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# Currents in the Stream: The Evolving Legal Status of Gay and Lesbian Persons in Kentucky

BY MATTHEW M. MORRISON\*

## INTRODUCTION

In 1992, the Kentucky Supreme Court decided *Commonwealth v. Wasson*,<sup>1</sup> one of the court's most controversial decisions of the 1990s. The court struck down Kentucky's criminal statute proscribing consensual homosexual sodomy on privacy and equal protection grounds.<sup>2</sup> Clearly, this decision was a pivotal development in the evolution of the legal status of homosexuals in the Commonwealth. Prior to *Wasson*, gay and lesbian Kentuckians were rendered sexual offenders because of purely private conduct.<sup>3</sup> After *Wasson*, these same Kentuckians could, at minimum, attempt to lead their lives without being branded criminals.

The court in *Wasson* characterized their decision not as "the leading edge of change," but as "a part of the moving stream."<sup>4</sup> When Kentucky joined this stream it marked a change in the legal status of gays<sup>5</sup> in the Commonwealth. Part I of this Article discusses the pre-*Wasson* era—a time when same-gender intimacy was criminalized, a period when Kentucky was not yet in the stream's waters.<sup>6</sup> Under the law, gays were merely offenders whose private lives needed to be controlled. Part II briefly reviews the *Wasson* decision<sup>7</sup>—when Kentucky waded into the stream—with attention

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<sup>1</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

<sup>2</sup> *Id.* at 491-92.

<sup>3</sup> See discussion *infra* Part I.

<sup>4</sup> *Wasson*, 842 S.W.2d at 498.

<sup>5</sup> This author uses the term "gays" to refer to both male and female homosexual persons.

<sup>6</sup> See *infra* text accompanying notes 10-67.

<sup>7</sup> A previous issue of the *Kentucky Law Journal* offers an in-depth discussion of *Wasson*. Special Feature, *Commonwealth v. Wasson: Invalidating Kentucky's Sodomy Statute*, 81 KY. L.J. 423 (1993).

to the transformation that it represented.<sup>8</sup> Part III looks beyond *Wasson* to determine that Kentucky is part of the moving stream, neither too far ahead nor too far behind.<sup>9</sup>

### I. BEFORE *WASSON*: OUT OF THE WATER -

In Kentucky, the first sodomy statute was enacted in 1798.<sup>10</sup> However, by the late eighteenth century, sodomy proscriptions were already well-established in Anglo-American law. During medieval times, sodomy was a religious offense punished by the ecclesiastical courts.<sup>11</sup> Moreover, sodomy, as conceptualized by Christian theology and Anglo-American law, appears to have its origin in those same medieval times.<sup>12</sup>

According to Professor Mark Jordan, the term “sodomy”—“sodomia” in Latin—was coined by theologian Peter Damian in the eleventh century.<sup>13</sup> The term resulted from a long process of “thinning and condensing.”<sup>14</sup> The story of the city of Sodom was distilled into a story of the punishment of a single, specifically stigmatized sin.<sup>15</sup> Jordan asserted that this distillation was the result of a process in which details and qualifications were eliminated “in order to enable an excessive simplification in thought.”<sup>16</sup>

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<sup>8</sup> See *infra* text accompanying notes 68-111.

<sup>9</sup> See *infra* text accompanying notes 112-263.

<sup>10</sup> Act of February 10, 1798, ch. 4, § 4, 2 Littell’s Laws of Kentucky 12 (1810), repealed by Act to adopt the Revised Statutes, ch. 358, § 2, 1851 Ky. Acts 32 (replacing laws adopted prior to November 1851 with Revised Statutes of 1852). The court in *Wasson* stated that the original sodomy statute was found in the Kentucky Revised Statutes of 1860. *Commonwealth v. Wasson*, 842 S.W.2d 487, 490-91 (Ky. 1992). This author, however, has traced the statutory sodomy proscriptions in the Commonwealth back to the late eighteenth century. Part I of this Article provides a complete history of sodomy laws in Kentucky.

<sup>11</sup> *Harris v. State*, 457 P.2d 638, 648 (Alaska 1969).

<sup>12</sup> See generally MARK D. JORDAN, *THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY* (1997) (tracing the history of the concept of sodomy from its roots). In the prelude of the book, Jordan stated his intention “to recover the medieval acts of invention that constituted Sodomy and prepared for its long-standing effects.” *Id.* at 1.

<sup>13</sup> *Id.* at 29.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

The category of sodomy was created even though there was no specific connection between the city of Sodom and same-sex copulation.<sup>17</sup> Actually, the sin of Sodom was as much non-sexual as sexual; the story of Sodom seems to be one of inhospitality.<sup>18</sup> There is no conclusive reference in biblical texts that the sexual activity connected to Sodom necessarily involved same-gender intimacy.<sup>19</sup>

Jordan explained that the concept of sodomy was and is tied to the unsettled place of the erotic in Christian love.<sup>20</sup> Jordan advanced that the church's historic exclusion of women indicates that there have been, and can be, familial communities of Christian men who live together and love one another, sometimes erotically and even genitally, in rejection of the heterosexual concept of family.<sup>21</sup> While the distinction between brotherly love—agape—and non-Christian sexual love—eros—has been applied to these communities, this distinction fails to recognize that erotic relations do exist between Christians and these are often subsumed within agape.<sup>22</sup> This failed distinction, as well as the negative judgment of all non-procreative sex, may be why there have been and still are theological issues surrounding same-sex love.<sup>23</sup> Ultimately, Christianity's failure to resolve the problem of the erotic spawned and maintains sodomy as a category to be condemned, an isolation of the erotic to be portrayed in frightening terms.<sup>24</sup> Thus, Jordan concluded that sodomy is not a human behavior, but "a failure of theologians."<sup>25</sup>

Against this theological backdrop, sodomy regulation developed. Considering its roots in the theology of the Middle Ages, it is not unexpected that sodomy was punished by the medieval ecclesiastical courts.<sup>26</sup> While sodomy was not an offense at early common law, England's secular courts punished the crime after the Statute of Henry VIII.<sup>27</sup>

In 1533, the Reformation Parliament enacted a statute making the "vice of buggery committed with mankind or beast" punishable by

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<sup>17</sup> *Id.* at 30.

<sup>18</sup> *Id.*

<sup>19</sup> *See id.* at 30-34.

<sup>20</sup> *Id.* at 175-76.

<sup>21</sup> *Id.* at 175.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 175-76.

<sup>25</sup> *Id.* at 176.

<sup>26</sup> *See supra* note 11 and accompanying text.

<sup>27</sup> *Harris v. State*, 457 P.2d 638, 649 (Alaska 1969).

death.<sup>28</sup> This secularization of the crime was attributed to Henry VIII's renunciation of the Roman Catholic Church.<sup>29</sup> Later case law clarified that buggery included anal intercourse between two men or between a man and a woman, while oral sex was not included.<sup>30</sup> Lesbian sex was not covered by the 1533 statute.<sup>31</sup>

English sodomy law generally applied in early America. The sixteenth century statutes constituted common law that was incorporated into American law.<sup>32</sup> As well, various colonies enacted statutes based upon the 1533 enactment. In 1656, the New Haven Colony prohibited both male-male and female-female sex, while the Connecticut Colony eliminated prohibitions on female-female sex when it formed in 1665.<sup>33</sup> The Jamestown Colony similarly echoed English law by prohibiting sodomy in its early statutes.<sup>34</sup>

Kentucky was also influenced by English sodomy law. In 1789, Virginia consented to the severance of the District of Kentucky.<sup>35</sup> At that time, pre-1607 acts of parliament that were of a general nature, not local to England, applicable to the Virginia colonists, and not repugnant to the various enactments of the Virginia general convention were part of the law of Virginia.<sup>36</sup> Later, the entire body of statutory law that was in force in

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<sup>28</sup> WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 157 (1999). The 1533 statute was repealed during the reign of Queen Mary, but was reenacted upon the ascension of Elizabeth I. *Harris*, 457 P.2d at 649 n.42.

<sup>29</sup> ESKRIDGE, *supra* note 28, at 157.

<sup>30</sup> *Id.* (citing *Rex v. Jacobs*, 168 Eng. Rep. 830 (1817)).

<sup>31</sup> *Id.*

<sup>32</sup> *Harris*, 457 P.2d at 649 (citing *Patterson v. Winn*, 30 U.S. (5 Pet.) 233, 241 (1831)).

<sup>33</sup> ESKRIDGE, *supra* note 28, at 157.

<sup>34</sup> Arthur E. Brooks, Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645, 649 (1985) (citing *FOR THE COLONY IN VIRGINIA BRITANNIA: LAWS DIVINE, MORALL AND MARTIAL, ETC.*, art. 9, at 12 (London 1612) (compiled by W. Strachery, 1969)).

<sup>35</sup> Lyman Chalkley, *The Sources, Progress and Printed Evidences of the Written Law in Kentucky*, 12 KY. L.J. 43, 48 (1923). Kentucky became the westernmost county of Virginia in 1776; as it was divided into additional counties, it became known as the District of Kentucky. ROBERT M. IRELAND, *THE KENTUCKY STATE CONSTITUTION: A REFERENCE GUIDE* 1 (1999). In 1791, Congress enacted a statute to admit Kentucky to the union, with admission occurring on June 1, 1792. *Id.* at 2.

