether to the terms of the statute itself or to its administration, under a standard that is even more toothless than rational basis review. Because of the plenary powers doctrine, the INS need only articulate a "facially legitimate and bona fide reason"[286] for its administration of the statute, even when its actions infringe on a fundamental right[287] or discriminate against a suspect class.[288]

2. *The Uniformity Requirement*

Given the probable futility of an equal protection challenge, the most powerful argument against using sodomy and public morality offenses to exclude, deport, or deny naturalization derives from two sources: the Constitutional requirement that there be a "uniform rule of naturalization";[289] and the obligation of courts and administrative agencies to

283. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); Dronenberg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984). *But see* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir.), *reh'g granted en banc*, 847 F.2d 1362 (9th Cir. 1988); Ben Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987).

284. *See, e.g.*, Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889). For an analysis of the virtual immunity of immigration law from constitutional judicial review, see generally Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

285. *Id. See also* Mattews v. Diaz, 426 U.S. 67, 80 (1976) (allowing Congress to "make rules that would be unacceptable if applied to citizens").

286. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

287. In *Kleindienst*, the Court held that immigration authorities could exercise the plenary power delegated to them by Congress and the Attorney General to override the First Amendment rights of citizens, as long as the officials could articulate a "facially legitimate and bona fide" reason for their decisions. 408 U.S. at 770.

288. Fiallo v. Bell, 430 U.S. 787, 792-800 (1977) (holding that INA provisions that discriminate on the basis of gender and legitimacy are immune from constitutional judicial review). *But see* Jean v. Nelson, 472 U.S. 846 (1985) (holding that discrimination on the basis of race or national origin in determining whether to grant temporary parole to Haitians filing asylum claims would be unlawful because contrary to the INA).

289. U.S. CONST. art. I, § 8, cl. 4.

construe a statute in accordance with its legislative intent.[290] The uniform rule of naturalization provisions has been held to require only geographic, not substantive, uniformity. It does not impose the equivalent of an equal protection guarantee preventing Congress from imposing different conditions of naturalization for different classes of aliens, but rather prevents individual states from enacting their own naturalization statutes and thus disrupting the uniformity of the federal rule.[291]

In other words, immigration is uniquely a federal matter, and Congress intended the immigration law to prescribe uniform standards across the nation.[292] Courts have long accepted that this minimal requirement of geographic uniformity is not confined to the specific provisions governing naturalization, but applies throughout the immigration law context, including the crimes involving moral turpitude provision.[293]

3. The Example of Adultery

The precise limits of this uniformity requirement, however, are contested. Courts have disagreed on whether or not the uniformity requirement means that just as individual states cannot directly confer federal citizenship,[294] neither can the vagaries of state law indirectly determine who may and who may not enter the country or become a citizen.[295] This disagreement has been most evident in cases dealing with adultery and the good moral character requirement. From 1952 to 1981, the INA explicitly listed the commission of an act of adultery during the five-year statutory period as an automatic bar to a finding of good moral character.[296] Although some courts looked to the individual state's defi-

290. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that courts "must reject administrative constructions which are contrary to clear congressional intent"); INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987) (citing *Chevron* to reject INS interpretation of asylum provisions of INA).

291. Kharaiti Ram Samras v. United States, 125 F.2d 879, 881 (9th Cir. 1942), *cert. denied*, 317 U.S. 634 (1942). Petition of Lee Wee, 143 F. Supp. 736, 738 (S.D. Cal. 1956).

292. *See* J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 224-25 (1978) (noting that the power to naturalize was delegated to Congress to avoid the confusion that would arise from allowing individual states to confer citizenship).

293. *See, e.g.*, Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959) (soliciting men to commit crimes against nature is a crime for the purposes of the immigration law even though New York State law terms it an "offense").

294. Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817) (holding that the power to determine who may gain citizenship is exclusively federal).

295. The need for uniformity among the states is the primary reason why Congress has not amended the law to make deportability hinge on the commission of a felony, instead of on a crime involving moral turpitude. Whether a particular crime is a felony or a misdemeanor varies from state to state. *See* Burr v. INS, 350 F.2d 87, 90 (9th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966) (holding that use of a felony standard to determine deportability would subject federal law to "niceties and nuances" of state law).

