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Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy

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**PUBLIC EMPLOYEES OR PRIVATE
CITIZENS: THE OFF-DUTY SEXUAL
ACTIVITIES OF POLICE OFFICERS
AND THE CONSTITUTIONAL
RIGHT OF PRIVACY**

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Society depends upon its police departments to maintain order, prevent and detect crime, and enforce the law. The ability of any police department to succeed in these tasks depends upon the ability of each of its individual police officers to do so. Society therefore has an interest in monitoring the behavior of each of its police officers to see if he or she has any physical, mental, or moral flaws which make the officer incapable of carrying out his or her charge. However, this interest may sometimes conflict with the police officer's privacy interest, as well as with society's interest in protecting the privacy of its citizens.

For the most part, the law's attempts to govern this conflict have been far from satisfying. Rules and regulations that govern

police officers' off-duty conduct are often broadly worded, usually prohibiting any "misconduct" or "conduct unbecoming an officer."¹ Consequently, issues concerning regulation of the private, off-duty, activities of police officers arise frequently, with the lower courts divided both in their analytic approaches and results. While several lower courts have upheld the removal, suspension, or demotion of police officers for off-duty conduct involving such things as adultery,² transvestite behavior,³ and spending the night with a co-employee,⁴ others have not allowed such state intrusion into the private lives of public employees, often basing this decision on some constitutional right of privacy.⁵ Such ad hoc treatment is a source of injustice to the police officer who may find him or herself dismissed, suspended, or demoted, without warning, for engaging in conduct that most people are free to engage in without consequence.⁶

This Note proposes a framework for dealing with problems in this area in a manner which best balances the competing interests involved. It argues that, while there is no explicit constitu-

1. See, e.g., *Allen v. City of Greensboro*, 452 F.2d 489, 490 (4th Cir. 1971) (citing a Greensboro regulation prohibiting conduct "unbecoming an officer and a gentleman"); *Civil Serv. Comm'n v. Livingston*, 22 Ariz. App. 183, 185, 525 P.2d 949, 950 (1974), cert. denied, 421 U.S. 951 (1975) (citing Tucson Police Department Regulation § 6-8.401(7) prohibiting "conduct unbecoming an officer"); *Fabio v. Civil Serv. Comm'n*, 489 Pa. 309, 313 n.1, 414 A.2d 82, 84 n.1 (1980) (citing art. I, § 1.75 of the Philadelphia Police Department Duty Manual which provides for dismissal for "conduct unbecoming an officer"); *Lubbock v. Estrello*, 581 S.W.2d 288, 289 (Tex. Civ. App. 1979) (citing Lubbock Civil Service Rule XIV, § 54 providing for dismissal or suspension for the commission of acts showing lack of good moral character and conduct prejudicial to good order).

For statutory prohibitions, see 53 PA. CONS. STAT. ANN. § 46190(4) (Purdon 1966) (prohibiting "immorality . . . or conduct unbecoming an officer"); IND. CODE § 18-1-11-3 (1976 ed.) (prohibiting "conduct unbecoming an officer"); IOWA CODE ANN. § 400.19 (West 1976) (prohibiting "misconduct"); N.J. Stat. Ann. § 40A:14-147 (West 1980) (prohibiting "misconduct").

2. E.g., *Wilson v. Swing*, 463 F. Supp. 555 (M.D.N.C. 1978); *Faust v. Police Civil Serv. Comm'n*, 22 Pa. Commw. 123, 347 A.2d 765 (1975).

3. E.g., *Etscheid v. Police Bd.*, 47 Ill. App. 2d 124, 197 N.E.2d 484 (1964).

4. E.g., *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir.), cert. denied, 104 S. Ct. 404 (1983).

5. See, e.g., *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585 (W.D. Mich. 1983) (holding that dismissal of part-time police officer, because he was cohabiting with a married woman not his wife, violated his right of privacy protected by the constitution); *Swope v. Bratton*, 541 F. Supp. 99 (W.D. Ark. 1982) (finding that a police officer's relationship with a female employee of the police department is protected by a constitutional right of privacy); *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979) (holding that a police department policy requiring officers, upon penalty of losing their jobs, to answer all questions asked in an official investigation, even though questions have no bearing upon officer's job performance, violates the officer's constitutionally protected right of privacy).

6. This Note considers only the regulation of otherwise lawful off-duty activities. See *infra* note 85 and accompanying text.

tional guarantee of privacy, the state is not free to regulate all aspects of a police officer's otherwise legal, off-duty, sexual activity. Part I of the Note examines several possible sources of a constitutional right of privacy. It concludes that, although many of the courts which invalidate state regulation of police officers' off-duty sexual activity do so on the basis of some constitutional right of privacy, any implied fundamental right of sexual privacy should be construed narrowly to protect only those activities within the realm of a family relationship. Part II analyzes an alternative basis for protecting this type of behavior. It asserts that prohibiting a police officer from engaging in off-duty sexual conduct in which the general public may otherwise engage violates equal protection. Finally, Part III argues that even if a sufficient state interest can be found to validate the separate treatment of police officers and other citizens for legislative purposes, a broad "conduct unbecoming an officer" standard is too vague to survive as a sufficient prohibition against off-duty, "immoral" behavior.

I. DUE PROCESS AND THE INDIVIDUAL'S RIGHT TO SEXUAL PRIVACY

Many courts have not hesitated to permit state intrusion into the private activities of police officers.⁷ On the other hand, several courts have invalidated state regulation of the off-duty, consensual, sexual conduct of police officers on the basis of some constitutional right of privacy.⁸ The determination of which is the correct view of the right of privacy establishes the proper level of protection to be afforded police officers from state intrusion into their private activities.

The Constitution does not explicitly mention a right of privacy.⁹ However, the Supreme Court has, for over a decade, recognized a right of privacy, founded in the fourteenth amendment's concept of personal liberty.¹⁰ Consequently, the degree to which this judicially-recognized right of privacy is considered

7. See, e.g., *Shawgo v. Spadlin*, 701 F.2d 470, 479 (5th Cir.), cert. denied, 104 S. Ct. 404 (1983) (declaring that cohabitation by, or romantic involvement between, a subordinate and a superior officer is within the scope of state personnel regulation and not protected by the Constitution); *Wilson v. Swing*, 463 F. Supp. 555, 563 (M.D.N.C. 1978) (indicating that adulterous conduct is protected by neither the constitutional right of association nor the analogous right of privacy).

8. See *supra* note 5.

9. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

10. *Id.* at 152-54; see also *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977).

fundamental governs the extent to which the state may regulate the off-duty private sexual behavior of public employees.¹¹

Unfortunately, the Supreme Court has yet to answer definitively whether, and to what extent, the Constitution prohibits state regulation of the private sexual behavior of consenting adults.¹² Furthermore, the Court has, at different times, espoused different views as to how fundamental the right of privacy actually is. For example, the Court has stated that only fundamental rights are included in the guarantee of personal privacy.¹³ Yet it has also declared that the right to be free from governmental intrusion into one's privacy, except in very limited circumstances, is indeed a fundamental right.¹⁴ Which of these two categories privacy actually belongs in—fundamental right or merely protector of fundamental rights—depends on the ultimate source of the individual's right of privacy. Consequently, an effective determination of whether a constitutional right of privacy extends to the private, consensual, sexual activities of off-duty police officers requires examination of those constitutional provisions from which such a right might arise.