<sup>36</sup> Chalkley, *supra* note 35, at 48-49.

Virginia at the time of Kentucky's founding became part of Kentucky law.<sup>37</sup> Further, later pronouncements of the Kentucky Court of Appeals indicated that English common law as of 1607 was fundamental law in Kentucky.<sup>38</sup>

In 1798, the young state of Kentucky codified various crimes, including sodomy.<sup>39</sup> The sodomy statute, which immediately followed a rape statute, stated: "Every person duly convicted of the crime of sodomy, shall be sentenced to undergo a similar confinement, for a period of time not less than two, nor more than five years . . ."<sup>40</sup> The 1798 statute was maintained in later statutory compilations published in 1822<sup>41</sup> and 1834.<sup>42</sup> Interestingly, sodomy was not defined. However, Kentucky was not unique in that regard: the other young states did not define it either because it was a sin "not to be named."<sup>43</sup>

The 1798 sodomy statute was unaltered until the early 1850s. The first revision of Kentucky statutory law took place in 1850 and 1851.<sup>44</sup> Commissioners were empowered by the legislature to organize state statutes by eliminating repealed acts, rewording text, and arranging them by subject into a code of law.<sup>45</sup> The revised sodomy statute also proscribed buggery: "Whoever shall be convicted of the crime of sodomy or buggery with man or beast, he shall be confined in the penitentiary not less than two nor more than five years."<sup>46</sup> Other states were also revising their sodomy

<sup>37</sup> *Id.* at 49-50.

<sup>38</sup> *Id.* at 47.

<sup>39</sup> Act of February 10, 1798, ch. 4, § 4, 2 *Littell's Laws of Kentucky* 12 (1810), *repealed by* Act to adopt the Revised Statutes, ch. 358, § 2, 1851 Ky. Acts 32 (replacing laws adopted prior to November 1851 with Revised Statutes of 1852).

<sup>40</sup> *Id.*

<sup>41</sup> Act of February 10, 1798, ch. 144, § 4, 2 *Digest of the Statute Law of Kentucky* 984 (1822), *repealed by* Act to adopt the Revised Statutes, ch. 358, § 2, 1851 Ky. Acts 32 (replacing laws adopted prior to November 1851 with the Revised Statutes of 1852).

<sup>42</sup> Act of February 10, 1798, Penal Laws, 1798, § 4, 2 *A Digest of Statute Laws of Kentucky* 1265 (1834), *repealed by* Act to adopt the Revised Statutes, ch. 358, § 2, 1851 Ky. Acts 32 (replacing laws adopted prior to November 1851 with the Revised Statutes of 1852).

<sup>43</sup> ESKRIDGE, *supra* note 28, at 157-58.

<sup>44</sup> Kurt X. Metzmeier, *Kentucky Statutory Authority*, in *KENTUCKY LEGAL RESEARCH MANUAL* 3-1, 3-12 (Kurt X. Metzmeier et al. eds., 2000).

<sup>45</sup> *Id.* at 3-12.

<sup>46</sup> REV. STAT. KY. ch. 28, art. 4, § 11 (Wickliffe, Turner & Nicholas 1852), *repealed by* Act to Revise the Statute Laws of the Commonwealth, ch. 208, §§ 1-4, 1942 Ky. Acts 909-10 (replacing all prior statutory law with the Kentucky Revised

statutes in the mid-nineteenth century, but the term “the infamous crime against nature” was favored over others.<sup>47</sup> Regardless of the language used, judges and commentators interpreted the statutes to criminalize “‘unnatural’” intercourse between two men or between a man and a woman.<sup>48</sup> In Kentucky, it was not until the early twentieth century that the sodomy statute was clarified.<sup>49</sup>

In 1891, Kentucky ratified a new constitution, and bills were prepared to conform state statutes to the new fundamental law of the Commonwealth.<sup>50</sup> In 1894, John D. Carroll codified the statutes and continued to publish regular compilations until 1936.<sup>51</sup> The text of the 1850’s sodomy and buggery proscription was maintained throughout Carroll’s compilations under “Other Felonies.”<sup>52</sup> After significant statutory revision in 1942, the sodomy statute—without change—was recodified under “Offenses Against Morality,” which included incest and fornication.<sup>53</sup>

While sodomy was certainly a mainstay of criminal law in Kentucky, it was not until the early twentieth century that a Kentucky court actually clarified what constituted the offense of sodomy. As of 1903, the Kentucky Court of Appeals seemed to believe that what constituted sodomy was generally understood by most people when it stated that “[e]very person of ordinary intelligence understands what is meant by a charge of sodomy.”<sup>54</sup> However, in 1909 the same court decided *Commonwealth v. Poindexter* and clarified that sodomy was anal intercourse “between two human beings, or man and man,” and that buggery was intercourse with an animal.<sup>55</sup> In that case, two black men were charged with sodomy for having engaged in oral

Statutes).

<sup>47</sup> ESKRIDGE, *supra* note 28, at 158.

<sup>48</sup> *Id.* It seems that, in Kentucky, buggery was an act performed with an animal because the term “beast” was not included in the prior version of the sodomy statute.

<sup>49</sup> See *infra* notes 54-58 and accompanying text.

<sup>50</sup> Metzmeier, *supra* note 44, at 3-12.

<sup>51</sup> *Id.*

<sup>52</sup> Ky. Stat. ch. 36, § 1218 (Baldwin 1915) (commonly referred to as “Carroll’s Kentucky Statutes” because the code was prepared by John D. Carroll), *repealed by Act to Revise the Statute Laws of the Commonwealth*, ch. 208, §§ 1-4, 1942 Ky. Acts 909-10 (replacing all prior statutory law with the Kentucky Revised Statutes).

<sup>53</sup> See NOTES AND ANNOTATIONS TO THE KENTUCKY REVISED STATUTES 1879 (Robert K. Cullen & L.C. Turner eds., 1944). See also KY. REV. STAT. [hereinafter K.R.S.] ch. 436, § 436.050-.070 (1962) (maintaining same sodomy statute).

<sup>54</sup> *White v. Commonwealth*, 73 S.W. 1120 (Ky. 1903).

<sup>55</sup> *Commonwealth v. Poindexter*, 118 S.W. 943, 944 (Ky. 1909).

sex.<sup>56</sup> After reviewing various authorities, the court determined that an oral penetration was not sodomy.<sup>57</sup> Indeed, this decision reflected the prevailing view of the time.<sup>58</sup>

As the twentieth century progressed, sodomy laws became a tool of the state to penalize homosexuals. During the post-war period sodomy arrests increased, and homosexuals became the primary target of enforcement.<sup>59</sup> In 1974, Kentucky enacted the Kentucky Penal Code,<sup>60</sup> drawing heavily from the American Law Institute's Model Penal Code.<sup>61</sup> In the new Penal Code, sodomy was classified into four degrees, three of which covered nonconsensual acts. Sodomy in the fourth degree criminalized consensual homosexual relations. The Code read:

(1) A person is guilty of sodomy in the fourth degree when he engages in deviate sexual intercourse with another person of the same sex. (2) Notwithstanding the provisions of section 82 of this Act, consent of the other person shall not be a defense under this section, nor shall lack of consent of the other person be an element of this offense. (3) Sodomy in the fourth degree is a Class A misdemeanor.<sup>62</sup>

With this revision, the legislature took care to proscribe oral sex and to exempt married couples from sodomy laws when it defined "deviate sexual intercourse" as including "any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another."<sup>63</sup>

<sup>56</sup> *Id.* The case was typical in that the defendants were African-Americans. Statistics indicate that as of 1880 two-thirds of the persons imprisoned for sodomy were of color and/or foreign immigrants. ESKRIDGE, *supra* note 28, at 158.

<sup>57</sup> *Poindexter*, 118 S.W. at 944. Later, the Sixth Circuit found that under Kentucky law an anal penetration was necessary to commit sodomy. *United States v. Milby*, 400 F.2d 702, 704 (6th Cir. 1968).

<sup>58</sup> ESKRIDGE, *supra* note 28, at 158-59. In 1879, Pennsylvania became the first state to include oral sex as sodomy; prior to this, Anglo-American authority generally accepted that oral sex was not encompassed by sodomy, buggery, or crime against nature laws. *Id.* at 158.

<sup>59</sup> *See id.* at 159.

<sup>60</sup> Kentucky Penal Code Act, ch. 406, § 1, 1974 Ky. Acts 831.

<sup>61</sup> Kathleen F. Brickey, *An Introduction to the Kentucky Penal Code: A Critique of Pure Reason?*, 61 KY. L.J. 624, 625 (1973).

<sup>62</sup> Kentucky Penal Code Act § 90 (codified at K.R.S. § 510.100 (Banks-Baldwin 1999)).

<sup>63</sup> Kentucky Penal Code Act § 81(1) (codified at K.R.S. § 510.010(1) (Banks-Baldwin 1999)). *See* Kentucky Penal Code Act §§ 87-90 (making deviant sexual intercourse the primary element of all degrees of sodomy).



