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The Constitutionality of Sodomy Statutes

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THE CONSTITUTIONALITY OF SODOMY STATUTES

I. INTRODUCTION

At the present time private consensual sodomy is a criminal offense in the large majority of our states,[1] punishable by sentences of up to ten, or even twenty years.[2] Such laws raise a number of constitutional issues, the resolution of which will determine whether or not consensual sodomy statutes exceed the limits of the state's police power by violating the constitutionally protected rights of its citizens. These issues include the vagueness and overbreadth of statutory language, the violation of the eighth amendment's prohibition against cruel and unusual punishments and of the first amendment's establishment clause, and the infringement of the rights of privacy and equal protection.

Recently the Supreme Court had the opportunity to address itself to the question of the validity of anti-sodomy legislation. In *Doe v. Commonwealth's Attorney for City of Richmond*,[3] without opinion and without benefit of full briefing or oral argument, the Court affirmed a decision of a three-judge federal district court,[4] in which the Virginia statute[5] had been held constitu-

1. Ala. Code tit. 14, § 106 (1958); Alaska Stat. § 11.40.120 (Cum. Supp. 1975); Ariz. Rev. Stat. Ann. §§ 13-651, -652 (Spec. Pamphlet 1973); Fla. Stat. Ann. § 800.02 (1976) (for constitutionality see note 41 infra); Ga. Code Ann. § 26-2002 (1972); Idaho Code § 18-6605 (Supp. 1975); Kan. Stat. Ann. § 21-3505 (1974); Ky. Rev. Stat. Ann. § 510.100 (1975); La. Rev. Stat. Ann. § 14:89 (West Supp. 1976); Md. Ann. Code art. 27, §§ 553, 554 (1976); Mass. Ann. Laws ch. 272, §§ 34, 35 (1968); Mich. Comp. Laws Ann. §§ 750.158, .338 (1968); Minn. Stat. Ann. § 609.293 (Supp. 1976); Miss. Code Ann. § 97-29-59 (1972); Mo. Rev. Stat. § 563.230 (1969); Mont. Rev. Codes Ann. § 94-5-505 (Spec. Crim. Code Pamphlet 1976); Neb. Rev. Stat. § 28-919 (1975); Nev. Rev. Stat. § 201.190 (1973); N.J. Stat. Ann. §§ 2A:115-1, 143-1 (1969); N.Y. Penal Law § 130.38 (McKinney 1975) (for constitutionality see notes 208-09 infra and accompanying text); N.C. Gen. Stat. § 14-177 (1969); Okla. Stat. Ann. tit. 21, § 886 (1958); Pa. Stat. Ann. tit. 18, § 3124 (1973); R.I. Gen. Laws Ann. § 11-10-1 (1969); S.C. Code Ann. § 16-412 (1962); Tenn. Code Ann. § 39-707 (1975); Tex. Penal Code Ann. § 21.06 (1974); Utah Code Ann. § 76-5-403 (Special Supp. 1975); Vt. Stat. Ann. tit. 13, § 2603 (1974); Va. Code Ann. § 18.2-361 (1975); Wis. Stat. Ann. § 944.17 (1958); Wyo. Stat. Ann. § 6-98 (Supp. 1975). Most courts have found these statutes inapplicable to married couples. See note 104 infra and accompanying text.

It is to be noted that the Indiana and South Dakota legislatures have repealed their sodomy statutes, effective July 1 and April 1, 1977, respectively. See note 93 infra. Also the Iowa statute (Iowa Code Ann. §§ 705.1, -.2 (1950)) has recently been held unconstitutional by the state's highest court. See note 93 infra.

2. See chart at text accompanying note 95 infra.

3. 425 U.S. 901 (1976), aff'g 403 F. Supp. 1199 (E.D. Va. 1975).

4. The Court's affirmance was received with dismay and harsh criticism by civil liberties groups as well as students of the Court. Lewis, No Process of Law, N.Y. Times, Apr. 8, 1976, at 37, col. 1; N.Y. Times, Mar. 30, 1976, at 17, cols. 1 & 2. It was viewed as a step backwards in the Court's trend over the last decade to expand the individual's right of privacy vis-à-vis government regulation. Griswold v. Connecticut, 381 U.S. 479 (1965) (marital right of privacy recognized); Stanley v. Georgia, 394 U.S. 557 (1969) (right to use obscene material in privacy of home); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarrieds cannot be deprived of equal access to contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion recognized).

tional. In the lower court, plaintiffs sought a declaratory judgment as to the constitutionality of the statute insofar as it affected their private homosexual conduct with other consenting adults. They claimed the statute violated not only the guarantees of due process and freedom of expression but also the right of privacy and the eighth amendment's prohibition against cruel and unusual punishments.[6]

Since this was an appeal as of right,[7] the Court had to give a decision on the merits.[8] On the other hand, the Court need not and indeed did not give full consideration to the appeal.[9] Thorough briefing with oral argument will not be allowed where a judgment below is so obviously correct that the Court could not reverse or where a question at issue has already been settled definitively by the Court's prior decisions.[10] If this rationale explains the

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More seriously, perhaps, the summary nature of the decision provided no guidance. Since an affirmance does not mean adoption of the lower court's opinion, the rationale of the district court cannot be relied on. Brown v. Allen, 344 U.S. 443, 459 (1953) ("[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."), quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937).

5. "§ 18.1-212. Crimes against nature. — If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years." Ch. 427, [1968] Va. Acts 529 (repealed and reenacted 1975). 403 F. Supp. at 1200.

6. 403 F. Supp. at 1200.

7. See 28 U.S.C. § 1253 (1970).

8. Apropos of its appellate jurisdiction, the Court has noted, "[W]e had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits." Hicks v. Miranda, 422 U.S. 332, 344 (1975).

9. The Supreme Court Rules require that the appellant show "reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." U.S. Sup. Ct. R. 15(1)(e).

Commenting on this Rule, former Chief Justice Warren declared: "Very few appeals from federal district courts are subject to dismissal for want of jurisdiction but many do not present a question sufficiently substantial to warrant the expense of printing the record and briefs, and the expenditure of the time of counsel and the Court in oral argument. In such cases the judgment will be affirmed." Address of Chief Justice Warren, ALI Annual Meeting, May 19, 1954, quoted in Wiener, The Supreme Court's New Rules, 68 Harv. L. Rev. 20, 51 (1954).

As a matter of fact, relatively few appeals are heard in full. In the 1965 Term, for instance, of the 145 appeals disposed of, 101 were given summary treatment without oral argument. R. Stern & E. Gressman, Supreme Court Practice § 4.28, at 197 (4th ed. 1969) [hereinafter cited as Stern & Gressman].

10. "In 1902 the Court declared that motions to dismiss would be granted even where 'a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appears that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so exclusively foreclosed by a decision or decisions of this Court as to leave no room for real controversy,' or 'where it is evident on the face of the record that question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the Court as to absolutely foreclose further contention on the subject.' " Stern & Gressman,

summary affirmance in *Doe,* then apparently the state prohibition of private consensual acts of sodomy between adults raises no question of the abridgement of fundamental rights in the judgment of the Court and any challenges to such laws are frivolous and without merit.[11] Even if this inference must be weighed against the consideration that the lack of explanation of memorandum decisions is often "the most effective way for the Court, within the limitations imposed by the jurisdictional statute, to minimize the effect of the dispositions as pronouncements on the law,"[12] nevertheless the summary affirmance in *Doe* was a decision on the merits, and so, whatever its meaning, it is the law and has precedential value.[13]

Since the Court failed to give any clue as to why it decided as it did, it is

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supra note 9, § 4.29, at 198, quoting Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311 (1902). See California Water Serv. Co. v. Redding, 304 U.S. 252, 255 (1938); Douglas, The Supreme Court and Its Case Load, 45 Cornell L.Q. 401, 411 (1960).

It is to be noted that if the Court could not exercise its discretion in this way, its ever-increasing case load would simply be unmanageable. See former Chief Justice Warren's remarks quoted in note 9 supra; Stern & Gressman, supra note 9, § 4.28, at 196; Note, The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts, 63 Colum. L. Rev. 688, 694 (1963).

11. This conclusion is supported by the Court's subsequent denial of a rehearing to Doe v. Commonwealth's Atty. for City of Richmond, 96 S. Ct. 2192 (1976), and its refusal to grant certiorari in Doe's companion case, Enslin v. North Carolina, 425 U.S. 903 (1976), denying cert. to 25 N.C. App. 662, 214 S.E.2d 318 (1975), where the accused had been entrapped by the police into committing an act of oral intercourse in his home with a seventeen-year old boy. Brief for Appellant, at 4. Two years earlier, the Court had dismissed for want of a substantial federal question an appeal from a state court imposition of a fifteen-year sentence (the commission of a prior unrelated felony had affected this sentence) for having engaged in an act of consensual sodomy with another adult in a car parked one hundred yards off the highway in a clump of trees. Canfield v. State, 414 U.S. 991 (1973), dismissing appeal from 506 P.2d 987 (Okla. Crim. App.). Such a summary dismissal for lack of a substantial federal question of an appeal from a state court is equivalent to a summary affirmance of an appeal from a federal court; that is, it is a decision on the merits and has precedential value. See generally P. Bator, P Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 646 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; Stern & Gressman, supra note 9, § 5.18, at 233.

12. Note, The Insubstantial Federal Question, 62 Harv. L. Rev. 488, 496 (1949). The Court may simply be tolerating the device of summary affirmance as a kind of necessary evil in order to gain time before committing itself to a definitive opinion on the consensual sodomy issue. Consider Justice Harlan's dissent in Redrup v. New York, 386 U.S. 767, 772 (1967) (per curiam) (Harlan, J., dissenting) (quoted in Hart & Wechsler, supra note 11, at 649): "I think the issues for which the cases were taken should be decided. Failing that, I prefer to cast my vote . . . to dismiss the appeal in Gent for lack of a substantial federal question. I deem it more appropriate to defer an expression of my own views on the questions brought here until an occasion when the Court is prepared to come to grips with such issues." What Harlan's statement clearly implies is that such a summary dismissal (or affirmance, if the appeal is from federal court) is a postponement of dealing with the merits. One authority questions whether instances of summary affirmances or dismissals for want of a substantial federal question being subsequently overruled cast doubt on their precedential value. Hart & Wechsler, supra note 11, at 649.

13. Id.; Stern & Gressman, supra note 9, § 4.28, at 197 & n.60; Note, The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts, 63 Colum. L. Rev. 688, 693-94 & nn.50-52 (1963).

not known which of the constitutional arguments raised by the plaintiffs in the district court were rejected or what points of law are now considered settled.[14] Moreover, there remain other substantial challenges not presented in *Doe*. This Comment will examine the constitutional arguments that can be marshalled against sodomy laws as well as the likelihood of their success. Despite the homosexual emphasis in *Doe*, sodomy statutes have traditionally made no distinction between heterosexual and homosexual sodomy. Thus, their constitutionality will be treated from a general perspective as opposed to the more limited, though more publicized,[15] perspective of homosexuality.

II. Arguments Directed at the Statutory Language

A. *The Void-for-Vagueness Argument*

American anti-sodomy legislation traces its ancestry back to a statute passed in the reign of Henry VIII.[16] There, and in subsequent English case law, sodomy meant exclusively copulation *per anum*,[17] and indeed some jurisdictions have adhered to this restricted definition.[18] In other states, however, legislation or judicial interpretation has broadened the crime to include copulation *per os*.[19]

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14. Indeed some or all of the appellants' arguments might possibly have proved more compelling if heterosexual, rather than homosexual, sodomy had been at issue. See, e.g., State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (en banc) (constitutionally protected right to perform sodomitical acts expressly limited to heterosexual conduct); see also People v. Johnson, 77 Misc. 2d 889, 355 N.Y.S.2d 266 (Buffalo City Ct. 1974), which, though recognizing a constitutionally protected right to perform sodomitical acts on equal protection grounds, expressly limited this right to heterosexual conduct.

15. E.g., W. Barnett, Sexual Freedom and The Constitution (1973) [hereinafter cited as Barnett]; Fisher, The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?, 30 Md. L. Rev. 91 (1970); Note, The Crimes Against Nature, 16 J. Pub. L. 159 (1967); Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, 72 Mich. L. Rev. 1613 (1974); Note, Homosexuality and the Law — An Overview, 17 N.Y.L.F. 273 (1971).

16. 25 Hen. 8, c. 6 (1533) (repealed by 9 Geo. 4, c. 31 (1828)). Before that, sodomy was handled by the ecclesiastical courts. R. Perkins, Criminal Law 389 (2d ed. 1969) [hereinafter cited as Perkins].

17. See Perkins v. State, 234 F. Supp. 333 (W.D.N.C. 1964); Koontz v. People, 82 Colo. 589, 263 P. 19 (1927); People v. Schmitt, 275 Mich. 575, 267 N.W. 741 (1936); Perkins, supra note 16, at 390. Contra, State v. Start, 65 Ore. 178, 132 P. 512 (1913).

18. E.g., Harris v. State, 457 P.2d 638 (Alas. 1969); State v. Potts, 75 Ariz. 211, 254 P.2d 1023 (1953); Daniels v. State, 237 Md. 71, 205 A.2d 295 (1964); People v. Dexter, 6 Mich. App. 247, 148 N.W.2d 915 (2d Div. 1967).

19. E.g., Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Parris v. State, 43 Ala. App. 351, 190 So. 2d 564 (1966); Connor v. State, 253 Ark. 854, 490 S.W.2d 114, appeal dismissed, 414 U.S. 991 (1973); State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975); Estes v. State, 244 Ind. 691, 195 N.E.2d 471 (1964); Dinkens v. State, __ Nev. __, 546 P.2d 228 (1976); State v. Lemire, 115 N.H. 526, 345 A.2d 906 (1975); Stephens v. State, 489 S.W.2d 542 (Tenn. Crim. App. 1972); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970), appeal dismissed, 402 U.S. 902 (1971); Barnett, supra note 15, at 24-25.

Where the statute in question does not specifically proscribe anal intercourse but employs the

In its broadest meaning, sodomy is the carnal copulation by human beings with each other against nature, or with a beast, in which sense it includes the crime against

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term crime against nature instead of sodomy, courts have frequently found this sufficient justification to conclude that its prohibition is broader in scope. E.g., Parris v. State, 43 Ala App. 351, 190 So. 2d 564 (1966); Young v. State, 194 Ind. 221, 141 N.E. 309 (1923); State v. Cyr, 135 Me. 515, 198 A. 743 (1938); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971).

The term crime against nature is used, usually without further explanation, by fifteen states, i.e., by just less than half the states currently penalizing consensual sodomy: Ala. Code tit. 14, § 106 (1958); Ariz. Rev. Stat. Ann. § 13-651 (Spec. Pamphlet 1973); Idaho Code § 18-6605 (Supp. 1976); La. Rev. Stat. Ann. § 14:89 (West Supp. 1976); Miss. Code Ann. § 97-29-59 (1972); Mo Rev. Stat. § 563.230 (1969); Neb. Rev. Stat. § 28-919 (1975); Nev. Rev. Stat. § 201.190 (1973); N.J. Stat. Ann. § 2A:143-1 (1969); N.C. Gen. Stat. § 14-177 (1969); Okla. Stat. Ann. tit. 21, § 886 (1958); R.I. Gen. Laws Ann. § 11-10-1 (1969); Tenn. Code Ann. § 39-707 (1975); Va. Code Ann. § 18.2-361 (1975); Wyo. Stat. Ann. § 6-98 (Supp. 1975).

The controversy as to the meaning of sodomy is not limited to the simple distinction between intercourse per anum and intercourse per os. The law reports abound in cases deciding whether or not sodomy encompasses cunnilingus. A case wherein this issue was debated has recently received the attention of the Supreme Court. Rose v. Locke, 423 U.S. 48 (1975) (per curiam) (since Tennessee's highest court had given sufficient indication that the sodomy statute was to be interpreted broadly, the punishment of cunnilingus thereunder was not challengeable on vagueness grounds). Young v. State, 531 S.W.2d 560 (Tenn. 1975), contains a brief history of the Tennessee statute's construction as well as of the progress of Rose through state and federal courts.