If a right of privacy does exist, it is most likely either a pe-

11. Under modern due process analysis, deprivation of a liberty which lacks textual support ordinarily will be found constitutional so long as the deprivation bears a rational relationship to the achievement of some permissible legislative objective. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1029-30 (1979); Posner, *The Uncertain Protection of Privacy By the Supreme Court*, 1979 SUP. CT. REV. 173, 195-96 (1980); see also Williamson v. Lee Optical Co., 348 U.S. 483 (1955). However, regulations limiting "fundamental" rights must be justified by a "compelling" state interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). Classification of a right as fundamental or not generally determines the outcome of a constitutional challenge to state regulation of that right, because rebuttal of the presumption of validity is generally not possible for regulation of non-fundamental liberties. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1426 (1974); Lupu, *supra*, at 1030.

12. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 694 n.17 (1977); *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585, 589 (W.D. Mich 1983).

While several of the lower courts have recognized no constitutional protection of sexual conduct outside marriage, see, e.g., *Baron v. Meloni*, 556 F. Supp. 796 (W.D.N.Y. 1983); *Suddarth v. Slane*, 539 F. Supp. 612 (W.D. Va. 1982); *Johnson v. San Jacinto Junior College*, 498 F. Supp. 555 (S.D. Tex. 1980), others have reached the opposite conclusion, see, e.g., *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *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).

13. *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[O]nly personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty . . . are included in this guarantee of personal privacy.").

14. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[F]undamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

ripheral right, emanating from several of the specific guarantees in the Bill of Rights, or it is encompassed in the ninth amendment's protection of certain rights retained by the people. As will shortly be shown, neither source seems particularly well-suited to protect the off-duty sexual behavior of public employees. Hence, decisions striking down state regulation of police officers' off-duty activities on the grounds that such regulations impose on the officer's right of privacy are inadequate; rather an alternative basis should be utilized and two possibilities are examined in Parts II and III of this Note.¹⁵

A. *Penumbra Protection of the Right of Privacy*

The "penumbras" or shadows which emanate from specific guarantees in the Bill of Rights compose the first potential source of the constitutional right of privacy. This ancillary theory of the right of privacy was first recognized in *Griswold v. Connecticut*,¹⁶ in which the Supreme Court adamantly advocated the sanctity of the marital bedroom,¹⁷ and implicitly categorized any private, consensual, sexual relations between married persons as within the "zone of privacy" protected against unwarranted government interference.¹⁸ While the result in *Griswold* may be correct, its logic remains unconvincing.

15. An additional possible protection of police officers' off-duty sexual activities is the right of association arising out of the first amendment, applied to the states by the fourteenth amendment. For example, in *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984), the court, stating that "the first amendment freedom of association applies not only to situations where an advancing of common beliefs occurs, but also to purely social and personal associations," *id.* at 1544, held that the police department violated a police officer's constitutionally protected freedom of association when it discharged him solely for dating the daughter of a convicted felon who was allegedly a key figure in organized crime. Contrary to *Wilson*, however, it is arguable that the right of association provides limited protection, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 12-23, at 700-01 (1978), and preserves nothing more than an individual's "right to join with others to pursue goals independently protected by the first amendment." *Id.* at 702 (emphasis in original). Thus a police officer's purely social off-duty activities would not be protected. This view is supported by the Supreme Court's decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) which may be read in conjunction with *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), as allowing local governments to assert "a general power to dictate the intimate composition of domestic associations," L. TRIBE, *supra* § 15-18, at 977, at least when no traditional family relationship is involved.

16. 381 U.S. 479 (1965) (invalidating a statute that made use of contraceptives a criminal offense, since such regulation would be an unconstitutional invasion of the right of privacy of married persons).

17. *Id.* at 485-86.

18. Henkin, *supra* note 11, at 1424 ("What is barred to 'intrusion' [in *Griswold*] is not the bedroom but . . . the 'marital privacy'").

Speaking for the majority, Justice Douglas declared that specific guarantees in the Bill of Rights have "penumbras" or shadows which emanate from those guarantees in order to "give them life and substance."¹⁹ According to Douglas, the emanations from the first, third, fourth, and fifth amendments create a right of privacy sufficient to protect the sexual activities of married couples.²⁰ For a "penumbra" theory to have meaning, however, the penumbral right must have some connection to the specific guarantee from which it emanates;²¹ otherwise, the courts may arbitrarily create rights never conferred by the Framers.

Yet the amendments Douglas mentioned as creating an ancillary right of privacy have little to do with the right of married people to be unregulated in their sexual relations.²² Prior to *Griswold*, any right of privacy emanating from explicit constitutional guarantees might reasonably have been found to protect one of two distinct interests,²³ the individual's interest in seclusion,²⁴ or his interest in secrecy.²⁵ By invalidating a statute prohibiting use of contraceptives, the Court in *Griswold* recognized a completely new privacy interest: the general right to be free from governmental regulation²⁶—put simply, a "right to be let alone."²⁷ Yet this interest emanates from no specific constitutional guarantee.

In short, *Griswold*'s penumbral theory lacks a legitimate ba-

19. 381 U.S. at 484. Note that, under this view, privacy would be categorized merely as a protector of otherwise fundamental rights.

20. 381 U.S. at 484-85.

21. Posner, *supra* note 11, at 191.

22. 381 U.S. at 528-29 (Stewart, J., dissenting).

23. Posner, *supra* note 11, at 174.

24. This consists of the right to be free from official intrusion, protected, for example, by the third amendment's prohibition of quartering troops in private homes during peacetime without the owner's consent, U.S. CONST. amend. III, and the fourth amendment's prohibition of unreasonable search and seizure, U.S. CONST. amend. IV. One commentator has said that this aspect of privacy affords the individual the opportunity "to think, plan and reflect without frequent interruption." Posner, *supra* note 11, at 174.

25. This consists of the individual's right to conceal selected aspects of his or her activity from the government, protected, for example, by the fifth amendment's self-incrimination clause, U.S. CONST. amend V.

26. Henkin, *supra* note 11, at 1424-25. This right to be free of government regulation can be distinguished from the right to be free of government intrusion, *supra* note 24. Through the right to be free of government intrusion the individual claims the right to do unimpeded in private whatever he is *otherwise legally allowed to do*. Through the right to be free of government regulation he claims a right to do in private something he is *otherwise prohibited from doing*. See Posner, *supra* note 11, at 193.

27. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

sis.²⁸ The decision prohibits governmental regulation of certain private sexual activities but provides no adequate rationale for how the Court reached its result to help establish the outer bounds of this prohibition.²⁹ Assuming that post-*Griswold* a state may still punish at least some offenses committed in private,³⁰ the holding in *Griswold* provides limited guidance and should be narrowly construed to provide fundamental protection only of marital privacy.³¹

Consequently, the penumbra theory of privacy has little value as a shield to protect public employees from state intrusion into their private sex lives. Indeed, if it were not for Justice Douglas's cryptic opinion in *Griswold*, the penumbra theory would not serve as a legitimate source of any constitutional right of privacy, and the holding in *Griswold* may adequately guard only against state intrusion into off-duty, *marital*, sexual activity.³²

28. As one commentator notes, "when the Constitution sought to protect private rights it specified them; that it explicitly protects some elements of privacy, but not others, suggests that it did not mean to protect those not mentioned." Henkin, *supra* note 11, at 1422; accord *Griswold v. Connecticut*, 381 U.S. at 508-10 (Black, J., dissenting).

29. In the course of his opinion, Justice Douglas never indicates which, if any, of the amendments he mentions is infringed by the Connecticut statute. 381 U.S. at 528 (Stewart, J., dissenting).

