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Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity

Authors

Yao Apasu-Gbotsu, Robert J. Arnold, Paul DiBella, Kevin Dorse, Elisa L. Fuller, Steven H. Naturman, Dung Hong Pham, and James B. Putney

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FOREWORD

This *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity* resulted from the Supreme Court's unexpected grant of certiorari in *Bowers v. Hardwick*, No. 85-140. *Hardwick* presents a challenge by a homosexual male to the State of Georgia's sodomy statute. When the Eleventh Circuit Court of Appeals first decided *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir.),

reh'g denied, 765 F.2d 1123 (11th Cir. 1985), the facts presented an interesting casenote topic. In that case, the court identified three issues on appeal: one based on standing, another on summary affirmances in light of *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), and finally a right to privacy claim. In *Doe v. Commonwealth's Attorney*, the Supreme Court of the United States summarily affirmed a Virginia district court decision upholding Virginia's sodomy statute. The Note published in the *University of Miami Law Review*, *Hardwick v. Bowers: An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. Miami L. Rev. 973 (1985) focused on the scope of precedential effect to be accorded the Supreme Court's summary affirmance in *Doe* in the face of a homosexual's assertion of a right to intimate privacy.

Although the precedential value of summary affirmances presents an interesting question, it may not capture the imagination and interest of a wide legal audience. The constitutional protections espoused in *Griswold v. Connecticut*, 81 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973) and their possible application to homosexual privacy rights, on the other hand, have not only great constitutional significance, but popular interest as well. It came as a great surprise to our staff when the Supreme Court decided to grant certiorari in *Hardwick*, particularly in light of its earlier reluctance to hear this question in *Doe* and subsequent cases. With preliminary research already in hand, we proceeded to address, in a survey format, the law and literature on the right to privacy as it has evolved, and as it may be applied in this most recent factual situation.

Bowers v. Hardwick presents the Court with the perfect opportunity to flesh out the parameters of the due process privacy rights that inhere from the fourteenth amendment. On August 3, 1982, Atlanta police arrested Michael Hardwick in his own bedroom and charged him with violating Georgia's criminal sodomy statute with another consenting male adult. Georgia's sodomy statute provides:

- (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another
- (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. 16-6-2 (1984). Though the district attorney ultimately dropped the charges due to a lack of evidence, Hardwick proceeded to file suit in the United States District Court for the Southern District of Georgia alleging that Georgia's sodomy statute violated his constitutionally protected right to privacy. He stated that he regularly engaged in acts proscribed by the Georgia sodomy statute and that he

would continue to do so in the future. The district court held that the Supreme Court of the United States' summary affirmance in *Doe v. Commonwealth's Attorney* foreclosed Hardwick's suit.

The Eleventh Circuit, however, held that either *Doe* was not clearly on point or, alternatively, that the Supreme Court's privacy cases had subsequently overruled *Doe*. The Eleventh Circuit chose to reach the merits of the case, holding the statute unconstitutional as impinging upon the fundamental right to engage in private consensual sexual activity protected under the ninth and fourteenth amendments. The Eleventh Circuit directed that on remand, the state must prove both a compelling interest to regulate such behavior and that the statute was narrowly drawn to serve only that interest. The Supreme Court has granted the state's petition for certiorari, with oral arguments scheduled to be heard on March 31, 1986.

For a number of reasons, the facts of *Hardwick* present the "purest" right to privacy case the Supreme Court could hear on the issue of the fourteenth amendment's constitutional right to privacy in the context of homosexual activities. There is no fourth amendment question to muddy the privacy issues. Neither Hardwick nor his partner were minors, there was no question of compulsion on either party's part, and the acts took place completely in private. Furthermore, *Hardwick*, does not present an equal protection issue because the Georgia sodomy statute at issue applies equally to all—men and women, married and unmarried, heterosexuals and homosexuals. Interestingly, a married couple joined Hardwick in his district court suit, but their claim was dismissed for lack of standing. As a result, the focus of the *Hardwick* case was narrowed to the specific question of the right to privacy of unmarried persons. Finally, the statute involved cannot be challenged for vagueness because it explicitly sets out what acts are prohibited.

It is our hope that what at first came as an unexpected surprise to our editorial board will result in an opinion offering greater insight into the proper scope of the right to privacy and its possible continued expansion into other areas of individual freedoms. As a Survey, we hope that our work will meaningfully contribute to legal scholarship in this area, and that those who rely on our research and analysis will find them both useful and complete.

I. INTRODUCTION

At common law, and at one time by statute in every state of the United States, sodomy was a criminal act. Traditionally, states have

considered homosexuality to be "sinful, sick and criminal."¹ In addition to making private gay sexual conduct a crime "not fit to be named,"² states have denied homosexuals custody of their children,³ the opportunity for public employment,⁴ and even the right to express their political views.⁵ Not until the rise of the gay rights movement have some courts decided that the constitutional right to privacy, as set forth in *Griswold v. Connecticut*,⁶ limits state authority to discriminate against homosexuals.⁷ This process of invalidating discriminatory state action because of the right to privacy has, however, been a slow and uneven one.⁸

Uneven application of the right of privacy to protect homosexuals is highlighted by the fact that twenty-four states and the District of Columbia currently impose criminal penalties on consenting adults who engage in private homosexual intercourse.⁹ Of these jurisdictions, only six have specific statutes that explicitly prohibit homosexual con-

1. Rivera, Book Review, 132 U. PA. L. REV. 391, 392 (1984) (reviewing D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (1983)).

2. Honselman v. People, 168 Ill. 172, 174-75, 48 N.E. 304, 305 (1897).

3. See, e.g., Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (denying child custody because mother was a lesbian), cert. denied, 415 U.S. 918 (1973).

4. See, e.g., Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (finding public knowledge of teacher's homosexual activity to impair ability to work and thus to justify firing), cert. denied, 434 U.S. 879 (1977). See generally Horenstein, *Homosexuals in the Teaching Profession*, 20 CLEV. ST. L. REV. 125 (1971) (generally discussing the rights of homosexual teachers); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons In the United States*, 30 HASTINGS L.J. 799, 860-73 (1979) (general discussion of the legal problems of homosexuals).

5. See, e.g., National Gay Task Force v. Board of Educ., 729 F.2d 1270 (1984), aff'd by equally divided Court, 105 S. Ct. 1858 (1985). See generally Willson & Shannon, *Homosexual Organization and Right of Association*, 30 HASTINGS L.J. 1029 (1979).

6. 381 U.S. 479 (1965).

7. See, e.g., People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981).

8. See, e.g., Neville v. State, 430 A.2d 570 (Md. App. 1981) (a post-Onofre case finding no fundamental right even for married couples to engage in oral or anal sex).

9. Private, consensual sodomy is a criminal offense in the following states: ALA. CODE § 13A-6-65(a)(3) (1975); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1978); ARK. STAT. ANN. § 41-1813 (1975); D.C. CODE ENCYCL. § 22-3052 (West 1981); FLA. STAT. ANN. § 800.02 (West 1984); GA. CODE ANN. § 16-6-2 (1982); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1974); KY. REV. STAT. § 510.100 (1975); LA. REV. STAT. ANN. §§ 14:89, 14:89.1 (West Supp. 1982); MD. ANN. CODE art. 27, §§ 553-54 (Supp. 1982); MICH. COMP. LAWS ANN. §§ 750.158, 750.338, 750.388(a)-(b) (1981); MINN. STAT. ANN. § 609.293 (Supp. 1982); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 566.090 (Vernon 1982); MONT. CODE ANN. § 45-5-505 (1981); NEV. REV. STAT. § 201.190 (1979); N.C. GEN. STAT. § 14-177 (1981); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1977); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (1983); VA. CODE § 18.2-361 (1982).

duct.¹⁰ The other jurisdictions rely on sodomy statutes, which prohibit oral and anal intercourse between any two individuals—including heterosexuals.¹¹ Traditionally, however, sodomy statutes have been aimed primarily at homosexuals.¹²

Current state laws prohibiting homosexual intercourse are ancient in origin. The earliest legal argument for outlawing homosexuality can be found in Plato's *Laws*.¹³ Plato believed that homosexuality had to be forbidden because it undermined the important Greek values of masculinity and procreation.¹⁴ While accepting Plato's reasoning, Judeo-Christian opposition to homosexuality derives from the legendary account in Genesis of the fire and brimstone destruction of Sodom and Gomorrah.¹⁵ The word sodomy is derived from Sodom. The Mosaic Law sets forth an absolute prohibition against homosexual activity: "Thou shalt not lie with mankind as with womankind; it is abomination."¹⁶

Throughout the Middle Ages, ecclesiastical courts enforced the Biblical prohibition against sodomy by prosecuting homosexuals as heretics and burning them at the stake.¹⁷ The first secular legislation forbidding sodomy was not passed until the English Reformation when Henry VIII removed jurisdiction from the ecclesiastical courts and granted it to the king's courts.¹⁸ Blackstone later restated this

10. See ARK. STAT. ANN. § 41-1813 (1975); KAN. STAT. ANN. § 21-3505 (1974); KY. REV. STAT. ANN. § 510.100 (1975); MO. ANN. STAT. § 566.090 (Vernon 1982); NEV. REV. STAT. § 201.190 (1979); TEX. PENAL CODE ANN. § 21.06 (Vernon 1972).

11. See *supra* note 7. For a compilation of statutory materials showing legislative intent in the enactment and repeal of sodomy legislation, see the *Appendix*, at 639-57, attached to this Survey.

12. See Rivera, *supra* note 3, at 942-44.

13. See PLATO, LAWS, Book VIII 835d-842a.

14. *Id.*

15. See Genesis 19:5-8, 24-26; Deuteronomy 23:17.

16. Leviticus 18:16-20, 22-23 (King James).

17. D.S. BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 146-47 (1955).

18. The original English statute read:

For as much as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this realm, for the detestable and abominable vice of buggery committed with mankind or beast . . . it may therefore please the King's highness, with the assent of his lords spiritual and temporal, and the commons of this present parliament assembled . . . that the same offence be from henceforth adjudged felony . . . And that the offenders being hereof convict . . . shall suffer such pains of death, and losses, and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as felons be accustomed to do, according to the order of the common laws of this realm And that justices of Peace shall have power and authority, within the limits of their Commissions and Jurisdiction, to hear and determine the said offence, as they do use to do in cases of other felonies

25 Hen. 8, c. 6 (1533).

early sodomy legislation as prohibiting an "infamous crime against nature."¹⁹

Blackstone's characterization of sodomy, as a "crime against nature," would serve as the basis for most American sodomy laws.²⁰ For example, the original North Carolina sodomy statute read: "Any person who shall commit the abominable and detestable crime against nature, not fit to be named among Christians, . . . shall be adjudged guilty of a felony and shall suffer death without the benefit of clergy."²¹ While some states continue to use the Blackstonian language, most jurisdictions that retain prohibitions against sodomy have rewritten their statutes to describe with greater specificity the types of private consensual sexual acts deemed illegal.²² This is largely to avoid challenges to the term "unnatural" as unconstitutionally vague.

Until the early 1960's, homosexual behavior was prohibited in all fifty states and the District of Columbia through some form of sodomy statute.²³ Then in 1961, Illinois became the first state to adopt the American Law Institute's Model Penal Code provision, which decriminalized adult, consensual, private, sexual conduct.²⁴ In supporting the decriminalization of sodomy, the American Law Institute (ALI) noted that such nations as France, Great Britain, Canada, Mexico, Italy, Denmark, and Sweden had repealed their sodomy statutes.²⁵ The ALI further cited scientific studies that found homosexual conduct to be neither "unnatural" nor socially harmful.²⁶ Despite the ALI's support and Illinois's lead, no other state decriminalized consensual sodomy until Connecticut repealed its sodomy law in 1969.²⁷ In response to the gay rights movement, the ALI proposal gained support in the 1970's when legislators in twenty additional states acted to decriminalize private, consensual homosexual conduct.²⁸ The impe-

19. 4 W. BLACKSTONE, COMMENTARIES *215.

20. See Note, *Commonwealth v. Bonadio: Voluntary Deviate Sexual Intercourse—A Comparative Analysis*, 43 U. PITT. L. REV. 253, 254 (1981).

21. N.C. REV. CODE ch. 34 § 6 (1837).

22. By finding that it was clear enough to meet due process requirements, the Supreme Court laid to rest any concerns over the vagueness of the Blackstonian definition. *Rose v. Locke*, 423 U.S. 48 (1975).

23. See Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553, 554-57 (1977).

24. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws 1985-2006 (codified as amended at ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3) (Smith-Hurd 1979 & Supp. 1983). See MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962); MODEL PENAL CODE § 207.5 (Tent. Draft No. 4, 1955).

25. MODEL PENAL CODE § 207.5 comment 276, at 278 (Tent. Draft No. 9, 1955).

26. *Id.*

27. CONN. PENAL CODE, Pub. Act. No. 828, §§ 66-91, 1969 Conn. Pub. Acts 1554, 1579-85.

28. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219; Act of May 12, 1975, ch.

tus of the gay rights movement appears to have waned in the 1980's, however, with only Wisconsin acting to decriminalize sodomy.²⁹

With state legislatures less hospitable, gay activists have mounted constitutional challenges to sodomy statutes in state and federal courts. These challenges have been based on the federal constitutional right to privacy as the Supreme Court has articulated it in the *Griswold v. Connecticut* and *Roe v. Wade*³⁰ line of cases. Gay rights litigants have attempted to force the courts to expand the right to privacy to cover private, adult, consensual sexual activity.³¹ The courts have been split over whether to accept this proposition.

Essentially, the debate centers on the scope of the right to privacy. Because the Supreme Court has not squarely confronted the problem of giving content to the right in a manner that would allow courts to develop the law in some coherent fashion, lower courts have floundered with the concept. This Survey attempts to analyze the cases and literature relevant to the determination of whether the right to privacy protects private, adult, consensual homosexual activity. As a threshold matter, Part II initially highlights the methods of constitutional interpretation by which courts have attempted to discover the meaning of the right to privacy, arguing that the method employed is in some sense outcome-determinative as to the scope of the right. Part III analyzes the Supreme Court's doctrinal development of the right to date, i.e., *Griswold* and its progeny. Part IV surveys the literature commenting on the Supreme Court's right to privacy cases and attempts to reconcile the values underlying the Court's decisions. Part V then details lower court opinions that have struggled to assess

71, §§ 4-12, 1975 Cal. Stat. 131, 133-136; Colorado Criminal Code, chs. 40-3-403, 40-3-404, 1971 Colo. Sess. Laws 388, 423; Delaware Criminal Code, ch. 497 §§ 766, 767, 58 Del. Laws 1611, 1665-66 (1972); Hawaii Penal Code, Act 9, §§ 733-735, 1972 Hawaii Sess. Laws 32, 90-01; Act of Feb. 25, 1976, Pub. Law No. 148, ch. 4 § 2, 1976 Ind. Acts 718, 733-734; Iowa Criminal Code, ch. 1245, §§ 901-906, 1976 Iowa Acts 549, 558-559; Maine Criminal Code, ch. 499, §§ 251-255, 1975 Me. Laws 1273, 1297-1300; Nebraska Criminal Code, L.B. 38 §§ 32-38, 1977 Neb. Laws 88, 100-102; Act of July 2, 1973, ch. 532:26, 1973 N.H. Laws 999, 1011; New Jersey Code of Criminal Justice, ch. 95, §§ 14:1 to 14:3, 1978; N.J. Laws 482, 547-550; Act of Apr. 3, 1975, ch. 109, 1975 Laws 265, 266-267; Act of Dec. 14, 1972, §§ 2907.01-.07, 1972 Ohio Laws 1966, 1906-1911; Oregon Criminal Code of 1971, §§ 104-120, 1971 Or. Laws 1873, 1907-1910; Crimes Code, No. 334, ch. 31, 1972 Pa. Laws 1983, 1528-31; Act of Feb. 26, 1976, ch. 158, §§ 22-2 to -4, 1976 S.D. Sess. Laws 227, 260-261; Washington Criminal Code, ch. 260, § 9A.88.100, 1975 Wash. Laws 817, 858; Act of Mar. 11, 1976, ch. 43, 1976 W. Va. Acts 241; Act of Feb. 24, 1977, ch. 70, 1977 Wyo. Sess. Laws 228, 228-310.

29. WIS. STAT. ANN. § 944.17 (West 1982 & Supp. 1984).

30. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). For a full discussion of this line of cases, see *infra* Part III.

31. See, e.g., *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (statute imposing criminal sanctions for consensual sodomy between adults violates the right to privacy).

the parameters of the right. Part VI next focuses on the level of judicial review to which the Court subjects state legislation impinging on a fundamental right. Included within this Part is a discussion of the state interest in preventing the spread of acquired immunodeficiency syndrome (AIDS) as a justification for sodomy statutes.

II. METHODS OF CONSTITUTIONAL ADJUDICATION

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A. *Introduction*

The Supreme Court's 1973 abortion decision, *Roe v. Wade*,³² has revitalized the debate among scholars over the proper role in constitutional adjudication of the Constitution's written text and the intentions of its Framers. Professor Grey was probably one of the first commentators to note this link, and he described recent interest in the interpretive constitutional model as in part a reaction to the Court's identification of a libertarian right to privacy in familial and sexual matters.³³ The interpretive model essentially limits the Court's ability to overrule the work of the political branches to those instances clearly at odds with a specific value judgment evidenced in constitutional text and documented by historical evidence of the Framers' intent.³⁴ The theory limits the scope of judicial review, but it does not necessarily challenge this power.³⁵

It is somewhat inaccurate and pedestrian to identify the development of a constitutional theory as a specific reaction to the Court's ruling in *Roe*. Indeed the interpretive model has always had a majestically straightforward appeal, and the Court itself tied the legitimacy

32. 410 U.S. 113 (1973).

33. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

34. J. ELY, *DEMOCRACY AND DISTRUST* 1-2 (1980). The interpretivist versus noninterpretivist debate carries over to the area of statutory interpretation. See Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489. Professor Lehman suggested that the historical method of statutory interpretation, which defers to the legislative intent behind a statute, is connected to the philosophy of legal positivism. *Id.* at 491. This theory strictly construes separation of powers issues because judges are understood to implement their own values when they move beyond legislative intent. Yet, Professor Lehman said judges prefer the historical method because it actually allows them to rule on the equities without appearing to do so. *Id.* at 497. See also Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 544 (1983) (arguing that a statute's breadth should be restricted to the type of cases anticipated by its framers unless it clearly allows the court to revise the common law).

35. R. BERGER, *CONGRESS V. THE SUPREME COURT* 335 (1969).

of its first assertion of the power of judicial review to interpretive reasoning.³⁶ Yet, as Dean Ely has acknowledged, "the controversial abortion decision of 1973 . . . was the clearest example of noninterpretivist 'reasoning' on the part of the Court in four decades: it forced all of us who work in the area to think about which camp we fall into"³⁷

Noninterpretivism is most closely associated with the notion of a living constitution, a document that can be understood only by looking beyond its text and history.³⁸ Some noninterpretivists argue that their call to color the Constitution's meaning with current values is completely consistent with the Framers' intent.³⁹ They suggest that the broad, open-ended language of some of the Constitution's clauses is best understood as evidence of the Framers' intent to leave the specifics to future generations.⁴⁰ Others who call for contemporary values to inform constitutional adjudication deny that the specific intent of the Framers matters at all.⁴¹ This allows them to ignore historical

36. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Court also used interpretive reasoning in one of its most infamous exercises of judicial review, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). The Court held that the federal courts did not have diversity jurisdiction under the Constitution because the Framers did not intend to include negro slaves as state citizens. *Id.* at 454. The Court said that its duty was "to interpret the instrument they have framed, with the best light we can attain of the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted." *Id.* at 405. The Court definitively claimed:

[n]o one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

Id. at 426.

37. J. ELY, *supra* note 34, at 2-3.

38. Grey, *supra* note 33, at 703-06.

39. Wright, *Professor Bickel, The Scholarly Tradition, and The Supreme Court*, 84 HARV. L. REV. 769, 785 (1981).

40. The fourteenth amendment is an obvious example of the Constitution's open-ended language:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

41. M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982); Brest, *The Misconceived Quest for the Original Understanding*, B.U.L. REV. 204 (1980); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482 (1985).

evidence that indicates the Framers attached crabbed and narrow meanings to some crucial clauses.⁴² Furthermore, unlike interpretivists, noninterpretivists are still free to exercise judicial review where the historical record is either ambiguous or contradictory. Noninterpretivism does not deny that the Court must obey the Constitution's specific textual commands, but it instead seeks an additional role for the Court as an active participant in defining the more open-ended clauses.⁴³

Critical theorists, predictably, have launched devastating attacks both at these camps and those who seek to occupy a middle ground. They view these theories as hopelessly hypocritical and inconsistent with a political liberalism that requires its judiciary to be constrained by principle and law.⁴⁴ Interestingly, interpretivists lay essentially this same criticism at noninterpretivists, i.e., that noninterpretivist judges are unconstrained. But critical theorists understand all judicial reasoning to be inherently value-laden, and historiographic methods to be incapable of defining the Framers' intent with sufficient clarity to rule out alternate readings. Professor Tushnet saw the only possible synthesis as a new Burkean conservatism that does not even require a constitutional theory.⁴⁵

It is nearly impossible to find a right to personal and sexual privacy unless one adopts a method of constitutional theorizing that grants the Court an active and important role in interpreting the text. A strict interpretive model by definition prohibits such a role for the Court, and historians have yet to unearth evidence that the Framers specifically intended individuals to be protected in their sexual pursuits. One must therefore turn to noninterpretivism and its intermediate variants for a theory that legitimizes finding a constitutional right to privacy. This assumes, of course, that the type of historical analysis found in *Griswold v. Connecticut*,⁴⁶ placing the right to privacy in

42. L. LEVY, EMERGENCE OF A FREE PRESS (1985); L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963); L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767 (1985).

43. Grey, *supra* note 33, at 706.

44. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

45. *Id.* at 785-86. For a definition and discussion of Burkean conservative theory, see Wilson, *infra* note 172 and accompanying text. For Professor Tushnet's own description, see Tushnet & Jaff, *infra* note 153, at 1327-31.

46. 381 U.S. 479 (1965) (Justice Douglas for the majority, with Justice Goldberg concurring).

the ninth and first amendments, is not really interpretivist at all.⁴⁷ Professor Perry has become one of the most influential spokesmen for the noninterpretivist position, but even he sought distance between his theoretical approach and the Court's handling of some of its privacy cases.⁴⁸ He wanted the reader to remember that even if the abortion decisions are "illegitimate on the merits, it does not follow that noninterpretive review . . . is illegitimate too."⁴⁹

It is surely apparent that these issues are as difficult as they are important. Not unexpectedly, there is a virtual cottage industry of scholars who have approached these questions and have either suggested some answers or have posited that none exist. This section of the Survey can only attempt to present and organize the views of the most influential scholars who have written about ways in which to interpret the Constitution. These commentators have engaged in an often rich, sometimes trite, and occasionally acrimonious debate. Some articles are primarily important exchanges between particular scholars, while others are best viewed as wide-ranging attempts to unify constitutional theory.⁵⁰

47. At least Professor Berger, an ardent interpretivist, has stridently rejected Justice Goldberg's historical proof. See Berger, *supra* note 42, at 1-14. Professor Berger labeled the amendment's reference to unenumerated rights a simple reminder that the people of the states retain the ultimate power to "add to or subtract from the rights enumerated in the Constitution by the process of amendment . . ." *Id.* at 14. Justice Goldberg used the fourteenth amendment to incorporate what he said was the ninth amendment's prohibition against infringement of fundamental rights. *Griswold*, 381 U.S. at 493. Justice Goldberg used a quote by James Madison to shed light upon the Framers' intent in enacting the ninth amendment. *Id.* at 489. Madison described the amendment as ensuring the protection of fundamental rights, serving essentially the same function as a bill of rights without the risk that unenumerated rights would be overlooked. *Id.* Justice Goldberg definitively concluded that "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people." *Id.* at 490. Justice Goldberg fails to win the interpretivist appellation because he cannot cite historical evidence that *specifically* indicates that the Framers intended contraceptive use to be private. The nonexistence of contraceptives at the time the Constitution was adopted merely highlights the fact that the *Griswold* Court moved beyond the original intent of the Framers. Any expansion beyond the Framers' particular conceptions of rights simply fails to constrain judicial discretion in the way interpretivists demand. For a complete discussion of the difference between concepts and conceptions, see *infra* notes 119-25 and accompanying text. Similarly, Justice Douglas's reliance in *Griswold* upon the penumbral and peripheral first amendment right of privacy definitionally fails to limit the Court's discretion. 381 U.S. at 482-86. His decision to base the right of privacy in the first amendment leaves the right without either *textual* or historical support.

48. M. PERRY, *supra* note 41, at 145.

49. *Id.* Professor Cox, who endorsed an active role for the Court in guaranteeing natural rights, was also critical of the Court's abortion decisions. See *infra* notes 116-18 and accompanying text.

50. Before turning directly to the issue of *how* to interpret the Constitution, it is necessary to identify a fundamental issue in constitutional adjudication that is *not* addressed in this Survey. It is important to note that the Court does not work with a clean slate. The correct

B. *Interpretivism*

The most complete and competent presentation of the interpretivist position can be found in Professor Berger's book, *Government by Judiciary*. Professor Berger presented a powerful argument that interpretive constitutional reasoning is the *only* method consistent with our representative democracy. After conducting a detailed historical analysis of the fourteenth amendment, Professor Berger concluded that these records are especially trustworthy⁵¹ and that there is no trace, for example, of the Framers' intent to encroach upon traditional state control of suffrage and segregation.⁵² He posited that the amendment is best understood as merely "constitutionalizing" the Civil Rights Act of 1866.⁵³ This Act did not protect the Negro's right to vote, thereby highlighting the narrow intent of the fourteenth amendment.⁵⁴ The Framers did not intend the amendment to enact a broad theory of social and political equality,⁵⁵ and Professor Berger described suggestions that its broad liberty and equality language was intended to allow for different application in the future as "a speculative fabric that collapses under the fact[s]" ⁵⁶ Professor Berger did conclude, however, that the original Framers contemplated and

mix of consistency with precedent and a newly reformulated constitutional theory in the Court's future work is an immensely important issue deserving of extensive exploration. Perhaps, as Professor Greenawalt has said, the lack of a clear-cut answer as to how to interpret the Constitution is precisely the reason that the Court needs to pay close attention to the way it uses precedent. Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1014 (1978).

In a comprehensive analysis of the Court as an institution, Professor Easterbrook suggested that inconsistency is inevitable given the constraints of voting and the case selection process. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). Professor Easterbrook used the abortion and sexual privacy cases to illustrate the way that results can be influenced by the order in which the issues reach the Court. *Id.* at 819, 820 n.43. Professor Easterbrook's criticism was that it makes no sense that constitutional rights are determined by the *order* that cases reach the Court. Yet, Professor Easterbrook said that inconsistency in the Court's reasoning is inevitable when forced to decide hard cases, and that criticizing the Court as an institution is pointless. *Id.* at 813. See also Abraham, *Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision*, 23 ARIZ. L. REV. 771 (1981). Professor Abraham said that there is a dualistic conception of adjudication. *Id.* The distinction between the "hard" and the "easy" cases is that there is no clear, on-point precedent for the former. *Id.* Yet, Professor Abraham found this distinction misleading and said that reasoning from the past to the present is a common link between *both* the hard and easy cases. *Id.* at 774. Cf. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979) (stating that precedent is only an effective limit on the Court's work if the Court is committed to it as a principle).

51. R. BERGER, *GOVERNMENT BY JUDICIARY* 6 (1977).

52. *Id.* at 18.

53. *Id.* at 23.

54. *Id.* at 55-60.

55. *Id.* at 29-31.

56. *Id.* at 115.

provided for judicial review of the legislative and executive branches.⁵⁷

Professor Berger's *defense* of interpretivism as a theory is more interesting for present purposes than is his well-researched historical analysis. For if he is wrong that the Court must defer to the Framers' specific value judgments, historical proof becomes superfluous. Professor Berger premised his defense of interpretivism on a rationale that is both conservative yet consistent with liberal political theory: "judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier."⁵⁸ This defense apparently views interpretivism as insuring that a basic core of constitutional defenses will be undiluted by the passage of time. It may be, as Professor Perry suggested, that interpretivism is best understood as a Burkean conservative theory.⁵⁹ Although it may prevent the Court from checking new forms of tyranny by the political branches that were not envisioned by the Framers, interpretivism guarantees that *some* checks are always in place by fixing the meaning of the Constitution.⁶⁰ This guaranteed minimum, however, would not permit judicial construction of a right to privacy solely to check a state legislature's novel form of tyranny.

The core of Professor Berger's defense of interpretivism, however, was what one can best describe as an argument for representative democracy. Professor Berger described this as a solemn command that the "intention of the sovereign people, whether expressed in convention or through the amendment process, demands . . . obedience."⁶¹ His argument is bolstered by Professor Choper's extensive analysis of the institution of judicial review and the political process.⁶² Professor Choper acknowledged that all three branches of our government contain undemocratic elements, but he concluded that the judiciary is significantly more undemocratic than the others.⁶³ He did not attempt, however, to articulate a principled approach to judicial enforcement of the Constitution's open-ended

57. R. BERGER, *supra* note 35, at 335.

58. R. BERGER, *supra* note 51, at 364.

59. Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551, 556 n.23 (1985).

60. Dean Ely, however, said that Justice Black, "the quintessential interpretivist, [stood] almost alone against the variety of novel threats to freedom of expression the legislators and executives of the 1940's and 1950's were able to devise . . ." J. ELY, *supra* note 34, at 2. Justice Black, however, wrote a vigorous dissent to the Court's contraception decision, *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

61. R. BERGER, *supra* note 51, at 369.

62. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

63. *Id.* at 5, 50.

provisions.⁶⁴ Even accepting this description of the judiciary as accurate, it does not directly explain *why* its undemocratic character requires it to apply the interpretivist's narrow construction of the Framers' original intent.

Professor Dworkin perceived a subtle split among those who call for a strict interpretation of the Constitution.⁶⁵ Although his own contribution to constitutional theory is discussed below in the noninterpretivist section, Professor Dworkin's critique of interpretivists is useful to help explain *their* position. He described one camp as motivated by a moral skepticism that "attacks activism at its roots" because activism "presupposes a certain objectivity of moral principle."⁶⁶ Because all claims of moral rights are only disguised representations of the speaker's personal preferences, it is best to let a politically accountable branch decide which value or moral right it prefers.⁶⁷ In constitutional adjudication, the Framers *were* the politically accountable actors. Importantly, this moral skepticism is not too deep-rooted, for it presupposes the Court's ability to understand the contemporary meanings of the Framers' value choices. A more critical skepticism labels even the interpretivist's enterprise subjective. The second interpretivist camp that Professor Dworkin distinguished does not deny the existence of moral rights. Instead it may passionately demand that there are such rights, but insist that the judiciary defer to politically accountable actors to decide which rights should be recognized.⁶⁸ When interpretivists as a group are compared with other constitutional theorists, however, Professor Dworkin's distinction turns out not to be very important. Both of these interpretive camps deny the existence of judicially discoverable moral principles apart from those most clearly present in the Constitution. In addition, neither camp would sanction judicial fabrication of a right to privacy.

Judge Bork's pre-*Roe* article on interpretive theory and principled constitutional adjudication supports this last conclusion.⁶⁹

64. *Id.* at 79. Professor Choper *does* detail the inherent restrictions on the exercise of national political power that may make such enforcement unnecessary. For a concise summary of his argument, see Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981) (comparing the political process-based theories of Professor Choper and Dean Ely).

65. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 138 (1977).

66. *Id.*

67. *Id.* at 140.

68. *Id.* See also Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (defining and criticizing judicial activism under the banner of a living constitution).

69. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). For Judge Bork's recent reaction to the constitutional theory debate, see Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 391-92 (1985) (reaffirming his past conclusions and

Although his timing placed him ahead of those who wrote in reaction to *Roe*, he was primarily concerned with exposing other examples of the Court's noninterpretive reasoning, especially *Griswold v. Connecticut*.⁷⁰ Judge Bork added an element to Professor Wechsler's theory of neutral principles.⁷¹ Judge Bork said that Professor Wechsler had correctly identified the neutral definition and application of constitutional principles as key concerns. Judge Bork noted, however, that this approach overlooked an equally crucial element in a neutral constitutional theory: the neutral *derivation* of constitutional principles.⁷² He argued that neutral derivation is impossible where the Constitution does not clearly embody a moral or ethical choice because the Court is unfit to distinguish between forms of society's gratifications.⁷³ A Court that makes rather than implements value choices cannot be squared with democratic theory. Judge Bork described *Griswold* as especially unprincipled because there was neither textual nor historical support for the Court's derivation of a right to privacy; nor was there a principled definition of the scope of the right.⁷⁴

Judge Bork demonstrated a basic skepticism that the judiciary merely implements its *own* value choice when it prohibits a political branch from doing an act not specifically proscribed by the Constitution. This skepticism requires that a politically accountable branch choose among competing moral values because none is more correct than another. Professor Dworkin challenged the assumption that the Constitution requires that all political and moral choices be made by politically responsible institutions.⁷⁵ He suggested that any defense of judicial deference to the political branches must be based on the theory that legislatures are fairer and sounder institutions to make these choices.⁷⁶ Professor Dworkin denied that fairness required that the majority decide the limits of its own power. His response to the second justification for judicial deference is clearly more likely to convince only noninterpretivists. The argument that legislatures are sounder institutions to make value choices essentially posits that the

describing recent literature to be as difficult to read as it must be to write) [hereinafter cited as *Styles*].

70. 381 U.S. 479 (1965). See Bork, *supra* note 69, at 7-11.

71. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

72. Bork, *supra* note 69, at 7.

73. *Id.* at 21. The majority is gratified when a court does not prevent it from choosing between competing values such as low-cost electric power versus clean air, or sexual satisfaction versus morality. *Id.*

74. *Id.* at 9.

75. R. DWORKIN, *supra* note 65, at 141.

76. *Id.*

organic political processes will secure genuine rights more permanently without the intrusion of the courts.⁷⁷ Professor Dworkin responded that, because rights *exist*, the suggestion that they can be demonstrated by process rather than principle “shows either a confusion or no real concern about what rights are.”⁷⁸

Judge Bork concluded that many of the Court’s decisions are inconsistent with interpretive theory because the Court has acted far beyond the original intent of the Framers. He said, for example, that “substantive due process, revived by the *Griswold* case, is and has been an improper doctrine.”⁷⁹ Interpretivism also “indicates that most of substantive equal protection is also improper.”⁸⁰ He denied, though, that an interpretive approach would invalidate the Court’s desegregation decision in *Brown v. Board of Education*.⁸¹ Somewhat unexpectedly for an interpretivist, however, Judge Bork did not attempt to discover the *specific* intent of the fourteenth amendment’s Framers. Instead, he relied on the broad notion that the amendment was “intended to enforce a core idea of black equality against governmental discrimination.”⁸² Professor Berger, however, said that *Brown* was invalid given that the “key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia”⁸³

Professor Grey also devoted much of his article to identifying the Court’s past work that is inconsistent with pure interpretive theory.⁸⁴ He said that the Court’s decisions requiring “fundamentally fair” procedures in criminal and civil proceedings cannot be reconciled with interpretive theory.⁸⁵ Neither can “the application of the provisions of the Bill of Rights to [the] states . . . be justified under an interpretive model”⁸⁶ Professor Grey also charged interpretivists with overlooking a rather stark implication of their theory, namely, that “the demise of substantive due process must constitutionally free the federal government to engage in explicit racial discrimination.”⁸⁷ Pro-

77. *Id.* at 146. Professor Dworkin is primarily critiquing Professor Bickel’s concern that the Court does serious harm to itself as an institution when it marches ahead of social value judgments made by the political branches. See *infra* notes 154-59 and accompanying text.

78. R. DWORKIN, *supra* note 65, at 147.

79. Bork, *supra* note 69, at 11.

80. *Id.* Eisenstadt v. Baird is an example of the way the Court has used equal protection reasoning in the area of the right to privacy. 405 U.S. 438 (1972).

81. 347 U.S. 483 (1954).

82. Bork, *supra* note 69, at 14.

83. R. BERGER, *supra* note 51, at 10.

84. Grey, *supra* note 33, at 710.

85. *Id.* at 711.

86. *Id.*

87. *Id.*

fessor Grey also said that "there is serious question how much of the law prohibiting state racial discrimination can survive honest application of the interpretive model."⁸⁸

Judge Bork easily accepted the conclusion that "broad areas of constitutional law ought to be reformulated."⁸⁹ Professor Berger, however, suggested that reworking and overruling past precedents would have "undesirable consequences."⁹⁰ He did not explain, however, *why* undesirable consequences would result if the Court were to repudiate past cases that relied upon noninterpretive reasoning. He considered his position defensible because "to accept thus far accomplished ends is not to condone the continued employment of unlawful means."⁹¹ Professor Berger may have been attempting to insure that the debate over interpretivism did not become intertwined with a debate over the legitimacy of particular past decisions. In staking out the broader ground, he took the same approach as Professor Perry, who sought to put distance between noninterpretivism and the abortion decision.⁹² Yet, interpretivism seems to place a greater value on the consistency of constitutional interpretation, and it is not entirely clear that it is legitimate from an *interpretivist* perspective to only require that the Court's future decisions are made in an interpretive manner.

The most obvious result of following Professor Berger's decision not to overrule past noninterpretive decisions is a hopelessly complicated, truncated, and confused body of precedent. The Court would be forced to ignore analogies to noninterpretive cases and would have to write opinions that simply did not square with clearly related issues. This situation would render future opinions illegitimate from Professor Wechsler's perspective of neutral application of past principles to new facts, even if new decisions were somehow more neutral in the derivation of their underlying principles. Professor Berger's decision not to overrule noninterpretivist precedent is more pragmatic and political than it is theoretical. Perhaps he hoped to lay an intellectual foundation that will one day make it no longer "utterly unrealistic and probably impossible to undo the past . . ."⁹³ Professor Berger may not, however, wish to limit previous noninterpretive decisions strictly to their specific facts in a strident and unyielding manner. He may allow the principles of previous decisions, including the

88. *Id.* at 712.

89. Bork, *supra* note 69, at 11.

90. R. BERGER, *supra* note 51, at 412.

91. *Id.* at 413.

92. See *supra* text accompanying note 49.

93. R. BERGER, *supra* note 51, at 412.

right to privacy decisions, to be cautiously applied to new factual variations.