296. 8 U.S.C. § 1101(f)(2), repealed 1981. The definition of adultery differs greatly from state to state. *See* Comment, *Private Consensual Sexual Conduct and "The Good Moral*

nition of adultery,[297] most courts found that relying on state law defeated the requirment of a uniform federal standard, and held that only adultery that harmed an existing marriage triggered the automatic bar.[298] In 1981, Congress implicitly endorsed the majority position on the need for a uniform rule by eliminating adultery from the list of automatic bars to a finding of good moral character. The legislative report accompanying the amendment explained that inquiries into the sex lives of applicants "clearly represent an invasion of privacy."[299]

This resolution of the dispute over adultery strongly suggests in *Nemetz* held that private homosexual sodomy must also receive uniform treatment in the context of immigration. Decided in 1980 before Congress changed the law with regard to adultery, *Nemetz* modelled its protection of sodomy that has no harmful public impact on the judicially-created protection of adultery that has no harmful public impact.[300] Sodomy and adultery are both rarely prosecuted offenses which are criminalized in some states, but not in others.[301] Like most of the courts dealing with adultery, the *Nemetz* court found that relying on state sodomy laws would create an unacceptable geographic patchwork of naturalization standards.[302] If the uniformity requirement obliged courts to devise a uniform federal definition of adultery in the naturalization context, then it also obliged courts to devise a uniform federal policy regarding sodomy.[303]

Although the *Nemetz* court might have achieved uniformity by barring anyone who committed an act of sodomy from a finding of good moral character, this route to uniform treatment would have been drastically at odds with the increasingly liberal treatment accorded by the INS and the courts to adultery and other kinds of consensual sexual behavior in the context of immigration.[304]

Character" Requirement of the Immigration and Nationality Act, 14 COLUM. J. TRANSNAT'L L., 357, 365-70 (1975); Comment, *State Adultery Laws and the "Good Moral Character" Naturalization Requirement*, 7 HARV. J. LEGIS. 295, 300-01 (1970). *See also* the discussion of differences in state adultery laws in Brea-Garcia v. INS, 531 F.2d 693 (3d Cir. 1976).

297. *See, e.g.*, Brea-Garcia v. INS, 531 F.2d 693, 697 (3d Cir. 1976).

298. *See, e.g.*, Wadman v. INS, 329 F.2d 179, 812 (9th Cir. 1964); Moon Ho Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975). For a discussion of this caselaw, see Maurice A. Roberts, *Sex and the Immigration Laws*, 14 SAN DIEGO L. REV. 9, 29-34 (1976).

299. The view that INS officials have no business inquiring into the private sex lives of petitioners for naturalization indicates that Congress was removing adultery from the good moral character analysis, not directing INS officials to look to state laws. The legislative report also quoted an INS estimate that "7 out of 10 persons today who would admit to that conduct would fall within one or more of the judicial interpretations which excuse that conduct for purposes of naturalization." ALIENIKOFF & MARTIN, *supra* note 4, at 961.

300. Nemetz v. INS, 647 F.2d 432, 436 (citing Wadman v. INS, 329 F.2d 812 (9th Cir. 1964)).

301. *See supra* notes 211-32 and accompanying text.

302. *Nemetz*, 647 F.2d at 435-36.

303. *Id.*

304. *See supra* notes 154-58, 296-97 and accompanying text.

As the court in *Nemetz* recognized, the constitutional uniformity requirement does not in itself prevent Congress or the courts from discriminating against those who engage in homosexual activity or against any other group. But courts also have an independent obligation to interpret the immigration law in accordance with legislative intent.[305] Accordingly, the *Nemetz* court based its decision both on the uniformity requirement and on an appeal to legislative intent—namely, on the conclusion that Congress chose not to include homosexuality in the list of conditions that automatically bar a finding of good moral character because "it did not intend purely private sexual activities to act as an absolute bar to a finding of good moral character."[306] As the court in *Nemetz* rightly concluded, the decision to exempt private consensual sodomy from the good moral character analysis was more faithful to the statutory intent than the decision to deny naturalization to any alien who engaged in homosexual sodomy would have been.

The *Nemetz* holding should be extended beyond private sodomy to the public morality offenses that are used to police public expressions of lesbian and gay identity and to harass lesbians and gay men. As the court in *Nemetz* persuasively argued with respect to sodomy statutes, the existence and enforcement of public morality offenses that target consensual same-gender sexual activity vary widely from state to state, and reliance on the vagaries of individual state and national laws violates the requirement of a geographically uniform immigration law. Again, the requirement of a uniform law does not in itself prohibit drafting or administering the immigration law in a manner that discriminates against a particular class of people. But the INS and the courts must construe the INA according to the legislature's intent, and the 1990 Act has now explicitly signalled that Congress no longer intends to single out homosexual aliens for discrimination.

