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Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy†

JULI A. MORRIS*

INTRODUCTION

The 1986 Supreme Court decision of *Bowers v. Hardwick*[1] effectively ended federal constitutional law challenges to state sodomy statutes. The Court rejected Hardwick's substantive due process argument in stating that the rights announced in the chain of cases beginning with *Griswold v. Connecticut*[2] bore no "resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[3] The concurring[4] and dissenting[5] opinions in *Hardwick* suggest the possibility of other federal law challenges, particularly under the equal protection clause of the fourteenth amendment. However, courts which have considered these challenges have refused to recognize that lesbians and gay men constitute a group deserving the protection of heightened scrutiny[6] available

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1. 478 U.S. 186 (1986).

2. 381 U.S. 479 (1965) (the right of married couples to use contraception). This line of cases is generally thought to include Roe v. Wade, 410 U.S. 113 (1973) (the right of women to decide whether to bear a child; the right to an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the right of unmarried couples to use contraception); Stanley v. Georgia, 394 U.S. 557 (1969) (the right to private possession of obscene materials); and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right of a parent to control the education and rearing of a child).

3. *Hardwick,* 478 U.S. at 190-91. Federal privacy protection has traditionally been limited to the realms of family, marriage and procreation. The Court in *Hardwick* concluded that these were categories to which private and consensual sex acts between homosexuals cannot belong. *Id.* at 191.

4. *Id.* at 197 (Powell, J., concurring) (stating that the eighth amendment's cruel and unusual punishment clause may be implicated where, as in this case, the statute at issue authorized up to twenty years imprisonment upon conviction for engaging in a single, private, consensual act of sodomy).

5. *Id.* at 199, 201 (Blackmun, J., dissenting) (arguing that claims based on the equal protection clause and the eighth and ninth amendments should have been considered by the Court).

6. *See* Lasson, *Homosexual Rights: The Law in Flux and Conflict,* 9 U. BALT. L. REV. 47, 58 (1979). *But see* Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980). For an argument that sodomy laws themselves violate the equal protection guarantee, see Note, *The Miscegenatiòn Analogy: Sodomy Law as Sex Discrimination,* 98 YALE L.J. 145 (1988).

Most courts that refuse to extend equal protection to gays base their decisions on their view of the mutability of sexual preference. Since United States v. Carolene Prods. Co., 304 U.S. 144 (1938), a determination that a classification is suspect has depended on a finding of stigma,

to groups such as those classified on the basis of race, alienage, national origin, sex and illegitimacy.[7] Thus, under current federal law analysis, a finding of heightened scrutiny would appear necessary to any successful equal protection challenge. In fact, several courts have held that *Hardwick*'s refusal to recognize a fundamental right in the context of lesbian and gay lifestyles is binding precedent in equal protection analysis.[8] Because federal challenges are now precluded, gay rights advocates are limited to challenges at the state level. Most legislative repeal of sodomy statutes has occurred since 1970, but that movement seems to have lost momentum in the 1980s.[9]

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unequal treatment, immutability, and discreteness and insularity. *Id.* at 152 n.4. Until recently, gay rights advocates have fairly consistently argued that sexual orientation is fixed either at birth or within the first few years of life. *See* Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality,* 57 S. CAL. L. REV. 797, 818 (1984). Court decisions, however, have relied on conflicting reports from the scientific community in finding that the origins of homosexuality cannot be empirically determined and therefore, since homosexuality may not be immutable, classifications based on sexual preference are not suspect. *See generally id.*; Comment, Bowers v. Hardwick: *Balancing the Interests of the Moral Order and Individual Liberty,* 16 CUMB. L. REV. 555 (1986) (noting that the Court has limited the definition of immutability to characteristics which one is born with and which are beyond one's control). For an analysis of why immutability is not required by equal protection precedents and for a framework for adopting a process-based argument that would protect the dialogue that generates group identity (focusing on the *classification,* not defining a class by the acts of its members), see Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian, and Bisexual Identity,* 36 UCLA L. REV. 915 (1989).

7. *See* Loving v. Virginia, 388 U.S. 1 (1967) (race as a suspect classification meriting strict scrutiny); McLaughlin v. Florida, 379 U.S. 184 (1964) (race as a suspect classification); Graham v. Richardson, 403 U.S. 365 (1971) (alienage as a suspect classification); Korematsu v. United States, 323 U.S. 214 (1944) (national origin as a suspect classification); Craig v. Boren, 429 U.S. 190 (1976) (sex as a quasi-suspect classification meriting intermediate scrutiny); Lalli v. Lalli, 439 U.S. 259 (1978) (subjecting classifications based on illegitimacy to intermediate scrutiny).

