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The Aftermath of Doe v. Commonweath's Attorney: In Search of the Right to Be Let Alone

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THE AFTERMATH OF *DOE v. COMMONWEALTH'S ATTORNEY:* IN SEARCH OF THE RIGHT TO BE LET ALONE

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I. INTRODUCTION

If there is one principle of American government which has survived the currents of history it is the sanctity of a citizen's right to be free from unwarranted governmental intervention. Indeed, some have suggested that the most important seed which spawned this country's movement for independence was the colonists' commitment to the acquisition of individual liberty.[1] The revolutionary vision of maximizing individual liberty did not meet the fate of extinction as the concluding thesis of a political philosophical treatise. Instead, it provided, as John Adams wrote, the "stamina vitae" for a constitution of government.[2] It, therefore, seems incredulous that many Americans remain the potential targets of the most unconscionable form of governmental invasion conceivable—the placing of criminal sanctions on private, adult, consensual sexual behavior.[3]

While some states have chosen to criminalize forms of heterosexual activity, most states which place criminal sanctions on sexual conduct have directed their legislative enactments toward homosexual behavior.[4] The United States Supreme Court's summary affirmance of Virginia's criminal sodomy statute as applied to private, adult, consensual, homosexual behavior in *Doe v. Commonwealth's Attorney*[5] was a devastating blow to all Americans who are concerned with the most cherished right of all civilized men—"the right to be let alone."[6]

The Court's denial of a discretionary appeal, of course, may be, as some lower courts have suggested, insufficient legal precedent to signal

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1. *See, e.g.*, B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).
2. THE WORKS OF JOHN ADAMS 478–79 (C. Adams ed. 1850).
3. *See generally* C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR (1951); B. MACEL, ONE IN TWENTY: A STUDY OF HOMOSEXUALITY (1966); J. MARMOR, SEXUAL INVERSION (1965).
4. For an excellent overview of state statutes which prohibit private, adult, consensual, homosexual acts, see Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 949–51 (1979).
5. 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975).
6. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

a firm federal standard providing irrefutable constitutional legitimacy to state intrusion into the sanctity of consensual sexual relations between adults.[7] But many judges and legal authorities disagree.[8] Depending upon state statutes and the jurisprudential tenets to which each state or lower federal court judge subscribes, dramatically different judicial rationales have been enunciated in an effort to determine the constitutional implications of *Doe*.[9]

The most important task of this article is to identify the various judicial attitudes concerning private, adult, consensual, homosexual behavior which have emerged since *Doe* and evaluate the constitutionality of these lower court determinations. To accomplish this objective it will be necessary to examine briefly the philosophical and historical origins of what some have described as the constitutional right of privacy. From this excursion into the matrix of constitutional priorities, the investigation will turn to contemporary United States Supreme Court decisions which have addressed the fundamentality of individual self-determination. Finally, after a firm understanding of our past constitutional commitments has been established, the current judicial inconsistencies will be analyzed in light of the federal district court's opinion that was subsequently affirmed by the Supreme Court in *Doe*.

II. INDIVIDUAL AUTONOMY—EARLY AMERICAN VISIONS

In this society of mass technology, large and seemingly faceless government and corporate bureaucracies, and communication systems which homogenize Americans into prepackaged consumer marketing ventures, we too often have to literally force ourselves to focus upon our individuality. Most Americans however, have become adept at devising their own methods for this inward search for meaning. Our quest for self-awareness is derived from a uniquely American reverence for personal autonomy and individual liberty. The philosophical roots of this important value can be traced to a myriad of political philosophers across the continuum of modern history.[10] Indeed, our constitutional system is an amalgam of various seventeenth and eighteenth century political and philosophical epistemologies. But if there was one current of political thought which captured the hearts and minds of colonial

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

8. *See infra* note 241 and accompanying text.

9. *See infra* notes 163–270 and accompanying text.

10. *See generally* THE ENGLISH LIBERTARIAN HERITAGE (D. Jacobsen ed. 1965) [hereinafter cited as JACOBSEN]; J. LOCKE, TWO TREATISES OF GOVERNMENT (2d ed. London 1967); J. MILL, ON LIBERTY (1980); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969); THE WRITINGS OF JAMES MADISON (G. Hunt ed. 1960) [hereinafter cited as MADISON].

Americans it was English libertarianism.[11]

The radical Whig tradition of early eighteenth century England that "Americans found most attractive, most relevant to their situation and needs,"[12] can be understood generally through the writings of John Trenchard and Thomas Gordon.[13] Of particular interest to this investigation is their vision of what constituted the legitimate aim of government. Trenchard and Gordon urged that government was but a practical restraint, and that the role of free government was to protect the people in their liberties.[14] Government was not to be concerned "with the private Thoughts and Actions of Men."[15] For the English libertarians and for many colonial Americans, government was not "to direct them in their own Affairs, in which no one is interested but themselves."[16] But more specifically, they wrote of liberty and government:

> And it is foolish to say, that Government is concerned to meddle with the private Thoughts and Actions of Men, while they injure neither the Society, nor any of its Members. Every Man is, in Nature and Reason, the Judge and Disposer of his own domestic Affairs; and, according to the Rules of Religion and Equity, every Man must carry his own Conscience. So that neither has the Magistrate . . . or any body else, any manner of Power to model People's Speculations, no more than their Dreams. Government being intended to protect Men from the injuries of one another, and not to direct them in their own Affairs, in which no one is interested but themselves; it is plain, that their Thoughts and domestic Concerns are exempted intirely from its Jurisdiction.[17]

Ultimately, Trenchard and Gordon concluded that "[t]his Passion for Liberty in Men, and their Possession of it, is of that Efficacy and Importance, that it seems the Parent of all Virtues."[18] Therefore, the attainment and protection of liberty was not only believed to be the highest aspirational goal of government, but it was also the progenitor of other values necessary in a society committed to maximizing the human potential. Without the freedom to "judge" and be the "dis-

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11. *See generally* B. BAILYN, *supra* note 1, at 36; G. WOOD, *supra* note 10, at 49. *See also* B. BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION (1965).

12. *See* G. WOOD, *supra* note 10, at 15. *See also* B. BAILYN, *supra* note 1, at 36.

13. *See* G. WOOD, *supra* note 10, at 50; Trenchard & Gordon, *Cato's Letters in the Independent Whig*, in JACOBSEN, *supra* note 10. The writings of Trenchard and Gordon have come to be known as "Cato's Letters" because the signature attached to each essay published in *The London Journal* in 1720 was "Cato," representing the Roman spokesman of liberty. B. BAILYN, *supra* note 1, at 36.

14. JACOBSEN, *supra* note 10, at 127, 129.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 131.

poser" of one's "domestic affairs" and to "carry [one's] own conscience," government has failed. Nevertheless, neither the libertarians nor the colonialists believed that individual liberty was an absolute and unqualified right.[19]

Trenchard and Gordon placed an important condition upon the citizen's right to personal autonomy. The "private Thoughts and Actions of Men," were not to be interfered with by government "while they injure neither the Society, nor any of its Members."[20] The litmus test of the legitimate parameters of individual behavior and the corresponding obligation of government may be described as the *harm factor.*

There are two implicit yet clear presumptions interwoven into their vision of the appropriate relationship between a free society and its government. The first is that it is the burden of government to demonstrate that harm has been or will be the resultant effect of an individual's behavior. The basis, of course, of this claim is that the autonomy of the individual is to be exalted as a first priority for legitimate government. The limitation of liberty can be justified only as an exception to the general principle of governmental nonintervention. The second presumption is that for government to carry its burden it must demonstrate that society or one of its members is injured. Obviously, this is a fact question. Therefore, before government's heavy burden of proof can be met to justify limiting individual behavior, it must demonstrate empirically that an individual citizen is harmed by the behavior or that the collective as a whole is somehow injured. This harm calculator which depicts a strong mutuality of respect between the citizen's personal autonomy and the majoritarian interest was accepted with enthusiasm by colonial Americans and has been subsequently incorporated within our jurisprudential system.[21]

James Madison, one of the most influential draftsmen of the Constitution and a fervent supporter of majoritarian government, cautioned his colleagues to design structural safeguards within the governmental process to guard against abuses of power originating from the collective people. He wrote that:

> In our governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from

19. *Id.* at 129.

20. *Id.*

21. *See* B. BAILYN, *supra* note 1, at 36; *see also Letters from a Pennsylvania Farmer*, in THE WRITINGS OF JOHN DICKINSON 343 (P.L. Ford ed. 1895).

acts in which the government is the mere instrument of the majority . . . .[22]

As a staunch proponent of majoritarian government, Madison was not suggesting that government ought not be responsive to the collective will. Yet, his understanding of government was tempered by the eighteenth century concern for the sanctity of individual liberty.[23] To protect the private rights of citizens who may not possess majoritarian political power, Madison warned that Americans must understand the important distinction between "popular" majoritarian and "constitutional" majoritarian government. He reminded his associates that "[t]he majority, as formed by the Constitution, may be a minority when compared with the popular majority."[24] As long as the Constitution was operative, the only legitimate source of governmental action was derived from those citizens who accepted the values expressed by it—even if on occasion constitutional rule was not reflective of popular opinion.[25]

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22. *See* MADISON, *supra* note 10, at 272.

23. *See* MADISON, *supra* note 10, at 523. Madison wrote the following:

> It has been said that all government is evil. It would be more proper to say that the necessity of any government is a misfortune. This necessity however exists; and the problem to be solved is, not what form of government is perfect, but which form is least imperfect; and here the general question must be between a republican government in which a lesser number or the least number rule the majority. If the republican form is, as all of us agree, to be preferred, the final question must be, what is the structure of it that will best guard against precipitate counsels and factious combinations for unjust purposes, without a sacrifice of the fundamental principles of republicanism. Those who denounce majority governments altogether because they may have interest in abusing their power, denounce at the same time all republican government and must maintain that minority governments would feel less of the bias of interest or the seductions of power.

Id.

24. *Id.* at 527.