Kentucky was not unique in decriminalizing different-sex sodomy while continuing to criminalize same-sex sodomy. While developing the Model Penal Code, the American Law Institute ("ALI") stated that consensual sex was outside the realm of legitimate governmental regulation.<sup>64</sup> However, states with a significant conservative religious presence ignored the ALI and continued to criminalize homosexual relations, apparently due to moral opposition to homosexuality.<sup>65</sup> Curiously, these states decriminalized heterosexual sodomy despite the view that it too was sinful.<sup>66</sup> Whether Kentuckians in 1974 viewed heterosexual sodomy as somehow acceptable we will never know. It may be that maintaining homosexual-only sodomy proscriptions had more to do with the feelings people had toward homosexuals.<sup>67</sup>

## II. WASSON: KENTUCKY WADES INTO THE STREAM

Less than twenty years later, the 1974 sodomy statute met its doom. In 1992, the Kentucky Supreme Court ruled that the statute violated rights of both privacy and equal protection guaranteed by the Kentucky Constitution.<sup>68</sup> The case began in 1985 when the Lexington, Kentucky police department decided to enforce the statute.<sup>69</sup> The police department did this by visiting a local gay bar and engaging men in suggestive conversation, encouraging the target to describe activities that would take place if the two men were to leave together.<sup>70</sup> Then, the officer would arrest the target on a charge of solicitation to commit sodomy.<sup>71</sup> One of the men charged, Jeffrey Wasson, challenged the sodomy statute, ultimately prevailing in the state's highest court.<sup>72</sup>

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<sup>64</sup> ESKRIDGE, *supra* note 28, at 159.

<sup>65</sup> *Id.* at 106.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* at 57-97 (reviewing the history of animus toward homosexuals in the United States and the expression of that animus through law); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703 app. 6 at 829-38 (1997) (reprinting minutes of a 1964 Florida criminal code revision committee that focused largely on homosexuals and the regulation of homosexuals).

<sup>68</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 491-92 (Ky. 1992).

<sup>69</sup> Shirley A. Weigand & Sara Farr, *Part of the Moving Stream: State Constitutional Law, Sodomy, and Beyond*, 81 KY. L.J. 449 (1993).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Several commentators have written about the *Wasson* decision and the constitutional grounds upon which it was based.<sup>73</sup> These writers often discuss the significant role the state constitution played in the decision and the opportunities that state constitutions offer to litigants frustrated by the limits of the Federal Constitution.<sup>74</sup> Here, however, the goal is to briefly review the main points of the decision and to consider it in broader context.

The first right violated by the sodomy statute was that of privacy. The Kentucky Supreme Court found that a greater privacy right exists under the Kentucky Constitution than under the Federal Constitution and rejected the Commonwealth's argument that *Bowers v. Hardwick*<sup>75</sup> was dispositive.<sup>76</sup> The court determined that the 1891 constitutional debates and prior case law indicated that broader protections were afforded by the state constitution.<sup>77</sup> Further, sections 1 and 2 of the Kentucky Constitution<sup>78</sup> were found to provide the source of the privacy right despite there being no mention of a right of privacy in the constitutional debates—this lack of articulation was attributed to the fact that the concept of privacy as a legal right was not

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<sup>73</sup> See, e.g., Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355 (1998); John C. Roach, Note, *Rule of Men*, 81 KY. L.J. 483 (1993); Recent Case, *State Constitutions—Homosexual Sodomy—Kentucky Supreme Court Finds That Criminalization of Homosexual Sodomy Violates State Constitutional Guarantees of Privacy and Equal Protection*, 106 HARV. L. REV. 1370 (1993); Elizabeth A. Leveno, Comment, *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 U. CIN. L. REV. 1029 (1994).

<sup>74</sup> See Weigand & Farr, *supra* note 69, at 449-50.

<sup>75</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the federal right to privacy does not extend to homosexual sodomy).

<sup>76</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 493 (Ky. 1992). The Commonwealth asserted that the U.S. Supreme Court's narrow interpretation of the right to privacy as expressed in *Bowers* was controlling because the Kentucky Constitution conferred no greater right to privacy than afforded by the U.S. Constitution. *Id.* at 490.

<sup>77</sup> *Id.* at 494.

<sup>78</sup> The pertinent text of these sections quoted by the court reads:

§ 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . . Third: The right of seeking and pursuing their safety and happiness.

§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

*Id.* (quoting Ky. CONST. §§ 1, 2).

explored until Warren and Brandeis's Harvard Law Review article of 1890.<sup>79</sup>

The court in *Wasson* then reviewed several early twentieth century cases that invalidated various liquor control laws,<sup>80</sup> paying particular attention to *Commonwealth v. Campbell*.<sup>81</sup> At issue in *Campbell* was an ordinance that criminalized possession of intoxicating liquor of greater than a certain quantity even though the liquor was possessed for private use.<sup>82</sup> The court struck down the ordinance, stating that "[i]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."<sup>83</sup>

The court in *Wasson* considered this language, as well as other passages from the *Campbell* opinion, as an interpretation that the Kentucky Bill of Rights implicitly defined a right of privacy.<sup>84</sup> Further, the court stated that alcohol use was as much a moral issue in the early 1900s as "deviate sexual behavior in private" was in the early 1990s.<sup>85</sup> This comparison of contemporary moral issues led the court to conclude that "[t]he clear implication is that immorality in private which does 'not operate to the detriment of others,' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution."<sup>86</sup>

The Kentucky Supreme Court also found that the consensual sodomy statute violated the guarantee of equal protection under the state constitution. The court determined that equal protection review under the U.S. Constitution was inapposite and instead applied sections 2 and 3 of the Kentucky Constitution.<sup>87</sup> The court concluded that these sections pre-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 494-96.

<sup>81</sup> *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909).

<sup>82</sup> *Id.* at 383.

<sup>83</sup> *Id.* at 385.

<sup>84</sup> *Wasson*, 842 S.W.2d at 494-95.

<sup>85</sup> *Id.* at 495.

<sup>86</sup> *Id.* at 496. The court also noted that the court in *Campbell* quoted extensively from John Stuart Mill and, in turn, the court in *Wasson* relied upon *Mill*. *Id.* Also, the court briefly noted *Commonwealth v. Bonadio*, 415 A.2d 47 (1980), in which the Pennsylvania Supreme Court invalidated that state's sodomy statute noting the common heritage of the Kentucky Bill of Rights and the Pennsylvania Bill of Rights. *Wasson*, 842 S.W.2d at 498.

<sup>87</sup> *Wasson*, 842 S.W.2d at 500. The court quoted from section 3: "'[A]ll men (persons), when they form a social compact, are equal.'" *Id.* (quoting Ky. CONST. § 3).

vent the majority from criminalizing sexual activity that is outside of majoritarian preference because to do so is "arbitrary" and lacks rational basis.<sup>88</sup>

The court was particularly moved by the fact that the statute singled out homosexual sodomy for criminalization. The court took note that, when Kentucky adopted the Model Penal Code in 1974, the General Assembly took pains to punish consensual sexual activity only of persons of the same sex, and the court stated that "this is punishing people because they are different rather than because of what they are doing."<sup>89</sup> The court found that the Commonwealth's justifications for the distinction were, at best, unpersuasive and, at worst, outrageous.<sup>90</sup> Thus, the court concluded that there was no proper legislative purpose of the statute—the state was singling out homosexuals for different treatment for engaging in activity that heterosexuals were already at liberty to perform.<sup>91</sup> In sum, the court found no rational basis for criminalizing one type of "extramarital intercourse" simply because it was more offensive to the majority; to do so was to criminalize "the sexual [orientation] of homosexuals."<sup>92</sup>

The *Wasson* decision is a landmark in a larger transformation taking place in the state and the country. As discussed earlier, sodomy is rooted in a medieval theological distillation of the story of the city of Sodom into the concept of a single, specifically stigmatized sin.<sup>93</sup> This distillation persisted into the mid-nineteenth century. Through that time, sodomy was a discrete act to be punished—it did not define an individual, but represented the human capacity to sin.<sup>94</sup>

From 1880 to around 1950, a homosexual identity began to emerge.<sup>95</sup> While colonial Americans conceived of sodomites as individuals performing certain acts, post-1880 Americans began to recognize that a homosexual can exist separately from sexual activity.<sup>96</sup> An identity arose that some

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 501.

<sup>90</sup> *Id.* The Commonwealth characterized homosexuals as promiscuous pedophiles who engage in public sex. *Id.* It also argued that anal sodomy spreads infectious disease; however, the Commonwealth failed to show why the statute should also cover oral sex and why it should not cover male-female anal sex. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 502.

<sup>93</sup> See *supra* text accompanying notes 13-16.

<sup>94</sup> John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 917 (1986).

<sup>95</sup> *Id.* at 917.