8. *See* Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987). Other cases in which courts have advanced this argument include: Gay Inmates of Shelby County Jail v. Barksdale, No. 84-5666 (6th Cir. June 1, 1987) (WESTLAW, Allfeds database); Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984); State v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986); *In re* Opinion of the Justices, 129 N.H. 290, 295, 530 A.2d 21, 24 (1987); *cf.* Gay and Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045, 1057 (W.D. Ark. 1987), *rev'd,* 850 F.2d 361 (8th Cir. 1988). *But see* Webster v. Doe, 486 U.S. 592 (1988); *Hardwick,* 478 U.S. at 190; Watkins v. United States Army, 847 F.2d 1329 (9th Cir.), *reh'g granted en banc,* 847 F.2d 1362 (1988), *withdrawn,* 875 F.2d 699 (1989) (specifically rejecting this argument and criticizing the over-simplification of the structure of the fourteenth amendment); Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986), *cert. granted,* 482 U.S. 913 (1987), *aff'd in part and rev'd in part,* 486 U.S. 592 (1988); benShalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989), *rev'd,* 881 F.2d 454 (7th Cir. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368-69 (N.D. Cal. 1987), *rev'd in part and vacated in part,* 895 F.2d 563 (9th Cir. 1990); Swift v. United States, 649 F. Supp. 596, 601 (D.D.C. 1986); benShalom v. Secretary of Army, 489 F. Supp. 964, 975 (E.D. Wis. 1980). For a sustained and forceful critique of arguments that conflate due process with equal protection in this context, see Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1161 (1988).

9. *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity,* 40 U. MIAMI L. REV. 521, 526-27 (1986).

Twenty-four states and the District of Columbia still make private, consensual sodomy a criminal offense.[10] Combatting prejudice and discrimination in the political arena is fraught with far-reaching difficulties:

> [W]hen [lesbians and gay men] voluntarily adopt or involuntarily bear the public identity 'homosexual' and for that reason lose their employment and other public benefits, housing, custody of children, resident alien status, medical insurance, and even physical safety, they are hindered and deterred from entering the public debate surrounding the sodomy laws. The harms they suffer interfere sharply, albeit indirectly, with the political process.[11]

As a result, state-level challenges to sodomy statutes must now delve into the largely untested waters of state constitutional law.

A few state courts have relied on the interpretation of *state* constitutional provisions to extend protection for individual rights beyond the limits recognized in federal jurisprudence.[12] This Note will examine the methods used by those courts in the context of sodomy statutes and will point out the underlying theories of state legislative authority, homosexual identity and privacy on which state courts rely in determining the protection due lesbians and gay men. This Note will then review the jurisprudence surrounding select state constitutional privacy and equal protection provisions and will suggest possible avenues for challenging the validity of sodomy statutes under those provisions.

I. State Constitutions and the Protection of Privacy Rights

Justice Brennan argued in 1977 that "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those

10. Ala. Code § 13A-6-65(a)(3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1989); Ark. Stat. Ann. § 5-14-122 (1987); D.C. Code Ann. § 22-3502 (1981); Ga. Code Ann. § 16-6-2 (1988); Idaho Code § 18-6605 (1987); Kan. Stat. Ann. § 21-3505 (1988); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1985); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Crim. Law Code Ann. §§ 553, 554 (1987); Mich. Comp. Laws Ann. § 750.158 (West 1968); Minn. Stat. Ann. § 609.293 (West 1987); Miss. Code Ann. § 97-29-59 (1973); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. § 45-5-505 (1989); Nev. Rev. Stat. Ann. § 201.190 (Michie 1986); N.C. Gen. Stat. § 14-177 (1988); 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. 1985); Tenn. Code Ann. § 39-2-612 (1982); Tex. Penal Code Ann. § 21.06 (Vernon 1989); Utah Code Ann. § 76-5-403 (1990); Va. Code Ann. § 18.2-361 (1988). Florida now punishes sodomy under Fla. Stat. Ann. § 800.02 (West 1976) (deviate sexual intercourse) after its sodomy statute (§ 800.01) was declared unconstitutionally vague by the Florida Supreme Court. Franklin v. State, 257 So.2d 21 (Fla. 1971).

11. Halley, *supra* note 6, at 918. To be sure, state constitutional law challenges to sodomy statutes have their own political component in that state judges can be as susceptible to political pressure as state legislators. *See* Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights,* 16 U. Tol. L. Rev. 465, 469-73 (1985).

12. *Developments in the Law—The Interpretation of State Constitutional Rights,* 95 Harv. L. Rev. 1324, 1433-34 (1982) [hereinafter *Developments in the Law*].

required by the Supreme Court's interpretation of federal law."[13] While the methods and theories of state constitutional law have generated considerable interest among scholars,[14] most courts faced with claims based on state constitutions adopt a posture of noninterpretation.[15] A small number of state courts, however, have developed state constitutional privacy and equal protection doctrines and have interpreted them to hold that sodomy statutes violate the rights of lesbians and gay men.

A. State Law Privacy Rights and the New Jersey Courts

In 1976, the New Jersey Supreme Court held that the guarantees of the New Jersey Constitution included a right to privacy[16] that allowed the parents of a comatose woman to decide whether to remove her from a life support system.[17] The court had laid the groundwork for such a politically hazardous extension of privacy rights by expressing its dissatisfaction with federal precedent in two less emotionally charged forums.

The court held in *Robinson v. Cahill*[18] that a method of school financing, which based allocations to a particular district on the real property taxes collected from that district, violated the state's equal protection clause,[19] even though the Supreme Court in *San Antonio Independent School District v. Rodriguez*[20] upheld a similar method of financing. Close on the heels of the New Jersey court's 1973 decision, the court extended protection under the state constitution's search and seizure clause[21] beyond that required by

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13. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 491 (1977).