25. *Id.* Madison understood that the protection of minority rights could not be totally dependent upon simple calculations of popular opinions. The "popular majority" represented the collective opinions or interests of the largest numerical combination of Americans. In contemporary terminology Madison's "popular majority" might be analogous to 51% of those citizens who responded similarly to a Harris or Gallup type poll. The "constitutional majority," while not mutually distinct from the "popular majority," was (is) limited in its composition to those individuals whose desires and interests generally reflect the expressed and implicit goals of the Constitution. It was this body of citizens which Madison argued would fulfill the purposes of democratic republican government.

He was well aware that the "constitutional majority," on some occasions, would be a "popular minority." The primary task of the constitutionally established departments of government—particularly, the Supreme Court—was to gain, and subsequently maintain, the confidence of the "constitutional majority." For inclusion in this group one needed more than simply an opinion. American constitutional government could not survive, let alone attain its aspirational objectives, without a tacit commitment to the securing of basic human freedoms through compromise and tolerance. Therefore, compliance which was engendered by bias or prejudice—even if it reflected a popular majority of Americans—could not provide the basis for Supreme Court action or inaction.

For Madison, majority rule, in the context of constitutional government, was not a mere calculation of current popular opinion. With an eye toward the dangers of legislative assemblies simply carrying out the desires of popular whim regardless of constitutional mandates, he urged that while majoritarian government was to be preferred over any system which was grounded upon the minority ruling the majority, our new governmental experiment could survive only if a constant evaluation of the basis for majoritarian governmental action was instituted.[26] Madison realized that without strict adherence to constitutional purposes there would be little difference between majoritarianism and totalitarianism.[27] Opinion alone was insufficient to provide legitimacy to legislative enactments which impinged upon the rights of individuals.[28] His insistence on strong separations of power in government and conformity to constitutional purposes was a reflection of the Founders' vision which perceived government as a mechanism by which each individual could obtain a maximum of liberty and a minimum of suppression.[29] Hence, majoritarian opinion which rejected this aspirational objective of our constitutional democracy with a limited government could not provide a legitimate basis for governmental action.

This fear of majoritarian abuse of power and the equating of popular approval of legislation with constitutional validation was eloquently expressed by Thomas Cooley in 1873. In Joseph Story's *Commentaries on the Constitution of the United States*, Cooley wrote:

> [N]or are laws necessarily equal and just because professedly they act upon all alike. A general law may establish regulations upon subjects not properly falling within the province of government, and yet be desired and cheerfully submitted to by the majority, who might be inclined, under any circumstances, voluntarily to establish such regulations for

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Professor Archibald Cox has identified subdivisions of American society whose support is *sine que non* for a minimum level of voluntary compliance when, in Madison's terminology, the "popular majority" outnumbers the "constitutional majority." He suggests that on those "great occasions" when the Supreme Court may activate its power of judicial interpretation of the vague constitutional boundaries, it must generate acceptance from the political branches of government, the rest of the legal profession, and enough of the public. *See* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 105 (1976).

Whether the Court should look to only this population to be forewarned as to the probability of compliance with its decisions, or, more importantly, should look to compliance as the only criterion for constitutional decision making, is another question.

26. *See generally* MADISON, *supra* note 10.

27. *See supra* note 23.

28. *See, e.g.*, C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION (1963), which provides in part as follows: "[G]overnment existed only for the benefit of the men who had submitted to it. Even when they used such collective phrases as 'the welfare of mankind,' 'the public good' and 'the benefit of the community,' they were thinking in terms of the welfare, good, or benefit of each individual." *Id.* at 164–65.

29. *Id.* at 174.

> themselves; while, on the other hand, the same law might to the minority be in the highest degree offensive, unjust and tyrannical.[30]

Cooley's observation is particularly significant to the thesis of this article. Heterosexual Americans, through the auspices of state legislatures, "voluntarily" create and "cheerfully" submit to criminal laws which reinforce their sexual orientation. But, for the homosexual minority of our citizenry, recognition of their sexual orientation and the fulfillment of their needs as human beings may result in criminal punishment.[31]

Cooley's concern for the potential abuse of our majoritarian political process, when coupled with Madison's earlier forewarnings about the possibility that popular opinion, not constitutional commitment, could provide the basis of governmental decision making, is reflective of an important and often overlooked fear of our forebearers. As the libertarians and their colonial counterparts constantly suggested, government was intended to maximize human aspiration by the protections it provided for broadly shaped personal liberties and it was to minimize human regulation only to those actions which could be proven to be injurious to others.[32] Thus, legislative assemblies, acting as mechanisms to legitimize popular whim or bias, were to be cautiously monitored by the judiciary for the purpose of protecting the personal liberties of each citizen.[33]

The commitment and success of the federal judiciary in fulfilling this special function has been erratic at best.[34] One of the most frequent arguments posited in defense of judicial deference to legislative enactments which limit personal autonomy is that the collective people may be injured by the proscribed behavior. This public welfare argument does have some constitutional justification.

As has been suggested,[35] the colonial and subsequent constitutional test for legitimate regulation of individual conduct is grounded upon the theoretical concern that the harm produced by such behavior may be injurious to society as a whole. Because this argument provides the jurisprudential basis for placing criminal sanctions on private,

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30. Cooley, *Editorial Comment*, in J. STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 689 (M. Bigelow 5th ed. 1891).

31. *See generally* Rivera, *supra* note 4, at 949–51.

32. *See supra* text accompanying note 17.

33. THE FEDERALIST NO. 51 (J. Madison). *See generally* THE FEDERALIST NO. 78, at 470 (A. Hamilton) (R. Fairfield ed. 1961).

34. For the position that there is a need for increased judicial restraint rather than continued judicial monitoring, see L. LUSKY, BY WHAT RIGHT? (1975); *see also* R. BERGER, GOVERNMENT BY JUDICIARY (1977); J. ELY, DEMOCRACY AND DISTRUST (1980).

35. *See supra* text accompanying note 17.

adult, consensual, homosexual behavior, it is imperative that this investigation identify and then analyze its various theoretical components before it turns to the case law that has addressed generally individual autonomy and more specifically, homosexual behavior.

A. Protection of the Public Welfare

The seminal jurisprudential question concerning the correct relationship between a citizen and the state has been the catalyst for literally volumes of scholarly inquiries and the basis for political strife sometimes culminating in revolution.[36] Out of this constant philosophical and political quest for the legitimate role of the state, important claims have been posited by Anglo-American jurisprudents that have direct relevance to the central focus of this investigation—whether the state through the auspices of its legislative assemblies may criminalize private, consensual, sexual behavior.

What is known as the "police power" has been defined as a reserved power of state government guaranteed by the tenth amendment of the Constitution. Its mandate has been described as the individual state's power to protect the health, safety, welfare, and morals of its citizenry.[37] One of the most influential jurisprudential proponents of such a broad interpretation of state sovereignty was Lord Patrick Devlin.[38]

Following in the path of his nineteenth century counterpart, James Fitzjames Stephen,[39] Devlin has taken the position that the criminal law must protect the moral standards of the citizenry. While Devlin's arguments for an unqualified use of the criminal law based upon the police power to protect the community's "recognized morality"[40] were presented in an unsuccessful attempt to rebut the findings of the Wolfenden Committee on Homosexual Offenses and Prostitution in England almost twenty-five years ago, their significance to American judges and state legislators still remains powerful.[41] He argued that "[t]here are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality."[42]

While there are serious flaws within Devlin's claim as it relates to

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36. *See generally* T. HOBBES, THE LEVIATHAN (1651) (E. Rhys ed.); J. LOCKE, *supra* note 10; K. MARX & F. ENGELS, THE COMMUNIST MANIFESTO (P. Sweezy & L. Huberman ed. 1964).

37. Lochner v. New York, 198 U.S. 45 (1905); Mugler v. Kansas, 123 U.S. 623 (1887); Munn v. Illinois, 94 U.S. 113 (1876).

38. P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

39. *See* J. STEPHEN, LIBERTY, EQUALITY AND FRATERNITY (R. White ed. 1967).

40. P. DEVLIN, *supra* note 38, at 11.

41. *See infra* notes 200–37 and accompanying text.

42. P. DEVLIN, *supra* note 38, at 14.

American constitutional government, the importance attached to the protection of morality through the auspices of the criminal law can be documented throughout our legislative and judicial traditions.[43] Of course, what is so remarkable is not that moral principles are inculcated into our codes for the regulation of individual conduct, but rather that so little thoughtful analysis has accompanied their legislative creation or judicial application.[44] More specifically, what is needed is a more articulate understanding of what constitutes our "recognized morality." Does it conform with the original principles of constitutional government? Has the specific moral issue been set in context with other moral principles? What measurement ought be used to determine what behaviors fall within the purview of our criminal law? Because Devlin directly or indirectly attempted to address these questions, further elucidation of his positions will assist an analysis of *Doe* and its progeny.

While Devlin was not operating from the exact epistemological system that formed the American constitutional process, his jurisprudential point of departure appears to be quite similar. Remembering that individual liberty was thought to be "the parent of all virtues"[45] and a cornerstone of our system of rules, Devlin's recognition that, "[t]here must be toleration of the maximum individual freedom that is consistent with the integrity of society,"[46] would suggest that there is a shared, fundamental, aspirational first principle. He appears to agree that personal autonomy and the choices inherently attached thereto ought be tolerated, particularly when the choices concern "questions of morals."[47] Indeed, at one point in his explication of how this principle ought be instituted, he concurred with what has been previously described as the *harm factor* litmus test for limiting individual behavior. He wrote that "before a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society."[48]

Yet, Devlin's willingness to protect, or in his words "tolerate," a citizen's personal choice in the realm of morals is grounded upon a significantly different premise than that which this investigation has

43. *See supra* note 4; *see also* Reynolds v. United States, 98 U.S. 145 (1878).

44. At this stage it is important to indicate that this writer does not accept the jurisprudential basis upon which some scholars have suggested that there exists a separation between law and morals. For an interesting discussion concerning this point see L. FULLER, THE MORALITY OF LAW (1964); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Nicholson, *The Internal Morality of Law: Fuller and His Critics*, 84 ETHICS 1 (1974).