<sup>96</sup> *Id.* at 917-18.

believed included personality, emotional, and even physical traits.<sup>97</sup> Thus, a world divided into heterosexuals and homosexuals is a recent historical invention.<sup>98</sup>

The new social category of homosexual was created by a “dialectic between external labeling and self-definition.”<sup>99</sup> Institutions helped create the category and, in turn, reinforced it over time.<sup>100</sup> This reinforcement has ultimately created a gay minority.<sup>101</sup> Now, sexual activity, which has gradually been detached from the procreative model, is an entity itself that marks personal identity and is the foundation of self-worth and important emotional relationships.<sup>102</sup> Ultimately, this elevated importance of sexuality enables greater public intervention into one’s personal life; thus, the sexual politics of the twentieth century have intensified.<sup>103</sup>

The *Wasson* majority recognized the transformation gays have experienced from sodomite to homosexual. This recognition was advanced by the court when it refused to follow *Bowers*.<sup>104</sup> The defendant in *Bowers* was judged to be a deviant outlaw by what one commentator calls the “straight mind.”<sup>105</sup> The straight mind of the *Bowers* majority labeled the defendant an “[o]ther—defined by a criminal act that the [majority] announced was necessarily a source of moral opprobrium.”<sup>106</sup> The *Bowers* majority viewed prior privacy cases through the lens of the straight mind—a mind that conceives of gays as only the sodomite “other.”<sup>107</sup> The dissent, however, interpreted the same precedent as protecting the sexual privacy of individuals.<sup>108</sup> Justice Blackmun stated that “[w]e protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.”<sup>109</sup>

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<sup>97</sup> *Id.* at 917.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 918.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 919.

<sup>103</sup> *Id.*

<sup>104</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992).

<sup>105</sup> Ayres, *supra* note 73, at 373.

<sup>106</sup> *Id.* (quoting Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 905).

<sup>107</sup> *Id.* at 371.

<sup>108</sup> *Id.*

<sup>109</sup> *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting).

Following Justice Blackmun's lead, the court in *Wasson* criticized the *Bowers* majority for its "misdirected application of the theory of original intent" and, instead, praised the decision in *Loving v. Virginia*<sup>110</sup> because it recognized that "a contemporary, enlightened interpretation of the liberty interest involved in the sexual act made its punishment constitutionally impermissible."<sup>111</sup>

### III. BEYOND *WASSON*: KENTUCKY AS "PART OF THE MOVING STREAM"

The dissent in *Wasson* opined that the majority decision created a slippery slope that would lead to profound ramifications.<sup>112</sup> This fear, however, was unwarranted. In fact, Kentucky is very much in the mainstream. Judging by a review of the fate of sodomy laws in other states, and by a broader assessment of the current status of legal protection from anti-gay bias, Kentucky's mainstream position is revealed.

#### A. *Sodomy Laws*

Today, less than half the states criminalize private, consensual sexual relations. Five states maintain "gender-specific"<sup>113</sup> sodomy proscriptions that apply only to same-sex relations: Arkansas,<sup>114</sup> Kan-

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<sup>110</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>111</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992).

<sup>112</sup> *Id.* at 509 (Lambert, J., dissenting).

<sup>113</sup> One commentator has aptly described "same-sex only" proscriptions as gender-specific. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110-11 (2000). These statutes categorize gays as a "legally distinct 'other.'" *Id.* at 111.

<sup>114</sup> ARK. CODE ANN. § 5-14-122 (Michie 1997). Currently, the Lambda Legal Defense and Education Fund is representing Elena Picado and others in challenging the statute as unconstitutional under the United States and Arkansas constitutions. Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275> (June 14, 2000). In March 2001, an Arkansas trial court struck down the state's sodomy law under the Arkansas constitution. *Picado v. Jegley*, No. CV99-7048 (Ark. Cir. Ct. Sixth Div. Mar. 23, 2001), available at <http://www.lambdalegal.org/sections/library/decisions/picadodecision.pdf>. Echoing other decisions, the circuit court held that the Arkansas constitution provides greater protection than the federal constitution and that the sodomy statute violated rights of privacy and equal protection guaranteed by the Arkansas constitution. *Id.* The state is giving "serious consideration" to appealing the decision. Traci Shurley,

sas,<sup>115</sup> Missouri,<sup>116</sup> Oklahoma,<sup>117</sup> and Texas.<sup>118</sup> Thirteen states have “gender-neutral”<sup>119</sup> laws that proscribe both heterosexual and homosexual relations: Alabama,<sup>120</sup> Arizona,<sup>121</sup> Florida,<sup>122</sup> Idaho,<sup>123</sup> Louisiana,<sup>124</sup> Massachu-

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*Sodomy Law Struck Down as Violation of Privacy*, ARKANSAS DEMOCRAT-GAZETTE, Mar. 24, 2001, at A1.

<sup>115</sup> KAN. STAT. ANN. § 21-3505(a)(1) (1995).

<sup>116</sup> MO. ANN. STAT. § 566.090 (West 1999). This section has a lack of consent element that applies to the “sexual contact” provision, but not to the “deviate sexual intercourse with another person of the same sex” provision. *See State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999).

<sup>117</sup> OKLA. STAT. ANN. tit. 21, § 886 (West 1983). The application of this section to consensual sex has been narrowed to homosexuals. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) (holding that the sodomy statute is unconstitutional as applied to consensual, private heterosexual relations without reaching the question of homosexual relations).

<sup>118</sup> TEX. PENAL CODE ANN. § 21.06 (West 1994). A state appellate court declared this statute unconstitutional under the Texas Constitution. *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417 (Tex. App. 2000), *withdrawn en banc*, 2001 WL 265994 (Tex. App. 2001). *See infra* text accompanying notes 177-93. However, upon rehearing en banc the court upheld the statute. *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2001 WL 265994 (Tex. App. 2001).

<sup>119</sup> *See Leslie*, *supra* note 113, at 111. While these statutes appear to target conduct irrespective of the participant’s gender, they are applied and interpreted as same-sex only proscriptions. *Id.*

<sup>120</sup> ALA. CODE § 13A-6-65(a)(3) (1994). Married individuals are exempt by definition. *Id.* § 13A-6-60(2).

<sup>121</sup> ARIZ. REV. STAT. ANN. § 13-1411 (West 1989).

<sup>122</sup> FLA. STAT. ANN. § 800.02 (West 2000).

<sup>123</sup> IDAHO CODE § 18-6605 (Michie 1997). Marital relations are exempt from the statute. *State v. Holden*, 890 P.2d 341 (Idaho Ct. App. 1995) (holding that the sodomy statute may not be constitutionally enforced against private, consensual marital conduct).

<sup>124</sup> LA. REV. STAT. ANN. § 14:89 (West 1986). This section was recently held constitutional by the state supreme court in a criminal case. *See infra* text accompanying notes 206-09. However, in a 1999 case brought by gays and gay rights activists, a New Orleans trial court judge ruled that the law violated plaintiffs’ right to privacy. Pamela Coyle, *Second State Court Overturns Sodomy Law*, NEW ORLEANS TIMES-PICAYUNE, Mar. 18, 1999, at A1, *available at* 1999 WL 4402110. Nonetheless, the judge upheld the law on other grounds. Janet McConnaughey, *Louisiana Court to Hear Sodomy Law Case*, ASSOCIATED PRESS ONLINE, Jan. 8, 2001, *available at* 2001 WL 3650222. The state appealed the privacy ruling, and the state supreme court, shortly after upholding the statute in the above-referenced criminal case, ordered the trial court to reconsider its

setts,<sup>125</sup> Michigan,<sup>126</sup> Minnesota,<sup>127</sup> Mississippi,<sup>128</sup> North Carolina,<sup>129</sup> South Carolina,<sup>130</sup> Utah,<sup>131</sup> and Virginia.<sup>132</sup>

Decriminalization of consensual sodomy has typically been the result of legislative repeal,<sup>133</sup> however, judicial invalidation of sodomy statutes is not unique. Since *Wasson* was decided in 1992, courts in five states have

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decision. *Id.* The trial court has scheduled oral argument on the privacy issue for March 9, 2001. *Id.* Meanwhile, the plaintiffs have appealed the trial court ruling upholding the law and arguments, which were limited to non-privacy issues, were heard by the state appellate court on January 8, 2001. *Id.*

<sup>125</sup> MASS. ANN. LAWS ch. 272, §§ 34, 35 (Law. Co-op. 1992). Section 34 proscribes sodomy and buggery, § 35 proscribes “unnatural and lascivious acts.” *Id.*

<sup>126</sup> MICH. COMP. LAWS ANN. § 750.158 (West 1991). In 1990, a Wayne County trial court invalidated the statute on privacy grounds in a suit brought against the county prosecutor and state attorney general; to date, neither defendant has appealed. See Frank Bruni, *Sodomy Statute is Struck Down: Laws Violate Right to Privacy, Judge Says*, DETROIT FREE PRESS, July 10, 1990, at B1.

<sup>127</sup> MINN. STAT. ANN. § 609.293 (West 1987).

<sup>128</sup> MISS. CODE ANN. § 97-29-59 (1999). This statute was recently challenged unsuccessfully. See *Miller v. State*, 636 So. 2d 391 (Miss. 1994) (declining to reach the issue whether sodomy statute infringes state constitutional guarantee of privacy).

<sup>129</sup> N.C. GEN. STAT. § 14-177 (1999).

<sup>130</sup> S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985).

<sup>131</sup> UTAH CODE ANN. § 76-5-403(1) (1999).

<sup>132</sup> VA. CODE ANN. § 18.2-361 (Michie 1996). Recent challenges of this statute have been unsuccessful. See *DePriest v. Commonwealth*, 537 S.E.2d 1 (Va. App. 2000) (rejecting challenge of section 18.2-361 as violation of the right to privacy because appellants conduct was not private when it was to take place in public park) (rejecting challenge on establishment of religion grounds because statute rests on long-established secular values).