The clearest motive for an interpretivist to apply his theory only prospectively is to allow both the Court and constitutional adjudication to maintain legitimacy.⁹⁴ Although constitutional adjudication might be more legitimate in a representative democracy if all value choices could be ascribed to the Framers, the Court's own prestige would be greatly diminished were it to overrule the great body of its past work. Any modern-day wholesale abandonment of the precedents as outlined by Professors Bork and Grey would fundamentally reshape the locus of decision-making power and leave America a very different place, a place very few Americans would know or understand.⁹⁵ History has demonstrated, of course, that the Court can survive such a dramatic turn of events.⁹⁶ Yet, the Court's first complete abandonment of substantive due process brought its work firmly within the matrix of then-contemporary social and political theory. It is simply incomprehensible to overrule a key noninterpretive decision such as *Brown*, however, because it has come to embody a first principle of American social and political theory.⁹⁷ Professor Berger's reticence to dispense with all of the Court's noninterpretivist decisions is an implicit acknowledgement of this type of problem. Such concern for contemporary effects is out of place with a constitutional theory that looks back only to a specific time and setting to find meaning.⁹⁸

C. *Noninterpretivism*

Noninterpretivism does not necessarily deny the Framers a role in contemporary constitutional adjudication. Firstly, it does not

94. For a persuasive argument that the Court's power depends on its appearance of legitimacy, see Cox, *infra* note 116, at 104-09.

95. This is implicit in Professor Perry's approach. See *infra* text accompanying notes 102-06.

96. *United States v. Carolene Prod.*, 304 U.S. 144 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

97. R. KLUGER, *SIMPLE JUSTICE* (1976) (definitively portraying the struggle, both in and out of the courtroom, to integrate American schools).

98. Professor Schauer staked out a small part of the interpretivist camp by arguing that certain provisions are so clear-cut that they allow only a single reading. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). Professor Schauer said that certain "unlitigated" portions of the Constitution remain important influences on adjudication. *Id.* at 404. These "easy cases," which are rarely viewed as interesting, are the structural provisions of the first four articles of the Constitution and key amendments that extended the franchise. *Id.* at 402. That the minimum age of office requirement for elected officials presents an easy case is apparent when compared to an alternate phrasing requiring: "an age representing sufficient maturity to perform the duties requisite to the office." *Id.* at 404-05. Yet, fourteenth amendment right to privacy issues never present easy cases.

require the Court to ignore the Constitution's specific textual commands. Secondly, some noninterpretivists argue that the Court is actually fulfilling the Framers' intentions when it applies contemporary values to the Constitution's open-ended phrases.⁹⁹ Even Professor Dworkin, who called for the Court to use moral rights as a source for constitutional interpretation, said the Framers understood that their Constitution would be so treated. Thirdly, Dean Ely gave meaning to the fourteenth amendment's broad due process and equal protection language by focusing upon the constitution's generally procedural nature. Although these approaches make some attempt to refer to the Constitution's text or to the broad intent of the Framers, it is best to categorize them as noninterpretivist because they still permit the Court to look beyond these two sources to solve constitutional riddles. Perhaps the only true *noninterpretivist* denies that the Framers' intent has *any* role whatsoever in contemporary constitutional interpretation, but this extreme position is not our working definition of noninterpretivism.

So understood, noninterpretivism, when compared with interpretivism, has at least one advantage and one disadvantage as a workable theory. The advantage is that the interpretivist's dependence upon the historical record seems to leave them in an inherently untenable position. Because historical materials are the *only* legitimate source of constitutional values in pure interpretivist theory, any deficiency in those materials leaves the interpretivist without answers. Although Professor Berger and others have said that the Framers' crystal-clear intentions are discoverable, other historians are less sure history has *any* simple and complete answers to the questions interpretivists pose.¹⁰⁰ The disadvantage that noninterpretivists as a group labor under is one of legitimacy. Noninterpretivists are open to the charge

99. See Wright, *supra* note 39, at 785.

100. See E. CORWIN, *THE "HIGHER LAW" ORIGIN OF AMERICAN CONSTITUTIONAL LAW* (1955); Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretive Grounds*, 80 MICH. L. REV. 462 (1982) (arguing that the open-ended nature of the fourteenth amendment's language presumptively allows for a flexible construction); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Grey, *Origins of the Unwritten Constitution*, 30 STAN. L. REV. 843, 891 (1978). Professor Grey investigated the historical evidence to support the proposition that the Framers intended the Constitution to be read as a document appealing to natural rights and higher law. He concluded that earlier appeals to natural rights in the Declaration of Independence "give a distorted view of the political and constitutional ideas of revolutionary Americans." *Id.* at 891. See also Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (criticizing the Court's use of history in key reapportionment and desegregation cases as well as in *Griswold*); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979) (characterizing Professor Berger's use of historical materials as misleading and internally inconsistent).

that by looking beyond the Framers' specific value judgments they merely inject their *own* personal predilections into constitutional interpretation. This charge carries much weight, regardless of whether the noninterpretivist's particular theory calls for contemporary values, moral rights or the Constitution's procedural nature to supplement the historical record.

Professor Perry is one of a select group of true *noninterpretivists*.¹⁰¹ He accepted the stark historical evidence gathered by Professor Berger and others and, indeed, enthusiastically buttressed and supplemented it.¹⁰² This active support seems to be something of a debater's trick, though, as he concluded that interpretivism is discredited because its implications are "so severe."¹⁰³ Although Professor Perry admitted that the ultimate source of constitutional interpretation is the judge's values, this acknowledgement does not mean that the Court's work is entirely inconsistent with a representative democracy. For example, Professor Perry said that Congress's ultimate power to govern the jurisdiction of the federal courts is a meaningful check on the Court's power.¹⁰⁴ Professor Perry has also argued that the Court has admirably advanced the cause of individual rights¹⁰⁵ and that, because noninterpretivism is generally salutary, it should not be discredited simply because it is fallible.¹⁰⁶ Professor Perry's

101. See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). Professor Brest described the dominant mode of the Court's constitutional decisionmaking as a moderate originalism. Originalism is another term for interpretivism. Professor Brest concluded that a nonoriginalist approach better served the demands of complex constitutional adjudication than did even a moderate originalism.

102. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981). Interestingly, Professor Perry released this article defending the interpretivist position before he published his book where it was included as a chapter. See *supra* note 41. In his article endorsing the interpretivist position, Professor Monaghan described Professor Perry's defense of interpretivism as "splendid." Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 n.54 (1981). Professor Monaghan said that the historical origins of the ninth and fourteenth amendments to the Constitution do not justify the Court's privacy decisions in the areas of sex and procreation. *Id.* at 366-67.

103. M. PERRY, *supra* note 41, at 66.

104. *Id.* at 126-27. There has been an intense debate over Congress's power to change the federal courts' jurisdiction, especially if Congress were to act in response to disagreement over particular Supreme Court decisions on individual rights. See generally Tushnet & Jaff, *infra* note 153 (Professors Tushnet and Jaff argued that Congress's power is plenary and not subject to judicial review because the political process is a sufficient check on Congress's discretion). See also Sager, *The Supreme Court, 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (arguing against enactment of jurisdiction-limiting restrictions as an attack on an independent judicial process); Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982) (rejecting Professor Sager's analysis).

105. Perry, *supra* note 59, at 578.

106. M. PERRY, *supra* note 41, at 116. Professor Perry recently stated that an originalist or

judge, then, would apparently have the discretion to actively formulate a constitutional right to privacy.

Professor Berger responded directly to Professor Perry's attempt to legitimize noninterpretivism.¹⁰⁷ Professor Berger said that although Professor Perry did not believe that the Court's justices were "Platonic Guardians,"¹⁰⁸ his theory forces them to assume this role and the Court's composition makes it particularly unsuited to this task.¹⁰⁹ Professor Alexander criticized another aspect of Professor Perry's justification for noninterpretivism, namely, Professor Perry's assertion that the Court's noninterpretive decisions have advanced individual rights. Professor Alexander noted that this is essentially an empirical argument, and like all such arguments, it is "subject to reassessment at any moment."¹¹⁰ Professor Saphire said that Professor Perry's judge actively creates the law "without even the pretense of purporting that the 'law' antedated her decision."¹¹¹ According to Professor Saphire, Professor Perry's central failure is that the Court's legitimacy depends much more upon the Constitution than Professor Perry admits. The Court's abdication of this dependence would seri-

interpretivist approach to constitutional theory is viable, but that he preferred a noninterpretivist approach. Perry, *supra* note 59, at 551. Professor Perry's recent article compared the text of the Constitution in constitutional interpretation to a religious text in a living religious tradition. *Id.* at 560. In a living religious tradition, "to interpret a sacred text is . . . to interpret the tradition itself, to mediate the past of the tradition with its present." *Id.* at 560-61. Professor Perry said that comparing constitutional interpretation to interpretation of a religious text is preferable to an analogy with literary interpretation. This is so because contemporary America does not turn to its literature to answer the central aspirations of its tradition in the way that the religious community would turn to its texts. *Id.* at 561-62. See Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). See also Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). For another critique of Professor Levinson, see Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982).

107. Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465 (1983).

108. Judge Learned Hand was the first to criticize an aggressive form of judicial review in this manner. L. HAND, *THE BILL OF RIGHTS* (1958).

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

Id. at 73.

109. Berger, *supra* note 107, at 479-81. Professor Berger noted that Supreme Court justices are likely to be political appointees or former corporate lawyers without serious academic credentials. *Id.*

110. Alexander, *Painting Without Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447 (1983).

111. Saphire, *Making Noninterpretivism Respectable: Michael Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782, 794 (1983) [hereinafter cited as *Theory*]. For Professor Saphire's equally critical analysis of interpretivist Judge Bork, see Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice*; Dronenburg v. Zech, 10 U. DAYTON L. REV. 767 (1985).

ously deplete the Court's political clout and ultimately undermine its ability to implement the sort of policies Professor Perry favors.¹¹²

Judge Skelly Wright, like Professor Perry, saw the Court's most important function as an expositor of basic values.¹¹³ Judge Wright, however, said the Framers *intended* the Constitution to be interpreted as a living document.¹¹⁴ Some might dismiss his theory as merely a mechanism to justify active judicial intervention to support liberal political causes. But Judge Wright would probably argue that his theory is also rooted in conservative constitutional theory, a theory that views a powerful judiciary as a crucial institutional deterrent to legislative and executive excesses.¹¹⁵ Professor Cox also subscribed to the notion of a "living constitution" that permits the Court to look beyond the Framers' specific directives. He said that the due process clause was sufficient textual support to justify the Court's forays into substantive due process.¹¹⁶ Additionally, Professor Cox said that the Court's activism "attests [to] the strength of our natural law inheritance in constitutional adjudication . . .," and he thought it "unwise as well as hopeless to resist it."¹¹⁷ Professor Cox was critical of *Roe*, however, because the Court failed to declare a principle of "sufficient abstractness to lift the ruling above the level of a political judgment"¹¹⁸

A constitutional theory that turns to moral rights or natural law to color the meaning of the Constitution potentially gives the judge as active a role as the "living constitution" theory. The truth of this proposition depends on whether one accepts the concept of independently identifiable moral rights that exist apart from the judge's own values. Professor Dworkin's book, *Taking Rights Seriously*, has been most influential in reestablishing and defending a theory of moral rights.¹¹⁹ He said that the Framers used broad, open-ended language as an invitation to future generations to apply the moral rights individuals possess against the majority.¹²⁰ The core of Professor Dwor-

112. *Theory*, *supra* note 111, at 795. See also Maltz, *Murder in the Cathedral—The Supreme Court as Moral Prophet*, 8 U. DAYTON L. REV. 623 (1983) (stating that Professor Perry's call for the Court to actively apply moral principles to the Constitution is deeply flawed).

113. Wright, *supra* note 39, at 780. Judge Wright was also critical of the scholarly tradition that attempted to limit the Court's reasoning by strict adherence to neutral principles.

114. *Id.* at 785.

115. *Id.* at 782 n.54.

116. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113 (1976).

117. *Id.*

118. *Id.*

119. R. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977).

120. *Id.* at 133.

kin's constitutional theory is that the Framers intended the Constitution to enact the *concepts* of liberty, equality and fairness, rather than any specific *conception* of these values.¹²¹ He rejected this latter approach "because it limits such rights to those recognized by a limited group of people at a fixed date of history."¹²² Professor Dworkin emphasized that the difference between these two approaches is not just in the *detail* of the instructions given, but in the *kind* of instructions the Framers gave to future generations.¹²³ Although somewhat critical of Professor Dworkin's "deep conventionalism," Professor Moore has recently written in defense of the proposition that there are "real morals" that give "right answers" to moral questions in constitutional interpretation.¹²⁴

Professor Sandalow seemed to rely upon the same concepts versus conception distinction when he suggested that the "important objects" of the Framers, not their specific intentions, should guide the Court.¹²⁵ Yet, unlike Professor Dworkin, Professor Sandalow did not turn to moral rights to define these important objects. Instead, Professor Sandalow said that the Constitution has not only been read *in light* of contemporary values, "it has been read *so that* the circumstances and values of the present generation might be given expression in constitutional law."¹²⁶ His approach is similar in temperament to other commentators who are much more cautious in their endorsement of a "living constitution," but who nonetheless reject a strict interpretivist approach. Professors Munzer and Nickel said that, in general, a theory of constitutional interpretation must be textually focused, but must still allow for gradual innovation where the amend-

121. *Id.* at 134.

122. *Id.*

123. *Id.* at 135. See also Dworkin, *The Forum Principle*, 56 N.Y.U. L. REV. 469 (1981). Professor Dworkin responded directly to Dean Ely's process-oriented theory of judicial review. Professor Dworkin said that judicial policing of a particular conception of democratic processes inevitably requires substantive political choices. *Id.* at 469, 500-02. He also explained why the interpretivist goal of discerning a single original intention is inherently unworkable. *Id.* at 482-95.

124. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985). See also Richards, *Human Rights as the Unwritten Constitution: The Promise of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979) (endorsing a "jurisprudence of rights" that takes seriously the concept of basic human rights).

125. Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981). Professor Sandalow recognized that an appeal to the Framers' important objectives gave the Court much flexibility. He said that "it must be recognized that the more general the statement of the Framers' intentions, the weaker is the claim that those intentions circumscribe present judgment." *Id.* at 1046. Yet, he argued, to acknowledge the element of choice is not to argue that contemporary judicial discretion is unlimited. *Id.* at 1054.

126. *Id.* at 1051.

ment process is not likely to produce needed change.¹²⁷ Professor Fiss struck a moderate chord when he said that noninterpretivism can be reasonably objective because disciplining rules of interpretation derived from a broad interpretive community can adequately constrain judicial discretion.¹²⁸ The legal community establishes "a set of rules that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence). . . ."¹²⁹ These moderate constitutional theories leave the door open for a cautious advancement of the right to privacy to new factual situations.

Professor Brest stridently criticized Professor Fiss's attempt to construct a constitutional theory premised on a body of disciplining rules made by an "interpretive community."¹³⁰ Professor Brest noted that the demographic composition of this community raised serious normative problems in a democratic polity.¹³¹ He said that these interpretive rules respond directly to the interpreter's background, and that the skewed socio-economic composition of this group refuted Professor Fiss's claim to a somewhat objective approach to constitutional theory.¹³²

Professor Dworkin's distinction between concepts and conceptions is closely related to an important philosophical school of historical inquiry, the hermeneutic tradition.¹³³ Professor Tushnet, himself no follower in the tradition, described and summarized hermeneutics perhaps as comprehensibly as is possible.¹³⁴ Historical knowledge is

127. Munzer & Nickel, *Does the Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1028, 1054-58 (1977). Professors Munzer and Nickel said that the abortion cases are examples of the way in which the Court incorporates community values and natural rights into constitutional decisions. *Id.* at 1050-52. Yet, they said that popular approval of the Court's work does not explain many constitutional decisions, including the right to privacy. *Id.* at 1032.

128. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744-45 (1982). Professor Fiss's article precipitated a belated exchange with Professor Fish. See Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984). Their debate is somewhat ironic as they both seek to bolster the theoretical basis for a moderate form of judicial review unconstrained by the tethers of interpretivism and free from the skepticism of critical legal theorists. Professor Fish argued that setting down disciplining rules is not really necessary to make constitutional interpretation legitimate or objective. *Id.* at 1345. Disciplining judicial subjectivity does not depend on rules, but rather the rationality and process underlying them. *Id.* Professor Fiss has recently responded to Professor Fish and has defended his disciplining rules. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) [hereinafter cited as *Conventionalism*].

129. Fiss, *supra* note 128, at 744-45.

130. Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982).

131. *Id.* at 770-71.

132. *Id.* at 770-72.

133. The importance of this branch of historical study to constitutional interpretation is demonstrated by its prominence at a recent symposium on constitutional interpretation. See *Interpretation Symposium*, 58 S. CAL. L. REV. 35-275 (1985).

134. Tushnet, *supra* note 44, at 798-804. See also McIntosh, *Legal Hermeneutics: A*

viewed as the understanding of the meanings that the actors gave their actions.¹³⁵ In constitutional theory, of course, the Framers are the actors of interest. "The historian must enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms."¹³⁶ The hermeneutic historian is chiefly concerned with discovering an actor's grand design, rather than his specific views. Importantly, the hermeneutic approach to historical interpretation seems as if it may answer the interpretivist's need for clarity in historical interpretation. Professor Tushnet concluded, however, that hermeneutics lacks the "determinacy about the framers' meanings necessary to serve its underlying goals."¹³⁷

A still narrower role for the Court is available both in theory and practice under Dean Ely's influential constitutional theory. In *Democracy and Distrust*, Dean Ely explicated a theory that he said bridged the distance between interpretivism and noninterpretivism.¹³⁸ Dean Ely said that his "participation-oriented, representation-reinforcing approach to judicial review" focused on the essentially procedural structure of the Constitution itself.¹³⁹ Dean Ely justified the link between his theory and the Framers' intent because "the only reliable evidence of what" the ratifiers "thought they were ratifying is the language of the provision they approved."¹⁴⁰ Dean Ely encouraged a quite active role for the Court in policing the political process and insuring that access is not foreclosed to minority interest groups. Yet, "rather than dictate substantive results it intervenes only when . . . the political market is systematically malfunctioning."¹⁴¹ Quite simply, Dean Ely strove both to give content and meaning to the fourteenth amendment in a way that allowed for its principled judicial enforcement, while remaining true to the Framers' objectives. He noted that if such a principled approach to the Constitution's open-ended provisions is impossible to formulate, "responsible commentators must consider seriously the possibility that courts simply should stay away from them."¹⁴²

Professor Laycock, however, has directly attacked Dean Ely's

Philosophical Critique, 35 OKLA. L. REV. 1 (1982) (positing that the Constitution is a symbol and a political philosophy, not a compression of specific answers).

135. Tushnet, *supra* note 44, at 798.

136. *Id.*

137. *Id.* at 799-800.

138. J. ELY, *supra* note 34, at 1-3.

139. *Id.* at 87.

140. *Id.* at 17.

141. *Id.* at 102-03.

142. *Id.* at 41.

claim to camaraderie with the interpretivist camp.¹⁴³ Arguing from an unyielding interpretivist position, Professor Laycock criticized Dean Ely for elevating *his* personal conception of democracy above the narrow commands of the Constitution.¹⁴⁴ Although not an interpretivist, Professor Tushnet offered essentially the same criticism that "participation is [not] *the* basic value embodied in the Constitution"¹⁴⁵ Professor Tribe also noted that deciding "what *kind* of participation the Constitution demands . . . requires a theory of values and rights [that is] plainly substantive"¹⁴⁶ In spite of this type of fundamental inconsistency in process-based constitutional theories, Professor Tribe said that their continuing intuitive appeal makes such logical flaws seemingly "beside the point."¹⁴⁷ Professor Tushnet made another telling criticism of process-based constitutional theories. The recurrent call to natural law rights in American constitutional law is proof that we do not "believe in Democracy [any more] than we do in Justice."¹⁴⁸ Professor Tushnet also said that the Court's removal of formal barriers to democratic participation fails to remedy equally crucial obstacles: functional obstacles, such as poverty, that affect a group's political lobbying abilities.¹⁴⁹

Professor Gerety has identified a crucial result of adopting Dean Ely's model of constitutional theory.¹⁵⁰ Professor Gerety said that there could be no right to privacy if the Court is unable to overrule the substantive results of a political process that is seemingly well-functioning.¹⁵¹ The Court would be left with no power to overrule state statutes it simply thought were too oppressive. Unfortunately, Professor Gerety does no more than make an urgent plea for a theory that can legitimize a constitutional right to privacy.¹⁵²

To a certain extent, process-based approaches, such as Dean Ely's, have shifted the focus of the interpretivist versus noninterpretivist debate. In some sense, these approaches may have even supplanted the debate, making process the debate's focus. Yet, theories that require the Court to guard the vitality and efficacy of the political

143. Laycock, Book Review, 59 TEX. L. REV. 343 (1981).

144. *Id.* at 358.

145. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1046 (1980) (emphasis added).

146. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1069 (1980).

147. *Id.* at 1080.

148. Tushnet, *supra* note 145, at 1047.

149. *Id.* at 1050-51, 1053-57.

150. Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143 (1981).

151. *Id.* at 143.

152. *Id.* at 165.

processes are not necessarily a cure-all answer to judicial review of *both* state legislatures and Congress. There may indeed be validity in the essentially empirical argument that diffuse interests and structural limitations sufficiently check exercises of Congress's power.¹⁵³ The consequence is that judicial review of Congress is unnecessary to enforce the Constitution's structural provisions and assumptions, such as federalism and separation of powers.

It is more difficult to prove the parallel argument that a sufficiently wide variety of conflicting interests inherently limit a *state* legislature's exercise of power. By deferring to state political processes, Dean Ely apparently assumed that such limits are effective. Although the empirical invalidity of this assumption mandates a role for federal power to guarantee state liberties beyond process, the Supreme Court need not necessarily act on its own. Perhaps the Court would still do best to defer to legislative, albeit *Congressional*, action under the enforcement provision of the fourteenth amendment.

In *The Supreme Court and the Idea of Progress*, Professor Bickel evidenced a skepticism similar to Dean Ely's about the Court's handling of cases that rejected the substantive outcome of the political process.¹⁵⁴ Professor Bickel was concerned about the intense hostility of some groups in reaction to the Court's school prayer and desegre-

153. Professors Tushnet and Jaff have described two competing models of judicial review that are substantially different from the interpretivist versus noninterpretivist dichotomy used in this Survey. Tushnet & Jaff, *Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311 (1984). They described a "general" theory that "asserts that the courts should enforce every limitation that the Constitution places on the exercise of national power—the first amendment, the fifth amendment, federalism and the separation of powers." *Id.* at 1311. They contrasted this model with the "political breakdown" theory of judicial review that "asserts that the courts should enforce only those limitations as to which there are reasons to think that the political process is an inadequate mechanism to control improvident exercises of national power." *Id.* at 1311-12. Dean Ely defined and outlined this latter approach as a representation-reinforcing model of judicial review. See J. ELY, *supra* note 34, at 17. Importantly, however, Professor Tushnet's political breakdown theory is premised on an empirical argument that describes exercises of *federal* power as by and large constrained by the multitude of varied interests that operate through the national political process. This is a separation of powers theory that rejects a role for the Supreme Court to police *Congress's* exercise of plenary powers such as the commerce power and jurisdiction over the federal courts. Dean Ely's model defers to *state* legislatures so long as political access is assured to all comers. For a discussion of Dean Ely's approach, see *supra* notes 138-42 and accompanying text. Yet, one can accept Professor Tushnet's argument that the political process is probably an adequate check against tyranny on the *national* level, without deferring to the political process to prevent liberty-threatening legislation in *state* legislatures. This distinction can leave a role open for the Court to enforce the fourteenth amendment against the states beyond merely policing access to the political process.

154. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970). See Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

gation cases.¹⁵⁵ Professor Bickel cautioned that it is not the business of the Court to become the instrument for attaining the substantive objectives of excluded groups.¹⁵⁶ The essence of Professor Bickel's theory is that there is an inherent contradiction between the Court's primary institutional role and the complex value judgments inevitably involved in formulating social policy. Because, he argued, the "coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function . . .," there is great reason to doubt the Court's ability to shape "durable principles" that answer specific questions of social policy.¹⁵⁷

Professor Bickel described the Court as an institution inevitably caught up in the complex political matrix of contemporary America. He said that the Court was most likely to err when it made broad pronouncements of constitutional principles that required the cooperation of hostile political branches. Professor Bickel seemed vitally concerned about the Court's loss of institutional prestige when it becomes embroiled in social issues. Although Professor Bickel wrote *Progress* before the Court's abortion decisions, he would no doubt be critical of the Court's work as these cases raise the same deep moral and social questions as the school prayer and desegregation cases.

Instead of actively invalidating the work of the political branches, Professor Bickel would have the Court exercise judicial review sparingly. He felt that judicial review should be a conservative device, even when it is an instrument of change.¹⁵⁸ A Burkean conservative theory is apparent in Professor Bickel's desire to insure that judicial review remains a powerful, if unused, weapon. If judicial review were perceived as illegitimate, this "would remove a bulwark, or at any rate a symbol, that might just preserve and protect the very regime itself at some awful moment of supreme peril."¹⁵⁹

D. Critical Responses

Critical theorist Professor Tushnet has rejected all of the above approaches to constitutional interpretation as unworkable and has suggested instead that "construction of a satisfactory constitutional theory will be either impossible or unnecessary."¹⁶⁰ Professor Tushnet

155. *Id.* at 91.

156. *Id.* at 85.

157. *Id.* at 96, 99.

158. *Id.* at 87. See also A. BICKEL, *THE MORALITY OF CONSENT* (1975).

159. *Id.* at 180-81. For a first-hand account of the "fire-storm" of public reaction when President Nixon said he would never obey a court order directing him to produce the Watergate tapes, see A. COX, *supra* note 116, at 3-9.

160. Tushnet, *supra* note 44, at 786. Professor Tushnet has also criticized Professor

posited that the only coherent way to approach the complicated issues raised in constitutional interpretation is through the "communitarian assumptions of conservative social thought."¹⁶¹ Although he did not attempt to fully develop the contours of these communitarian assumptions, he noted that they "[reject] the individualist premises that make constitutional theory necessary" and that they "[emphasize] our mutual dependence."¹⁶² Communitarian assumptions of civic republican virtue would make constitutional theory unnecessary because the Constitution's structural checks and balances would be self-enforcing without federal judicial intervention.¹⁶³

Professor Tushnet said that Lockean liberal political theory required that a judge's exercise of power be constrained so as to insure that the possibility of judicial tyranny was not merely substituted for that of legislative tyranny.¹⁶⁴ Professor Tushnet's description of this compromise was premised on the threat of the abuse of power, not on a social contract analysis that demanded that all exercises of power eventually be ascribed to the will of the governed. He said that interpretivism is essentially a vehicle to constrain a judge's exercise of

Schauer's argument that certain constitutional provisions are "easy." Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985). See Schauer, *supra* note 98, at 399-404. Professor Tushnet said that "textualism" is an insufficient theory because it ignores the fact that constitutional powers can conflict. *Id.* at 687. He also said that this unsophisticated form of interpretivism allows contemporary political conservatives to mistakenly view judicial review as consistent with democratic liberal theory. *Id.* at 690. See also Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972). Professor Linde criticized a legal realist tradition that he said measured the Court's "success" by its alignment with political realities and institutional constraints. *Id.* at 230-32.

161. *Id.* at 785.

162. *Id.*

163. Although Professor Tushnet deferred an extensive analysis and definition of communitarian assumptions, a later article might provide some guidance. See Tushnet & Jaff, *supra* note 153, at 1327-31. He described a crucial component of the Framers' world-view: "a collective self-understanding of the common enterprise of advancing the common good, in which the common good was seen as something greater than the aggregate of good for individuals." *Id.* at 1329. In summary, this was a world of "civic republican virtue." *Id.* A crucial consequence of this conception was that there was a definite efficacy to the Constitution's structural limitations designed to offset and counterbalance divisive factionalizing. In consequence, "liberty-threatening legislation would never be enacted." *Id.* at 1330. Yet, it is difficult to describe the import of this characterization for contemporary constitutional interpretation. Professor Tushnet noted that this world-view of civic virtue "was almost certainly false then, and it is clearly false now." *Id.* Contemporary Americans, therefore, "do not believe in the efficacy of structural devices to protect liberty, because the political process was supposed to implement those devices." *Id.* Perhaps paradoxically, however, Professor Tushnet continued to rely upon the structural limitations of the political process to check Congress's power to govern federal jurisdiction. *Id.* at 1311. The only sensible rationalization offered by Professor Tushnet is that there simply "is not an alternative, more satisfactory constitutionalism available." *Id.* at 1312.

164. Tushnet, *supra* note 44, at 784-85.

power, and that it fails at that task.¹⁶⁵ Professor Berger, however, defended interpretivism not merely because it constrains the Court's exercise of power, but because the *source* of the constraint derives from the Framers as representatives of the people.¹⁶⁶ Nonetheless, Professor Tushnet denied that interpretivism serves as any constraint whatsoever on judicial discretion because the interpretivist cannot "detach the meanings that the framers gave to the words they used from the entire complex of meanings that the framers gave to their political vocabulary as a whole and from the larger political, economic, and intellectual world in which they lived"¹⁶⁷

In addition to being unable to transfer historical meaning from the past to the present, Professor Tushnet said that interpretivism fails to fully protect the present generation from tyranny. He refuted the interpretivist argument that *it* is the best mechanism to protect society from tyranny. The interpretive argument essentially insures that a core of timeless barriers to legislative tyranny remains in place, though it admits that there is some risk that novel forms of tyranny may remain unchecked.¹⁶⁸ Professor Tushnet is sympathetic with the "external critique" of interpretivism—the "living constitution" response—that the risk of novel forms of legislative tyranny is in fact great and that interpretivism leaves these unchecked.¹⁶⁹ He noted by way of footnote that one "would be hard pressed to defend the claim that in contemporary society more tyranny is exercised by willful judges than by willful legislatures."¹⁷⁰

Professor Tushnet, however, did not fall into the noninterpretivist camp. He viewed noninterpretivism as a liberal political theory left hopelessly hypocritical unless actors are able to divorce their personal preferences from their judicial roles—something Professor Tushnet said is impossible.¹⁷¹ Professor Tushnet's reference to the communitarian assumptions of conservative social thought leaves an uncertain opening for a constitutional right to privacy. Burkean conservative thought is primarily concerned with developing a political institutional configuration that is best suited to prevent tyranny.¹⁷²

165. *Id.*

166. *See supra* note 61 and accompanying text.

167. Tushnet, *supra* note 44, at 797. For a recent response to the critical theorist challenge, see Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 *YALE L.J.* 821 (1985).

168. *Id.* at 787. *But see* J. ELY, *supra* note 34, at 2.

169. *Id.* at 787-88.

170. *Id.* at 788 n.19.

171. *Id.* at 785.

172. *See* Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative/Academic Judges*, 40 *U. MIAMI L. REV.* — (1986).

Consequently, using this definition of Burkean theory, there may be a role for the Court to develop a right to privacy in order to police novel legislative tyranny. Professor Tushnet, however, later defined elected "Burkean representatives" as wise and responsible actors motivated by the common good, not influential constituents' self-interest.¹⁷³ Judicial construction of a right to privacy would be suspect under Professor Tushnet's reasoning, however, because civic virtue no longer motivates governmental actors and there is reason to doubt that a judge's own civic virtue will temper his exercise of power. Given that contemporary America may lack *both* virtuous legislators and judges, however, the scope and appropriateness of judicial review may ultimately depend upon an empirical argument assessing both groups' propensity towards tyranny.

Feminist critic Professor Freedman has urged the Court to adopt an explicitly normative approach to constitutional law that strives to promote equality between the sexes.¹⁷⁴ She argued that key decision-makers, including Congress, the executive branch, the legal profession and the media, *are* aware that so-called neutral principles of constitutional law are inherently value-laden.¹⁷⁵ If people continue to desire an anti-normative jurisprudence, she continued, it is "because the courts have told them it is *possible* to have one."¹⁷⁶ Professor Freedman's constitutional theory undoubtedly gives the Court broad discretion to rework constitutional law so that it comports with contemporary learning and values.

Professor Polan has argued that the "whole structure of law" is patriarchal.¹⁷⁷ This is a result of the legal system's "hierarchical organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values."¹⁷⁸ She also said that by confining their efforts to litigation and lobbying, feminists risk losing the fight for broad-based reform "in the context of broader economic, social, and cultural change."¹⁷⁹ Professor Olsen labeled this type of criticism "very useful, although [she did] not entirely agree

173. Tushnet & Jaff, *supra* note 153, at 1330. For a fuller discussion of Professor Tushnet's Burkean representatives, see *supra* note 163.

174. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983).

175. *Id.* at 964.

176. *Id.* (emphasis added).

177. Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 84 (D. Kairys ed. 1982).

178. *Id.* at 87. See also MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y (1983).

179. *Id.* at 302.

with [it]."¹⁸⁰ While she did not find law to be fundamentally patriarchal, Professor Olsen broadly criticized the Court's work that failed to understand that "heterosexual behavior in our society is seldom fully voluntary" ¹⁸¹ Professor Olsen said that feminists "should stop trying to fit [their] goals into [constitutional] rights arguments . . .," but she nonetheless accepted the proposition that constitutional adjudication is inherently value-laden.¹⁸²

E. Conclusion

While a given method of constitutional analysis may not be determinative of the resolution of a particular case, its impact cannot be doubted. Yet, Professor Berger's strict interpretive model, and Dean Ely's representation-reinforcing model, *do* preclude an active role for the Supreme Court to guard a constitutional right of privacy. Most noninterpretive theories, however, fail to provide guidance as to the existence or scope of this right. In other words, the relationship between the particular theory and its *application* to the right of privacy simply becomes too attenuated to make predictions as to the scope of the right. Only a noninterpretivist approach could justify an expansive right to privacy. Even ardent noninterpretivists, however, such as Professors Perry and Cox, may be unwilling to define the scope of the right so as to include private consensual adult homosexual activity. This follows from their attempts to put distance between their own flexible theories of constitutional interpretation and the Supreme Court's abortion decision. Nonetheless, subtle differences among noninterpretive theories will have *some* sort of influence, even though that influence may be otherwise unidentifiable. This conclusion may not seem momentous, but it does serve as a reminder that theory impacts in an important, though unpredictable, way upon the resolution of particular controversies.

III. THE SUPREME COURT: EVOLUTION OF THE RIGHT TO PRIVACY

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This section sets forth, in chronological order, the Supreme Court cases which are relevant to a discussion of the right of privacy.

180. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 401 (1984).

181. *Id.* at 428.

182. *Id.* at 430.

The Court first recognized a constitutional right of privacy in *Griswold v. Connecticut*.¹⁸³ In doing so, the Court cited several earlier substantive due process cases to support the proposition that individual fundamental rights are not limited to only those rights specifically enumerated in the Bill of Rights.¹⁸⁴ Those cases are set out first, to provide a backdrop for the Court's recognition of the right of privacy.

A. *Pre-Griswold*

Despite uncertain grounds to do so, the Supreme Court has repeatedly relied on the fourteenth amendment to strike down social and economic legislation. One of the most infamous decisions of a now discredited era of judicial recalcitrance was *Lochner v. New York*.¹⁸⁵ In *Lochner*, the Court overturned the conviction of an employer under a New York law that forbade requiring or permitting an employee to work more than 10 hours per day or more than 60 hours per week in a biscuit, bread or cake bakery or confectionery.¹⁸⁶ The Court held that the due process clause of the fourteenth amendment protects the individual's right to contract. "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."¹⁸⁷

The state, however, may regulate this liberty through its police powers if necessary to protect the public's "safety, health, morals and general welfare."¹⁸⁸ The Court promulgated a "reasonableness" test in order to choose between the individual's rights and the state's power. Under that test, the Court must ask: "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts" ¹⁸⁹ The Court held the New York law to be unconstitutional because there was no connection between limiting the hours of bakery

183. 381 U.S. 479 (1965).

184. *Id.* at 482.

185. 198 U.S. 45 (1905). *See also* *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Adams v. Tanner*, 244 U.S. 590 (1917); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

186. 198 U.S. at 45, 46 n.1.

187. *Id.* at 53. *But see* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-93 (1937) (freedom of contract is not an absolute right).

188. *Id.*

189. *Id.* at 56. This "reasonableness" test should not be confused with the "mere rationality" standard which the Court now applies in cases that do not implicate a fundamental right. The *Lochner* Court applied a stricter scrutiny than "mere rationality." G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 568-70 (1975).

workers and safeguarding public health. The Court saw the law as purely an attempt to interfere with a private labor contract, an illegitimate end.¹⁹⁰

The Court has not only relied on the fourteenth amendment to invalidate economic laws, but has relied on the due process clause to invalidate social legislation as well. In *Meyer v. Nebraska*,¹⁹¹ a teacher was convicted of violating a statute that prohibited teaching foreign languages to children who had not yet passed the eighth grade.¹⁹² The Court held that the statute implicated two fourteenth amendment liberties, namely, the right of parents to direct their children's education and the right to contract with a teacher for that education.¹⁹³ A statute may not interfere with such fundamental rights unless it has a "reasonable relation to some purpose within the competency of the State to effect."¹⁹⁴ The state claimed that the purpose of the statute was to foster patriotism by preventing immigrant communities from instilling their children with foreign, rather than American, ideals. The legislature saw a direct link between learning a language and acquiring patriotic ideals.¹⁹⁵ The Court, however, rejected this purpose as insufficient to justify completely prohibiting children from learning a foreign language. A legislative desire to cultivate homogenous patriotic beliefs could not override individual beliefs and interests.¹⁹⁶ The Court also rejected the notion that the statute protected children's health by limiting their mental activities because the statute only prohibited the teaching of foreign languages.¹⁹⁷

190. *Id.* at 62, 64.

191. 262 U.S. 390 (1923).

192. *Id.* at 396-97. The defendant taught reading in German. *Id.*

193. *Id.* at 400. "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Id.*

194. *Id.* In later cases, the Court began applying a strict scrutiny test. For a full discussion of that test, see *infra* Section VI.

195. *Id.* at 401.

196. *Id.* at 402-03.

197. *Id.* at 403. See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating a state statute that required children to attend public schools because it unreasonably interfered with parents' right to direct the education of their children).

In *Prince v. Massachusetts*, the state convicted a woman under the child labor laws after she allowed her daughter to distribute religious literature on a public street in violation of state statutes. 321 U.S. 158, 159-60 (1944). The defendant appealed the conviction to the Supreme Court claiming that the statutes violated the child's freedom of religion and her own parental rights. *Id.* at 164. The Court affirmed the conviction stating that the state may restrict parents' control over their children in order to preserve the children's well-being. *Id.* at 166. The Court wrote that "[i]t is too late now to doubt that legislation appropriately designed to reach such evils [child employment] is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action." *Id.* at 168-69.