45. *See* Jacobsen, *supra* note 10, at 131.

46. P. DEVLIN, *supra* note 38, at 16.

47. *Id.*

48. *Id.* at 17.

suggested provides the basis for liberty in the American constitutional system. It would appear that the key variable, for Devlin, which tips the scales between individual freedom and the protection of the public welfare, is based upon the depth of societal disdain for the so-called immoral behavior.[49] The mechanism for measuring the harm of particular individual conduct upon the collective, then, is the depth of the society's "disgust" for the behavior.[50] While he does urge that "dislike" of a particular practice by the majority of the citizenry is not sufficient to limit the behavior through the arm of the criminal law, he suggests that if there is "a real feeling of reprobation" the behavior ought be criminally sanctioned.[51] As to the specific application of this standard to homosexual behavior, he confidently concluded that:

> We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offense. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.[52]

Setting aside for the moment his conclusion governing homosexual conduct, the epistemological justification for societal intrusion into what he has described as individual freedom should be examined.

Lord Devlin, and some American jurists and legislators who expressly or impliedly espouse similar positions,[53] ground their argument for limiting individual liberty upon the state's right or obligation to protect its "recognized morality."[54] The criteria that are to be used to determine what constitutes this collective moral system, according to Devlin, include: (a) whether the depth of societal disgust for the particular behavior is great; (b) whether there exists "a real feeling of reprobation;"[55] (c) whether the behavior is believed to be "abominable;"[56] and finally (d) whether the societal feeling concerning the particular individual conduct is "genuine."[57]

These indicia simply do not provide any real guidance to the legislator or the judge who must seek to balance individual and societal rights and obligations. They certainly can not assist in determining whether the bases for these feelings are produced by rational or irra-

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *See infra* notes 238–70 and accompanying text.
54. *See supra* text accompanying note 40.
55. *See* P. DEVLIN, *supra* note 38, at 17.
56. *Id.*
57. *Id.*

tional beliefs. More importantly, they do not assist in determining whether these subjective attitudes can be compatible with original principles of constitutional government and with the necessity for evidence of empirically based harm directly related to the particular form of individual conduct that is subject to criminal penalty.

But it is to be expected that those who begin with the premise that "there can be no theoretical limits to the power of the State . . . to legislate against immorality,"[58] would produce a measurement device for triggering the state's police power that equates potentially biased majoritarian belief systems with legitimate governmental functioning. Following this model of government, criminal punishment is based upon the majority's "disgust" toward the particular behavior and the perceived injury that it believes is created by the conduct.

If this theory of the role of the police power is accepted, then one of the most important principles of our constitutional system—the maximizing of personal liberty—may be waived for the nonempirically based protection of the public welfare and morals. Ignorance, bias, or intolerance can then provide the stimulus for majoritarian opinion that may activate the police power.

As was suggested earlier, the draftsmen of our constitutional process believed that government must bear the burden of proving that our personal autonomy ought to be limited and our conduct punished.[59] The injury to another or to the collective must be real and not imagined to justify governmental intrusion into the "domestic" concerns of the individual citizen.[60] However, following the methodology which Devlin proposes for determining whether homosexual behavior ought be punished by criminal law via the police power—that is, whether it is "regarded as a vice so abominable that its mere presence is an offense,"[61] it would seem that a perceived disgust for a particular behavior, rather than an empirically proven societal or individual injury, is enough to satisfy any requirement of harm to the community. While this understanding of the plenary power of government to control so-called injurious immoral conduct is fraught with serious jurisprudential and constitutional misrepresentation,[62] some of our state legislative assemblies and judical officers from both state and federal benches appear to have succumbed to majoritarian political pressure or have concurred implicitly with this view of government by affirming challenged state statutes that criminalize private, adult, consensual, ho-

58. *Id.* at 14.
59. *See supra* text accompanying notes 14–17.
60. *Id.*
61. *See supra* text accompanying note 52.
62. *See infra* text accompanying notes 238–70.

mosexual behavior.

III. EMERGING PRINCIPLES OF PERSONAL AUTONOMY IN SEXUAL RELATIONS: THE PRE-DOE CASES

As with most of our legal doctrines, the source of judicial precedent concerning homosexuality can be traced to the English common law.[63] Homosexuality was thought to be so horrible a crime that it ought not to be named among Christians—"*peccatum illud horrible, inter christianos non nominandum . . . .*"[64] This quasi-ecclesiastical attitude which was derived from what some contemporary theologians believe to be an incorrect interpretation of *Leviticus*,[65] has had an impact on American judicial decision making. Just as Lord Devlin, consciously or inadvertantly, chose the word "abominable" to describe immoral conduct which he believed should be proscribed by the criminal law, our own judiciary has justified its determinations based upon this language and the traditionally accepted Judeo-Christian interpretations of the Old Testament.

As early as 1897, in *Honselman v. People*,[66] counsel for the defendant argued that the indictment against his client, who was charged with the "abominable and detestable crime against nature" was unconstitutionally vague. The court disagreed, holding that:

> The existence of such an offense is a disgrace to human nature. The legislation has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it.[67]

Other state court decisions have agreed also that the "horrible" activities surrounding homosexual behavior need not be expressed in a criminal indictment.[68] The justification for this departure from consti-

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63. However, the English common law was not totally absorbed by colonial jurists. *See generally* B. BAILYN, *supra* note 11, at 69.

64. W. BLACKSTONE, COMMENTARIES *215–16 (W.C. Jones ed. 1916).

> I will not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature. It well be more eligible to imitate, in this respect, the delicacy of our English law, which treats it in its very indictments as crime not fit to be named: 'pecatum illud horrible, inter Christiano non nominadum . . .' This the voice of nature and of reason, and the express law of God, determined to be capital. Of which we have a signal instance, long before the Jewish dispensation.

Id.

65. *Leviticus* 18:22 ("Thou shalt not lie with man, as with women; it *is* an abomination."); *accord Leviticus* 20:13. *See also Deuteronomy* 23:17. For a discussion of the misinterpretation of this section see A NEW CATECHISM 384 (K. Smyth trans. 2d ed. 1967).

66. 168 Ill. 172, 48 N.E. 304 (1897).

67. *Id.* at 175, 48 N.E. at 305.

68. *See* State v. Whitmarsh, 26 S.D. 426, 128 N.W. 580 (1910); Herring v. State, 119 Ga.

tutionally guaranteed notice requirements within our criminal law indictment or information process is not clear. But one can surmise that these courts found support for their rationales from debatable common law and ecclesiastical interpretation.[69] Even more disconcerting than the ultimate findings in these cases is the lack of any judicial analysis regarding their conclusions.[70] The dearth of explication on the procedural issue of appropriate notice, of course, is only symptomatic of judicial reluctance to address the more basic issue of the state's power to limit individual liberty absent empirically documented personal or collective injury. While some have suggested that this is a purely jurisprudential question and that Devlin's positions are not relevant in a discussion of American constitutional government,[71] such an interpretation fails to understand the underlying interrelationship of general jurisprudential principles such as those espoused by Devlin and the specific constitutional mechanisms which have been developed to address these concerns.

The technique which has evolved in constitutional law that has attempted to balance the interests of personal liberty with the collective's right to be free from injurious behavior is the compelling state interest test.[72] The application of this standard entails a recognition of the general powers of the state to protect the public welfare and yet requires a strong demonstration by the state that a citizen's liberty ought to be constrained. Because the evolution of this test is riddled with judicial presumptions of just what constitutes the public welfare or whether the behavior is such that it should be raised to the level of a constitutional liberty, it is obvious that considerations such as those offered by Devlin can sometimes even unconsciously provide the unexpressed basis for judicial determinations which, with no more than a passing comment about personal autonomy, conclude that private, adult, consensual, homosexual behavior does not require judicial protection.

The Supreme Court has addressed the general application of the compelling state interest test on various occasions.[73] Yet, in *Doe v.*

709, 46 S.E. 876 (1904); Commonwealth v. Dill, 160 Mass. 536, 36 N.E. 472 (1894).

69. Indeed, in *Whitmarsh*, 26 S.D. at ___, 128 N.W. at 581, the court directly quoted *Blackstone's Commentaries* concerning homosexuality.

70. It should be noted that more recent decisions by some state and federal courts have either addressed this issue in greater depth or are preparing to do so. *See, e.g.*, Polk v. Ellington, 309 F. Supp. 1349 (W.D. Tenn. 1970); Harris v. State, 457 P.2d 638 (Alaska 1969); Miller v. State, 256 Ind. 296, 268 N.E.2d 299 (1971); Dixon v. State, 256 Ind. 266, 268 N.E.2d 84 (1971); Barnes v. State, 255 Ind. 674, 266 N.E.2d 617 (1971); State v. Sharpe, 1 Ohio App. 2d 425, 205 N.E.2d 113 (1965).

71. W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 105 (1973).

72. L. LUSKY, *supra* note 34, at 249–53.

73. *Id. See also* Shapiro v. Thompson, 394 U.S. 618 (1969); Korematsu v. United States,

Commonwealth's Attorney[74] this standard was not applied and has been mentioned only in passing in other earlier cases.[75] Indeed, prior to *Doe*, the Court frequently denied certiorari to lower court cases which involved the rights of homosexuals.[76] Nevertheless, it is essential to this investigation that the various components of the compelling state interest test be extracted from the pre-*Doe* Supreme Court decisions and pieced together with selected lower court cases that have attempted to grapple with the more specific issue of private, adult, consensual, homosexual behavior. In so doing, it will become apparent that considerations such as those articulated by Devlin, and expressed by turn-of-the-twentieth-century, lower court jurists, played a crucial role in obfuscating the central question in the regulation of individual behavior in America: Has the government borne its burden of demonstrating that the specific behavior is injurious to another citizen or to the society as a whole?