<sup>133</sup> See *Status of U.S. Sodomy Laws* at <http://www.qrd.org/browse/sodomy.laws> (last modified July 9, 1997). Rhode Island has repealed their statute since this list was updated. 1998 R.I. Pub. Laws ch. 24, § 1 (amending section 11-10-1 of the Rhode Island Laws to eliminate proscriptions of sodomy while maintaining proscriptions of acts performed with animals). The presence of HIV and AIDS was one of the main arguments made by those opposed to the repeal; however, the proponents noted that in three New England states without sodomy laws HIV rates were lower than in Rhode Island. Jonathan Saltzman, *State Senate Repeals 1896 Sodomy Law*, PROVIDENCE JOURNAL-BULLETIN, June 3, 1998, at B1, available at LEXIS, News Library, Prvjnl File.



invalidated sodomy proscriptions,<sup>134</sup> while only one court of last resort has upheld the criminalization of consensual sex.<sup>135</sup>

Four years after *Wasson*, Kentucky's neighbor invalidated its sodomy law when, in 1996, the Tennessee Court of Appeals decided *Campbell v. Sundquist*.<sup>136</sup> There, a group of gay citizens brought a declaratory judgment action seeking a declaration that Tennessee's Homosexual Practices Act violated the privacy right guaranteed by several sections of the state constitution.<sup>137</sup> The state relied heavily upon *Bowers v. Hardwick* in defending the statute.<sup>138</sup> However, the court, like the court in *Wasson*, rejected the argument that they were bound by U.S. Supreme Court decisions, noting that Tennessee may "impose higher standards" when the Tennessee and federal constitutions are similar.<sup>139</sup>

Instead, the court in *Campbell* looked to *Davis v. Davis*,<sup>140</sup> in which the Tennessee Supreme Court recognized a state privacy right that included the right not to procreate.<sup>141</sup> The Tennessee high court understood that the constitutional drafters could not have anticipated the issues of modern life, but they did foresee the need to protect individuals from intrusion into personal, intimate matters.<sup>142</sup> Further, the court in *Campbell* noted Tennessee's strong, historic commitment to liberty and freedom from government

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<sup>134</sup> See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (invalidating state sodomy law on privacy grounds); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (invalidating state sodomy law on privacy grounds); *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417 (Tex. App. June 8, 2000) (invalidating state sodomy law on equal protection grounds); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (invalidating state sodomy law on privacy grounds); *Williams v. State*, No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Baltimore City Cir. Ct. Oct. 15, 1998).

<sup>135</sup> *State v. Smith*, 766 So. 2d 501 (La. 2000).

<sup>136</sup> *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

<sup>137</sup> *Id.* at 253. The constitutional sections cited by the plaintiffs were sections 1, 2, 3, 7, 8, 19, and 27 of Article I of the Tennessee Constitution. *Id.* In finding that the plaintiffs had standing the court stated that "the plaintiffs' status as homosexuals confers upon them an interest distinct from that of the general public with respect to the HPA." *Id.* at 256.

<sup>138</sup> *Id.* at 258.

<sup>139</sup> *Id.* at 259. *Accord* *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992).

<sup>140</sup> *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>141</sup> *Campbell*, 926 S.W.2d at 259-60 (citing *Davis*, 842 S.W.2d at 601).

<sup>142</sup> *Id.* at 260 (quoting *Davis*, 842 S.W.2d at 600).

interference.<sup>143</sup> Thus, the court held that private, consensual sexual matters are “at the heart of . . . the right to privacy” even for same-sex relations.<sup>144</sup>

The court rejected the state’s “compelling interests” as lacking validity. The court rebutted the state’s attempts to portray gays as pariahs: “We think . . . that the State’s attempt to rescue homosexuals from a socially unpopular lifestyle does not provide a compelling reason or even a valid reason for infringement of [a] fundamental right.”<sup>145</sup> The court continued by stating that “even if we assume that the State can punish a ‘lifestyle,’ the record before us indicates that there is no one ‘homosexual lifestyle’ in which all or even a majority of homosexuals engage.”<sup>146</sup>

Two of Tennessee’s “compelling interests” were more reasonable and have commonly been proffered by state’s defending their sodomy laws: reducing the spread of AIDS and protecting public morality.<sup>147</sup> While the court in *Campbell* recognized that AIDS prevention is a compelling interest of the state, it determined that the statute did not fit the goal because behavior that presented no risk of spreading disease was prohibited.<sup>148</sup> Similarly, the court in *Wasson* rejected the AIDS justification because the Kentucky law permitted behavior that posed a risk of spreading the disease.<sup>149</sup>

Tennessee’s public morality argument was also rejected. The court recognized that laws often reflect the public’s moral choices.<sup>150</sup> However, when moral choices are made into law they face constitutional limits.<sup>151</sup> Further, the advancement of a moral choice must be compelling enough to override a citizen’s privacy right.<sup>152</sup> Here, the court echoed the sentiments regarding majoritarian morality expressed in *Wasson*: majority will should “not be imposed upon the minority absent some showing of harmful consequences created by the actions of the minority.”<sup>153</sup>

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<sup>143</sup> *Id.* at 261. Similarly, the court in *Wasson* recognized a tradition of individual liberty in Kentucky. *Wasson*, 842 S.W.2d at 492-93.

<sup>144</sup> *Campbell*, 926 S.W.2d at 262.

<sup>145</sup> *Id.* at 263.

<sup>146</sup> *Id.* The court in *Wasson* blunted Kentucky’s lifestyle-based justifications by calling them “simply outrageous.” *Wasson*, 842 S.W.2d at 501.

<sup>147</sup> *Campbell*, 926 S.W.2d at 263.

<sup>148</sup> *Id.*

<sup>149</sup> *Wasson*, 842 S.W.2d at 501.

<sup>150</sup> *Campbell*, 926 S.W.2d at 264.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 264-65.

<sup>153</sup> *Id.* at 265 (citing *Wasson*, 842 S.W.2d at 496-97).

On the heels of *Campbell*, courts in two other states invalidated consensual sodomy proscriptions on privacy grounds, similarly rejecting morality-based arguments. In 1997, the Montana Supreme Court decided *Gryczan v. State*.<sup>154</sup> This court also found that its state constitution provides broader protection than the federal constitution; as well, the Montana Constitution explicitly grants a right of individual privacy.<sup>155</sup>

In defending its sodomy statute, Montana argued that the appropriate test for determining whether a fundamental right to privacy exists was the *Palko* test applied by the Court in *Bowers*.<sup>156</sup> The court disagreed and found the two-part *Katz* test to be appropriate.<sup>157</sup> Moreover, the court determined that, even under a *Palko* test, the right to privacy in Montana includes consensual same-sex relations when it stated: "Montana's Constitution . . . explicitly protects individual or personal-autonomy privacy as a fundamental right . . . [and] it is hard to imagine any activity . . . more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity."<sup>158</sup>

Montana limited its justifications for the sodomy statute to AIDS prevention and the protection of public morals.<sup>159</sup> Following an informed discussion of HIV and AIDS, the court in *Gryczan* concluded that the statute did not relate to the state's public health goal because the statute included conduct not associated with the spread of AIDS and excluded high-risk behavior among non-homosexuals.<sup>160</sup> The state's public morals

<sup>154</sup> *Gryczan v. State*, 942 P.2d 112 (Mont. 1997). As in Kentucky, the Montana sodomy statute was limited to same-sex relations following a 1970s criminal law revision. *Id.* at 116. Like *Campbell*, this case was a declaratory judgment action brought by gay citizens. *Id.* at 115. The court in *Gryczan* found that the plaintiffs had standing for reasons similar to those expressed in *Campbell*. *Id.* at 120.

<sup>155</sup> *Id.* at 121. A right of privacy is expressly granted in Article II, Section 10 of the Montana Constitution. *Id.*

<sup>156</sup> *Id.* at 122. Under the *Palko* test, a statute fails if it "violate[s] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 328 (1937)).

<sup>157</sup> *Id.* When using a *Katz* test, which is derived from Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), a court considers whether a person has an actual expectation of privacy and whether that expectation is recognized by society as reasonable. *Gryczan*, 942 P.2d at 121 (citing *Katz*, 389 U.S. at 361).

<sup>158</sup> *Id.* at 123.