14. *See, e.g., Developments in the Law, supra* note 12, at 1356-67, 1384-98; Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy,* 14 HARV. C.R.-C.L. L. REV. 361 (1979) (competing tensions between family-based and autonomy-based theories of privacy); Halley, *supra* note 6 (political circumstances so infect the process by which antihomosexual legislation has been passed that process-based equal protection scrutiny is both necessary and justified); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory,* 45 FORDHAM L. REV. 1281 (1977) (the influence of contractarian moral theory on the federal constitution); Comment, State v. Reeves: *Interpreting Louisiana's Constitutional Right to Privacy,* 44 LA. L. REV. 183 (1983).

15. *Developments in the Law, supra* note 12, at 1438. Courts often abstain from construing state constitutional privacy provisions by basing their decisions on federal law. Federal law also affects the disposition of state law claims because courts which frequently use federal precedent as guidance in construing state provisions construct state law doctrines that closely track federal law (thus risking instability in state law if subsequent federal cases change direction) and because courts implicitly reinterpret federal precedent to justify creating privacy rights that are rejected by the Supreme Court. *Id.* at 1434-43.

16. *See* N.J. CONST. art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty . . . and of pursuing and obtaining safety and happiness.").

17. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied,* 429 U.S. 922 (1976).

18. 62 N.J. 473, 303 A.2d 273, *cert. denied,* 414 U.S. 976 (1973).

19. N.J. CONST. art. I, para. 1.

20. 411 U.S. 1 (1973).

21. N.J. CONST. art. I, para. 7.

the United States Supreme Court.[22] In *State v. Johnson,*[23] the New Jersey Supreme Court held that the state must prove that a defendant waived a known constitutional right before evidence obtained in a consensual search is admissible. In both cases, as in In re *Quinlan,*[24] the New Jersey court filled the gap in federal protection through an extension of state constitutional guarantees of individual rights. This "gap-filling" approach has been termed "interstitial" and it allows state courts to "tinker with the federal floors" to interpose "an additional layer of protection between individual rights and the oppressive potential of the state."[25]

One year after *Quinlan,* the New Jersey Supreme Court in *State v. Saunders*[26] again extended the limits of the protection available under New Jersey's constitutional right to privacy beyond that available under federal privacy law. The court in *Saunders* held that New Jersey's fornication statute[27] violated the state constitution's right to privacy, despite a less than ideal factual situation.[28] The court relied on its interpretation of the New Jersey right to privacy in *Quinlan* and did not ground its decision on protection of federal privacy rights.[29] Instead, the court implemented an autonomy-based view of individual rights that constitutes the most important and distinguishing feature of its decision in terms of creating future state constitutional privacy rights for lesbians and gay men.[30]

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22. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (finding admissible evidence obtained in a supposedly consensual search without requiring the state to show that the defendant waived a known constitutional right).

23. 68 N.J. 349, 346 A.2d 66 (1975).

24. 70 N.J. 10, 355 A.2d 647, *cert. denied,* 429 U.S. 922 (1976); *see supra* note 17 and accompanying text (discussing *Quinlan*).

25. *Developments in the Law, supra* note 12, at 1357, 1363. This article provides an extensive discussion of interstitial and other methods of state constitutional interpretation. *See id.* at 1356-59.

26. 75 N.J. 200, 381 A.2d 333 (1977).

27. N.J. STAT. ANN. § 2A:110-1 (West 1985) (repealed 1979).

28. "[I]ndiscriminate group fornicating by—or indeed, among—complete strangers exhibiting remarkable dexterity in the confined quarters of a parked automobile on a deserted lot in Newark" is not an ideal foundation for constitutional principles. *Saunders,* 75 N.J. at 228, 381 A.2d at 346-47 (Clifford, J., dissenting). The defendants in this case were charged with rape but convicted of the lesser included offense of fornication with prostitutes.

29. Indeed, the *Saunders* court pointed out the fact that the "*Quinlan* decision could not have been predicated on privacy grounds if the class of cognizable privacy interests was limited to personal decisions concerning procreative matters." *Id.* at 213, 381 A.2d at 339.

In Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977), the United States Supreme Court specifically reserved the question of whether fornication was protected by federal privacy law.

30. The concluding paragraphs of the court's decision in *Saunders* eloquently describe the autonomy-based model of privacy and its limitations on legislative authority and police power so necessary to avoid the consequences of *Hardwick*:

> Our conclusion today extends no further than to strike down a measure which has as its objective the regulation of *private* morality. To the extent that [the fornication statute] serves as an official sanction of certain conceptions of

Once the court determined that state constitutional privacy rights were violated by the fornication statute, the *Saunders* court examined the justifications put forth by the state to consider whether they could constitute a compelling state interest. The justices found that the state's interests in protecting the institution of marriage, preventing illegitimate children and the spread of venereal disease and upholding public morality did not rise to the level of "compelling."[31] One year later the Superior Court of New Jersey, Appellate Division, extended the rights protected in *Saunders* to invalidate New Jersey's sodomy statute[32] in *State v. Ciuffini.*[33] Because of these decisions, the legislative authority and police power of the state of New Jersey no longer extend to the regulation of adult, private, consensual sexual behavior.

A final important consideration present in the New Jersey cases is the care taken to base these decisions on adequate and independent state grounds.[34]

> desirable lifestyles, social mores or individualized beliefs, it is not an appropriate exercise of the police power.
>
> Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornication as opprobrious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. As aptly stated by Sir Francis Bacon, "[t]he sum of behavior is to retain a man's own dignity without intruding on the liberty of others." The fornication statute mocks the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called "wayward" life. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed." More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy.