A. Developing a Constitutional Analysis

The application of the compelling state interest test requires the reviewing court to determine whether the state's regulation of a particular behavior possesses a reasonable relationship to a legitimate governmental objective. It must also be shown that the proscription of the targeted conduct is so essential for societal protection that a fundamental personal liberty must be subordinated for the protection of the public welfare.[77] Before the reviewing court can address the aforementioned considerations it must decide first if the behavior is a liberty which was intended to be protected by the Bill of Rights, if so, then these additional elements must be satisfied. The primary query, then, for any court which is asked to determine whether a legislative enactment that proscribes particular forms of personal behavior is constitutionally sound is: Does this statute intercede into the sanctity of personal choices which falls objectively within the purview of the intended meaning of the Bill of Rights?

The Supreme Court has utilized numerous tests by which it has determined whether certain behaviors can be described as fundamental and, therefore, worthy of close judicial monitoring via the compelling

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323 U.S. 214 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935).

74. *See Doe*, 403 F. Supp. at 1202.

75. Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., concurring); Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).

76. *See* Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969); Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 951 (1964).

77. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Kent v. Dulles, 357 U.S. 116, 128–29 (1958).

state interest test.[78] In *Snyder v. Massachusetts*,[79] the Court urged that the search for the meaning of our fundamental liberties must be directed toward the "traditions and [collective] conscience of our people."[80] And, in *Hebert v. Louisiana*,[81] the Court suggested that the correct method by which to determine whether a particular conduct ought to receive constitutional protection was to decide if the alleged 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."[82] Another standard cited in some of the Court's more recent decisions was established in *Palko v. Connecticut*.[83] In that case, the Court held that constitutional protections which are "implicit in the concept of ordered liberty" should be afforded to American citizens.[84] All of these standards, in some fashion or another, have been the mechanisms applied by the Court in cases concerning personal sexual autonomy.

The Court in *Poe v. Ullman*[85] circumvented a full-blown discussion by a majority of the justices as to the substantive constitutional issue of whether states could criminally proscribe the use of contraceptive devices and the giving of medical advice on their use by deciding that the case was not justiciable.[86] Mr. Justice Douglas and Mr. Justice Harlan, however, presented dissenting opinions which have provided the jurisprudential foundations for an expanded meaning of the words "liberty" and "fundamental." Justice Douglas believed that the word "liberty" reflected all the specifically enumerated rights in the first eight amendments of the Bill of Rights,[87] and also included other individual protections from governmental interference which evolved "[f]rom the totality of the constitutional scheme under which we live."[88] He urged that because the fourteenth amendment's due process clause incorporated all of these liberties, state governments should be responsible for their protection.[89] But Justice Douglas' most insightful

78. The types of activities which have been found to be entitled to fall within this description have ranged from the right to educate one's child as one chooses, Pierce v. Society of Sisters, 268 U.S. 510 (1925), to the right to study German in private school, Meyer v. Nebraska, 262 U.S. 390 (1923).

79. 291 U.S. 97 (1934).

80. *Id.* at 105.

81. 272 U.S. 312 (1926).

82. *Id.* at 316.

83. 302 U.S. 319 (1937).

84. *See id.* at 325.

85. 367 U.S. 497 (1961).

86. *Id.* at 508–09.

87. U.S. CONST. amends. I–VIII.

88. *Poe*, 367 U.S. at 521 (Douglas, J., dissenting).

89. *See id.* at 516–17.

statement concerning the enterprise of determining what conduct could be described as being "implicit in the concept of ordered liberty" drew upon the principles which this article has suggested formed our governmental process.[90] He wrote:

> The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility. Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.[91]

Like Madison's vision of government which produced our constitutional system with its Bill of Rights, Douglas understood the subtle yet essential distinction between constitutional majoritarian government and legislative tyranny. That state involvement in personal decisions concerning the use of contraceptive devices breached the most basic notion of what was implicit in the concept of ordered liberty was not only irrefutable for Douglas, but it was dangerously close to totalitarian government.[92] While ultimately concluding in *Poe* that the privacy of the marital relationship was the principle which deserved constitutional protection, his eloquent analysis reached far beyond the specific facts of that case and into the core of governmental interference with private sexual relations.[93]

Mr. Justice Harlan, while also finding constitutional justification for striking down the Connecticut statute, believed that the essential factor which made the law so iniquitous was "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy."[94] It was this invasion of the "private realm of family life"[95] upon which Harlan built his rationale. Unlike Douglas who reached beyond considerations of marriage to determine the legitimate functioning of the state, Harlan carved out one zone of privacy which deserves to be entitled a "liberty." But he quickly rejected any notion that this "liberty" described as marital privacy could be extended to other areas of sexual relations.[96] Implicit in the concept of ordered lib-

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90. *See supra* notes 10–21 and accompanying text.
91. *Poe*, 367 U.S. at 518 (Douglas, J., dissenting).
92. *See id.* at 522.
93. *See id.* at 521.
94. *Id.* at 553 (Harlan, J., dissenting).
95. *Id.* at 552 (Harlan, J., dissenting).
96. *Id.* (Harlan, J., dissenting).

erty, for Harlan, were those sexual mores which had been traditionally accepted by the state. Since the institution of marriage had always been given special status throughout our history, he concluded that intrusion by the use of this statute into the sanctity of the relationship between husband and wife would destroy the foundations of familial relations.[97]

Harlan quickly distinguished his interpretation of this privacy right from other forms of sexual behavior which he believed the state could constitutionally prohibit. He wrote:

> The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.[98]

Therefore, with a majority of the Court unwilling to reach any of the substantive constitutional arguments presented by either Douglas or Harlan, the basic question of whether personal autonomy in the realm of private, consensual, sexual relations ought to receive constitutional protection was left unanswered. One of the dissenters even qualified the application of the right to privacy to sexual decisions framed only within the contours of his vision of marriage and the American family.[99] But five years later some of the same issues were brought before the Court once again.

In *Griswold v. Connecticut*,[100] with two justices dissenting and three offering concurring opinions, the Court held that a state statute which forbade the use of contraceptives or the dissemination of information concerning their usage was in violation of the right of marital privacy.[101] Justice Douglas, writing for the majority, quickly disavowed any intention on the part of the Court to rely upon earlier decisions which had grounded their rationale upon the due process clause of the fourteenth amendment.[102] Attempting to avoid claims that the Court was resurrecting the controversial substantive due process technique in an effort to function as a "super-legislature,"[103] Douglas found consti-

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97. *See id.* at 553.
98. *Id.* at 552–53 (Harlan, J., dissenting).
99. *Id.* at 546 (Harlan, J., dissenting).
100. 381 U.S. 479 (1965).
101. *Id.* at 481–86.
102. *See id.* at 482; *see also* Lochner v. New York, 198 U.S. 45 (1905). Unfortunately this debate continues even today. *See supra* note 34.
103. *Griswold*, 381 U.S. at 482.

tutional support for overturning the Connecticut law in the first amendment's right to association and the third, fourth, fifth, and ninth amendments' "zones of privacy."[104] Citing *Boyd v. United States*[105] and its interpretation of the fourth and fifth amendments, Douglas stressed that the right to privacy was a "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' "[106] He concluded that the statute was unconstitutional not only because it clearly impinged upon considerations of personal privacy, but also because its application permitted techniques of enforcement which "sweep unnecessarily broadly and thereby invade the area of protected freedoms."[107]

Justice Goldberg, along with Chief Justice Warren and Justice Brennan, concurred with Douglas' determination that the Connecticut statute was unconstitutional. But, they believed that the ninth amendment ought be the constitutional basis for the protection of the right of privacy.[108] After a historical analysis of the Framers' concerns on how individual liberty could best be protected within our constitutional structure,[109] Goldberg agreed that constitutional protection could be afforded to Americans via a general right of privacy. He went further and suggested that simply because a particular right is not specifically mentioned in the Bill of Rights, the Court is not prohibited from reaching into what Douglas in *Poe* described as, "the totality of the constitutional scheme under which we live."[110] Applying the tests already mentioned in this analysis,[111] Justice Goldberg addressed the question of whether private decision making between two consenting adults concerning sexual behavior ought to be deemed fundamental.[112] If so, did the Connecticut statute have not only a reasonable relationship to some legitimate governmental objective but also could the encroachment upon this fundamental liberty be defended because there existed a compelling state interest that necessitates such a restriction?[113] The concurring justices believed that there was such a fundamental personal liberty and that Connecticut had not demonstrated any "subordinating

104. *Id.* at 484.

105. 116 U.S. 616, 630 (1886).

106. *Griswold*, 381 U.S. at 484.

107. *Id.* at 485 (quoting NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964).

108. *Id.* at 492–94 (Goldberg, J., concurring).

109. *Id.* at 489–91. For a different view of the ninth amendment see Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

110. *Griswold*, 381 U.S. at 494 (Douglas, J., dissenting). *See also Poe*, 367 U.S. at 517.

111. *See supra* notes 72–83 and accompanying text.

112. *Griswold*, 381 U.S. at 499.

113. *Id.* at 497–98.

[state] interest which is compelling."[114] But, similar to Justice Harlan's concerns evinced in *Poe v. Ullman*,[115] Goldberg ended his analysis by specifically distinguishing the legitimate personal liberty which he believed exists for marital privacy in sexual decision making from what he described as a "State's proper regulation of sexual promiscuity or misconduct."[116] So as to leave no doubt concerning the application of his concurring rationale, he quoted Harlan's dissent in *Poe* as precedential justification that behaviors such as adultery and homosexuality were "sexual intimacies" which fell outside the purview of ninth amendment protection.[117]

While the *Griswold* decision repudiated a long established judicial reluctance to address matters of sexual privacy, both the majority and concurring opinions cautiously implanted the right to personal autonomy in sexual behavior within the confines of the traditional marriage relationship. The justifications or lack thereof for such incremental changes in constitutional decision making provided the grist for numerous jurisprudential discussions.[118] By 1972, however, the theoretical discussions concerning the appropriate limitations of state involvement in private, sexual autonomy culminated into a reviewable case and controversy which collaterally involved the rights of unmarried citizens to obtain contraceptives.