<sup>159</sup> *See id.*

<sup>160</sup> *Id.* at 123-24.

argument was similarly doomed when the court noted that the judiciary is not required to acquiesce simply because a law reflects a moral choice.<sup>161</sup> Advancing the sentiment of *Wasson* and *Campbell*, the court delivered the final blow to the state's case when it stated that "a tyranny sincerely exercised for the good of its victims may be the most oppressive" and that "those who torment us for our own good will torment us without end for they do so with the approval of their own conscience."<sup>162</sup>

A year after *Gryczan*, the Georgia sodomy statute, the very one that had gained notoriety in *Bowers*, met its end. In 1998, the Georgia Supreme Court struck down the statute in *Powell v. State*.<sup>163</sup> Powell had been convicted of a lesser-included offense of sodomy and subsequently appealed, contending that the statute infringed his right of privacy under the Georgia Constitution.<sup>164</sup> The court in *Powell* did not look to specific constitutional language. Instead, the court turned to *Pavesich v. New England Life Insurance*,<sup>165</sup> an early twentieth-century case that recognized a right of privacy in Georgia arising from the state constitution's Due Process Clause.<sup>166</sup>

The court in *Powell* stated that, since *Pavesich* was decided, Georgia courts had developed a jurisprudence recognizing a right of privacy as a fundamental right.<sup>167</sup> The court in *Pavesich* determined that the right of privacy was "ancient law," and the majority in *Powell* characterized the *Pavesich* opinion as a ringing endorsement of the "right to be let alone."<sup>168</sup> The majority then reviewed several privacy cases to determine that the right to privacy had withstood the test of various instances of state intrusion.<sup>169</sup> By drawing on principles stated in *Pavesich*, and by looking to *Gryczan* and *Campbell*, the court concluded that intimate sexual behavior is constitutionally protected, because it "is at the heart of the Georgia Constitution's protection of the right of privacy."<sup>170</sup>

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<sup>161</sup> *Id.* at 125.

<sup>162</sup> *Id.* (quoting C.S. LEWIS, *The Humanitarian Theory of Punishment*, in GOD IN THE DOCK 287, 292 (Walter Hooper ed., 1970)).

<sup>163</sup> *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

<sup>164</sup> *Id.* at 20-21.

<sup>165</sup> *Pavesich v. New England Life Ins.*, 50 S.E. 68 (Ga. 1905).

<sup>166</sup> *Powell*, 510 S.E.2d at 21.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 22.

<sup>169</sup> *See id.*

<sup>170</sup> *Id.* at 24.

The state attempted to defend the statute by arguing that it was within the state's police power and, predictably, that it bolstered public morals.<sup>171</sup> The court rejected the state's police power argument, noting that valid exercises of police power require public benefit without undue oppression of the individual.<sup>172</sup> Because the court had determined that the statute was designed to reach only private, consensual conduct, the statute did not benefit the public, while the individual was unduly oppressed.<sup>173</sup>

The court in *Powell* responded to Georgia's public morals argument as did the courts in *Wasson*, *Campbell*, and *Gryczan*: the majority rejected the notion that courts must acquiesce to morality legislation.<sup>174</sup> Further, the court recognized that majoritarian morality must be balanced against constitutional guarantees.<sup>175</sup> Thus, the courts in *Wasson*, *Campbell*, *Gryczan*, and *Powell* together express the view that consensual sex is a highly private matter and, while morality will always be debated, "no [significant] state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority."<sup>176</sup>

The Court of Appeals of Texas for the Fourteenth District invalidated Texas's sodomy statute, which applied only to same-sex relations, by taking a different approach. In *Lawrence v. State*,<sup>177</sup> two men pleaded nolo

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<sup>171</sup> *Id.* at 25.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* The court determined that the statute was designed to reach only private, consensual conduct because there were numerous other statutes on the books aimed at assault and public sex. *Id.* at 24-25.

<sup>174</sup> *Id.* at 25.

<sup>175</sup> *See id.* at 25-26.

<sup>176</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 498 (Ky. 1992) (quoting *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980)).

<sup>177</sup> *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417 (Tex. App. June 8, 2000), *withdrawn en banc*, 2001 WL 265994 (Tex. App. 2001). In March 2001, upon rehearing en banc, the court upheld the sodomy statute. *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2001 WL 265994 (Tex. App. 2001). The en banc majority reviewed the defendants' equal protection and privacy claims taking a narrow, traditional approach. *See id.* at \*1-9. The court rejected the claim that the statute discriminates against gays by simply stating that sexual orientation is not a suspect class and by embracing the State's contention that the statute advances public morality. *Id.* at \*3-5. However, the majority never articulated how public morality is advanced by regulating private intimate activity. *See id.*

The majority also rejected the defendants' claim of gender discrimination. *Id.* at \*7. Rather than recognizing that gender determines the criminality of conduct under the statute, *see infra* text accompanying notes 190-93, the court simply considered whether the statute applies equally to men and women. *Lawrence*, 2001 WL 265994 at \*6-7.

contendre to a sodomy charge and subsequently appealed, challenging the statute on privacy and equal protection grounds under both the federal and Texas constitutions.<sup>178</sup> The court found that the Texas Equal Rights Amendment (“ERA”) was dispositive and that the equal protection guarantee provided by the state constitution is more extensive than the federal guarantee.<sup>179</sup> The ERA prohibits the denial of equality under law on the basis of sex, as well as other grounds.<sup>180</sup>

The court looked to state supreme court precedent to determine that sex is a suspect classification; thus, strict scrutiny was warranted.<sup>181</sup> The court then stated that the proper inquiry was whether the defendants were treated differently under the statute from others engaging in the same activity solely on the basis of gender.<sup>182</sup> The court paid careful attention to the fact that Texas, like Kentucky, prohibited both heterosexual and homosexual sodomy until 1974, at which time opposite-sex relations became legal.<sup>183</sup> The court recognized that after 1974 “the distinction between legal and illegal conduct was not the act, but rather the sex of one of the participants.”<sup>184</sup> Thus, the appellants were treated differently solely because of their gender.<sup>185</sup>

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The court rejected the privacy challenge by relying upon *Bowers* and by stating that there is no “general constitutional right to privacy.” *Id.* at \*7-9. Also, the court, not surprisingly, relied upon Justinian and Blackstone for support, even though it did not explain why snippets of ancient law should be a guide for post-modern society. *See id.* at \*9.

Ultimately, the en banc majority echoed the tack taken by the Louisiana Supreme Court when it upheld its state’s sodomy law. *See infra* text accompanying notes 206-10. The defendants in *Lawrence*, however, plan to appeal. Lambda Legal Defense and Education Fund, *Two Men Continue to Fight to Overturn Texas Anti-Gay Law*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=820> (Apr. 16, 2001). Also, the Texas decision is limited to the court’s jurisdiction, which includes the greater Houston area. *See* TEX. GOV’T CODE ANN. § 22.220 (West 1988).

<sup>178</sup> *Lawrence*, 2000 WL 729417 at \*1.

<sup>179</sup> *Id.* The appeals court noted that the Texas Supreme Court had limited the right of privacy, implicating the analysis in two cases in which another Texas appellate panel had found the sodomy statute to be unconstitutional. *Id.* at \*2. Thus, the court limited its analysis to equal protection. *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at \*3 (quoting *In re Unnamed Baby McLean*, 725 S.W.2d 696, 698 (Tex. 1987)).

<sup>182</sup> *Id.*

<sup>183</sup> *See id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

The state conceded that no compelling interest could support the gender distinction.<sup>186</sup> Instead, the state contended that the statute did not discriminate on the basis of gender because it applied to both men and women.<sup>187</sup> Further, Texas, as expected, argued that the statute fulfilled the interests of enforcing morality and promoting family values.<sup>188</sup>

The court rejected the state's argument that because the statute applied to both men and women it did not discriminate.<sup>189</sup> The court looked to *Loving v. Virginia*,<sup>190</sup> in which the U.S. Supreme Court rejected a similar argument as applied to race. The Texas court noted: "By using the race of an individual as the sole determinant of the criminality of his conduct the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment."<sup>191</sup> The court then applied the same analysis to gender to determine that the statute made the same conduct criminal for some but not others based only on the sex of the individuals involved.<sup>192</sup> Thus, "the sex of the individual [was] the sole determinant of the criminality of the conduct."<sup>193</sup>

The situation in Maryland was unusual. There, a trial court invalidated the state's sodomy proscriptions in *Williams v. State*.<sup>194</sup> Various plaintiffs had sought a declaration that one of the sodomy statutes<sup>195</sup> and the lewdness statute were unconstitutional as applied.<sup>196</sup> The court analyzed the standing issue by looking to *Gryczan* and *Campbell* and determined that the plaintiffs concern was with more than the mere existence of the statute.<sup>197</sup> The court then applied a subjective standard to determine if the plaintiff's

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<sup>186</sup> *Id.* at \*4.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* The court did not address the state's morality interests because they were offered as "legitimate purposes" and, thus, could not save the statute under the court's application of strict scrutiny. *See id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>191</sup> *Lawrence*, 2000 WL 729417 at \*4 (citing *Loving*, 388 U.S. at 11).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Williams v. State*, No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Baltimore City Cir. Ct. Oct. 15, 1998).

<sup>195</sup> Maryland had two statutes prohibiting sodomous acts: section 553 covered anal sex and section 554 covered oral sex. *See* MD. ANN. CODE art. 27, §§ 553, 554 (1996).

<sup>196</sup> *Williams*, 1998 Extra LEXIS 260, at \*2.

