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**Doe and Dronenburg: Sodomy Statutes Are Constitutional**

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NOTES

DOE AND DRONENBURG: SODOMY STATUTES ARE CONSTITUTIONAL

In 1976 the United States Supreme Court in *Doe v. Commonwealth's Attorney for Richmond*\(^1\) summarily affirmed a three judge district court's dismissal of a challenge to the Virginia sodomy statute. In *Doe*, anonymous homosexuals contended that the statute impinged on their constitutional rights to due process, privacy, and expression.\(^2\) The United States District Court for the Eastern District of Virginia rejected those arguments, finding that the right to privacy extended only to marriage, family, and procreation. Because the district court reasoned that homosexuality had no connection to those traditional privacy interests, it held that the constitutional right to privacy did not extend to consensual homosexual activities.\(^3\)

More recently, in *Dronenburg v. Zech*,\(^4\) the United States Court of Appeals for the District of Columbia Circuit rejected a homosexual's contention that an administrative discharge from the United States Navy for homosexual conduct impinged on his rights to privacy and equal protection. Citing *Doe* and *Poe v. Ullman*,\(^5\) the court held that the rights to privacy and equal protection do not protect homosexual conduct even though that conduct occurs in private.\(^6\)

Since *Doe*, several federal courts either ignored or rejected *Doe* as a summary affirmance and extended the scope of constitutionally protected privacy to protect consensual homosexual relations.\(^7\)

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3. *Id.* at 1202.
6. *Id.* at 20.
Additionally, several state courts used federal or state equal protection and privacy doctrines to strike down state sodomy statutes.\(^8\)

The underlying issue of the topic discussed in this Note is the allocation of government power in areas not addressed textually by the Constitution. Stated differently, can a court of a particular sovereign constitutionally invalidate a clear expression of that sovereign’s representative unit without express constitutional support? Because sodomy statutes provide a good example of modern statutory criminal law well supported by common law history\(^9\) and because the Constitution does not address sodomy or sexual preference expressly, this Note examines whether a court constitutionally can invalidate a state prohibition of sodomy. To resolve these issues, the Note first reviews the background of and reasons for sodomy statutes. The Virginia sodomy statute serves as an example of modern sodomy statutes, and Doe is discussed in relation to that statute. The Note then tests the validity of Doe, Drnenburg, and the statute by analyzing the recent challenges to state sodomy statutes.

This Note contends that legislatures should decide whether to decriminalize sodomy; the judiciary should not make the decision through substantive due process.\(^10\) Although arguing that all sodomy should be subject to criminalization, this Note reaches three specific conclusions.\(^11\) First, current case law prohibits criminalization...
tion of marital sodomy. Second, the courts are divided on the issue of nonmarital sodomy. Third, legislatures constitutionally may prohibit homosexual sodomy but first should weigh a number of factors before making the decision.

THE MODERN SODOMY STATUTE

In general, sodomy is the unnatural carnal knowledge of human beings with each other or with a beast. More specific definitions appear in state sodomy statutes, of which Virginia's is typical:

§ 18.2-361. Crimes against nature.—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 Class 6 felony; . . .

This statute prohibits several types of conduct. First, the statute prohibits any carnal knowledge of a brute animal, or bestiality. Sodomy statutes generally define carnal knowledge as the knowledge of the body, passions, or sexual appetites of either another person or an animal. Thus, the Virginia statute forbids any sexual contact between a person and any animal, including oral or genital copulation. The statute also prohibits any sexual contact between male or female persons by the anus or by oral-genital contact. Any coupling or sexual contact by the genitals with the