In *Eisenstadt v. Baird*,[119] the Court through Justice Brennan declared unconstitutional a Massachusetts statute which prohibited selling or giving away any contraceptive drug or device to unmarried persons. The Court chose not to apply the compelling state interest standard as they had in *Griswold*.[120] Instead, the majority believed that the state statute failed what Justice Brennan described as "even the more lenient equal protection standard."[121] Therefore, while the *Eisenstadt* decision did not utilize the compelling state interest standard, it did analyze the scope of the right to privacy in personal sexual autonomy beyond the confines of the marriage relationship. Focusing solely upon the equal protection clause of the fourteenth amendment, Bren-

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114. *Id.* at 497.

115. 367 U.S. 497.

116. 381 U.S. at 498–99.

117. *Id.* at 499.

118. *See* Beaney, *The Constitutional Right to Privacy in the Supreme Court*, SUP. CT. REV. 212 (1962); Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 216 (1960); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966).

119. 405 U.S. 438 (1972).

120. *Id.* at 447 n.7.

121. *Id.*

nan restricted his constitutional analysis to the issue of whether the state statute was based upon an objective rationale which justified treating married and unmarried citizens differently.[122] He found no such justification. While he readily admitted that a state has the constitutional power to distinguish between different groups of its citizens, it may do so only if the public purpose for the statute can be demonstrated to be reasonable.[123]

From a review of Massachusetts Supreme Court decisions which interpreted the statute's general intent, Justice Brennan found that the purpose for the legislation was "to encourage premarital sexual intercourse."[124] In theory, Brennan noted that such an objective may be legitimate.[125] But he believed that upon close examination it was not reasonable to think that the prevention of premarital or even extramarital sexual relations was the purpose of this legislation. He found that not only did this statute in effect "prescribe pregnancy and the birth of an unwanted child as punishment for fornication,"[126] but also that the availability of such devices to unmarried as well as married persons was admitted to be widespread.[127] By making contraceptives available to married persons without sanctioning their potential "illicit sexual relations with unmarried persons"[128] this statute established an irrational and unequal classification between citizens.[129] Finally, Justice Brennan concluded that the arbitrary nature of the statute could be demonstrated clearly by comparing the criminal sanctions placed upon this "crime" versus fornication. The latter was a misdemeanor with a thirty dollar fine or three month jail term attached while this statute was a felony, punishable by five years in prison.[130]

While the *Eisenstadt* majority did not address the specific question of whether a state, absent rational justifications based upon the protection of the public health, could prohibit contraception upon considerations of public morality, important dicta was offered that has direct relevancy to the analogous issues inherent in private, adult, consensual, homosexual relations. Brennan wrote:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity

122. *Id.*
123. *Id.*
124. *Id.* at 448.
125. *Id.*
126. *See id.*
127. *Id.* at 448–49 (quoting *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring)).
128. *Id.* at 449.
129. *Id.* at 454.
130. *Id.* at 449.

> 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.[131]

Therefore, while the majority placed its stamp of disapproval upon the Massachusetts statute based upon violations of equal protection, it nevertheless indicated that the more compelling issue of privacy had not been forgotten. In fact, it appeared as if the illogical rigidity of the *Griswold* rationale—finding a narrow privacy right for married Americans yet leaving unmarried citizens without constitutional protection—was finally discredited. Just as importantly, Brennan's recognition of the historical significance attached to the necessity of judicial monitoring of arbitrary governmental action demonstrated a willingness by the Court to add an additional constitutional mechanism, the equal protection clause, to its arsenal for the protection of personal autonomy. Reminiscent of Thomas Cooley's concern cited earlier in this article,[132] the *Eisenstadt* Court noted the concerns which Mr. Justice Jackson had articulated in an earlier Supreme Court decision:

> [N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.[133]

Armed with a broader vision of the right of personal privacy and an emerging respect for the potential application of the equal protection clause to individual decision making in the realm of sexual relations, the Court one year after *Eisenstadt* decided to address an even more socially volatile issue—abortion.

In *Roe v. Wade*[134] and its companion case *Doe v. Bolton*,[135] the Court was once again asked to determine the constitutional parameters of state regulation of personal autonomy in sexual relations. After years of state legislative prohibition of abortions and much judicial confusion about whether such cases were justiciable,[136] a majority of the Supreme Court held Texas and Georgia statutes unconstitutional, find-

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131. *Id.* at 453.

132. *See supra* note 30 and accompanying text.

133. 405 U.S. at 454 (quoting Railway Express Agency v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

134. 410 U.S. 113 (1973).

135. 410 U.S. 179 (1973).

136. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978); *see also* Wilkinson & White, *Constitutional Protection for Personal Life-Styles*, 62 CORNELL L. REV. 563, 593 (1977).

ing them to be in violation of the fourteenth amendment's concept of personal liberty.[137] Mr. Justice Blackmun writing for the majority determined that the right to personal privacy was "fundamental" and "implicit in the context of ordered liberty."[138] As a result, he applied the compelling state interest standards to the statutes at issue. He reasoned that there were two potentially legitimate purposes for state statutes which proscribed abortions. The first was the state's theoretical obligation to protect women from dangerous medical procedures.[139] While such a purpose might have justified a subordination of this personal right when abortions created a real threat of risk of life to the woman at a time when any surgery was dangerous, Blackmun dismissed such a reason as compelling when the abortion is performed in early pregnancy.[140] The second reason for state limitation of abortions which could arguably be presented, Blackmun wrote, was the state's obligation to protect prenatal life.[141] Yet, although he recognized the state's corresponding obligation to preserve and protect the potentiality of human life, he believed that the most important issue was the determination of when this obligation becomes primary as against the right of the woman to be free from unwarranted governmental intervention.[142] While the Court's response to this question continues to stir academic and political controversy,[143] Blackmun's rationale was well within the logical framework of judicial precedent established in *Griswold* and *Eisenstadt* and reflective of traditional constitutional interpretations of when, if at all, potential human life receives constitutional protection.

Rejecting any argument that the right to privacy is absolute,[144] Blackmun suggested that, "[a]t some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of factors that govern the abortion decision."[145] He reasoned that the personal right of privacy of the woman diminishes in constitutional significance proportionate to the increasing medical likelihood that the fetus will be capable of viability.[146] Thus, he concluded that while the right to privacy encompasses the right of a woman, in consultation with her physician, to have an abortion within the first trimester of pregnancy,

137. *Roe*, 410 U.S. at 153.
138. *Id.* at 152.
139. *Id.* at 148.
140. *Id.* at 129–52.
141. *Id.* at 150.
142. *Id.*
143. *See supra* note 34; *see also* A. Cox, *supra* note 25.
144. *Roe*, 410 U.S. at 153–54.
145. *Id.* at 154.
146. *Id.* at 155.

the compelling state interest to protect potential human life could subordinate this right even to the point of constitutionally proscribing the performance of an abortion at the later stages of pregnancy.[147]

But it was Justice Douglas who understood the significance of this decision to the broader issues of governmental intrusion into the private decisions of individual Americans. Addressing the interrelated meanings of the ninth and fourteenth amendments, he enumerated a "catalogue" of the rights which he believed were intended to fall within the gambit of these provisions of the Bill of Rights. The word "liberty" within the fourteenth amendment and "the rights retained by the people" inferred in the ninth amendment meant to Douglas "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality . . . freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children . . . the freedom to care for one's health and person."[148] The evolution of the right of personal autonomy appeared to have reached its most sophisticated stage of constitutional development. It was not absolute. The state could subordinate personal privacy if it could demonstrate a legitimate governmental objective and that harm was in fact being done to the collective or to another. But the right of privacy was not some limited protection applicable only to married person. It inured to all Americans involved in decisions relating to private, consensual, sexual affairs. Yet the applicability of the right to personal autonomy in sexual relations to private, adult, consensual, homosexual behavior still remained unclear.

B. The Constitutional Analysis of the Lower Courts

During the *Griswold* to *Roe* period numerous lower court cases attempted to determine whether the Supreme Court's recognition of personal privacy also applied to homosexual conduct. For example, in a series of decisions involving government employment and eligibility requirements for immigration and naturalization, some lower courts rejected government contentions that homosexual behavior per se was a sufficient justification for job dismissal or deportation. In *Scott v. Macy*,[149] the court held that while the government could legitimately require more information concerning a person's background when he or she was seeking employment with the federal government, applicants "do not, wholly apart from fifth amendment concerns, forfeit all rights

147. *Id.* at 165.
148. *Bolton*, 410 U.S. at 211–12.
149. 402 F.2d 644 (D.C. Cir. 1968).

of privacy."[150] One year later in *Norton v. Macy*,[151] the same court held that there must be a reasonable nexus between the so-called immoral behavior and the performance of the job in question.[152] Once again calling upon considerations of the general constitutional right to be let alone, Judge Bazelon wrote for the majority, "the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."[153] By 1971 there was some indication that considerations of personal privacy were beginning to be recognized in immigration and naturalization law. The *In re Labady*[154] decision is an excellent example. In this case an applicant for naturalization admitted participation in private, consensual, homosexual acts.[155] Rejecting government arguments that such acts were violative of the "good moral character" requirement for naturalization, the court held that:

> [T]he most important factor to be considered is whether the challenged conduct is public or private in nature. If it is public or if it involves a large number of other persons, it may pose a threat to the community. If, on the other hand, it is entirely private, the likelihood of harm to others is minimal and any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights. . . . In short, private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality . . . .[156]

The *In re Labady* holding was unquestionably a marked expansion of the *Griswold* finding. Although this case was limited to the narrow arena of immigration and naturalization law, the court's recognition of personal decisions which fall outside the purview of government regulation and its laudable effort to address the empirical question of whether collective or individual harm was produced by this conduct set the stage for additional analysis in a criminal case decided two years later.[157]

Basing its rationale upon the Supreme Court's decision in *Eisen-*

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150. *Id.* at 648.
151. 417 F.2d 1161 (D.C. Cir. 1969).
152. *Id.* at 1167.
153. *Id.* at 1165.
154. 326 F. Supp. 924 (S.D.N.Y. 1971).
155. *Id.* at 925–26.
156. *Id.* at 927.
157. The problem of applying constitutional standards concerning this evolving right to dramatically differing fact patterns can be seen lucidly in this federal judicial decision-making era. Nevertheless, the analogous nature of the inherently intimate forms of personal conduct even here are jurisprudentially defensible.

stadt,[158] a federal district court in *Lovisi v. Slayton*[159] held that the right of privacy extended to private acts of sodomy between married or unmarried adults.[160] Although the court refused to insulate the defendants from criminal responsibility, it found that they had waived their privacy rights by taking photographs of their sexual activities, and indicated that had the issue before them been untainted with such a waiver and had instead been focused upon private sexual activity between consenting adults, the right of sexual privacy would protect the participants from state intrusion.[161] The language of the court has particular importance to homosexual behavior. Judge Merhige wrote that, "[i]t is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection."[162] By 1975 the impact of *Griswold, Eisenstadt,* and *Roe* could be seen in lower state trial courts.