Here, too, the evolving treatment of adultery under U.S. immigration law provides a useful analogy. Because the pre-1981 immigration law explicitly excluded adulterers from citizenship, the pre-1981 adultery cases restricted protection to adulterers whose behavior did not "destroy an existing, viable marriage" or otherwise "represent a threat to public morality."[307] The elimination of adultery as a bar to good moral character in 1981 also eliminated the legal significance of the distinction between private and public adultery.[308] Acts of adultery, even

305. Nemetz, 647 F.2d at 436-37. *See also supra* note 290.

306. *Nemetz*, 647 F.2d at 437. The force of this statutory argument was obviously strengthened by the fact that most courts did not treat discreet acts of adultery as a bar to a finding of good moral character, despite the listing of adultery in the INA as an automatic bar. *See supra* notes 296-97 and accompanying text.

307. Moon Ho Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975). *See also supra* notes 296-98 and accompanying text.

308. *See supra* note 299 and accompanying text. Moreover, despite the fact that the Constitutional right of privacy extends only peripherally, if at all, to adulterous behavior, Congress registered an intent to recognize and protect the privacy of consensual sexual behavior that is not only outside of marriage, but that is usually

those that harm an existing marriage or that otherwise threaten public morality, no longer constitute crimes of moral turpitude or bar a finding of good moral character. Similarly, *Nemetz* restricted protection to homosexuals who kept their sexual identity private because the immigration law excluded homosexuals from entering the country.[309] When Congress eliminated the categorical exclusion of homosexuals in 1990, it also eliminated the legal rationale for penalizing aliens for public expressions of gay and lesbian identity. Public homosexual acts should no longer constitute crimes of moral turpitude or bars to good moral character.

In short, the "uniform rule of naturalization" clause of the Constitution requires a uniform national standard to supersede the patchwork of conflicting state and national laws criminalizing public consensual homosexual behavior. This uniform national standard must either formulate a national definition of the behavior that will constitute a crime involving moral turpitude or bar a finding of good moral character; or, it must hold that consensual sexual and affectionate homosexual behavior, even when criminalized under state law, is neither morally turpitudinous nor incompatible with good moral character. The first alternative is permissible only if it employs a non-discriminatory standard. A discriminatory standard would conflict with Congress' express intent to eliminate discrimination against homosexuals from the immigration law, and to keep immigration officials out of the business of monitoring consensual sexual behavior, even when criminalized under state laws regulating sexual morality.

4. The Inequity of the Public-Private Distinction

Many courts might think that the distinction between public and private behavior as articulated in *Nemetz* and in the pre-1981 adultery cases is itself an appropriate and non-discriminatory standard, and that *Nemetz* should be extended no further. Indeed, the articulated rationale behind the public-private distinction in *Nemetz* was an egalitarian one, the idea that exempting all private sexual behavior from the purview of the federal immigration law places homosexuals and heterosexuals on equal footing.[310] According to this view, the distinction is both neutral and fair, because it exempts all purely private behavior, and penalizes all public behavior. Only those people, heterosexual and homosexual alike, who choose to engage in public or quasi-public sexual activity are at risk of incurring a penalty.

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deemed destructive of marriage. *See, e.g.*, Southern Surety Co. v. Oklahoma, 241 U.S. 582 (1916) (upholding constitutionality of state law criminalizing adultery); and Commonwealth v. Stowell, 449 N.E.2d 537 (Mass. 1983) (upholding state's right to criminalize adultery on grounds that it threatens institution of marriage).

309. 647 F.2d 432, 436-37 (4th Cir. 1981) (holding that "the distinction between private and public acts for purposes of naturalization" is decisive both for adultery and homosexuality).

310. *Id.* at 434, n.1 (arguing that homosexual and heterosexual acts of sodomy should be accorded equal treatment).