Saunders, 75 N.J. at 219-20, 381 A.2d at 342-43 (footnotes omitted) (emphasis in original).

31. *Id.* at 217, 381 A.2d at 341. The court found that, although the benefits of marriage were substantial, the state could not legitimately regulate private sexual expression or use the police power to force couples to the altar. *Id.* at 219, 381 A.2d at 342. Also, the court reasoned that the threat of a $50 fine levied very rarely could hardly reduce the number of illegitimate children more effectively than contraceptives, and that the threat of prosecution would only hinder those afflicted with venereal diseases from obtaining treatment and thus aid the spread of such diseases. *Id.* at 218-19, 381 A.2d at 341-42.

32. N.J. Stat. Ann. § 2A:143-1 to 143-2 (West 1985) (repealed 1979). New Jersey decriminalized adult, private, consensual homosexual behavior in 1978. New Jersey Code of Criminal Justice ch. 95, §§ 14:1-3, 1978 N.J. Laws 482, 547-50 (codified as amended at N.J. Stat. Ann. §§ 2C:14-1 to 14-3 (West 1982 & Supp. 1987)).

33. 164 N.J. Super. 145, 395 A.2d 904 (1978).

34. *See* Michigan v. Long, 463 U.S. 1032 (1983). If a state court bases its decision completely on federal law or does not clearly engage in decision-making based on adequate and independent state grounds, the Supreme Court will assume that the decision was based on federal doctrine. *Id.* at 1040-41.

The consequences of failing to argue in depth the state constitutional dimensions of privacy are illustrated in State v. Walsh, 713 S.W.2d 508, 513 (Mo. 1986) (en banc) ("[W]ithout the parties having addressed the distinct nature of Missouri's right of privacy apart from federal doctrines, we decline to decide this case on that basis.").

Doing so insulates these decisions from United States Supreme Court review.[35] Thus, the New Jersey courts have succeeded in extending the "federal floor" to protect lesbians and gay men by developing their own state constitutional jurisprudence of privacy rights. A state jurisprudence will protect the politically and socially disadvantaged at a time when the Supreme Court seems to be retreating from its commitment to these groups.[36]

B. Potential Applications of the New Jersey Model

Ten states explicitly protect the right to privacy in their state constitutions.[37] Of these states, five still criminalize adult, private, consensual sodomy.[38] At least five state courts confronted with state constitutional privacy challenges to sexual practice regulations have held the statutes to be unconstitutional.[39]

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35. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

36. *See* Comment, *The Louisiana Constitution's Declaration of Rights: Post-*Hardwick *Protection for Sexual Privacy?,* 62 TUL. L. REV. 767, 790-91 (1988); *see also id.* at 786-91 (containing an extensive analysis of the New Jersey Supreme Court's treatment of state law privacy rights).

37. *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1 ("All people . . . have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."); HAW. CONST. art. I, §§ 6-7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against . . . invasions of privacy."); MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

Other states that have created a jurisprudence of privacy have done so, for the most part, by extending due process rights in a fashion analogous to federal privacy law. *Developments in the Law, supra* note 12, at 1437-41.

Some states have explicitly refused to extend privacy rights under their state constitutions. *See* State v. Santos, 122 R.I. 799, 812-18, 413 A.2d 58, 66-69 (1980) (the Rhode Island Constitution does not establish a right to privacy; sodomy conviction upheld); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981) (unequivocally rejecting privacy "as a test of the validity of laws").

38. These states include Arizona, Florida, Louisiana, Montana and South Carolina. The difficulty here is in the fact that the jurisprudence surrounding their privacy clauses is practically nonexistent. This Note will confine its analysis to states in which sodomy is criminalized *and* in which courts and commentators have created a dialogue about privacy rights which they have yet to extend to protect lesbians and gay men. The other practical difficulty inherent in this limited analysis is that, for the most part, the states with well-developed privacy doctrines have liberal views on individual rights and have legislatures that have already decriminalized sodomy.

39. *See Saunders,* 75 N.J. 200, 381 A.2d 333 (invalidating a statute prohibiting fornication) (discussed *supra* at notes 26-31 and accompanying text); *Ciuffini,* 164 N.J. Super. 145, 395 A.2d 904 (extending privacy rights to consensual sodomy) (discussed *supra* at text and accompanying notes 32-36); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (invalidating a statute criminalizing consensual sodomy on federal grounds, ignoring state grounds relied on below), *cert. denied,* 451 U.S. 987 (1981); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (holding unconstitutional a statute prohibiting deviate sexual intercourse). Cases upholding such statutes include People v. Roberts, 256 Cal. App. 2d 488,

The privacy rights protected by these states have usually tracked existing federal privacy principles. Both the particular theories of privacy and legislative authority, and the context in which they have been used, must be considered in determining the feasibility of challenges to state sodomy statutes. Privacy theories articulated in one kind of case may not be amenable to translation for the purpose of protecting the sexual privacy rights of lesbians and gay men. This is the dilemma present in Texas' privacy jurisprudence.

1. Privacy Rights Acknowledged by the Texas Supreme Court

The right to privacy in the Texas Constitution has not been used to challenge the validity of Texas' sodomy statute.[40] Indeed, privacy principles have not been developed even to the level of the "penumbra" rights guaranteed by the federal doctrine.[41] There is some faint hope, however, that Texas courts may further develop a state constitutional privacy jurisprudence along the lines of the autonomy-based rights model in New Jersey.