Also holding cunnilingus to be sodomy is State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967), noted in 8 Nat. Res. J. 531 (1968); accord, Parris v. State, 43 Ala. App. 351, 190 So. 2d 564 (1966); Gilmore v. People, 171 Colo. 358, 467 P.2d 828 (1970); United States v. Cozart, 321 A.2d 342 (D.C. Ct. App. 1974); Carter v. State, 122 Ga. App. 21, 176 S.E 2d 238 (1970); State v. Young, 249 La. 1054, 193 So. 2d 243 (1966); Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970). Contra, Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963), discussed at notes 203-204 infra and accompanying text, Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (1939); State v. Tarrant, 83 Ohio App. 199, 80 N.E 2d 509 (1948); cf. note 27 infra.

Again, the very elements required to constitute the offense vary from one jurisdiction to the other. Holding penetration necessary, Tarrant v. State, 12 Ala. App. 172, 67 So. 626 (1915), State v. Alkhowarizmi, 101 Ariz. 514, 421 P.2d 871 (1966) (en banc); State v. Pratt, 309 A.2d 864 (Me. 1973); Nev. Rev. Stat. § 201.193 (1973). Contra, Ruff v. State, 132 Ga. App. 568, 208 S.E.2d 581 (1974); Sinclair v. State, 166 Tex. Crim. 167, 311 S.W.2d 824 (1958). Apparently, a statute defining the crime as "sexual contact" or "sexual gratification involving the sex organs" would not require a showing of penetration; e.g., Ill. Ann. Stat. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1972), as amended, (Supp. 1976) (so construed in People v. Anderson, 20 Ill. App. 3d 840, 314 N.E.2d 651 (1st Dist. 1974)); Mont. Rev. Codes Ann. §§ 94-2-101(14), (55), 94-5-505 (Spec. Crim Code Pamphlet 1976); N.Y. Penal Law §§ 130.00(2), 130.38 (McKinney 1975).

Note that "[t]he view that cunnilingus is not within the crime against nature . . . has been based on the lack of penetration of the body." 81 C.J.S. Sodomy § 1(b)(4) (1953), quoted in Locke v State, 501 S.W.2d 826, 831 (Tenn. Crim. App. 1973) (Galbreath, J., dissenting) Thus Swain v. State, 172 So. 2d 3 (Fla. Dist. Ct. App. 1965), refused to find that cunnilingus had been committed where there was no penetration.

As to whether or not emission is a necessary element of the crime, here, too, jurisdictions differ. E.g., Miller v. State, 256 Ind. 296, 268 N.E.2d 299 (1971) (not necessary); People v. Ford, 28

nature, bestiality, buggery, cunnilingus, and fellatio. In its narrower sense sodomy is the carnal copulation between two human beings per anus [*sic*], or by a human being in any manner with a beast.[20]

This standard definition indicates what a varied and amorphous range of conduct the term "sodomy" can encompass. In fact, since each state has promulgated its own sodomy statute, there need be little or no correspondence between the activity proscribed as sodomitical in one state and that outlawed in another. Moreover, the problem of definition exists even within the states themselves since a sizeable minority of jurisdictions prefer to designate the crime simply as "sodomy,"[21] "the crime against nature,"[22] an "act of gross indecency"[23] or to employ some other equally unrevealing phrase.[24]

This ambiguity and confusion has resulted in numerous constitutional challenges to sodomy statutes on void-for-vagueness grounds.[25] It is con-

Mich. App. 547, 184 N.W.2d 473 (1st Div. 1970) (per curiam) (not necessary). Some statutes specifically declare emission not to be an element of the crime. E.g., Ala. Code tit. 14, § 107 (1958); La. Rev. Stat. Ann. § 14:89 (West Supp. 1976).

In sum, there is little unanimity over the nature and elements of sodomy. Its scope may be either broad or narrow depending on the statute in question and the make-up of the court construing it. One court has even held that penetration of the anus with a blunt instrument fell under the statute. State v. Anthony, 179 Ore. 282, 169 P.2d 587 (1946) (en banc), cert. denied, 330 U.S. 826 (1947); accord, Edmonds v. State, 18 Md. App. 55, 305 A.2d 205 (1973). Both these cases dealt with statutes expressly forbidding "sexual perversity" in addition to ordinary sodomy, and it was under the former charge that the convictions were upheld.

20. 81 C.J.S. Sodomy § 1(a) (1953) (footnotes omitted).

21. E.g., Alaska Stat. § 11.40.120 (Supp. 1975).

22. See statutes listed in note 19 supra.

23. E.g., Mich. Comp. Laws Ann. § 750.338 (1968).

24. This lack of descriptive detail and specificity is deliberate. "Courts have universally pointed out that the acts sought to be prevented . . . are of such a nature that legislatures and courts are reluctant to engage in detailed descriptions of the many acts which the human being is capable of accomplishing which are so offensive as to be deemed an 'abominable and detestable crime against nature with mankind or beast.' " Dixon v. State, 256 Ind. 266, 271, 268 N.E.2d 84, 87 (1971); accord, Honselman v. People, 168 Ill. 172, 174, 48 N.E. 304, 305 (1897). But cf. State v. Bluain, 315 So. 2d 749 (La. 1975).

The reticence of the law with regard to sodomy is at least as old as Blackstone, who called it "a crime not fit to be named" and felt compelled to resort to Latin in speaking of it, " 'peccatum illud horribile, inter christianos non nominandum.' " 4 W. Blackstone, Commentaries *215 (italics omitted). For the same reason, even indictments are exempted from the ordinary strict rules of pleading when charging this crime. State v. Dayton, 535 S.W.2d 469, 479 (Mo. Ct. App. 1976); accord, Boyington v. State, 45 Ala. App. 176, 227 So. 2d 807 (1969); Commonwealth v. Balthazar, __ Mass. __, 318 N.E.2d 478 (1974); State v. Langelier, 136 Me. 320, 8 A.2d 897 (1939); State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968); Md. Ann. Code art. 27, § 554 (1976) ("[I]t shall not be necessary to set forth the particular unnatural or perverted sexual practice . . . nor to set forth the particular manner . . . .").

25. The void-for-vagueness doctrine is based on due process and can be used to challenge any statute, particularly a penal one. Several Supreme Court decisions have elucidated the main outlines of the doctrine and its rationale. Colten v. Kentucky, 407 U.S. 104, 110 (1972); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); United States v. National Dairy Prod. Corp., 372 U.S. 29, 32-33 (1963); Musser v. Utah, 333 U.S. 95, 97 (1948); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

tended that no reasonably clear standards of guilt are set forth by merely denominating an offense as sodomy or the crime against nature. As a result, the ordinary citizen is deprived of fair warning, and prosecutors and judges are left without guidance.

This argument, however, has not been sustained in the overwhelming majority of cases, including two recent decisions by the Supreme Court.[26] Courts have emphasized that the terminology in question is very old and has therefore acquired a well understood and generally accepted meaning.[27] They have also relied on the rule that a statute ambiguous on its face may be made precise by reference to the meaning of sodomy at common law or by prior interpretations of a state's highest court.[28]

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26. E.g., Rose v. Locke, 423 U.S. 48 (1975) (per curiam); Wainwright v. Stone, 414 U.S. 21 (1973) (per curiam); Thompson v. Turner, 275 F. Supp. 65 (E.D.N.C. 1967); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Horn v. State, 49 Ala. App. 489, 273 So. 2d 249 (1973); Connor v. State, 253 Ark. 854, 490 S.W.2d 114, appeal dismissed, 414 U.S. 991 (1973); Gilmore v. People, 171 Colo. 358, 467 P.2d 828 (1970); State v. Carringer, 95 Idaho 929, 523 P.2d 532 (1974); Dixon v. State, 256 Ind. 266, 268 N.E.2d 84 (1971); State v. Lindsey, 310 So. 2d 89 (La. 1975); Commonwealth v. Balthazar, __ Mass. __, 318 N.E.2d 478 (1974); People v. Askar, 8 Mich. App. 95, 153 N.W.2d 888 (2d Div. 1967); State v. Crawford, 478 S.W.2d 314 (Mo.), appeal dismissed, 409 U.S. 811 (1972); State v. Temple, 192 Neb. 442, 222 N.W.2d 356 (1974); Dinkens v. State, __ Nev. __, 546 P.2d 228 (1976); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973); Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971); State v. Anthony, 179 Ore. 282, 169 P.2d 587 (1946) (en banc), cert. denied, 330 U.S. 826 (1947); Young v. State, 531 S.W 2d 560 (Tenn. 1975).

The void-for-vagueness doctrine represents the most common challenge to sodomy statutes. Since most prosecutions brought under these statutes are against defendants who have used violence on the other party or who have engaged in deviate sex with a minor (see note 56 infra), more substantive defenses (e.g., the right of privacy or equal protection) are not available to them.

27. E.g., Rose v. Locke, 423 U.S. 48, 50 (1975) (per curiam); State v. Lindsey, 310 So. 2d 89, 91-92 (La. 1975); Commonwealth v. Balthazar, __ Mass. __, __, 318 N.E.2d 478, 480 (1974); State v. Crawford, 478 S.W.2d 314, 317-18 (Mo.), appeal dismissed, 409 U.S. 811 (1972).

28. E.g., Wainwright v. Stone, 414 U.S. 21, 22-23 (1973) (per curiam); Perkins v. North Carolina, 234 F. Supp. 333, 336 (W.D.N.C. 1964); State v. Carringer, 95 Idaho 929, 930, 523 P.2d 532, 533 (1974); Commonwealth v. Balthazar, __ Mass. __, __, 318 N.E.2d 478, 480 (1974). Moreover, the existence of a prior interpretation by the state's highest court is not a prerequisite to a statute's withstanding a void-for-vagueness attack. In Rose v. Locke, 423 U.S. 48 (1975) (per curiam), a conviction for cunnilingus was sustained though no earlier decision had construed the statute's prohibition of the crime against nature as encompassing this offense. The Court said that the conviction was not the result of "an unforeseeable judicial enlargement of a criminal statute," inasmuch as earlier Tennessee cases had made clear that a broad definition of sodomy was encompassed by the statute. Id. at 52-53.

When force is used or the other party is a minor, these circumstances provide a sufficient basis for rejecting a vagueness attack. E.g., State v. Carringer, 95 Idaho 929, 930, 523 P 2d 532, 533 (1974). In general, unless a statute regulates in the area of first amendment guarantees, it will not be evaluated on its face but only in the context of the conduct with which the defendant is charged. Where found vague, the statute may still be held unconstitutional only as applied, if there also exists conduct which the statute may lawfully prohibit and if its good effects outweigh any harm done. United States v. National Dairy Prod. Corp., 372 U.S. 29, 31-33 (1963). See Palmer v. City of Euclid, 402 U.S. 544, 545 (1971) (per curiam); Robinson v. United States, 324 U.S. 282, 286 (1945).

Research has disclosed only four appellate decisions[29] in the last decade which have overturned a sodomy conviction on void-for-vagueness grounds. On closer inspection, even these are not real departures from the general tendency to reject the vagueness argument. Thus, although an Ohio appellate court pronounced a statute prohibiting solicitation to commit an "unnatural sexual act" unconstitutionally vague because that phrase had not been defined by legal usage,[30] the court indicated that it could uphold a statute prohibiting "an unnatural and lascivious act," as that language had been construed by the courts.[31] In *Harris v. State*,[32] a decision of Alaska's highest court, the statute under discussion outlawed both sodomy and the crime against nature. The latter expression was declared unconstitutional since Alaska had no prior case law "to rescue it from the realm of nebulosity."[33] The term sodomy was retained, however, as its meaning was well attested in the Anglo-American legal tradition.[34] The same rationale was used by the Ninth Circuit in *Jellum v. Cupp*.[35] The accused had been charged with committing "an act of sexual perversity" in violation of a law proscribing sodomy, the crime against nature, and "any act or practice of sexual perversity."[36] The court looked to the common law and general knowledge to invalidate the last prohibition and to sustain the first two.[37]

In 1971 the Supreme Court of Florida struck down its sodomy act on vagueness grounds. It pointed out that over the past one hundred years not only had society become increasingly sophisticated, but language had evolved so drastically that the term crime against nature had become incomprehensible.[38] The legal fiction that the average citizen will consult judicial interpretations to understand and comply with the statute was rejected.[39] However, without explanation the court reaffirmed the constitutionality of a second statute proscribing "any unnatural and lascivious act with another person,"[40] which in fact punished sodomitical conduct, though with a lesser penalty. Apparently, the court did not find this wording ambiguous,[41] although,

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29. Jellum v. Cupp, 475 F.2d 829 (9th Cir. 1973); Harris v. State, 457 P.2d 638 (Alas. 1969); Franklin v. State, 257 So. 2d 21 (Fla. 1971) (per curiam); State v. Sharpe, 1 Ohio App. 2d 425, 205 N.E.2d 113 (1965) (per curiam).

30. State v. Sharpe, 1 Ohio App. 2d 425, 426, 205 N.E.2d 113, 114 (1965) (per curiam).

31. Id., 205 N.E.2d at 114-15.

32. 457 P.2d 638 (Alas. 1969).

33. Id. at 644 (footnote omitted).

34. Id. at 649.

35. 475 F.2d 829 (9th Cir. 1973).

36. Id. at 830 n.1. The accused had accosted a woman, struggled with her, knocked her down, and then urinated on her. Id. at 831.

37. Id. at 831-32.

38. Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971) (per curiam).

39. Id.

40. Id. at 24. See Fla. Stat. Ann. § 800.02 (1976).

41. Id. It is submitted that the Franklin court's unwillingness to apply the same rationale to invalidate the statute prohibiting unnatural and lascivious acts was illogical. See Justice England's criticism to that effect in Thomas v. State, 326 So. 2d 413, 417-18 (Fla. 1975) (England, J., dissenting). The practical effect of the decision, which was to retain a prohibition against

unlike the language of the more serious offense, it enjoyed no ancient or long-established usage.

The first three cases considered actually reaffirm the principle that the common law and judicial construction can cure ambiguity in traditional statutory language. The Florida decision, which, unlike the other three, argues forcefully and plausibly that the term "crime against nature" is incomprehensible to contemporary society, undercuts its own rationale by tolerating the equally vague lesser offense. Thus, despite the very real confusion as to the meaning of sodomy or the crime against nature, the void-for-vagueness argument has been practically ineffective. But even were it to prove successful in a given case, it would aid only a particular defendant, since it is always open to a legislature to revise a given statute and precisely delineate the conduct forbidden.[42]

B. *The Overbreadth Argument*

Whereas the void-for-vagueness doctrine focuses on the clarity and explicitness of the statutory language, the overbreadth doctrine requires that a prohibition be narrowly and precisely limited lest it sweep under its coverage related areas that may not constitutionally be so regulated.[43] As a result of the Supreme Court's decision in *Griswold v. Connecticut*,[44] it has become a

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consensual sodomy while reducing its penalty, gives a clue to what motivated the court. In support of its holding that the statute penalizing the crime against nature was unconstitutional, the court had noted in passing: "Such a sentence [twenty years to each of the two appellants caught performing acts of sodomy in a car parked in a public place] is equal to that for manslaughter and would no doubt be a shocking revelation to persons who do not have an understanding of the meaning of the statute." Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971) (per curiam). On the other hand, the court continued, saying: "[S]ociety will continue to be protected from this sort of reprehensible act under Section 800.02 . . . ." Id. at 24. The decision, then, resulted from the balancing of two instincts, a revulsion at the disproportionately severe sentence imposed and a feeling that consensual sodomy should nevertheless continue to be restricted by force of criminal sanction.

A Florida county court has recently found § 800.02 void for vagueness. State v. Alvarez, 42 Fla. Supp. 83 (Dade County Ct. 1975).

42. The doctrine of void for vagueness would be ineffective to invalidate a modern statutue worded thus: "'Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." N.Y. Penal Law § 130.00(2) (McKinney 1975).

43. Zwickler v. Koota, 389 U.S. 241, 249-50 (1967). For cases discussing the overbreadth doctrine, see Lewis v. City of New Orleans, 415 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (extensive discussion); Gooding v. Wilson, 405 U.S. 518 (1972); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). "[A]n overbroad statute which sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct." Congressional Research Service, Library of Congress, Constitution of the United States of America 960 (1973) [hereinafter cited as Constitution Annotated]. Thus both the overbreadth and void-for-vagueness doctrines are peculiarly sensitive to invasions of first amendment rights. See note 28 supra.

44. 381 U.S. 479 (1965).

settled principle of constitutional law that the privacy of marital sex is immune from government interference and regulation.[45] Despite the virtually universal recognition of this fundamental right, rarely do sodomy statutes draw distinctions between those who are married and those who are not.[46] Where no distinction is made, a statute is susceptible to a challenge for overbreadth.