(1981); see also Harris v. State, 457 P.2d 638 (Alaska 1969).
12. State v. Young, 140 Or. 228, 13 P.2d 604, 607 (1932). The common law defined "sodomy" as a "crime against nature" between humans and "buggery" as a "crime against nature" between a man and a beast. The terms sodomy and buggery now are used interchangeably. Wise v. Commonwealth, 135 Va. 757, 760, 45 S.E. 508, 509 (1923).
13. VA. CODE § 18.2-361 (1982). A class 6 felony has an authorized punishment of imprisonment from one to five years or, within the discretion of the fact finder, imprisonment of not greater than one year and a $1000 fine, or both. VA. CODE § 18.2-10 (1982).
14. Bestiality is a sexual connection between a human and a "beast" of the opposite sex. State v. Poole, 59 Ariz. 44, 122 P.2d 415 (1942). Sodomy statutes define a beast as any animal other than a human. See Murray v. State, 236 Ind. 587, 143 N.E.2d 290 (1957) (intercourse with a chicken is intercourse with a beast even thought the chicken is not a mammal); see also Hudspeth v. State, 194 Ark. 576, 108 S.W.2d 1085 (1937) (intercourse with a cow violated the Arkansas sodomy statute).
15. 81 C.J.S. Sodomy § 2(a), at 646 (1983).
17. VA. CODE § 18.2-361.
mouth or anus of another person, including fellatio, cunnilingus, and anilingus is prohibited. Consequently, penile-vaginal intercourse is the only permissible sexual activity under the Virginia statute. Finally, any person who consents to any of the prohibited sex acts also is guilty of sodomy.

Four situations potentially could be prosecuted under statutes like Virginia's: first, bestiality; second, consensual sodomy between married persons; third, consensual sodomy between unmarried heterosexuals; and fourth, consensual sodomy between homosexuals. This Note analyzes the latter three classes and concludes that all should be subject to prohibition by the states.

History of Sodomy Statutes

Sodomy laws have existed in western civilization at least since biblical times. The term “sodomy” comes from the ancient city of Sodom, which, according to the Bible, God destroyed because of its citizens’ evil practices. Sodomy prohibitions appeared in Judaic law as part of a regulatory scheme designed to guide the Hebrew people in all aspects of life. During the middle ages, sodomy

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24. This Note does not discuss bestiality because no one has challenged state power to prohibit bestiality recently.
26. Id.
28. Judaic law specifically prohibited homosexual sodomy. Leviticus 18:22. As examples of the overall scheme of Judaic law, the following sex acts also were prohibited: adultery, Leviticus 18:20; bestiality/buggery, Leviticus 18:23; incest, Leviticus 18:6-16 and sex with any woman during menstruation, Leviticus 18:19.
was a religious offense punished by the ecclesiastic courts. In England, sodomy was not an offense at common law but became punishable in the temporal courts by the statute of Henry VIII. The statute was repealed during the reign of Queen Mary but was reinstated upon the ascension of Elizabeth I.

These English statutes influenced early American law. The first laws of the Jamestown colony incorporated the English prohibition of sodomy. The colonists enacted this law to prevent persons from succumbing to the "weakness of the[ir] bod[ies]." The present Virginia statute is directly traceable to a statute enacted in 1792. The statute has no recorded legislative history because the Biblical law carried heavy penalties for these crimes: adultery - death, Leviticus 20:10; homosexuality - death, Leviticus 20:13; bestiality/buggery - death for both person and the animal, Leviticus 20:15-16; incest - death/exile, Leviticus 20:11, 12, 17.

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29. Harris, 457 P.2d at 468.
30. Id. at 469 (citing 25 Henry VIII, c. 6 (1533)). The statute reads in part:
   Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the laws of this realm, for the detestable and abominable vice of buggery committed with mankind or beast: (2) it may therefore please the King's highness, with the assent of his lords spiritual and temporal, and the commons of this present parliament assembled, that it may be enacted by authority of the same that the same offense be from henceforth adjudged felony, and such order and form of process therein to be used against the offenders as in cases of felony at the common law; . . .

Id.
31. Id. at 649 n.42 (citing 1 Mary, c. 1 (1553)).
32. Id. (citing Elizabeth I, 5 Eliz., c. 17 (1562)).
33. Id. at 649.
34. For the Colony in Virginia Britannia: Laws Divine, Morall and Martial, etc., art. 9, at 12 (London 1612) (compiled by W. Strachery, 1969) ("No man shall commit the horrible, and detestable sins of Sodomie upon pain of death; . . . .").
35. I have found either the necessity of the present State of the Colonie to require, or the infancie, and weakness of the body thereof, as yet able to digest, and doe now publish [these laws] to all persons in the Colonie, that they may as well take knowledge of the laws . . .
Id. at 9-10.
36. 1 S. Shepard, The Statutes at Large of Virginia, 1792 to 1806, at 113 (1970) (reprinted from 1835 ed., Richmond). The Virginia legislature passed the statute on December 10, 1792, which reads as follows:
   Be it enacted and declared by the General Assembly, That if any do commit the detestible and abominable vice of buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without benefit of clergy.
Id.
lawmakers considered the crime too disgusting to debate.\textsuperscript{37}