In *Industrial Foundation v. Texas Industrial Accident Board,*[42] the Texas Supreme Court utilized privacy principles in its decision to subject requests for information from workers' compensation files made under the Open Records Act to case-by-case in camera review. The court recognized "zones of privacy" created by the federal and Texas Bill of Rights,[43] and cited approvingly the *Griswold* line of cases,[44] particularly the rights protected in *Roe v. Wade.*[45] It is the Court's characterization of these rights that inspires a certain degree of hope for the future protection of sexual privacy rights.

Justice Doughty described the protections of *Roe* and the penumbra rights as encompassing "intimate personal relationships or activities, freedoms of the individual to make fundamental choices involving himself, his family, and his relationships with others."[46] This statement of privacy rights does not follow the view of the federal precedents of family and contraception-based principles narrowly articulated in *Hardwick.*[47] Instead, these protections

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64 Cal. Rptr. 70 (1967); Kelly v. State, 45 Md. App. 212, 412 A.2d 1274 (1980), *aff'd sub nom.* Neville v. State, 290 Md. 364, 430 A.2d 570 (1981); People v. Penn, 70 Mich. App. 638, 247 N.W.2d 575 (1976); and *Santos,* 122 R.I. 799, 413 A.2d 58.

Courts have also struck down consensual sex regulations on state constitutional vagueness grounds. *See, e.g.,* Franklin v. State, 257 So.2d 21 (Fla. 1971). However, this protection seems tenuous at best when considering that legislatures need only reword their statutes to specify exactly which acts are prohibited.

40. TEX. PENAL CODE ANN. § 21.06 (Vernon 1989).

41. Harrington, *The Texas Bill of Rights and Civil Liberties,* 17 TEX. TECH L. REV. 1487, 1534 (1986).

42. 540 S.W.2d 668 (Tex. 1976), *cert. denied,* 430 U.S. 931 (1977).

43. *Id.* at 679.

44. *See supra* note 2 and accompanying text.

45. 410 U.S. 113 (1973).

46. *Industrial Found.,* 540 S.W.2d at 679; *see also* Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973) (the installation of a wiretap by the telephone company on a subscriber's telephone was an unwarranted invasion of the right to privacy).

47. *Hardwick,* 478 U.S. 186.

are much more closely analogous to the autonomy-based theory adopted by the New Jersey courts. The problem facing lesbian and gay rights advocates will be in transferring these protections to a situation implicating perceptions of morality and legislative authority.

The fact that Texas still has a statute that prohibits adult, private, consensual, homosexual sodomy is some indication that the courts and the legislature believe that the state has a legitimate interest in supervising private morality. This argument has not been challenged on the basis of state constitutional privacy principles,[48] probably due to the dearth of state law jurisprudence in this area and the recently ended reliance on federal privacy doctrine. Although the Texas Supreme Court has deviated somewhat from the federal enunciation of privacy rights, the court grounded its holding in *Industrial Foundation* on federal precedent, possibly signifying a commitment to keep Texas' privacy principles closely aligned with federal doctrine. If the Texas court does not move further toward an autonomy-based model of interpretation—or if the legislature does not move away from the regulation of adult, private, consensual activity—the sexual privacy of lesbians and gay men will remain unprotected.

2. *State v. Gray*: Minnesota Recognizes a State Constitutional Right to Privacy

Unlike the Texas court, the Supreme Court of Minnesota explicitly stated in *State v. Gray*[49] that the Minnesota Bill of Rights protects privacy rights. The court also refused to consider itself restricted by federal precedent in the extension of these rights. "[W]e are not limited by United States Supreme Court decisions. . . . [T]he protection we afford cannot be less than that afforded by the Federal Constitution, but it is equally certain that we can afford more protection under our constitution than is afforded under the Federal Constitution."[50] Further, the court found that it was not restricted to protecting only those fundamental rights expressly set out in the Minnesota Constitution.[51] These declarations lend encouragement to the idea that the court may in the future extend constitutional protection to the sexual privacy of lesbians and gay men.

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48. *See* Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (upholding federal privacy and equal protection challenges to the Texas sodomy statute), *rev'd,* 769 F.2d 289 (5th Cir. 1985), *cert. denied,* 478 U.S. 1022 (1986). In denying a petition for a rehearing en banc, the Fifth Circuit stated: "Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people." 774 F.2d 1285, 1287 (5th Cir. 1985).

49. 413 N.W.2d 107 (Minn. 1987).

50. *Id.* at 111.

51. *Id.*

In *State v. Gray*, the court upheld Minnesota's sodomy statute[52] despite its recognition of state constitutional privacy rights. The Minnesota court's refusal to extend protection to adult, consensual sexual activity actually conducted in the privacy of the defendant's home is troubling in its similarity to the Supreme Court's holding in *Hardwick*,[53] but may not affect future privacy law challenges.

The court created an exception to the state right to privacy for "commercial sex," and distinguished Gray's conduct from truly *private* sexual activity between consenting adults.[54] This distinction will undoubtedly aid gay rights advocates in future attempts to have Minnesota's sodomy statute declared unconstitutional because a challenge brought in a case with facts involving non-commercial, private, adult, consensual activity will implicate none of the court's concerns in *Gray*. The court's characterization of the protection afforded by Minnesota's right to privacy is closer to the autonomy-based interpretation of *Saunders*[55] than the family-based federal right. Although the court in *Gray* avoided the issue of whether the newly recognized state constitutional right to privacy would protect heterosexual or homosexual sodomy, its explicit recognition of privacy rights grounded in state constitutional law, and its careful method of distinguishing the facts of *Gray*, engender optimism that the court will be receptive to future state privacy law challenges to Minnesota's sodomy statute.