The Court eventually abandoned the practice of applying a due process analysis to strike down economic legislation. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."¹⁹⁸ Although the Court has allowed states to decide how best to regulate their commercial affairs,¹⁹⁹ the Justices have continued to review social legislation despite their claim that they will not substitute their economic or *social* judgments for those of the legislative branch.²⁰⁰

B. *Griswold and its Progeny*

The Court began to develop the concept of a right to privacy inherent in the Constitution in 1965. In *Griswold v. Connecticut*,²⁰¹ the Executive Director of the Planned Parenthood League of Connecticut and a physician were convicted of prescribing contraceptive devices for married women in violation of state law.²⁰² On appeal, the Supreme Court refused to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."²⁰³ The Court emphasized, however, that the contraceptive statute directly affected the intimate relationship between a married couple.²⁰⁴ Although the Constitution does not specifically mention a marital right, the Court held that the Bill of Rights contains penumbral rights which are necessary to give meaning to its specific guarantees.²⁰⁵ For example, the freedoms to read, study and teach are necessary to enjoy the freedoms of speech and press.²⁰⁶ Likewise, the freedom of association is a "peripheral

198. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The Court held that states are free to regulate commerce, "so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Id.* at 730-31.

199. For examples of cases where the Court refused to strike down economic legislation, see *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

200. *Ferguson*, 372 U.S. at 730. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In *Skinner*, the Court held a statute which provided for sterilization of "habitual criminals" unconstitutional on equal protection grounds. The Court applied a strict scrutiny test to the statute, stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

201. 381 U.S. 479 (1965).

202. CONN. GEN. STAT. §§ 53-32, 54-196 (1958).

203. *Griswold*, 381 U.S. at 482.

204. *Id.*

205. *Id.* at 484.

206. *Id.* at 482. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

First Amendment right."²⁰⁷

Justice Douglas, writing for the Court, held that the first, third, fourth, fifth and ninth amendments created a "zone of privacy" and that marital privacy, a right older than the Bill of Rights, fell within that zone.²⁰⁸ "[I]t is an association for as noble a purpose as any involved in our prior decisions."²⁰⁹ Justice Douglas focused on the fact that the statute was aimed at the use of contraceptives rather than at their manufacture or sale. As such, the law violated the constitutional right to privacy because it had the "maximum destructive impact" on the marital relationship by directly affecting married couples.²¹⁰

In concurrence, Justice Goldberg stressed the importance of the ninth amendment and its relevance to a *state* statute. He reviewed the history of the ninth amendment to show that its purpose was to emphasize that the first eight amendments did not exhaust the fundamental rights which the Constitution guaranteed to the people.²¹¹ The Court, he argued, would essentially render the ninth amendment useless if it held that the Constitution only protected specifically enumerated rights. In other words, the ninth amendment supports the argument that "fundamental" rights cannot be defined strictly by looking to the rights specifically mentioned in the Constitution.²¹² Justice Goldberg extended the ninth amendment analysis to the states through the fourteenth amendment²¹³ because the fourteenth amendment also protects fundamental rights.²¹⁴

Justice Goldberg suggested several ways in which courts could determine what rights are fundamental. For example, he suggested that courts rely on the "traditions and [collective] conscience of our people."²¹⁵ In addition, the principles of liberty and justice that underlie our political system as well as specific constitutional guaran-

207. *Griswold*, 381 U.S. at 483. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

208. *Griswold*, 381 U.S. at 484-86. This right of privacy is applicable to the states through the due process clause of the fourteenth amendment. *Id.* at 481.

209. *Id.* at 486.

210. *Id.* at 485.

211. *Id.* at 489-90. The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

212. *Griswold*, 381 U.S. at 493.

213. It is generally accepted that the Bill of Rights serves only to restrict the federal government. *Id.*

214. *Id.* at 487.

215. *Id.* at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (brackets in original).

tees will help define the boundaries of fundamental rights.²¹⁶

Applying these tests, Justice Goldberg held that the decision to use contraceptives falls within the protected realm of family life. He agreed with the majority that the right to marital privacy is as fundamental as any other constitutional right. "Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relationship."²¹⁷

Justice Harlan also concurred in the result, but rejected any attempt to define the fourteenth amendment's notion of liberty through either the "letter or penumbra of the Bill of Rights."²¹⁸ Instead, he reasoned that the due process clause protects "basic values 'implicit in the concept of ordered liberty.'"²¹⁹

The next important opinion addressing the right to privacy was *Stanley v. Georgia*.²²⁰ In *Stanley*, the appellant was convicted of possessing obscene films in his own home. The Court held that although the freedoms of speech and press do not ordinarily protect pornography, the first amendment, together with a general right to privacy, does prevent the state from arresting a person for mere possession of obscene materials in the privacy of his or her own home. "[The appellant] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."²²¹ Later cases emphasized that the decision in *Stanley* was based on the privacy of the home.²²² "This privacy right encompasses and protects the personal intimacies of the *home*, the family, marriage, motherhood, procreation, and child-rearing."²²³

216. *Griswold*, 381 U.S. at 493.

217. *Id.* at 495. Justice Goldberg specifically commented that the decision should not be read to forbid state regulation of "sexual promiscuity or misconduct." *Id.* at 498-99.

218. *Id.* at 499-500.

219. *Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justices Black and Stewart, in dissent, rejected any notion of a right to privacy implicit in the Constitution:

The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.

Griswold, 381 U.S. at 513.

220. 394 U.S. 557 (1969).

221. *Id.* at 565.

222. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (limiting the right to view pornography to the home); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (holding that Congress may prohibit the importation of pornography, even if only intended for private use).

223. *Paris Adult Theatre I*, 413 U.S. at 65 (emphasis added). See also *Loving v. Virginia*,

Three years later, in *Eisenstadt v. Baird*,²²⁴ the Court extended *Griswold* to also protect the right of unmarried persons to use contraceptives. The Massachusetts law under scrutiny in *Eisenstadt* provided that only married persons could obtain contraceptives for the purpose of preventing pregnancy. Single persons could only obtain contraceptives in order to prevent the spread of disease.²²⁵ The state convicted a lecturer under this law for dispensing vaginal foam to an unmarried woman following a speech at a university.²²⁶ The defendant appealed the conviction,²²⁷ claiming that the contraceptive laws violated the equal protection clause of the fourteenth amendment. In response, the state claimed that the statutes were constitutional because the state had a valid interest in deterring premarital sex. The Court held, however, that the statutes had only a marginal relation to the deterrence of premarital sex because single persons could still obtain contraceptives to prevent disease. Furthermore, the statutes allowed married persons access to contraceptives without regard to whether they intended to use them with a single person or with their spouse. The Court also found it unlikely that the legislature would advocate an unwanted pregnancy as punishment for violation of a misdemeanor fornication statute.²²⁸ "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."²²⁹

Justices White and Blackmun concurred in the result, but focused on the defendant's lack of status as a "distributor" of contra-

388 U.S. 1 (1967) (holding that the fourteenth amendment protects the freedom to marry someone of another race).

224. 405 U.S. 438 (1972). Although the Court decided *Eisenstadt* on equal protection grounds, it relied on *Eisenstadt* in later cases to define the scope of the right of privacy. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973).

225. *Id.* at 442.

226. *Id.* at 440. The record was not clear as to the woman's marital status, but apparently the majority assumed that the woman was single. *Id.* at n.1. See *infra* note 234 and accompanying text.

227. The Massachusetts Supreme Judicial Court affirmed the conviction. *Eisenstadt*, 405 U.S. at 440. The defendant subsequently filed a petition for a federal writ of habeas corpus, which the Court of Appeals for the First Circuit granted. *Id.* at 440.

228. *Id.* at 448-49. The state also argued that the legislature passed the statutes as a health measure. The Court, however, found the statute discriminatory and overbroad because unmarried persons have the same health needs as do married persons. In addition, not all contraceptives are potentially dangerous. *Id.* at 450-51.

229. *Id.* at 453. Justice Douglas concurred in the decision stating that the defendant's conviction was invalid on first amendment grounds because he was merely "dispensing" information in conjunction with a lecture. *Id.* at 459.

ceptives, rather than on the recipient's marital status.²³⁰ The statute under review provided that only doctors or pharmacists could dispense contraceptives for the purpose of preventing pregnancy and then, only to married persons.²³¹ Assuming the woman who received the foam was married, Justice White argued that the statute unreasonably impaired the exercise of her constitutional right to obtain contraceptives under *Griswold* because the state did not prove that the use of vaginal foam posed a health hazard.²³² According to Justices White and Blackmun, however, the Court did not need to reach the question of whether the state may restrict the distribution of contraceptives to *unmarried* persons because the record in *Eisenstadt* never definitively established the woman's marital status.²³³ Apparently, Justice White believed that the majority's assumption that the recipient was unmarried resulted in an unwarranted extension of *Griswold*. "Because this case can be disposed of on the basis of settled constitutional doctrine, I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried."²³⁴

The Court's attempt to define a constitutional right to privacy culminated with *Roe v. Wade*.²³⁵ A pregnant single woman, Jane Roe, brought a class action suit in federal court to challenge the constitutionality of Texas's criminal abortion statutes.²³⁶ Roe presented three constitutional theories to support a woman's right to choose to abort her pregnancy: (1) the personal liberty embodied in the due process clause of the fourteenth amendment; (2) the personal, marital,

230. *Id.* at 460, 462.

231. *Id.* at 461.

232. *Id.* at 464.

233. *Id.* at 464-65.

234. *Id.* at 465. Chief Justice Burger dissented from the majority opinion stating that the only issue was whether a state may require that only doctors and pharmacists could distribute contraceptives. Unlike Justice White, however, the Chief Justice found that it *was* within the state's power to require that medicinal contraceptives be dispensed by prescription only, rather than on the open market, just as it could for any other medicine. *Id.* at 468. Regardless of whether the woman was married or single, the defendant was *not* a licensed doctor or pharmacist. *Id.* at 465-72.

235. 410 U.S. 113 (1973). See also *Doe v. Bolton*, 410 U.S. 179 (1973) (decided as a companion case to *Roe*).

236. *Roe*, 410 U.S. at 120. The Court dismissed a physician's complaint in intervention because two state criminal actions were pending against him. *Id.* at 127. See *Younger v. Harris*, 401 U.S. 37 (1971).

In addition, a married couple, the Does, filed a companion complaint to Roe's claim. The wife was not pregnant, but alleged she would want to terminate her pregnancy *if* she became pregnant. *Roe*, 410 U.S. at 121. The Court dismissed the Does' complaint because their allegations were too speculative and therefore did not present a case or controversy. *Id.* at 128. See *Younger*, 401 U.S. at 41-42.

familial, and sexual privacy protected by the penumbras of the Bill of Rights; or (3) the rights reserved to the people by the ninth amendment.²³⁷ The majority agreed that although the Constitution does not explicitly grant a right to privacy, prior opinions had found zones of privacy under all three theories. "They [prior decisions] also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child-rearing and education."²³⁸ Relying on precedent,²³⁹ the history of abortion²⁴⁰ and the emotional and physical effects of an unwanted pregnancy,²⁴¹ the Court held that the right of privacy protects a woman's right to choose to terminate her pregnancy.²⁴²

Justice Stewart, concurring, emphasized that the right of privacy could only be properly understood as derived from the "liberty" concept of the fourteenth amendment's due process clause. This "liberty" should not be confined to those rights specifically enumerated in the Constitution. "It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"²⁴³ "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."²⁴⁴ Justice Stewart went on to state that a woman's decision to bear a child falls within the realm of protected liberty. He commented that the right to make decisions regarding child-bearing is surely more significant than the right to send one's children to a private school (*Pierce*) or the right to teach a foreign

237. *Roe*, 410 U.S. at 129.

238. *Id.* at 152-53 (citations omitted). The Court cited the following cases to support its proposition: *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the state may not criminalize the use of contraceptives by either married or unmarried persons); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down antimiscegenation statute under the equal protection and due process clauses of the fourteenth amendment); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (permitting the state to limit parental control if necessary for the children's well-being); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (invalidating statute ordering sterilization of certain "habitual criminals" on equal protection grounds); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (recognizing parents' right to choose to send children to private schools); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (upholding the right to teach and the right to learn).

239. *Roe*, 410 U.S. at 152.

240. *Id.* at 130-52.

241. *Id.* at 153.

242. The Court felt that the right of privacy was founded in the fourteenth amendment's concept of liberty. *Id.*

243. *Id.* at 169 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

244. *Roe*, 410 U.S. at 169 (quoting *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

language (*Meyer*).²⁴⁵

In 1976, the Court addressed some of the questions *Roe* left open in *Planned Parenthood v. Danforth*.²⁴⁶ In *Planned Parenthood*, the Court considered constitutional challenges to a Missouri act which required, inter alia, spousal consent if the patient was married and parental consent for unmarried, minor patients. The Court held that the state could not grant the husband a "veto power" over the wife's decision to abort during the first trimester of pregnancy when the state itself does not have that power.²⁴⁷ Although the Court recognized the husband's interest in the fetus²⁴⁸ and the importance of the marital relationship, it held that the mother's interest outweighed these factors because an unwanted pregnancy would most directly affect her.²⁴⁹

The majority similarly held the parental consent requirement unconstitutional.²⁵⁰ Although parents do have an interest in controlling their children's behavior and the state does have broader authority over children than adults, the state did not have an adequate justification to grant a parent an absolute veto over a daughter's decision to terminate her pregnancy. "Minors, as well as adults, are protected by the Constitution and possess constitutional rights."²⁵¹ Granting such a veto would do little to further family relations where the child and parent disagree on such a fundamental issue. The Court held the statute to be defective because it did not provide for alternative procedures when the minor patient was sufficiently mature to give effective consent for an abortion.²⁵²

Justice White, in a dissenting opinion joined by Chief Justice Burger and Justice Rehnquist, stated that the Constitution did not elevate the wife's right to seek an abortion above the husband's interest in raising a child. They would leave the states free to decide which interest to favor.²⁵³ In addition, Justice White agreed with the state that parental consent *would* further the state's asserted interest in

245. *Roe*, 410 U.S. at 170. Justice Douglas would find the right to privacy in the ninth amendment. *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). Justices White and Rehnquist dissented from the majority's holding. *Id.* at 221; *Roe*, 410 U.S. at 171.

246. 428 U.S. 52 (1976).

247. *Id.* at 69.

248. The act required the husband's consent regardless of whether he was actually the father of the fetus.

249. *Planned Parenthood*, 428 U.S. at 69-71. Justice Stewart emphasized, in concurrence, that a father enjoys a constitutional right to father children. *Id.* at 90 (Stewart, J., concurring).

250. *Id.* at 72-75.

251. *Id.* at 74.

252. *Id.* at 75, 90.

253. *Id.* at 93.

guiding minors when making important decisions, such as the decision whether or not to terminate a pregnancy.²⁵⁴

The Court addressed similar issues in *Carey v. Population Services International*.²⁵⁵ *Carey* involved constitutional challenges to a New York law that prohibited the distribution of contraceptives by anyone other than a licensed pharmacist and the distribution of contraceptives to minors under 16 years of age.²⁵⁶ The case generated considerable disagreement among the Justices who filed three concurring opinions and one dissenting opinion.²⁵⁷ Justice Brennan, writing for the majority, first surveyed the cases establishing a right of privacy. He concluded that although the Court has not established the limits of the right of privacy, the fundamental decision whether or not to bear a child is clearly within that right.²⁵⁸

Justice Brennan, joined by a majority, went on to hold that section of the statute which prohibited the distribution of contraceptives by anyone other than a licensed pharmacist as unconstitutional because it served no compelling state interest and imposed an unreasonable burden on the individual's right to make her own child-bearing decisions.²⁵⁹

The Justices' disagreement centered on the section of the statute that prohibited the distribution of contraceptives to minors. Relying on *Planned Parenthood*, a plurality held the section unconstitutional because it prevented minors from exercising their fundamental right to make their own decisions regarding procreation. The Court held that the state's interest in deterring premarital sex among minors did not override this right because it was unreasonable to punish an offender by forcing her to accept an unwanted pregnancy.²⁶⁰

Justices White and Powell expressed concern that the Court's holding would "subject all state regulation affecting adult sexual relations to the strictest standard of judicial review."²⁶¹ Justice Powell

254. *Id.* at 95. See also *id.* at 103 (Stevens, J., dissenting) (stating that a legislative requirement of parental consent is not irrational).

255. 431 U.S. 678 (1977).

256. *Id.* at 681. The statute also prohibited all advertisement or display of contraceptives. The Court held this provision unconstitutional under the first amendment. *Id.* at 700-02.

257. For a diagram of the Court's holding, see Note, Hardwick v. Bowers: *An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. MIAMI L. REV. 973, 990 n.103 (1985).

258. *Carey*, 431 U.S. at 684-85.

259. *Id.* at 690-91. The Court has provided that a state may only regulate the exercise of a fundamental right if there is a compelling state interest and if the statute is narrowly drawn to meet only that interest. *Id.* at 686. For a full discussion of this test, see *infra* Section VI.

260. *Carey*, 431 U.S. at 694-95. See *Eisenstadt*, 405 U.S. at 448.

261. *Carey*, 431 U.S. at 703; *id.* at 702.

elaborated on this concern stating that the “compelling interest” standard should not be applied to all matters involving sexual freedom, but only when state regulation severely burdens the constitutional right to make decisions regarding procreation. A rational relation test would be sufficient to review statutes regulating the behavior of minors because the state has an important interest in protecting the well-being of children.²⁶² Applying this test, Justice Powell found the absolute prohibition on the distribution of contraceptives to minors unconstitutional because the statute did not provide exceptions for married minors or for parental distribution.²⁶³

Replying to Justice Powell’s concerns, Justice Brennan noted that the strict standard of review *was* limited to cases where the state burdened the individual’s right to make decisions regarding conception or terminating pregnancy.²⁶⁴ The plurality went on to stress that “the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [sexual relations] among adults.”²⁶⁵

C. Conclusion

The decisions in *Griswold* and *Roe* established only one thing for certain—the existence of a constitutional right to privacy. The source of that right, whether it be the penumbras emanating from the Bill of Rights, the ninth amendment, or the fourteenth amendment, is still unclear. More importantly, however, the Court has not definitively defined the boundaries of the protected zone of privacy. The privacy line of cases can be read to either restrict the right of privacy to familial decisions or to expand the right of privacy to protect individual autonomy. It is not clear which interpretation the Court will ultimately embrace.

262. *Id.* at 705-07.

263. *Id.* at 707-08. *See also id.* at 713 (Stevens, J., concurring).

264. *Id.* at 688 n.5.

265. *Id.* at 694 n.17 (*Carey* was not dispositive of that question because the statute in question *did* burden the individual’s right to make decisions regarding contraception). *Cf. id.* at 718 n.2 (Rehnquist, J., dissenting) (“While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been ‘definitively’ established.” (citations omitted)).

IV. PRIVACY: A SEARCH FOR A LINCH-PIN

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The Court's test of balancing fundamental rights *vis-a-vis* compelling state interests presumes an operational definition of the concept of privacy. Yet, the Court has not sufficiently delimited the concept of privacy to allow a reasonable prediction of what activities will be constitutionally protected.²⁶⁶ The Court needs to define what makes a right "fundamental" and therefore entitles the right to heightened constitutional scrutiny.

Consistent with a noninterpretivist posture, *Herbert v. Louisiana*,²⁶⁷ defines a right as fundamental if the right cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²⁶⁸ The Court gleans the meaning of a fundamental right from the traditions and shared values of the society.²⁶⁹ In that vein, a right is fundamental when it is "implicit in the concept of ordered liberty."²⁷⁰ Ordered liberty, from an interpretivist perspective, reflects only the express

266. Doss & Doss, *On Morals, Privacy and the Constitution*, 25 U. MIAMI L. REV. 395 (1971); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926-37 (1973); McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259 (1965).

267. 272 U.S. 312 (1926). The cases cited in notes 267-70 and 290-91 are from the *Lochner* era. During that era, the Court interpreted the fourteenth amendment's due process clause expansively. The Court defined "liberty" interests to include not only "freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, . . . to marry, establish a home and bring up children . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The *Lochner* era Court strictly interpreted the "means-ends relation test" for due process. The Court struck down statutes that substantially impaired the "natural law" of private contractual autonomy and property, unless there was a close relation between the means and the end. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-3, at 437 (1978).

The post-*Lochner* Court distanced itself from the pitfalls of looking to "natural laws" for the definition of "liberties" and the implied bounds of state police power. The Court has consistently cited decisions from this era as support for propositions different from the narrow issues with which the cases dealt. See Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 2-3. Thus, notwithstanding the fact that the "liberty of contract" notion has since been discredited, the *Lochner* era cases cited in this section have retained precedential value for other notions in the Court's more recent decisions. The cases are thus useful in tracking the Court's search for a new way of defining and protecting certain types of "liberties" from undue governmental intrusion. L. TRIBE, *supra* note 267, § 11-1, at 564.

268. *Id.* at 316.

269. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

270. *Palko v. Connecticut*, 302 U.S. 319 (1937).

provisions of the Constitution, particularly the Bill of Rights.²⁷¹ The totality of the federal "constitutional scheme" supplements the specific textual provisions.²⁷² Alternatively, ordered liberty in a noninterpretivist model refers at a minimum to the traditionally sacred social unit—the family with its incidents—which is considered to be indispensable in defining the individual's relation to society.²⁷³

The difficulty of identifying what is fundamental carries over to the definition of privacy. Justice Rehnquist, in *Paul v. Davis*,²⁷⁴ classified the privacy cases as either dealing with unwarranted searches or defying any meaningful categorization. The former consist of the Brandeisian, informational torts line of cases.²⁷⁵ The concept of personal privacy derived from these cases is rooted in the express provisions of the first, fourth, and fifth amendments.²⁷⁶ The nontextual right of privacy, on the other hand, originates independently from the fourteenth amendment's protection of life, liberty, and property. Justice Rehnquist in *Davis* indicated that the fourteenth amendment was not to be read substantively and independently of the Bill of Rights, and that only the latter is a limit on state legislatures. Yet the Court later said that the fourteenth amendment protects "the formation and preservation of certain kinds of highly personal relationships."²⁷⁷ These relationships have "played a critical role in the culture and traditions"²⁷⁸ of our society, and are important in "cultivating and transmitting [the society's] shared ideals and beliefs."²⁷⁹ Examples of critical units in the process of enculturation, which deserve "constitutional protection, are those that attend the creation and sustenance of a family-marriage . . . childbirth, . . . raising and education of children . . . and cohabitation with one's relatives. . . ."²⁸⁰ The nature of the activity and the status of the social unit, therefore, define the right of privacy.

In contrast to the familial interpretation, an application of Mill's²⁸¹ philosophy to the Court's precedents would suggest an

271. *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting).

272. *Id.*

273. *Id.* at 553 (Harlan, J., dissenting).

274. 424 U.S. 693, 694 (1976).

275. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (arguing for the principle of "inviolable personality"). The concept of the right "to be let alone" was within the context of prohibiting newspapers from disclosing personal information. *Id.* at 195.

276. 424 U.S. at 712-13.

277. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984).

278. *Id.*

279. *Id.*

280. *Id.*

281. J. MILL, ON LIBERTY 9 (E. Rapaport ed. 1978) (originally published in 1859) (arguing

autonomy-based right of privacy. The Millian camp would restrict an individual's sphere of action only where other members of the society are at risk of harm.²⁸² The right is anchored in interests of personhood and intimacy.²⁸³ It is a right which recognizes that individuals "have a set of capacities that enables them, with a sense of separateness from other persons, to make independent decisions regarding . . . life choices."²⁸⁴ Thus, privacy involves harmless conduct which is intimately related to an individual²⁸⁵ as distinguished from concealment of information from others.

Philosophical distinctions as to the meaning of privacy, then, underlie the choice of which intimate, personal activities the Constitution will protect. The task is to discover which of the competing principles serves as the linch-pin for the Court's precedents. We shall, therefore, evaluate the cases and identify what support exists for the two competing principles.

This section first argues that the importance of the family as a social unit links the precedents. In that sense, family decisions subsume decisions on procreation, abortion, marital relations, child-rearing, and the right to educate children. This section next uses those same precedents to support the proposition that the right of privacy is autonomy-based. The section concludes by suggesting a way of reconciling the tensions between the two competing principles.

that the "only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others").

282. *Id.*; see also WOLFENDEN REPORT, REPORT OF COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1963) [hereinafter cited as WOLFENDEN REPORT] (stating that it is not the function of law to intrude on the personal choices of citizens, or to advocate any specific pattern of behavior); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 603 (1967) (every individual deserves freedom, "even the freedom to be immoral" so long as "others are not harmed").

283. Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976); see also Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977) (defining privacy as the "moral fact that a person belongs to himself and not to others nor to society as a whole").

284. Richards, *Taking Taking Rights Seriously Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265, 1329 (1977).

285. There are other philosophies of privacy. The moralists, for example, argue that criminal law should reinforce morals of the community. P. DEVLIN, *THE ENFORCEMENT OF MORALS* 25 (1st ed. 1959). The utilitarians, on the other hand, suggest that governmental restrictions should be based on the community's judgment of what "is conformable to the utility" of the community, and should "augment the total sum of the happiness of the individuals that compose the community." J. BENTHAM, *THEORY OF LEGISLATION* 2 (Hildreth ed. 1876). Devlin's theory is reducible to a sub-theorem of Bentham's utilitarian principle. The latter includes the former's psychic satisfaction from "doing good." Both theories assume that community standards will determine the permissible extent of the intrusion of the law on the individual. See Comment, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

A. *Privacy: A Familial Right*

The catalogue of activities which the Court has afforded constitutional protection seems to indicate a family-based right of privacy.²⁸⁶ The family as a social unit has always been an important part of our culture.²⁸⁷ A family-based right of privacy, therefore, reflects traditional institutions and social values.²⁸⁸ Although *Griswold v. Connecticut*²⁸⁹ first articulated a familial right in the context of the constitutional right of privacy, the Court had long noted a concern for family rights in *Meyer v. Nebraska*,²⁹⁰ *Pierce v. Society of Sisters*,²⁹¹ and *Prince v. Massachusetts*.²⁹²

In *Meyer*, the Court invalidated a state law prohibiting teaching foreign languages to children who had not finished the eighth grade. The Court held that the statute unduly intruded on the parents' right to educate their children.²⁹³ Similarly, in *Pierce*, the Court struck down a state statute requiring parents to send their children to public schools as an impermissible intrusion on parent's rights to educate

286. See *supra* note 280 and accompanying text; see also *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (stating that the right is related to "procreation . . . contraception . . . family relations . . . and child rearing and education") (citations omitted).

287. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765, 772 (1973); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1976) (the family is deeply rooted in the society's traditions and history); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental authority in the family is basic in our societal structure).

288. A value as used here is an enduring belief that certain modes of behavior or end-states of existence are socially or personally preferable to their converse modes of behavior or end-states. A value system then is a hierarchically structured set of beliefs in which values are arranged in order of importance. Thus, personal autonomy and family security are terminal values or end-states within society's value system. The choice of which value or values should be protected reflects the societal ordering of the preferred ends. The ordering may change with respect to changes in societal preferences. See generally M. ROKEACH, *THE NATURE OF HUMAN VALUES* (1973).

289. 381 U.S. 479 (1965). Although *Meyer*, *Pierce*, and *Prince* are not privacy cases, the Court relied on them to find the right to privacy in *Griswold*. Despite the fact that these cases are from the *Lochner* era and were not decided in the context of the right of privacy, they are a rich source of "constitutional doctrine concerning the nature of liberty, the respective rights of social institutions, and the limits of governmental power to homogenize the beliefs and attitudes of the populace." L. TRIBE, *supra* note 267, § 15-6, at 902-03. The Court's interpretations of these cases have divorced them from the historical context and the taints of the *Lochner* era. The interpretations have significantly expanded their precedential effect as support for the importance of the family in privacy cases. See Richards, *supra* note 267, at 1-3.

290. 262 U.S. 390 (1923).

291. 268 U.S. 510 (1925).

292. 321 U.S. 158 (1944).

293. 262 U.S. at 401; see also *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (citing *Meyer* as authority for the right of "parental direction of the . . . education of . . . children in their early and formative years").

their children.²⁹⁴ The Court rejected the state's attempt to "standardize its children,"²⁹⁵ and "looked to the family as a constitutional buffer between the individual and the state."²⁹⁶ The *Prince* Court interpreted *Meyer* and *Pierce* as defining a "private realm of family life" upon which the state could not intrude without a compelling state interest.²⁹⁷ The Court has continued to vindicate parents' right to control the early and formative years of their children. In *Ginsberg v. New York*,²⁹⁸ the Court reiterated the importance of parents' right to rear their children as "basic in the structure of our society."²⁹⁹ More recently, in *Wisconsin v. Yoder*,³⁰⁰ the Court noted that "the primary role of . . . parents in the upbringing of their children . . . [is] an enduring American tradition" and an important element of the "history and culture of Western Civilization."³⁰¹ The *Yoder* Court held that the state's interest in compulsory education of children beyond the eighth grade was subject to balancing against the traditional interests of Amish parents in the religious upbringing of their children.³⁰² The decision underscores the importance of the family. Where the "state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal."³⁰³

The constitutional protection for parental rights reflects "a strong tradition of parental concern for the nurture and upbringing of . . . children."³⁰⁴ The family is the primary reference group, and is important as the basic socializing agent of children.³⁰⁵ The existence and survival of society depends not only on marriage and procreation, but also on the race's ability to enculturate its young. The Court has,

294. 268 U.S. at 534.

295. 268 U.S. at 535.

296. L. TRIBE, *supra* note 267, § 14-13, at 883-84.

297. 321 U.S. 158, 166 (1944).

298. 390 U.S. 629 (1968).

299. *Id.* at 639.

300. 406 U.S. 205 (1972).

301. *Id.* at 232.

302. *Id.* at 214.

303. Burt, *Developing Constitutional Rights of, in, and for Children*, 39 LAW & CONTEMP. PROB. 118, 127 (1975).

304. 406 U.S. at 232; *see supra* note 286 and accompanying text.

305. *See* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 806-07 (1978); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights*, 1976 B.Y.U. L. REV. 605, 626-29. *See generally*, Comment, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1213-18, 1350-72 (1980).

therefore, deferred to the decisional rights of parents with respect to the rearing of their children.

The catalogue of activities afforded constitutional protection also includes procreative decisions.³⁰⁶ *Poe v. Ullman*³⁰⁷ provided the jurisprudential foundation for the procreative decisions. In *Poe*, the majority of the justices held that the controversy involving a state statute which prohibited the use of, and the provision of medical advice on, contraceptives was not justiciable.³⁰⁸ Justice Harlan, however, reached the merits of the case in his dissent. He stated that the state illegitimately encumbered the "very heart of marital privacy"³⁰⁹ with the "whole machinery of the criminal law."³¹⁰ The zone of privacy, he continued, is a "liberty," which is limited to the marital relationship.³¹¹ This "zone" included those marital activities traditionally acceptable to the state. The traditional sexual mores of the state precluded "adultery, homosexuality, fornication and incest [which were not] immune from criminal inquiry, however privately practiced."³¹² Justice Harlan, therefore, struck down the statute for impermissibly intruding upon the sanctity of the familial relationship.³¹³

In dissent, Justice Douglas inferred the meaning of the concept of ordered liberty from the Constitution. Specifically, he argued that the first eight provisions of the Constitution's text and the "totality of the constitutional scheme under which we live"³¹⁴ reflect the concept of ordered liberty. Justice Douglas concluded that marital privacy was entitled to constitutional protection.³¹⁵

In *Griswold v. Connecticut*,³¹⁶ the Court recognized the constitutional protection against "unwarranted government intrusion in familial and procreative affairs established by *Meyer*, *Pierce*, *Prince* and *Skinner*."³¹⁷ *Griswold* held that the marital relationship is within

306. See *supra* text accompanying note 280.

307. 367 U.S. 497 (1961).

308. *Id.* at 508-09. The Court held that the case was not justiciable because no one had been charged under the statute since its passage in 1879, with the exception of two doctors and a nurse charged with operating a birth control clinic. Compliance with the statute, therefore, was uncoerced because there was no risk of enforcement. The litigants also suffered no hardship if the Court denied them relief.

309. *Id.* at 553.

310. *Id.*

311. *Id.* at 552 (Harlan, J., dissenting).

312. *Id.* at 552-53 (Harlan, J., dissenting).

313. See *id.* at 553 (Harlan, J., dissenting).

314. *Id.* at 521 (Douglas, J., dissenting).

315. *Id.* (Douglas, J., dissenting).

316. 381 U.S. 479 (1965).

317. Heyman & Barzelay, *supra* note 287, at 771; see also *Lovisi v. Slayton*, 363 F. Supp. 620, 624 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976) (the

a "Zone of Privacy" which is protected against governmental intrusion.³¹⁸ The source of the right of privacy in *Griswold* has been extensively discussed.³¹⁹ Some commentators, however, have criticized the penumbral theory as a "fragile and convoluted reasoning of privacy rights swirling around in ectoplasmic emanations."³²⁰ Others have criticized the decision for being unclear as to whether the crucial factor was protection of particular personal decisions (i.e., autonomy) or protection of the sanctity of marital decisions.³²¹

Although Justice Douglas's inferences from the language of the Constitution may be weak,³²² the penumbral concept is a vivid metaphor for the shared social values which are "so rooted in the conscience of our people as to be ranked as fundamental."³²³ The Framers could not have anticipated all the contexts in which the government could intrude on values that should be protected from state regulation. Therefore, the existence of unenumerated rights flowing from the Constitution is necessary to protect the individual against the state's control. Even if one were unwilling to concede the existence of unenumerated rights, the state should be estopped from regulating marital intimacy and the use of contraceptives, because the marital relationship is state-sanctioned.³²⁴ As the Court has noted, marital intimacy is an integral part of the sanctioned relationship.³²⁵

Nevertheless, the *Griswold* decision brought to the fore the recommendations of the Wolfenden Report and the Model Penal Code

marital relationship is inviolable). The procreative line of cases is a subset of the familial line of cases because the latter embraces decisions on the former.

318. 381 U.S. at 485; *see also* *Roe v. Wade*, 410 U.S. 113, 152 (1973) (the fourteenth amendment protects rights that are fundamental or "implicit in the concept of ordered liberty") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Griswold*, 381 U.S. at 497 ("where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling") (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

319. *See, e.g., Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965).

320. G. HUGHES, *THE CONSCIENCE OF THE COURTS* 72 (1975). *See also* Kauper, *Penumbra, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 242-44 (1965) (as a whole, the opinion "is ambiguous and uncertain" in its use of the Bill of Rights to strike down the statute).

321. *See, e.g., Comment, A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decisions*, 64 CAL. L. REV. 1447, 1466 (1976).

322. *See Note, Due Process Privacy and the Path of Progress*, 1979 LAW F. 469, 476.

323. 381 U.S. at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

324. *See infra* note 336 and accompanying text.

325. *Poe v. Ullman*, 367 U.S. 497 (1961); *see also infra* notes 343-54 and accompanying text (narrowly construing *Eisenstadt* as granting the unmarried person a right of privacy to procreative decisions).

to decriminalize the private, consensual, sexual behavior of adults.³²⁶ *Griswold's* emphasis on marital privacy as the fundamental value protected, however, forestalled any Millian interpretation of privacy.³²⁷ Justice Douglas's majority opinion made it clear that the law was unconstitutional because of the direct intrusion on "an intimate relation of husband and wife."³²⁸ Justice Goldberg concurred that the Constitution protects the right of marital privacy,³²⁹ and that our tradition and shared values could not countenance governmental interference with marital intimacies.³³⁰

The limitation of the right of privacy to the family context is made even clearer in *Griswold's* concurring opinions. These opinions explicitly disavowed constitutional protection for sexual freedom between unmarried adults.³³¹ Indeed, the Court noted that

laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual [activities restrict] . . . sexuality to lawful marriage, [and establish a pattern so embedded in] . . . the substance of our social life that any constitutional doctrine in this area must build upon that basis.³³²

Griswold, therefore, upheld the fundamental right of marital privacy. Marriage is "intimate to the degree of being sacred,"³³³ and procreation is "fundamental to the very existence and survival of the race."³³⁴

Griswold also extended derivative privacy to those who, at the

326. See WOLFENDEN REPORT, *supra* note 282; see also *supra* note 285 and accompanying text (criminal law should reinforce society's morals); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963); Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963) (explaining the rationale of the Code and distinguishing between permissible social restraints and nonconformities which are constitutionally protected).

327. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS., 83, 84 (1980). "Millian interpretation" as used in this section refers to Mill's theory of individual autonomy. See *supra* notes 281-85 and accompanying text.

328. *Griswold*, 381 U.S. at 482.

329. Justice Goldberg also stated in his concurring opinion that the right of privacy precludes governmental interference in autonomous decisionmaking, absent a compelling state interest. *Id.* at 496-97.

330. See also *id.* at 485-86 (plurality opinion); *id.* at 500 (Harlan, J., concurring) (incorporating his dissenting opinion in *Poe*, 367 U.S. at 545-55).

331. *Id.* at 486 (Goldberg, J., concurring) (stating that the Court's decision "in no way interfere[d] with a state's proper regulation of sexual promiscuity or misconduct"); *id.* at 500 (Harlan, J., concurring and incorporating his dissent in *Poe*, 367 U.S. at 553); *id.* at 505 (White, J., concurring) (noting that the "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").

332. 367 U.S. at 546 (Harlan, J., dissenting).

333. 381 U.S. at 486.

334. 316 U.S. at 541.

behest of the married couple, shared in marital decisions. The derivative protection of the physician's role in decisions about birth control was effectuated by the exercise of the right of privacy.³³⁵ *Griswold* simply conceded limited sexual autonomy to married couples because of the social compact between the state and the married couple.³³⁶ *Griswold* may be read to imply that the right of privacy, although difficult to delineate,³³⁷ is family-based,³³⁸ and does not extend to nonmarital, sexual activities.³³⁹

335. 381 U.S. at 482 (characterizing the law as operating "directly on an intimate relation of husband and wife and their physician's role in one aspect of the relation"). See also Note, *Consent, Not Morality, As the Proper Limitation on Sexual Privacy*, 4 HASTINGS CONST. L. Q. 637, 643 (1977).

336. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 285-311 (1973).

337. See, e.g., Comment, *supra* note 321, at 1447-66 (categorizing the right of privacy as encompassing those activities involving repose, sanctuary and intimate decisions); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-1, at 887 (1978) (commenting that the right of privacy within the literature is unspecified); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 42 (1967) (the right is illusory); Thompson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 315 (1975) (describing the right of privacy as a nebulous cluster of rights whose boundaries are disputed).