The vast majority of sodomy prosecutions involve cases where the accused is alleged to have used force[47] or to have committed the sodomitical act with a minor[48] or in public.[49] Thus in this area the overbreadth doctrine is essentially a defense which asserts the rights of third parties — whether it be the marital right of privacy or a more general right of sexual privacy between consenting adults. If the defense is successful, one who may have forced another at gun point to perform acts of sodomy will go unpunished. Perhaps the seeming injustice of this situation has affected judicial decisions. At any rate, the large majority of opinions[50] have rejected the overbreadth defense, usually by finding the accused lacked standing to raise the constitutional rights of others.[51]

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45. See notes 99-105 infra and accompanying text.

46. Only seven of the thirty-two states that currently outlaw consensual sodomy specifically exempt married couples in their statutes. See note 105 infra.

47. E.g., State v. Dale, 25 Ariz. App. 417, 544 P.2d 241 (1975), vacated 113 Ariz. 212, 550 P.2d 83 (1976) (en banc); State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), rev'd on other grounds sub nom. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc); Commonwealth v. LaBella, __ Mass. __, 306 N.E.2d 813 (1974); State v. Crawford, 478 S.W.2d 314 (Mo.), appeal dismissed, 409 U.S. 811 (1972); State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct App. 1975), rev'd, __ N.M. __, 551 P.2d 1352 (1976); Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971); Pruett v. State, 463 S.W.2d 191 (Tex. Crim App. 1970), appeal dismissed, 402 U.S. 902 (1971).

48. E.g., Hughes v. State, 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025 (1972); Moore v. State, 501 P.2d 529 (Okla. Crim. App. 1972), cert. denied, 410 U.S. 987 (1973). See also Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971).

49. E.g., Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184) (married couple waived privacy by having photographs taken and allowing these to come into the hands of their children); United States v. Brewer, 363 F. Supp. 606 (M.D. Pa.), aff'd mem., 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 990 (1974) (act performed in prison); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971) (acts performed in public restrooms); Raphael v. Hogan, 305 F Supp. 749 (S.D.N.Y. 1969) (acts occurred during theatrical performance); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905 (1974) (in auto in well-lighted public rest area); People v. Baldwin, 37 Cal. App. 3d 385, 112 Cal. Rptr. 290 (4th Dist. 1974) (in public restroom); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (2d Dist. 1973) (filming of oral sodomy); Harris v. United States, 315 A.2d 569 (D.C. Ct. App. 1974) (en banc) (owner of homosexual health club charged with keeping bawdy house); People v. Rice, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Suffolk County Dist. Ct. 1975), rev'd, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. T. 1976) (per curiam) (in public restroom).

50. Of the cases cited in notes 47-49 supra only five have allowed an overbreadth defense: Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971); State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147

Despite the general rule that one to whom application of a statute is constitutional cannot be heard to attack it on the ground that it would be unconstitutional as applied to others,[52] certain exceptions exist,[53] one of which may apply to sodomy prosecutions. A third party's right may be asserted if it is a substantial constitutional right not otherwise likely to be presented before a court and if it will necessarily be affected by the outcome of the litigant's suit.[54] Thus a few cases have allowed one charged with

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(1975), rev'd on other grounds sub nom. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc); State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), rev'd, __ N.M. __, 551 P.2d 1352 (1976); People v. Rice, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Suffolk County Dist. Ct. 1975), rev'd, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. T. 1976) (per curiam).

51. E.g., Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc); United States v. Brewer, 363 F. Supp. 606 (M.D. Pa.), aff'd mem., 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 990 (1974); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905 (1974); People v. Baldwin, 37 Cal. App. 3d 385, 112 Cal. Rptr. 290 (4th Dist. 1974); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (2d Dist. 1973); Harris v. United States, 315 A.2d 569 (D.C. Ct. App. 1974) (en banc); Commonwealth v. LaBella, __ Mass. __, 306 N.E.2d 813 (1974); State v. Crawford, 478 S.W.2d 314 (Mo.), appeal dismissed, 409 U.S. 811 (1972).

Other cases have simply rejected the overbreadth defense summarily (e.g., Moore v. State, 501 P.2d 529 (Okla. Crim. App. 1972), cert. denied, 410 U.S. 987 (1973); Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971)) or have stated that there was no overbreadth issue inasmuch as it was "conceivable" for married couples to be prosecuted under the statute (e.g., Hughes v. State, 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025 (1972); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970), appeal dismissed, 402 U.S. 902 (1971)).

52. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); United States v. Raines, 362 U.S. 17, 21 (1960). Closely related to this rule is the principle that a statute will not be declared facially overbroad where a limiting construction would validate its application to ordinary criminal conduct, the prohibition of which is not unconstitutional. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); United States v. Raines, 362 U.S. 17, 22 (1960); accord, Dawson v. Vance, 329 F. Supp. 1320, 1325 (S.D. Tex. 1971); People v. Parker, 33 Cal. App. 3d 842, 848, 109 Cal. Rptr. 354, 358 (2d Dist. 1973); Commonwealth v. LaBella, __ Mass. __, __, 306 N.E.2d 813, 815 (1974); cf. note 28 supra.

53. A litigant will be allowed to raise third-party rights (1) where the statute has a chilling effect on the exercise of the first amendment guarantee of free expression, (2) where the litigation in question may impair the constitutional rights of one not a party and that person has no effective way of preserving those rights himself, (3) where it can be shown that the legislature did not intend the statute to stand unless it could be applied in all cases, or (4) where the statute has been declared invalid in a large majority of cases. See Lovisi v. Slayton, 363 F. Supp. 620, 628 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184); United States v. Brewer, 363 F. Supp. 606, 609-10 (M.D. Pa.), aff'd mem., 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 990 (1974).

54. This has been the only one of the four exceptions listed in note 53 supra that has been utilized in sodomy cases to date. The others, in fact, do not suit anti-sodomy legislation. The first is inappropriate, notwithstanding Justice Douglas' opinion in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), since the right of privacy has been recognized as squarely founded on the fourteenth amendment's due process clause. See notes 119-20 infra. The third exception is almost impossible to prove, and the last falls before the hard fact that there has been no large-scale invalidation of sodomy statutes by the courts.

Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), vacated and remanded sub nom.

forcible or public sodomy to challenge the constitutionality of the statute because it also regulated the private conduct of consenting adults.[55] These cases have stressed that because consenting adults are rarely, if ever, prosecuted under sodomy laws, they have no opportunity to assert their own rights.[56]

In a significantly large, and probably growing, number of jurisdictions sodomy statutes, though still the law, are not enforced against consenting adults engaging in such sexual activity in private.[57] This phenomenon may be

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Wade v. Buchanan, 401 U.S. 989 (1971), illustrates a novel solution to the standing question where a jus tertii assertion is attempted. The petitioner had twice been caught performing acts of sodomy with other adult males in public restrooms and now sought an injunction from a three-judge federal court to block state prosecution. Id. at 730. An overbreadth challenge was permitted when the court gave a married couple and an admitted homosexual leave to intervene in order to protect the respective rights of married persons and of those engaging in sodomitical conduct in private. Id. at 735. The statute was held unconstitutional as infringing on the marital right of privacy and the injunction was granted. Id.

This approach was subsequently rejected by the Supreme Court in Wade v. Buchanan, 401 U.S. 989 (1971). The district court's decision was vacated and remanded in the light of Younger v. Harris, 401 U.S. 37 (1971), where, in reviewing an action seeking federal injunctive relief against state prosecution under the California Criminal Syndicalism Act, the Court did not permit interested third parties to intervene on the ground that they had not been arrested or even threatened with prosecution and could only show that they were inhibited by a speculative fear of possible arrest. Though Harris is limited to situations in which criminal proceedings are already pending in state court (id. at 55 (Stewart, J., concurring)), it effectively bars future use of the Buchanan approach, since one who can assert no defense other than the rights of third parties will hardly be likely to seek federal injunctive relief unless he himself is actually facing conviction under the sodomy statute. Indeed, soon after the vacating of Buchanan, another federal district court in Texas dismissed a suit similar to Buchanan, refusing, in reliance upon Harris, to let a married couple intervene. Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971). There would seem to be no reason, on the other hand, why a nisi prius state court could not avail itself of the Buchanan approach. However, there might be a ripeness problem. See note 61 infra.

55. State v. Dale, 25 Ariz. App. 417, 544 P.2d 241 (1975), vacated, 113 Ariz. 212, 550 P.2d 83 (1976) (en banc); State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), rev'd on other grounds sub nom. State v. Batemen, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc); State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), rev'd, __ N.M. __, 551 P.2d 1352 (1976); People v. Rice, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Suffolk County Dist. Ct. 1975), rev'd, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. T. 1976) (per curiam).

56. Cf. Doe v. Bolton, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) (rejection of dependence on prosecutorial discretion in the abortion area); Poe v. Ullman, 367 U.S. 497, 537-38 (1961) (Harlan, J., dissenting) (rejection of dependence on prosecutorial discretion as to the enforcement of law prohibiting use of contraceptives). Moreover, "[t]he failure of the executive branch to enforce a law does not result in its modification or repeal." District of Columbia v. Thompson Co., 346 U.S. 100, 113-14 (1953) (law had not been enforced for seventy-eight years); accord, Buchanan v. Batchelor, 308 F. Supp. 729, 733-34 (N.D. Tex. 1970), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971).

The courts have found that citizens commonly obeyed restrictions buttressed with criminal sanctions regardless of their enforcement. State v. Elliott, 88 N.M. 187, 191, 539 P.2d 207, 211 (Ct. App. 1975), rev'd, __ N.M. __, 551 P.2d 1352 (1976). See also Poe v. Ullman, 367 U.S. 497, 512 (1961) (Douglas, J., dissenting).

57. During the first six months of 1973 only 200 arrests occurred in New York City. All of

due to a deliberate police policy which views such victimless crimes as relatively harmless and not deserving an expenditure of manpower and resources that could better be used in preventing and punishing more serious offenses[58] or may be a result of the practical impossibility of acquiring constitutionally valid evidence to gain convictions for such conduct.[59] In any event, prosecutions are rare. In addition, very few are willing to bear the notoriety, embarrassment, and possible economic ruin entailed in initiating a challenge to anti-sodomy legislation.[60] Those who do bring suit risk dismissal

these were made in quasi-public places. Even so, the charges were invariably reduced to loitering or disorderly conduct. N.Y. Post, Mar. 31, 1976, at 31, cols. 1-2. See N.Y. Times, May 9, 1976, at 26, cols. 6-7; 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, 689 (1966) [hereinafter cited as Project].

58. N.Y. Times, May 9, 1976, at 26, col. 7; Project, supra note 57, at 687-88. Also, acts committed discreetly, outside the purview of third parties do not summon up the public outrage and indignation that often impels enforcement of the law. Id. at 688.

59. Even where a policy of enforcement exists, practically insurmountable obstacles lie in the way of obtaining convictions. Since the deviate sexual conduct was engaged in willingly, it is unlikely that one of the participants would come forward to complain or serve as a witness against the other. Moreover, were this to happen, such a person's testimony, in most jurisdictions, would require corroboration, since he had been an accomplice in the illicit activity. E.g., State v. Simpson, 243 Iowa 65, 70, 50 N.W.2d 601, 603 (1951); State v. Narcisse, 187 Neb. 209, 212, 188 N.W.2d 715, 717 (1971); Sherrill v. State, 204 Tenn. 427, 435, 321 S.W.2d 811, 814 (1959); Ariz. Rev. Stat. Ann. § 13-136 (1956); N.Y. Penal Law § 130.16 (McKinney 1975). Contra, State v. Moles, 17 N.C. App. 664, 668, 195 S.E.2d 352, 355 (1973).

Neither is police initiative effective. The two principal methods of detection — the use of decoys and surreptitious observation — are unavailing against activity carried on in private, the first, for obvious reasons, the second, because of the inevitable violation of search and seizure laws. Project, supra note 57, at 686, 689. The crucial fact is neither the manner of observation nor the place of commission, but whether the police have observed persons in a place which is ordinarily understood to afford personal privacy to individual occupants. The fourth amendment protects reasonable expectations of privacy. Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (documents seized from office shared by defendant with others); Katz v. United States, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) (listening device attached to outside of telephone booth); People v. Diaz, 85 Misc. 2d 41, 44-45, 376 N.Y.S.2d 849, 852 (N.Y.C. Crim. Ct. 1975) (accused observed stealing clothing in partially enclosed fitting room). A number of courts have carried this rationale as far as overturning convictions where sodomitical acts had been performed within public toilet stalls. E.g., People v. Triggs, 8 Cal. 3d 884, 106 Cal. Rptr. 408, 506 P.2d 232 (1973) (en banc); State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970), see Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975); Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971), cert. denied, 405 U.S. 930 (1972). Contra, Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966); United States v. McKean, 338 A.2d 439 (D.C. Ct. App. 1975).

60. Consider the words of one court, "The practice [sodomy] is inherently inimical to the general integrity of the human person. This is a postulate not of dogma but of common knowledge." Dawson v. Vance, 329 F. Supp. 1320, 1322 (S.D. Tex. 1971), accord, Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tex. 1970), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971). Publicity is particularly hazardous for homosexuals, since they are commonly regarded with revulsion and hostility by many Americans. In re Labady, 326 F. Supp. 924, 927 (S.D.N.Y. 1971); Slovenko, Sexual Deviation, 40 U. Colo. L. Rev. 222, 233 & n.34 (1968); 13 San Diego L. Rev. 439, 443 (1976). Moreover, disclosure of one's deviate sexual proclivities often results in economic sanctions. See, e.g., Singer v. United States Civil Serv.

for lack of ripeness.[61] Given these facts, one can appreciate the rationale of courts that have urged the necessity of letting those who have been arrested and charged with sodomy — because their conduct involved force or a minor or was carried out in public — assert the rights of others.

As noted,[62] these courts are applying an exception to the general principle that one does not have standing to challenge the constitutionality of a statute because it infringes the rights of another. Other cases have considered this exception only to reject its application to the typical overbreadth attack on anti-sodomy legislation.[63] They reason that the inability of the third party to assert his own rights is insufficient. In addition, they emphasize the need for such a relationship between the litigant and the third party that the rights of the latter would "likely . . . be diluted or adversely affected" if they could not be asserted in the suit.[64]

This reasoning has been more than amply supported by the Supreme Court's most recent discussion of *jus tertii* assertion. In *Singleton v. Wulff*[65] the Court stated that the third party's right should be "inextricably bound up with the activity the litigant wishes to pursue . . . ."[66] Whether the connection between the litigant and third party was that of doctor-patient, contraceptive advocate-contraceptive user, or seller-buyer, a conviction of the former meant that the latter would, by consequence, encounter serious difficulty in exercising the right to obtain an abortion, to use or learn about contraceptives, or to purchase a house in an area where racially restrictive covenants were employed. It seems clear, then, that there are two criteria for allowing a *jus tertii* assertion: the inability of the third party to protect his own rights as well as the existence of a sufficiently close relationship between the litigant and the third party.

The decisions which permitted an overbreadth challenge[67] took no account of this second element and, therefore, are questionable. Any attempt to argue a close connection between one who has been indicted for forcing his victim by threats of physical harm to perform an act of sodomy and one who engages

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Comm'n, 530 F.2d 247 (9th Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3043 (U.S. Apr. 12, 1976) (No. 75-1454) (dismissal of employee who openly flaunted his homosexual way of life affirmed).

61. See Poe v. Ullman, 367 U.S. 497 (1961), in which the Court declined to exercise its admitted jurisdiction because the likelihood of prosecution was too remote, and analysis of Poe in Doe v. Bolton, 410 U.S. 179, 188-89 (1973). But cf. note 56 supra.

62. See note 54 supra and accompanying text.

63. E.g., Lovisi v. Slayton, 363 F. Supp. 620, 628 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184); United States v. Brewer, 363 F. Supp. 606, 609-10 (M.D. Pa.), aff'd mem., 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 990 (1974); Harris v. United States, 315 A.2d 569, 575 (D.C. Ct. App. 1974) (en banc).

64. Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

65. 96 S. Ct. 2868 (1976).