3. Doubtful Applications of the New Jersey Approach

a. Louisiana

Louisiana is one of the few states still criminalizing adult, private, consensual sodomy whose constitution contains an explicit right to privacy.[56] It

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52. MINN. STAT. ANN. § 609.293 (West 1987).

53. *See supra* notes 1-3 and accompanying text.

54. The defendant in *Gray* was convicted of having oral sex with a prostitute. The court reasoned that the sexual acts, although conducted in private, were actually public in nature because the parties did not know each other and because Gray paid for the sex. *Gray*, 413 N.W.2d at 113-14. Consent was also implicated because the complainant was a sixteen-year-old boy, but the court considered him a consenting adult because he lied about his age and because Gray reasonably believed him to be eighteen years old. *Id.* at 113 n.5.

By creating a "commercial sex" distinction, the court side-stepped the issue of whether the right to privacy protects adult, private, consensual sodomy. One commentator suggests that the court created this distinction for the purpose of denying protection to the particular defendant in this case. *Recent Developments in Minnesota Law: Minnesota Recognizes a Right of Privacy*, 14 WM. MITCHELL L. REV. 193, 198 (1988) ("One can imply from the decision that the reason the court did not address the issue was its unwillingness to let the Minnesota Constitution protect an admitted sex offender.").

The court also refused to allow Gray standing to challenge the statute as facially overbroad and thus implicating the rights of third parties, *Gray*, 413 N.W.2d at 112-13, even though the Minnesota court had precedent for this type of argument in the context of first amendment rights. *See* Koppinger v. City of Fairmont, 311 Minn. 186, 248 N.W.2d 708 (1976).

55. *See supra* note 26.

56. *See supra* notes 36-37 and accompanying text.

seems unlikely, however, that Louisiana courts will be willing to extend the privilege of sexual privacy beyond the limits announced in *Hardwick,*[57] given their consistent refusal to break with federal precedent even when offered considerable textual and historical authority to do so.[58] The language of the constitution's preamble could support an autonomy-based theory of privacy.[59] However, the preamble's lack of status as law, the legislature's failure to consider protecting private sexual activities when adopting the Declaration of Rights in 1974 and the court's adherence to federal privacy jurisprudence all point to a dismal outlook for future state constitutional privacy challenges to Louisiana's sodomy statute.[60]

b. Missouri

In *State v. Walsh,*[61] the Missouri Supreme Court declined to consider whether the privacy rights recognized in Missouri case law, emanating from the Missouri Constitution, would require invalidating the Missouri sexual misconduct statute.[62] The court refused to consider the argument because the defendant failed to raise the "distinct nature of Missouri's right of privacy apart from federal doctrines."[63] It is unlikely that a state challenge would prevail, because, as the court pointed out, the Missouri right to privacy has not even extended protection to the level reached by federal privacy jurisprudence.[64] The cases enunciating the Missouri right to privacy have generally involved protection against publication of private facts.[65]

In *Barber v. Time, Inc.,*[66] the court announced that a right to privacy is present in, or grows out of, the Missouri Constitution. The court characterized this right as "the right to be let alone."[67] This gives advocates of gay rights little guidance now in searching for authority in which to ground

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57. *See supra* notes 1-3 and accompanying text.

58. *See* State v. Reeves, 427 So. 2d 403 (La. 1983); Comment, *supra* note 36, at 791. This Comment provides an in-depth analysis of all the provisions of the Louisiana Declaration of Rights that could possibly be argued to strike down the state's sodomy statute.

59. "We, the people of Louisiana . . . desiring to protect individual rights to life, liberty, and property; afford opportunity for the fullest development of the individual . . . ." LA. CONST. preamble.

60. LA. REV. STAT. ANN. § 14:89 (West 1986). *See* Comment, *supra* note 36.

61. 713 S.W.2d 508 (Mo. 1986) (en banc).

62. MO. ANN. STAT. § 566.090 (Vernon 1979). Sexual misconduct is defined as deviate sexual intercourse with another person of the same sex.

63. *Walsh,* 713 S.W.2d at 513.

64. *Id.* The court also suggested that it would be far from amenable to any challenge to the sexual misconduct statute based on a non-originalist interpretation of the Missouri Constitution. *Id.*

65. *See* Langworthy v. Pulitzer Publishing Co., 368 S.W.2d 385 (Mo. 1963); Biederman's of Springfield v. Wright, 322 S.W.2d 892 (Mo. 1959); State v. Nolan, 316 S.W.2d 630 (Mo. 1958); Corcoran v. Southwestern Bell Tel. Co., 572 S.W.2d 212 (Mo. Ct. App. 1978).

66. 348 Mo. 1199, 159 S.W.2d 291 (1942).

67. *Id.* at 1205-06, 159 S.W.2d at 294.

an autonomy-based interpretation of the right to privacy. Like the courts of Texas, Missouri courts have taken a "hands off" non-interpretationalist approach to privacy, leaving state constitutional principles undeveloped while basing decisions on federal precedent. When taken together, these facts do not bode well for future state privacy challenges to Missouri's sexual misconduct statute.