In *People v. Rice*,[163] the defendants, two single individuals who were charged with consensual sodomy, challenged the New York criminal statute as unconstitutional in violation of their right to privacy and the equal protection clause.[164] The trial court agreed.[165] Citing both *Griswold* and *Eisenstadt*, the court held that the right of privacy encompasses "the basic right of an individual to privacy."[166] In an attempt to determine if there was a legitimate governmental purpose which could support such an invasion of personal autonomy in sexual relations, the court concluded that no such "overriding or compelling state interest" was present.[167] Responding to the state's argument that the statute in question was designed "[t]o proscribe conduct which "unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests,"[168] Judge LaCarrubba wrote that "[w]e cannot see how the activities of two consenting adults threatens or causes any, nonetheless substantial, harm to either individual or public

158. 405 U.S. 438.

159. 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

160. *Id.* at 624–25.

161. *Id.* at 625–27.

162. *Id.* at 625.

163. 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Dist. Ct. 1975), *rev'd*, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. Term 1976), *aff'd*, 41 N.Y.2d 1018, 363 N.E.2d 1371, 395 N.Y.S.2d 626 (1977).

164. *Id.* at 512, 363 N.Y.S.2d at 486.

165. *Id.* at 517, 363 N.Y.S.2d at 490.

166. *Id.* at 515, 363 N.Y.S.2d at 489.

167. *Id.* at 515, 363 N.Y.S.2d at 488.

168. *Id.* at 514, 363 N.Y.S.2d at 488 (quoting N.Y. Penal Law § 1.105(1) (McKinney 1975)).

interests. Nor can we see any threat to public safety."[169]

While the *Rice* decision was an articulate and logical application of the right to privacy as established by *Griswold*, *Eisenstadt*, and *Roe*, in the very same year a three-judge federal district court in Virginia came to a completely different conclusion.[170] Indeed, the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*[171] has had an important impact on the status of the right to be let alone for all homosexual Americans.

IV. DOE AND ITS PROGENY: CONSTITUTIONAL COMMITMENT OR CONTRADICTION?

The Virginia Federal District Court was asked to provide injunctive relief for homosexuals charged with violating the state's sodomy statute and to declare the statute unconstitutional as it was applied to private, adult, consensual, homosexual relations.[172] Two of the three judges denied the request for injunctive relief and held the Virginia statute constitutional. Judge Bryan, with whom Judge Lewis concurred, believed that the statute did not violate a constitutional right to privacy.[173] Citing *Griswold*—the Supreme Court's most recent decision as to "its views on the question here,"[174] the two judges argued that the right of privacy was operative only within the context of marriage, home, and family.[175] The judges found irrefutable Justice Goldberg's concurring opinion in *Griswold* which relied upon Justice Harlan's dicta in *Poe v. Ullman* that presumed "[a]dultery, homosexuality and the like are sexual intimacies which the State forbids."[176] Concluding then that homosexuality could be proscribed through the criminal law, they posited[177] that even though the behavior occurred in private, if the state determined that punishment was "appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not

169. *Id.* at 514–15, 363 N.Y.S.2d at 488.

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

171. *Id.*

172. *Id.* at 1200. At the time *Doe* was decided, the Virginia sodomy statute provided:

> If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

Id. (quoting Va. Code § 18.1-212 (1950)).

173. *Id.* at 1200–02.

174. *Id.* at 1200.

175. *Id.* at 1201.

176. *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

177. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

free to do so." In short, it is an inquiry addressable only to the State's Legislature."[178]

Having so concluded, the judges confidently held that the state's police power provided constitutional justification for this statute and that it bore a rational relationship to a legitimate state interest—the suppression of crime and the prevention of moral delinquency.[179] The judges rejected any contention that the state was required to prove that "moral delinquency actually results from homosexuality."[180] Instead, they held that the state need only demonstrate that private, adult, consensual, homosexual behavior "is likely to end in a contribution to moral delinquency."[181] Apparently, the basis for this conclusion was the judges' belief that it would be "impracticable" for the state to prove the empirical basis for such a belief; in their words, "the law is not so exacting."[182] To support their rationale that moral delinquency was related directly to private, adult, consensual, homosexual behavior, the judges offered the facts of *Lovisi* as "just such a sexual orgy as the statute was evidently intended to punish."[183] The judges did not, however, offer any discussion of how the facts in that case in any way were analogous to the issue present in the case at bar. The judges ultimately found solace, as have many of their judicial counterparts,[184] in calling upon the historical longevity of the criminal proscription and its direct ascendency from our Judeo-Christian and common-law traditions.[185]

Judge Merhige, citing the trilogy of cases beginning with *Griswold*, including *Eisenstadt*, and ending with *Roe*, argued in dissent that the majority had "misapplied" the Supreme Court's interpretation of the fourteenth amendment's due process clause protection of the right to personal privacy.[186] He wrote:

> The Supreme Court has consistently held that [it] protects the right of individuals to make personal choices, unfettered by arbitrary and purposeless restraints, in the private matters of marriage and procreation. . . . I view those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *See supra* notes 65–70 and accompanying text.
185. *See Doe*, 403 F. Supp. at 1202–03.
186. *Id.* at 1203.

> intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.[187]

Moreover, the judge reminded his colleagues that they had not placed the *Griswold* commentary by Justice Goldberg in context with two later cases that they mysteriously failed to cite in their analysis of the right to privacy.[188] Identifying *Eisenstadt* as a more recent reflection by the Court that "the right to privacy in sexual relationships is not limited to the marital relationship,"[189] he stressed that the right to personal autonomy logically included the selection of a "consenting adult sexual partner."[190] Absent a showing by the state that there was a compelling state interest to proscribe this choice, whether it involved heterosexuals or homosexuals, the exercise of this right could not be restricted.[191]

Judge Merhige indicated that such a conclusion in no way establishes an absolute right for individuals to participate in sexual relations.[192] The conduct must take place free from coercion and therefore must involve adults legally defined as such.[193] The conduct must also be private.[194] Therefore, activity which takes place in "publicly frequented areas" cannot receive constitutional protection.[195] But just as important as Judge Merhige's analysis of relevant Supreme Court decisions was his scholarly reliance upon the state's inability to provide any evidence that private, adult, consensual, homosexual behavior causes harm to any individual or the collective as a whole.[196] In a cogent response to his judicial colleagues he wrote:

> To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response. In any event, what we know as men is not forgotten as judges—it is difficult to envision any substantial number of heterosexual marriages being in danger of dissolution because of the private sexual activities of homosexuals.[197]

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187. *Id.*
188. *See id.* at 1204.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 1204–05.
195. *Id.* at 1205.
196. *Id.*
197. *Id.*

Judge Merhige correctly concluded that the issue for his colleagues was not the right to privacy, but rather what they believed to be appropriate moral conduct.[198] Such a construction of the issue, he reasoned, was not only jurisprudently incorrect, it was a direct violation of a citizen's constitutional right to personal privacy.[199] Other lower courts have agreed with Judge Merhige and have refused to accept the logic of the *Doe* majority. In fact, the Supreme Court's summary affirmance of *Doe* has created numerous responses from some state tribunals asked to determine the constitutionality of their respective criminal laws proscribing private, adult, consensual, sexual behavior.

For example, in *State v. Saunders*,[200] the Supreme Court of New Jersey addressed whether the state's criminal fornication statute prohibiting all sexual relations between men and unmarried women was unconstitutional. Citing *Eisenstadt*, *Roe*, and *Carey v. Population Services International*,[201] the Court held that the statute was unconstitutional pursuant to the right to privacy which they believed emanated from the first, third, fourth, fifth, and ninth amendments of the Constitution.[202] Judge Pashman, writing for the majority, urged that the meaning of the right to privacy could not be limited to only "the private situations" of the prior cases.[203] Instead, he believed that the fundamental nature of the right to privacy could be more clearly understood if it was viewed as the "freedom of personal development."[204] Whether the issue is fornication, contraception, abortion, or even the personal choice to maintain or stop "heroic" measures which may be used to sustain physiological functioning of the human body, Judge Pashman concluded that these decisions are within the constitutionally protected realm of personal autonomy.[205]

The majority gave little credence to the Supreme Court's summary affirmance in *Doe*. The New Jersey Supreme Court pointed to what it believed to be an apparent disagreement within the United States Supreme Court about the impact of *Doe*,[206] and instead directed its attention to whether there was a compelling state interest which could justify the fornication statute.[207] After rejecting the state's con-

198. *Id.*
199. *See id.* at 1203.
200. 75 N.J. 200, 381 A.2d 333 (1977).
201. 431 U.S. 678 (1977).
202. *Saunders*, 75 N.J. at 210–11, 381 A.2d at 338.
203. *Id.* at 211–12, 381 A.2d at 339.
204. *Id.* at 213, 381 A.2d at 339.
205. *Id.*
206. *Id.* at 215–16, 381 A.2d at 340. *See also Carey*, 431 U.S. at 688 n.5, 694 n.17, 718 n.2.
207. *Saunders*, 75 N.J. at 217, 381 A.2d at 341.

tentions that the statute was essential in preventing venereal disease, the propagation of illegitimate children and the protection of the marital relationship,[208] the *Saunders* court repeated the underlying constitutional priority which has been the core of Supreme Court decision making since *Griswold* and which has its foundation in our constitutional history. Judge Pashman stressed that "[p]rivate personal acts between two consenting adults are not to be lightly meddled with by the State."[209] Unlike the federal district court in *Doe*, the *Saunders* majority refused to believe that a "remedy" for supposed immoral conduct should "come from legislative fiat."[210] Concluding that "the right of personal autonomy is fundamental to a free society,"[211] the New Jersey Supreme Court noted an important consideration overlooked by some reviewing courts: "Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and 'exposed.' "[212] But the New Jersey Supreme Court was not the only court which was unwilling to accept the apparent impact of the Supreme Court's summary affirmance of *Doe*.