66. Id. at 2874. Several of the Court's earlier decisions were analyzed to illustrate this requirement. Id.

67. See notes 55-56 supra and accompanying text.

in atypical sex acts with another consenting adult in the privacy of his home would prove unconvincing. The just conviction of the former will in no way provide a legal obstacle to the latter's continued practice of sodomy.[68]

In sum, the overbreadth argument, like the void-for-vagueness doctrine, principally focuses on the language of the statute, not its substance. Striking down a law for overbreadth does not go to the merits of the accused's case, though it may present an opportunity for the recognition of the rights of others. Essentially, it puts the legislature on notice that it may retain its anti-sodomy policy provided the law is restated and made to encompass a narrower range of citizens. An attack for overbreadth is useful where the statutory language is explicit enough to forestall a charge of vagueness.[69] On the other hand, it appears barred by an insurmountable standing problem, something that is rare in a void-for-vagueness challenge.[70]

III. The Cruel and Unusual Punishment Argument

Another ground for voiding sodomy statutes is the eighth amendment's prohibition of cruel and unusual punishments.[71] At common law sodomy was a felony punishable by death.[72] While no state today imposes capital punishment for consensual sodomy, many statutes still define it as a serious felony subject to long sentences.[73] Although the sexual conduct in question involved consenting adults, courts have found no difficulty in upholding heavy penalties. Perhaps the most shocking sentence, sustained by a federal district court in *Perkins v. North Carolina*,[74] was one for twenty to thirty years. But this case has not stood alone. For example, one defendant received ten years for performing an act of fellatio in a movie theater;[75] another was given eight years for sodomy committed in a parked car;[76] in a third case, a prisoner was sentenced to fifteen years for engaging in such conduct with a fellow inmate.[77]

68. Here the reasoning tends to become circular when it is recalled that the whole question of an exception to permit a jus tertii assertion arose because consenting adults acting in private were not prosecuted for sodomy.

69. This was the case, for example in Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971), and in State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), rev'd sub nom. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc).

70. There a statute, if ambiguous, is always unconstitutional as to the defendant.

71. U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This prohibition has been made applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

72. Ex Parte Miller, 23 Idaho 403, 406, 129 P. 1075, 1075-76 (1913); 4 W. Blackstone, Commentaries *216.

73. Of the thirty-two states presently penalizing consensual sodomy, eighteen permit maximum sentences in excess of five years. See chart at text accompanying note 95 infra.

74. 234 F. Supp. 333 (W.D.N.C. 1964).

75. Sinclair v. State, 166 Tex. Crim. 167, 311 S.W.2d 824 (1958).

76. Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905 (1974).

77. Bue v. State, 368 S.W.2d 774 (Tex. Crim. App. 1963); see Velez-Lozano v. Immigration & Naturalization Serv., 463 F.2d 1305 (D.C. Cir. 1972) (per curiam) (court sustained a deportation order under the Immigration and Nationality Act based solely upon a conviction for

Those courts that have attempted to justify sustaining such severe punishments have relied on the well-settled rule that when a sentence is within statutory limits an appellate court may not set it aside.[78] Even *Perkins*, which asked rhetorically whether homosexuals were twice as dangerous to society as second-degree murderers, as might be concluded from the sentencing structure of the state's penal law,[79] ultimately bowed before the fact that the sentence in question had not exceeded the statutory maximum.[80]

While the eighth amendment's framers were probably concerned only with preventing torture and other barbarous methods of inflicting punishment,[81] the Supreme Court has since recognized that cruel and unusual punishments include sentences greatly disproportionate to the offense charged.[82] In the landmark case of *Weems v. United States*,[83] the Court struck down a fifteen year sentence of incarceration at hard labor — which included the loss of basic civil liberties and was to be followed by a lifetime of surveillance — where the crime involved was falsifying official documents. Though the methods of punishment were standard, the punishment itself was found to be excessive and thus unconstitutionally cruel. In view of *Weems* and the long sentences meted out for acts of consensual sodomy, it is questionable whether statutes permitting such long periods of imprisonment could withstand a constitutional challenge under the eighth amendment. Often the harmfulness of the offense charged is, practically speaking, undemonstrable[84] and hardly commensurate with that of other crimes which receive similar penalties.[85]

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consensual sodomy); State v. Alkhowarizmi, 101 Ariz. 514, 421 P.2d 871 (1966) (en banc) (fifteen years to life for sodomy committed in back of truck, but conviction overturned on other grounds); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966) (seven to ten year sentence upheld); Canfield v. State, 506 P.2d 987 (Okla. Crim App.), appeal dismissed, 414 U.S. 991 (1973) (because of prior unrelated felony, fifteen years for sodomy committed in automobile parked off the road in a clump of trees); Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971), cert. denied, 405 U.S. 930 (1972) (five years for each of two acts of sodomy committed in locked toilet stalls in public restrooms, first conviction upheld, second reversed on other grounds).

78. State v. Stubbs, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966); Bue v. State, 368 S.W.2d 774, 775 (Tex. Crim. App. 1963); accord, United States v. Martell, 335 F.2d 764, 766 (4th Cir. 1964) (forty year sentence for kidnapping); Annot., 33 A.L.R.3d 335, 359-63 (1970). Contra, Woolsey v. United States, 478 F.2d 139, 141-43 (8th Cir. 1973).

Thus in order to make a successful attack on a sentence as violative of the eighth amendment, the accused must ordinarily show that the statute itself is unconstitutional because the penalties permitted are cruel and unusual.

79. 234 F. Supp. at 340.

80. Id. at 337.

81. Gregg v. Georgia, 96 S. Ct. 2909, 2923 (1976); 44 Fordham L. Rev. 637, 638 & n.6 (1975).

82. Gregg v. Georgia, 96 S. Ct. 2909, 2924 (1976); L. Berkson, The Concept of Cruel and Unusual Punishment 65-86 (1975); Constitution Annotated, supra note 43, at 1254-55.

83. 217 U.S. 349 (1910). The eighth amendment as such was not applicable here, since Philippine law was in dispute; however, the Court interpreted the Philippine bill of rights as guaranteeing a similar protection. Id. at 367.

84. See notes 148 and 169 infra.

85. See chart at text accompanying note 95 infra, which compares maximum sentences

To date, no decisions have been reported holding a sodomy statute invalid because of its excessive and disproportionate penalties.[86] This no doubt reflects the general reluctance of lower courts to apply the teaching of *Weems*.[87] The cause of this reluctance is the principle that the deference traditionally owed to the legislative judgment "is enhanced where the specification of punishments is concerned."[88] Nevertheless, there have been a few recent examples of state courts utilizing the *Weems* rationale in the non-sodomy area to strike down individual sentences or statutes providing for sentences found to be excessively long in relation to the petty nature of the offense.[89] What is of particular importance about these decisions for an eighth amendment challenge to sodomy statutes is that they suggest a three-tiered test for determining whether or not a sentence is unconstitutionally disproportionate. First, the sentence in question is measured against penalties mandated for the same offense in other jurisdictions; second, it is compared to punishments for more serious crimes in the same jurisdiction; third, the court weighs the harm to society caused by the offense.[90]

Applying this three-pronged test to statutes imposing maximum sentences of more than five years for consensual sodomy will illustrate their vulnerability to an eighth amendment attack. In view of the sizeable number of states with maximum penalties of such length,[91] the case for excessiveness would probably fail the first tier of the test.[92] Still, it is arguable that this purely quantitative factor is more than offset by the striking fact that in eighteen

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permitted for consensual sodomy with those for first-degree or voluntary manslaughter. It has been suggested that such preposterously harsh penalties may, in part, be motivated by the fact that the enforcement of sodomy laws is so difficult that a threat of drastic punishment is needed to assist police to coerce confessions and obtain the collaboration of the accused through the promise of a reduced charge. L. Fuller, Anatomy of the Law 24-25 (1968).

86. However, this was probably the underlying rationale of the Florida Supreme Court in Franklin v. State, 257 So. 2d 21 (Fla. 1971) (per curiam), discussed in notes 38-41 supra and accompanying text.

87. See Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 640 (1966); 44 Fordham L. Rev. 637, 638-39 (1975).

88. Gregg v. Georgia, 96 S. Ct. 2909, 2926 (1976). The Court continued, quoting Gore v. United States, 357 U.S. 386, 393 (1958), noting that sentencing considerations " 'are peculiarly questions of legislative policy.' " Id. But cf. Weems v. United States, 217 U.S. 349, 378-79 (1910).

89. 44 Fordham L. Rev. 637, 638-45 (1975).

90. Id. at 642.

91. In eighteen of the thirty-two states that prohibit consensual sodomy the maximum sentence is greater than five years. See chart at text accompanying note 95 infra.

92. See, e.g., Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976), where a ten to twenty year sentence for non-forcible statutory rape of a thirteen-year-old female was affirmed against an eighth amendment challenge. The court stressed that an equal or greater sentence could have been received "in at least sixteen other states and the District of Columbia." Id. at 1236. A contrast was drawn with an earlier case, Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974), in which a mandatory life sentence for perjury was reversed for excessiveness, since such a penalty might have been received in at most three other states. Hall v. McKenzie, 537 F.2d at 1235-36.

states there is absolutely no punishment for sodomy,[93] while twelve other states prescribe a maximum sentence of five years or less.[94]

As for the second tier of the test, the following chart contrasting the maximum penalty for manslaughter with the maximum penalty for consensual sodomy in each of those states imposing a maximum in excess of five years for the latter offense will prove most helpful.

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93. Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington and West Virginia. The repeals of both Indiana and South Dakota's prohibitions against consensual sodomy will not become effective until July 1 and April 1, 1977, respectively. P.L. 148, § 124, [1976] Ind. Acts, repealing Ind. Code § 35-1-89-1 (Burns Supp. 1976); ch. 158, § 22-8, [1976] S.D. Laws, repealing S.D. Codified Laws § 22-22-21 (Spec. Supp. 1976). The Iowa Statute has been declared unconstitutional by that state's highest court. State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (en banc).

94. Fla. Stat. Ann. § 800.02 (1976) (for discussion of constitutionality see note 41 supra); Kan. Stat. Ann. § 21-3505 (1974); Ky. Rev. Stat. Ann. § 510.100 (1975); La. Rev. Stat. Ann. § 14:89 (West Supp. 1976); Minn. Stat. Ann. § 609.293(5) (West Supp. 1976); N.Y. Penal Law § 130.38 (McKinney 1975) (for discussion of constitutionality see notes 208-09 infra and accompanying text); Pa. Stat. Ann. tit. 18, § 3124 (1973); S.C. Code Ann. § 16-412 (1962); Tex. Penal Code Ann. § 21.06 (1974); Utah Code Ann. § 76-5-403 (Supp. 1975); Vt. Stat. Ann. tit. 13, § 2603 (1974); Va. Code Ann. § 18.2-361 (1975).

COMPARISON OF PENALTIES FOR SODOMY AND MANSLAUGHTER[95]

	Maximum Penalty for Consensual Sodomy		*Maximum Penalty for Manslaughter*	
Ala. Code	10 yrs.	(tit. 14, § 106 (1958))	10 yrs.	(Id., § 322)
Alaska Stat.	10 yrs.	(§ 11.40.120 (Cum. Supp. 1975))	20 yrs.	(§ 11.15.040 (1970))
Ariz. Rev. Stat. Ann.	20 yrs.	(§ 13-651 (Spec. Pamphlet 1973))	10 yrs.	(Id. -457)
Ga. Code Ann.	20 yrs.	(§ 26-2002 (1972))	20 yrs.	(Id. -1102)
Md. Ann. Code	10 yrs.	(art. 27, §§ 553, 554 (Supp. 1976))	10 yrs.	(Id., § 387)
Mass. Ann. Laws	20 yrs.	(ch. 272, § 34 (1968))	20 yrs.	(ch. 265, § 13 (Cum. Supp. 1975))
Mich. Comp. Laws	15 yrs.	(§ 750.158 (1968))	15 yrs.	(§ 750.321)
Miss. Code Ann.	10 yrs.	(§ 97-29-59 (1972))	20 yrs.	(Id. -3-25)
Mo. Rev. Stat.	no maximum	(§ 563.230 (1969))	10 yrs.	(§ 559.140 (1969))
Mont. Rev. Codes Ann.	10 yrs.	(§ 94-5-505 (Spec. Crim. Code Pamphlet 1976))	40 yrs.	(Id. -103)
Neb. Rev. Stat.	20 yrs.	(§ 28-919 (1975))	10 yrs.	(Id. -403)
Nev. Rev. Stat.	6 yrs.	(§ 201.190 (1973))	10 yrs.	(§ 200.080 (1975))
N.J. Stat. Ann.	20 yrs.	(§ 2A:143-1 (1969))	10 yrs.	(Id. :113-5)
N.C. Gen. Stat.	10 yrs.	(§ 14-177 (1969))	20 yrs.	(Id. -18)
Okla. Stat. Ann.	10 yrs.	(tit. 21, § 886 (1958))	no maximum	(Id., § 715)
R.I. Gen. Laws Ann.	20 yrs.	(§ 11-10-1 (1969))	20 yrs.	(Id. -23-3)
Tenn. Code Ann.	15 yrs.	(§ 39-707 (1975))	10 yrs.	(Id. -2410)
Wyo. Stat. Ann.	10 yrs.	(§ 6-98 (Supp. 1975))	20 yrs.	(§ 6-58 (1957))

95. In those states where the crime of manslaughter has degrees, the sentence given is that for voluntary or first-degree manslaughter.

When one considers first-degree manslaughter — a crime that unjustly deprives another human being of his most cherished possession and fundamental right, life itself — it is difficult to justify prescribing equivalent or even longer maximum sentences for consensual sodomy. By this reasoning, the statutes of Alabama, Arizona, Georgia, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Rhode Island, and Tennessee permit unconstitutionally disproportionate penalties for consensual sodomy.[96]

The third tier of the test, unlike the other two, does not lend itself to straightforward statistical measurement since the harm caused by deviate sexual behavior is undemonstrable.[97] In a jurisdiction where the maximum sentences permissible for manslaughter and adultery are ten years and one year respectively, a court that finds a statute with a twenty-year maximum for consensual sodomy constitutionally acceptable is in conscience bound to show some tangible harm to society from the private practice of consensual sodomy.

Although the tools are available, this kind of three-tiered analysis has not yet been made by the courts with respect to sodomy laws. It is submitted that a large number of these statutes will not survive an eighth amendment challenge to their sentencing structures. In any case, a successful challenge would not negate the fundamental validity of anti-sodomy legislation, since, in the long run, it leaves the legislature free to re-enact the same law with a more reasonable penalty.[98]

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96. Additional confirmation of this conclusion can be had by contrasting sodomy's maximum punishment in these states with that of another sex crime, adultery. Adultery, rather than fornication, is chosen for comparison because the former is more harmful, in that it undermines society's most basic unit, the family. Cf. Reynolds v. United States, 98 U.S. 145, 165 (1879) (on polygamy). Indeed, adultery is sometimes classed as an offense against marriage and the family rather than as a sex offense. E.g., Minn. Stat. Ann. § 609.36 (1964); N.Y. Penal Law § 255.17 (McKinney 1975). It is suggested that sodomy's ill effects, on the other hand, whatever they may be, are hardly so deleterious as those of adultery. Yet compare the maximum penalties for adultery: Ala. Code tit. 14, § 16 (1958) (two years, on third conviction); Ariz. Rev. Stat. Ann. § 13-221 (1956) (three years); Ga. Code Ann. § 26-2009 (1973) (one year); Md. Ann. Code art. 27, § 4 (1976) (no imprisonment); Mass. Ann. Laws ch. 272, § 14 (1968) (three years); Mich. Comp. Laws Ann. § 750.30 (1968) (four years); Mo. Rev. Stat. § 563.150 (1969) (one year); Neb. Rev. Stat. § 28-902 (1975) (one year); N.J. Stat. Ann. § 2A:88-1 (1969) (three years); R.I. Gen. Laws Ann. § 11-6-2 (1969) (one year); Tennessee (not a crime). It is to be noted, too, that in Alabama, Arizona, and Missouri adultery is punished only if it is open and notorious or habitual. Ala. Code tit. 14, § 16 (1958); Ariz. Rev. Stat. Ann. § 13-221 (1956); Mo. Rev. Stat. § 563.150 (1969). But see Colo. Rev. Stat. § 18-6-501 (1973) (adultery prohibited, but not consensual sodomy); Conn. Gen. Stat. Ann. § 53a-81 (1972) (same); Minn. Stat. Ann. §§ 609.293(5) (Supp. 1976), 609.36 (1964) (sodomy and adultery punished equally); N.H. Rev. Stat. Ann. § 645:3 (1974) (adultery prohibited, but not consensual sodomy); N.Y. Penal Law §§ 130.38, 255.17 (McKinney 1975) (sodomy and adultery punished equally); Utah Code Ann. §§ 76-5-403, 76-7-103 (Supp. 1975) (adultery punished more severely than sodomy).