30. 381 U.S. at 530 n.7 (Stewart, J., dissenting) ("I suppose . . . that even after [*Griswold*] a State can constitutionally still punish at least some offenses which are not committed in public."); accord *Stanley v. Georgia*, 394 U.S. 557, 568 n.11 (1969).

31. The Court's post-*Griswold* language seemingly indicates a retreat from the view of privacy as being based *solely* on the marital relationship. For example, in declaring a state prohibition of contraceptives to unmarried persons impermissible, the Court stated that,

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

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). However, the decision in *Eisenstadt* was not based on a finding that unmarried persons have a fundamental right to use contraception but rather on the irrationality of the distinction between married and unmarried couples for this purpose. See *infra* notes 73-78 and accompanying text. Indeed, the court in *Eisenstadt* clearly recognized that "in *Griswold* the right of privacy in question inhered in the marital relationship." 405 U.S. at 453.

32. One indication that the courts have read the decision to provide fundamental protection at least to marital privacy is the fact that "[t]he current trend of case law indicates that anti-sodomy legislation no longer is applicable to married couples, regardless of whether the wording of the state statute has been changed to accord with *Griswold*." Note, *Right of Privacy—Consensual Sodomy and the Choice of a Moral Doctrine: New York's Permissive Position*, 5 W. NEW ENG. L. REV. 75, 80 (1982) (footnote omitted).

B. *Natural Right Theory of Privacy*

A second possible source of the constitutional right of privacy, the ninth amendment, provides that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”³³ This language has led some to conclude that the Framers intended to announce the principle that, in addition to those fundamental rights explicitly mentioned in the Constitution, there exist other, unmentioned, fundamental rights that are also protected against unwarranted governmental interference.³⁴

Acknowledgment that unmentioned natural rights are protected as fundamental, however, does not identify these natural rights. Even proponents of this view of the ninth amendment recognize that judges cannot categorize an unspecified right as fundamental based merely on their personal discretion.³⁵ Unfortunately, the factors that elevate an unspecified right to fundamental status are not clearly articulated. It has been said, however, that courts must inquire whether the right “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’”³⁶ With this amorphous view in mind, the following sections examine several possible formulations of a natural right protection of sexual

33. U.S. CONST. amend. IX.

34. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J. concurring); *accord* *United Mine Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947). Justice Goldberg’s examination of the history of the ninth amendment found that “[i]t was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.” *Griswold*, 381 U.S. at 488-89 (Goldberg, J., concurring) (footnotes omitted). Hence, in Justice Goldberg’s opinion, the ninth amendment supports the view that the liberty protected by the fifth and fourteenth amendments includes rights not explicitly mentioned in the Constitution. *Id.* at 493. This position lends support to those who insist that “an intense and widely shared adherence to natural rights ideas by the Constitution’s framers led them to neglect more specific mention of rights deemed too obvious to require elaboration.” L. TRIBE, *supra* note 15, § 15-3, at 894.

35. 381 U.S. at 493 (Goldberg, J. concurring) (“In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions.”).

36. *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). The traditions and collective conscience of the country may also establish a right as fundamental, *id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)), but the impracticality of applying this test—i.e. how can the court determine the collective conscience?—renders it nothing more than a goal to be approximated.

privacy.³⁷

1. *Right to be free from unwarranted governmental regulation of morality*— The Supreme Court has long recognized that the police power may be exercised to preserve and protect public morals.³⁸ Some courts, however, distinguish between regulation of public morality and regulation of private morality.³⁹ Implicitly recognizing a natural right to be free of unwarranted regulation of private morality, these courts find regulation of private activity for reasons of public morality inappropriate for at least two reasons. First, what one does in private, by definition, generally will not come before the public eye; therefore, government interference does not advance the cause of public morality but merely restricts individual conduct and imposes concepts of private morality chosen by the government.⁴⁰ Second, even if it is possible for the public to ascertain what one does in private, infringement of constitutionally protected rights cannot be justified by general community disapproval of the protected conduct, because constitutional protection of individual liberties intentionally prevents majoritarian coercion.⁴¹

37. While some claim that natural rights analysis has become simply a "historical curiosity," L. TRIBE, *supra* note 15, § 15-3, at 894, discussion of natural rights do arise in opinions of several Justices. See, e.g., *Griswold*, 381 U.S. at 486-99 (Goldberg, J. concurring); *Poe v. Ullman*, 367 U.S. 497, 541-42 (1961) (Harlan, J., dissenting); *United Mine Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947). Furthermore, if the Framers did not intend the ninth amendment to be a meaningless tautology, see, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.) ("It cannot be presumed that any clause in the constitution is intended to be without effect."), it must serve as the guardian of otherwise unmentioned constitutional rights. Therefore, it becomes necessary to determine whether the Framers included the right of sexual privacy as one so obvious as to require no elaboration. See *supra* note 34.

38. See *Berman v. Parker*, 348 U.S. 26, 32 (1954). This power has been justified on the grounds that the destruction of morality renders the power of government invalid, since government is, in essence, no more than public order. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 4 N.Y.2d 349, 359, 151 N.E.2d 197, 205, 175 N.Y.S.2d 39, 47, *rev'd on other grounds*, 360 U.S. 684 (1958).

39. See, e.g., *People v. Onofre*, 51 N.Y.2d 476, 491-92, 415 N.E.2d 936, 943, 434 N.Y.S.2d 947, 953 (1980), *cert. denied*, 451 U.S. 987 (1981) (finding state statute prohibiting private acts of consensual sodomy among unmarried adults violated defendant's right of privacy and could not be justified as a valid exercise of police power authorized for the preservation of morality, since "[n]o substantial prospect of harm from consensual sodomy nor any threat to public—as opposed to private—morality has been shown").

40. *Id.* at 489-90; *State v. Saunders*, 75 N.J. 200, 218-20, 381 A.2d 333 (1977).

41. *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585, 590-91 (W.D. Mich. 1983); see also *People v. Onofre*, 51 N.Y.2d 476, 490, 415 N.E.2d 936, 942, 434 N.Y.S.2d 947, 952 (1980) ("disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area . . . protected [by the constitutional] right of privacy"), *cert. denied*, 451 U.S. 987 (1981); accord *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971).

Note the circular quality of this reasoning: an activity is constitutionally protected because it is done in private and consequently does not affect public morality; therefore, even if the activity is somehow disclosed to the public, it is still protected against majoritarian coercion by the right of privacy, though it may now have an effect on public morality.

Nevertheless, the Supreme Court seemingly adopted at least a limited version of the public/private morality distinction in *Stanley v. Georgia*.⁴² The Court held that, although obscenity is not protected by the first amendment, the mere private possession of obscene matter cannot constitutionally be made a crime.⁴³ While some have read this decision as protecting only the right to receive information and ideas,⁴⁴ the Court later expressly denied this view and reaffirmed its belief in the constitutional protection of the privacy of the home.⁴⁵

Yet *Stanley* does not stand for the proposition, as some would argue, that the right of privacy includes a ban on criminal sanctions against any voluntary act done in private which does not harm others.⁴⁶ In addition to its interest in preventing an individual from harming others, a government also has an interest in protecting both society at large⁴⁷ and, to a certain extent, the individual himself.⁴⁸ Therefore, just as the government may regulate the private use of drugs to prevent physical and mental

42. 394 U.S. 557 (1969).

43. *Id.* at 559-62.