338. See, e.g., 381 U.S. at 495 (Goldberg, J., concurring). The integrity of family "life is so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right." *Id.* (quoting *Poe v. Ullman*, 367 U.S. at 551-52); see also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the right to marry is fundamental); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (noting that "among the most private and sensitive decisions" are those that involve procreation). In a plurality opinion in *Moore v. City of E. Cleveland*, the Court stated that the right of "close relatives" to live together is related to the sharing of "mutual sustenance." 431 U.S. 494, 505 (1977). Justice Brennan, in concurrence, commented that the family gives social, economic and emotional support. *Id.* at 508. See also *Roe v. Wade*, 410 U.S. at 152-53 ("the right has some extension to activities relating to marriage, . . . procreation . . . family relationships, . . . child rearing and education") (citations omitted); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (stating that the "warm, enduring and important" familial relationship between children and their families is a basis for parental rights to custody and child rearing); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that the Constitution protects the realm of family life against all but compelling state interests). Because the right is family-based, the state cannot prosecute a married person for a consensual act of sodomy with his spouse. *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).

339. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (upholding sodomy statute).

Only a few courts have extended the right to privacy to nonmarital, sexual relations. See, e.g., *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979) (holding that private sexual activities are within the zone of privacy); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (striking down antifornication statute as violative of the right of privacy); see also Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case-Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979) (the right of privacy would extend to homosexuals if the Court consistently applies it); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 952-55 (1979) (reevaluation of societal attitudes would result in equal application of the laws to all people).

In addition to the right of privacy with respect to marital activities, the right to marry also reflects the importance of the family in the society. The right to marry, as a type of familial activity, is protected against undue intrusion by the state.³⁴⁰ The fundamental character of the right to marry has "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."³⁴¹ Thus, in *Loving v. Virginia*, the Court invalidated a state miscegenation statute that impinged upon the "fundamental freedom" to marry.³⁴² Although the Court did not discuss the right of privacy in *Loving*, the Court has used *Loving* as a privacy case.³⁴³

In *Eisenstadt v. Baird*,³⁴⁴ a case involving a statute that restricted distribution of contraceptives to married persons, the Court held that although the state could prohibit sexual activity among unmarried individuals, the state could not indirectly restrain procreative choices.³⁴⁵ The majority struck down only the means the state used to attain the goal of deterring nonmarital sex.³⁴⁶ *Roe v. Wade*³⁴⁷ later

340. *Loving v. Virginia*, 388 U.S. 1, 7-8 (1967).

341. *Id.* at 12 (Stewart joined by Douglas, J., concurring).

342. *Id.* The Court stated that the statute also violated the equal protection clause of the fourteenth amendment. *Id.*

343. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152 (1973). The Court noted that *Loving* "make[s] . . . clear that the right of privacy has some extension to activities relating to marriage . . ." *Id.* at 152 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). *Zablocki v. Redhail* recognized *Loving* as establishing the right to marry, and reiterated the constitutional protection of the right to marry. 434 U.S. 374, 383-84 (1978). In *Zablocki*, the Court struck down a statute that had the effect of prohibiting a parent who was delinquent in child custody payments from marrying as violative of the fourteenth amendment. *Id.* at 388-90. The *Zablocki* majority reconciled viewing the right to marry as fundamental with its holding in *California v. Jobst*, 434 U.S. 47 (1977). *Jobst* upheld the provisions of the Social Security Act that reduced benefits of certain classes of persons upon marrying. The Court noted that the only regulations which significantly interfered with "incidents of or prerequisites for marriage" were subjected to rigorous scrutiny. *Id.* at 386. The regulation in *Zablocki* directly and significantly intruded on the decision to marry by precluding those who could not meet their obligations of support from remarrying. *Id.* at 387. Conversely, in *Jobst*, the termination of benefits from the social security program was found to have an indirect and insignificant impact on the exercise of the right to marry. 434 U.S. at 387 n.12. The provisions of the regulation, therefore, triggered the traditional deference to the state legislature. *Id.* at 54. Although *Zablocki* was an equal protection case, the fundamental character of the right to marry would also trigger a due process analysis. The importance of family cohesion and marriage (or remarriage) also underlie the Court's decisions dealing with dissolution of marriage. For example, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that due process of law prohibited the state from charging fees which blocked indigents' access to divorce. Such fees, the Court held, unduly restrained the indigents' right to marry. *Id.* at 374-83.

344. 405 U.S. 438 (1972).

345. Many commentators have interpreted *Eisenstadt* as extending an individual's right of privacy to nonmarital sexual activity. *E.g., W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION* (1973); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 944 n.12 (1978).

346. 405 U.S. at 448-49.

upheld that interpretation. The majority in *Eisenstadt* based the decision on individual choice, but the individual choice at issue was procreational—not sexual.³⁴⁸ Thus, the holding in *Eisenstadt* may be narrowly construed to limit an unmarried individual's right of privacy to procreative decisions.³⁴⁹ Such decisions are familial in nature.

Justice Brennan's statement that a legislature has the discretion to fashion "means to prevent fornication,"³⁵⁰ further buttresses a family-based interpretation of *Eisenstadt*. *Eisenstadt* did not foreclose the possibility that a state statute prohibiting access to contraceptives for unmarried individuals enacted for the purpose of preventing nonmarital sex would pass constitutional muster. This prohibition arguably is constitutional where the statutory means bears a close relation to deterring nonmarital sexual intimacies.³⁵¹ If the legislature could prohibit fornication, the Court's distinction between married and unmarried individuals was redundant to the holding.³⁵²

Within the marital context of *Griswold*, *Eisenstadt* merely held that individuals may have equal access to contraceptives, and *not* that transient, consensual, sexual intimacy is protected by the right of privacy.³⁵³ Professor Gerety has suggested that married couples are implicitly permitted access to contraceptives for marital activities because those activities are state-sanctioned. He noted that the state tolerates access to contraceptives by unmarried persons because of "quasi-marital" intimacy concerns. This tolerance reflects a change in the ways the state views nonmarital sex.³⁵⁴ Nonetheless, the state

347. 410 U.S. 113, 152-53 (1973); see also *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 640 (1974) (undue restrictions on maternity leave burden the exercise of the right of procreation).

348. Grey, *supra* note 327, at 88.

349. See, e.g., Comment, *Aids—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 315, 322 (1984); see also Grey, *supra* note 327, at 88 (the choice was one of procreation); Katz, *Sexual Morality and the Constitution*, 46 ALB. L. REV. 311, 335 (1982) (the Court only upheld the right of procreational choice); Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553, 557 (1976) (the right was the freedom to choose whether or not to bear a child).

350. 405 U.S. at 449. The purpose of the statute at issue was not regulation of sexual promiscuity. *Id.* at 448. See also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 695-96 (1977) (stating that contraceptive and abortion laws were not meant to discourage illicit sex, and it would be absurd to assume that a state would prescribe pregnancy and the birth of an unwanted child as a sanction for fornication).

351. See W. BARNETT, *supra* note 345, at 66.

352. Wellington, *supra* note 336, at 296-98; see also P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 189-91 (2d ed. 1973) (Massachusetts affirmed defendant's conviction without determining whether he was married or not; therefore, his marital status was separable from the decision).

353. Heyman & Barzelay, *supra* note 287, at 772-74.

354. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 279 (1977).

need not bestow any greater protection for nonmarital sexual activity than the protection implied from the mandate of the majority.³⁵⁵

A couple's right to decide whether or not to have a child is within the zone of privacy protected by the Court's marriage, procreation and child-rearing cases.³⁵⁶ *Roe v. Wade*³⁵⁷ located that zone of privacy within the meaning of the due process clause's notion of "liberty."³⁵⁸ Although *Roe* held that the right to an abortion applied to both married and unmarried women, the majority in *Roe* explicitly rejected the Millian theory of an "unlimited right" "to do with one's body as one pleases."³⁵⁹ *Roe's* rejection of an individual autonomy-

355. Gerety, *supra* note 354, at 280 n.173; see Heyman & Barzelay, *supra* note 287, at 774.

The state may regulate disfavored life styles or personal intimacies that do not conform with majoritarian views where the state has a legitimate justification. See, e.g., *supra* note 321 and accompanying text; *Paris Adult Theater I*, 413 U.S. at 61 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). In *Chaplinsky*, the Court upheld an injunction prohibiting showing obscene films in two "adults only" theaters partly because of the state's interest in protecting "the social interest in . . . morality." *Id.* at 572. See Gelfand, *Authority and Autonomy: The State, the Individual and the Family*, 33 U. MIAMI L. REV. 125 (1978); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977); see also Richards, *supra* note 339, at 984-99 (implicitly admitting societal interest in morality but noting that a sound moral basis no longer exists for branding homosexuality as immoral).

The Court has prohibited use of interstate commerce under certain circumstances in order to protect morality. See, e.g., *United States v. Orito*, 413 U.S. 139 (1973); *Cleveland v. United States*, 329 U.S. 14 (1946); *United States v. Simpson*, 252 U.S. 465 (1920); *Caminetti v. United States*, 242 U.S. 470 (1917). The Court has also held that the states' police power extends to the "preservation of good order and the public morals." *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877). For a condemnation of polygamous marriages, see *Church of Latter Day Saints v. United States*, 136 U.S. 1, 48-49 (1890); *Reynolds v. United States* 98 U.S. 145 (1878). *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972) (stating that there "can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."). It is worth noting that Chief Justice Burger wrote both the *Paris Adult Theatre I* and *Yoder* decisions.

See generally Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Levi, *The Collective Morality of a Maturing Society*, 30 WASH. & LEE L. REV. 399, 400 (1973) (establishment of religion clause of the first amendment as an alternative ground to invalidate some laws regulating morality); Wellington, *supra*, note 336, at 225 (1973) (privacy as a construct is culturally determined, so that an offensive situation in one culture may be an indifferent situation in another).

356. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

357. 410 U.S. 113 (1973).

358. *Id.* at 167-68 (Stewart, J., concurring); see also *Whalen v. Roe*, 429 U.S. 589 (1977) ("In *Roe v. Wade*, however, after carefully reviewing . . . [the precedents], the Court expressed the opinion that the 'right of privacy' is founded in the Fourteenth Amendment's concept of personal liberty."). *Id.* at 598-99 n.23 (1977).

359. 410 U.S. at 154. Subsequent Court decisions support rejecting Justice Douglas's "choice-of-lifestyle" themes as issues of intimate associations and personal privacy. See, e.g., *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978), *denying cert* to 578 F.2d 1374 (3d Cir. 1978) (discharge of two employees for "living together in a state of 'open adultery'"); *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D.

based right of privacy, and the trend of recent decisions suggest that the right is not "an independent source of constitutional protection."³⁶⁰ The inclusion of spheres of activities outside marriage, procreation and child-rearing within the zone of privacy must accord with the liberty concept of the due process clause.³⁶¹

Roe, however, has been widely criticized.³⁶² Professor Ely found it disconcerting that a woman's right to have an abortion "is not inferable from the language of the Constitution, the Framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."³⁶³ One may argue, however, that *Roe* reflected the implied constitutional limitation of a state's exercise of police power with respect to the public welfare.³⁶⁴ Under this argument, the substantive rights of a woman to have an abortion represent an external bound to the state's undue exercise of police power and are inferable from the constitutional scheme. As Professor Perry has argued, the real issue decided in *Roe* was "whether conventional moral culture supported placing the criminal sanction behind a moral imperative against most abortions or whether . . . the legislation involved what is essentially a personal matter"³⁶⁵ beyond the scope of public morals. The Court's

Va. 1975) (upholding constitutionality of state sodomy statute); *Rose v. Locke*, 423 U.S. 48, 50 n.3 (1975) (noting that no fundamental right of privacy was involved in the application of sodomy statutes to unmarried individuals); *Wainwright v. Stone*, 414 U.S. 21 (1973) (upholding state sodomy statute against vagueness challenge). In other contexts, the Court has rejected an autonomy-based interpretation of the right of privacy. See, e.g., *Kelly v. Johnson*, 425 U.S. 238 (1976) (privacy rights do not protect policemen from hair length regulation).

360. 429 U.S. at 598-99 n.23.

361. See Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 521 (1983) (arguing that nonmarital sexual intimacies are not within the zone of privacy).

362. See, e.g., Ely, *supra* note 266, at 920; Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337.

363. Ely, *supra* note 266, at 935-36.

364. See Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) [hereinafter cited as *Abortion*]; see also Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 452 (1976) [hereinafter cited as *Due Process*]; Tribe, *The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18-25 (1973). Professor Tribe argued that *Roe* protected values implicit within the first amendment's establishment clause. He suggested that restrictive legislations on abortion do no more than entangle the legislature in a "whirlpool of religious disputation," which would violate the establishment clause. Tribe, *supra* at 22-23. That may be true, but then a fundamental moral conflict is not ipso facto beyond discussion of the legislature. The legal conflicts that generally reflect tensions between communitarianism and individualism are rooted in morality. Abortion conflicts are not necessarily different in law. See, e.g., G. HUGHES, *supra* note 320, at 70; *Abortion*, *supra* note 364, at 692 n.23.

365. *Abortion*, *supra* note 364, at 733.

implicit evaluation of majoritarian values was that abortion is essentially a personal matter in the first trimester of pregnancy, but that it may have ramifications for the public welfare and morality after that trimester.³⁶⁶ Although one may criticize the conceptual distinction between previability and viability of the fetus,³⁶⁷ majoritarian views nevertheless indicate that once the fetus is viable, abortion is closer to infanticide than it is to ending a pregnancy.³⁶⁸

In addition, "a pregnant woman and an unborn child each . . . [may have] her own kind of claim on the interest of life and liberty in the fourteenth amendment's due process clause."³⁶⁹ Whether a woman has the right to unilaterally terminate the life of an unborn child, or whether she may be compelled to continue the pregnancy where she is not at risk of harm, depends on one's beliefs about an unborn child.³⁷⁰ If a fetus is not considered to be equivalent to a person, it can have no fundamental rights worthy of constitutional protection.³⁷¹ *Roe* reflects existing cultural sensibilities.³⁷² A woman's right of privacy is not absolute,³⁷³ but must be balanced against "important state interests in regulation."³⁷⁴ *Roe* again emphasized the familial context of privacy. The right is related to "procreation . . . contraception . . . family relations . . . child rearing and education."³⁷⁵

In *Planned Parenthood v. Danforth*,³⁷⁶ the majority also explicitly recognized the "deep and proper concern and interest that a devoted husband has in his wife's pregnancy."³⁷⁷ The majority stressed the "importance of the marital relationship"³⁷⁸ and balanced the interests of the woman against those of the man.³⁷⁹ The recognition of the

366. *Id.*

367. Ely, *supra* note 266, at 924. According to Dean Ely, why viability is "the magic moment" is unclear. He believes that the Court is confusing a definition with a syllogism. See also Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 *HASTINGS L.J.* 867, 875 (1974).

368. See G. HUGHES, *supra* note 320, at 66-68.

369. Hafen, *supra* note 305, at 533 n.341.

370. *Id.*

371. *Id.*; see also Heyman & Barzelay, *supra* note 287, at 775-76 (society hardly associates life with the few cells present at conception).

372. *Abortion*, *supra* note 364, at 689.

373. 410 U.S. at 159; see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (cognizable interests of parents or husbands in abortion balanced against woman's interest).

374. 410 U.S. at 154.

375. 410 U.S. at 152-53 (citations omitted).

376. 428 U.S. 52 (1976) (striking down state abortion statute that encumbered the exercise of the right to abortion).

377. *Id.* at 69.

378. *Id.*

379. *Id.* at 71.

spousal and parental interests, implies an emphasis on the family context of the right to privacy. Justice White's opinion directly emphasized the family context, stating that the husband's interests in the fetus's life should not be unilaterally ended by the wife's decision.³⁸⁰ Although the Court struck down the statute because it impermissibly delegated an absolute veto over minors' procreative decisions to parents, the majority emphasized the lack of a nexus between the statute and the asserted state interest in protecting the family as a social unit.³⁸¹

Although *Danforth* and *Carey v. Population Services International*³⁸² extended the right of privacy with respect to procreative decisions to minors,³⁸³ *Carey* did not establish a right of privacy for sexual freedom.³⁸⁴ Justice Rehnquist, for example, trivialized the constitutional importance of sex outside of marriage.³⁸⁵ This view of nonmarital sex as trivial suggests that nonmarital sex should not be regulated, and also suggests that it is of little social utility. The Court should not, therefore, elevate nonmarital sex to a prominence entitling it to constitutional protection. The Court protects procreative autonomy as an incident of family and marital relationships. Transient, tolerated, sexual activity "does not produce the same kind of nearly irrevocable effects, nor spring from the same deep well of cultural values" as marital sexual intimacy.³⁸⁶ By implication, sexual practices which are not incidental to marital sexual expressions are not

380. *Id.* at 93 (White, J., concurring in part and dissenting in part).

381. *Id.* at 75.

382. 431 U.S. 678 (1977) (plurality opinion) (striking down state statute that prohibited the sale and distribution of contraceptives to minors under 16 years of age).

383. *Id.* at 693-96.

384. *Id.* at 702-03 (White, J., concurring); *id.* at 713 (Stevens, J., concurring); *id.* at 705 (Powell, J., concurring) ("Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard whenever it implicates sexual freedom."); *id.* at 718 n.2 (Rehnquist, J., dissenting) (the "facial validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established") (citing *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976)). *Cf. id.* at 694 n.17 (Justice Brennan writing for the Court stating that the Court had not definitively answered the question of the validity of state statutes proscribing adult consensual sexual behavior).

The ambiguity of the summary affirmance of *Doe v. Commonwealth's Attorney* accounts for the difference in opinion between Justices Rehnquist and Brennan. See Note, Hardwick v. Bowers: *An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. MIAMI L. REV. 973, 983-95 (1985); Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedence*, 52 B.U.L. REV. 373 (1972).

385. *Carey*, 431 U.S. at 717 (Rehnquist, J., dissenting) (questioning whether the heroes of Bunker Hill, Shiloh, Gettysburg, and Cold Harbor sacrificed themselves to guarantee teenagers access to contraceptives).

386. Heymann & Barzelav, *supra* note 287, at 774.

protected.³⁸⁷

The line of cases dealing with associational privacy further buttresses the right of privacy's familial base. Justice Powell, in a plurality opinion, in *Moore v. City of East Cleveland*,³⁸⁸ stated that the *Meyer-Griswold-Roe* line of cases had established a "private realm of family life which the state cannot enter."³⁸⁹ The plurality opinion in *Moore* functionally defined the family as the extended family, and protected a grandmother and her two sons from a local zoning ordinance.³⁹⁰ The basis of the protection was not only "history and tradition,"³⁹¹ but also the important function the extended family serves as a social agent for child-rearing, and economic and social support.³⁹² Because these functions are traditional incidents of the nuclear family, an extended family performing such functions is equivalent to the nuclear family. The extended family, like the nuclear family, is therefore constitutionally protected.³⁹³ The plurality's reasoning is consistent with the constitutional protection of unmarried persons in the procreative cases. The Court protects the unmarried individual's procreative decisions as incidents of "quasi-marital" sexual practices.³⁹⁴ The autonomy of the extended family as an incident of the functions of the nuclear family is similarly protected. Thus, the relationship of a grandmother to her grandson is functionally similar to that of a parent to his or her child.³⁹⁵

The emphasis in *Moore* was on the family as an important social unit. It can be argued, therefore, that non-linear and nonsexual

387. See *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (summarily affirming a finding of no right of privacy for homosexual practices); *Lovisi v. Slayton*, *rev'd sub nom. Lovisi v. Zahradnick*, 539 F.2d 349, 352 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1976) (protected right to privacy confined "to heterosexual conduct, probably even that only within the marital relationship"); *Berg v. Clayton*, 436 F. Supp. 76, 79 (D.D.C. 1977) ("right to privacy does not extend to homosexual conduct even where it occurs in private between consenting adults"); *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (teacher in high school discharged for being a homosexual).

388. 431 U.S. 494 (1977).

389. *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

390. *Id.* at 504-06. In *Smith v. Organization of Foster Families for Equality & Reform*, the Court explained that relationships of foster families may be functionally equivalent to those of the traditional nuclear family because foster families also promote intimate emotional relationships and perform functions of child-rearing. 431 U.S. 816 (1977). They may therefore be entitled to protection similar to that which the Court gives to the nuclear family. *Id.* at 842-47. The Court did not decide whether the foster family had a liberty interest.

391. *Id.* at 503.

392. *Id.* at 504-05.

393. *Id.* at 504.

394. See *supra* note 354 and accompanying text.

395. Jensen, *From Belle Terre to E. Cleveland: Zoning, the Family, and the Right of Privacy*, 13 FAM. L.Q. 1 (1979).

cohabitations do not fall within activities protected by the right of privacy. Applying *Moore* in this fashion, a court would be unlikely to find a right of privacy in associations of unrelated persons.³⁹⁶ Even Justice Douglas, who was the only judge to find a fundamental right of privacy in *Moreno*,³⁹⁷ noted in *Village of Belle Terre v. Boraas*³⁹⁸ that the Constitution did not extend to communal living.³⁹⁹ Unlike *Moore*, the relationship at issue in *Belle Terre* was devoid of child-rearing or potential child-rearing.⁴⁰⁰ The Court, therefore, upheld the ordinance with minimal scrutiny.⁴⁰¹ The familial context, then, aside from the marital relationship, is an important prerequisite for finding the existence of the right of privacy.⁴⁰²

B. Privacy: Personal Autonomy as a Principle

Contrary to the preceding familial interpretation of the right of privacy, an alternative analysis of the Supreme Court's decisions locates the right of privacy in the individual's autonomy from undue

396. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating a state statute because the means stated therein were not rationally related to its stated purpose of preventing fraud; only Justice Douglas found the legislation to infringe the fundamental right of association).

397. *Id.* at 541 (Douglas, J., concurring).

398. 416 U.S. 1 (1974).

399. *Id.* at 9.

400. See *supra* note 395 and accompanying text; see also Veitch, *The Essence of Marriage—A Comment on the Homosexual Challenge*, 5 *ANGLO-AM. L. REV.* 41 (1976) (homosexual relations are devoid of the potential for child-rearing).

401. 416 U.S. at 8.

402. The importance of the familial relationship also has been emphasized in several cases. See, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (upholding procedures of New York statute dissolving relations of foster family as satisfying due process; the Court distinguished foster families from the constitutionally protected traditional family, because they are temporary contractual arrangements under state law, and do not originate from the exercise of a fundamental human right). In *Kyees v. County Dep't. of Pub. Welfare*, the court held that the foster parent/foster child relationship, even over a substantial period of time, does not rise to the status of "family" so as to trigger due process. 600 F.2d 693, 698-99 (7th Cir. 1979) (per curiam). In *Drummond v. Fulton County Dep't of Family Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978), and *Sherrard v. Owens*, 484 F. Supp. 728 (W.D. Mich. 1980), aff'd, 644 F.2d 542 (6th Cir.) (per curiam), cert. denied, 454 U.S. 828 (1981), the courts reiterated the distinction between traditional and foster families. In *Rivera v. Marcus*, 696 F.2d 1016, 1025, aff'g 533 F. Supp. 203 (1982), the court distinguished *Kyees* and held that a half-sister has a liberty interest in the familial relationship with her foster children. See also *Caban v. Mohammed*, 441 U.S. 380 (1979) (5-4 decision) (invalidating state law permitting a child's stepfather to adopt the child without biological father's consent because the father had acted as a father to the child); *Parham v. Hughes*, 441 U.S. 347 (1979) (5-4 decision) (upholding Georgia statute granting cause of action in wrongful death to all unwed mothers and unwed fathers who had chosen to make their children legitimate); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (upholding application of state law requiring the consent of only the mother to adopt a child as applied to a father who did not significantly protect or care for the child).

governmental control.⁴⁰³ For example, the right of procreative autonomy, recognized in *Skinner*, *Carey*, *Danforth*, *Roe* and *Griswold* is the "right of the individual . . . to be free from unwarranted governmental intrusion."⁴⁰⁴ Under this theory, the right of privacy is simply a protection of human dignity and the freedom to choose lifestyles that serve value-expressive functions.⁴⁰⁵ In *Poe v. Ullman*,⁴⁰⁶ the majority did not address the substantive issue of the right of privacy. Justice Douglas's dissent, however, noted that the "liberty" of the individual within the "totality of the constitutional scheme"⁴⁰⁷ protected the individual from undue governmental influence. Although Justice Douglas concluded that the state statute was illegal because it made the use of contraceptives "a crime and . . . [applied] the criminal sanction to man and wife,"⁴⁰⁸ his analysis went beyond the state's violation of the "innermost sanction of the home,"⁴⁰⁹ to a rejection of the state's attempt to unduly control associational freedoms.⁴¹⁰ The state's "involvement in personal decisions concerning the use of contraceptive devices breached the most basic notion of what was implicit in the concept of ordered liberty . . . [and] was dangerously close to totalitarian government."⁴¹¹

Similarly, in *Griswold*,⁴¹² Justice Douglas's plurality opinion noted the zone of privacy afforded to certain uncatalogued relations. Although Justice Douglas's discussion of privacy was within the context of the marital relationship, subsequent Supreme Court decisions have indicated that the central issue in *Griswold* was one of freedom of intimate associations.⁴¹³ As Professor Richards has argued, the *Griswold* plurality "properly invoked the right of privacy to invalidate the Connecticut statute."⁴¹⁴ The invalidation, he noted, was proper because the statute "failed to satisfy the postulate of constitutional

403. Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech*, 10 U. DAYTON L. REV. 767, 778-88 (1985); see also Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right to be Let Alone*, 10 U. DAYTON L. REV. 705 (1985).

404. *Eisenstadt*, 405 U.S. 438, 453 (1972).

405. Wilkinson & White, *supra* note 355, at 612.

406. 367 U.S. 497 (1961).

407. *Id.* at 521 (Douglas, J., dissenting).

408. *Id.* at 520-21.

409. *Id.* at 521.

410. *Id.* at 522 (quoting Calhoun, *Democracy and Natural Law*, 5 NAT. L.F. 31, 36 (1960)); see also Ludd, *supra* note 403, at 720.

411. See Ludd, *supra* note 403, at 720.

412. 381 U.S. at 485.

413. See generally Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Richards, *supra* note 339.

414. Richards, *supra* note 339, at 981.

morality that legally enforceable moral ideas be grounded on . . . *respect for autonomy*.”⁴¹⁵ According to Professor Richards, the right of privacy should not be defined in terms of rigid, marital procreative sex.⁴¹⁶ Sexual intimacy and “mature love” are terminal values⁴¹⁷ through which individuals add meaning to their lives.⁴¹⁸ Therefore, as in *Griswold*, statutes which determine “how one will have sex and with what consequences are constitutionally invalid”⁴¹⁹ in the absence of a compelling state interest.

The right to use contraceptives in marriage is fundamental because it is integral to a relationship described by Justice Goldberg as a “coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”⁴²⁰ *Griswold*, therefore, links *Skinner*, *Eisenstadt*, *Roe* and *Carey* to establish the fundamental right of autonomy of intimate procreative decisions. As Justice Brennan noted in *Eisenstadt*, *Griswold*’s right of privacy is one of autonomy of procreative decisions, regardless of marital status.⁴²¹ The decision whether to beget a child is no less important in a nonmarital context than in a marital one.⁴²² The Court has rejected the proposition that a state would prescribe pregnancy and child birth as the wages of fornication. Such a rejection reflects the substantive choice of the “special nature of procreative decisions and the heightened judicial protection they deserve.”⁴²³

The majority in *Loving v. Virginia* repeated the theme of the marital relationship as a form of personal association in which individuals choose to express, and give meaning to, their lives.⁴²⁴ The majority characterized the freedom to marry as “one of the *vital personal rights* essential to the orderly pursuit of happiness by free men.”⁴²⁵ The right to marry is properly considered to be within the zone of privacy because the right guarantees individuals the right to form intimate associations wherein they may care for, and love another.⁴²⁶ Mar-

415. *Id.* (emphasis added).

416. *Id.*

417. See generally Rokeach, *supra* note 288, at 14. A terminal value is an enduring belief that an end is socially or personally preferable to its converse.

418. Richards, *supra* note 339, at 1003; see also Karst, *supra* note 413, at 653-54 (homosexuality is an expression of intimate associations and a personal statement of the individual).

419. Richards, *supra* note 339, at 1006.

420. 381 U.S. at 486.

421. 405 U.S. at 453.

422. *Id.* at 448.

423. Note, *The Constitution and the Family*, 93 HARV. L. REV. 1156, 1185 (1980).

424. 388 U.S. at 12.

425. *Id.*

426. Saphire, *supra* note 403, at 179.

riage, as described in *Zablocki v. Redhail*,⁴²⁷ involves the “values of self-identification and commitment,”⁴²⁸ and is a form of personal association.

The majority in *Stanley v. Georgia* reiterated the individual right of privacy as an external bound to the state’s undue exercise of police power.⁴²⁹ The Court noted that the state had a justifiable interest in the regulation of obscenity.⁴³⁰ But the state could prohibit obscenity only so long as the state interest outweighed the intrusion on the individual’s right to possess or use pornographic films at home.⁴³¹ *Stanley* emphasized the right of privacy and the first amendment, and implied that the Constitution protects individual freedom in a general sense. The *Stanley* Court rejected the state’s effort to regulate the “moral content of a person’s thoughts.”⁴³² Thus, *Stanley* articulates the individual’s “right to satisfy his intellectual and emotional needs in the privacy of his own home,”⁴³³ even where public manifestations of the activity would be prohibited.⁴³⁴

Similarly, the state could not control a visitor’s activity in the individual’s home,⁴³⁵ in the absence of a compelling state interest, even where the activity may be sodomitic and offensive to the sensibilities of the popular majority.⁴³⁶ The right of intimate associations, therefore, should extend to intimate sexual practices so long as they are consensual, private, and among adults.⁴³⁷ So characterized, these

427. 434 U.S. 374 (1978).

428. Karst, *supra* note 413, at 669-71.

429. 394 U.S. 557 (1969).

430. *Id.* at 564-66.

431. *Id.*

432. *Id.* at 565. Although morality may be a sufficient justification for public prohibition of obscenity, it is not sufficient to justify state intrusion into the privacy of the home. *See id.* at 565 n.8 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963)).

433. *Id.* at 565.

434. *E.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (use of obscene materials outside the home does not fall within the zone of privacy); *accord* *United States v. Orito*, 413 U.S. 139 (1973).

435. 413 U.S. at 142 (special constitutional “safeguards to the privacy of the home,” and “other special privacy rights”); *see also* Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1188 (1974).

436. *Doe v. Commonwealth’s Attorney*, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting), *aff’d mem.*, 425 U.S. 901 (1976) (stating that “socially condemned” but harmless activity is “beyond the scope of state regulation when conducted within the privacy of the home”); *Moreno v. United States Dep’t of Agric.*, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff’d*, 413 U.S. 528 (1973) (states cannot use the police power to infringe the rights to “privacy . . . in the home” in the “name of morality”).

437. *See* Note, *supra* note 335, at 656, 664. The *Stanley* Court focused on the first amendment, rejected the state’s attempt to control the “moral content of a person’s thoughts,” and implied that the Constitution protects individual freedom in a general sense. 394 U.S. at

practices would include sodomitic activities.⁴³⁸

The Karstian values of "caring and commitment, intimacy and self-identification"⁴³⁹ are interwoven within the autonomy-based interpretation of privacy. In *Eisenstadt* and *Roe* the Court seemed to favor an autonomy-based interpretation of the right of privacy over the marital interpretation.⁴⁴⁰ The *Eisenstadt* plurality opinion interpreted the right of privacy as "the right of the *individual*,"⁴⁴¹ independent of marriage, to be free from unwarranted governmental intrusion into matters as fundamental "as the decision whether to bear or beget a child."⁴⁴² Thus, the zone of privacy in *Griswold*, although carved from the familial context, protects intimate and fundamental personal decisions.⁴⁴³ The right of privacy protects "the *choice* to form and maintain an intimate association that permits full realization of the associational values we cherish,"⁴⁴⁴ and not the *form* per se. The plurality decision in *Eisenstadt*, coupled with *Loving's* fundamental right to marry, casts *Griswold* in a new light. *Eisenstadt* and *Loving* read together seriously question the justification of marital privacy based on the theory of a compact with the state.⁴⁴⁵ As Professor Karst has forcefully argued, Wellington's theory of marital compact with the state⁴⁴⁶

565. Yet, when *Paris Adult Theater I* is read together with *Stanley*, it is apparent that the former severely curtailed the Millian overtones of the latter. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973). Justice Burger's majority opinion in *Paris Adult Theater I* defines privacy interests as encompassing and protecting "motherhood, procreation and childrearing." *Id.* at 65 (1973); *accord* *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Paul v. Davis*, 424 U.S. 693, 713 (1976) (the right of privacy covers "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education"). The protection of the privacy of the home is not because of the "sanctity of property rights," or the privacy of consensual sexual practices. *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). This protection stems from the preeminence of the marital relation, the family as an important social unit, and the home as the seat of the family. *Id.* The *Paris Adult Theater I* majority refused to extend *Stanley* to protect purchasing and transporting obscene materials. *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973) (barring private importation of obscene materials); *United States v. Reidel*, 402 U.S. 351 (1971) (refusing to extend *Stanley* to include commercial distribution); *United States v. Orito*, 413 U.S. 139, 142 (1973) (refusing to extend the zone of privacy to include use of obscene materials outside the home).

438. See *Doe v. Commonwealth's Attorney: A Set-Back For the Right of Privacy*, 65 KY. L.J. 718, 757 (1977).

439. Karst, *supra* note 413, at 640.

440. Eichbaum, *Towards An Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 373 (1979).

441. *Eisenstadt*, 405 U.S. at 453.

442. *Id.*

443. Eichbaum, *supra* note 440, at 373; *accord* Comment, *supra* note 305, at 1467.

444. Karst, *supra* note 413, at 637.

445. See *supra* note 336 and accompanying text.

446. *Id.*

appears to promote a reasoning that would permit the state to regulate would-be spouses' sexual intimacy by simply refusing them the status of marriage. Where marriage is involved, however, the state does not have a contracting party's choice to accept or reject the compact. The most clearly established feature of the constitutional freedom of intimate association is the freedom to marry, which radically restricts the state's power to withhold the status of marriage from a willing couple. A compact that one party is compelled to enter is not much of a compact; it is, instead, a fictional middle step in a line of legal reasoning—a step that can be eliminated in the interest of economy. Justice Douglas was sometimes accused of using Occam's Razor to achieve not economy or reasoning but parsimony; in *Griswold*, however, he correctly saw that it was the freedom of intimate association, not the state's contractual obligation, that justified the Court's decision.

The logic of the freedom of intimate association—that is, the implications of the values that are the substantive components of this associational freedom—cannot be contained at the status boundaries of formal marriage or legitimacy of parentage.⁴⁴⁷

The right to choose whether to beget a child is a right of the *individual* in association with another. A formal "associational status plainly is neither a necessary nor a sufficient condition for the realization"⁴⁴⁸ of intimate associations. Therefore, the marital/nonmarital distinction for criminalizing access to contraceptives in *Eisenstadt* was unconstitutional. *Eisenstadt* reflected the national attitude toward nonmarital sexual behavior at the time it was decided.⁴⁴⁹ *Eisenstadt* and *Griswold* together free individuals in an association to "express themselves through sexual intimacy without the 'chilling effect' of the risk of unwanted"⁴⁵⁰ pregnancies.

Because of its emphasis on the sanctity of the marital relation, *Griswold* can be said to protect consensual sodomy between married couples. *Eisenstadt*, as previously mentioned, was an equal protection case based on the *Griswold* right of privacy.⁴⁵¹ It can be argued, then, that the two cases read together do not legitimize the state "in prosecuting private, consensual heterosexual sodomy between unmarried people" any more than the regulation of the use of contraceptives by

447. Karst, *supra* note 413, at 652 (footnotes omitted).

448. *Id.* at 647; see also Saphire, *supra* note 403, at 790 (how an individual chooses to express his/her association with another is a statement about the individual).

449. Morse, *Family Law in Transition: From Traditional Families to Individual Liberties*, in *CHANGING IMAGES OF THE FAMILY* 327 (V. Tuft & B. Myerhoff eds. 1979).

450. Karst, *supra* note 413, at 654.

451. See *supra* note 353 and accompanying text.

unmarried people.⁴⁵²

Eisenstadt, read in the context of Justice Harlan's dissent in *Poe* and incorporated in *Griswold*, however, severely cripples the right to privacy. Such a reading legitimizes Wellington's argument that the right of privacy depends on a pact with the state.⁴⁵³ But an individual need not be married to activate a right to self-expression. At a minimum, consistency and equal application dictate an autonomy-based right of privacy barring state intrusion into personal decisions regarding harmless, consensual, sexual intimacies.⁴⁵⁴ Selective application of a right results in failure to protect the constitutional rights of politically weak⁴⁵⁵ minorities.

When *Griswold* and *Eisenstadt* are considered in light of *Stanley*, the right of privacy seems to extend to protect private, adult, consensual sexual behavior against state intrusion. Thus, it can be argued that laws against heterosexual practices⁴⁵⁶ including sodomy,⁴⁵⁷ and homosexual intimacies,⁴⁵⁸ are unconstitutional in the absence of a compelling state interest.

Roe v. Wade underscored the importance of protecting the individual's choice to form an association. The form of association, however, was not determinative.⁴⁵⁹ The right of a woman to choose whether to end her pregnancy is unambiguous, regardless of the form of association she chooses to express her love and caring for another.⁴⁶⁰ A woman's decision to have an abortion is an intimate decision that involves her self-fulfillment,⁴⁶¹ identification,⁴⁶² and autonomy. Such a decision affects her sexuality and choices about her

452. Hines, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 365 (1977).

453. See *supra* note 336 and accompanying text.

454. See Gerety, *supra* note 354, at 280.

455. *Reynolds v. Sims*, 377 U.S. 533 (1964); see also Note, *supra* note 322, at 499.

456. See Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); Comment, *Sexual Freedom for Consenting Adults—Why Not?*, 2 PAC. L.J. 206 (1971); Comment, *California's "Consenting Adults" Law: The Sex Act in Perspective*, 13 SAN DIEGO L. REV. 439 (1976).

457. See generally Richards, *supra* note 210, at 1347-48; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 719-738 (1973).

458. Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84 (1973); Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687 (1973); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

459. Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553, 577 (1973).

460. 410 U.S. 113, 170 (Stewart, J., concurring).