The prevailing trend in state constitutional privacy analysis has been one of non-interpretation. For the most part, state courts have failed to develop a jurisprudence of privacy rights that can stand apart from federal doctrine and that lends itself to challenges to statutes prohibiting private sexual conduct between consenting adults. This problem is even more evident in state equal protection jurisprudence.

II. The Equal Protection Alternative

Seven states limit their prohibitions against adult, private, consensual sodomy to the sexual conduct of homosexuals.[68] In the District of Columbia and the other sixteen states with sodomy statutes, sodomy statutes are much more frequently enforced against homosexuals, and thus can be shown to be discriminatorily applied.[69] The Supreme Court has not taken the opportunity to rule on the issue of whether these laws violate the fourteenth amendment's guarantee of equal protection, but any decision on this controversy by the Court is likely to be unfavorable to lesbians and gay men.

The Court's holding in *Bowers v. Hardwick*[70] foreclosed one argument for subjecting sodomy statutes to strict scrutiny by finding that no "fundamental right" was implicated by criminalizing homosexual sodomy.[71] State and federal courts have demonstrated their reluctance to utilize the other method of triggering strict scrutiny by refusing to grant homosexuals the status of a "suspect class."[72] Thus, gay rights advocates are left the murky alternative of state equal protection and the possibility of a different conceptualization of what constitutes invidious classifications, rational relationships and legitimate state interests.

A. *A State Constitutional Equal Protection Model?*

The closest that state equal protection jurisprudence has come to establishing a model for challenges to state sodomy statutes is the 1980 decision

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68. Ark. Stat. Ann. § 5-14-122 (1987); Kan. Stat. Ann. § 21-3505 (1988); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1985); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. § 45-5-505 (1989); Nev. Rev. Stat. Ann. § 201.190 (Michie 1986); Tex. Penal Code Ann. § 21.06 (Vernon 1989).

69. *See* Note, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes,* 15 U. Tol. L. Rev. 811, 846 (1984).

70. 478 U.S. 186 (1986).

71. *Id.* at 190-91.

72. *See supra* notes 7-9 and accompanying text.

of the Pennsylvania Supreme Court in *Commonwealth v. Bonadio*.[73] Even though a large number of states have equal protection clauses and equal rights provisions in their constitutions, few courts in states that maintain sodomy statutes have developed an equal protection jurisprudence distinct from federal law.

Bonadio involved a challenge to Pennsylvania's deviate sexual intercourse statute[74] by defendants who were arrested at a pornographic theater.[75] The court held that the statute violated the equal protection clauses of both the federal and state constitutions by creating a classification based on marital status where such differential treatment was not supported by a state interest bearing a rational relationship to the object of the statute.[76] However, the court based its ruling on the Supreme Court's holding in *Eisenstadt v. Baird*[77] which prohibited a state from classifying on the basis of marital status in outlawing the distribution of contraceptives.[78]

The reasoning of the Pennsylvania court is problematic. In basing a state law decision on federal equal protection precedent, the court allowed the later retrenchment of the federal judiciary in the area of individual rights to cast doubt on the validity of its arguments. To its credit, however, the Pennsylvania Supreme Court is the only state court which has used state equal protection principles to strike down a statute prohibiting adult, private, consensual homosexual conduct.[79]

Before it considered the issue of equal protection, the court engaged in a discussion of the proper limits of the state police power over the individual, quoting at length from John Stuart Mill's *On Liberty*.[80] This discussion sheds light on the court's theory of what constitutes a legitimate state interest. "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*."[81] An interpretation of state interests, triggered by harm to others, will be

73. 490 Pa. 91, 415 A.2d 47 (1980).

74. Act of Dec. 6, 1972, Pub. L. 1482, No. 334 § 1 (codified at 18 PA. CONS. STAT. ANN. § 3124 (Purdon 1973)).

75. *Bonadio*, 490 Pa. at 93, 415 A.2d at 49.

76. *Id.* at 95, 415 A.2d at 50.

77. 405 U.S. 438 (1972).

78. *Bonadio*, 490 Pa. at 99, 415 A.2d at 51.

79. *Id.* at 98, 415 A.2d at 51. In 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), the Court of Appeals of New York struck down the state's sodomy statute on federal equal protection and privacy grounds.

It is questionable whether the Pennsylvania Court based its holding on the adequate and independent state grounds that would have been necessary to avoid Supreme Court review. *See supra* note 34.

80. *Bonadio*, 490 Pa. at 96-98, 415 A.2d at 50-51 (citing J.S. MILL, ON LIBERTY 9-12 (E. Rapaport ed. 1978)).

81. *Id.* at 96, 415 A.2d at 50 (emphasis in original).

vital to a state equal protection claim if the state refuses to recognize homosexuals as a class meriting heightened scrutiny. Texas courts, however, may very well extend a degree of scrutiny to sodomy statutes that rises at least to that of federal middle-tier scrutiny.

B. *The Texas Courts and Equal Protection Analysis*

The Texas Constitution contains two provisions designed to protect equal rights. Although Texas courts have not expanded suspect classifications or fundamental rights beyond those recognized by federal law,[82] the Texas Equal Rights Amendment ("ERA")[83] specifies suspect classifications in constitutional terms. The jurisprudence surrounding the Texas ERA is limited but noteworthy.