97. See notes 144-48 & 169 infra and accompanying texts.

98. See the recent examples of Pennsylvania and Texas which reduced their maximum sentences for consensual sodomy. Act of Dec. 6, 1972, No. 334, ch. 31, § 3124, Pa. Laws 1531, repealing Act of June 24, 1939, No. 375, art. V, § 501, Pa. Laws 905 (ten year maximum reduced

IV. THE RIGHT OF PRIVACY ARGUMENT

A. *Griswold and Its Aftermath*

"[U]ntil *Griswold*," one author has noted, "every case, both in England and America, that touched upon the applicability of the sodomy laws to husband and wife assumed that they do apply."[99] He was referring to the Supreme Court decision in *Griswold v. Connecticut*,[100] which has triggered a revolution in anti-sodomy legislation. In that case a Connecticut statute forbidding any person to use contraceptives was held unconstitutional because it applied to married persons and thus infringed upon a fundamental right of privacy which the Court found inherent in the marriage relationship.[101] The holding means that a state must show a compelling interest which cannot be achieved by less drastic means in order to justify any legislation encroaching upon the marital right of privacy.[102] Such legislation will be subjected to strict judicial scrutiny, an examination which has proved almost impossible to survive.[103]

In the wake of *Griswold*, the overwhelming majority of reported cases in which the marital privacy defense was discussed have ruled that criminal sanctions cannot be imposed on married couples for deviate sexual conduct, at

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to two); ch. 399, §§ 1 & 3, [1973] Tex. Acts 917, 991, repealing ch. 112, § 1, [1943] Tex. Acts 194 (former statute had fifteen year maximum, present one only permits a fine).

Another eighth amendment argument for striking down the excessively long sentences permitted by so many sodomy laws has been adumbrated in the concurring opinions of three Justices in Furman v. Georgia, 408 U.S. 238 (1972). It was maintained that a sentence may be so rarely imposed that it thereby becomes a cruel and unusual punishment. Id. at 291-95, 309, 311 (concurring opinions by Brennan, Stewart & White, J.J.); accord, People v. Anderson, 6 Cal. 3d 628, 653-57, 493 P.2d 880, 897-99, 100 Cal. Rptr. 152, 169-71, cert. denied, 406 U.S. 958 (1972) (construing death penalty as unusual under state constitution). Thus, in a jurisdiction where the minimum sentence for consensual sodomy is regularly imposed, or where the offense is invariably reduced to one less serious, or, especially, where the law itself is hardly ever enforced so that no punishment at all is incurred, a strong argument can be made that a statute with a ten or twenty year maximum penalty violates the eighth amendment.

99. Barnett, supra note 15, at 55 (emphasis omitted). See generally Annot., 58 A.L.R.3d 636, 641-43 (1974).

100. 381 U.S. 479 (1965).

101. Id. at 485; see also Loving v. Virginia, 388 U.S. 1, 12 (1967).

102. 381 U.S. at 503-04 (White, J., concurring); see Roe v. Wade, 410 U.S. 113, 155-56 (1973); Heymann & Barzelay, The Forest and the Trees: Roe v. Wade and Its Critics, 53 B.U.L. Rev. 765, 768 (1973) [hereinafter cited as Heymann & Barzelay].

103. "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); see Gunther, The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) [hereinafter cited as Gunther]; Yackle, Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court, 9 U. Rich. L. Rev. 181, 191 (1975) [hereinafter cited as Yackle]. But see, e.g., American Party v. White, 415 U.S. 767, 780-88 (1974) (state statute upheld though strict scrutiny applied); Storer v. Brown, 415 U.S. 724, 734-35 (1974) (same).

least where such conduct takes place outside the public gaze.[104] Hence, there is little question that anti-sodomy legislation no longer applies to married couples, whether or not the wording of the statute has been revised to reflect *Griswold*.[105]

However, it is not yet clear whether the right of sexual privacy recognized in *Griswold* is broader than the confines of the marriage relationship. The majority and concurring opinions in that case indicate that the answer is no. Justice Goldberg, for instance, emphasized that the Court's holding "in no way interfere[d] with a State's proper regulation of sexual promiscuity or misconduct."[106] He quoted with approval from Justice Harlan's dissent in *Poe v. Ullman*:[107]

> Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[108]

Justice White's concurrence contained the following words:

> [T]he statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, *concededly a permissible and legitimate legislative goal*.[109]

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104. E.g., Cotner v. Henry, 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968); Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971); Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969) (dictum), Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (dictum); State v. Bateman, 25 Ariz. App. 1, 540 P.2d 732 (1975), rev'd in part & aff'd in part, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973) (dictum); Mentek v. State, 71 Wis.2d 799, 238 N.W.2d 752 (1976) (dictum); Jones v. State, 55 Wis.2d 742, 200 N.W.2d 587 (1972) (dictum). Contra, Hughes v. State, 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025 (1972) (dictum); State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1966) (dictum); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970), appeal dismissed, 402 U.S. 902 (1971) (dictum).

105. Besides those states that have abrogated their consensual sodomy laws in toto (see note 93 supra), seven states have revised the wording of their statutes to reflect Griswold by excluding application to married couples. Statutes specifically excluding married couples: N.Y. Penal Law §§ 130.00(2), (3), 130.38 (McKinney 1975) (for constitutionality see notes 208-09 infra and accompanying text); Pa. Stat. Ann. tit. 18, §§ 3101, 3124 (1973); Utah Code Ann. §§ 76-5-403,-407 (Special Supp. 1975). Statutes specifically excluding heterosexual consensual sodomy: Kan. Stat. Ann. § 21-3505 (1974); Ky. Rev. Stat. Ann. § 510.100 (1975); Mont. Rev. Codes Ann. §§ 94-2-101(4), -5-505 (Spec. Crim. Code Pamphlet 1976); Tex. Penal Code Ann. § 21.06 (1974)

106. 381 U.S. at 498-99 (Goldberg, J., concurring).

107. 367 U.S. 497 (1961).

108. Id. at 553 (Harlan, J., dissenting), quoted in Griswold v. Connecticut, 381 U.S. at 499 (Goldberg, J., concurring); accord, Paris Adult Theater I v. Slaton, 413 U.S. 49, 68 n.15 (1973).

109. 381 U.S. at 505 (White, J., concurring) (emphasis added).

Justice Douglas, writing for the Court, made it clear that because the sexual intimacies in question were part of the marriage relationship, they were uniquely immune to state interference:

> Would we allow the police to search the *sacred precincts of marital bedrooms* . . . ? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. . . . [The] association . . . promotes a way of life . . . .[110]

If *Griswold*, by itself, is limited to a recognition of a right of sexual privacy for the married, a number of courts have interpreted the Supreme Court's subsequent holding in *Eisenstadt v. Baird*[111] as extending that right to all persons.[112] Although *Baird* was essentially an equal protection case in which the Court found a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons, but not to married persons, violative of the equal protection clause, in the course of its plurality opinion the Court noted:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[113]

These words have been interpreted as affirming a general right of privacy covering sexual conduct, irrespective of whether the parties are married. On the other hand, a more faithful reading of the Court's statement in *Baird* would indicate that the right referred to was the freedom to decide whether or not to have children.[114] Indeed, in a later decision the Court confirmed this

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110. Id. at 485-86 (emphasis added).

111. 405 U.S. 438 (1972).

112. E.g., Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D. Va. 1973) (dictum), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184); United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa.) (dictum), aff'd mem., 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 990 (1974); In re Labady, 326 F. Supp. 924, 929 n.4 (S.D.N.Y. 1971) (dictum) (a pre-Baird case relying on Griswold); State v. Callaway, 25 Ariz. App. 267, 273, 542 P.2d 1147, 1150-51 (1975), rev'd sub nom. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc); United States v. Doe, No. 71860-71 (D.C. Super. Ct., Feb. 12, 1973), 12 Crim. L. Rep. 2531, 2532 (1973), rev'd sub nom. United States v. Montalvo, No. 7301 (D.C. Ct. App., Dec. 13, 1974); State v. Pilcher, 242 N.W.2d 348, 358-59 (Iowa 1976) (en banc) (expressly limited to heterosexual conduct); Commonwealth v. Balthazar, — Mass. —, —, 318 N.E.2d 478, 480-81 & n.2 (1974) (dictum).

It is to be noted that, with the exception of Pilcher, the cases asserting a general right of sexual privacy are dicta or have been reversed. See State v. Pilcher, 242 N.W.2d 348, 363 (Iowa 1976) (Reynoldson, J., dissenting).

113. 405 U.S. at 453.

114. See text accompanying note 113 supra.

interpretation.[115] Accordingly *Baird* did not recognize any broad right of privacy protecting sexual intimacies.

Moreover, *Baird* did not question the legitimacy of the state's regulating fornication. In fact, the Court found that discouraging premarital sex was one of the goals of the ban on the distribution of contraceptive devices. Far from rejecting that goal, the Court voided the statute only because the *means* chosen were not effective, not rationally related to achieving the goal, and eliminated merely an insignificant amount of premarital sexual activity.[116] Even if the above quotation from *Baird* supports a general right of sexual privacy, it is mere dictum[117] inasmuch as the case was decided on equal protection grounds. Thus the Court did not even rule that access to contraceptives, let alone consensual sexual activity among single adults, was protected by a constitutional right of privacy.

B. *The Nature of the Fundamental Right of Privacy as Recognized to Date and the Likelihood of Its Including a General Right of Sexual Privacy*

Among the fundamental rights to be subordinated only to a compelling state interest is the right of personal privacy.[118] With *Roe v. Wade*,[119] it was finally settled that the right of personal privacy is derived from the fourteenth amendment's concept of personal liberty and its restriction upon state action.[120] Instead of defining the right and its essential elements, however, the

115. Roe v. Wade, 410 U.S. 113, 152-53 (1973); see Board of Educ. v. LaFleur, 414 U.S. 632, 640 (1974).

116. 405 U.S. at 448-49.

117. Chief Justice Marshall gave early expression to the weight to be given to dicta when he stated: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

118. This right of personal privacy may be distinguished from the right of privacy that derives from specific constitutional guarantees, such as the first, fourth, or fifth amendments. See Paul v. Davis, 424 U.S. 693, 712-13 (1976). The latter relates to the right of the individual to control what and how much information is revealed about himself and sets restrictions on the methods of police detection and enforcement of the law. Thus, a homosexual who has committed an act of sodomy in an enclosed toilet stall may not be convicted, even though such activity is criminal, because his reasonable expectation of privacy was violated by police observation. See note 59 supra. The former right, on the other hand, is not dependent on specific circumstances, but is secured by the nature of the activity itself or the status of the actors. See Paris Adult Theater I v. Slaton, 413 U.S. 49, 66 n.13 (1973); Lovisi v. Slayton, 439 F.2d 349, 352-55 (4th Cir. 1976) (en banc) (Winter, J., dissenting), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184). See also Constitution Annotated, supra note 43, at 84-86 (Supp. 1974).

119. 410 U.S. 113 (1973).

120. Id. at 152-53.

Court simply provided a catalogue of what the right of personal privacy had been recognized as encompassing to date.

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . .; procreation . . .; contraception . . .; family relationships . . .; and child rearing and education . . . .[121]

Thus it is difficult to define the essence of the right of privacy.[122] What can be said, however, is that marriage alone is not the determinative factor, as illustrated by *Roe*, which recognized the right of an unmarried woman to an abortion.

One author would infer from the types of interests protected by the right of personal privacy a fundamental right to sexual fulfillment. All sexual activity among consenting adults in private would thus be beyond governmental regulation.[123] Other authors would distinguish the sexual activity which is part of marriage and child bearing from sexual activity of a more transient kind.[124] Since the latter "does not produce the same kind of nearly irrevocable effects, nor spring from the same deep well of cultural values"[125] as the former, the degree of constitutional protection afforded to each need not be the same.[126]

To determine which of these two views is closer to the "constitutional" truth, it is important to recall that the personal right of privacy is a "fundamental" right. The source of fundamental rights, insofar as they protect the individual against the regulations of the state, is the due process clause of the fourteenth amendment.[127] The term due process, however, is peculiarly opaque. In the attempt to supply it with meaning two basic approaches have been suggested. The first, that of the incorporationists, attributes to due process the content of the specific guarantees of the first eight amendments.[128] While such an approach may be helpful when the

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121. Id. (citations omitted).

122. See Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 926-37 (1973) [hereinafter cited as Ely]. The right is connected with "family, marriage, motherhood, procreation, and child rearing." Paris Adult Theater I v. Slaton, 413 U.S. 49, 66 n.13 (1973); accord, Paul v. Davis, 424 U.S. 693, 712-13 (1976).

123. Barnett, supra note 15, at 97; accord, California v. LaRue, 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissenting).

124. Heymann & Barzelay, supra note 102, at 772-74.

125. Id. at 774.

126. Id.

127. See Malloy v. Hogan, 378 U.S. 1, 5-6 (1964); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), overruled in Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

128. See Cord, Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment, 44 Fordham L. Rev. 215, 224-26 (1975) [hereinafter cited as Cord].

question of the extent of the states' authority to abridge freedom of speech or religion is at issue, it has little relevance to the right of privacy or the right to travel, which are not explicitly mentioned in the Constitution.[129]

A more expansive approach to due process, one that allows it a meaning independent of other parts of the Constitution, is represented by those who have interpreted due process as outlawing state violation of liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[130] This view requires the courts to focus upon the history and tradition of our laws and institutions. That is why, for instance, in the recent decision upholding the right to an abortion, the Court gave such detailed attention[131] to illustrating the fact that laws proscribing this procedure were "not of ancient or even of common-law origin."[132] It was precisely because abortion was an ancient common law privilege that, at least in the first trimester, it could not be forbidden by a state, absent a compelling interest.[133]

If the second definition of due process provides the criterion for a fundamental right, the long, unbroken history of anti-sodomy legislation may indicate that there exists no general right of sexual privacy protecting deviate sexual activity.[134] As one court put it:

> [I]t is apparent that western civilization has through the centuries abhored sodomy, fellatio and cunnilingus. *See*, Genesis 19:1-29; Deuteronomy 23:17, Leviticus 18:22-23, 20:16. As early as 1533 in the reign of Henry VIII, England enacted statutes prohibiting sodomy which became a part of American common law at the time of the American revolution.[135]

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129. Compare Roe v. Wade, 410 U.S. 113, 152 (1973) with id. at 167-68 (Stewart, J., concurring) and Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (Black, J., dissenting). Though recognizing the right to travel as fundamental (see, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969)), the Court has frankly admitted, "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." Id. at 630.

130. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring), quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); accord, Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Poe v. Ullman, 367 U.S. 497, 542, 544-45 (1961) (Harlan, J., dissenting); Malinski v. New York, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring); see Cord, supra note 128, at 216-23.

131. Roe v. Wade, 410 U.S. 113, 129-41 (1973).

132. Id. at 129.

133. Id. at 140-41, 152-53, 155. Griswold, too, espoused this rationale when it spoke of marriage as a "right of privacy older than the Bill of Rights." Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

134. For this reason, no matter how incongruous it may seem to the layman, the right to an abortion, though it terminates the life of a human-like being, is protected, whereas sodomitical acts, which harm no one, are not. Laymen, however, have not been the only ones to find inconsistency here. See United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa.), aff'd mem., 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 990 (1974).

135. State v. Bateman, 25 Ariz. App. 1, 4, 540 P.2d 732, 735 (1975), rev'd in part & aff'd in part, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc). To St. Augustine, Thomas Aquinas, and Blackstone, sodomy, even when consensual, was far more heinous than rape. 43 T. Aquinas, Summa Theologiae 246-49 (T. Gilby ed. 1968), quoting St. Augustine; 4 W. Blackstone, Commentaries *215; see note 60 supra.