44. See *People v. Onofre*, 51 N.Y.2d 476, 501 n.2, 415 N.E.2d 936, 948 n.2, 434 N.Y.S.2d 947, 958-59 n.2 (1980) (Gabielli, J., dissenting), *cert. denied*, 451 U.S. 987 (1981); *Neville v. State*, 290 Md. 364, 374-75, 430 A.2d 570, 575 (1981). This view is supported by the *Stanley* opinion:

What we have said in no way infringes upon the power of the State . . . to make possession of other items . . . a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

394 U.S. at 568 n.11.

45. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) (If there is a first amendment "penumbra" protecting otherwise unprotected obscene material, it would not have been necessary to decide *Stanley* on the "basis of the 'privacy of the home' which was hardly more than a reaffirmation that 'a man's home is his castle.'") (quoting *Stanley*, 394 U.S. at 564).

46. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 759 (2d ed. 1983) ("Such a right would be based on the philosophy which underlies . . . any true right to privacy; that society may not limit individual freedom unless it does so to prevent an individual from harming others.").

47. *Paris Adult Theatre I v. Slaton*, 413 U.S. at 57-58 ("[L]egitimate state interests . . . include the interest of the public in the quality of life and the total community environment . . .").

48. *Roe v. Wade*, 410 U.S. 113, 162 (1973); see also L. TRIBE, *supra* note 15, § 15-12.

damage to the individual,⁴⁹ it should also be allowed to regulate private sexual relations to the extent such regulation addresses the social problems of illegitimacy and venereal disease and attempts to prevent potential destructive effects on the familial structure.

Stanley affords only limited protection of sexual privacy. The decision merely defends acts performed in the privacy of the home against government regulations that are based strictly on morality grounds. Yet most regulations of sexual behavior are based at least in part on public welfare grounds, and *Stanley* clearly does not elevate to fundamental right status the ability to do in private an activity that could otherwise be regulated by the state.⁵⁰

In short, to the extent that men create governments to regulate, there can be no natural fundamental right to go unregulated,⁵¹ and in the absence of such a natural right, the ninth amendment will not adequately protect against state intrusion into the private sexual activities of police officers.

2. *Right of privacy in activities associated with the family*—Private protection for certain aspects of the family relationship constitutes a more likely candidate for natural right status. For example, the Supreme Court quite clearly afforded strict protection to the marital privacy.⁵² The Court has implied that this protection does not arise out of any explicit constitutional guarantee, but rather is one of the natural rights of man.⁵³ Even strong advocates of the view that the ninth amendment fundamentally protects constitutionally unmentioned natural rights are quick to concede that such protection does not extend to sexual conduct in and of itself.⁵⁴ Rather, the ninth amendment

49. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 603 (1977). But see *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (holding that individuals have a right under both the federal and Alaska constitutions to possess marijuana for private, noncommercial use in one's home, since such use does not seriously interfere with the health, safety, rights, and privileges of others or with the public welfare).

50. See *Stanley*, 394 U.S. at 568 n.11 ("What we have said in no way infringes upon the power of the State or federal government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime.")

51. See, e.g., *id.*; accord *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("The Court has refused to recognize an unlimited right" of the individual to do with her body as she pleases.)

52. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) ("The very idea [of intrusion into the precincts of the marital bedroom] is repulsive to notions of privacy surrounding the marriage relationship.")

53. *Id.* at 486 ("We deal with a right of privacy older than the Bill of Rights Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.")

54. See, e.g., *id.* at 498 (Goldberg, J., concurring) (it is constitutionally permissible to

protects the fundamental right of privacy in the marital relation, "a relation as old and as fundamental as our entire civilization."⁵⁵

The Supreme Court has strengthened this argument for natural right protection of activities associated with the family by extending the guarantee of personal privacy to marriage itself,⁵⁶ procreation,⁵⁷ contraception,⁵⁸ family relationships,⁵⁹ child rearing and education,⁶⁰ and abortion.⁶¹ Indeed, the Supreme Court has come extremely close to acknowledging a natural right of family privacy, rooted in the nation's history and tradition.⁶² Hence, while there may be no general right to be free from governmental regulation,⁶³ the ninth amendment does encompass the right of family privacy and strict scrutiny should therefore be applied to all governmental regulation of "family" activities.

In sum, although many of the courts which invalidate state regulation of police officers' off-duty, sexual activity do so on the basis of a due process violation of the individual's right of privacy, the protection that may validly be offered is slim. Under either a penumbral or natural right theory, no all-encompassing fundamental right of privacy exists, and due process, therefore, cannot afford privacy any protection other than in the realm of the family relationship. This does not mean, however, that the state is free to regulate all activity of the off-duty police officer short of intrusion into a family relationship for, as Part II of this Note explains, prohibiting a police officer from engaging in off-duty conduct in which the general public may engage violates the equal protection clause.

prohibit adultery and fornication); *id.* at 498-99 (a state may properly regulate sexual promiscuity and misconduct).

55. *Id.* at 495-96, 499.

56. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

57. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942)).

58. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972)).

59. *Id.* at 153 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

60. *Id.* (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

61. *Id.* at 154.

62. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy has its source, . . . not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'") (citation omitted); *see also supra* note 53.

63. *See supra* text accompanying notes 46-51.

II. AN EQUAL PROTECTION ANALYSIS OF SEXUAL PRIVACY

Like the protection afforded by due process,⁶⁴ that arising out of the fourteenth amendment's equal protection clause has traditionally been effectuated by means of a two-tier test. In general, a court will uphold a challenged law that it finds to be reasonably related to a legitimate government concern.⁶⁵ When, however, the challenged law intrudes upon a fundamental right, it faces heightened scrutiny and will be invalidated "unless shown to be necessary to promote a *compelling* governmental interest."⁶⁶

Both courts⁶⁷ and commentators⁶⁸ have expressed severe dissatisfaction with the rigid two-tier format of equal protection analysis. Under this format, initial determination of the standard to be applied effectively determines the final outcome.⁶⁹ Growing dissatisfaction with the two-tier format has not led the Supreme Court to abandon use of either the strict scrutiny or rational basis test. The Court has, however, shown a willingness to expand the contours of the equal protection clause by adding, in certain circumstances, a more flexible balancing test which re-

64. See *supra* note 11.

65. See *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); see also *L. TRIBE supra* note 15, §§ 16-2 to -5.

Reflecting the broad deference afforded legislatures by the courts, most laws challenged under this test are upheld. See *L. TRIBE supra* note 15, § 16-2. This is especially evident from the Court's rejection of equal protection challenges to economic and social legislation. See, e.g., *Cleland v. National College of Business*, 435 U.S. 213 (1978) (*per curiam*); *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977) (*per curiam*); *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Consequently, the rational basis test requires only "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (footnote omitted).

66. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); see also *L. TRIBE, supra* note 15, §§ 16-6 to -18. Strict scrutiny is also required in cases involving suspect classifications, see *Korematsu v. United States*, 323 U.S. 214 (1944); however, the suspect class aspect of equal protection is not relevant to the present discussion. Commentators have described strict scrutiny as "scrutiny that [is] 'strict' in theory and fatal in fact." Gunther, *supra* note 65, at 8.

67. See, e.g., *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); *Craig v. Boren*, 429 U.S. 190, 210-11 & n.* (1976) (Powell, J., concurring).

68. See *L. TRIBE, supra* note 15, § 16-30, at 1089:

[T]he all-or-nothing choice between minimum rationality and strict scrutiny ill-suits the broad range of situations arising under the equal protection clause, many of which are best dealt with neither through the virtual rubber-stamp of truly minimal review nor through the virtual death blow of truly strict scrutiny, but through methods more sensitive to risks of injustice than the former and yet less blind to the needs of governmental flexibility than the latter.