<sup>197</sup> *Id.* at \*13.

fears of prosecution were real.<sup>198</sup> Finding that genuine concerns had been expressed, the court determined that the matter was justiciable.<sup>199</sup>

The plaintiffs argued that the holding of *Schochet v. State*,<sup>200</sup> in which the Maryland high court ruled that section 554 did not cover private, consensual heterosexual activity, should be extended to also exempt homosexual activity.<sup>201</sup> The state responded that the holding of *Schochet* should be extended if the plaintiffs were found to have standing because the complaint could be dismissed for failing to state a claim.<sup>202</sup>

The state of Maryland raised two concerns to justify their position: that equal protection issues arise from criminalizing homosexual conduct but not heterosexual conduct and that criminalizing homosexual conduct could be an unconstitutional infringement of privacy.<sup>203</sup> The court agreed and followed the reasoning of *Schochet* when it held that the statute did not prohibit “consensual, non-commercial, heterosexual or homosexual activity between adults in private.”<sup>204</sup> In the end, the state consented to the court’s declaration that sections 553 and 554 do not apply to consensual, private sexual activity.<sup>205</sup>

In a case that shows outright refusal to join “the moving stream,” the Louisiana Supreme Court upheld its state’s sodomy law in *State v. Smith*.<sup>206</sup> The case arose from defendant Smith’s conviction of a lesser-included offense of consensual sodomy.<sup>207</sup> The lower appellate court found the sodomy statute unconstitutional because it infringed the right of privacy guaranteed in the Louisiana Constitution.<sup>208</sup> However, the high court

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<sup>198</sup> *Id.* at \*13-14.

<sup>199</sup> *Id.* at \*15.

<sup>200</sup> *Schochet v. State*, 580 A.2d 176 (Md. 1990).

<sup>201</sup> *See Williams*, 1998 Extra LEXIS 260, at \*15-17.

<sup>202</sup> *Id.* at \*17-18.

<sup>203</sup> *Id.* at \*18-19.

<sup>204</sup> *Id.* at \*22.

<sup>205</sup> *Id.* at \*1.

<sup>206</sup> *State v. Smith*, 766 So. 2d 501 (La. 2000). *See also* *Commonwealth v. Paris*, Nos. K96062, K96063, 1999 WL 1499542 (Va. Cir. Ct. Dec. 16, 1999) (rejecting a challenge to Virginia’s sodomy law and finding that the Virginia Constitution is coextensive with the federal constitution and that the analysis in *Bowers* was dispositive).

<sup>207</sup> *Smith*, 766 So. 2d at 504. The defendant in this case engaged in heterosexual acts. *See id.*

<sup>208</sup> *Id.* Article I, section 5 of the Louisiana Constitution contains a Privacy Clause that provides a guarantee against unreasonable invasions of privacy. *Id.* at 505.



reinstated Smith's conviction, concluding that extending the privacy right to include consensual oral and anal sex would be a "serious misinterpretation" of the state constitution.<sup>209</sup>

The Louisiana Supreme Court took a hands-off approach by declaring that expanding the right of privacy would violate the principle of separation of powers.<sup>210</sup> Moreover, the court reviewed the history of sodomy proscriptions and concluded that it was obvious that the right to privacy cannot include conduct that was considered criminal at the time the state constitution was ratified.<sup>211</sup> As a result, the court placed the will of the majority above the rights of the individual even though the state constitution protects privacy. The court noted: "The question is not one of what is good or wise for Louisiana society, but rather whether the people's majority which adopted the constitution at referendum intended to deprive the legislature of the power to deal with the matter."<sup>212</sup>

The court showed great deference to majority will by stating that it would be unconstitutional for jurists to "elevate [their] own personal notions of individual 'liberty' over the collective wisdom of the voters' elected representatives' belief."<sup>213</sup> Further, the court engaged in faulty reasoning when it presumed the constitutionality of the sodomy statute. The court noted: "A violation of the criminal law of this state is not justified as an element of the 'liberty' or 'privacy' guaranteed by this state's constitution. The freedom to violate criminal law is simply anarchy."<sup>214</sup> Clearly, the court ignored the principle that conduct cannot be criminal if it is constitutionally protected. The court subverted the concept of supremacy by placing the statute above the constitution and neglected its responsibility to fully analyze privacy rights under the state constitution.

Instead of a careful analysis of the state constitution, the court relied on *Bowers* to blunt any attempt to secure greater privacy rights in Louisiana.<sup>215</sup> As well, the court equated judicial interpretation of the state's Privacy Clause with an impermissible judicial amendment to the state constitution.<sup>216</sup> Moreover, the court appeared to address gay citizens when it stated that if the court were to interpret the constitution as affording

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<sup>209</sup> *Id.* at 512.

<sup>210</sup> *Id.* at 506-07.

<sup>211</sup> *Id.* at 508.

<sup>212</sup> *Id.* at 508-09.

<sup>213</sup> *Id.* at 510.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* at 509.

<sup>216</sup> *Id.* at 510.

greater privacy rights than “any and all disaffected groups unable to obtain legislative redress need only convince a majority of this court that what they seek is an implicit ‘right’ afforded by the Louisiana Constitution.”<sup>217</sup>

The court in *Smith* specifically distinguished *Wasson* by noting that *Wasson* relied on language in the Kentucky Constitution that has no counterpart in the Louisiana Constitution.<sup>218</sup> However, the greater distinction between *Smith* and *Wasson*, *Campbell*, *Gryczan*, and *Powell* is revealed in the issue of public morality. The court in *Smith* read the constitution as nothing but an embodiment of majority will to which the court was required to yield. In contrast, the courts that struck down their states’ sodomy laws understood that their duty was not to acquiesce to morality legislation, but to interpret constitutional guarantees to achieve the best balance of competing interests. In this way, constitutional provisions protect all citizens rather than facilitating a “tyranny . . . exercised for the good of its victims.”<sup>219</sup>

### B. Protection from Discrimination

Anti-discrimination law is an area in which Kentucky is “part of the moving stream.” At present, protections from sexual orientation discrimination primarily exist at the local level. Only eleven states ban sexual orientation bias: California,<sup>220</sup> Connecticut,<sup>221</sup> Hawaii,<sup>222</sup> Massachusetts,<sup>223</sup> Minnesota,<sup>224</sup> Nevada,<sup>225</sup> New Hampshire,<sup>226</sup> New Jersey,<sup>227</sup> Rhode Island,<sup>228</sup>

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 511 n.11. The court attacked the court in *Wasson* for interpreting the Kentucky Constitution in a manner that “would be a formula for anarchy.” *Id.*

<sup>219</sup> *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997) (quoting C.S. LEWIS, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK* 287, 292 (1970)).

<sup>220</sup> CAL. GOV’T CODE §§ 12920, 12921, 12926, 12940, 12955, 12955.8 (West Supp. 2000).

<sup>221</sup> CONN. GEN. STAT. ANN. §§ 46a-81a to 81r (West 1995).

<sup>222</sup> HAW. REV. STAT. §§ 368-1, 378-2 (1993 & Supp. 1999).

<sup>223</sup> MASS. ANN. LAWS ch. 151B, §§ 1, 3, 4; *id.* ch. 272, §§ 92A, 98 (Law. Co-op. 1992, 1999 & Supp. 2000).

<sup>224</sup> MINN. STAT. ANN. §§ 363.01, 363.02, 363.021, 363.03 (West Supp. 2000).

<sup>225</sup> NEV. REV. STAT. §§ 281.370, 610.010, 610.020 (2000).

<sup>226</sup> N.H. REV. STAT. ANN. §§ 354-A:1, :2, :6 to :8, :10, :16, :17 (Supp. 1999).

<sup>227</sup> N.J. STAT. ANN. §§ 10:5-3 to 10:5-5 (West Supp. 2000).

<sup>228</sup> R.I. GEN. LAWS §§ 11-24-2, 11-24-2.2, 28-5-2, 28-5-3, 28-5-5 to 28-5-7, 28-5-7.3, 34-37-1 to 34-37-4, 34-37-4.2, 34-37-4.3, 34-37-5.2 to 34-37-5.4 (Supp. 1999).

Vermont,<sup>229</sup> and Wisconsin.<sup>230</sup> In 2001, Maryland will become the twelfth state to ban sexual orientation bias when a bill passed by the state legislature is signed into law.<sup>231</sup> While most states do not ban sexual orientation bias, over 150 cities and counties provide some degree of protection.<sup>232</sup> A large number of these localities are in jurisdictions that do not provide state-wide protection.<sup>233</sup>

Kentucky reflects the general trend: the Commonwealth has no state-wide anti-discrimination statute covering sexual orientation, but three localities currently ban such bias.<sup>234</sup> A bill was introduced in the 2000 General Assembly seeking to ban sexual orientation discrimination in employment, housing, and housing and mortgage-related transactions,<sup>235</sup> but the bill died in committee when the chairman decided not to call it for a hearing.<sup>236</sup> The chairman characterized the committee as reluctant to get involved in gay rights.<sup>237</sup> The bill will return in the 2001 session of the legislature;<sup>238</sup> it is unlikely that it will face better prospects.

Local laws banning sexual orientation bias have fared better in Kentucky. In 1999, four localities enacted anti-discrimination ordinances:

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<sup>229</sup> VT. STAT. ANN. tit. 3, §§ 961, 963, 1001, 1013, 1026, 1028, 1041 (Supp. 2000); VT. STAT. ANN. tit. 8, §§ 1211, 1302, 4724, 10403 (Supp. 2000); VT. STAT. ANN. tit. 9, §§ 2362, 2410, 2488, 4502, 4503 (1993); VT. STAT. ANN. tit. 21, §§ 495, 1621, 1726 (Supp. 2000).