461. See generally Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

462. Karst, *supra* note 413, at 665.

reproductive life. Therefore, the line between viability and previability as drawn in *Roe* demarcates a woman's right to contraception and choice of associations on the one hand, and her legal disability to commit infanticide on the other hand. The former guarantees the autonomy of her intimate decisions and self-expressions, which are decidedly harmless to others. The latter circumscribes her choices where her intimate decisions and self-expressions are demonstrably harmful to others. *Roe*, therefore, may be interpreted as curtailing state power to impose criminal penalties on activities repugnant to majoritarian morality where the activities are of no demonstrable harm to others.

State restrictions on abortion also affect reproductive autonomy,⁴⁶³ although abortion has not been used to effectuate procreative autonomy. Abortion is now an instrument in a woman's exercise of procreative autonomy. Criticisms of the difficulty in drawing the line between viability and previability do not tarnish a woman's choice to exercise her right to procreative autonomy.⁴⁶⁴ As Professor Tribe has noted, *Roe* is simply a question of role-allocation.⁴⁶⁵ *Roe* represents "less a decision in favor of abortion than a decision in favor of leaving the matter. . . to women."⁴⁶⁶ *Roe*, therefore, emphasizes the right to choose and not the form of association. *Roe* implies that "much that we associate with the value of human life is not present" at the early stages of pregnancy to justify "overriding the right of the woman to decide whether she will bear a child."⁴⁶⁷ The fetus may have moral claims to life in the early stages of pregnancy, but it certainly has no legally enforceable claims.⁴⁶⁸ The state, therefore, cannot intrude upon a woman's right to make personal decisions in the previable period of pregnancy. Even within a marital context, a spousal veto of a woman's personal decision on abortion in the first trimester would be constitutionally illegitimate. The veto would impermissibly encumber the exercise of her fundamental right to procreative autonomy.⁴⁶⁹

Roe also reaffirmed consensual sharing of the right of privacy. A woman's right to end her pregnancy confers an implied protection on

463. Heymann & Barzelay, *supra* note 287, at 775.

464. See generally Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807 (1973); Riga, *Byrn and Roe: The Threshold Question and Juridical Review*, 23 *CATH. LAW.* 309 (1978).

465. Tribe, *supra* note 364, at 44.

466. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-1, at 933 (1981).

467. Heymann & Barzelay, *supra* note 287, at 776.

468. *Id.* at 777.

469. Eichbaum, *supra* note 440, at 375.

those rights indispensable to effectuating that decision.⁴⁷⁰ The right was exercised in a hospital, abrogating the home-bound interpretation of the right to privacy. This activity, like many sexual practices, is not public. *Stanley*, *Eisenstadt*, and *Roe* have thus extended the right of privacy to include a generalized right of personal autonomy, regardless of marital status.⁴⁷¹

The extension of reproductive autonomy to sexually active minors in *Danforth*⁴⁷² directly contradicts the notion of a family-based right of privacy.⁴⁷³ *Danforth* preserved the decisionmaking role in abortions to the pregnant individual and not to her parents or spouse.⁴⁷⁴ Admittedly, the plurality opinion recognized the "importance of the marital relationship" and would balance the interests of the woman against those of the husband.⁴⁷⁵ Relying on *Roe v. Wade*,⁴⁷⁶ the *Danforth* Court held that the state "cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy."⁴⁷⁷ A woman's right to procreative decisions exists regardless of whether or not it is within a marital context.⁴⁷⁸ The existence of the right to procreative decisions precludes the state from adopting an affirmative stance as to how that right may be exercised.⁴⁷⁹

*Carey v. Population Services International*⁴⁸⁰ further confirms the existence of an autonomy-based right of privacy. The right was extended to minors with respect to decisions on abortions⁴⁸¹ and contraceptives.⁴⁸² Again, these decisions are protected, regardless of the

470. Heymann & Barzelay, *supra* note 287, at 375.

471. See Wolf, *Expanding the Right of Privacy*, 27 LOY. L. REV. 1279, 1286 (1981); see also Levy & Hectus, *Privacy Revisited: The Downfall of Griswold*, 12 U. RICH. L. REV. 627, 630 (1978).

472. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

473. Eichbaum, *supra* note 287, at 374; accord Richards, *The Individual, The Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 4 (1980).

474. 428 U.S. at 67-72.

475. *Id.* at 69.

476. 410 U.S. at 152-53; see also Note, *supra* note 435, at 1165, 1167. See generally L. TRIBE, *supra* note 267, at 933.

477. 428 U.S. at 69 (quoting the dissent in *Danforth*, 392 F. Supp. 1362, 1375 (1975)).

478. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (right to procreative autonomy extends to unmarried individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion extends to unmarried women).

479. Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1232 n.88 (1977).

480. 431 U.S. at 691-96 (plurality opinion).

481. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, *reh'g denied*, 448 U.S. 887 (1979) (right of privacy in having an abortion for mature, unmarried minors); *Danforth*, 428 U.S. at 74-75 (abortion by minors).

482. 431 U.S. at 694 (plurality opinion) (contraceptives); see also Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV.

form of association.⁴⁸³ The exercise of the right may not be unduly encumbered by approval procedures,⁴⁸⁴ restricted to specified hospitals,⁴⁸⁵ or constrained by means which may have a chilling effect on it.⁴⁸⁶

The autonomy-based interpretations of the right of privacy show the weakness of the plurality opinion in *Moore*,⁴⁸⁷ which failed to protect alternative living arrangements that did not conform to the "traditional model of the white middle class nuclear family."⁴⁸⁸ Among the poor, and among racial and ethnic minorities, living arrangements differ considerably⁴⁸⁹ from the *Moore* plurality's apparent concept of the family. If the right of privacy is a family-based concept, racial and ethnic minorities who have nontraditional living arrangements will be denied the right to choose forms of association in which to express the values of intimate association. Indeed, the import of the right of privacy is the *freedom to choose* in which form to express oneself⁴⁹⁰ in the absence of a compelling state interest.

C. Conclusion: A Reconciliation

Prior to *Griswold*, the law governing the family and sexual relations was mainly dicta, scattered in *Pierce*,⁴⁹¹ *Meyer*,⁴⁹² *Skinner*,⁴⁹³ and *Prince*.⁴⁹⁴ When one views the right of privacy as an autonomy-based concept, *Griswold* and its progeny embody the Millian princi-

1001 (1975); Note, *Sexual Privacy: Access of a Minor to Contraceptives, Abortion, and Sterilization Without Parental Consent*, 12 U. RICH. L. REV. 221 (1977). See generally Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Perry, *The Abortion Finding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L. J. 1191 (1978); Note, *The Minor's Right of Privacy: Limitations of State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216 (1977).

483. See *supra* note 459 and accompanying text.

484. *Doe v. Bolton*, 410 U.S. 179, 198 (1973).

485. *Id.* at 195.

486. *Colautti v. Franklin*, 439 U.S. 379 (1979); see also Comment, *Colautti v. Franklin: The Court Questions the Use of "Viability" in Abortion Statutes*, 6 W. ST. U.L. REV. 311 (1979).

487. See *supra* notes 388-91 and accompanying text.

488. Karst, *supra* note 413, at 686 (citing tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964) (part one); 16 STAN. L. REV. 900 (1964) (part two); 17 STAN. L. REV. 614, 682 (1965) (part three)).

489. See tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 17 STAN. L. REV. 614, 617-21 (1965); see also Karst, *supra* note 413, at 687 (different types of familial arrangements are a reality because of the deficiencies of the traditional family).

490. Karst, *supra* note 413, at 688.

491. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

492. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

493. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

494. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

ples of individual autonomy.⁴⁹⁵ On the other hand, the right of privacy in the familial context simply manifests the Court's continued use of "marriage and kinship as the criteria for determining the relational and sexual interests protected by the Constitution."⁴⁹⁶

The familial and autonomy-based interpretations of the right of privacy vividly reflect the tension between two conflicting societal values.⁴⁹⁷ The familial interpretation reflects communitarian values. The autonomy-based interpretation reflects individualistic values. The familial interpretation manifests the Court's concern with the need to reinforce traditional social institutions, and to allow gradual social reforms. New and untested social changes do not need to be elevated to the same status as tried and tested social values which are designed to serve legitimate social functions, such as child-rearing. The familial interpretation of the right of privacy reflects an approach to constitutional adjudication that is less flexible and sensitive to the facts of each particular case. Although the absence of a formally realizable rule as to what is constitutionally protected makes prediction of the outcome of cases difficult, the Court has consistently emphasized the stability of the family unit, and social cohesion in its decisions involving the right of privacy. For example, as Professor Grey has argued, the abortion cases simply deal with family planning.⁴⁹⁸ They protect the stability of the family from the threats of transient sexual intimacies, single parenthood, and abused and neglected children.⁴⁹⁹

Similarly, in cases dealing with child-rearing, the concern is for the proper enculturation of the children,⁵⁰⁰ a function that the family ably performs. As Justice Powell argued in *Bellotti v. Baird*,⁵⁰¹ the legal "restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."⁵⁰² In cases dealing with abortions by minors, however, "the minors are themselves potential parents."⁵⁰³ The deci-

495. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 84 (1980).

496. Hafen, *supra* note 361, at 533.

497. The tensions between the two competing values—family-based rights (protected rights) and autonomy-based rights (the right to personal freedom) are also evident in other areas of the law. See generally Olsen, *supra* note 180.

498. Grey, *supra* note 493, at 88.

499. The problems associated with the abuse of children have alarmed society. For a discussion of some of the problems of child abuse, see *Symposium on Child Sexual Abuse Prosecutions: The Current State of the Art*, 40 U. MIAMI L. REV. 1, 1-216 (1985).

500. Grey, *supra* note 495, at 88.

501. 443 U.S. 622 (1979).

502. *Id.* at 638-39 (plurality opinion).

503. *Id.* at 642.

sion to have an abortion is therefore different from other decisions that a minor will normally make.⁵⁰⁴ The right of the minor to make that decision conflicts with her parents' right to rear her.⁵⁰⁵ The Court's decisions in favor of the minor's right reiterates the fundamental nature of the decision whether or not to beget a child and form a family. Unless the minor makes the decision, she might be forced to have a child that she does not want. If she gives birth to the child, she assumes a parental relationship with the child.⁵⁰⁶ The cases dealing with the minor's abortion, therefore, are more supportive of the family than they are of individual autonomy.⁵⁰⁷

The Court's opinions are couched in terms of individualistic values which are the building blocks of the line of cases dealing with informational tort.⁵⁰⁸ Admittedly, an autonomy-based right is more formally realizable and more likely to protect against "prohibitions on nontraditional lifestyle choices which incur the obloquy of the majority than a family-based right."⁵⁰⁹ In addition, the Court's pronouncements in terms of individual autonomy conform with the Kantian⁵¹⁰ view of autonomy and equality underlying constitutional adjudications. Nevertheless, the Court has consistently emphasized tradition and family stability as the values underlying its decisions about procreation, abortion, and other associational rights. Yet, a disproportionately large number of commentators have found support in the cases for sexual freedom as a fundamental right.⁵¹¹

Recently, in *Roberts v. United States Jaycees*,⁵¹² the Court reiterated the existence of constitutional protection for "formation and preservation of certain kinds of highly personal relationships"⁵¹³ from unwarranted governmental intrusion.⁵¹⁴ The right protects those kinds of "personal bonds [which] have played a critical role in the *culture and traditions* of the Nation by cultivating and transmitting

504. See generally Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605.

505. Hafen, *supra* note 361, at 515.

506. *Id.*

507. See Grey, *supra* note 495, at 90.

508. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

509. Eichbaum, *supra* note 440, at 367.

510. I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* 57-58 (T. Abbot trans. 1838).

511. A survey of articles on the right of privacy published between 1965 and 1979 reveals that 38 of 41 commentators agreed that the right of privacy protects consensual sexual relations. Grey, *supra* note 495, at 98-100 (opinion of the staff of LAW & CONTEMP. PROBS.).

512. 104 S. Ct. 3244 (1984).

513. *Id.* at 3250.

514. The opinion cited *Pierce* and *Meyer* as authority.

shared ideals and beliefs."⁵¹⁵ It is a recognition that individuals emotionally enrich themselves from close relations with others. The protection offers individuals the choice to independently define their own identity, an idea considered to be "central to the concept of liberty."⁵¹⁶ *Roberts*, therefore, recognized not only the importance of the family, but also that of the individual within society. The majority opinion carefully balanced the needs of the individual in relation to the needs of others in society. The personal relations that are constitutionally protected by the right of privacy are those related to the "creation and sustenance of a family—marriage."⁵¹⁷ The attributes of these relations are "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation and seclusion from others in critical aspects of the relationships."⁵¹⁸ Privacy is not a blanket protection for the individual. There is a wide spectrum of activities lacking these attributes that are, therefore, not protected. Sexual promiscuity, and deviant sexual practices either lack the enumerated attributes or are not related to the creation and maintenance of a family. Under this analysis, then, the Court's precedents show no support for sexual freedom.⁵¹⁹

The Court's decisions, however, afford protection for certain types of personal relationships that are geared toward the formation and maintenance of the family and its incidents. The issue, therefore, is whether a relationship has the distinct attributes of "relative smallness,"⁵²⁰ selectivity, and exclusion of others from the "critical aspects of the relationship"⁵²¹ so as to constitute a family. The definition of family need not depend upon the sexual practices of its members but by the presence or absence of the attributes enumerated above. The relationship must meet *all* of the essential attributes to qualify for protection. Even a heterosexual relationship that is promiscuous would not qualify. Thus, the protection is for certain types of intimate relationships, and not for homosexuality or heterosexuality per se.

515. 104 S. Ct. at 3250 (emphasis added). The Court cited *Zablocki*, *Moore*, *Yoder*, *Griswold*, *Pierce*, and *Poe*, among others, as authority.

516. *Id.* at 3250.

517. *Id.*

518. *Id.*

519. See Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 734-36 (1973); Note, *Texas Statute Prohibiting Sodomy is Unconstitutionally Overbroad in Proscribing Private, Consensual Acts of Married Couples*, 49 TEX. L. REV. 400, 405 (1971).

520. 104 S. Ct. at 3250.

521. *Id.*

V. LOWER COURT OPINIONS

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The specific question of whether the constitutional right to privacy as developed in *Griswold v. Connecticut*⁵²² and its progeny⁵²³ protects private consensual homosexual activity among adults is far from settled. Indeed, there is a great deal of controversy over whether the one Supreme Court case on the subject—a summary affirmance of a three-member district court opinion in *Doe v. Commonwealth's Attorney*⁵²⁴—has the precedential value needed to command respect in the lower courts.⁵²⁵ Because of the somewhat dubious nature of Supreme Court authority in this area, various lower federal courts and state courts have reached sharply different conclusions on the constitutionality of statutes that prohibit homosexual activity. Moreover, the lower courts' analyses, both for and against expanding the right of privacy, have been diverse and unfocused.⁵²⁶

A. *Right to Privacy Found*

The first judicial appearance of the notion that the right to privacy protects consenting adult homosexual activity came in *Doe v. Commonwealth's Attorney*. In this case, a homosexual plaintiff asked a federal court to issue an injunction to prevent enforcement of Virginia's sodomy statute. Because the case challenged the constitutionality of a state statute, a special three-judge district court panel convened.⁵²⁷ In a split decision, the district court refused to issue the injunction, finding that the sodomy statute did not violate the plaintiff's right to privacy.⁵²⁸ On direct appeal, the Supreme Court

522. 381 U.S. 479 (1965).

523. See *supra* Part III.

524. 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975) (three judge panel).

525. This issue has been the focus of debate and confusion in the lower courts. For a comprehensive discussion of the question, see Note, *supra* note 383, at 992.

526. Some courts have found similar, but more limited, privacy rights for homosexuals. See *Ben Shalom v. Secretary of the Army*, 489 F. Supp. 964, 966 (E.D. Wis. 1980) ("constitutional privacy principles clearly protect one's sexual preferences in and of themselves from government regulation" as distinguished from the unsettled question of whether homosexual conduct is protected); see also *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976) (court blended concepts of fourth amendment privacy rights holding that: "The Federal constitution protects . . . the right of privacy in circumstances in which it may reasonably be expected. Once a married couple admits strangers as onlookers, federal protection of privacy dissolves.").

527. See *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1202.

528. *Id.* at 1203.

affirmed without a written opinion.⁵²⁹

By affirming the district court's decision, the Supreme Court seemingly approved an opinion that gave a very narrow interpretation to the right of privacy. The interpretation that the Court approved found that the right to privacy protected only the marital relationship and procreative choice. Judge Merhige strongly challenged this interpretation at the district court level in a stinging dissent.⁵³⁰ The central premise of Judge Merhige's dissent was that although *Griswold* and its progeny did not specifically articulate a broad right to sexual privacy, these opinions stood for "the principle that every individual ha[d] a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern."⁵³¹ One such private decision, according to Judge Merhige, is "[a] mature individual's choice of an adult sexual partner, in the privacy of his or her own home. . . ."⁵³²

The heart of Judge Merhige's argument was that while *Griswold* developed the right to privacy within the specific context of a case involving a marital relationship, later cases had diminished that distinction.⁵³³ As a consequence, Judge Merhige argued, the majority's reliance on Justice Harlan's dissenting opinion in *Poe v. Ullman*⁵³⁴ was misguided. Judge Merhige specifically pointed to *Eisenstadt v. Baird*⁵³⁵ as primary support for the proposition that the right to privacy extends to all adult private consensual activity.⁵³⁶ *Roe v. Wade*,⁵³⁷ according to Judge Merhige, reaffirmed the expansive nature

529. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). The Supreme Court's entire opinion read: "Affirmed on appeal from D.C.E.D. Va." *Id.*

530. *Doe*, 403 F. Supp. at 1203 (Merhige, J., dissenting).

531. *Id.*

532. *Id.*

533. *Id.* at 1204.

534. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). The *Doe* majority relied heavily on Justice Harlan's dissent in *Poe*, and specifically pointed to certain passages Justice Goldberg adopted in his concurrence in *Griswold* to support the position that the privacy right developed in this line of cases is limited to the marital relationship.

535. 405 U.S. 430 (1972).

536. *Doe*, 403 F. Supp. at 1204. Judge Merhige quoted the critical language from Justice Brennan's majority opinion in *Eisenstadt*, where the Court refused to restrict the right of privacy as it related to contraceptives for married couples. The quoted portion reads in full:

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. . . .

405 U.S. at 453.

537. 410 U.S. 113 (1973).

of the right to privacy when it extended that right to individual women without regard to the family relationship. Judge Merhige concluded: "Both *Roe* . . . and *Eisenstadt* . . . cogently demonstrate that intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered in the category."⁵³⁸

In Judge Merhige's view, this right of privacy, though important, was not without limits. First, the state could only regulate these protected activities after demonstrating a compelling state interest.⁵³⁹ Second, this activity could only be sanctioned if the participants were adults capable of consenting to the activity and who actually had consented.⁵⁴⁰ Third, an additional limitation on this right was that it could only be exercised in the privacy of one's own home.⁵⁴¹

The elegance and power of Judge Merhige's reasoning soon found its way into the opinions of courts who favored a broader right to privacy. Initially, at least, these courts tended to be state intermediate appellate courts. State supreme courts, however, began overturning these decisions, generally refusing to give an expansive reading to *Griswold* and its progeny.

In 1975, two divisions of Arizona's court of appeals found that the right to sexual privacy between consenting adults was fundamental and that the state's sodomy statutes furthered no compelling state interest. One division of the court found that the right to sexual privacy was limited to the marital relationship,⁵⁴² while the other division found that the right to sexual privacy among consenting adults is wholly independent of a marital relationship.⁵⁴³ After an extensive review of Supreme Court precedents, the court found that the right of sexual privacy is "deemed fundamental because it is basic to the concept of the individual in our American culture and because it is a

538. *Doe*, 403 F. Supp. at 1204. Judge Merhige adheres to the view that the right of privacy derives from the due process clause of the fourteenth amendment or from "penumbras" emanating from the Bill of Rights. For a discussion of these theories, see *supra* notes 201-07 and accompanying text.

539. *Id.* at 1204-05. See *infra* note 652 and accompanying text.

540. *Id.*

541. *Id.* It is unclear to what extent Judge Merhige accepts the reasoning of *Lovisi*, where the court used a fourth amendment privacy analysis along with a *Griswold* right of privacy analysis. See *supra* note 524. Nevertheless, it seems clear that Judge Merhige would extend the right of privacy in sexual activity only to nonpublic areas. *Doe*, 403 F. Supp. at 1204-05. The Court developed this concept of the home providing a greater protection from governmental intrusion in *Stanley v. Georgia*, 394 U.S. 557 (1969).

542. *State v. Bateman*, 25 Ariz. App. 1, 540 P.2d 732 (1975), *vacated*, 547 P.2d 6 (1976).

543. *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 (en banc), *cert. denied*, 429 U.S. 864 (1976).

necessary prerequisite to the effective enjoyment of all of our other fundamental rights."⁵⁴⁴ This division of the court went on to hold that the right to sexual privacy was so basic that it could not rationally be limited to the marital relationship. The precedential value of both of these court of appeals cases is limited, however, because the Supreme Court of Arizona later vacated both decisions on the basis that the legislature could criminalize consensual sodomy under its traditional power to regulate the health and morals of its citizens.⁵⁴⁵

In *State v. Elliot*,⁵⁴⁶ a New Mexico appeals court struck down that state's sodomy statute on the ground that it violated the right to sexual privacy and unconstitutionally regulated the sexual affairs of consenting adults within the privacy of their homes. The New Mexico Court of Appeal found that the power to forbid sodomitic acts between consenting adults was outside the scope of the state's police power. The court stated that "the [c]onstitutional protection from governmental interference with sexual relations of married couples must extend also to unmarried consenting adults."⁵⁴⁷ The court added that the sodomy statute was unconstitutional because it "regulates the sexual conduct of consenting adults in the home, where sexual activity is centered in our society. In reaching into the home, the statutes invade a constitutionally-protected zone of privacy—the privacy of the home."⁵⁴⁸ The court concluded: "We have found nothing in judicial opinions dealing with sodomy statutes which suggests that a compelling necessity to regulate sexual conduct between consenting adults overcomes this . . . violation of constitutionally-protected rights."⁵⁴⁹ This finding was ultimately overturned, however, when the Supreme Court of New Mexico reversed the court of appeals, holding that the state's police power could reach into the home to regulate private sexual activity.⁵⁵⁰

In 1976, the Supreme Court of Iowa broke this trend, becoming the first state high court to give *Griswold* and its progeny an expansive reading. In *State v. Pilcher*,⁵⁵¹ a man was convicted under Iowa's sodomy statute for having oral sex with a woman who was not his wife. After reviewing cases on the right to privacy, the state supreme court

544. *Callaway*, 25 Ariz. App. at 273, 542 P.2d at 1151.

545. *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (en banc) (state may criminalize consensual sodomy by both married and unmarried couples), *cert. denied*, 429 U.S. 684 (1976).

546. 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976).

547. *Id.* at 192, 539 P.2d at 212.

548. *Id.* at 194, 539 P.2d at 214.

549. *Id.*

550. *Elliot v. State*, 89 N.M. 305, 551 P.2d 1352 (1976).

551. 242 N.W.2d 348 (Iowa 1976).

concluded that the sodomy statute was unconstitutional as applied to the defendant. The court stated that the statute was "unconstitutional as an invasion of fundamental rights, such as the personal right of privacy, to the extent it attempts to regulate, through use of criminal penalty, consensual sodomitical practices performed in private by adult persons of the opposite sex."⁵⁵² Reading *Griswold* and *Eisenstadt* together, the Iowa court concluded that the right to privacy attempts "to protect the manner of sexual relations performed in private between consenting adults of the opposite sex not married to each other."⁵⁵³ The Supreme Court of Iowa thus became the first state supreme court to find that consensual adult sodomy is protected constitutionally. However, the *Pilcher* court expressly left open the question of whether adult consensual homosexual conduct is constitutionally protected within the zone of privacy.⁵⁵⁴ Nevertheless, the court's constitutional analysis would seem to be of equal force in cases of homosexual sodomy.

Soon after the *Pilcher* decision, the Supreme Court of New Jersey employed a right to privacy analysis to declare a statute regulating sexual behavior unconstitutional. In *State v. Saunder*,⁵⁵⁵ a man was convicted under a fornication statute for having sexual relations with two women in a deserted parking lot. New Jersey's high court reversed the conviction and found the statute unconstitutional. The court concluded:

[T]he conduct statutorily defined as fornication involved, by its very nature, a fundamental personal choice. Thus, the statute, infringes upon the right of privacy. Although persons may differ as to the propriety and morality of such conduct . . . [the] decision [to engage in such conduct] is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.⁵⁵⁶

New Jersey thus joined Iowa in finding that the Constitution offers some protection for sexual privacy.

In light of *Pilcher* and *Saunder*, the New York Court of Appeals agreed to hear *People v. Onofre*.⁵⁵⁷ Along with *Onofre*, New York's highest court decided two companion cases. In the first case, Ronald Onofre was convicted of violating New York's statutes that criminal-

552. *Id.* at 359.

553. *Id.*

554. *Id.*

555. 75 N.J. 200, 381 A.2d 333 (1977).

556. *Id.* at 213-14, 381 A.2d at 339.

557. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

ized consensual sodomy. Onofre had admitted to engaging in sexual activity in his home with a 17 year old male.⁵⁵⁸ In the second case, two men were convicted of violating New York's sodomy statutes. At trial, the jury determined that the two had engaged in an act of sodomy in a parked automobile on a city street.⁵⁵⁹ In the last case, Mary Sweat was convicted under the sodomy statutes for engaging in oral sex with a man in a truck parked on a residential street.⁵⁶⁰

The court of appeals consolidated the three cases because, in the court's opinion, they presented the common question of whether New York's sodomy statutes were constitutional in light of the Supreme Court's cases articulating a right to privacy.⁵⁶¹ The court interpreted the right to privacy as a "right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint. . . ."⁵⁶² The court then held that because the sodomy statutes were "broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults,"⁵⁶³ they violated the right to privacy.

In *Onofre*, the state argued that the the right to privacy protected only two areas of sexual affairs: marital intimacy and procreative choice.⁵⁶⁴ The court rejected this contention because it "fails . . . adequately to take into account the decision in *Stanley v. Georgia* . . . and the explication of the right to privacy contained in . . . *Eisenstadt* . . . [and] the right enunciated in *Griswold* . . . to make decisions with respect to the consequences of sexual encounters"⁵⁶⁵

After further reviewing the Supreme Court cases, the court of appeals commented:

In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons . . . no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting.⁵⁶⁶

558. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.

559. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.

560. *Id.*

561. *Id.* at 486, 415 N.E.2d at 939, 434 N.Y.S.2d at 949.

562. *Id.* at 486, 415 N.E.2d at 938, 434 N.Y.S.2d at 949.

563. *Id.*

564. *Id.* at 487, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.

565. *Id.* at 488, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.

566. *Id.* at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951.

By equating sexual gratification with the right to privacy, New York's Court of Appeals was the first state high court to find a constitutional right to sexual privacy for homosexuals.

Shortly before *Onofre*, the Supreme Court of Pennsylvania decided *Commonwealth v. Bonadio*.⁵⁶⁷ This case involved a challenge to the constitutionality of two state sodomy statutes that prohibited oral and anal intercourse between unmarried adults.⁵⁶⁸ The court found these sodomy statutes to be unconstitutional under the equal protection clauses of the Pennsylvania and United States Constitutions, because the statutes discriminated against unmarried persons.⁵⁶⁹ While this decision was not based on the right to privacy, the court did note:

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality 'No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners.' . . . Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals.⁵⁷⁰

Thus, *Bonadio* can properly be seen as within the trend of decisions recognizing the right to sexual privacy. Moreover, the court's analysis in *Bonadio* left little doubt that homosexuals were among those unmarried individuals the Constitution protected.⁵⁷¹

In 1982, after a long silence in the area, the federal courts again dealt with the scope of the right of privacy as it relates to private adult consensual homosexual activity. In *Baker v. Wade*,⁵⁷² a homosexual activist⁵⁷³ challenged the constitutionality of Texas's "Homosexual Conduct" statute.⁵⁷⁴ The district court initially held that the Supreme Court's summary affirmance of *Doe* had not resolved the constitu-

567. 490 Pa. 91, 415 A.2d 47 (1980).

568. *Id.* at 95, 415 A.2d at 51.

569. *Id.* at 95, 415 A.2d at 49-50.

570. *Id.* at 96, 415 A.2d at 53 (quoting MODEL PENAL CODE § 207.5 comment 276 at 278 (Tent. Draft No. 4, 1955)).

571. 490 Pa. at 99, 415 A.2d at 52.

572. 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985).

573. The court found that the plaintiff, Donald F. Baker, had standing to challenge the constitutionality of the statute even though he had never been arrested, or threatened with arrest under the statute. Despite the apparent lack of injury, the court found that the statute made Baker, who is active in various gay organizations, a "criminal" within the community. *Id.* at 1128. The stigma of being labeled a criminal was enough of an injury to give Baker standing. *Id.*

574. Section 21.06 provides: "A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex."

Section 21.01 defines deviate sexual intercourse: "'Deviate sexual intercourse' means any

tional controversy over sodomy statutes.⁵⁷⁵ The district court was free, therefore, to reach the merits of the case. In a comprehensive and detailed opinion, the district court found that the statute was unconstitutional because it violated homosexuals' right of privacy.⁵⁷⁶ Despite the Fifth Circuit's reversal of this decision,⁵⁷⁷ the district court's opinion stands as one of the best expressions of the argument favoring a broad right to privacy.

In declaring the sodomy statute unconstitutional, the district

contact between any part of the genitals of one person and the mouth or anus of another person."

Section 21.06 further provides that: "A violation of this statute is a 'Class C misdemeanor,' punishable only by a fine not to exceed \$200." TEX. PENAL CODE ANN. §§ 21.01, 21.06 (Vernon 1974).

575. 553 F. Supp. at 1137.

576. *Id.* at 1137-38, 1140. The court held that because § 21.06 discriminated against homosexuals in permitting only consenting heterosexual adults to commit the prohibited acts, the statute would be unconstitutional unless the state could demonstrate a rational relation between this prohibition and a legitimate state interest. *Id.* at 1143. The court added that the statute was unconstitutional because at trial the state did not demonstrate any legitimate state interest to support the statute. *Id.* at 1144. See *Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S. 947. Although the court did not reach the issue, it did state that homosexuals would not qualify as a "suspect class" so as to trigger the "compelling state interest" standard of review. 553 F. Supp. at 1144 n.58. The court chose not to discuss the possible application of "the emerging intermediate level of review" which has been utilized in certain gender and illegitimacy cases. See, e.g., *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Plyler v. Doe*, 457 U.S. 202 (1982).

577. 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc). The Fifth Circuit reversed the district court after some unusual procedural and political maneuvers. Approximately one month after the district court rendered its judgment, Danny Hill, the district attorney for Potter County, Texas, filed a notice of appeal. District Attorney Hill was a member of the class of defendants in the suit, but was neither a named defendant nor a class representative. Soon afterward, the Attorney General of the State of Texas filed a notice of appeal on behalf of the State of Texas. 769 F.2d 289, 294 (Rubin, J., dissenting). The Attorney General then withdrew his notice of appeal. In response, District Attorney Hill made an unsuccessful attempt to have the Supreme Court of Texas compel the Attorney General by writ of mandamus to continue his appeal. *Id.* District Attorney Hill then filed both a motion to set aside the judgment and to reopen the evidence and a motion to intervene and to substitute class representatives. An organization called Dallas Doctors Against AIDS also sought to intervene. *Id.* at 239. A motions panel denied all the motions except District Attorney Hill's motion to intervene on appeal which was granted. *Id.* Another Fifth Circuit panel then reversed the finding of the motions panel on the grounds that as class member in an action where the representative was the government, District Attorney Hill had no right to challenge the decisions of the class representative because the interest at stake was not personal in nature, but was instead a sovereign interest. *Id.* at 236, 244. On grant of rehearing en banc, the Fifth Circuit reversed the panel's decision as to the motion to intervene. The court went on to reverse the decision of the district court, and held that the statute was constitutional based on the precedential value of *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). The court also disagreed with the district court's equal protection analysis of the statute. The Fifth Circuit held that § 21.06 did not violate the equal protection clause of the fourteenth amendment because morality, a legitimate state interest, was not totally unrelated to the statute and the regulation of homosexual conduct. *Id.*

court found that the right to privacy protected private consensual homosexual activity among adults. It was the court's view that *Griswold* and its progeny recognized a right of privacy that extended beyond the specific settings presented in those cases such that its "outer limits" had not yet been established.⁵⁷⁸ Therefore, the court concluded, the fact that the right of privacy has developed on almost a case-by-case basis evinced the notion that there were other unspecified fundamental personal liberties protected by the right of privacy. The district court stated further that the Supreme Court's refusal, despite several opportunities, to directly confront the issue, was further proof that the limits of the rights of privacy had not yet been defined.⁵⁷⁹

The heart of the district court's argument was that, because the right of privacy had already been found to protect marital privacy⁵⁸⁰ and procreative choice,⁵⁸¹ it would be broad enough to include "[t]he right of two individuals to choose what type of sexual conduct they will enjoy in private."⁵⁸² That is, decisions concerning "a person's sexual needs or desires are "in a field that by definition concerns the most intimate of human activities and relationships"⁵⁸³ and hence, should be "free from undue interference by the state. . . ."⁵⁸⁴ Furthermore, the court argued that *Eisenstadt* made clear that personal pri-

578. 553 F. Supp. at 1135.

579. The three cases cited by the court were *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, *aff'd*, 425 U.S. 901 (1971); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *remanded*, 401 U.S. 989 (1971); *People v. Onofre*, 434 N.Y.S.2d 947, 415 N.E.2d 936, *cert. denied*, 451 U.S. 987 (1981). *Buchanan* involved a challenge to the previous Texas sodomy statute, which prohibited all oral and anal sex by homosexuals and heterosexuals. The plaintiffs included a homosexual male seeking an injunction against two pending prosecutions for public offenses. Among the intervenors seeking declaratory relief was a homosexual male. A three-member district court panel found the act unconstitutional on its face as overbroad. 308 F. Supp. at 736. On appeal, the Supreme Court of the United States remanded on the basis of the *Younger* doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). Judge Buchmeyer argued that no *Younger* abstention problem was presented in the case of the homosexual because no prior state action was pending. 553 F. Supp. at 1136.

Judge Buchmeyer pointed out that although the Supreme Court's denial of certiorari has no precedential value, it nevertheless demonstrates the openness of the question. *Id.* at 1139. Similarly, Judge Buchmeyer found that the Supreme Court's summary affirmance of *Doe* did not control the instant case. *Id.* at 1136-38.

580. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

581. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

582. 553 F. Supp. at 1140.

583. *Id.* (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1978)).

584. 553 F. Supp. 1140. The court seemed quite impressed with the plaintiff's testimony. The plaintiff stated that his decision regarding sexual orientation came only after much suffering and difficulty. The court stated that "it is evident that Baker's resulting decisions concerning his sexual needs and desires are of the most personal, intimate and important concern. . . ." *Id.* at 1140 n.52.

vacy rights were not limited to the marital relationship.⁵⁸⁵

The court also found additional support for its holding in *Stanley v. Georgia*.⁵⁸⁶ The court reasoned that it would be an unreasonable distinction to differentiate between the right to seek sexual gratification by viewing obscene materials, as accorded in *Stanley*, and the right to seek sexual gratification with a consenting adult partner in private as was sought in *Baker*.⁵⁸⁷ The court also noted that the fact that *Stanley* and *Eisenstadt* would surely permit a person to possess and enjoy, in private, pornographic materials depicting homosexual conduct best illustrated this idea.⁵⁸⁸

Hardwick v. Bowers is the most recent case where a federal court found that the right of privacy protects homosexual conduct.⁵⁸⁹ This case involved a challenge to Georgia's criminal sodomy statute.⁵⁹⁰ Hardwick was arrested in 1982 after he was observed engaging in homosexual activity in his home.⁵⁹¹ Following a hearing before the Municipal Court of Atlanta, the local district attorney's office decided not to pursue the case.⁵⁹² Nevertheless, Hardwick filed a complaint in the federal district court asking for declaratory relief.⁵⁹³ Hardwick alleged that Georgia's sodomy statute was unconstitutional as applied to him because it violated his right to privacy. The district court dismissed the claim, stating that the Supreme Court's summary affirm-

585. *Id.*; see *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

586. 394 U.S. 557 (1969). For a full discussion of this case, see *supra* notes 220-23 and accompanying text.

587. 553 F. Supp. at 1141.

588. *Id.*

589. 760 F.2d 1202 (11th Cir. 1985).

590. GA. CODE ANN. § 16-6-2 (1982) reads as follows:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

Id.

591. 760 F.2d 1202. Hardwick was joined in the suit by a married couple, using the pseudonyms John and Mary Doe, who claimed that the existence and enforcement of the statute chilled and deterred their desire to engage in sexual activity. The district court found that the Does lacked proper standing to maintain the action. The court of appeals affirmed this decision. *Id.* at 1206.

592. *Id.* at 1204.

593. *Hardwick v. Bowers*, No. C83-273A, slip op. at 4 (N.D. Ga. Apr. 18, 1983). The Does were found at the district court level, and again in the court of appeals, to lack proper standing to maintain the action because they had failed to demonstrate a "realistic" threat of harm from the statute. 760 F.2d at 1206 (11th Cir.), *cert. granted*, 102 S. Ct. 342 (1985).

ance of *Doe v. Commonwealth's Attorney* was controlling precedent.⁵⁹⁴

In a split decision, the Court of Appeals for the Eleventh Circuit reversed the district court's finding. The court of appeals held that the district court erred in relying on *Doe* as controlling precedent.⁵⁹⁵ The court, however, did not end its analysis there; it went on to hold that Georgia's sodomy statute infringed upon Hardwick's constitutionally protected right of sexual privacy.⁵⁹⁶ The Eleventh Circuit then remanded the case to the district court shifting the burden to the state to demonstrate a compelling interest that would justify its invasion of Hardwick's privacy.⁵⁹⁷ Before the district court could take evidence on this matter, the Supreme Court granted certiorari to review the court of appeals' decision.⁵⁹⁸

The Eleventh Circuit's opinion provides an interesting analysis of the issues. The court found that the right of privacy was a constitutional safeguard that "prevents the states from unduly interfering in certain individual decisions critical to personal autonomy" ⁵⁹⁹ The court stated that while it was willing to extend the right of privacy beyond the specific factual circumstances of the *Griswold* line of cases, it was unwilling to expand this right outside the natural path of its historical development.⁶⁰⁰

The court of appeals stated that the right of privacy protected Hardwick's conduct on two primary grounds. First, the court found that Hardwick's conduct and lifestyle was similar to that found in a

594. 760 F.2d at 1206.