69. See *supra* notes 65-66.

quires closer scrutiny of the competing interests involved in the particular case.⁷⁰ The Court applies this intermediate level of review to cases involving differential treatment of sensitive (as opposed to "suspect") classes and important (as opposed to "fundamental") individual interests, or to cases indirectly affecting constitutionally preferred interests.⁷¹

The right of sexual privacy is arguably an important, if not fundamental, individual interest; therefore, any law which infringes on this interest should be subject to the middle-tier approach.⁷² Indeed, the Supreme Court used this intermediate level of analysis in *Eisenstadt v. Baird*⁷³ to invalidate a prohibition on contraception as violating the rights of single persons under the equal protection clause.⁷⁴ Reading *Eisenstadt* with a reasonable interpretation of *Griswold*⁷⁵ shows the Court's use of an interesting chain of reasoning: even if the state could otherwise ban contraception on morality grounds, it may not prohibit distribution of contraceptives to married persons, as this would violate the marital privacy. However, since any moral evil caused by use of contraceptives would be identical whether such use was by married or unmarried couples, a ban on distribution of contraceptives to single, but not married, couples impermissibly violates the equal protection clause. Therefore, the state may not ban distribution of contraceptives on morality grounds at

70. See, e.g., *Weber v. Aetna Casualty Co.*, 406 U.S. 164, 172-73 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971). See also L. TRIBE, *supra* note 15, §§ 16-30 to -31.

71. See L. TRIBE, *supra* note 15, § 16-31.

72. See L. TRIBE, *supra* note 15, § 15-20. "[W]hatever the threshold of harm the state must otherwise establish to justify intruding upon an aspect of personhood in the public realm, the required threshold is significantly higher when the conduct occurs in a place, or under circumstances, that the individuals involved justifiably regard as private." *Id.* at 985. In fact, the Supreme Court has come close to recognizing a fundamental right to sexual privacy. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). *But see supra* note 32; see also L. TRIBE, *supra* note 15, § 15-13, at 944 n.12.

73. 405 U.S. 438 (1972).

74. Although the majority opinion purports to apply the rational basis standard, see, e.g., 405 U.S. at 447 & n.7, the scrutiny actually exercised is more intense than that which is articulated. See Gunther, *supra* note 65, at 34-36. This point is reinforced by the fact that the Court in *Eisenstadt* draws its version of the equal protection test from a passage it quotes from *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Although in *Reed* the Court also purported to apply the rational basis test, it has subsequently indicated that in *Reed* it actually applied what has become known as the "middle-tier" test. See Craig v. Boren, 429 U.S. 190, 197 (1976); see also Gunther, *supra* note 65, at 34. Hence, it is this middle-tier test that the Court in *Eisenstadt* actually used. 405 U.S. at 446-47.

75. See *supra* notes 16-32 and accompanying text.

all.⁷⁶

The Court in *Eisenstadt* went on to make it clear that even if the state could prohibit distribution of contraceptives to married persons but chose not to, it could not outlaw distribution to unmarried persons. The evil, as perceived by the state, would in each case be identical; therefore, the underinclusion⁷⁷ would be invidious.⁷⁸ By this analysis, the Court expresses a desire to perform more than cursory equal protection analysis when the right of privacy is involved;⁷⁹ although not utilizing a full strict scrutiny test, the Court is unwilling merely to defer to legislative judgment.

This intermediate scrutiny test should be applied to regulations of police officers' off-duty, private sexual conduct. Under this test, for a law or regulation to withstand constitutional challenge, it first must serve an important governmental objective (a higher standard than the legitimate purpose required by the rational basis test); and, second, it must be substantially (as opposed to reasonably) related to achievement of that objective.⁸⁰ The following sections examine the most likely asserted justifications for regulating the private activities of police officers and conclude that regulation of an officer's off-duty activities cannot substantially serve any important governmental objectives.

A. *State Interest in Regulating Off-duty Activity to Promote the Public Morality.*

A state may assert many possible justifications for regulating the off-duty activities of a police officer. However, assuming that promoting the public morality is an important governmental objective,⁸¹ prohibiting only police officers from engaging in an ac-

76. 405 U.S. at 453.

77. The equal protection clause guarantees that individuals in similar situations with regard to the ends of particular legislation will be dealt with in a similar manner. An underinclusive classification violates this concept of horizontal equity because it includes some of the people who fit the purpose of the legislation but excludes many others who are similarly situated. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 46, at 586-89.

78. 405 U.S. at 454. Even under the lenient, rational basis standard, underinclusiveness will generally serve to invalidate a legislative or administrative mandate. Underinclusive classifications, which do not include all those who are similarly situated with respect to the purpose of a law, "burden less than would be logical to achieve the intended government end." L. TRIBE, *supra* note 15, § 16-4, at 997; *see also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-51 (1949).

79. *See supra* notes 72-74 and accompanying text.

80. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

81. *See supra* text accompanying note 38.

tivity solely to protect the public morality would be invidious classification, since the evil, as perceived by the state, would be identical whether the activity were engaged in by a public employee or an ordinary citizen.⁸² Such underinclusion would be a violation of equal protection.⁸³

Nor does the state interest in maintaining a police department of individuals with the *highest* possible moral standards satisfy equal protection requirements. Moral requisites are never easily defined—if only because of the question of whose moral standards should be used. Even if a majority view could be ascertained, it would hardly be entitled to much force.⁸⁴ Hence, although the state has an important interest in prohibiting the unlawful off-duty conduct of police officers,⁸⁵ an activity that society has not deemed sufficiently immoral to be illegal does not constitute an activity sufficiently immoral to override a police officer's right to privacy.⁸⁶

82. Cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972). In *Eisenstadt*, the Court addressed a legislative division of married and unmarried persons, declaring a state prohibition on distribution of contraceptives to unmarried persons impermissible. The Court reasoned that, because the evil inherent in the use of contraceptives would be identical whether such use was by married or unmarried persons, the underinclusion resulting from this moral bifurcation would be invidious.

83. See *supra* notes 77-78. While the Court may allow an underinclusive classification for problems too large, pragmatically, to be remedied all at once, see, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974) (“[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.”) (quoting *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970)); L. TRIBE, *supra* note 15, § 16-4, at 997 (“In defense of underinclusiveness it has been argued that piecemeal legislation is a pragmatic means of effecting needed reforms, where a demand for completeness may lead to total paralysis”) (citation omitted); Tussman & tenBroek, *supra*, at 349, no compelling reason exists for society to target its battle against immorality only at police officers. For example, if society deems pre-marital sex immoral, and if pre-marital sex is not protected by some right of privacy, it would not be impractical to outlaw *all* pre-marital sex, rather than merely the pre-marital sex of police officers.

84. See *supra* note 41 and accompanying text. Many courts are quick to point out that the states must “tread lightly” when regulating the private actions of their employees and “must be careful not to transform anachronistic notions of unacceptable social conduct into law.” *Fabio v. Civil Serv. Comm’n*, 489 Pa. 309, 325, 414 A.2d 82, 90 (1980).

85. The equal protection clause provides no barrier to prohibiting police officers from doing what the population as a whole may not do. Indeed, subjecting police officers to additional prohibitions of otherwise illegal conduct is not constitutionally impermissible. Police officers are charged with upholding the the law. Consequently, a police officer committing a crime places himself in a position where his interests as an individual and his interests as an officer will conflict, thereby creating a substantial state interest in treating police officers different from the general public. *Andrad v. City of Phoenix*, 692 F.2d 557, 559 (9th Cir. 1982).