In *Commonwealth v. Bonadio*,[213] a case involving a challenge to a state statute which prohibited "voluntary deviate sexual intercourse" between unmarried persons, the Supreme Court of Pennsylvania also rejected *Doe's* acceptance of plenary power of state legislatures to criminalize any behavior a majority of lawmakers believe to be contrary to the public morals.[214] The *Bonadio* court did not address directly the fundamental right of personal autonomy,[215] but its decision was an excellent analysis of most issues intertwined within the realm of private, adult, consensual, sexual behavior. Declaring the Pennsylvania statute unconstitutional in violation of the fourteenth amendment's equal protection clause, Justice Flaherty joined a long line of jurists and scholars in reinforcing the legitimate function of the state's police power.[216] He suggested that the state could justifiably protect the collective from coerced sexual conduct, and protect minors from sexual contact by adults and other forms of sexual conduct.[217] But he concluded that the statute under scrutiny exceeded any legitimate function of the police power. He wrote that:

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208. *Id.*
209. *Id.* at 220, 381 A.2d at 342.
210. *Id.*
211. *Id.*
212. *Id.* at 220, 381 A.2d at 343.
213. 490 Pa. 91, 415 A.2d 47 (1980).
214. *Id.* at 95–98, 415 A.2d at 49–51.
215. *Id.* at 49. *See also id.* at 47 n.2.
216. *Id.* at 98–99, 415 A.2d at 51.
217. *Id.* at 95, 415 A.2d at 49.

> 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* . . . . Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority.[218]

Calling upon the political philosophical principles espoused by John Stuart Mill in *On Liberty*,[219] which received their impetus from the libertarians,[220] the *Bonadio* majority argued that absent a showing of harm to another, sexual morality was beyond the legitimate purview of the state police power.[221] But, because the issue before the court was the discriminatory nature of the Pennsylvania statute as it applied to unmarried adults, they grounded their rationale upon the absence of any legitimate state objectives for the creation of such a proscription.[222] As the Supreme Court had determined in *Eisenstadt*, Justice Flaherty concluded that even if there was a rational basis for proscribing this form of sexual behavior, there was no justification to distinguish between married and unmarried Americans.[223]

In the same year, the highest court in New York also declared its consensual sodomy statute unconstitutional. In *People v. Onofre*,[224] the court was asked to determine whether its penal law which criminalized consensual sodomy or deviant sexual intercourse between unmarried persons violated the constitutional rights of privacy and equal protection. The New York court joined Pennsylvania in finding that the state legislature had unconstitutionally established illegitimate distinctions between married and unmarried sexual conduct and had interceded without any compelling interest into the sanctity of personal privacy.[225] Citing a litany of Supreme Court decisions which defined the broad meaning of the right to privacy, Judge Jones rejected the state's contention that the fundamental right of personal decisions applied only to sexual behavior conducted within the marital unit and for procreation.[226] Similar to the New Jersey and Pennsylvania decisions, the New

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218. *Id.* at 96, 415 A.2d at 50 (emphasis in original).
219. *Id.*
220. *See supra* notes 10–21 and accompanying text.
221. *Bonadio*, 91 Pa. at 98, 415 A.2d at 51.
222. *Id.* at 99, 415 A.2d at 51.
223. *Id.*
224. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).
225. *Id.* at 489–90, 415 N.E.2d 936.
226. *Id.* at 486–87, 415 N.E.2d 939.

York court stated that absent a showing that private, consensual, sexual behavior was harmful, their state sodomy statute was constitutionally infirm.[227] Arguments based upon the need for the protection of the institution of marriage, the necessity of bolstering public morality, or the paternalistic protection of individuals from physical harm, were rejected absent any empirical data to substantiate these purported justifications.[228] Judge Jones and his colleagues pierced through the veil of the state's arguments by citing a legislative memorandum which indicated that "the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premises that deletion thereof might ostensibly be construed as legislative approval of deviate conduct."[229] The state legislature's disapproval of private consensual sexual conduct, without a demonstration of harm was simply not considered to be a constitutional justification to intrude upon an individual's right of personal autonomy. Judge Jones aptly concluded that:

> Personal feelings of distaste for the conduct sought to be proscribed . . . and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution.[230]

But, similar to *Bonadio*,[231] the New York court did not base its conclusion upon the right to privacy. Instead, it applied in its review of the statute the theoretically more lenient standard attendant to the equal protection clause.[232] Yet, even when the issue was narrowed to whether the statute possessed a rational relationship to a legitimate government objective, the law failed to withstand constitutional scrutiny.[233] As with the Pennsylvania statute, New York's penal law prohibiting sodomy between unmarried adults established a prohibition against one class of its citizens which simply did not bear a rational justification and which was discriminatory on its face.[234]

The New York court joined the highest courts in the states of New Jersey and Pennsylvania in refusing to accept the precedential value of *Doe*. Instead of construing the state constitution to require more re-

227. *Id.* at 492, 415 N.E.2d at 942–43.
228. *Id.* at 491, 415 N.E.2d at 942.
229. *Id.* at 489, 415 N.E.2d at 941.
230. *Id.* at 490, 415 N.E.2d at 941–42.
231. 490 Pa. 91, 415 A.2d 47.
232. *Onofre*, 51 N.Y.2d at 492 n.6, 415 N.E.2d at 942 n.6, 434 N.Y.S.2d at 953 n.6.
233. *Id.* at 490, 415 N.E.2d at 941–42, 434 N.Y.S.2d at 952.
234. *Id.* at 491–92, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.

strictive standards for legislative enactments as the *Saunders* court had done earlier,[235] the New York court reasoned that both the civil nature of the *Doe* decision along with the Supreme Court's apparent internal disagreement as to the appropriate application of *Doe*, evident in the later *Carey* decision,[236] provided ample justification for distinguishing its impact from this case.[237] But, even though these state courts believed that *Doe* did not preclude a finding that their state sodomy or sexual deviancy laws were a violation of the fundamental right of personal privacy or of equal protection of the law, a recent decision from the federal judiciary has disagreed.

In *Dronenburg v. Zech*,[238] the circuit court of appeals affirmed the district court's grant of a motion for summary judgment requested by the Department of the Navy in an action brought by a naval petty officer to enjoin his discharge from the service because of homosexual conduct.[239] In responding to the claim that the discharge violated his constitutional rights to privacy and equal protection of the laws, the circuit court of appeals, through Judge Bork, held that private, consensual, homosexual conduct is not constitutionally protected.[240] Citing *Doe*, Judge Bork reasoned that a summary affirmance by the Supreme Court "constitutes a vote on the merits; as such it is binding on lower Federal courts."[241] The Court rejected appellant's argument that the Supreme Court's summary affirmance in *Doe* was based upon the plaintiffs' lack of standing because they had not been threatened with prosecution under the Virginia statute.[242] Judge Bork argued that if such was the case, the Supreme Court could have so indicated. It did not. Therefore, he suggested, "we doubt that a Court of Appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind."[243]

But, similar to the state court decisions, the circuit court of appeals offered an extensive analysis of the case law concerning the applicability of a right to privacy to private, consensual, homosexual conduct. Judge Bork's interpretation of *Griswold* and its progeny was significantly different than those offered by the highest courts in New Jersey, Pennsylvania, and New York. Citing a truism for most consti-

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235. *Saunders*, 75 N.J. at 216–17, 381 A.2d at 341.

236. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (opinion by Brennan, J., concurred in by a plurality).

237. *Onofre*, 51 N.Y.2d at 492–93, 415 N.E.2d at 943, 434 N.Y.S.2d at 953.

238. 741 F.2d 1388 (D.C. Cir. 1984).

239. *Id.* at 1388–89.

240. *Id.* at 1389.

241. *Id.* at 1392.

242. *Id.*

243. *Id.*

tutional law scholars and jurists that the right to privacy is not an absolute right, and then distinguishing the privacy cases from homosexual conduct, Judge Bork reasoned that the Supreme Court has not provided an interpretation which would justify the application of the right to privacy to homosexual behavior.[244] The suggestion that this behavior is "fundamental" or "implicit in the concept of ordered liberty" was a conclusion that the *Dronenburg* court found unacceptable, "unless any and all private sexual behavior falls within those categories."[245] Apparently because there are no absolute rights in our constitutional scheme and the grant of constitutional protection to homosexual conduct would create such a right, they believed any justification for such a protection is contradictory to our system of rules.