<sup>230</sup> WIS. STAT. ANN. §§ 15.04, 16.765 (West Supp. 2000); WIS. STAT. ANN. § 21.35 (West 1996); WIS. STAT. ANN. § 36.12 (West Supp. 2000); WIS. STAT. ANN. § 38.23 (West 1992); WIS. STAT. ANN. §§ 66.1011, 66.1213, 66.1301, 106.50 (West Supp. 2000); WIS. STAT. ANN. §§ 111.31, 111.32, 111.70, 111.85 (West 1997); WIS. STAT. ANN. § 230.18 (West Supp. 2000); WIS. STAT. ANN. § 234.29 (West 1987).

<sup>231</sup> Jeff Barker, *House Oks Gay Rights Legislation*, BALTIMORE SUN, Mar. 31, 2001, at B1. The bill's passage was a victory for Governor Glendening who had been lobbying for the bill for two years. *See id.*

<sup>232</sup> Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217> (last modified Oct. 25, 1999).

<sup>233</sup> *Id.*

<sup>234</sup> *See infra* notes 239-42.

<sup>235</sup> H.R. 7, 2000 Gen. Assem., Reg. Sess. (Ky. 2000).

<sup>236</sup> Rick McDonough, *Two Bills on Gay Rights Going Nowhere in House*, LOUISVILLE COURIER-JOURNAL, Feb. 23, 2000, at A1.

<sup>237</sup> *Id.*

<sup>238</sup> H.R. 116, 2001 Gen. Assem., Reg. Sess. (Ky. 2001).

Louisville,<sup>239</sup> Lexington,<sup>240</sup> Jefferson County,<sup>241</sup> and Henderson.<sup>242</sup> The passage of these ordinances created significant controversy and revealed divisions between Kentuckians. The supporters of the ordinances saw their struggle in terms of fairness and civil rights. The opponents couched their opposition in terms of morality, decency, and religious values.

In each locality, protests and public debates revealed the contrasting stands taken by citizens.<sup>243</sup> In Louisville, an African-American pastor led the opposition, rejecting the notion that protecting people against sexual orientation bias had anything to do with civil rights.<sup>244</sup> Rather, he said that the issue was sin and that “[i]t has everything to do with the moral rights of people who believe in God.”<sup>245</sup> However, an African-American alderman who voted for the ordinance viewed the issue differently. Before casting his vote for the ordinance, Alderman Unsel said: “The days of discrimination need to fade into darkness.”<sup>246</sup>

The issue in other cities was equally heated. In Lexington, council persons characterized the debate as mean-spirited and said that they had been threatened.<sup>247</sup> There were churches in Lexington that supported the anti-discrimination law, while the pastor from a church outside of

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<sup>239</sup> The Louisville ordinance is limited to employment discrimination. LOUISVILLE, KY., CODE OF ORDINANCES ch. 98, §§ 98.00, 98.15-98.18 (1999).

<sup>240</sup> The Lexington ordinance covers employment, housing, and public accommodations. LEXINGTON-FAYETTE COUNTY, KY., CHARTER & CODE OF ORDINANCES § 2-33 (1999).

<sup>241</sup> The Jefferson ordinance covers employment, housing, and public accommodations. JEFFERSON COUNTY, KY., CODE OF ORDINANCES ch. 92, §§ 92.01-92.07 (1999).

<sup>242</sup> The Henderson law covered employment, housing, and public accommodations. Henderson, Ky., Ordinance 33-99 (Sept. 28, 1999), *repealed by* Henderson, Ky., Ordinance 07-2001 (Mar. 13, 2001).

<sup>243</sup> *But see* Commonwealth v. Wasson, 842 S.W.2d 487, 509 (Ky. 1992) (Lambert, J., dissenting) (predicting that the majority opinion will be an obstacle to those who wish to speak against gays). Considering the level of anti-gay sentiment expressed during the ordinance debates, it appears that Justice Lambert’s prediction was wrong.

<sup>244</sup> Leslie Scanlon, *Black Pastor Fights Protection for Gays: Minister Says Issue is Not Like Fight for Racial Equality*, LOUISVILLE COURIER-JOURNAL, Jan. 20, 1999, at B1.

<sup>245</sup> *Id.*

<sup>246</sup> Rick McDonough, *Gay-rights Ordinance Passes: Aldermen Vote 7-5 to Outlaw Job Discrimination*, LOUISVILLE COURIER-JOURNAL, Jan. 27, 1999, at A1.

<sup>247</sup> Joseph Gerth, *Lexington Passes Gay-rights Law*, LOUISVILLE COURIER-JOURNAL, July 9, 1999, at A1.

Lexington condemned the law, saying that it "endorse[d] a lifestyle that God deems immoral."<sup>248</sup> In Henderson, more than one thousand people attended two public meetings.<sup>249</sup> At one of these meetings, the debate became intense when a citizen threatened commissioners saying that anyone voting for the ordinance deserved to be thrown into the river with "a rope tied around [his] neck with a rock at the other end."<sup>250</sup> This sentiment was vindicated when the city repealed the anti-bias ordinance eighteen months after its passage.<sup>251</sup>

The significant debate surrounding the anti-bias ordinances was not lost on state legislators. Under the guise of promoting the uniform application of civil rights in Kentucky, several legislators sponsored a bill that would have overturned the four anti-discrimination laws by eliminating all local civil rights ordinances.<sup>252</sup> One of the sponsors had originally planned a bill to specifically outlaw local gay-rights laws.<sup>253</sup> However, it was decided by the sponsors that a broader approach of eliminating local civil rights jurisdiction would be less controversial.<sup>254</sup> The sponsors seemed unconcerned by the divisive nature of their bill, and were sympathetic to individuals who opposed the local anti-bias laws.<sup>255</sup> Ultimately, the bill died in committee because the committee chair did not want the state micro-managing local laws.<sup>256</sup>

Reaction to the anti-discrimination laws has not been limited to the state legislature. In the Fall of 1999, Barrett Hyman, a Louisville doctor, filed a federal suit against both the Louisville and Jefferson County ordinances.<sup>257</sup> Hyman challenged the ordinances by asserting that they violate his religious freedom.<sup>258</sup> Hyman has several employees and stated

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<sup>248</sup> Todd Van Campen, *Churches Differ on Gay Bias Proposal: Issue Shows Split in Christian Views*, LEXINGTON HERALD-LEADER, June 30, 1999, at A1.

<sup>249</sup> Chris Poynter, *Kentucky Gay-Rights Battle*, LOUISVILLE COURIER-JOURNAL, Oct. 18, 1999, at A1.

<sup>250</sup> *Id.*

<sup>251</sup> Henderson, Ky., Ordinance 07-2001 (Mar. 13, 2001). The city also revised its own employment policy to permit anti-gay bias. *See* Henderson, Ky., Ordinance 08-2001 (Mar. 13, 2001).

<sup>252</sup> H.R. 485, 2000 Gen. Assem., Reg. Sess. (Ky. 2000).

<sup>253</sup> McDonough, *supra* note 236, at A1.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Rick McDonough & Sheldon S. Shafer, *Federal Agency Backs Gay Rights*, LOUISVILLE COURIER-JOURNAL, Aug. 17, 2000, at A1.

<sup>258</sup> Andrew Wolfson, *Lawsuit Challenges City Gay-Rights Law*, LOUISVILLE COURIER-JOURNAL, Sept. 14, 1999, at A1.

he did not want to be required to employ homosexuals because he believes them to be sinful and offensive to God.<sup>259</sup> However, Hyman's lawyer acknowledged that no federal court has invalidated a law prohibiting sexual orientation bias on free exercise grounds.<sup>260</sup>

Several months after Hyman filed his lawsuit, the U.S. Department of Justice filed a brief in favor of the anti-discrimination laws.<sup>261</sup> The Department filed the brief because it claimed that if Hyman's suit is successful it will interfere with the American interest in assuring equal employment opportunity for all.<sup>262</sup> The Louisville law director stated that the federal brief indicated the importance of the Hyman case to civil rights matters across the country.<sup>263</sup> Indeed, this may be accurate considering the large number of local ordinances banning sexual orientation bias.

### CONCLUSION

Kentucky is "part of the moving stream." A majority of states have disposed of their sodomy laws, recognizing that gay individuals are more than the sodomite "other." Many of these states have judicially invalidated their statutes, joining with Kentucky in balancing expressions of moral sentiment against the ideals of individual autonomy, personal privacy, and equal treatment under the law. As well, Kentucky cities are not alone in their efforts to legislatively combat sexual orientation discrimination. The Hyman case is an indication that Kentucky is "in the stream" because the outcome of that case could have a profound impact throughout the nation.

Certainly, issues surrounding sexual orientation will take years to resolve. Matters of sexual privacy and discrimination are a significant starting point. As we reach consensus on those matters, we will be better prepared to deal with others. For now, it appears that Kentucky will move neither too far ahead nor too far behind other states in its treatment of gays under the law. The hope is that the Commonwealth will remain in the water and "part of the moving stream."

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* In March 2001, a federal judge dismissed Hyman's lawsuit and granted summary judgment to the defendants. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 549 (W.D. Ky. 2001). The court rejected all of Hyman's claims, including those brought under the federal and Kentucky constitutions. *See id.* at 536-49.

<sup>261</sup> McDonough & Shafer, *supra* note 257, at A1.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