This rationale must be challenged on several grounds. First, it ignores the extent to which public heterosexual activity is not in fact subject to the same surveillance and prosecution as homosexual activity. Laws against public sexual behavior are not only frequently defined in biased terms, they are also enforced disproportionately against gays and lesbians.[311] Solicitation is the prime example of a statutory offense that singles out homosexuals by its very terms. The fact that merely asking a person of the same gender to have sex is a crime in many jurisdictions indicates how disparately the law still treats similarly situated persons of different sexual orientations.[312] Undercover police officers do not try to entrap straight persons soliciting non-commercial sex.[313] Moreover, many laws that do apply to both orientations are enforced almost exclusively against lesbians and gay men. Charges of disorderly conduct for holding hands in the street or in a parked car, or of lewd and lascivious behavior or public indecency for having sex in a secluded public place are very rarely brought against heterosexuals. The police do not shut down public parks known to be frequented by heterosexuals.[314]

Second, because of legal and social discrimination, homosexual and heterosexual people do not have equal access to privacy. Most obviously, gays and lesbians cannot marry.[315] Except in jurisdictions with civil rights legislation, they are not protected from discrimination in housing and employment.[316] For heterosexuals, the right to privacy is not conditional on concealing one's sexual orientation from the world, as it is for most lesbians and gay men. Heterosexuals do not, for instance, have to hide their sexual identity in order to rent a house or an apartment, or to find a job. It is, in fact, precisely because lesbians and gay men lack equal access to privacy that they have been forced to create alternative social spaces in which to socialize and find sexual and romantic partners.[317]

Third, to restrict the definition of "private" behavior to activity between two people alone in a private home is to insist on a very partial and tendentious definition. This narrow interpretation of privacy universalizes the experience of married heterosexual couples who live in private homes, and excludes the history and experience of lesbians and gay men, and of the many heterosexuals whose lives do not conform to this narrow pattern. Moreover, the conduct punished under public morality statutes is "public" only in the most arbitrary legal sense; it does not literally happen in front of indiscriminate passers-by, but

311. *See supra* notes 217-49 and accompanying text.
312. *See supra* note 249.
313. *Id.*
314. *See supra* notes 250-64 and accompanying text.
315. *See* SEXUAL ORIENTATION & L., *supra* note 218, at 9-31.
316. *Id.*
317. *See* Wolfson & Sears, *supra* note 233, at 22 (noting that "[m]any of those targeted [by public lewdness arrests] are people of color and the young, as well as those not out or just stepping out of the closet, and those without homes or places to which they dare bring others.").

rather in spaces that the state defines as public.[318] As historian Gary Kinsman has observed:

> [B]attles between the gay movement and the police are a manifestation of social struggles over the State-defined distinction between public and private. The police are trying to establish that gay baths, and male sex in parks and washrooms, is public sex and therefore subject to their direct intervention. The very institutions of the gay community would thus be rendered "public."[319]

The lesbian and gay movement, in turn, has sought to shift the meaning of privacy from its narrow, state-controlled definition to one that is grounded in the actual lives of lesbian and gay people.[320]

Conclusion

The most effective way to challenge the discriminatory impact of public morality offenses on lesbians and gay men under U.S. immigration law is to extend the argument used in *Nemetz* to exempt private sodomy from the good moral character analysis. That argument combined the "uniform rule of naturalization" requirement with an appeal to Congress' intent with regard to private sexual behavior in the immigration statute.[321] The 1990 Act clarified Congress' intention to eliminate discrimination against homosexuals in immigration.[322] The 1990 Act was also consistent with court decisions and legislative amendments that increasingly exempted consensual sexual behavior from the scrutiny of the immigration law.[323] It appears that Congress did not intend for consensual homosexual behavior, even when criminalized by state or national law, to affect an alien's treatment under the immigration law.

Currently, conviction or admission of same-gender public morality offenses triggers the crimes involving moral turpitude exclusion, and can also be used to negate a finding of good moral character. This state of affairs violates Congress' intent in the 1990 Act. The inconsistency among state and national laws regulating public same-gender activity and in enforcement from state to state and nation to nation also violates the requirement of geographic uniformity in the federal immigration law. Together, these violations of Congressional intent and of the uniformity requirement create a strong argument against the use of consensual sodomy and public sex offenses for immigration purposes.

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318. *See supra* notes 248-49 and accompanying text.
319. KINSMAN, *supra* note 237, at 209.
320. *See supra* notes 244-49 and accompanying text.
321. *See supra* notes 182-92, 304-05 and accompanying text.
322. *See supra* notes 81-84 and accompanying text.
323. *See supra* notes 154-58, 296-99 and accompanying text.