Yet, Judge Bork failed to identify the key element which triggers the application of the right to privacy; that is, the determination whether the conduct is harmful to another or to the collective as a whole. Instead of addressing this question and then applying it to the facts of the case, the judge described what he believed to be the function of the judiciary as to constitutional interpretation. Admitting that he had believed prior to his appointment to the federal judiciary that "no court should create new constitutional rights,"[246] he cited Justice White's dissenting opinion in *Moore v. City of East Cleveland*,[247] in which Justice White argued that the Court ought be wary of broad interpretation of the due process clause. Of particular importance to Judge Bork was Justice White's forewarning against voiding "legislation adopted by a State or City to promote its welfare. Whenever the judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."[248] Drawing support from Justice White's admonition, Judge Bork concluded that, "[i]f the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this Court."[249]

The *Dronenburg* court held "frivolous" the appellant's contention that support for the Navy's administrative rule would endanger all minority protection.[250] Relying on what Judge Bork described as, "constitutional rights that are solidly based in constitutional text and his-

244. *Id.* at 1395.
245. *Id.* at 1396.
246. *Id. See also supra* note 5.
247. 431 U.S. 494 (1977).
248. *Id.* at 544 (White, J., dissenting) (also cited in *Dronenburg*, 741 F.2d at 1396).
249. *Dronenburg*, 741 F.2d 1388, 1397.
250. *Id.*

tory,"[251] the court also rejected the argument that majoritarian morality should be precluded from regulating private sexual intimacy. Judge Bork confidently cited legislation grounded upon majoritarian mores which he believed have protected "civil rights, worker safety, [and] the preservation of the environment."[252]

The *Dronenburg* decision is important for various reasons. Not only is it the most recent federal judicial analysis of *Doe* and its significance to the right to be let alone, but even more importantly, the opinion of Judge Bork sharpened the underlying constitutional and jurisprudential issues surrounding the protection of civil rights at this time and in the foreseeable future. If Judge Bork's interpretation is correct concerning the right to privacy, the apparent unimportance of the "harm" qualifier in constitutional law, the historical involvement of legislative bodies as protectors of civil liberties, and the function of our federal judiciary, the very core of our constitutional democracy may be at risk. But, it is respectfully submitted that the presumptions upon which *Dronenburg* was constructed are inaccurate.

As has been pointed out earlier,[253] the development of the right to personal autonomy has encompassed individual decisions such as the acquisition and use of contraceptive devices,[254] and the performance of an abortion.[255] While it is true that none of these cases have ever indicated that these fundamental decisions are absolute constitutional liberties, the Supreme Court's acceptance of state involvement has been limited to narrowly drawn governmental intrusion where there is a showing of a compelling state interest which necessitates restricting the fundamental individual conduct. This form of state involvement is jurisprudentially and constitutionally sound.[256] The *Dronenburg* opinion, however, fails to examine seriously whether private, consensual, homosexual behavior is conduct which is analogous logically to other forms of sexual decisions which the Court has deemed to be "fundamental," thus necessitating the application of the compelling state interest standard. In this regard, it is totally indefensible to recite segments of *Griswold* and its progeny which discussed the conduct in question as it related to the relationship of the parties without also indicating that the fundamentality of the behavior was established because of our historical commitment to governmental nonintervention.[257] It has been a basic

251. *Id.*
252. *Id.*
253. *See supra* notes 100–48 and accompanying text.
254. *See supra* notes 100 & 119.
255. *See supra* notes 134–35.
256. *See supra* notes 100–48 and accompanying text.
257. *See Carey*, 431 U.S. at 685.

tenet of our system of rules that such intrusion must be justified by a demonstration of injury. The most disconcerting element of the opinion is what appears to be a complete disregard for any governmental demonstration that private, adult, consensual, homosexual conduct is in fact harmful.

Even if we accept the principle that the right to privacy may not encompass the "right to do as one pleases with one's body,"[258] this in no way justifies Judge Bork's quantum leap of reasoning which restricted the application of the right to privacy to personal decisions which concern childbearing.[259] Such a narrow reading of the right to privacy completely ignores the very basis for the constitutional guarantee that intimate personal decisions which provide citizens with the opportunity for self-actualization in matters of sexual relations, and which cannot be demonstrated to be injurious to another or the collective as a whole, must remain outside the purview of governmental control.

The justification for such an understanding of the right to be let alone is, to borrow Judge Bork's own words, "fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution."[260] That the "harm" qualifier is an integral part of our jurisprudential system[261] is easily discernible from the political philosophical treatises which provided the intellectual catalyst for the American Revolution. Therefore, to conclude as did Judge Bork that private, adult, consensual, homosexual conduct is per se outside of the intended meaning of that which is implicit in the concept of ordered liberty, and then to reject the need for any demonstration of harm, is truly inexplicable. Such a conclusion violates the judge's correct demand for objective constitutional decision making. The importance that has been attached to the right to be free from unwarranted governmental intrusion into the intimate decisions of Americans requires more from our judicial system than simply calling upon nonempirical presumptions of so-called "common sense and common experience"[262] to withold constitutional protection from citizens. Indeed, such a commitment to the maximization of individual liberty is firmly grounded in our tradition as a people.

But even accepting the unacceptable, that private, adult, consen-

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258. *Dronenburg*, 741 F.2d at 1395.

259. *Id.*

260. *Id.* at 1396 n.5.

261. *See supra* notes 17–21 and accompanying text.

262. *Dronenburg*, 741 F.2d at 1398. Indeed Judge Bork's position seems to be very similar to that of Sir Patrick Devlin, which was discussed earlier. *See supra* notes 42–57 and accompanying text.

sual, homosexual conduct is not a fundamental right, the *Dronenburg* opinion's understanding of what constitutes a rational relationship to a legitimate governmental objective is ill-conceived. Is it truly rational to presume that the result of a dissolved sexual relationship will always result in unprofessional behavior by the jilted party, particularly if this person is in a position superior to the person who dissolved the relationship? Even presuming that there is evidence to support this presumption, does this justify a regulation which prohibits the type of sexual relationship, or does it necessitate a prohibition of any unprofessional coercion by a superior toward a subordinate regardless of sexual orientation? Certainly the overbreadth of the regulation should have been examined more rigorously.

Yet, the opinion contains another presumption that takes this decision beyond the issue of the scope of the constitutional right to privacy for homosexual Americans. It assumes that the protection of our civil liberties properly belongs in our legislative assemblies, particularly our state legislatures.

If the judiciary is to commit itself to "legal interpretation from the text, structure, and history of the constitution,"[263] then there can be little doubt that such a presumption cannot withstand any "honestly applied"[264] political, philosophical, legal, or historical analysis of the American experiment. To construct the issue as accepting majoritarian democracy or succumbing to judicial oligarchy is simplistic at best and historically inaccurate at worst. Indeed, acceptance of this depiction of the powers and relationship of the branches of our federal system would render the development of national citizenship for all Americans meaningless. The protection of civil rights for minority Americans, the standardization of law enforcement procedures, not to mention the numerous protections attendant to the right to privacy, would be legitimately within the political choices of state legislators. The impact of such an interpretation of our federal system can be discovered with only a cursory examination of our confederacy period prior to the adoption of the Constitution.[265]

It is not a distrust of democracy to understand the forewarnings of the draftsmen of the Constitution and early American constitutional scholars. As will be remembered, Madison understood the necessity for majoritarian rule.[266] But he knew the coequal importance of protecting "private rights" from legislative assemblies which would act as the

263. *Dronenburg*, 741 F.2d at 1396 n.5.

264. *Id.*

265. For an excellent analysis of the historical period prior to and including the adoption of the American Constitution, see G. WOOD, *supra* note 10.

266. *See supra* notes 22–29.

"mere instrument of the majority."[267] Cooley was even more direct when he wrote that "[a] general law may establish regulations upon subjects not properly falling within the province of government, and yet be desired and cheerfully submitted to by the majority."[268] It would therefore not be dishonest to suggest that it has been understood across our history that unmonitored legislative assemblies may not protect the fundamental rights of all citizens.

The irony within Judge Bork's opinion is that while he is willing to qualify his "deference to democratic choice [when] the Constitution removes the choice from majorities,"[269] he seems unwilling to really accept the special role of the federal judiciary in our governmental system to determine when the Bill of Rights precludes majoritarian intrusion. One fears that Judge Bork believes that decisions by the federal courts, and maybe even the Supreme Court, whose "mode of analysis"[270] is contrary to his or some democratic theorist's reading of our federal system, cannot withstand the charge that they are usurpations of the will of the democratic process. If the function of our federal judiciary is as it appears the *Dronenburg* decision would suggest, constitutional interpretation will consist of a rigid review of the letter of our Constitution without consideration of the spirit of the document and the philosophical values which have underpinned its application across our history.

V. CONCLUSION

The constitutional issues surrounding *Doe v. Commonwealth's Attorney*[271] and its progeny at the state and federal level still remain unanswered. But there are a few developments which ought not be overlooked. The Supreme Court's summary affirmance has produced wide variances in state and federal court determinations about whether private, adult, consensual, sexual behavior is constitutionally protected. Depending upon the courage of state court judges, American citizens may or may not be protected from governmental intrusion into their intimate decisions concerning sexual relations. What a citizen may believe to be a decision solely within his or her personal domain may be totally dependent upon the willingness of state legislatures to criminalize sexual conduct between consenting adults. That the void of federal judicial leadership has resulted in a bizarre patchwork of constitutional interpretation depending upon the state from which the cause of action

267. *See* MADISON, *supra* note 10, at 272.
268. *See Cooley, supra* note 30.
269. *Dronenburg*, 741 F.2d at 1397.
270. *Id.* at 1396 n.5.
271. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

arises is not surprising. Indeed, if the Supreme Court continues to remain silent, legislative and judicial confusion will continue and the definition of American citizenship will be subordinated to the political machinations of state legislatures.

The attainment of civil rights for homosexual Americans is directly related to the continuance of civil rights for heterosexual Americans. Not only do "sexual deviancy" laws often include forms of sexual conduct in which heterosexuals may choose to participate, but also the continuance of state intervention into the sanctity of noninjurious sexual behavior legitimizes other forms of intrusion under the guise of majoritarian morality. This majoritarian morality may have produced legislation, as Judge Bork pointed out in *Dronenburg v. Zech*,[272] that protected civil rights, but it has also been the basis for burning witches, denying the free exercise of religious conscience, and maintaining slavery. The development of man and his collective governments has been one of intolerance to those who have been different. If we are to write a unique chapter in the annals of history, our federal courts cannot abdicate their responsibility to guarantee what has been and can be again the spirit of America—toleration.

272. 741 F.2d 1348 (D.C. Cir. 1984).