595. *Id.* at 1214.

596. *Id.* at 1211.

597. *Id.* at 1210.

598. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir.), *cert. granted*, 102 S. Ct. 342 (1985).

599. 760 F.2d at 1211. The court analyzed the factual circumstances of the Supreme Court cases both before and after *Griswold*. The court concluded that the right developed around broad factual contexts such as the right to choose whether or not to conceive a child. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1978); *Roe v. Wade*, 410 U.S. 113 (1973). The privacy right also emanates from the right to make decisions affecting intimate relationships such as marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978), or about the makeup of the family unit, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

The court also clarified an often confused issue, stating that the term "right to privacy" is somewhat of a misnomer because the right is not limited to "non-public" decisions but rather encompassed certain private "personal" decisions. 760 F.2d at 1211.

600. The court relied on language in *Griswold* and *Zablocki* to support the proposition that these interests were separate and therefore entitled to their own protection. *Id.* at 1212. Similarly, the court also looked to *Eisenstadt* to demonstrate that these rights were not intended to be limited to married couples. *Id.*

The court stated that "the marital relationship is . . . significant because of the unsurpassed opportunity for mutual support and self-expression that it provides." *Id.* at 1211-12.

marital relationship⁶⁰¹ and it should, for that reason, be protected.⁶⁰² It was the court's opinion that the right of privacy was not limited to the procreational aspects of marriage, but rather that it extended far enough to protect the "association of interests" found in marriage and in intimate relationships *like* marriage.⁶⁰³

The second ground the court found for protecting Hardwick's conduct was that Hardwick's activities took place in the home.⁶⁰⁴ The court stated that "the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home."⁶⁰⁵ The court added that "the fact that the activity is carried out in seclusion bolsters its significance."⁶⁰⁶ In short, the court concluded that

the Supreme Court's analysis of the right to privacy in *Griswold* . . . , *Eisenstadt* . . . , and *Stanley* . . . , leads to . . . [the conclusion] that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation.⁶⁰⁷

B. *No Right to Privacy Found*

As previously stated, the first case to specifically address the question of whether there was a right of privacy for private adult consensual homosexual conduct was *Doe v. Commonwealth's Attorney*.⁶⁰⁸ The *Doe* court viewed the right of privacy as a narrow and limited guarantee whose "outer limits" the Supreme Court had already developed. The *Doe* majority looked to *Griswold* and to Justice Harlan's dissent in *Poe v. Ullman*⁶⁰⁹ to examine the purposes and limits of the right of privacy. The court concluded from its review of the Supreme Court's cases that the right to privacy was built on the "sanctity of the home and family."⁶¹⁰ This notion, along with the specific references to Justice Harlan's *Poe* dissent,⁶¹¹ moved the court to conclude that

601. The court stated that "for some, the sexual activity in question here serves the same purpose as the intimacy of marriage." *Id.* at 1212.

602. *Id.*

603. *Id.*

604. *Id.* at 1211.

605. *Id.* at 1212.

606. *Id.*

607. *Id.*

608. 403 F. Supp. 1199 (1975).

609. 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Justice Harlan's dissenting opinion took on added significance when Justice Goldberg adopted a portion of its text in his concurrence in *Griswold*. 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).

610. 403 F. Supp at 1201-02.

611. The court relied not only on that part of Justice Harlan's dissent in *Poe v. Ullman* as

the right to privacy did not prohibit the state from exercising its sovereign power to regulate certain types of sexual conduct.⁶¹²

The *Doe* majority did not go beyond *Griswold* itself to explain or discuss the right of privacy. Nowhere in the opinion is there any mention of the cases following *Griswold* that arguably broadened the right of privacy, such as *Eisenstadt* and *Loving v. Virginia*.⁶¹³ Perhaps even more significant was the court's failure to even mention *Roe v. Wade*,⁶¹⁴ decided only two years earlier.

The *Doe* court, having found no fundamental right of privacy in private consensual adult homosexual activity, applied a rational relation test to Virginia's sodomy statute.⁶¹⁵ Not surprisingly, the court found that the statute easily passed this test. The court ultimately held that the state had met its burden of proving that it had a legitimate interest in regulating this activity⁶¹⁶ and that, although the law was "questionable," its basis was well-supported from both a historical and precedential perspective.⁶¹⁷

Following *Doe*, state courts adopted similarly wooden reasoning in refusing to expand the right of privacy.⁶¹⁸ A thoughtful opinion as to why the right of privacy should be narrowly construed was not forthcoming until Judge Gabrielli's biting dissent in *Onofre*.⁶¹⁹ Judge Gabrielli attacked the majority's "amorphous concept of personal autonomy"⁶²⁰ and its interpretation of *Griswold* and its progeny. According to his dissent in *Onofre*, "the right of sexual choice established . . . [by the *Onofre* majority] is really a wholly new legal concept bearing little resemblance to the familiar principles enunciated in *Griswold* . . . and its progeny."⁶²¹

Judge Gabrielli's interpretation of the right to privacy cases was

was adopted by Justice Goldberg in his *Griswold* concurrence, but also noted some additional language for support. *Id.* at 1201-02 (quoting *Poe v. Ullman*, 367 U.S. 497, 546, 552-53 (1961) (Harlan, J., dissenting)).

612. *Id.* at 1201.

613. 388 U.S. 1 (1973).

614. 410 U.S. 113 (1973).

615. 403 F. Supp. at 1202. The court stated that: "It is enough for upholding the legislation that the conduct is likely to end in a contribution to moral delinquency. Plainly, it would indeed be impracticable to prove the actuality of such a consequence, and the law is not so exacting." *Id.*

616. *Id.*

617. *Id.*

618. See, e.g., *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied, 218 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947 (1980); *State v. Santos*, 413 A.2d 58 (R.I. 1980); *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6, cert. denied, 429 U.S. 864 (1976).

619. 51 N.Y.2d 495, 415 N.E.2d 944, 434 N.Y.S.2d 955 (1980) (Gabrielli, J., dissenting).

620. *Id.* at 496, 415 N.E.2d at 944, 434 N.Y.S.2d at 955.

621. *Id.* at 496, 415 N.E.2d at 945-46, 434 N.Y.S.2d at 954-55.

much narrower than the majority's interpretation. In his view, the Supreme Court had extended the right of privacy only to decisions relating to the family, marital intimacy, and procreation.⁶²² He rejected the majority's contention that *Eisenstadt* provided a general right of privacy to seek sexual gratification. According to Judge Gabrielli, *Eisenstadt* stood for the narrow proposition that the fundamental right of an individual to decide whether to bear or beget a child could not be limited to married adults.⁶²³

Perhaps the biggest difference between the majority's views in *Onofre* and those of Judge Gabrielli involved the role of the court in making decisions affecting individual rights. Judge Gabrielli feared that the majority's open-ended concept of fundamental rights could be a vehicle for law-making by "judicial fiat."⁶²⁴ Because the majority did not articulate an analytical framework with which to resolve future cases under its "amorphous concept of personal autonomy," Judge Gabrielli feared that the majority's opinion could "bring the law of substantive due process full circle" and usher back *Lochner*-type judicial decisionmaking.⁶²⁵

Judge Bork shared Judge Gabrielli's concern over the return of *Lochnerism* in *Dronenburg v. Zech*.⁶²⁶ This case involved a United States Navy enlisted man's challenge to his discharge for homosexual conduct.⁶²⁷ After the discharge was recommended at an administrative hearing and approved by the Secretary of the Navy, James Dronenburg filed suit in federal district court claiming that the Navy's policy of mandatory discharge for homosexual conduct⁶²⁸ vio-

622. *Id.* at 500-01, 415 N.E.2d at 947, 434 N.Y.S.2d at 957-58.

623. *Id.*, 415 N.E.2d at 947, 434 N.Y.S.2d at 958.

624. *Id.* at 503, 415 N.E.2d at 948, 434 N.Y.S.2d at 959.

625. *Id.* at 503, 415 N.E.2d at 948-49, 434 N.Y.S.2d at 957-59.

626. 741 F.2d 1388 (D.C. Cir. 1984).

627. *Id.* Prior to his discharge, James L. Dronenburg had served in the Navy for nine years as a linguist and cryptographer. *Id.* Dronenburg was discharged pursuant to SEC/NAV Instruction 1900.9C (Jan. 20, 1978), Joint Appendix at 216. That instruction provides:

Any member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.

Id.

628. The Navy's policy does not precisely call for mandatory discharge for homosexual conduct, providing instead that:

A member who has solicited, attempted or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the

lated his constitutional right to privacy.⁶²⁹ The district court upheld the constitutionality of the policy, granting the Navy a summary judgment. Based on the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney* as controlling,⁶³⁰ the Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision.

After reaching this decision, Judge Bork, writing for the court, began an extraordinary and comprehensive discussion in dicta on whether homosexual conduct is entitled to the protective cloak of the constitutional right of privacy.⁶³¹ This discussion of the relevant case law is perhaps the best existing statement of the view that homosexual conduct does not merit fundamental right protection.

Judge Bork first examined each of the seminal "right to privacy" cases individually, to determine if they explicitly extended the right to privacy to protect homosexual conduct. Judge Bork stated that while the right to privacy was developed in *Griswold*,⁶³² that decision gave no indication of what activities were protected beyond those within the marital context.⁶³³ Similarly, the court argued that *Loving v. Virginia*,⁶³⁴ where the Court struck down Virginia's anti-miscegenation statute, provided no guidance as to the rights of homosexuals, because *Loving* was also based on the concept of "the right to marry."⁶³⁵

Supporters of homosexual rights have interpreted *Eisenstadt v. Baird*⁶³⁶ as providing the critical link between the right to privacy within a marital context and the right within an individual rights setting.⁶³⁷ Judge Bork refused to afford the opinion this significance, stating instead that *Eisenstadt* itself did not provide guidance as to what activities the right of privacy should protect and in what contexts. Judge Bork then examined the often-quoted phrase from *Eisenstadt*: "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

unit to which the member is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

Id.

629. *Id.*

630. *Id.*

631. *Id.* at 1389-93.

632. *Id.* at 1391.

633. *Id.* at 1392.

634. 388 U.S. 1 (1966).

635. 741 F.2d at 1393. The court further noted about *Loving* that: "It is not entirely clear whether the due process analysis broke new ground." *Id.*

636. 405 U.S. 438 (1972).

637. For a full discussion, see *supra* notes 344-52 and accompanying text.

the decision whether to bear or beget children."⁶³⁸ Judge Bork noted that the Court's failure to define what rights are "so fundamental" or what types of intrusions are "unwarranted" has created a situation that would necessarily involve courts in judicial legislating.⁶³⁹

The court similarly reasoned that the Court in *Roe v. Wade*⁶⁴⁰ gave so little guidance as to the right of privacy's parameters that it is of almost no use in principled judicial decisionmaking. After examining and quoting critical portions of *Roe v. Wade*, Judge Bork concluded that aside from affirming that the right of privacy has certain limits, *Roe v. Wade* "provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy."⁶⁴¹

Finally, Judge Bork stated that *Carey v. Population Services International*,⁶⁴² another case involving the right to access of contraceptives, did little to extend the right of privacy or provide guidance as to how the privacy right relates to homosexuals. Judge Bork reasoned that the holding in *Carey* merely reaffirmed the notion embodied in the prior cases that the "right of access to contraceptives" was "essential to exercise the constitutionally protected right of decision in matters affecting childbearing. . . ."⁶⁴³

Judge Bork concluded that neither these cases, nor any general principle so far articulated,⁶⁴⁴ provided the court with support to find that the right of privacy protects private adult consensual homosexual conduct. The court further noted that such a holding would be an extension or creation of a constitutional right; something it, as a lower federal court, was unable and unwilling to do. If this were to occur, Judge Bork reasoned, many cases would evade Supreme Court review and "a great body of judge-made law would grow up" preempting the authority of another branch of government without proper constitutional authority.⁶⁴⁵ Judge Bork summed up the court's reasoning

638. 405 U.S. at 453.

639. 741 F.2d at 1393-94.

640. 410 U.S. 113 (1973).

641. 741 F.2d at 1395.

642. 431 U.S. 678 (1977).

643. 741 F.2d at 1395 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1976)).

644. After examining the case law, the court discussed the question of whether a more general principle would provide any guidance. The court found that the language "fundamental rights" or "implicit in the concept of ordered liberty," was "not particularly helpful to us . . . because they are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated." *Id.* at 1396.

645. Judge Bork stated in a footnote that he believes that no court, even the Supreme Court, may create constitutional rights. However, as a circuit judge he must apply those rules laid down by the Supreme Court. He stated further that:

quite cogently: “[W]e can find no constitutional right to engage in homosexual conduct and . . . , as judges, we have no warrant to create one.”⁶⁴⁶

C. Conclusion

This discussion of federal and state court decisions that have confronted the question of whether the right to privacy extends to protect private, adult consensual homosexual conduct clearly demonstrates the divergence of views on the subject. It is to be expected that the extension of a doctrine, particularly one involving constitutional rights, would generate such differences. Thus, the judges’ analyses contained in these decisions can best be utilized as a tool to understand the current debate about the right to privacy and to determine what the limits of the right should be. The ideas expressed in these opinions should also be helpful to develop an understanding of the right, not only in the context of homosexual activity, but as applied to other activities as well.

VI. STATE INTERESTS IN THE PROHIBITION OF SODOMY

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A. *The Constitutional Test*

As the right to privacy emerged from the *Griswold v. Connecticut* line of cases, this right came into conflict with state interests. It thus became necessary for the Court to develop a standard of review that

The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination. The only questions open for us are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide.

Id. at 1396 n.5.

646. *Id.* at 1395.

would apply whenever an individual claimed that a state law violated a fundamental freedom. The Court struggled to settle upon such a standard in *Griswold*.⁶⁴⁷ In *Roe*, the Court applied a strict scrutiny level of judicial review which it borrowed from equal protection analysis.⁶⁴⁸ The Supreme Court has continued to adhere to this standard in cases where state laws have conflicted with privacy rights protected by the due process clause of the fourteenth amendment.⁶⁴⁹

After examining prior lower court abortion decisions, the Court in *Roe* first concluded that "the right of personal privacy is not unqualified and must be considered against important state interests in regulation."⁶⁵⁰ The Court then observed that "most . . . courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision . . . and that at some point state interests of health protection, medical standards, and prenatal life, become dominant. We agree with this approach."⁶⁵¹ The Court next made

647. 381 U.S. 479 (1965). In *Griswold*, the Justices appeared to disagree on the proper test to apply to protect the right to privacy, as much as they disagreed on the theory explaining the source of the right. Justice Douglas, in a rather summary fashion, deplored the statute's "maximum destructive impact" on the marriage relationship as well as its undue breadth. *Id.* at 483. Justice Goldberg enunciated the requirement that the law serve any "'subordinating [state] interest which is compelling' or that is 'necessary . . . to the accomplishment of a permissible state policy'." *Id.* at 497-98 (citing two equal protection cases, *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) and *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)). While questioning the rationality of the justification for the state concern—the discouraging of extramarital relationships—he struck down the statute on the ground that it was essentially unnecessarily broad and indiscriminately tailored. *Id.* at 497-98. Justice White's concurrence began by requiring a "strict scrutiny" approach which "must be viewed in the light of the less drastic means for achieving the same basic purpose." He then stated that the Connecticut statute would not be invalid under the due process clause "if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application." *Id.* at 503-04.

648. *Roe v. Wade*, 410 U.S. 113, 154-55 (1972).

649. The Court has quoted and applied *Roe*'s "compelling interest/narrowness" test in privacy cases: *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1976) (striking limitations on sale and advertisement of contraceptives); *Planned Parenthood v. Danforth*, 428 U.S. 52, 60-61 (1975) (examining various state abortion regulations passed in the wake of *Roe*).

In some fundamental rights cases not dealing with privacy, the Court has repeated *Roe*'s "important state interests" language, but has gone on to overturn statutes that failed the lesser standard of rationality. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499-500 (1976) (reversing conviction for violation of ordinance limiting the extent of family relations that may dwell together); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641-43 (1973) (examining rules regulating maternity leave and return).

The Court has used an identical analysis where fundamental rights issues have been raised along with equal protection issues. In *Zablocki v. Redhail*, for example, the Court held that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently compelling state interests and is closely tailored to effectuate only those interests." 434 U.S. 374, 388 (1978) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1976)).

650. *Roe*, 410 U.S. at 154.

651. *Id.* at 155.

the oft-quoted statement that “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”⁶⁵² Every state and federal court that has recognized a fundamental right to privacy in adult sexual relations outside marriage has used this standard to evaluate the challenged statute.⁶⁵³ The only exception would be where a court has

652. *Id.* (citations omitted).

653. *Doe v. Duling*, 603 F. Supp. 960, 967 (E.D. Va. 1985), *vacated*, No. 85-1326 (4th Cir. 1986) (available Feb. 17, 1986, on WESTLAW, Allfeds database); *Baker v. Wade*, 553 F. Supp. 1121, 1141 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *United States v. Doe*, 12 Crim. L. Rep. 2531, 2533 (BNA) (Mar. 28, 1973); *State v. Bateman*, 25 Ariz. App. 1, 540 P.2d 732 (1975), *rev'd*, 113 Ariz. 107, 547 P.2d 6 (1976); *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976); *State v. Saunders*, 75 N.J. 200, 217, 381 A.2d 333, 341 (1977).

Courts do not always use the fundamental right/compelling interest/narrowness rubric. In at least two cases, state supreme courts have either upheld or invalidated sodomy statutes without considering the compelling state interest/narrowly tailored analysis. In *Commonwealth v. Bonadio*, before even raising the issue of a fundamental right to privacy, the Supreme Court of Pennsylvania held that the statute in question, which forbade “sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal,” was an invalid exercise of the state’s police power. 415 A.2d 47, 49 n.1 (Pa. 1980). The court found that “[t]he Voluntary Deviate Sexual Intercourse Statute has only one possible purpose: to regulate the private conduct of consenting adults.” This, according to the court, was beyond the police power of the state. *Id.* at 50. When dealing with morality, the state may validly exercise the police power to protect individuals’ rights to follow their own moral codes, *not* to enforce external codes on individuals. “Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals.” *Id.*

The Supreme Court of Arizona reached a contrary result in *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976). An intermediate court had held that the challenged statute violated the right to privacy, and that no compelling state interest would justify the statute. *State v. Bateman*, 25 Ariz. App. 1, 540 P.2d 732 (1975). The supreme court employed an analysis that bypassed the issues of fundamental rights and compelling state interests. The court first observed that “[t]he State may . . . regulate . . . sexual conduct in its rightful concern for the moral welfare of its people The right of privacy is not unqualified and absolute and must be considered in the light of important state interests.” 113 Ariz. at 111, 547 P.2d at 10 (citing *Roe v. Wade*, 410 U.S. 113 (1973)). Then, after stating that the Supreme Court had never discussed the issue, *Doe v. Commonwealth* was summarily affirmed 19 days after the court decided *Bateman*. The court went on to hold that “sexual activity between two consenting adults in private is not a matter of concern for the State except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivious acts.” *Id.* at 111, 547 P.2d at 10. The court was apparently willing to let the legislature determine the “importance” of its own interests. The court appeared to draw support from Justice Harlan’s dissent in *Poe v. Ullman*, and from the fact that neither *Griswold* nor *Eisenstadt* decided that the state could not regulate sexual misconduct. *Id.* at 110, 547 P.2d at 9-10. The holding is baffling, however, because, as the dissent succinctly points out, even though the Court appeared to acknowledge the protection of the right to privacy “within the context of the intimate sexual relations between consenting adults in private, whether single or married,” it nonetheless allowed the state to “separate certain of these relations it finds distasteful, label them as misconduct,” and subject the participants to felony charges. *Id.* at 112, 547 P.2d at 11. The oddity of the holding may be

invalidated a statute under a minimal rationality test.⁶⁵⁴

States generally assert two broad categories of interests in support of sodomy statutes—morality and health.⁶⁵⁵ This section will examine each of these values and discuss their treatment by state and federal courts under the strict scrutiny standard.

B. *Morality*

1. BACKGROUND

Dean Rostow once remarked, "Men often say that one cannot legislate morality. I should say that we legislate hardly anything else."⁶⁵⁶ Undoubtedly, most criminal laws enforce morality because serious crimes which criminal laws seek to punish or prevent also constitute moral wrongs. It is equally clear, however, that criminal laws cannot enforce morality in its entirety. Bad thoughts, verbal cruelty, or lying in private relationships, for example, which everyone would agree constitute morally reprehensible conduct, hardly seem appropriate subjects for criminal sanctions.

In his essay *On Liberty*, John Stuart Mill took the position that:

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will

attributable to two factors. First, the court's reliance on Justice Harlan's dissent may be misplaced because Justice Douglas's majority opinion in *Griswold* did not follow Justice Harlan's dissent in *Poe*, as the Supreme Court of Arizona apparently thought. *Id.* at 110, 547 P.2d at 9. Second, had the Arizona court properly articulated and applied the compelling state interest/narrowness test, it might well have invalidated the statute because it was not narrowly drawn.

654. *People v. Onofre*, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 451 U.S. 987 (1981).

The requirement that a statute bear a rational relation to a legitimate state objective is a less demanding test than the compelling state interest requirement. *See Roe v. Wade*, 410 U.S. 113, 172-73 (1973) (Rehnquist, J., dissenting). When states seek to support statutes such as fornication or sodomy laws, which were presumably enacted to further morality, on more generally acceptable bases such as "family values," courts may invalidate those statutes because they are not rationally related to those proffered bases. This is the thrust of the court's opinion in *Onofre*. Likewise, the Supreme Court of New Jersey in *State v. Saunders*, applied both "compelling interest" and "rational relation" tests while examining that state's fornication statute: "We fail to comprehend how the state's interest in preventing the propagation of illegitimate children will be measurably advanced." 75 N.J. at 217-18, 381 A.2d at 341 (1977).

655. *See, e.g.*, Brief for Appellant at 34-39, *Bowers v. Hardwick*, No. 85-140 (U.S. filed Dec. 19, 1985). For a compilation of state legislative histories that evidence the concerns of legislators in prohibiting sodomy, see *Appendix*, at 639-57, attached to this Survey.

656. Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174, 197.

make him happier, because, in the opinions of others, to do so would be wise, or even right.⁶⁵⁷

Mill's attempt to limit the enforcement of morality to the prevention of "harm to others" runs into definitional difficulties inherent in the concept of "harm." His view was reflected, however, in the Model Penal Code's proposal in 1955 to exclude from criminal prosecution "all sexual practices not involving force, adult corruption of minors, or public offense"⁶⁵⁸

In 1957, the British Wolfenden Committee on Homosexual Offenses and Prostitution released a report adopting the Millian view that it is not the law's business to regulate private morality unless society is to equate crime with sin.⁶⁵⁹ Two years later, the noted English jurist Lord Devlin, in his now famous Maccabean lecture "The Enforcement of Morals,"⁶⁶⁰ argued that society should impose on all of its members the moral views of the majority. He tendered two principal grounds in support of his view, the first being that "a recognized morality is as necessary to society as, say, a recognized government."⁶⁶¹ Lord Devlin maintained that "[a]ny immorality is capable of affecting society injuriously."⁶⁶² He further noted that "the suppression of vice is as much the law's business as the suppression of subversive activities."⁶⁶³ The purpose in either case is the preservation of an organized society. His second reason for societal enforcement of morality is that in a democracy, a majority of the members has the right to set the moral stage for the entire community.⁶⁶⁴ Lord Devlin illustrated the application of this second argument to the practice of homosexuality as follows:

We should ask ourselves in the first instance whether, looking at it

657. J. MILL, *supra* note 281, at 9.

658. MODEL PENAL CODE § 207.5 commentary at 277 (Tent. Draft No. 4, 1955). The Model Penal Code, as adopted in 1962, does not punish "deviate sexual intercourse" among consenting adults, "given the absence of harm to the secular interests of the community." *Id.*

659. "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." See WOLFENDEN REPORT, *supra* note 282, at 24.

660. LORD DEVLIN, *Morals in the Criminal Law*, in THE ENFORCEMENT OF MORALS (1965).

661. *Id.* at 11.

662. *Id.* at 15.

663. *Id.* at 13-14.

664. *Id.* at 86-101. Professor Dworkin suggested that the second argument, as developed in disjointed forms through chapters V, VI, and VII of Lord Devlin's *The Enforcement of Morals*, supported the community's moral responsibility to act on "its own lights—that is, on the moral faith of [the majority of] its members" in protecting its "central and valued social institutions." Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 993-94 (1966).

calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offense. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.⁶⁶⁵

Lord Devlin's views have been attacked on both grounds. As to his first argument, Professor H.L.A. Hart pointed out that "no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society."⁶⁶⁶ Even assuming such a threat existed, Professor Dworkin has pointed out the difficulty of determining just when a danger is of sufficient magnitude to justify its eradication.⁶⁶⁷

At least three lines of attack have been directed at Lord Devlin's second argument. Professor Hart, although agreeing that political power is better entrusted to the majority than to a selected class, nevertheless took issue with the view that the majority's views on morality should always be imposed upon the entire society. He raised the argument that even in a democracy, the "high-minded politician" must adhere to "the theory that his duty is to do what he thinks is right," and not to defer to community judgments on moral questions.⁶⁶⁸

665. LORD DEVLIN, *supra* note 660, at 17. Courts appear to embrace Lord Devlin's emphasis on the protection of society as a whole, as opposed to the protection of individual members of the society, whenever they decide to apply the "rational relation" test in the absence of a fundamental constitutional guarantee. In *Doe v. Commonwealth's Attorney*, a majority of the three-judge panel in the lower court, after excluding homosexuality from the realm of protection afforded by the right of privacy, was willing to find that the state interests of promoting morality and decency and of preventing moral delinquency rationally supported the Virginia sodomy statute. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). The court deferred to the legislature's finding that such proscribed conduct is *likely* to contribute to moral delinquency and relieved the state from the burden of having to prove that such conduct *actually* encourages moral delinquency. *Id.* at 1202.

666. H. HART, *LAW, LIBERTY AND MORALITY* 50 (1963). Professor Hart contended that Lord Devlin based his first argument on the incorrect assumption that "all morality . . . forms a single seamless web, so that those who deviate from the part are likely or perhaps bound to deviate from the whole." *Id.* at 50-51. Even if this assumption were to hold true, Professor Hart pointed out that "there [was] again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society." *Id.* at 51.

667. Dworkin noted that the danger may be "so small that it would be wise policy, a prudent protection of individual liberty from transient hysteria, to raise [a] constitutional barrier" which placed private sexual practices beyond the law's scrutiny. Dworkin, *supra* note 664, at 991.

668. H. HART, *supra* note 666, at 79-81. "No one should think even when popular morality is supported by an 'overwhelming' majority or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified." *Id.*

Professor Dworkin's attack of Lord Devlin's view took a quite different approach. Even if the legislator were to follow a moral consensus reached by the majority, Professor Dworkin disagreed with Lord Devlin as to how the majority should reach that consensus.⁶⁶⁹ For a legislator to deem a practice immoral, Lord Devlin only required that a reasonable man so believe, and also believe that "no right-minded member of his society could think otherwise," so long as the belief is "honest and dispassionate," and regardless of whether it is "right or wrong."⁶⁷⁰ Professor Dworkin, on the other hand, argued that the conscientious legislator must distinguish between consistently reasoned, principled moral convictions and prejudices, rationalizations, or personal aversions. If the latter constitute the bases of the consensus, the enforcement of that consensus is not justified.⁶⁷¹

Professor Sartorius suggested yet another line of attack. Echoing Mill, Professor Sartorius pointed out why legislators should not impose majority morality, however reached, on society as a whole. "[T]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place."⁶⁷² Mill conceded that the opinion of the overruling majority should prevail on matters of social morality involving duty to others because the majority is more likely to be right than wrong when it has only to consider how a certain practice affects its own interests. On matters involving self-regarding conduct, however, "the opinion of a similar majority . . . is quite as likely to be wrong as right, for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people."⁶⁷³

669. Dworkin, *supra* note 664, at 1000-02. "What is shocking and wrong is not [Lord Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality." *Id.* at 1001.

670. LORD DEVLIN, *supra* note 660, at 22-23.

671. The argument begs the question: How reasoned and principled need one's moral conviction be before they can be counted towards the moral consensus? See Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891, 896-97 (1972).

672. *Id.* at 903 (quoting J. MILL, *supra* note 281 at 81).

673. *Id.* at 904 (quoting J. MILL, *supra* note 281 at 81). Professor Sartorius modified Mill's views to accommodate instances where social interference is necessary to protect individuals against themselves, where "identifiable classes of individuals can be shown to be likely to manifest choice behavior inconsistent with their preferences as these preferences can be unproblematically attributed to them." *Id.* at 905-06.

Professor Hart also departed from Mill's absolute antipaternalism. He would allow legal interference not only to protect others from harm, but also "even when the victims consent to or against the acts which are harmful to them." H. HART, *supra* note 666, at 33. Even if Professor Hart meant only physical, and not moral, harm to be the event triggering legal interference into self-regarding conduct, he did not advance any theory to distinguish between physical and moral paternalism. Professor Hart's views appear to allow society to substitute

Professor Feinberg, in his recent book entitled *Harm to Others*,⁶⁷⁴ agreed with Mill that the "harm principle" is a valid legislative principle. He began with the premise that "whenever a legislator is faced with a choice between imposing a legal duty on citizens or having them at liberty, other things being equal, he should leave individuals free to make their own choice."⁶⁷⁵ He then considered various "liberty-limiting principles"⁶⁷⁶ which various philosophers have put forth to overcome the "presumptive case for liberty." He concluded that the "harm to others principle" derived from Mill's *On Liberty* presents the potentially most valid justification for penal intervention.⁶⁷⁷ He stated the principle as follows: "state interference with a citizen's behavior tends to be morally justified when it is reasonably necessary [and effective] to prevent harm or the unreasonable risk of harm to parties other than the person interfered with."⁶⁷⁸ He defined harm as "the thwarting, setting back, or defeating of an interest."⁶⁷⁹ The concept of "interest" is closely related to the "components of a person's well-being: . . . [what] promotes them is to his advantage or *in his interest*; what thwarts them is to his detriment or *against his interest*."⁶⁸⁰ Professor Feinberg specifically excluded from his definition of "harm" those invasions of interest to which the victim has consented or which constitute merely occasional unpleasant experiences.⁶⁸¹ The harm principle, he concluded, "will not suffice to legitimize prohibition of conduct on the grounds that it is offensive to others, harmful to the actor himself, or inherently immoral. Elastic it

its judgment for that of the individual on the question of what might constitute harm to himself. Professor Sartorius, however, would employ a concept of harm and immorality that would bear on "the needs and desires [of the individual whom society seeks] to protect against [himself], as [that individual] quite consistently [perceives his] needs and desires." Sartorius, *supra* note 671, at 906.

674. J. FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* (1984).

675. *Id.* at 9.

676. Among liberty-limiting principles considered by Feinberg are: the offense principle (preventing offenses to others), legal paternalism (preventing harm to the actor himself), legal moralism (preventing inherently immoral conduct even though it causes neither harm nor offense to anybody) and moralistic paternalism (preventing moral harm to the actor himself). *Id.* at 13, 26. *Harm to Others* is the first in a four-volume work. The later volumes would discuss offensive conduct (such as offensive nuisances, obscenity and pornography); harm to self (and the problems of legal paternalism) and harmless wrongdoing (including various justifications for morality enforcement under the heading "legal moralism"). *Id.* at vii. Feinberg found, however, that "paternalistic and moralistic considerations, when introduced as support for penal legislation, have no weight at all." *Id.* at 15.

677. *Id.*

678. *Id.* at 11.

679. *Id.* at 33.

680. *Id.* at 34.

681. *Id.* at 45-46.

may be, but it cannot stretch that far."⁶⁸² Thus, the "harm to others principle," as refined by Professor Feinberg, would not justify the prohibition of private sexual activities among consenting adults.

Because notions of morality appear, within the context of a pluralistic society, not only heterogeneous, but also transient, Mill's suggestion of "harm to others" as a neutral ground for penal intervention is appealing when applied to the arena of consensual adult sexual activities, despite definitional problems with the concept. The Model Penal Code in its final form adopted the Millian view of abolishing sanctions against deviate sexual intercourse between consenting adults, regardless of gender, or marital status.⁶⁸³ The Code's underlying rationale is that atypical sexuality between consenting adults does not occasion any harm to the secular interests of the community.⁶⁸⁴

2. THE STATE INTEREST IN MORALITY IN THE FACE OF FUNDAMENTAL RIGHTS

Where courts have found a fundamental right, they have been unwilling to recognize the state's interest in promoting morality as sufficiently compelling, if no legally cognizable harm resulted from the breach of the challenged statute. In *Stanley v. Georgia*,⁶⁸⁵ after holding that the first amendment protects possession of obscene materials in the home, the Court refused to defer to Georgia's unproven assumption that exposure to obscene materials may lead to deviate sexual behavior or crimes of sexual violence.⁶⁸⁶

In *Roe v. Wade*,⁶⁸⁷ the Court recognized that the fundamental right of privacy protects a woman's decision whether or not to terminate her pregnancy.⁶⁸⁸ The Court then refused to allow Texas to act on its assumptions that life begins at conception, or that abortion is immoral or offensive and not "good for the people,"⁶⁸⁹ or that it could

682. *Id.* at 245.

683. The term "deviate sexual intercourse" would encompass all acts proscribed by various state sodomy statutes. It is intended to refer to "various styles of sexual intimacy between man and wife and to sexual relations between unmarried persons, regardless of gender." MODEL PENAL CODE § 213.2 commentary at 363 (1980).

684. *Id.* at 369.

685. 394 U.S. 557 (1969).

686. *Id.* at 566.

687. 410 U.S. 113 (1972).

688. *Id.* at 153.

689. *Cf.* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1972). After finding that commerce in obscene material and its exhibition in public places were not protected by the fundamental right of free speech or right to privacy, the Court upheld a Georgia statute criminalizing the distribution of obscene material. The Court deferred to the state legislature's determination that a nexus did or might exist between antisocial behavior and obscene material, although conclusive proof of such a connection was lacking. *Id.* at 60, 63. The Court went on to grant

contribute to moral delinquency.⁶⁹⁰ The Court thus rejected the state's interest in protecting prenatal life.

Instead, the Court acknowledged only the state's interest in protecting the *potentiality* of human life—an interest the Court did not recognize as compelling until after the first trimester of pregnancy.⁶⁹¹ The *Roe* Court's notable lack of discussion on morality and offensiveness, along with its acknowledged resolve to judge questions of constitutionality "free of emotion and of predilection," indicate that it required considerably more than society's mere disapproval to justify a denial of the right of privacy in that case.⁶⁹²

Lower federal courts have also followed the same mode of critical analysis in refusing to uphold public morality as a sufficiently compelling interest to justify sodomy statutes. In *Baker v. Wade*,⁶⁹³ the district court held that the assertion of "general platitudes (morality, decency, etc.*)" is totally inadequate to justify Texas's unprovable assumptions that criminal sanctions against sodomitic acts would promote morality and decency. The court went on to hold that even widespread public distaste would not constitute a "compelling state interest" sufficient to justify an infringement upon the right of privacy.⁶⁹⁴

In *United States v. Doe*,⁶⁹⁵ the District of Columbia Superior Court addressed a constitutional attack on the District of Columbia's sodomy statute, which was directed to "[e]very person who . . . [takes] into his mouth or anus the sexual organ of any other person"⁶⁹⁶ The defendants, who were arrested for violating the statute in a

the states a sweeping mandate to act "on unprovable assumptions about what is good for the people," to protect "the interest of the public in the quality of life and the total community environment." *Id.* at 62, 58.

690. Texas did not press the argument that antiabortion laws served to discourage illicit sexual conduct. The Court nevertheless concluded that this was not a proper state purpose, and that in any case, the Texas statute was overbroad for failing to distinguish between married and unwed mothers. *Id.* at 148.

691. *Id.* at 163. The Court's decision as to when the "compelling" point is reached was based on the state of "present medical knowledge."

692. *Id.* at 116. The *Roe* Court began by quoting Justice Holmes's "now-vindicated dissent" in *Lochner v. New York*, that "[the Constitution] is made for people of fundamentally differing views, and the accident of [the Court's] finding certain opinions novel and even shocking ought not to conclude [its] judgment upon the question" of constitutionality. *Id.* at 117 (quoting *Lochner*, 198 U.S. at 76).

693. 553 F. Supp. 1142 (N.D. Tex. 1982). The Fifth Circuit Court of Appeals reversed the lower court opinion, holding the Texas statute constitutional on the strength of *Doe*'s precedential value.

694. *Id.* at 1142.

695. 12 CRIM. L. REP. 2531 (BNA) (Mar. 28, 1973).

696. *Id.* at 2532.

“quasi-public place,”⁶⁹⁷ claimed that the statute was overbroad because it could reach behavior protected by the right to privacy. In order to save the statute from constitutional infirmity, the court interpreted it so as to exclude from its proscription the private sexual activities of consenting adults.

In the course of its opinion, the court addressed a number of governmental interests in proscribing sodomy. After reviewing the long history of Judeo-Christian abhorrence of sodomy, the court observed that “[t]he mere recitation of this history suggests that the governmental interest served by this statute is not only far from compelling, but may well be violative of the First Amendment to the Constitution.”⁶⁹⁸ Aside from the establishment issue, the “enforcement of Judeo-Christian notions of sexual morality, absent a clear secular justification, is not a ‘compelling’ governmental interest sufficient to override the fundamental right of individuals to privacy in sexual matters.”⁶⁹⁹

In *People v. Onofre*,⁷⁰⁰ the New York Court of Appeals affirmed a lower court’s opinion declaring New York’s sodomy statute unconstitutional. The state had argued that the statute would, inter alia, promote public morality. The court rejected the propriety of such a goal:

Any purported justification for the consensual sodomy statute in terms of upholding public morality is belied by the position reflected in the *Eisenstadt* decision in which the court carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home. There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. . . . So here, the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.⁷⁰¹

The Supreme Court of Pennsylvania in *Commonwealth v.*

697. *Id.* at 2531.

698. *Id.* at 2533.

699. *Id.*

700. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

701. *Id.* at 489-90, 415 N.E.2d at 941, 434 N.Y.S.2d at 951-52 (citation omitted).