The preceding analysis of due process notwithstanding, the Supreme Court could still reason that the right of privacy encompasses sodomitical activity.[136] If the test of whether a right is fundamental depends on the prevailing national consensus, be this over a long or short period of time, then a simple reflection of that consensus in a decision by the Court would only duplicate the role of the legislature. Such a redundant function, however, is not the role of a separate judicial branch.[137] Whereas the legislature normally responds to the will of the majority, the judiciary is the guardian of the constitutionally guaranteed rights of all citizens.[138] Following this line of thinking, the Court could, theoretically, prove to be a more successful forum for change. Indeed, Justice Frankfurter, the early leading exponent of the second approach to due process, believed that "the concept of due process of law [was] not final and fixed,"[139] but, like the Constitution itself, "was designed for a developing nation" and meant to allow "accommodations or modifications in the rules and standards that govern the conduct of men."[140]

C. *The Police Power*

The police power of a state embraces "regulations to promote the health, peace, morals, education, and good order of the people . . . ."[141] As the least

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136. If Doe v. Commonwealth's Atty. for City of Richmond, 425 U.S. 901 (1976), aff'g 403 F. Supp. 1199 (E.D. Va. 1975), is any indication, such determination is unlikely. See note 11 supra and accompanying text.

137. A. Bickel, The Least Dangerous Branch 239 (1962) [hereinafter cited as Bickel].

138. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Furman v. Georgia, 408 U.S. 238, 268-69 (1972) (Brennan, J., concurring), quoting Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

139. Rochin v. California, 342 U.S. 165, 170 (1952).

140. Frankfurter, The Process of Judging in the Supreme Court, in The Supreme Court: Views from Inside 35-36, 37 (A. Westin ed. 1961); accord, Frank v. Maryland, 359 U.S. 360, 371 (1959) (overruled in part in Camara v. Municipal Ct., 387 U.S. 523, 528 (1967)); Malinski v. New York, 324 U.S. 401, 414 (1945). Compare the Court's wholehearted endorsement of evolving values in the segregation cases: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." Brown v. Board of Educ., 347 U.S. 483, 492-93 (1954) (italics omitted). The eighth amendment, too, has been recognized as having an "expansive and vital character," drawing its meaning "from the evolving standards of decency that mark the progress of a maturing society." Constitution Annotated, supra note 43, at 1252, quoting Weems v. United States, 217 U.S. 349, 377 (1910), and Trop v. Dulles, 356 U.S. 86, 101 (1958).

However abominable and heinous sodomitical practices may have been to our forefathers (see note 135 supra), such forms of sexual activity are presently encouraged by sex manuals like The Joy of Sex (1972), a best-seller purchased by over 3.8 million people. Potter, Sex Offenses, 28 Me. L. Rev. 65, 90 (1976), citing Newsweek Oct. 27, 1975, at 78, col. 3. See Johnson, Crimes Against Nature in Tennessee: Out of the Dark and Into the Light?, 5 Memphis St. U.L. Rev. 319, 352-53 (1975).

141. Barbier v. Connolly, 113 U.S. 27, 31 (1885). Some such power would seem to be indispensable to organized society, and its constitutionality remains unquestioned. See Winters v.

limitable of the exercises of government, the police power of a state may be used even to protect a citizen from himself. Thus the Court in *Roe v. Wade*, refusing to recognize "an unlimited right to do with one's body as one pleases,"[142] held that a state's interest in the health of the mother permitted it to regulate the abortion procedure after the first trimester.[143] The case illustrates another characteristic of the police power — it will at times justify the infringement of a fundamental right, here, the right to an abortion.

Since it can be demonstrated that deviate sexual practices carried out in private by willing adults result in no mental or physical danger to the health or safety of the participants or of others,[144] the only possible interest capable of being safeguarded by the prohibition of such conduct is the moral interest. Adult consensual sodomy, if it does any harm at all, harms the soul of the actor, as Plato would say.[145] But while the welfare of its citizens' souls may have been the most important concern of Plato's ideal state,[146] it is questionable whether such a concern is proper to a secular, pluralistic society.[147] Critics

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New York, 333 U.S. 507, 515 (1948); Nebbia v. New York, 291 U.S. 502, 537-39 (1934); Hoke v. United States, 227 U.S. 308, 321 (1913); Jacobson v. Massachusetts, 197 U.S. 11, 24-27 (1905); Lochner v. New York, 198 U.S. 45, 53 (1905); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824); Dawson v. Vance, 329 F. Supp. 1320, 1322 (S.D. Tex. 1971); People v. Drolet, 30 Cal. App. 3d 207, 212-13, 105 Cal. Rptr. 824, 826-27 (1st Dist. 1973).

142. 410 U.S. at 154.

143. Id. at 163. A similar view was expressed later in Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973), where the Court stated, "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take." Id. at 68 (footnote omitted). The Court was referring to such "constitutionally unchallenged laws" as those against suicide and self-mutilation. Id. at 68 n.15. For an analysis of the state's use of its power to compel lifesaving medical treatment, see Byrn, Compulsory Lifesaving Treatment for the Competent Adult, 44 Fordham L. Rev. 1 (1975).

Rarely has the Court expressed a more restrictive attitude towards the use of police power to protect the citizen from himself: "[O]ur system of government . . . does not claim to control [the citizen], except as to his conduct to others, leaving him the sole judge as to all that only affects himself." Mugler v. Kansas, 123 U.S. 623, 660 (1887) (on the use of alcohol); cf. Paris Adult Theater I v. Slaton, 413 U.S. 49, 110-11 (1973) (Brennan, J., dissenting).

144. See Barnett, supra note 15, at 100 & n.22, citing Masters & Johnson, Ten Sex Myths Exploded, Playboy, Dec., 1970, at 124, 126-28; ALI Model Penal Code § 207.5, comment 277-78 (Tent. Draft No. 4, 1955): "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." See also Hart, Social Solidarity and the Enforcement of Morality, 35 U. Chi. L. Rev. 1 (1967); Comment, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A.L. Rev. 581 (1967) [hereinafter cited as U.C.L.A. Comment].

145. For Plato justice was the highest good and the source of the soul's health. It was to be preserved by keeping the elements of the soul in their proper balance and by avoiding excesses. Plato, Republic 443 D-444 E, 588 A-590 A.

146. See, e.g., Plato, Republic 519 C-520 D, 590 C- 591 A.

147. After all, whose morals are to be enforced? In 1957 England's Wolfenden Committee recommended that private homosexual acts between consenting adults be decriminalized, reasoning that, unless crime is to be made synonymous with sin, "there remains a realm of private morality and immorality which is, in brief and crude terms, not the law's business." Report of the

of sodomy laws argue that majority opinion as to what is moral and rational should not carry the sanction of the criminal law. Indeed, they point out that such moral condemnation cannot satisfy the rational basis test required by substantive due process.[148]

Nevertheless, the Supreme Court has found no difficulty in upholding federal and state laws legislating morality. It has ruled that the interstate commerce power may be used to defeat what are deemed to be immoral purposes.[149] Polygamy has been condemned as "abhorent to the sentiments and feelings of the civilized world" and "contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world."[150] Similarly, the right of a state to regulate so-called sexual promis-

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Committee on Homosexual Offenses and Prostitution ¶ 62 (Stein & Day eds. 1963) (Wolfenden Report).

On the other hand, many of our legal writers and judges have expressed the view that morality is the source and inspiration of lawmaking. "Dean Pound has said that 'the attempt to make law and morals identical by covering the whole field of morals with legal precepts, and by conforming existing precepts to the requirements of a reasoned system of morals, made the modern law.' In a similar generalization, Justice Cardozo held that 'The scope of legal duty has expanded in obedience to the urge of morals.' " S. Stumpf, Morality and the Law 9 (1966) (footnotes omitted); see U.C.L.A. Comment, supra note 144, at 582.

Lord Devlin, one of the most vigorous advocates of society's right to use the law to prevent moral harm, has relied on two principal arguments. The first is that a set of shared moral values is essential to society and, therefore, private conduct that threatens a moral principle, though it may not be a menace to particular individuals, is a threat to the existence of society. The second argument holds that a sincere moral conviction that certain activity is wrong justifies the individual or community in seeking to outlaw it. Sartorius, The Enforcement of Morality, 81 Yale L.J. 891, 892-93 (1972). For a bibliography of the debate over Lord Devlin's thesis, see Potter, Sex Offenses, 28 Me. L. Rev. 65, 65-66 n.2 (1976); U.C.L.A. Comment, supra note 144, at 584 n.13 (1967).

148. Barnett, supra note 15, at 104; see Dworkin, Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986, 1001 (1966); note 169 infra and accompanying text

149. E.g., United States v. Orito, 413 U.S. 139 (1973) (transportation of obscene material for private use); Cleveland v. United States, 329 U.S. 14 (1946) (transportation of plural wives by Mormons across state lines); United States v. Simpson, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption); Caminetti v. United States, 242 U.S. 470 (1917) (transportation of female across state line for noncommercial sexual purposes).

150. Church of Latter-Day Saints v. United States, 136 U.S. 1, 48-49 (1890). The Court's language here may be compared to that of opinions which appear to support anti-sodomy legislation by reference to Christian morality and religious texts. E.g., Doe v Commonwealth's Atty. for City of Richmond, 403 F. Supp. 1199, 1202 & n.2 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976); Dawson v. Vance, 329 F. Supp. 1320, 1322 (S.D. Tex. 1971); State v. Bateman, 113 Ariz. 107, 112, 547 P.2d 6, 10 (1976) (en banc); 4 W. Blackstone, Commentaries *216.

The fact that sodomy laws can be traced back to biblical prohibitions and that our society, which derives so many of its values from the Judaeo-Christian tradition, evidences a strong hostility to deviate sex acts which is not generally found in other cultures have led some to argue that sodomy statutes are religiously motivated and hence violate the establishment clause of the first amendment. See Harris v. State, 457 P.2d 638, 646-47 (Alas. 1969); Barnett, supra note 15, at 75-82. The fact that the punishment of such activity was originally vested in ecclesiastical courts in England is also relied on. People v. Baldwin, 37 Cal. App. 3d 385, 388, 112 Cal. Rptr. 290, 292 (4th Dist. 1974); Perkins, supra note 16, at 389.

cuity or misconduct has been affirmed time and again.[151]

This moral paternalism was justified recently by Chief Justice Burger in *Paris Adult Theater I v. Slaton*.[152] After quoting with approval from former Chief Justice Warren's dissent in *Jacobellis v. Ohio*,[153] where he stated that there is a "right of the Nation and of the States to maintain a decent society,"[154] Burger declared that the legislature might rest its anti-obscenity laws on "unprovable assumptions" about what is good for the people and that such laws were not thereby open to constitutional challenge.[155] Pornography statutes were compared to blue sky laws, which "protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."[156]

This reasoning, however, is unsound. First, English ecclesiastical courts at one time administered all marriage laws as well as the law of succession. Reynolds v. United States, 98 U.S. 145, 164-65 (1879). Yet marriage today is recognized by statute as a civil contract (e.g., N.Y. Domestic Relations Law § 10 (McKinney 1964)), whereas the law of decedents' estates never had a truly religious character.

Secondly, almost all our criminal laws correspond to, and often derive from, religious teachings of the Judaeo-Christian tradition. If it were a constitutional principle that wherever an agreement between the present secular rule and the earlier religious one should occur, the former would be voided as violating the establishment clause of the first amendment, few criminal laws would be left on the books. The Supreme Court recognized as much in McGowan v. Maryland, 366 U.S. 420 (1961), when it stated, "[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." Id. at 442; accord, Connor v. State, 253 Ark. 854, 856, 490 S.W.2d 114, 115, appeal dismissed, 414 U.S. 991 (1973); People v. Baldwin, 37 Cal. App. 3d 385, 389, 112 Cal. Rptr. 290, 292 (4th Dist. 1974); see Reynolds v. United States, 98 U.S. 145, 165 (1879) (prohibition of polygamy upheld against an establishment of religion attack).

The issue, then, is not the religious origins of sodomy laws but their purpose in today's world. Abington School Dist. v. Schempp, 374 U.S. 203 (1963) established the criteria for determining whether legislation is constitutionally tainted for breaching the wall of separation between church and state. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. at 222. The prohibition of sodomy, unlike that of other crimes such as murder or polygamy, whose origins may concededly have been religious, is different in that it is not common to most societies and its rationale is not readily apparent. See notes 144-48 supra and accompanying text. In this respect an establishment of religion attack has merit. For it is not so much that the application of the Schempp test will prove a religious purpose, but that states will be forced to articulate some rational justification for sodomy laws in order to meet the test. Simple reliance on the vague prerogatives of the police power or on presumptions of constitutionality will not be enough, since the Court will be applying "the close scrutiny demanded . . . when First Amendment liberties are at issue . . . ." McGowan v. Maryland, supra, at 449.

151. See notes 106-09 supra and accompanying text.

152. 413 U.S. 49 (1973).

153. 378 U.S. 184 (1964).

154. Id. at 199 (Warren, C.J., dissenting), quoted in Paris, 413 U.S. at 59-60.

155. 413 U.S. at 62.

156. Id. at 64.

Although the *Paris* majority was influenced by the fact that obscenity was a commercialized vice,[157] which is not the case with most private acts of sodomy, nevertheless the tenor of the opinion is well expressed in one of the Court's footnotes. After noting with approval statutes making adultery, fornication, bigamy, and prostitution illegal, the Court chose to explain why another debasing pastime — bearbaiting — was outlawed: " '[I]t was felt that [this] debased and brutalized the citizenry who flocked to witness such spectacles.' "[158] The clear message is that the state may keep its citizens from degrading themselves and for that purpose certain types of sexual expression may be proscribed.

D. *The Rational Basis Test*

Thus the permissible scope of the police power is considerable. Balanced against this power stands the due process clause — the basic limitation imposed by the Constitution on the exercise of the police power.[159] This restriction has been formulated in terms of two tests, the stricter compelling state interest test and the rational basis test. Where it is determined that a given piece of legislation infringes upon no "fundamental" right and that therefore the compelling state interest test need not be met, the statute will pass constitutional muster if there exists a rational relationship between its means and the social ends that may be legitimately served by the police power.[160]

In practice, the use of the rational basis test has most often meant an automatic stamp of approval for the legislation in question.[161] In fact, the Court begins with the assumption that the statute is constitutional.[162] Further, it will frequently postulate a legislative purpose that will sustain the statute.[163] So willing is the Court to defer to the judgment of the legislature that the rational basis test will be satisfied if "any state of facts *reasonably may be conceived* to justify [the legislation]."[164]

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157. See id. at 65.

158. Id. at 68 n.15.

159. See note 127 supra and accompanying text; Constitution Annotated, supra note 43, at 1310-16.

160. See Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 16-17, 29, 40, 51 (1973); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 806-09 (1969); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

161. The rationale for such judicial deference is that in fulfilling their function of judicial review courts should avoid duplicating the legislative process by acting as a kind of superlegislature. This would violate the principle of the separation of powers. The duty of the judiciary is not to assess the wisdom of the policy underlying a statute, and so when it finds that the fourteenth amendment does not deny a state the right to enact a particular policy into law, its task is at an end. Dandridge v. Williams, 397 U.S. 471, 487 (1970); Griswold v. Connecticut, 381 U.S. 479, 520-21 (1965) (Black, J., dissenting); Carpenters Union v. Ritter's Cafe, 315 U.S 722, 728 (1942).

162. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); Olsen v. Nebraska, 313 U.S. 236, 246 (1941); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257-58 (1931).

163. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

164. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (emphasis added); accord, Jefferson v.

These rules of judicial self-restraint have been primarily applied in regard to cases involving economic and social welfare laws.[165] In the personal liberty area, however, the Court has not been as reluctant to subject legislation to examination.[166] For example, despite occasional statements to the contrary,[167] several recent equal protection decisions employing the rational basis test have shown the Court carefully scrutinizing legislative purposes and concluding that either the statutory aim or means was invalid.[168] Hence, it is by no means pointless to inquire how a statute criminalizing consensual sodomy would fare under a rational basis analysis.

Were the Court actually to undertake the task of judging the rationality of sodomy legislation, selecting standards could prove most difficult, if not impossible. Indeed it may be doubted that a purely ethical justification — where no harm to the safety or mental well-being of the actors or of others is involved — can be demonstrated by the "logic and proof inherent in reasonableness and rationality."[169] Such a dilemma would, theoretically, leave

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Hackney, 406 U.S. 535, 549 (1972); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); Tigner v. Texas, 310 U.S. 141, 145 (1940). The Court's readiness to permit the legislature to indulge its "unprovable assumptions" has already been discussed. See note 155 supra and accompanying text. Lest such judicial self-abnegation take on the appearance of an ostrich burying its head before a host of injustices, however, it would be well to bear in mind that calling "a statute constitutional is no more of a compliment than [saying] that it is not intolerable." Curtis, A Modern Supreme Court in a Modern World, 4 Vand. L. Rev. 427, 433 (1951).