86. Cf. *Risner v. State Personnel Bd. of Review*, 56 Ohio App. 2d 21, 27, 381 N.E.2d 346, 350 (1978) (finding that regulation providing for removal of public employees for “immoral conduct” established no higher standards than those prevalent among the general public).

Furthermore, even if promotion of morality constitutes an important governmental objective and a valid reason exists for treating police officers differently from the general public, to the extent that a "conduct unbecoming an officer" standard prohibits a certain activity, neither the public's (nor even the legislature's) view of morality is imposed, but rather the view of the officer's superiors. Consequently the standards imposed on police officers will often be quite different from public standards, and will therefore not be substantially, or even reasonably, related to the important governmental objective.

B. State Interest in Promoting a High Degree of Respect for Police Officers

The Supreme Court has made clear that when a state acts as an employer it may not, without substantial justification, condition employment on the relinquishment of constitutional rights,⁸⁷ and further, that even police officers are entitled to full protection of these rights.⁸⁸ The Court, however, also has indicated that a state may have a greater interest in regulating the activities of its employees than the activities of the population at large.⁸⁹

87. *Pickering v. Board of Educ.* 391 U.S. 563, 568 (1968). Indeed, "[i]t is well established that terminable-at-will government employees, while they may generally be discharged for any number of reasons or for no reason at all, may not be discharged for exercising their constitutional rights." *McMullan v. Carson*, 568 F. Supp. 937, 943 (M.D. Fla. 1983) (citing *Branti v. Finkel*, 445 U.S. 507, 514-16 (1980)).

88. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("policemen . . . are not relegated to a watered-down version of constitutional rights.")

89. *See Kelley v. Johnson*, 425 U.S. 238 (1976) (holding that regulation establishing hair grooming standards for police officers does not violate the fourteenth amendment, because the choice reflected in the regulation that similarity in appearance is desirable—whether based on a desire to make police officers readily recognizable to the public or on a desire for the esprit de corps which such similarity may inculcate—is rationally justified).

Neither of the proposed justifications in *Kelley* applies to intrusion upon the private sexual conduct of police officers. First, nothing a police officer does in private will affect the public's ability to recognize him or her on duty. Second, the esprit de corps the Court discussed in *Kelley* arose from a similarity of appearance while on-duty, not from a similarity of life-style choices. For example, the Court would likely not uphold a regulation requiring dismissal of all unmarried officers in order to promote an esprit de corps. Furthermore, it is impermissible to attempt to enforce the department's majority morality upon individual officers. *See supra* notes 41, 84 and accompanying text.

Finally, to the extent that the Court in *Kelley* recognized the State's interest in conducting its internal affairs, 425 U.S. at 247, regulation of officer appearance (i.e. hair grooming) for on-duty police officers constitutes a proper area for state intervention, while regulation of off-duty sexual conduct does not.

Several lower courts assert an overriding state interest in promoting a high degree of respect for police officers in order to facilitate the officers' ability to perform their function.⁹⁰ Often courts worry about a weakening of public confidence and trust.⁹¹ However, promoting a high degree of respect for police officers is not a sufficiently important governmental objective to support intrusion into the police officer's off-duty, private activities. Although cases upholding the disciplining of police officers may assert to be premised on a loss of community respect for the officer, the underlying rationale is actually based on this lack of respect coupled with some form of immoral behavior.⁹² It is hard to believe that a court would uphold dismissal of an officer in a case where lack of respect was not based on some form of "immorality."⁹³ Yet imposition of a majority view of moral conduct is an impermissible reason to impinge on the police officer's ability to engage in otherwise lawful off-duty conduct.⁹⁴

Furthermore, to justify state regulation, a substantial connection would have to exist between the police officer's off-duty conduct and a weakening of the public confidence. Because what one does in private, by definition, generally will not come before the public eye, government interference serves no justifiable purpose but merely imposes a concept of private morality chosen by the state.⁹⁵ Indeed, if factors exist which contribute to the belief that sexual activity is a vital component of protected personhood, then, to the extent such factors do not depend on

90. See *Faust v. Police Civil Serv. Comm'n*, 22 Pa. Commw. 123, 127, 347 A.2d 765, 768 (1975) (holding that adultery, committed by a police officer while he was off-duty constituted "immorality" and "conduct unbecoming an officer" and warranted dismissal even though adultery was not a criminal act in the state of Pennsylvania).

91. *Faust v. Police Civil Serv. Comm'n*, 22 Pa. Commw. 123, 127, 347 A.2d 765, 768-69 (1975) (quoting *Cerceo v. Darby*, 3 Pa. Commw. 174, 183, 281 A.2d 251, 255 (1971)); *McMullen v. Carson*, 568 F. Supp. 937, 944 (M.D. Fla. 1983) ("[P]olice departments have an important governmental interest in maintaining public confidence in the police force and public respect for its officers.") (citation omitted).

92. For example, in upholding the dismissal of a police officer for adultery (behavior which was otherwise legal in the state), the court in *Faust v. Police Civil Serv. Comm'n*, 22 Pa. Commw. 123, 347 A.2d 765 (1975), relied in large part on the fact that "a great portion of our citizenry still believes [adultery] to be morally offensive." *Id.* at 127, 347 A.2d at 769.

93. For example, one can imagine a conservative small community that would not be favorably disposed to its male police chief taking ballet lessons. Yet it is hard to believe that a court would allow disciplining of the officer based on a loss of respect or confidence resulting from his engaging in this activity.

94. See *supra* notes 41, 84 and accompanying text.

95. *People v. Onofre*, 51 N.Y.2d 476, 490, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 952 (1980), *cert. denied*, 451 U.S. 987 (1981); *accord State v. Saunders*, 75 N.J. 200, 218-20, 381 A.2d 333, 341-43 (1977).

some narrow definition of privacy,⁹⁶ failure to seal sexual activity hermetically from public view provides no basis for state intrusion into the private sex lives of police officers.⁹⁷ This is true "[e]ven when the harm feared has existence independent of the beholder's awareness of the offending conduct,"⁹⁸ as may be the case when the state is concerned with public opinion of its police officers. If a public finding of certain off-duty sexual conduct as offensive to contemplate is enough to justify regulatory prohibition of such conduct then no aspect of the individual's privacy is safe from regulation and the notion of protected personhood is nothing more than a hollow shell.⁹⁹

Finally, because public expectations influence public confidence, an intrusion upon a police officer's private, off-duty activities in order to promote public confidence raises a serious policy concern. In today's society, some police officers will engage in off-duty sexual conduct even in the face of prohibiting regulations.¹⁰⁰ Public confidence in the police department will be more shaken if police officers engage in such conduct in violation of regulations than if no such regulations exist. Both the public at large and police officers themselves will acquire a general disrespect for regulations which prohibit what might otherwise be pervasive conduct.¹⁰¹ To the extent that this occurs, any regulation of otherwise lawful, off-duty activity promulgated to promote public trust in the police department will be self-defeating.

C. *State Interest in Ensuring the Proper Functioning of the Police Department*

Some courts assert that, to justify controlling the private, off-duty conduct of a police officer, a governing body must show that his or her "usefulness as a police officer would be substan-

96. L. TRIBE, *supra* note 15, § 15-13, at 947-48. For example, the doctor's involvement in *Griswold* in the couple's decision on contraception did not cause them to forfeit their constitutional protection. *Id.*

97. *Accord* *Britt v. Superior Court*, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962) (finding that the right of privacy required dismissal of charge in consensual act between two men seen through a hole in the ceiling of a store toilet stall).