*Bonadio*⁷⁰² likewise overturned that state's sodomy statute. The court rejected any state interest in morality as a proper exercise of the police power, even in the absence of a constitutional right to privacy. The court stated:

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*. 'No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners.' . . . Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be "moral" changes with the times and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals. Enactment of the Voluntary Deviate Sexual Intercourse Statute, despite the fact that it provides punishment for what many believe to be abhorrent crimes against nature and perceived sins against God, is not properly in the realm of the temporal police power.⁷⁰³

The court quoted extensively from Mill's *On Liberty*⁷⁰⁴ and concluded that Mill's "philosophy, as applied to the issue of regulation of sexual morality presently before the court, or employed to delimit the police power generally, properly circumscribes state power over the individual."⁷⁰⁵

In *State v. Pilcher*,⁷⁰⁶ the Supreme Court of Iowa held Iowa's sodomy statute unconstitutional as it sought to regulate the private, consenting sexual interaction of unmarried adults of the opposite sex. The decision did not reach the rights of homosexuals because the defendant in the case specifically excluded that issue.⁷⁰⁷ Although the holding is thus limited to heterosexual acts of sodomy, the Court's reasoning is nevertheless instructive. After recognizing a right to sexual privacy for unmarried adults under *Eisenstadt*,⁷⁰⁸ the court stated that "[b]efore the state can encroach into recognized areas of fundamental rights, such as the personal right of privacy, there must exist a

702. 490 Pa. 91, 415 A.2d 47 (Pa. 1980).

703. *Id.* at 96, 415 A.2d at 50 (citation omitted).

704. *See supra* note 281 and accompanying text.

705. *Bonadio*, 415 A.2d at 51.

706. 242 N.W.2d 348 (Iowa 1976).

707. *Id.* at 352.

708. *See supra* notes 224-34.

subordinating interest which is compelling. . . . The State has not shown the existence of any such interest here."⁷⁰⁹ The court cited *Buchanan v. Batchelor*⁷¹⁰ for the proposition that "[a]bsent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation"⁷¹¹ Although *Buchanan* was ultimately vacated on comity grounds, the Supreme Court of Iowa noted that *Buchanan's* "reasoning concerning sodomy is capable of reliance."⁷¹²

Constitutional challenges to prosecutions for fornication raise many of the same issues as do prosecutions for sodomy. Two such cases are *State v. Saunders*,⁷¹³ a case from the Supreme Court of New Jersey, and *Doe v. Duling*,⁷¹⁴ a Virginia federal district court case which was subsequently vacated on standing grounds.⁷¹⁵ Both courts acknowledged a right of privacy in unmarried adults to engage in private consensual intercourse.⁷¹⁶ Both courts rejected asserted state interests in morality.

The New Jersey court, although willing to admit that the state could act in the area of public morality, found it necessary to "strike down a measure which has as its objective the regulation of *private* morality. To the extent that [New Jersey's fornication statute] serves as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs, it is not an appropriate exercise of the police power."⁷¹⁷ The *Duling* court similarly ruled that "[t]he state interest of promoting healthy and conforming social values is not a compelling interest which justifies deprivation of the constitutional right to privacy in adult sexual relations."⁷¹⁸

Other morality-based state interests in promoting family values have not fared well at the hands of those courts that have directly addressed this interest. The *Onofre* court spoke of the institution of marriage as merely "[c]ommendable."⁷¹⁹ The *Saunders* court would not permit the state to intrude into this area: "we can only reiterate that decisions such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction,

709. *Pilcher*, 242 N.W.2d at 359.

710. 308 F. Supp. 729 (N.D. Tex. 1970), *vacated*, 401 U.S. 989 (1971).

711. *Id.* at 733.

712. *Pilcher*, 242 N.W.2d at 357.

713. 75 N.J. 200, 381 A.2d 333 (N.J. 1977).

714. 603 F. Supp. 960 (E.D. Va. 1985).

715. No. 85-1326 (4th Cir. 1986) (available Feb. 17, 1986, on WESTLAW, Allfeds database.)

716. *Doe*, 603 F. Supp. at 967; *Saunders*, 75 N.J. at 213, 381 A.2d at 339.

717. *Saunders*, 75 N.J. at 219, 381 A.2d at 342.

718. *Duling*, 603 F. Supp. at 967.

719. *Onofre*, 51 N.Y.2d at 489, 415 N.E.2d at 941, N.Y.S.2d at 951.

nor fall within the regulatory power of those who are elected to govern."⁷²⁰ The *Duling* court also rejected family values as beyond the state's business altogether:

Just as the decisions whether to bear or beget a child, a decision to marry is a personal choice protected by the right of privacy. . . . Such a decision cannot be coerced through infringement on other constitutional rights. Moreover, this state purpose, an attempt to regulate public morals, cannot extend into the privacy of one's home.⁷²¹

3. NARROWNESS OF MEANS

One approach the courts have used to decide whether a statute meets the "narrowly drawn" requirement is to determine whether the state's interest could be advanced by alternative means that would not affect the individual's fundamental right.⁷²² One argument states may advance is that the sodomy statutes, though rarely enforced, still serve to express society's disapproval of the prohibited acts. According to this argument, then, the criminal system may legitimately contribute to the moral education of society.⁷²³ Courts may not allow resort to the coercive powers of the criminal law, however, where the community can otherwise condemn morally repugnant acts through "theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means."⁷²⁴ Similarly, courts may be unwilling to uphold sodomy statutes solely on the grounds of protection of public decency, where statutes are, or could be, enacted to specifically prohibit the public display or public solicitation of sodomitic acts.⁷²⁵

It seems obvious, however, that if a court were to uphold morality as a sufficiently compelling interest to override a fundamental right to privacy, then sodomy and fornication statutes would pass the "narrowly drawn" test. Because those acts would themselves constitute "the substantive problem which legitimately concerns"⁷²⁶ the state, a

720. *Saunders*, 75 N.J. at 219, 381 A.2d at 342.

721. *Duling*, 603 F. Supp. at 967.

722. "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

723. Because criminal liability is seldom imposed on omissions except where a duty for affirmative action arises from common law, statute or contract, a knowledge of wrong based solely on what the law punishes would be sadly amiss. Furthermore, sporadic and erratic enforcement would foster disrespect for the law rather than moral enhancement.

724. *Onofre*, 434 N.Y.S.2d at 951 n.3.

725. Analogically, the state can properly uphold its interest in the protection of the young by enacting laws against homosexual conduct by force or with a minor.

726. *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2132 (1984).

law prohibiting just those acts would be perfectly tailored.

C. Health

1. THE STATE'S INTEREST IN THE PROTECTION OF PUBLIC HEALTH

The Supreme Court of the United States has recognized that the enactment and enforcement of statutes aimed at the preservation of public health constitutes a legitimate exercise of the state's police power.⁷²⁷ The state's interest in safeguarding the health of its citizens becomes more important when a particular threat to life grows more dangerous. Thus, in *Roe v. Wade*,⁷²⁸ the Court held that the state's interest in the health of the mother was not compelling until after the first trimester of the pregnancy because it found that the mortality rate for abortions performed in later stages of pregnancy exceeded the mortality rate in normal childbirth.⁷²⁹ The Court went on to grant the state the power to regulate the abortion procedure after the first trimester of pregnancy, even though it had found earlier that the right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁷³⁰ The *Roe* decision thus established that the state may assert a compelling interest in protecting a person from personal decisions that affect his or her own body, notwithstanding that in doing so, the state may be infringing upon the fundamental rights of the very person whom it seeks to protect.

If, as the *Roe* Court suggested, the state's interest in protecting an individual's health can reach a compelling point sufficient to sustain state regulation, then the state's interest in preserving public health would seem to take on even greater importance. The state has traditionally exercised its police power to control the spread of communicable diseases through measures that have restricted individual rights.

In *Jacobson v. Massachusetts*,⁷³¹ the Supreme Court of the United States upheld a state statute that permitted municipalities to require

727. "A state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). Similarly, the *Roe* Court approved the state's assertion of "important interests in safeguarding health." *Roe v. Wade*, 410 U.S. 113, 154 (1972).

728. 410 U.S. 113 (1972).

729. *Id.* at 163.

730. *Id.* at 153.

731. 197 U.S. 11 (1905).

all citizens to obtain vaccination against smallpox, a contagious disease.

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing country essential to the safety, health, . . . and morals of the community. Even liberty, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.⁷³²

Some courts have allowed the states to prevent the spread of venereal diseases by subjecting persons suspected of being afflicted with the disease to involuntary physical examination.⁷³³ Other courts, however, declined to uphold the constitutionality of involuntary physical examinations based on mere suspicion.⁷³⁴ Quarantine and isolation is another means of controlling contagious diseases.⁷³⁵ Even though the courts have established that a mere suspicion will not justify the quarantine, they have only required that the person placed under quarantine is likely to have contracted the disease.⁷³⁶ Furthermore, the state did not have "to wait until the person affected with a contagious disease has actually caused others to become sick . . . before he is placed under the quarantine."⁷³⁷ Thus, the compelling necessity for health regulations may justify the infringement on fundamental rights.

The Court in *Jacobson*, however, was careful to announce its willingness to interfere to "prevent wrong and oppression," where state regulations are "arbitrary and oppressive" in their enforcement.⁷³⁸ Similarly, the *Roe* Court only allowed the state to regulate the abortion procedure during later stages of pregnancy only "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."⁷³⁹ Thus, even though a state regulation may address a compelling interest in protecting the health of its people, the Court could still invalidate it on the ground that it is not

732. *Id.* at 26-27.

733. *See, e.g.,* *People v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944) (The court found it reasonable to suspect that prostitutes may be carriers of venereal diseases). *See also infra* note 815 and accompanying text.

734. *See, e.g.,* *Wragg v. Griffin*, 85 Iowa 243, 170 N.W. 400 (1919) (Restraint of a person solely as a suspect of having a venereal disease for the purpose of subjecting him to involuntary examination is a deprivation of his liberty without due process of law.).

735. *See infra* note 816 and accompanying text.

736. 302 Ill. 422, *People ex rel. Barmore v. Robertson*, 113 N.E. 815 (1922). *See also In re Arata*, 52 Cal. App. 380, 198 P. 814 (1921).

737. 302 Ill. at 434, 134 N.E. at 820.

738. 197 U.S. at 38-39.

739. 410 U.S. at 163.

“narrowly drawn to express only the legitimate state interest at stake.”⁷⁴⁰

The prevention of the spread of sexually-transmitted diseases is likely to fail constitutional muster as a state interest justifying the sodomy statutes, because such diseases could be controlled through other means which are both less drastic and more efficient.⁷⁴¹ State courts have struck down fornication statutes on the same grounds. In *State v. Saunders*,⁷⁴² even though the Court did “not question the state’s compelling interest in preventing the spread of venereal diseases,”⁷⁴³ it concluded that the fornication statute would actually hamper the prevention of such diseases:

To the extent that any successful program to combat venereal disease must depend upon affected persons coming forward for treatment, the present statute operates as a deterrent to such voluntary participation. The fear of being prosecuted for the ‘crime’ of fornication can only deter people from seeking such necessary treatment.⁷⁴⁴

The *Duling* court specifically found that “the fornication statute is not narrowly drawn. All single people who engage in sexual intercourse do not pose a threat of spreading sexual diseases.”⁷⁴⁵ Similarly, in *In re P*,⁷⁴⁶ the court held that the attenuated relationship between prostitution and venereal diseases makes it “unreasonable to prohibit all prostitution for the sake of eradicating 5% of the venereal disease health hazard”⁷⁴⁷ actually attributable to prostitution; even though it admitted that “the state may have a legitimate interest in seeking to eradicate even this small incidence of disease.”⁷⁴⁸

The prohibitions on homosexual conduct are likely to result in homosexuals becoming involved in furtive affairs and engaging in sexual intercourse with strangers and prostitutes. This promiscuous nature of homosexual relationships, in turn, increases the chance of contracting and transmitting infectious diseases. Furthermore, fear of prosecution under sodomy statutes will discourage homosexuals from seeking necessary treatment, or identifying their partners, thereby seriously undermining the efforts of health authorities to control the spread of venereal diseases.

740. *Id.* at 155.

741. *See supra* notes 731-37 and accompanying text.

742. 75 N.J. 200, 381 A.2d 333 (N.J. 1977).

743. *Id.* at 217-18, 381 A.2d at 341.

744. *Id.* at 218, 381 A.2d at 342.

745. *Duling*, 306 F. Supp. at 967.

746. 92 Misc.2d 62, 400 N.Y.S.2d 455 (1977).

747. *Id.* at 73, 400 N.Y.S.2d at 466.

748. *Id.*

The debate over the proper balance between the state's police power to protect the public health and respect for individual rights has taken on added dimensions of importance and urgency, as a deadly epidemic illness, Acquired Immuno-Deficiency Syndrome (AIDS) continues to spread across the country. The following section will discuss whether a state interest in controlling the spread of AIDS would justify the enactment and enforcement of sodomy statutes.

2. AIDS: A NEW CASE FOR STATE REGULATION OF HOMOSEXUAL CONDUCT?

a. Background

In 1981, a California doctor began to treat several patients for an unusual lung infection called *Pneumocystis carinii* pneumonia.⁷⁴⁹ This type of infection generally only attacks persons who have a weakened immune system,⁷⁵⁰ such as cancer victims and transplant recipients.⁷⁵¹ All of the persons with the infection were homosexuals.⁷⁵² The doctor reported these incidences to federal health authorities at the Center for Disease Control in Atlanta, Georgia (Center).⁷⁵³ At that time, there were only four reported cases.⁷⁵⁴

The Center published its first report on the strange new disease in 1981, naming it acquired immunodeficiency syndrome.⁷⁵⁵ Several months after the Center published its report, doctors from around the country reported over 100 new cases of AIDS.⁷⁵⁶ The Center reports that since 1979, doctors have diagnosed 18,406⁷⁵⁷ cases. Of this number of AIDS victims, 9,780, or fifty-three percent, have died.⁷⁵⁸ With the number of AIDS cases expected to double annually, researchers estimate that doctors will diagnose over 12,000 new cases between July 1985 and June 1986,⁷⁵⁹ and a total of 40,000 new cases

749. *AIDS: A Growing Threat*, Time Magazine, Aug. 12, 1985, at 41 [hereinafter cited as *A Growing Threat*].

750. *Id.*

751. *Id.*

752. *Id.*

753. *Id.*

754. *Id.*

755. 30 CENTER FOR DISEASE CONTROL, MORBIDITY & MORTALITY WEEKLY REPORT 250 (1981).

756. See *A Growing Threat*, *supra* note 749, at 42.

757. Telephone interview with the office of Mr. Charles Fallis, Center for Disease Control, Atlanta, Georgia (Mar. 19, 1986).

758. *Id.* Prior to January 1, 1983, 73% of those persons that doctors diagnosed as having AIDS died. See United States Congress, OFFICE OF TECHNOLOGY ASSESSMENT, REVIEW OF THE PUBLIC HEALTH SERVICES RESPONSE TO AIDS 6 (Wash., D.C.) (pub. no. OTA-TM-H-24) (Feb. 1985) [hereinafter cited as GOVERNMENT RESPONSE TO AIDS].

759. Curran, Morgan, Hardy, Jaffe, Darrow & Dowdle, *The Epidemiology of AIDS*:

over the following two years.⁷⁶⁰ At present, no one has recovered from the disease.⁷⁶¹

“HUMAN T-cell lymphotropic virus type III/lymphadenopathy-associated infection” (HTLV-III/LAV) is the cause of the AIDS disease.⁷⁶² The “T-cells,”⁷⁶³ which are found in the white blood cells, can be broken down into two subsets. One subset, “T-4,” functions to “help” the body’s immune system function when foreign materials invade the body.⁷⁶⁴ The other subset, “T-8,” functions to “suppress” the immune system when foreign materials invade the body.⁷⁶⁵ Consequently, the “T-4” subset is called the “helper/inducer” portion of the “T-cell,” and the “T-8” subset is called the “suppressor” portion of the “T-cell.”⁷⁶⁶

The “T-4” subset performs a scavenging function, engulfing and consuming foreign materials that enter the body.⁷⁶⁷ Researchers have concluded that HTLV-III/LAV enters the cell through a cell surface interaction with the “T-4” subset.⁷⁶⁸ Once inside the “T-cell,” HTLV-III/LAV reproduces at a rate over 1000 times as fast as any other virus.⁷⁶⁹ Eventually, HTLV-III/LAV destroys the entire “T-cell.”⁷⁷⁰ Without the “T-cell,” the immune system allows bacteria or viruses to enter the body and cause diseases where they otherwise would not but for the body’s weakened condition.⁷⁷¹

Some of the typical symptoms that AIDS victims experience are fever, weight loss, sore throat, swollen lymph nodes, diarrhea, and a general feeling of discomfort.⁷⁷² Not all persons who suffer from AIDS experience the typical symptoms, however. Persons with AIDS but without the symptoms, called “carriers,” can infect others

Current Status and Future Prospects, 229 SCI. MAG. 1352-57 (Sept. 1985) [hereinafter cited as *The Epidemiology of AIDS*].

760. GOVERNMENT RESPONSE TO AIDS, *supra* note 758, at 6.

761. See *supra* note 757.

762. Redfield, Markham, Salahuddin, Wright, Sarngadharan & Gallo, *Heterosexually Acquired HTLV/LAV Disease*, 254:15 J. AM. MED. 2094 (Oct. 18, 1985) [hereinafter cited as *Heterosexually Acquired HTLV/LAV*]; GOVERNMENT RESPONSE TO AIDS, *supra* note 758, at 4.

763. Also known as “T-lymphocytes.” See GOVERNMENT RESPONSE TO AIDS, *supra* note 758, at 4.

764. *Id.*

765. *Id.*

766. *Id.*

767. *Id.*

768. *Id.*

769. *A Growing Threat*, *supra* note 749, at 42.

770. *Id.*

771. See GOVERNMENT RESPONSE TO AIDS, *supra* note 758, at 3.

772. See *The Epidemiology of AIDS*, *supra* note 759, at 1354.

with the disease.⁷⁷³ The condition of symptomless AIDS is called "AIDS-related complex" (ARC).⁷⁷⁴ Researchers estimate that 500,000 to 1,000,000 Americans have ARC.⁷⁷⁵ No one knows just what is going to happen to these "carriers," but researchers estimate that one to two percent of the "carriers" will become AIDS victims annually,⁷⁷⁶ with the total number eventually reaching ten to fifteen percent of the "carriers."⁷⁷⁷

Researchers have isolated four ways in which AIDS victims and "carriers" transmit the disease: (1) sexual contact; (2) intravenous drug abuse; (3) blood transfusions, and; (4) mother to child at birth where one parent has the disease or is a member of a high risk group.⁷⁷⁸ Newly developed blood screening methods, however, should eliminate blood transfusions as a means of contracting AIDS.⁷⁷⁹

Transmission of HTLV-III/LAV through infected blood is the surest way to contract AIDS.⁷⁸⁰ There is also evidence that other body fluids, such as saliva, contain the AIDS virus, but researchers have determined that the incidence of transmission through saliva is

773. Often the symptomless AIDS carriers are unaware that they are infectious. See *A Growing Threat*, *supra* note 749, at 42.

774. *Id.*

775. See *supra* note 757.

776. See *The Epidemiology of AIDS*, *supra* note 759, at 1354.

777. See *A Growing Threat*, *supra* note 749, at 42.

778. See *supra* note 759.

779. Federal authorities licensed a serologic blood test for antibodies to HTLV-III/LAV in March, 1985. *The Epidemiology of AIDS*, *supra* note 759, at 1356. Blood and plasma centers throughout the United States are currently using this test. Results show that only one quarter of one percent of the donated blood contains HTLV-III/LAV. *Id.* The blood centers can discard the HTLV-III/LAV infected blood without significantly affecting blood supplies. *Id.* The new blood screening test should help detect the disease before donor blood is transmitted to hemophiliacs and others, thus, eliminating blood transfusion as a high risk means of contracting AIDS. The new test uses an enzyme-linked immunosorbent assay (ELISA) to detect antibodies to HTLV-III/LAV. SPECIAL REPORT: *The AIDS Epidemic*, 312:8 NEW ENG. J. MED. 521 (Feb. 21, 1985) [hereinafter cited as *The AIDS Epidemic*]. Despite the new blood test, doctors will continue to diagnose AIDS in hemophiliacs and blood transfusion recipients because the long incubation period prevents those persons that the disease has already infected from benefiting from the blood screening test. *Id.* AIDS researchers have also developed heat treatments that eliminate HTLV-III/LAV from donated blood. *Id.* To further decrease the incidences of HTLV-III/LAV donor infected blood, the U.S. Public Health Service asked members of AIDS high risk groups to voluntarily refrain from donating blood. See *The Epidemiology of AIDS*, *supra* note 759, at 1356.

780. *AIDS*, Newsweek, Aug. 12, 1985, at 24 [hereinafter cited as *AIDS*]. This may be the reason for the high incidences of transmission among homosexuals. Generally, bleeding is more likely to occur during rectal intercourse than it is during vaginal intercourse. *Id.* As such, the AIDS virus can gain easy entry into the bloodstream through semen, which often transmits the disease.

almost nonexistent.⁷⁸¹ The risk of transmission is much greater with another body fluid, namely semen.⁷⁸² To avoid any risk of transmission, researchers assert that persons should avoid *any* sexual activity involving the exchange of semen with a person who is known or suspected to be infected with AIDS.⁷⁸³ Researchers have concluded that casual contact will not transmit the disease.⁷⁸⁴

Researchers have classified certain groups as high risk groups. These groups are homosexuals, intravenous drug abusers, and hemophiliacs.⁷⁸⁵ AIDS victims, however, are not limited to members of the high risk groups. Research indicates that all types of heterosexual contact can transmit the disease.⁷⁸⁶ At present, heterosexuals account for at least 118 of the reported AIDS cases.⁷⁸⁷ In fact, in Central Africa, where many researchers believe the disease originated, AIDS is most prevalent among heterosexuals.⁷⁸⁸ Many of the heterosexuals in Central Africa who have the disease, however, have come in contact with a large number of sexual partners.⁷⁸⁹ In the United States, many of the heterosexuals with AIDS are intravenous drug users.⁷⁹⁰ It follows that the heterosexuals with AIDS in both the United States and Central Africa have had contact with or are associated with members of the high risk groups. Exactly how the disease spread from Central Africa to the United States remains unanswered.⁷⁹¹

781. Sande, *Transmission of AIDS: The Case against Casual Transmission*, 314:6 NEW ENG. J. MED. 380-84 (Feb. 6, 1986) [hereinafter cited as *Transmission of AIDS*].

782. *The Epidemiology of AIDS*, *supra* note 759, at 1356.

783. *Id.*

784. *See Transmission of AIDS*, *supra* note 781, at 380-84.

785. GOVERNMENT RESPONSE TO AIDS, *supra* note 758, at 6.

786. Telephone conversation with Dr. Margaret Fischel, AIDS Researcher at Jackson Memorial Hospital, Miami, Florida (Feb. 3, 1986). Researchers are not certain as to the mechanics of heterosexual transmission, however. *Id.* Heterosexual contact is defined as oral-genital, vaginal, or rectal intercourse. *Heterosexually Acquired HTLV/LAV*, *supra* note 762, at 2094.

787. *A Growing Threat*, *supra* note 749, at 43. Of the heterosexual cases, only 14 are female. *AIDS*, *supra* note 780, at 24. AIDS among heterosexuals has been closely associated with steady sexual activity with a heterosexual partner who has AIDS or is a "carrier." *The Epidemiology of AIDS*, *supra* note 759, at 1355.

788. *A Growing Threat*, *supra* note 749, at 43-44.

789. *Id.* at 43.

790. *AIDS*, *supra* note 780, at 23.

791. One of the leading theories of how AIDS made its way into the United States suggests that the disease first spread from Central Africa to the Caribbean. *AIDS*, *supra* note 780, at 23. From the Caribbean country of Haiti, a popular vacation resort for homosexuals, visitors contracted the disease and brought it over to the United States. *Id.* The disease has spread far beyond Central Africa, the Caribbean, and the United States, as research indicates that almost every European country has reported incidences of AIDS. *Id.*

Some experts are calling AIDS the number one health menace.⁷⁹² Others feel that the disease will be the worst of this century.⁷⁹³ The public has reacted to AIDS with widespread fear. A recent magazine survey revealed that the percentage of people who fear that either they or someone they know will contract AIDS has doubled over the past two years.⁷⁹⁴

Because a large segment of the population is ignorant as to the actual cause and transmission of AIDS, many people have reacted irrationally. Recently, the technicians of a New York television station refused to work in the studio during a live interview with an AIDS victim.⁷⁹⁵ School authorities have refused to allow a young boy with AIDS to return to school;⁷⁹⁶ firemen have refused to give AIDS victims, and homosexuals in general, mouth-to-mouth resuscitation;⁷⁹⁷ ambulance drivers have refused to transport AIDS victims.⁷⁹⁸ Additionally, undertakers in several cities have refused to embalm AIDS victims.⁷⁹⁹

Undoubtedly, the list of public incidents such as these is growing daily. At what point societal pressures will force governmental action to regulate homosexual activity as a means of protecting public health is an open question. "Control of AIDS and HTLV-III/LAV infection cannot await the benefits of future research. There is an urgent need for community groups and health professionals to work together and utilize the tools available to prevent AIDS and care for its victims."⁸⁰⁰

b. Analysis

The high mortality rate of those who have contracted AIDS, the alarming rate at which AIDS is spreading, and the absence of any known cure for AIDS, pose a significant health problem with which the states must deal. *Hardwick v. Bowers*⁸⁰¹ presents the Court with the questions of whether the fundamental right of privacy protects

792. *Id.* at 20.

793. *A Growing Threat*, *supra* note 749, at 41.

794. *AIDS*, *supra* note 780, at 23.

795. *A Growing Threat*, *supra* note 749, at 41.

796. *Id.* at 45. The boy was a hemophiliac. *Id.* The school superintendent feared that the boy posed too much of a threat to the other students. *Id.* The superintendent said that according to state health officials, body fluids, such as saliva, transmitted the disease. *Id.* Recent discoveries, however, indicate that saliva and casual contact do not transmit AIDS. See *Transmission of AIDS*, *supra* note 781, at 380-84.

797. *A Growing Threat*, *supra* note 749, at 45.

798. *Id.*

799. *Id.*

800. *The Epidemiology of AIDS*, *supra* note 759, at 1357.

801. 760 F.2d 1202 (11th Cir.), *reh'g denied*, 765 F.2d 1123 (11th Cir.), *cert. granted*, 106 S. Ct. 342 (1985).

private adult homosexual conduct and, if so, whether a Georgia sodomy statute infringes upon that right. Notwithstanding the possibility that the Supreme Court may find the Georgia sodomy statute unconstitutional, the Court may provide the states with guidelines for enacting AIDS legislation that would pass constitutional muster. In this respect, the Court may use *Hardwick* in the same manner as it used *Roe*. Although the Court in *Roe* struck down the antiabortion statute, the Court utilized available medical data so as to provide states with guidelines for enacting constitutional antiabortion legislation.

Similar to *Roe*, the Court in *Hardwick* may be presented with the most recent medical data on AIDS as a possible justification for the Georgia sodomy statute. Assuming *arguendo* that the Court holds that the fundamental right of privacy protects consensual homosexual sodomy, the Court can use the AIDS data to find a compelling state interest in preventing the spread of the disease. The Court could hold, as in *Roe*, that a person has a fundamental right of privacy to make decisions regarding his or her own body—in this case, the decision to engage in homosexual sodomy. Armed with the data on AIDS, the Court may decide to hold that the state's interest in preventing AIDS victims from engaging in sodomy limits the right of privacy. By doing so, the Court can reemphasize the principle that it set forth in *Roe* that the state can protect a person from himself, even if the person whose rights are infringed is at the same time the person whom the state is seeking to protect. The State of Georgia, like other states in their efforts to prevent the spread of AIDS, may enact legislation to protect homosexuals from their own personal decisions to engage in acts of sodomy. This would apply to homosexuals who either have AIDS or those who will engage in sodomitic acts with homosexuals who do have AIDS. This type of legislation, however, would have broader-reaching implications than the legislative guidelines that the Court set in *Roe*. The only health interests at stake in antiabortion statutes are those of the pregnant woman and the fetus. On the other hand the health interests at stake in sodomy statutes are not only those of the homosexuals who engage in sodomy, but also those of others who engage in activities that may transmit the disease.

Several cities have already taken active measures to control the spread of AIDS by regulating homosexual activity. In an effort to curb the sexual activity of homosexuals, the Health Director for the City of San Francisco, for example, announced that the Health Department would take steps to curb sexual activity in the city's gay bathhouses.⁸⁰² Initially, the Health Director announced that either

802. Washington Post, Apr. 10, 1984, § A2. For a constitutional analysis of the restrictions

the city's gay bathhouses eliminate all sexual activity or the city would not renew their licenses.⁸⁰³ Shortly thereafter, the Health Director ordered the closing of the gay bathhouses and other establishments suspected of promoting the spread of AIDS.⁸⁰⁴ Within several hours after the Director's order, however, several clubs reopened, challenging the order.⁸⁰⁵ Following the actions of the health authorities in San Francisco, the City of New York empowered its health directors to close gay bathhouses and other establishments where "unsafe sex" took place.⁸⁰⁶

States may attempt to justify their sodomy statutes by advancing the argument that such statutes are necessary to contain AIDS. One attack on such an argument, however, is based upon a principle that the Supreme Court expressed in *Weinberger v. Weisenfeld*.⁸⁰⁷ In *Weinberger*, the Court stated that a court may reject a state's asserted reason for enacting a statute if the asserted reason "could not have been a goal of the legislation"⁸⁰⁸ at the time of its enactment. The *Weinberger* rationale, then, might disqualify prevention of AIDS as a post-hoc justification for a sodomy statute. The recent emergence of AIDS⁸⁰⁹ indicates quite obviously that the prevention of AIDS could not have been a goal of the legislatures at the time they enacted the sodomy statutes.

The states' response to this argument would be to focus on the their general interest in preventing diseases, of whatever kind. As the courts in *People v. Onofre*⁸¹⁰ and *Commonwealth v. Bonadio*⁸¹¹ have stated, and as the State of Georgia is presently asserting in *Hardwick*, one of the goals of sodomy statutes is to prevent the spread of sexually transmitted diseases.⁸¹² As researchers have established that AIDS can be transmitted sexually, it appears that the prevention of the spread of AIDS is consistent with at least one of the goals of sodomy

on sexual activity in gay bathhouses, see *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE 301 (1985).

803. Washington Post, *supra* note 802, at § A2.

804. San Francisco Chron., Oct. 10, 1984, at 1, col. 1, cited in *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE 301, 307 n.39 (1985).

805. *Id.*

806. N.Y. Times Oct. 26, 1986 § A, at 1, col. 4.

807. 420 U.S. 636 (1974).

808. *Id.* at 636 n.16.

809. See *supra* notes 755-61 and accompanying text.

810. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

811. 490 Pa. 91, 415 A.2d 47 (1980).

812. Brief for Appellant at 37, *Bowers v. Hardwick*, No. 85-140 (U.S. filed Dec. 19, 1985).

statutes. Therefore, an attack on these statutes based upon the *Weinberger* principle is unlikely to succeed.

Perhaps there is a more fundamental attack that may be made against state sodomy statutes. Unquestionably, the prevention or containment of AIDS would be deemed a compelling state interest. It appears, however, that state sodomy statutes would encounter difficulty surviving a narrowness analysis. The types of activities that these statutes restrict are far beyond what is necessary to achieve the objective of preventing the spread of sexually transmitted diseases such as AIDS. Some sodomy statutes restrict the sexual activities of perfectly healthy homosexuals, as well as the sexual activities of perfectly healthy heterosexuals, both married and unmarried. Additionally, sodomy statutes are indifferent as to where the prohibited acts occur; they ignore the privacy of the marital bedroom.⁸¹³ Sodomy statutes may therefore be overbroad in that they reach persons whose activities are unrelated to the interest that the state seeks to protect.

Many statutes that deal with venereal disease are narrowly written for that purpose. In Florida, for example, it is unlawful for anyone with a venereal disease to engage in sexual intercourse.⁸¹⁴ Additionally, Florida has the authority to subject any suspected carrier of the disease to a physical examination.⁸¹⁵ If any person is diag-

813. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the Supreme Court held that the right of privacy extends to the marital bedroom. *Id.* at 484. As such, it is unlikely that courts would tolerate general intrusions into the marital bedroom in a state's effort to enforce restrictions on sexual activity.

814. Section 384.02 states:

Sexual intercourse with person afflicted with any venereal disease illegal. It is unlawful for any female afflicted with any venereal disease, knowing of such condition, to have sexual intercourse with any male person, or for any male person afflicted with any venereal disease, knowing of such condition, to have sexual intercourse with any female.

FLA. STAT. § 384.02 (1985).

The Florida statutes define "venereal disease" as "[s]yphilis, gonorrhea, and chancroid are designated as venereal diseases and are declared to be contagious, infectious, communicable, and dangerous to the public health. It is unlawful for any one infected with either of these diseases to expose another to infection." FLA. STAT. § 384.01 (1985).

815. Section 384.04 states:

Physical examination. Any person suspected of being afflicted with any infectious venereal disease shall be subject to physical examination and inspection by any representative of the Department of Health and Rehabilitative Services, and for failure or refusal to allow such inspection or examination, they shall be guilty of a misdemeanor and shall be punished as for a misdemeanor; provided, the suspected person shall not be apprehended, inspected or examined against his will, except upon the sworn testimony of the person or persons accusing; and upon the presentation of the warrant duly authorized by the county court judge or some court officer charged with the execution of this law.

FLA. STAT. § 384.04 (1985).

nosed to have venereal disease, the state may, if necessary to protect the public health, quarantine that person and require treatment.⁸¹⁶ With the states' ability to provide for such measures under the authority of their police power, similar measures may be taken to prevent the spread of AIDS.

AIDS, however, is quite different from venereal diseases. Venereal diseases are treatable, whereas there is presently no treatment available to cure AIDS victims.⁸¹⁷ Thus, when a person who is afflicted with a venereal disease is quarantined for treatment, any such isolation is likely to be temporary. With AIDS, though, a quarantine would in effect impose a "life sentence" on those so isolated. Moreover, a quarantine would not only require the isolation of those persons who exhibit AIDS symptoms, but would also require the isolation of AIDS carriers. As previously stated, researchers estimate that the number of AIDS carriers may be as high as one million.⁸¹⁸ Given the above facts, a court might well decide that a sodomy statute, though not the most refined method for controlling AIDS, is the narrowest and most efficient practical means toward that end under the circumstances. The consequences of AIDS are so severe, and its control is so difficult, that courts may be reluctant to second-guess a state's proposed method for dealing with this disease. Sodomy, fornication, adultery and rape laws, if enforceable, could significantly reduce instances of sexually transmitted diseases. In order to locate AIDS victims and carriers, however, the states would be forced to conduct mandatory blood tests on all citizens. This would, of course, be both time consuming and extremely costly. Perhaps states will

816. Section 384.14 states:

Venereal diseases; quarantine; power and authority of health officers. State, county, and municipal health officers, or their authorized deputies, when in their judgment it is necessary to protect the public health, may commit persons within their respective jurisdictions, infected with venereal disease, for quarantine and compulsory treatment in any hospital within the state operated for that purpose by the Department of Health and Rehabilitative Services for quarantine and treatment.

FLA. STAT. § 384.14 (1985).

Section 384.17 permits the isolation of infected persons, and states:

Isolation of infected persons. In the event persons infected with venereal disease for any reason cannot be received at any hospital operated by the Department of Rehabilitative Services for quarantine and treatment of persons infected with venereal disease, and such persons, in the opinion of the health officer, should be isolated and quarantined for the protection of public health, then and in such event the health officer may cause such persons to be isolated, where such person resides, at the expense of the county or city involved.

FLA. STAT. § 384.17 (1985).

817. See *supra* note 757.

818. *The Epidemiology of AIDS*, *supra* note 759, at 1354.

require AIDS testing prior to issuing marriage licenses.⁸¹⁹ As a result, states may then require authorities to report those whose test results are positive so that health authorities could keep these people under surveillance.⁸²⁰ Who would bear such costs?⁸²¹ How could the states detect those persons whose blood tests are negative, but who subsequently contract AIDS from those who have not been tested? At present, these questions remain unanswered. Scientific breakthrough would at least quell the public fear that currently surrounds the disease and would make regulating AIDS more like the routine regulation of venereal diseases. Hopefully, the future holds promise for a breakthrough in the discovery of a cure for AIDS. Currently, however, the prevention of AIDS depends solely upon social education and counseling.⁸²²

D. Conclusion

No court that has recognized a fundamental right to sexual privacy outside marriage has viewed a state interest in morality as sufficient to override that right. This may simply be a function of the fact that a noninterpretivist court will be predisposed to view morality through the eyes of contemporary society, rather than through the eyes of the Founding Fathers. If a court were to deem morality a sufficiently important interest, a statute prohibiting "immoral acts" would perforce pass a narrowness test.

Just as in the case of morality, no court that has recognized the right to sexual privacy has seen as compelling a state interest in promoting "family values." Statutes limiting acts which run contrary to the family ethic also appear to be flawed for lack of narrowness.

Although no court would likely question a state's interest in preventing the spread of sexually transmitted diseases, the prohibition of sexual activity outside marriage may be too broad a method of dealing with such disease. In the context of sodomy in particular, a statute intended to prevent the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases would raise a serious narrowness question.

819. *The AIDS Epidemic*, *supra* note 779, at 523.

820. *Id.* Colorado is the first state to require those who have AIDS to report their names and addresses to the state health department. See N.Y. Times, Oct. 26, 1986 § A, at 30, col. 5.

821. The cost of caring for AIDS victims is already high. *The AIDS Epidemic*, *supra* note 779, at 523. The cost of caring for the average AIDS victim over the victim's expected life is \$42,000. *Id.* Estimates indicate that if there are 8,000 new cases of AIDS during 1985, the cost of caring for the new victims alone will be approximately \$336 million. *Id.*

822. *The Epidemiology of AIDS*, *supra* note 759, at 1357.

VII. CONCLUSION

The Court's method of constitutional analysis will obviously affect the Court's decision. A *strict* interpretive model and the representation-reinforcing model preclude the finding of a right to privacy as a fundamental right. The battle over the scope of the right of privacy must therefore be fought entirely within the noninterpretivist camp. The opposing forces are those who would restrict the right to the protection of traditional family-related activities, and those who would broaden the right so as to include nonmarital consensual sexual activities. Although a noninterpretivist model may legitimize the right of privacy as a fundamental right, the model does not itself provide a framework for delimiting the scope of that right.

Given the Court's past rulings in the area of privacy rights, it is difficult to fashion a doctrine that can support the extension of privacy rights to homosexual activity. The Court has stated that the right to do with one's body as one wishes is not absolute. There has never been any indication that the Court will extend this right beyond the area of procreative choices.