165. Indeed, with Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court has apparently renounced any future use of substantive due process to strike down this kind of legislation. Id. at 730.

166. See Roe v. Wade, 410 U.S. 113, 153 (1973); id. at 167-68 (Stewart, J., concurring).

167. See, e.g., note 155 supra and accompanying text.

168. E.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam); Gomez v. Perez, 409 U.S. 535 (1973); James v. Strange, 407 U.S. 128 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Reed v. Reed, 404 U.S. 71 (1971). See discussion at note 191 infra. A similar phenomenon is the use of the "irrebutable presumption" doctrine to overturn statutes on due process grounds, again, without the necessity of recognizing the presence of a fundamental right. See Board of Educ. v. LaFleur, 414 U.S. 632, 644-45 (1974).

169. Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391, 406 (1963); see Barnett, supra note 15, at 100-15, where he seeks to refute any possible rationale for prohibiting consensual heterosexual or homosexual sodomy. Lord Devlin's thesis, that society faces disintegration unless its moral values are enforced by criminal sanctions (see note 147 supra), though plausible in the abstract, rests on no empirical evidence whatsoever. Sartorius, The Enforcement of Morality, 81 Yale L.J. 891, 893 (1972).

Moral or ethical codes have generally been founded on the accepted authority of a deity or of some great teacher. Such is true of Christianity, Judaism, and Islam. The other principal source of moral rules has been a kind of pragmatism which balances the totality of pain/unhappiness against pleasure/happiness to determine what course of conduct is to be followed. Epicurus, Bentham, Mill, among others, have espoused this approach. 1 F. Copleston, A History of Philosophy 406-11 (1946); 4 R. Caponigri, A History of Western Philosophy 9-11, 198-99 (1971). Neither type of ethics, however, can provide the kind of justification for prohibiting consensual sodomy that the rational basis test requires. The former is authoritarian and sectarian, and thus

the Court free to decide either way. The impossibility of showing that sodomy legislation safeguards morality would be ground enough for holding it irrational and void. On the other hand, if the moral harm produced by acts of sodomy cannot be demonstrated, neither can it be proved that sodomitical conduct causes no such harm. Thus the benefit of the doubt would be given to the legislature, as the Court is wont to do in the economic and social welfare area.[170] This latter alternative seems the more probable in view of the Court's recent approval of "unprovable assumptions" made by the legislature[171] and its "decision" in *Doe v. Commonwealth's Attorney for City of Richmond*.[172]

V. THE EQUAL PROTECTION ARGUMENT

A. *Introduction*

With the coming of *Griswold* and its recognition of a marital right of privacy which may be subordinated only to a compelling state interest,

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poorly suited to the logical and secular analysis that an American court of law must make. The latter provides no assistance where a moral precept — here, the outlawing of deviate sexual practices — involves great inconvenience, not to say physical and mental anguish, to the parties affected and results in no corresponding tangible benefit for those individuals or for society as a whole.

Thomas Emerson has proposed two standards for objectively testing the rational basis of legislation, the purpose of which is strictly moral. "(1) [T]he moral practices regulated . . . must be objectively related to the public welfare or, (2) in the event [that] no such relationship can be demonstrated, the regulation must conform to the predominant view of morality in the community." Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219, 226 (1965). In other words, if it cannot be established that the law promotes the public welfare in a material sense, the morality of a minority may not be enforced upon other members of the community.

The first standard is readily acceptable in itself, but it seems to beg the question. If specific legislation could be justified on public welfare grounds, there would be no need to speak of a moral purpose at all. Accordingly, this standard is not likely to be of assistance where a law is aimed purely at morality.

The second standard is objective enough; it is only a matter of counting heads. But what heads? How is a court to determine the majority view? If the members of the legislature, who have been elected by vote of the majority, choose to pass or retain laws prohibiting consensual sodomy, will the judiciary, whose decisions and, for the most part, membership are not answerable to the electorate, be heard to say that the choice does not reflect the will of the majority? This is not to imply, of course, that a sodomy statute placed on the books more than a century ago and left there without change to the present is actually supported by a broad consensus of the public. The problem is how a court is to take account of what the public consensus is. For it will be the dawn of a new day in American legal history when a public opinion poll is conducted on which to base a judicial decision. This would usurp the role of the legislature. See Gregg v. Georgia, 96 S. Ct. 2909, 2926 (1976); Bickel, supra note 137, at 16-17. On the other hand, for a court to make its own intuitive assessment of the majority view would be the antithesis of the objectivity which Emerson's standards were meant to provide. See Furman v. Georgia, 408 U.S. 238, 382-84 (1972) (Burger, C.J., dissenting). But see id. at 332, 360-69 (Marshall, J., concurring).

170. See notes 161-65 supra and accompanying text.

171. See notes 154-55 supra and accompanying text.

172. See note 11 supra and accompanying text.

sodomy statutes do not apply to all citizens.[173] It is only the unmarried or the homosexuals for whom consensual sodomitical acts are criminal. As a result, the equal protection argument[174] has recently been relied on to challenge anti-sodomy legislation.

Justice Holmes once characterized the equal protection challenge as "the usual last resort of Constitutional arguments."[175] It is an attack, not upon what a law directs, but upon the classification of citizens to whom it is or is not to be applied.[176] Thus, as concerns a statute making consensual sodomy illicit, the issue is whether the distinction between married people and single people or between heterosexuals and homosexuals is the type of "invidious discrimination" that offends the Constitution.[177]

B. *Suspect Classification or Fundamental Right?*

Essentially, the Supreme Court applies the same twofold test to statutes challenged on equal protection grounds as it does to those facing a substantive due process attack. If the classification in question is "suspect" or if it touches on a fundamental right, then strict judicial scrutiny is required and the state has the burden of showing that the legislation is necessary to promote a compelling state interest. In other cases, a mere showing of a rational, non-arbitrary relationship between the classification and some permissible state objective will overcome the challenge.[178]

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173. See notes 100-06 supra and accompanying text.

174. This argument is based on the fourteenth amendment, which provides in pertinent part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This guarantee has been secured against the federal government under the fifth amendment's due process clause. Hampton v. Mow Sun Wong, 96 S. Ct. 1895, 1904-05 (1976); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

175. Buck v. Bell, 274 U.S. 200, 208 (1927).

176. "Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (footnote and emphasis omitted).

177. Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). It is worth noting that Doe v. Commonwealth's Atty. for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976), did not raise an equal protection challenge. No doubt, this was because the Virginia courts have not yet ruled on their statute's applicability to married couples. This is one constitutional argument against sodomy statutes that the Supreme Court has certainly not rejected.

178. See note 160 supra and accompanying text. Whether or not anti-sodomy legislation infringes upon a fundamental right has been given extensive treatment at notes 120-40 supra and accompanying text. That discussion holds true insofar as the stricter equal protection test is concerned.

Indeed, as has been suggested, " '[w]hen an equal protection decision rests on [the fundamental right] basis, it may be little more than a substantive due process decision decked out in the trappings of equal protection.' " Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, 72 Mich. L. Rev. 1613, 1624 & n.77 (1974), quoting Developments in the

If single people or homosexuals can be deemed to form a suspect class, they will qualify for the added protection of the compelling state interest test. Suspect classes are those composed of "discrete and insular minorities," groups therefore meriting judicial protection.[179] These groups must be readily definable. Thus the category "poor people" has been held not to qualify inasmuch as it was "a large, diverse, and amorphous class."[180] To date, only race, alienage, and national origin have been specifically denominated as suspect classes.[181] It may be noted that these are congenital attributes, over which the individual has no control and to which opprobrium has frequently attached.[182]

It seems evident that the unmarried fail to qualify as a suspect class. They form no relatively small, easily recognizable group, powerless against a majority hostile to their interests, nor are they stigmatized because of some

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Law — Equal Protection, 82 Harv. L. Rev. 1065, 1132 (1969) [hereinafter cited as Developments in the Law].

Nevertheless, it has been suggested that "fundamental right" does not mean exactly the same thing under the equal protection clause as it does under the due process clause. Several decisions, principally in the area of voting and the right of prisoners to appeal, indicate that under the equal protection clause it may have a broader scope. Developments in the Law, supra at 1130. See generally Constitution Annotated, supra note 43, at 1523-27. So, for example, although there exists no constitutional right to vote in state elections, several important equal protection decisions have voided state statutes restricting the exercise of the franchise. Yackle, supra note 103, at 229; see San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973); Heymann & Barzelay, supra note 102, at 768. These cases offer some hope for a strict scrutiny of laws affecting sexual intimacies, even though such activity might not be characterized as a fundamental right in the narrower due process sense. Unfortunately, because no clear principle explaining these decisions has been articulated by the Court, this hope remains rather speculative.

In applying strict scrutiny to voting rights and criminal procedure, the Court has pointed to the presence of one or more of the following factors: the fact that wealth distinctions were involved (see, e.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Douglas v. California, 372 U.S. 353, 357 (1963)), the fact that the deprivation of the right was absolute (see, e.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 20-21 (1973); Douglas v. California, 372 U.S. 353, 357 (1963)), or the fact that the right or benefit was made available by the state (see, e.g., Griffin v. Illinois, 351 U.S. 12, 18 (1956)). Since a general right of sexual privacy is not restricted on the basis of wealth and is not dependent on the state for its existence, factors one and three would be irrelevant to the strict scrutiny of anti-sodomy legislation.

179. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). Once a group has been determined to be a suspect class, the judiciary throws its weight into the balance in favor of that group, thereby serving to protect its interests against the interests of the majority. The justification is that such a group is usually incapable of looking after its own interests through normal political channels. Ely, supra note 122, at 934; Heymann & Barzelay, supra note 102, at 768 n.22. Actually, by safeguarding the rights of the minority against the majority in these circumstances, the judiciary is fulfilling one of the primary purposes of judicial review, thwarting absolute and unchecked majority rule through the legislature. Bickel, supra note 137, at 16-17.

180. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

181. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race).

182. See generally Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

characteristic beyond their control. On the other hand, a strong argument can be made that homosexuals may meet these criteria.[183] Even so, homosexuals would still confront a formidable obstacle in the Supreme Court's general reluctance to extend suspect classifications beyond the categories of race and alienage.[184] More particularly, the failure of sex to rise to the level of a suspect classification bodes ill for homosexuality's chances of success.[185] Like sex orientation, sex involves a long history of discrimination and is an

183. See note 185 infra; Barnett, supra note 15, at 262-63.

184. Constitution Annotated, supra note 43, at 101 (Supp. 1974). The development of the irrebutable presumption doctrine (see id.) and a more critical use of the rational relationship test (see cases cited at note 168 supra) have enabled the Court to avoid such an extension. See note 191 infra. Indeed, the special consideration given to racial discrimination can be understood as simply reflecting the historical fact that the equal protection guarantee was conceived primarily to assure blacks the enjoyment of their civil rights. Strauder v. West Virginia, 100 U.S. 303, 306 (1880); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873).

185. The rise and fall of sex as an inherently suspect classification can be traced from Reed v. Reed, 404 U.S. 71 (1971). There a unanimous Court, though applying the traditional rational basis test to overturn a statute mandating preference for males over females as estate administrators, expressed its view that sex-based classification required close scrutiny. Id. at 75. Then followed Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality opinion, wherein four Justices were prepared to hold that classifications based on sex were inherently suspect and therefore must be subjected to strict judicial scrutiny. In their reasoning they stressed the long history of sex discrimination and the fact that sex, like race or national origin, was an immutable characteristic determined soley by accident of birth. Id. at 684-87.

An argument analogous to the Frontiero rationale could be made for protecting those whose sexual orientation differs from that of the majority from invidious discrimination. Sexual orientation, if not congenital, is at least beyond the individual's power of control. See Barnett, supra note 15, at 263; Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, 72 Mich. L. Rev. 1613, 1625-26 (1974). Moreover, homosexuals have been the objects of age-old prejudice, and even loathing and have often been ostracized from the community, an experience to which the kind of discrimination met with by women is hardly comparable. See Leviticus 20:13 and notes 60 and 135 supra.

The Frontiero rationale, however, has never been accepted in a majority opinion. Indeed, three recent decisions by the Court dealing with equal protection attacks upon statutes treating men and women differently would seem to have sounded the death knell for sex as a suspect classification and, with that, for any similarly protected status for sexual orientation. Stanton v. Stanton, 421 U.S. 7 (1975) (reversal of state supreme court determination that a parent's support obligation ended toward daughters when they reached eighteen, toward sons when they reached twenty-one); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (gender-based classification held invalid, whereby Social Security benefits were allowed to widows who remained at home to care for dependent children but not to widowers); Schlesinger v. Ballard, 419 U.S. 498 (1975) (naval regulation setting different tenure criteria for male and female officers upheld). In all three the Court employed the traditional rational basis analysis, though in a vigorous manner (see note 168 supra and accompanying text); no reliance was put upon sex as a suspect classification requiring the compelling state interest test. It is worth noting that even Justice Brennan, who had written the Court's opinion in Frontiero and whose dissents since then had constantly reasserted the "suspectness" of sex-based distinctions (see Schlesinger v. Ballard, supra, at 511-21 (Brennan, J., dissenting); Geduldig v. Aiello, 417 U.S. 484, 497-505 (1974) (Brennan, J., dissenting); Kahn v. Shevin, 416 U.S. 351, 357-60 (1974) (Brennan, J., dissenting)), grounded his opinion in Wiesenfeld, in which he was joined by a majority of the Court, upon the rational basis test.

immutable characteristic determined by factors not subject to the individual's free choice.

C. *The Effects of Eisenstadt v. Baird*

If it is determined that anti-sodomy statutes do not deserve strict judicial scrutiny either because they do not affect a fundamental right or because they are not aimed at a suspect classification, then the rational basis test remains to be met. Yet, in applying this test, whether in the area of equal protection or of due process, the Court has shown a strong tendency to exercise restraint and defer to the legislative judgment.[186] Here *Eisenstadt v. Baird*[187] — examined earlier insofar as it was thought to extend the married couple's right of privacy to the unmarried[188] — is in point. Although the decision represented a plurality opinion,[189] a number of recent lower court cases[190] have relied on it to overturn anti-sodomy laws as violative of the Constitution's equal protection guarantee. Further, because the *Baird* decision did not hinge on a fundamental-right analysis nor recognize the unmarried as a suspect class, it illustrates an approach the Supreme Court could utilize in the future to find that distinctions between married people and single people or between heterosexuals and homosexuals are arbitrary and irrational.[191]

The equal protection clause denies states the power to pass a law treating different classes of persons differently "on the basis of criteria *wholly unrelated to the objective of* [*a particular*] *statute*."[192] It is not enough that the classification, as with the distinction between marrieds and unmarrieds, reflects an actual difference between groups of citizens. To be rational, in the constitutional sense, the classification must fit the legislative goal.[193]

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186. See notes 161-64 supra and accompanying text.

187. 405 U.S. 438 (1972). For the facts and holding of this case, see text following note 112 supra.

188. See notes 111-17 supra and accompanying text.

189. For an interpretation of the meaning of plurality decisions, see Comment, Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U. Chi. L. Rev 99 (1956).

190. See notes 208-09 infra and accompanying text.

191. Baird is typical of many recent decisions involving personal liberty (see cases cited at note 168 supra), wherein the Court has not automatically deferred to the legislative judgment as it has traditionally done when applying the rational basis test to economic and social welfare regulations. See Geduldig v. Aiello, 417 U.S. 484, 496 (1974). It has been suggested that such cases reflect a third, intermediate test which the Court has adopted. Reluctant to expand the number of suspect classifications and fundamental interests (see note 190 supra and accompanying text), and, at the same time, unwilling to relinquish judicial review in the area of personal liberties, the Court looks hard at the reasonableness of the connection between a classification and a statute's purposes. Constitution Annotated, supra note 43, at 99-101 (Supp. 1974); Gunther, supra note 103, at 20-48; Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications, 62 Geo. L.J. 1071 (1974).

192. Reed v. Reed, 404 U.S. 71, 76 (1971) (emphasis added).

193. Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 346 (1949).