In *Camarena v. Texas Employment Commission,*[84] a state district court relied primarily on the Texas ERA to prohibit the exclusion of 150,000 agricultural laborers from the Unemployment Compensation Act.[85] The court characterized farm workers in Texas as an easily identifiable class of people of Mexican origin, discrete and insular, and discriminated against by law.[86] The court's decision extended benefits to a disadvantaged minority that had previously been excluded from protective social legislation. Although *Camarena* gives some hope that the principles of the Texas ERA will be extended to protect lesbians and gay men, the dearth of cases and some strong arguments for strict construction of the ERA present problems.

The Texas Supreme Court has not applied the ERA and it is unclear how it would do so, although it has acknowledged its potential application in at least two cases.[87] A strict construction of the ERA would limit its applicability to protect Texans from discrimination only on the basis of the classifications set out in the text, leaving lesbians and gay men without protection. On the other hand, if the court creates balancing tests similar (or dissimilar) to those used in federal equal protection jurisprudence, the rights currently protected could be seriously weakened[88] while the rights of homosexuals could be bolstered, depending on how closely the court tracks

82. *See* Harrington, *supra* note 41, at 1511.

83. TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.").

84. No. 369,808 & No. 369,808-A (Dist. Ct. of Travis County, 201st Judicial Dist. of Texas) (1985), *modified,* July 2, 1985 [No. 369,808] and May 15, 1985 [No. 369,808-A].

85. A similar exclusion was upheld under federal law in a New York case. Doe v. Hodgson, 344 F. Supp. 964 (S.D.N.Y. 1972), *aff'd,* 478 F.2d 537 (2d Cir. 1973).

86. *Camarena,* No. 369,808 & No. 369,808-A, Findings of Fact and Conclusions of Law.

87. *In re* T. E. T., 603 S.W.2d 793, 801-03 (Tex. 1980); Whittlesey v. Miller, 572 S.W.2d 665, 668 n.5 (Tex. 1978).

88. *See* Harrington, *supra* note 41, at 1513. For an argument in favor of strict construction, see Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Developments 1978-1982,* 20 HOUS. L. REV. 1321 (1983).

federal tests. Even if the court strictly construes the Texas ERA, gay rights advocates still have an alternative available in the equal protection provision.

The equal protection clause of the Texas Constitution[89] has been interpreted by the Texas Supreme Court to create its own version of the rational basis test that approximates the level of scrutiny required by federal middle-tier analysis. In *Whitworth v. Bynum,*[90] the Texas Supreme Court invalidated the state's automobile guest statute after stating that the Texas version of the rational basis test required that "similarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so."[91] The court went on to insist that the classification not be overinclusive or create irrebuttable and unreasonable presumptions.[92]

Although *Whitworth* could go a long way toward helping gay rights advocates overcome the problems inherent in the traditional rational basis standard, the same difficulty present in Texas privacy jurisprudence crops up again here: perceptions of morality have not yet come up in the analysis of Texas' equal protection clause. The Texas courts are perfectly free to deny equal protection under a level of scrutiny higher than federal rational basis review.

The Fifth Circuit, the federal appeals court to which Texas generally looks for guidance in the equal protection area, concluded in *Baker v. Wade*[93] that no federal constitutional rights are deprived by Texas' sodomy statute. Furthermore, the court stated that "[t]he statute is directed at certain conduct, not at a class of people. Though the conduct be the desire of the bisexually or homosexually inclined, there is no necessity that they engage in it."[94] This view of homosexual identity, that the conduct defines the class, is one simple and self-perpetuating way to rationalize upholding sodomy statutes.[95] As long as the Texas courts consider private morality a proper concern of the legislature, they can justify refusing to extend the protection of an even more difficult standard than federal rational basis scrutiny to the sexual privacy of lesbians and gay men. Without a more extensively developed jurisprudence in the area of state constitutional equal protection, advocates can only remind the state court that it has refused to

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89. TEX. CONST. art. I, § 3 ("All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.").

90. 699 S.W.2d 194 (Tex. 1985).

91. *Id.* at 197.

92. *Id.* The United States Supreme Court in 1929 had upheld the validity of automobile guest laws in Silver v. Silver, 280 U.S. 117 (1929).

93. 774 F.2d 1285 (5th Cir. 1985).

94. *Id.* at 1287.

95. "If criminal or criminizable sodomy is the inevitable consequence or the essential characteristic of homosexual identity, then the class of homosexuals is coterminous with a class of criminals or at least of persons whose shared behavior is criminizable." Halley, *supra* note 6, at 919.

consider itself limited to the confines of federal equal protection in the past and need not do so in the future.

CONCLUSION

It is time for the courts to realize that private, adult, consensual sexual activity affects only the parties involved, and is of no concern to the public generally. It is time for the courts to deregulate private homosexual conduct. Many courts can do so with the tools of privacy and equal protection dormant in their own state constitutions. A few courts have already gathered the courage to delve into these waters of state constitutional law and have forged a state jurisprudence with the strength to protect adults who engage in private, consensual sexual activity. These courts have confined the reach of legislative authority to public conduct, and have constructed a theory of privacy based on rights of personality and a theory of homosexual identity based upon complex political discourse. Following this model, judges and rights advocates should develop a state constitutional jurisprudence that protects lesbians and gay men from antihomosexual discrimination. It may be a slow road, it may be that society's homophobic tendencies will be the last form of hatred eradicated by law, but the means of change must now, more than ever, come from the states.