Many of the Court's privacy decisions tend to suggest a family basis to the right to privacy. A privacy right based on the family will not provide much support for homosexuals. To date, the Court has not looked beyond marriage, biology and adoption to define the family. However, an argument can be made that the values which underlie heterosexual relationships are furthered by stable homosexual relationships as well. The family as a social unit is simply a type of intimate relationship characterized by relative smallness, high selectivity in its formation and exclusion of others from the important functions of the relationship. The family provides succor and emotional support for its members. A family, therefore, need not be defined by legal or biological relationships. Whether a relationship is protected may be determined by the presence or absence of the associational attributes enumerated above. Thus, a homosexual relationship might satisfy the definition of a family where all the attributes are present. A heterosexual relationship which failed to meet all of the attributes, however, would not. The protection would extend to certain types of intimate relationships, then, and not to homosexual or heterosexual activities *per se*.

The immediate consequences of denying homosexual activities the protection of the right to privacy would be few. *Hardwick v. Bowers* would be reversed, and Georgia's sodomy statute would remain valid. Those statutes that have outlawed sodomy, as well as those legislative acts that have decriminalized sodomy, would remain

unchanged. Most state court decisions upholding or invalidating sodomy statutes would not be affected. The only jurisdictions that would be affected would be New York and Washington, D.C. Neither New York's Legislature nor the Congress has repealed those jurisdictions' criminal sodomy statutes, despite court decisions invalidating those statutes on privacy grounds. In those instances there would no longer be any federal privacy right that would interfere with the enforcement of those statutes. On a broader level, the exclusion of homosexual activities would confine the limits of privacy rights to some reasonably close variant of the traditional family. Certainly, homosexuals would lose a major legal weapon in their fight against sodomy statutes. Homosexuals would have to look to legislatures rather than courts in their fight against sodomy statutes.

If the Court were to extend the right of privacy to adult, private, consensual, homosexual activities, the impact would be extensive. All current state sodomy statutes would be subject to certain challenge by homosexuals. In every case, states would likely find themselves called upon to show that their sodomy statutes were narrowly tailored to further a compelling state interest. A pattern might emerge. Courts which had previously upheld sodomy statutes might in many cases determine that the states' interests in morality, family values and/or health outweighed homosexuals' right to privacy. Almost certainly, there would be *some* disagreement among the state courts as to various asserted state interests, and the Supreme Court would eventually have to reconcile these conflicting results.

At that point, the Court would face issues as profound as the threshold privacy question. Do the states have an interest in regulating private morality sufficient to override a right to privacy? Is a state interest in furthering family values an important state interest and, if so, is it rationally furthered by sodomy statutes? Although a state clearly has an interest in protecting the public health, do sodomy statutes narrowly and rationally further that interest?

Of course, the Supreme Court could establish homosexual privacy rights and at the same time subject asserted state interests to strict scrutiny. In that event, it is unlikely that the Court would find private morality a sufficiently compelling interest to outweigh a fundamental right to privacy. It is unclear whether the state interest in promoting family values would outweigh an autonomy-based right of privacy. Should the Court base the right on intimate "familial" associations, the state interest in family values would by definition be furthered. And while there is no question that the state has an inter-

est in preventing the spread of communicable diseases, it is difficult to see how the criminalization of sodomy *narrowly* furthers that interest.

There would be other important implications to a Supreme Court decision recognizing homosexual privacy rights. Persons prosecuted for fornication, bestiality, and similar crimes would for the first time be able to raise a plausible fundamental right defense to their prosecutions. It is possible that such statutes would be subjected to strict scrutiny.

In a broad sense, a Supreme Court decision on the privacy rights of homosexuals could have a major impact on both constitutional doctrine and on our society's view of homosexuals. A decision in favor of homosexual rights would leave the limits of the right to privacy undefined. A contrary decision would have the effect of enshrining, within the Constitution, majoritarian morality. The result could be a radical redefinition of the purpose and utility of substantive due process.

Furthermore, some of the Court's past decisions affecting interpersonal relations have had a profound effect on societal values. For example, the Court's decision in *Brown v. Board of Education* legitimized the civil rights movement. Similarly, a decision extending the right of privacy to homosexual activities could legitimize the gay rights movement. A contrary decision might reinforce negative attitudes toward homosexuals. In this way, the symbolic importance of a determination of homosexuals' right to privacy might surpass its practical import.

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Appendix

*This appendix contains the results of a survey of state legislative reference librarians. The survey requested copies of any and all committee reports, reports of legislative and committee hearings, penal code commission reports, etc., discussing state legislation concerning sodomy statutes. The results give some indication of legislative intent in regard to the retention, modernization, or repeal of criminal sodomy statutes. The results are categorized by the type of statute to which they apply: states with archaic statutes, states with modern statutes, and states that have decriminalized sodomy. For a complete collection of the texts of all state statutes prohibiting consensual sodomy in effect as of 1984, see Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. Tol. L. Rev. 811, 868-75 (1984).*

The authors extend their deepest thanks to the many state law reference librarians who demonstrated thoroughness and professionalism in their detailed responses to the survey. To them alone belongs the credit for useful information contained within this survey.

ARCHAIC SODOMY STATUTES

Archaic 1 — North Carolina

State v. Stubbs, 145 S.E.2d 899 (N.C. 1966):

Defendant contends G.S. § 14-177 prior to the 1965 amendment is unconstitutional on its face "because the act of a crime against nature does not serve and comply with the legislative intent and purpose of the statute." His argument in essence is that the legislative intent of this statute is to punish offenses against public morality and decency, and if homosexuality is an illness, it cannot in any way be offensive to public morality and decency, and it should naturally follow that if the intent of the statute is not served then the statute on its face is unconstitutional. Prior to the 1965 amendment to G.S. § 14-177, the punishment by that statute was fixed at imprisonment in the State's prison for not less than five nor more than sixty years. The 1965 amendment provided that if any person shall commit the crime against nature with mankind or beast he shall be guilty of a felony, and shall be fined or imprisoned, in the discretion of the court. Defendant's contention is overruled. It is manifest that the legislative intent and purpose of G.S. § 14-177 prior to the 1965 amendment and since is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality.

MODERN SODOMY STATUTES

Modern 1A — Alabama

ALABAMA LAW INSTITUTE, ALABAMA CRIMINAL CODE, PROPOSED REVISION WITH COMMENTARY 123 (1974):

Section 2318(1)(c) covers deviate sexual intercourse without lawful consent under the same terms and circumstances as subparagraph (I) (a) covers vaginal intercourse. If both actors are adult and both consent, there is no offense; but this subparagraph covers situations where both parties are over sixteen, yet one party does not expressly or impliedly acquiesce in the actor's conduct, either as to the act done, or as to the person doing the act.

Modern 1B — Alabama

ALA. CODE § 13A-6-63 to -64 commentary (1975):

Alabama law was general in its scope as denouncing any crime against nature. Former § 13-1-110. There were no degrees of the offense, and it included all "unnatural" copulation with man or beast, whether homosexual or heterosexual in nature. *Woods v. State*, 10 Ala. App. 96, 64 So. 508 (1914); *Brown v. State*, 32 Ala. App. 131, 22 So. 2d 445 (1945); *Tarrant v. State*, 12 Ala. App. 172, 67 So. 626 (1915).

Sections 13A-6-63 and 13A-6-64 provide a more specific definition of the types of acts proscribed. See "deviate sexual intercourse," § 13A-6-60(2). That which is specific, however, by definition excludes the general. Hence, an inventive mind could conceive of acts, presently unlawful and generally distasteful, yet not covered by these sections, primarily bestiality in many forms and acts committed by consenting adults in private, whether heterosexual or homosexual.

Under the original draft deviate conduct between consenting adults was not criminal under this article. It was deemed that such acts are not subject to effective regulation—especially marital relations—and what few prosecutions may result are the product of either the use of vice squad decoys or the anguished cries of vengeful or disgruntled relatives or associates. Too, imprisoning a confirmed homosexual is "a little like throwing Brer Rabbit into the briarpatch." *Cravan, C.J. Perkins v. North Carolina*, 234 F. Supp. 333 (W.D.N.C. 1964).

No attempt, therefore, was originally made to regulate consensual acts performed in private. But such conduct was included by the legislature, and homosexual conduct is still criminal. See § 13A-6-65(a)(3).

Modern 2 — Kentucky

DEPARTMENT OF PUBLIC ADVOCACY, GENERAL COUNSEL, TITLE L
KENTUCKY PENAL CODE, KY. REV. STAT. § 510.070 COMMENTARY
(1984):

The essence of sodomy is “deviate sexual intercourse” as that term is defined in KRS 510.010(1). Although the primary concern is with homosexual contacts, the definition of deviate sexual intercourse includes nonvaginal heterosexual intercourse other than between spouses.

Sodomy in the Fourth Degree: KRS 510.100 prohibits deviant sexual intercourse with another person of the same sex. The statute is aimed primarily at private, consensual homosexual acts between adults. Subsection (2) provides that consent of the participants is not a defense, and the state does not have to prove lack of consent as an element of this offense. Each participant in the act violates this statute. Force is not an element of this offense.

Sodomy in the fourth degree differs from the other sodomy offenses in that it is restricted to persons of the same sex and is aimed at those persons who are not statutorily incapable of consenting. As noted above, this statute broadens former Kentucky law by including oral copulation.

Modern 3 — Maryland

MARYLAND SENATE JUDICIAL PROCEEDINGS COMMITTEE, REPORT
ON SB 358 4 (1976):

Present law proscribes consensual anal (sodomy) or oral (perverted practices) sexual acts. Since these crimes, when committed between consenting adults, are very rarely prosecuted because of their clandestine and personal nature, they are not a proper subject of statutory recognition by prohibition.

Modern 4 — Missouri

MO. ANN. STAT. § 566.090 comment (Vernon 1973):

Subsection 1(2) and (3) authorizes punishment for deviate sexual intercourse committed by unmarried persons, whether committed with or without consent. Since felony provisions punishing sodomy and deviate sexual assault parallel the rape and sexual assault provisions, the primary purpose of the subsection is to cover all other deviate sexual intercourse including deviate sexual intercourse by a person under 17 with a person to whom he is not married who is 14 or 15. The Committee was closely divided on whether deviate sexual intercourse between consenting adults in private should be a crime. It

remains a crime under this section, unless the courts ultimately hold the provision unconstitutional as unjustified governmental interference with the developing right to sexual privacy. Since § 566.010, subsection 1(2), defines deviate sexual intercourse as any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person, subsection 1(2) also covers male-female intercourse of this nature.

Modern 5 — Montana

MONTANA SENATE JUDICIARY COMMITTEE, MINUTES OF SB 109 DISCUSSION 2 (Mar. 1, 1973):

Representative Greely proposed that bestiality and homosexuality as crime be eliminated. Representative Greely stated the criminal code commission was very much in favor of eliminating bestiality and homosexuality as crimes for various reasons but, in order to eliminate much dissension, and since the vote was close, put it in. Discussion followed among committee members regarding the death penalty, desecration of flag, homosexuality and bestiality. Representative Hall stated he felt the sense of proportion bothered him and that there were more important issues to be considered in this bill. Representative Towe disagreed. Motion to amend bill to eliminate bestiality and homosexuality failed with Representative Baucus, Greely, Roberts, Towe and Warfield voting yes.

Modern 6A— Nevada

NEVADA SENATE JUDICIARY COMMITTEE, MINUTES OF SB 412 DISCUSSION 2-5 (Apr. 5, 1977):

In this bill whether you intended or not turns out to be a gay rights bill. All sexual acts between consenting adults is legalized: all consensual [sic] sodomy between adults, fellatio, cunnilingus. He didn't have any suggested language here; where it is in the bill is the last line, page 9, lines 37 to 38 and it repeals NRS 201.190 which is the former infamous crime against nature statute.

It says that any infamous crime against nature by force, or on a minor under 18 is punishable by life, otherwise its 1 to 6. And, it includes bestiality, consenting adults and all the rest of it. He said that the USSC, in the last year, ruled in *Dover vs. Commonwealth City of Richmond*, in a one word opinion, affirmed, binding upon all courts in this country as an interpretation of the U.S. Constitution. Under *Hicks v. Miranda*, it upheld a Virginia statute prohibiting consenting adults in a case where a homosexual male, who sought to have the statute declared unconstitutional because it invaded his right of

privacy. The 3 judge, lower court said simply, nuts, there is no right of privacy and there is nothing involved here. This is not a marital relationship and there is no significant interest for adult persons to commit acts of sodomy in private. So, if a state desires, they may prohibit such acts. That is a policy question, but in acting on this bill, I think you should be aware that the present act is repealed.

Senator Gojack said she would like to have it cleared up in Section 28, NRS 201.190 would repeal these statutes that Nevada has on its books prohibiting private sexual acts?

Mr. Beatty stated that we do not have a present statute prohibiting of the garden variety. We have a statute prohibiting homosexual acts between consenting adults; that is 201.190, subsection 2 and, otherwise, is the clause that prohibits it. That would be repealed by this act.

Senator Ashworth said if we repeal 201.190, are we in conflict with the rest of the bill? Mr. Beatty stated that if we do not repeal it, then we would be in conflict.

Senator Bryan stated that his understanding was that if we repeal this then we would affect the heterosexual relationship as well. Under the present law, infamous crime against nature could be successfully prosecuted presumably. Mr. Beatty stated that it could be successfully prosecuted per se if it is not in the marital relationship until the State Supreme Court rules otherwise. Some previous cases handed down indicated that they might so rule in a proper case, but that was before the United States Supreme Court determination. In the marital relationship, no, it could not be prosecuted successfully.

Senator Gojack asked what the difference was then; wouldn't thy [sic] have to go through the same kind of evidence for a homosexual relationship? And, if so, why? Mr. Beatty stated that he would not like to make a statement on that but there are a lot of people in the State that are concerned. Some are based on ideas of religion, some based on what is proper and what is a so-called natural act. His only purpose here is to spell out what this bill would do. The evidenciary [sic] procedure would be the same.

. . . .

Senator Dodge stated that on the homosexual thing, my vote is no. The committee agreed except for Senator Gojack.

Senator Close stated that then we have to decide on the heterosexual sexual acts. The committees [sic] decision was that they should have this in the law.

Modern 6B-Nevada

NEVADA ASSEMBLY JUDICIARY COMMITTEE, MINUTES OF SB 412 DISCUSSION 1 (Apr. 29, 1977):

SB 412: Assistant District Attorney of Clark County, Tom Beatty, was first to address this bill stating that he felt that whether or not section 17, subsection 3, should be include [sic] in the bill was a matter of legislative policy, but he pointed out that there was a matter of legislative policy, but he pointed out that there are many in public prosecution who feel that a prohibition against homosexual conduct is necessary because they feel to raise the prohibition would raise the inference that that type of behavior was condoned.

. . . .

Mrs. Wagner stated that she had discussed this subject with members of the Washoe Sheriff's Department and they had stated that they do not enforce these types of laws in general. Mr. Beatty stated that they are hard to prosecute because of the proof factor. He also pointed out in response to a question from Mr. Coulter that if you did not outlaw that type of behavior then it was supposed that that behavior was proper conduct. And, he stated, for that reason, many prosecutors believe it should be retained. He also said he did not feel they would object to a gross misdemeanor, depending on the gravity of the act.

Modern 7 — New York

NEW YORK LEGISLATIVE SERVICE, INC., NEW YORK STATE LEGISLATIVE ANNUAL, MEMORANDUM OF ASSEMBLYMAN RICHARD J. BARTLETT 51-52 (1965):

A. I. 4973, defining the crime of "consensual sodomy" (Proposed P. L. § 130.38), makes a class B misdemeanor for a person to engage in deviate sexual intercourse with another person even though both are acquiescent, competent adults. Such conduct constitutes a misdemeanor under the existing Penal Law, (§ 690), carrying a prison sentence of up to one year in contrast to the three month ceiling in the Proposed Penal Law. Although the main bill defines and penalizes "sodomy" committed by force or intimidation, or with children, incompetents, etc., it does not attach criminal sanctions to the consensual adult conduct in question. The Commission's reasons for omitting this phase of the crime of sodomy were similar to its reasons for omitting adultery. It was of the opinion that this infrequently prosecuted offense involves a manifestation of illness rather than of criminal culpability and should be regarded as an illness rather than as a crime. It may be noted that such conduct, when performed in a pub-

lic place, is punishable under other provisions of the Proposed Penal Law, (§§ 240.35[3]. 245.00). It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premise that deletion thereof might ostensibly be construed as legislative approval of deviate conduct.

Section 1 of this bill amends an introductory section to the "Sex Offenses" article (Art. 130) in which "consensual sodomy" is placed, which section declares that lack of consent of the victim is an element of every offense defined in the Article (§ 130.05[1]). With the insertion of consensual sodomy, that statement is no longer true, and the section is therefore amended to point out the new exception.

STATES WHICH HAVE DECRIMINALIZED SODOMY

Decriminalization 1 — Alaska

CRIMINAL CODE REVISION SUBCOMMISSION, ALASKA CRIMINAL CODE REVISION 74-76 (Tent. Draft, Part I 1977):

In revising the sexual offenses article to cover behavior which poses a real threat to the victim or to society, the Subcommittee broadened the coverage of several statutes to cover antisocial conduct which is not now criminal. At the same time, the subcommittee found an absence of compelling state interest in some (but not all) applications of a number of statutes which criminalize private sexual activity between consenting adults — Adultery, AS 11.40.010, Cohabitation, AS 11.40.040 and Sodomy, AS 11.40.120. Insofar as these statutes involve sexual activity between minors, sexual activity that is non-consensual, or sexual activity in public, the sexual offenses article provides greater protection than is found in existing law.

However, because these statutes go further and prohibit consensual activity between adults in private, the Tentative Draft has eliminated these applications from the Revised Code.

In doing so, the Subcommittee recognized that any statute prohibiting private consensual sexual activity between adults is subject to constitutional attack in light of the court's holding in *Ravin v. State*, 537 P.2d 494, 504 (Ak. 1975), that ". . . citizens of the State of Alaska have a basic right to privacy in their houses under Alaska's Constitution." Indeed, in the earlier case of *Harris v. State*, 457 P.2d 638, 645 (Ak. 1969), though the issue was not before the court, the Alaska Supreme Court noted that ". . . at least some of us might perceive a right to privacy claim" if the sodomy statute was used to prosecute cases involving consensual activity between adults.

The Subcommittee recognized that large numbers of people

share with them strong sentiment regarding the immorality of some of the conduct which would not be criminal under the Tentative Draft.

But as justice professionals and citizens, the Subcommittee also recognized that there are limits beyond which utilization of criminal sanctions loses its meaning and may become destructive to social interest as a result of capricious special applications, constitutional infringements or non-enforcement leading to general contempt for law or misallocation of limited law-enforcement resources.

The careful line which the Subcommittee has drawn is well illustrated by the absence of any history in this state of criminal prosecutions in all the classes of behavior excluded from the reach of the criminal law under the Tentative Draft.

Decriminalization 2 — California

CONCURRENCE IN SENATE AMENDMENTS, AB 489 (May 1, 1975) (amending in relevant part CAL. PENAL CODE § 286 (West Supp. 1986):

The overall effect of this legislation is to remove criminal sanctions for acts among consenting adults (those 18 and over). However, those who prior to the effective date of this legislation had lost a teaching credential or had been declared a mentally disordered sex offender for acts which are "decriminalized" by this bill (sexual acts of consenting adults) are left with the status quo.

Decriminalization 3 — Connecticut

REPORT OF THE CONNECTICUT COMMISSION TO REVISE THE CRIMINAL STATUTES 128-29 (1967):

The Commission has decided to adopt the basic principle that sexual activity in private, whether heterosexual or homosexual, between consenting, competent adults, not involving corruption of the young by older persons, is no business of the criminal law, and should be left to the domestic relations court and to the concern of the spiritual authorities. To put it another way, there should be excluded from the criminal law all sexual practices not involving force, adult corruption of the young, or public offense. This principle lies behind the corresponding provisions on sex offenses in the Model Penal Code (see MPC Tent. Draft No. 4, p. 277) and, to a great extent, the New York Revised Penal Law upon which much of the draft is based. It finds limited expression in the recent Illinois revision and has been endorsed by church and lay officials alike.

Great Britain has recently enacted a similar statute, dealing with homosexuality. See *Time*, December 30, 1966.

The Commission emphasizes that its position should in no way be regarded as moral condonation or approval of certain sexual activity which is now criminally prohibited; rather, its position is that for sound reasons of public policy these questions are better dealt with by authorities—spiritual, medical, judicial, etc.—other than those involved in criminal law-enforcement.

The reasons which lie behind the principle adopted may be summarized as follows: (1) such sexual activity presents no harm to the interests of the community that is not adequately dealt with by other areas of the law—e.g. divorce laws; (2) scientific studies by responsible professional people—e.g. Kinsey— demonstrate clearly that such activity is condoned and engaged in by a significantly high percentage of the population; (3) the present criminal sanctions are substantially unenforced, at least in relation to what the available statistics tell us is the high percentage of “offenders”; (4) what enforcement there is permits capricious selection of very few cases for prosecution and serves the interests of the blackmailer; (5) the threat of criminal sanction probably deters some from obtaining needed psychiatric or other help for their emotional problems; (6) any individual is entitled to protection against state interference in his personal affairs when he is not hurting others; (7) in terms of the practicalities of police administration, since funds and personnel are so limited they could be put to more effective and important work elsewhere.

Decriminalization 4 — Hawaii

HAWAII REV. STAT. §§ 707-730 to -742 (1976) (Part V. Sexual Offenses Introduction):

In recent years, one of the most significant and widely-accepted advances in the penal law has been the recognition that the social harm, if any, from consensual sexual activity between mature persons in private is not significant enough to warrant a penal sanction and that other institutions of government and society are better equipped to ameliorate any social ills which may result from such conduct.¹ Nearly all recent revisions of the penal law either have omitted from its ambit all such forms of consensual sexual activity,² or have omitted some previously proscribed forms of consensual activity, while reducing other forms to low grade misdemeanors.³

Prohibitions against non-marital sexual intercourse (fornication)⁴ and extramarital sexual intercourse (adultery)⁵ stem mainly from western religious sources,⁶ and it was not until theocratic governments, such as Cromwell's England or the Puritan New England colonies, used the power of the state to reinforce religious tenets that

these prohibitions found their place in civil, as opposed to ecclesiastical, law. Since the importation of religious standards into the penal law, social mores toward sexual conduct have changed markedly. The result has been the negligible enforcement of penal prohibitions against certain types of sexual conduct, and the extremely limited enforcement that does exist raises the specter of discriminatory enforcement wholly unrelated to the merits of individual prosecutions.

American penal laws against illicit intercourse are generally unenforced. This is particularly remarkable in view of the fact that thousands of cases of adultery are made a matter of judicial record in divorce proceedings, e.g., in New York, where adultery is the sole ground for divorce. There is some indication that these laws, like other dead letter statutes, may lend themselves to discriminatory enforcement, e.g., where the parties involved are of different races, or where a political figure is involved. The extraordinary incursion of the federal government into the field of regulating local morals under the *Caminetti* [*v. United States*, 242 U.S. 470 (1971)] interpretation of the Mann Act, has provided a means of imprisoning "alleged racketeers" by showing that they take girl friends on trips to Florida. This is a technique that could easily be turned against other vulnerable individuals or groups.⁷

Moreover, available research would tend to indicate that, with respect to fornication and adultery, at one time or another a majority of the American population breaches the sexual standards which the penal law purports to enforce.⁸ This is significant for two reasons: (1) It demonstrates that the penal law does not reflect society's actual conception of harmful behavior. (2) In addition to the problem of discriminatory enforcement, the number of offenders makes anything approaching effective enforcement impossible. The impossibility of an even-handed enforcement tends to bring the penal law in general, not merely the unenforced offense, into disrespect.

This Code adopts the position of the Model Penal Code that a secular penal code should not be used to enforce purely moral or religious standards.

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as

ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.⁹

Certain secular objectives have been offered as a rationale for the continued recognition of laws against fornication and adultery. Among these are preservation of the institution of marriage, preservation of the peace against disturbances by outraged relatives, prevention of relationships which affront the public, prevention of illegitimacy, and prevention of disease.¹⁰ The prohibitions against consensual sexual conduct do not appear to bear any logical relationship to these secular aims. The prohibition against adultery does not stem the number of divorces granted on that ground or on the ground of grievous mental suffering when adultery is the underlying cause. The laws against assault and public disorder seem more directly related to the prevention of disturbances than do laws against sexual behavior. There is no evidence that the public is affronted by adulterous or non-marital sexual relationships; moreover, the affront, even if it exists, is not a social harm of a magnitude sufficient to warrant the imposition of a criminal penalty upon the actors. Although the prevention of illegitimacy and disease is desirable, "the laws against illicit co-habitation are ill designed for these purposes. Bastardy is rare compared to the frequency of illicit intercourse."¹¹ The prohibitions against adultery and fornication do not differentiate on the basis of whether the undesired result occurs. As for the prevention of venereal disease, the prohibitions do not differentiate between the healthy and the diseased actor, nor between the prostitute or promiscuous participant, on the one hand, and the single incident or continuing non-marital relationship, on the other.¹²

As in the case of fornication and adultery, consensual homosexual conduct and what has been thought to be a typical heterosexual conduct are criminal offenses in most unrevised American penal codes.¹³ In this respect, the American jurisdictions differ from most western European countries, which do not use the criminal process to interfere with private behavior between consenting adults.¹⁴ It is generally conceded today that "the legal provisions against heterosexual behavior which violates sodomy and crimes-against-nature statutes should be eliminated,"¹⁵ and that problems, if any, presented by homosexual behavior between consenting mature persons in private are not likely to be cured by the continued use of the criminal sanction and the sanction ought to be eliminated in this context.¹⁶ The Model Penal Code adopts this position.

Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public

offense is based on the following grounds. No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities. . . .

As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers. Existence of the criminal threat probably deters some people from seeking psychiatric or other assistance for their emotional problems; certainly conviction and imprisonment are not conducive to cures. Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved.¹⁷

In addition to the particular objections, stated above, to dealing with consensual sexual conduct, between competent persons in private, as a penal offense, there is the pervasive realization that the penal system is intended to deal only with serious and aggravated injuries to protected social interests and that the penal process is not equipped, nor is it intended, to protect society against every social ill, even if significant. The civil courts, the Family Court and its counseling service, the Departments of Health and Social Services are all better suited, than are the penal system and the criminal court, to ameliorate any social ills which might result from consensual sexual conduct between competent persons.

This part of Chapter 707 therefore deals only with sexual behavior which involves (1) forcible compulsion, (2) imposition on a youth or other person incapable of giving meaningful consent, or (3) offensive conduct.

[Footnotes]

1. This introductory comment does not, of course, deal with consensual sexual activity which is compounded by aggravating circumstances, such as prostitution or pornography offenses. Those offenses are dealt with elsewhere in the Code.

2. See M.P.C., Article 213; Prop. Mich. Rev. Cr. Code, Chapter 23; Prop. Pa. Cr. Code, Article XII.

3. See N.Y.R.P.L., Article 130 and Prop. Del. Cr. Code,

Part VI, Subpart D, which, although generally following the trend toward legalization of all consensual sexual activity, allow exceptions by making consensual sodomy and adultery low grade misdemeanors, and Ill. Rev. Cr. Code, Article 11, which permits private consensual homosexual behavior but makes "open and notorious" fornication and adultery low grade misdemeanors.

4. H.R.S. § 768-17.
5. *Id.* §§ 768-13, 768-14.
6. Exodus, 20:14 (Seventh Commandment); Leviticus, 20:10, Deuteronomy, 22:22; I Corinthians 10:8; I Thessalonians, 4:3. For a brief discussion of the religious sources of consensual sexual offenses, see M.P.C., Tentative Draft No. 4, comments at 204 (1955).
7. M.P.C., Tentative Draft No. 4, comments at 205 (1955).
8. See *id.* at 206-207, citing Kinsey, Pomeroy and Martin, *Sexual Behavior in the Human Male* 549-552, 585 (1st ed. 1948); Kinsey, Martin and Gebhard, *Sexual Behavior in the Human Female* 416, 419-420 (1st ed. 1953); and Drummond, *The Sex Paradox* 243 (1953).
9. *Id.* at 207.
10. *Id.*
11. *Id.* at 209.
12. *Id.*
13. The prohibition against "atypical" heterosexual behavior may even proscribe certain conduct between married persons. See H.R.S. § 768-71.
14. Cf. M.P.C., Tentative Draft No. 4, comments at 278 (1955).
15. Ploscowe, *Sex and the Law* 213 (1951).
16. Marmor, *Sexual Inversion* 17 (1965); Schofield, *Sociological Aspects of Homosexuality* 161 (1965); Ploscowe, *supra* note 15 ["It might be desirable to eliminate the legal prohibitions against adult homosexual behavior in private altogether. Such prohibitions benefit nobody but blackmailers at the present time. . ."].
17. M.P.C., Tentative Draft No. 4, comments at 277-279 (1955).

Decriminalization 5 — New Jersey

2 NEW JERSEY CRIMINAL LAW REVISION COMMISSION, FINAL REPORT, THE NEW JERSEY PENAL CODE: COMMENTARY 196-97 (1971):

2. *Consensual [sic] Sodomy Between Adults.* We have arrived at the conclusion that private homosexuality between consenting adults

not involving force, imposition or corruption of the young should not be an offense.

The sexual impulse finds expression in a variety of ways other than heterosexual copulation. Substantial numbers of males and females find themselves drawn to members of their sex. In both homosexual and heterosexual relationships, gratification may be sought and bestowed digitally, orally, or by the anus. There may be no human partner, as in copulation with animals or corpses, or in masturbation. Some individuals obtain sexual gratification from exposing themselves indecently, from wearing clothes of the opposite sex, or from contact with objects of symbolic sexual significance, *e.g.*, a shoe or an undergarment. Heterosexual copulation must also be considered deviate when accomplished by force or with a child, especially when these circumstances appear to be essential to the actor's gratification. Superficially non-sexual offenses such as larceny, burglary, or arson may have an avowed or unconscious sexual aspect, just as, for that matter, approved behavior, including successful pursuit of art, literature, money, or fame may be bound up with sexual drives. It is generally agreed, also, that an isolated episode of deviate sexuality may have no important significance with respect to the character of the actor, being the result of a chance encounter, curiosity or experiment.

Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the grounds that no harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.

As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers. Existence of the criminal threat probably deters emotional problems; certainly conviction and imprisonment are not conducive to cures. Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of

police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require, and the temptation to bribery and extortion.

Decriminalization 6A — Ohio

Ohio State Legislature, Staff Redraft of Sections 1641-1653, Proposal A, Minutes of Committee Meeting 12-13 (Aug. 24-25, 1972):

Mr. Wefald noted that Proposal A essentially followed the original FCC draft, but went further to ensure that sexual intercourse or deviate sexual intercourse between consenting adults rendered those adults subject to criminal liability. In addition, Proposal A also included sections covering the existing North Dakota offenses of fornication, adultery, and unlawful cohabitation. Mr. Wefald noted that the definition of "sexual intercourse" in Section 1653 of Proposal A had been expanded to include a first sentence specifically indicating that sexual intercourse could only occur between a male and a female.

Mr. Wefald noted that Proposal B was a redraft of the FCC provisions using a previously adopted definition of "sexual act," thus allowing several FCC sections to be consolidated with each other, and, in addition, Proposal B did not prohibit sexual activity between consenting adults. In addition, Mr. Wefald stated that Section 1643 of Proposal B was presented in the alternative, with the second alternative placing emphasis on the idea of corruption of minors by offenders who are at least five years older than their victims. Further, Mr. Wefald noted that the crime of fornication, defined in Section 1646 of Proposal B, was limited to the performance of a sexual act in a public place.

Proposal C was designed to follow the original FCC format, but not to prohibit sexual activity between consenting adults, and further, contained definitions of the offenses of incest, bestiality, and bigamy, so that those offenses could be logically grouped with the sexual offense provisions. Mr. Wefald noted that the definitions of "deviate sexual intercourse" had been shortened to exclude intercourse with an animal, since Proposal C contained a particular provision dealing with bestiality.

The Chairman said that the Committee would have to make a choice between the drafts for the purposes of using one as the basis for discussion. Representative Murphy inquired as to why Section 1646 in Proposal A limited potential victims of the "sexual intercourse" portion of the offense to females. The Committee discussed the fact that it had previously reached a conclusion that either sex could be

the victim of illegal sexual intercourse or illegal deviate sexual intercourse.

The Committee Counsel stated that he had discussed the three sexual offense proposals with Judge Erickstad and that Judge Erickstad favored Proposal A, but wanted the Committee to note that Section 1645, defining sodomy, reduced the potential penalty under North Dakota law from the present 10-year maximum imprisonment to one-year maximum imprisonment. The Committee Counsel noted that Judge Erickstad would also like to see the definitions of incest, bestiality, and bigamy (contained in Proposal C) included in Proposal A.

Representative Hilleboe noted that recently a federal district court for the District of Columbia had rendered a decision striking down the District of Columbia sodomy statute as being unenforceably vague. Professor Lockney noted that there were two radically different philosophies represented in Proposals A and B, and that the committee would probably never resolve the differences. Therefore, he suggested again that the committee present alternative proposals to the Legislative Council and the Legislature so as to forego the possibility that the main body of the Code revision could be killed on the basis of choosing the wrong tack in regard to sexual offenses.

Mr. Wolf suggested that, should alternative proposals be submitted, he would put Proposal A in the main bill and would offer Proposal B as an alternative. The Chairman called on Mr. Webb and Mr. Kelsch for their comments regarding the feeling of the prosecuting attorneys concerning Proposal A or Proposal B.

Mr. Kelsch stated he felt that the majority of state's attorneys would only be opposed if the sexual offense definitions represented great change and that their opposition would probably be much less if alternatives were offered. He felt that, as a whole, the state's attorneys would probably find Proposal A most acceptable.

Mr. Webb stated that speaking for himself he would favor Proposal B, noting that he would require some revision of that Proposal, as the main proposal, with Proposal A as an alternate.

Representative Stone said she felt that the Committee had definitely decided that males could be the victims of sexual offenses. The Committee Counsel noted that this was probably the case, with the exception that, at the last meeting, Judge Erickstad had indicated an interest in maintaining a sharp delineation between forceful rape and forceful sodomy, with forceful rape remaining essentially as it is defined today, that is, with the victim being a female and the perpetrator being a male.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee limit its consideration of the various sexual offense proposals to Proposal A and Proposal B, with Proposal A to include the definitions of incest, bestiality, and bigamy contained in Proposal C.

Decriminalization 6B — Ohio

OHIO LEGISLATIVE SERVICE COMMISSION, 109TH GENERAL ASSEMBLY, SUMMARY OF AM. SUB. H.B. 511, THE NEW OHIO CRIMINAL CODE 13 (1972):

The principal on which the first group of offenses is founded is that sexual activity of whatever kind between consenting adults in private ought not to be a crime, but that the law ought to proscribe sexual assaults, sexual activity with the young and immature, public sexual displays, and other sexually oriented conduct which carries a significant risk of harming or unreasonably affronting others.

Decriminalization 6C — Ohio

OHIO CRIMINAL LAW TECHNICAL COMMITTEE, MINUTES 6 (Jan. 8, 1968):

Mr. Young requested a consideration of the problem and/or the criminality of homosexuality. Mr. Young believes that such conduct presented a serious threat to the moral stability of our society as well as to the participants. Such conduct is not entirely the result of "mental disease" nor is it uncontrollable conduct. Thus, since such conduct harms both society and the participants and is predicted upon free will, it is a proper and necessary subject for criminal prohibition.

While in basic agreement with Mr. Young, Judge Duffey raised the inescapable problem of enforcement. Detection of such conduct is difficult if not impossible. To enforce such provisions, the door is open to countless constitutional problems of entrapment and search. Existing statutes are rarely enforced except for motives entirely distinct from the purpose for their existence.

After a brief discussion Judge Duffey moved that consensual acts of homosexuality should not be criminally prohibited. All concurred except one dissent by Mr. Young.

Decriminalization 7 — Oregon

OREGON SENATE COMMITTEE ON CRIMINAL LAW & PROCEDURE, MINUTES OF SB 40, ARTICLE 13, SEXUAL OFFENSES 1-3 (Feb. 24, 1971):

Mr. Paillette prefaced his explanation of the Article with a general policy statement on behalf of the Commission:

The provisions in the Article have been approved by the Criminal Law Revision Commission and are based on the principle that private consensual activity between competent adults, whether heterosexual or homosexual, not involving corruption of the young or commercialization, is not a proper subject for regulation by the criminal code.

Other states that have completed or are in the process of criminal law revision, as well as the American Law Institute, in giving careful study to this complex and sensitive area of human behavior, have arrived at the same conclusion.

The ALI recognized and recommended that certain types of individual conduct are better left out of a criminal code. State legislatures around the country, likewise, are coming to the point of trying to distinguish between crime—that is, the type of conduct which poses a real threat to society by presenting dangers of injury to life or health, property loss or official corruption—and sin or immorality, which, while frequently justifiably condemned, seems a matter best left to the church, the family and other moral authorities, but not to the criminal courts. This general philosophy is evident in the new criminal codes of Connecticut and Illinois and in the recommendations of criminal law revision groups in New York and Michigan.

The Commission believes that the central issue that must be faced in this area is the extent to which conduct that is generally considered abhorrent or immoral, but does not produce demonstrable harm to others, should be made criminal.

As noted by the President's Commission on Law Enforcement and Administration of Justice in its report, *The Challenge of Crime in a Free Society* (1967), immorality and criminality are not necessarily identical concepts. Obviously, a state must make every possible effort to control criminality through the force of its criminal code, but it is patently evident that past efforts to legislate against private consensual sexual activity between competent adults have been dismal failures because such laws are substantially unenforceable and have only minimal deterrence and no rehabilitative value at all.

. . . .

Police, prosecutors and the other resources that make up the state's law enforcement machinery, in the view of the majority of the Commission, should be concentrated against the criminal element that poses a clear and present danger to life and property of the community and not deployed in futile attempts to be moral guardians for

the general populace of the state. Moreover, laws (such as the laws that are recommended for repeal) that define so-called "crimes without victims" either are not or cannot be enforced and consequently create disrespect not only for the laws in question but for the entire body of criminal statutes.

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In summary, the vital interests sought to be covered by the draft are the protection of the individual, adult or child, against all nonconsensual or forcible acts, protection of the incompetent and physically helpless, protection of the young and immature and protection of the public from affronts to generally accepted standards of conduct.

Decriminalization 8 — Wisconsin

WIS. STAT. § 944.01 (Supp. 1985):

944.01 Intent. The state recognizes that it has a duty to encourage high moral standards. Although the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage. Marriage is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and this state.