98. L. TRIBE, *supra* note 15, § 15-20, at 984.

99. *Cf. id.*, § 15-19, at 981 ("If simply finding another's appearance or habits offensive to hear, see, or think about were enough to justify exclusionary regulation, rights of personhood . . . would be at an end.").

100. *Cf. Kadish, The Crisis of Overcriminalization*, 374 ANNALS 157, 159-60 (1967).

101. *Id.* at 160 ("Moral adjudications vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere.").

tially and materially impaired by the conduct in question."¹⁰² This view has the advantage of both an important governmental objective (to promote order and safety through a well-functioning police department), and a substantial connection between the classification and the purpose of the statute.¹⁰³ However, this connection loses any semblance of reasonableness unless the regulation requires disciplining a police officer only for private, off-duty, sexual conduct that has an actual—rather than possible—substantial effect on the officer's inherent ability to perform.¹⁰⁴ Otherwise the regulation contains no effective limit on the aspects of the police officer's private life that may be regulated by the state—all off-duty activity has some possible effect on on-duty performance.

Recognition of the need for a direct connection between the

102. *Smith v. Price*, 446 F. Supp. 828, 834 (W.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980); *accord Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979).

103. It may be useful to compare the line of teacher dismissal cases, in which the courts are called upon to determine whether a teacher's sexual conduct constitutes sufficient grounds for dismissal or suspension under a statute prohibiting "immoral conduct."

While some courts have held that a teacher's inability to obey the law or otherwise act in accordance with traditional moral principles may alone be grounds for dismissal, *Pettit v. State Bd. of Educ.*, 10 Cal. 3d 29, 36, 513 P.2d 889, 894, 109 Cal. Rptr. 665, 670 (1973), many others declare that dismissal may not be based on unfitness absent proof that retention "poses a significant danger of harm to either students, school employees, or others who might be affected by [one's] actions as a teacher." *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 235, 461 P.2d 375, 391, 82 Cal. Rptr. 175, 191 (1969) (emphasis added). In other words, a teacher's private sexual conduct becomes a proper concern only to the extent that it directly and negatively affects his or her abilities as a teacher. *Jarvella v. Willoughby-Eastlake City School Dist. Bd. of Educ.*, 12 Ohio Misc. 288, 291, 233 N.E.2d 143, 146 (1967). Where the teacher's abilities are unaffected and the school faces no danger, the teacher's private sexual activities are his or her own business and should not be the basis of dismissal or suspension. *Id.*; *Reinhardt v. Board of Educ.*, 19 Ill. App. 3d 481, 485, 311 N.E.2d 710, 713 (1974) (holding that dismissal is proper "only where the record shows harm to pupils, faculty, or the school itself"), *vacated and remanded on other grounds*, 61 Ill. 2d 101, 329 N.E.2d 218 (1975); *see also Jerry v. Board of Educ.*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (holding that teacher's private association with a member of the opposite sex is not by itself a concern of the school unless the school board demonstrates that such association may interfere with the teacher's responsibilities to students and ability to teach); *accord Sullivan v. Meade Indep. School Dist.*, 530 F.2d 799 (8th Cir. 1976).

104. More and more courts are apparently recognizing this fact. *See L. TRIBE supra* note 15, § 15-13, at 942 n.3 ("The courts have increasingly put public agencies to the test of proving a *tangible and non-trivial connection* between alleged 'immorality' and the employee's ineffectiveness in performing his or her duties.") (emphasis added); *see also Perea v. Fales*, 39 Cal. App. 3d 939, 942, 114 Cal. Rptr. 808, 810 (1974) (A "nexus between conduct characterized as 'unbecoming an officer' and fitness to perform the functions of a police officer is required for the suspension of an officer from duty.") (citation omitted); *accord Boussom v. City of Elkhart*, 567 F. Supp. 1382, 1384 (N.D. Ind. 1983) (A police officer cannot "be removed if the cause for dismissal bears no reasonable relation to [his] fitness or capacity to hold his position.") (citation omitted).

off-duty activity and the deterioration in performance eliminates the need to examine the underlying off-duty activity. The state tries to prevent the evil of poor performance; but poor performance can, and indeed should, be prohibited, regardless of its cause. Punishing poor performance when it results from certain activities but not when it results from others creates an invidious classification and the underinclusion violates the equal protection clause.¹⁰⁵

In sum, state intrusion into the private, off-duty sexual conduct of police officers serves no important governmental objective. Consequently, intruding regulations cannot clear the equal protection hurdles necessary to constitute a valid exercise of the state's power. The fourteenth amendment's equal protection clause thus protects police officers' otherwise legal, private, off-duty, consensual, sexual conduct from state intrusion.

III. VAGUENESS DOCTRINE AND THE CONDUCT UNBECOMING AN OFFICER STANDARD

Even if the state has some justifiable interest in regulating the private, off-duty, sexual activities of police officers, the question remains whether a statute or regulation using a "conduct unbecoming an officer" or similar standard is drawn sufficiently narrowly to meet the notice requirement of the due process clause.¹⁰⁶ The vagueness doctrine compels the legislature to promulgate clear guidelines for law enforcement officials and triers of fact, to avoid arbitrary and discriminatory enforcement of statutes and regulations,¹⁰⁷ and to provide fair warning of pro-

105. See *supra* notes 77-78; see also L. TRIBE, *supra* note 15, § 15-13, at 942 n.3 ("[T]he particular attention courts have given to employment decisions based on private sexual conduct arguably evidences a perception that such a factor is not merely extraneous but is invidious.")

106. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925), *quoted in* *Bence v. Breier*, 501 F.2d 1188, 1187 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1974) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.")

107. *Smith v. Goguen*, 415 U.S. 556, 572-73 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *W. LAFAVE & A. SCOTT, CRIMINAL LAW*, 87-88 (1972); see also *Whisenhunt v. Spradlin*, 104 S. Ct. 404 (1983) (Brennan, J., dissenting), *denying cert. sub nom.* to *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983):

By demanding that government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values; reduces the danger of caprice and discrimination in the administration of the laws; and permits meaningful judicial review of state actions.

scribed conduct.¹⁰⁸

Although some courts allow a finding of misconduct to be based solely upon the violation of implicit standards of good behavior imposed upon those who stand in the public eye as upholders of that which is morally and legally correct,¹⁰⁹ most courts upholding prohibitions of "conduct unbecoming an officer" are not as permissive of such a broad standard and admit that it may indeed appear vague on its face.¹¹⁰ These courts assert that this standard nevertheless withstands constitutional challenge because it has been narrowed by custom, usage, and judicial interpretation so that it gives a person of ordinary intelligence fair notice that it forbids his contemplated conduct.¹¹¹

104 S. Ct. at 407.

108. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (acknowledging the importance of fair warning, the Court said that when a man remains free to choose between lawful and unlawful conduct, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *W. LAFAVE & A. SCOTT*, *supra* note 107, at 85-87. *But see* Note, *Vagueness Doctrine in the Federal Courts*, 26 STAN. L. REV. 855, 857 n.14 (1974) ("To the extent that it can be shown that few people actually rely on the state of the law at the time they act, the fair warning rationale is undercut.")

109. *See* *Civil Serv. Comm'n v. Livingston*, 22 Ariz. App. 183, 525 P.2d 949, 953-54 (1974), *cert. denied*, 421 U.S. 951 (1975).

110. *Fabio v. Civil Serv. Comm'n*, 489 Pa. 309, 315-16, 414 A.2d 82, 85-86 (1980); *Perea v. Fales*, 39 Cal. App. 3d 939, 942, 114 Cal. Rptr. 808, 810 (1974) ("The expression 'conduct unbecoming an officer' fails, on its face, to provide a standard.")