The Court in *Baird* chose to determine for itself the legislative purposes and then proceeded to its conclusion that the statutory means were not rationally related to them.[194] The Court reasoned that the statute, which prohibited the distribution of contraceptives to the unmarried, had three possible objectives: to deter premarital sex, to protect the health of the community by regulating potentially harmful drugs, and to prevent the use of contraceptives.[195] None of these goals were deemed improper in themselves. However, while the statute's distinction between married and single persons had "at best a marginal relation" to the first goal,[196] the Court found it irrational as to the other two. For if the health of the community[197] and the prevention of contraception[198] were in fact objectives, the statute should not have exempted married people.[199]

It is doubtful that sodomy statutes could withstand a *Baird*-type analysis, if the Court were to find other possible legislative goals in addition to the discouragement of nonmarital sexual activity. Whatever purposes — the protection of health, safety, morals — would appear to justify the exercise of the police power to prohibit private acts of consensual sodomy among adults would all be equally compelling with regard to married people. If sodomy is detrimental to the health, safety, or morals of the unmarried, it must be just as harmful to the married, and any exclusion of the latter must be arbitrary and therefore contrary to the guarantee of equal protection.[200] Even if the sole

194. The significant point about the Court's method in Baird is the seemingly limitless veto power it provides the Court, at least where a statute expresses no specific purpose on its face. Legislation is usually the result of compromise and so, by its nature, will contain multiple, and perhaps contradictory, objectives. By choosing to focus on these multiple goals, the Court can always point to an absence of rationality and strike down the law. See Bickel, supra note 137, at 225.

195. 405 U.S. at 442-43.

196. Id. at 448. This was so because, under the statute, unmarried people could obtain contraceptives for health reasons and also because married persons were not prevented from obtaining contraceptives in order to engage in sexual relations with unmarried persons. Id. at 448-49.

197. Id. at 450.

198. Id. at 454.

199. For an analysis of the Baird Court's logic, see Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123, 124-27 (1972).

200. This argument has been used by two lower courts in New York to declare that state's sodomy law unconstitutional. People v. Rice, 80 Misc. 2d 511, 515, 363 N.Y.S.2d 484, 488 (Suffolk County Dist. Ct. 1975), rev'd, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. T. 1976) (per curiam); People v. Johnson, 77 Misc. 2d 889, 891, 355 N.Y.S.2d 266, 267 (Buffalo City Ct. 1974), quoted at text accompanying note 209 infra.

The orthodox answer to such reasoning is that under equal protection a regulation is not required to be all-embracing. Zucht v. King, 260 U.S. 174, 177 (1922). "[A] [s]tate 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . .' " Geduldig v. Aiello, 417 U.S. 484, 495 (1974), quoting Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). This principle would seem inappropriate to sodomy statutes, however, inasmuch as the state may not at any time in the future extend the "benefits" of these laws to married couples without violating their marital right of privacy.

legislative purpose is determined to be the discouragement of nonmarital sex, for which the married/unmarried dichotomy is reasonable, this justification would be seriously undermined in those states that have no fornication laws.[201]

D. *Analysis of the Equal Protection Argument and Its Success in Recent Lower Court Decisions*

One interesting example of the use of the equal protection argument in the pre-*Baird* era occurred in *Riley v. Garrett*.[202] There it was held that since copulation *per os* between females was not prohibited by Georgia's statute, to make it punishable where the actors were of different sexes would violate the equal protection guarantee.[203] But Georgia's situation was unique and the attack sustained in *Riley* does not represent the typical equal protection challenge, since sodomy laws do not usually discriminate between the sexes but rather between the married and unmarried or else between heterosexuals and homosexuals. Such distinctions were dealt with in *Raphael v. Hogan*,[204] where the acts of sodomy were committed as part of a theatrical performance, and in *Hughes v. State*,[205] in which the defendant was charged with committing sodomy with a minor. The *Raphael* court simply dismissed the equal protection defense out of hand,[206] while the *Hughes* court pointed out that the accused's reliance on *Griswold* was misplaced, reasoning that the whole rationale of that case "flow[ed] from its eulogy of the marital status . . ." and, thus, there was nothing invidious in treating married and single people differently.[207]

After 1972, however, five cases[208] have found support in *Baird* for declar-

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The same analysis can be made with respect to statutes proscribing only homosexual sodomy. Here, however, the issue is complicated by the fact that, "[u]nlike heterosexual deviance, homosexual behavior is often an exclusive way of life for those disposed to engage in it. . . . The question must be asked whether homosexual conduct as a general social phenomenon . . . poses any threat to American society or its cherished institutions, such as the family, sufficient to justify criminal proscription of the acts themselves." Barnett, supra note 15, at 108. Barnett goes on to answer in the negative. Id. at 108-15. But see People v. Johnson, 77 Misc. 2d 889, 891, 355 N.Y.S.2d 266, 268 (Buffalo City Ct. 1974).

201. E.g., Alabama (only habitual fornication punished: Ala. Code tit. 14, § 16 (1958)), Alaska, Arizona, Maryland, New York, Oklahoma, Pennsylvania, South Carolina (only habitual fornication punished: S.C. Code Ann. §§ 16-406, -408 (1962)), Vermont, Wyoming.

202. 219 Ga. 345, 133 S.E.2d 367 (1963).

203. Id. at 346-47, 113 S.E.2d at 370. Apparently, the legislature was not pleased that as a result of Riley oral intercourse became lawful for all. Georgia's present statute has been made applicable to acts involving only female parties, thereby forestalling a similar equal protection challenge. Carter v. State, 122 Ga. App. 21, 22-23, 176 S.E.2d 238, 240 (1970). Cf. United States v. Cozart, 321 A.2d 342 (D.C. Ct. App. 1974).

204. 305 F. Supp. 749 (S.D.N.Y. 1969).

205. 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025 (1972).

206. 305 F. Supp. at 756.

207. 14 Md. App. at 506, 287 A.2d at 305.

208. Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976) (en banc), petition for cert. filed, 45 U.S.L.W. 3133 (U.S. Aug. 9, 1976) (No. 76-184) (sodomy

ing unconstitutional sodomy statutes applying exclusively to the unmarried. Where a rationale was expressed, it was that no rational basis existed to justify permitting married people to engage in deviate sexual intercourse, while forbidding unmarrieds to do so. For "all the arguments that have ever pertained to the prohibition of 'deviate' forms of intercourse . . . have pertained irrespective of the marital status of the participants."[209] Nevertheless, these decisions do not represent any real turning point in the area of the constitutionality of sodomy statutes. One was merely dictum; and three have been overruled by higher courts. *People v. Johnson* alone remains undisturbed, but, despite its convincing logic, it is the holding of a nisi prius court. In sum, although the equal protection argument offers the most likely ground for voiding present-day sodomy statutes, it has not fared well in the lower courts.

VI. CONCLUSION

In his book, *Sexual Freedom and the Constitution*,[210] published in 1973, Walter Barnett expressed the view that very little was to be expected of state legislatures in the way of decriminalizing sodomy. He pointed out that, although the Model Penal Code had recommended such reform almost twenty years earlier, only seven states[211] had so far repealed their consensual sodomy statutes. Thus he pinned his hopes for change on the constitutional invalidation of these statutes by the courts.[212] Since 1973, however, ten additional states[213] have abrogated their consensual sodomy laws.

By contrast, during the past decade, the highest court of only one state[214] has voided its sodomy statute on any of the various constitutional grounds

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committed by married couple who had had photographs taken of their conduct and allowed these to come into the hands of their children); State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), rev'd sub nom. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc); State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), rev'd, — N.M. —, 551 P.2d 1352 (1976); People v. Rice, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Suffolk County Dist. Ct. 1975), rev'd, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. T. 1976) (per curiam). See People v. Johnson, 77 Misc. 2d 889, 355 N.Y.S.2d 266 (Buffalo City Ct. 1974).

209. People v. Johnson, 77 Misc. 2d 889, 891, 355 N.Y.S.2d 266, 267 (Buffalo City Ct. 1974).

210. Barnett, supra note 15.

211. Colorado, Connecticut, Delaware, Hawaii, Illinois, Ohio, Oregon. Barnett, supra note 15, at 4 & n.12. Actually, the fact that seven states had no consensual sodomy law at the time represented some progress. Five years earlier, Hugh Hefner was able to write that forty-nine of the fifty states had anti-sodomy statutes which were applicable to consenting adults. Hefner, The Legal Enforcement of Morality, 40 U. Colo. L. Rev. 199, 210 (1968).

212. Barnett, supra note 15, at 4.

213. No. 928, § 3, [1975] Ark. Acts; ch. 71, §§ 7 & 10, ch. 877, §§ 1 & 2, [1975] Cal. Stats. 146-47, 2246-47; P.L. 148, § 24, [1976] Ind. Acts; ch. 499, § 5, [1975] Me. Laws 1363; ch. 532, § 26, [1973] N.H. Laws 1011; ch. 109, § 8, [1975] N.M. Laws 399; ch. 117, § 1, [1973] N.D. Laws 302 & 304 (amended to apply only to sexual contact with animals, birds, or dead bodies); ch. 158, § 22-8, [1976] S.D. Laws; ch. 260, 1st Ex. Sess., [1975] Wash. Laws 866; ch. 43, [1976] W. Va. Acts.

214. State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (en banc). The Florida Supreme Court,

that have been discussed above, and even this decision was expressly limited to heterosexual sodomy.[215] The Supreme Court itself has recently upheld sodomy laws against vagueness attacks,[216] and in *Doe v. Commonwealth's Attorney for City of Richmond* it rejected a constitutional challenge based on due process, freedom of expression, and the eighth amendment's prohibition against cruel and unusual punishments.[217] Certainly, hindsight would indicate that Barnett was wrong and that the source of future change will be the legislature rather than the judiciary. Apparently, the courts themselves have recognized that reform must come from the legislature. Those very courts that have sustained anti-sodomy laws have often called upon the legislature to decriminalize all sexual practices not involving force, the corruption of minors, or public display.[218]

Despite the very definite movement of state legislatures to abrogate their consensual sodomy statutes, an immediate and total revocation of these laws is unlikely, given the significant number of states that have deliberately rejected the opportunity to institute reform.[219] No doubt many legislators fear

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though striking down its sodomy statute, actually retained it in a milder form. See discussion at notes 38-41 supra and accompanying text.

215. State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (en banc).

216. Rose v. Locke, 423 U.S. 48 (1975) (per curiam); Wainwright v. Stone, 414 U.S. 21 (1973) (per curiam). See notes 26-28 supra and accompanying text.

217. 425 U.S. 901 (1976), aff'g 403 F. Supp. 1199 (E.D. Va. 1975), discussed at note 6 supra and accompanying text; see Canfield v. Oklahoma, 414 U.S. 991 (1973), dismissing appeal from 506 P.2d 987 (Okla. Crim. App. 1973), discussed at note 11 supra.

218. E.g., Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971) (per curiam); State v. Lair, 62 N.J. 388, 397-98, 301 A.2d 748, 754 (1973); Young v. State, 531 S.W.2d 560, 563 (Tenn. 1975); see Doe v. Commonwealth's Atty. for City of Richmond, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976); State v. Bateman, 113 Ariz. 107, 112, 547 P.2d 6, 10 (1976) (en banc); Carter v. State, 255 Ark. 225, 229, 500 S.W.2d 368, 371 (1973), cert. denied, 416 U.S. 905 (1974).

The dissent in State v. Pilcher pinpointed a very real practical consideration that courts which would strike down sodomy statutes must face, at least in those states that do not have separate statutes proscribing consensual and nonconsensual sodomy. The invalidation of a jurisdiction's sole sodomy statute would result in the complete absence of any penalty for forcible sodomy or sodomy with a minor. 242 N.W.2d 348, 363 (Iowa 1976) (Reynoldson, J., dissenting). Legislative repeal would obviate this problem.

219. E.g., Florida: The legislature repealed its sodomy statute, which had been declared unconstitutional. Ch. 121, § 1, [1974] Fla. Laws 372. In effect, however, consensual sodomy is still outlawed, since Fla. Stat. Ann. § 800.02 (1976) was retained. See notes 38-41 supra and accompanying text.

Georgia: Though the criminal law was revised, the sodomy statute was reenacted unchanged. No. 1157, [1968] Ga. Laws 1299.

Idaho: Though the criminal law was revised, the sodomy statute was reenacted unchanged. Ch. 336, [1972] Idaho Laws 966-67.

Kansas: Though the statute was revised to apply only to homosexuals, consensual sodomy is still prohibited. Ch. 180, [1969] Kan. Laws 457.

Kentucky: Though the statute was revised to apply only to homosexuals, consensual sodomy is still prohibited. Ch. 406, § 90, [1974] Ky. Laws 847.

to become known as supporters of sodomy repeal lest they suffer a backlash from some constituents.[220] Moreover, a do-nothing approach is encouraged in those jurisdictions where, because sodomy laws are not enforced,[221] there is a correspondingly small hue and cry against them.[222] In

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Louisiana: Law amended, but consensual sodomy still prohibited. No. 612, [1975] La. Acts 1307-09.

Maryland: Consensual sodomy statute reenacted. Ch. 573, [1976] Md. Laws. The legislature rejected the proposal of the Commission on Criminal Law that voluntary, private sodomy be excluded from the new revision of the Maryland Penal Code. See Fischer, The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?, 30 Md. L. Rev. 91 (1970).

Minnesota: Because a sodomy law had not been part of the Criminal Code of 1963, the legislature added one in 1967. Ch. 507, § 4, [1967] Minn. Laws 1048-49; see Commentary at Minn. Stat. Ann. § 609.293 (Supp. 1976).

Missouri: The legislature has not approved the decriminalization of consensual sodomy as proposed by The Committee to Draft a Modern Criminal Code, The Proposed Criminal Code for the State of Missouri § 11.060, at 148-49 (West 1973).

Montana: Though the statute was revised to apply only to homosexuals, consensual sodomy is still prohibited. Ch. 513, §1, [1973] Mont. Laws 1360.

Nevada: Law amended, but consensual sodomy is still prohibited. Ch. 69, § 12, [1973] Nev. Statutes 95 and ch. 195, § 9, [1973] Nev. Statutes 254-55.

New Jersey: No action by the legislature, despite the recommendation to decriminalize consensual sodomy in The Final Report of the New Jersey Criminal Law Revision Commission § 2C:14-2 (1971), cited in State v. Lair, 62 N.J. 388, 398, 301 A.2d 748, 754 (1973).

New York: Despite the fact that the Commission of Revision of the Penal Law and Criminal Code presented the legislature with a revised code that did not include consensual sodomy, the code, as adopted in 1965, prohibits that offense. "Practice Commentary" to the N.Y. Penal Law § 130.38 (McKinney 1975). In 1973, 1974, and 1975 bills introduced in both houses of the legislature failed to be adopted. S 2142, S 1854, S 731, A 3652, A 1220, [1975] N.Y. Legislative Record and Index; S 3472, S 4107, A 3545, A 3404, [1974] N.Y. Legislative Record and Index; S 4107, S 3472, A 3545, A 3404, [1973] N.Y. Legislative Record and Index.

Pennsylvania: Consensual sodomy statute was reenacted with amendments as part of recodification. Act of Dec. 6, 1972, No. 334, ch. 31, § 3124, Pa. Laws 1531.

Texas: Though the statute was revised to apply only to homosexuals, consensual sodomy is still prohibited. Ch. 399, §§ 1 & 3, [1973] Tex. Acts 917, 991.

Utah: Consensual sodomy statute amended and reenacted as part of recodification. Act of Mar. 8, 1973, ch. 196, [1973] Utah Laws 610.

Virginia: Consensual sodomy statute reenacted as part of recodification of criminal law. Ch. 14, [1975] Va. Acts 79 and ch. 15, [1975] Va. Acts 163.

Wyoming: Law amended, but consensual sodomy is still prohibited. Ch. 213, § 2, [1973] Wyo. Laws 319.

220. There are those who view the criminal law primarily as an expression of "state declared ideals," whether or not these ideals are or can be actually enforced. LeFave, The Police and Nonenforcement of the Law — Part II, [1962] Wis. L. Rev. 179, 197-98. Such persons, if they find sodomy morally reprehensible, would prefer to see it kept on the books rather than repealed.

221. See notes 57-59 supra and accompanying text.

222. Contrast the attitude of the Maine legislature, which was moved to repeal its consensual sodomy law precisely because it was unenforceable. See Potter, Sex Offenses, 28 Me. L. Rev. 65 & n.2 (1976). It is suggested that this approach to lawmaking, rather than that discussed in note

view of the political realities, it is submitted that, while state legislatures, and not the courts, will be the vehicles for ultimately eliminating laws proscribing consensual sodomy, the pace of reform will be slow.

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219 supra, is more conducive to the development of a body of law that is equitable and respected. See H. Packer, The Limits of the Criminal Sanction 302-05 (1968).