111. *Fabio v. Civil Serv. Comm'n*, 489 Pa. 309, 315-16, 414 A.2d 82, 85-86 (1980). In *Fabio*, the court relied on three factors in determining that the standard had been sufficiently narrowed over time. First, the phrase "conduct unbecoming an officer" has been continuously and successfully used as a military standard since the 18th century. Second, the Supreme Court upheld a similar standard (in a military setting) against a challenge of vagueness in *Parker v. Levy*, 417 U.S. 733 (1974). Third, the courts of the state had ruled upon specific types of behavior which they had deemed to be unbecoming conduct. 489 Pa. at 315-17, 414 A.2d at 85-86.

Military precedents have no application in the civilian context, making the first two factors of the court's decision irrelevant to regulation of police officers. *Bence v. Breier*, 501 F.2d 1185, 1192 (7th Cir. 1974); *accord* *Parker v. Levy*, 417 U.S. at 756. Additionally, the imprecision of any military-civilian police analogy precludes its use in the determination of constitutional rights. *Muller v. Conslisk*, 429 F.2d 901, 904 (7th Cir. 1970).

The third factor factor relied on by the *Fabio* court—previous state court rulings that specific types of behavior constituted unbecoming conduct—does little to alleviate the vagueness of the prohibition, since the regulation remains vague as to the propriety of conduct which has not yet been the subject of litigation. Furthermore, to the extent that a "conduct unbecoming an officer" standard tracks the morals of the community over time, conduct that was once allowed under the standard may at any time become prohibited and vice versa, indicating that past judicial decisions will provide less than perfect guidance.

It is important to note that the articulated standard need only give notice to those potentially subject to consequences under the rule. *W. LAFAVE & A. SCOTT*, *supra* note 107, at 85. Hence, "the required certainty may be provided by the common knowledge of members of the particular vocation when the regulation does not itself contain specific standards; it may be that police officers will normally be able to determine what kind of

These courts fail to consider several factors which should invalidate "conduct unbecoming an officer" and similar standards even if they have been somewhat narrowed over time. First, such a standard "still does not provide the individual with meaningful guidance concerning the required mode of conduct."¹¹² Even though ascertainable areas of permissible and nonpermissible behavior may exist, under such a vague standard conduct will always exist that will not fit easily into either category.¹¹³ Consequently, the standard does not provide an officer sufficient notice of just what conduct is prohibited.¹¹⁴

Second, the subjectivity implicit in the language of the rule still allows police officials unfettered discretion in enforcement,¹¹⁵ substantially decreasing the possibility of even-handed application.¹¹⁶ This potential for arbitrary enforcement is abhorrent to the due process clause.¹¹⁷

conduct indicates unfitness' to work in law enforcement." *Perea v. Fales*, 39 Cal. App. 3d 939, 942, 114 Cal. Rptr. 808, 810 (1974) (citation omitted).

112. *Civil Serv. Comm'n v. Pitlock*, 44 Mich. App. 410, 414, 205 N.W.2d 293, 294-5 (1973); *accord Note, supra* note 108, at 865 ("[T]he Supreme Court and lower federal courts have voided for failure to afford fair warning generally applicable criminal and civil statutes penalizing . . . 'misconduct,' conduct that is 'annoying,' 'reprehensible,' or 'improper,' 'immoral' or 'demoralizing,' 'offensive,' and 'prejudicial to the best interests' of a city.") (footnotes omitted); *see also supra* note 111.

113. If there were no gray area there would be no need for a "conduct unbecoming an officer" standard—all prohibited behavior would be known and could be specifically prohibited. To be sure, the level of vagueness permitted will be governed in part by the extent to which the context creates a necessity for imprecise regulation, *Note, supra* note 108, at 860, but the requirement of specificity has been found infeasible only on rare occasion. *Cf. id.* at 863 n.37. Furthermore, while it is inevitable that there will be some degree of uncertainty in applying any prohibitory statute or regulation, *W. LAFAVE & A. SCOTT, supra* note 107, at 84-85, the need for the protection afforded by the vagueness doctrine increases "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 390-91 (1979) (citations omitted). Consequently, to the extent that a "conduct unbecoming an officer" or similar regulatory prohibition may infringe upon the individual's constitutional right of privacy (whatever that right might be) or upon his or her right to equal protection, the regulation is subject to the strictest standard of permissible vagueness.

114. *See supra* notes 106, 108 and accompanying text for a discussion of the importance of notice.

115. *Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974). The officer's superiors, after all, will decide whether to fire, demote or suspend the officer for engaging in "misconduct" or to do nothing at all.

116. *Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 221 (1967).

117. *Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974). Of course, this does not mean that a rule "is void merely because it grants some discretion to those who administer" it. *W. LAFAVE & A. SCOTT, supra* note 107, at 88. "Uncertain statutory language has been upheld when the subject matter would not allow more exactness and when greater specificity in language would interfere with practical administration." *Id.* (footnotes omitted). But regulation of off-duty police conduct is not a context that creates a neces-

Finally, because a "conduct unbecoming an officer" or similar rule contains no standards, the result of administrative and judicial review will be arbitrary, comprising, at best, nothing more than a meaningless gesture.¹¹⁸ The vagueness doctrine fundamentally guards against this possibility.¹¹⁹

In short, because a "conduct unbecoming an officer" standard provides no guidance to those it regulates, enables arbitrary enforcement by police officials, and does not set appropriate standards for review, the courts should not uphold this standard. Those who assert the need for a broad standard, because of the impossibility of regulating specifically against all relevant activities, and who then assert that the "conduct unbecoming an officer" rule has been sufficiently narrowed by the courts to provide fair notice to a person of ordinary intelligence that the regulation forbids contemplated conduct, state conflicting propositions. If an individual can know all forbidden conduct, a regulation can specifically prohibit such activities. Broad standards are, therefore, neither a necessary nor a desirable way to enforce proper behavior and should be struck down.

CONCLUSION

Unfortunately, the courts have almost uniformly overlooked the equal protection inquiry suggested by this Note. They focus exclusively on due process reasoning regardless of outcome. This view, perhaps promoted by the Supreme Court's unwillingness or inability to make a definitive statement on the bounds of the constitutional right of privacy, is entirely backward. The due process clause alone affords scant protection to the private sexual activities of police officers. The barrier erected by the equal protection clause, however, should no longer be ignored. The courts should apply equal protection analysis when confronted with problems of regulation of off-duty police conduct.

Even if the state has an interest in regulating the private, off-duty sexual activities of its police officers substantial enough to clear the equal protection hurdles, any regulation must be drawn narrowly enough to meet the notice requirement of the due process clause. "Conduct unbecoming an officer" and similar stan-

sity for imprecise standards. See *supra* note 113, Rather, such regulations embody a clear attempt to exercise state power without making a conscious choice among competing social values and therefore violate the due process clause. See *supra* note 107.

118. *Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974).

119. See *supra* note 107.

dards do not meet this criterion and are therefore impermissible.

While society may depend on its police officers to enforce the rules which protect both its citizens and its structure, any tendency to view police officers only as public servants and not as a part of the society must be resisted. When a police officer is in off-duty garb, he or she is entitled to the safeguards and privileges available to any citizen. Indeed, allowing the state to strip the rights of an individual who has honorably chosen to serve society is allowing it to punish the individual who is most worthy of praise. Courts must therefore be especially zealous in applying equal protection and vagueness doctrines to regulations of police officers' off-duty activities.

—*Michael A. Woronoff*