Sodomy statutes exist in America today for several reasons. Many Americans believe that sodomy is wrong because it leads to moral delinquency.\textsuperscript{38} States therefore enact sodomy statutes to promote morality.\textsuperscript{39} Virginia, for instance, acted within its police power in enacting its sodomy statute; the statute appears in the Virginia Code chapter entitled "Crimes involving morals and decency."\textsuperscript{40} Preserving health has been another reason for prohibiting sodomy.\textsuperscript{41} States have contended, for instance, that prohibiting sodomy inhibits the spread of venereal diseases.

Courts have long recognized state authority to legislate against sodomy to protect morals or health.\textsuperscript{42} Protecting morality and

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37. See J. Davis, A Treatise on Criminal Law 133 (1838). The common law treated sodomy or buggery as a crime not fit to be named. See generally J. Matthews, Digest of the Laws of Virginia of a Criminal Nature 124-25 (2d ed. 1878). The unwillingness of legislators and judges to discuss factual situations in sodomy cases inhibits legal research in the field. See Harris, 457 P.2d at 642.


39. Id.

40. VA. CODE ch. 8, at 418 (1982).

41. See Baker v. Wade, 553 F. Supp. 1121, 1141-42 (N.D. Tex. 1982) (discussing the health element in general police power argument). As of November 26, 1984, there were 6,993 reported cases of Acquired Immune Deficiency syndrome (AIDS), a disease with a mortality rate exceeding 48\%. Seventy-three percent of patients diagnosed before January 1983 have died. Over 72\% of the victims have been male homosexuals, especially those with multiple sexual partners. The two primary methods of communication apparently are sexual relations with an infected person and blood transfusions from those persons. 33 CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MORBIDITY AND MORTALITY WEEKLY REPORT (MMWR), Update: Acquired Immunodeficiency Syndrome (AIDS) - United States, No. 47 (Nov. 30, 1984).

Assume that all of the states had sodomy statutes and that those statutes were enforced strictly. Assume further that all blood donations were screened effectively for the AIDS virus. Under such a model, the AIDS virus would be contained.

Problems arise, however, as one moves away from the model. Not all states have sodomy statutes. For the states that do have sodomy statutes, enforcement is difficult and expensive. Despite these practical problems, any inhibition of homosexual sodomy will lessen the incidence of AIDS.

As the incidence of AIDS increases in the homosexual community and as bisexual members of that community carry the disease to the population at large, the enforcement of sodomy statutes may become a primary alternative in the containment of this disease.


Writing for the United States Court of Appeals for the District of Columbia Circuit in
health is at the core of the police power because government is no more than public order and the erosion of morality weakens that public order. This exercise of power is proper, however, only if the matter sought to be regulated actually affects public morals and is not protected by the constitution. Holding the protection of morals to be within the police power recognizes that the states, not the federal courts, should set standards of morality.

Presently, twenty-five states and the District of Columbia impose criminal sanctions for some form of consensual sodomy; four

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*Dronenburg*, Judge Bork stated:

>[The] theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian, but as conclusively valid for that very reason.

741 F.2d 1388, 1397 (D.C. Cir. 1984).

43. The Court in *Berman* emphasized that the scope of the police power is elastic and is determined on the facts of each case. Subject to specific constitutional limitations, however, when the legislature speaks, the public interest is declared in conclusive terms. In such cases the legislature, not the judiciary, is the main guardian of the public needs that are served by social legislation.

"Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power." *Berman* v. Parker, 348 U.S. 26, 32 (1954); *see also* California v. LaRue, 409 U.S. 109 (1972).


states have had their sodomy statutes invalidated;\textsuperscript{48} the other twenty-two states have decriminalized consensual sodomy.\textsuperscript{49} These sodomy statutes do not prohibit homosexuality.\textsuperscript{50} Rather, they merely prohibit certain types of deviant sexual conduct.


Doe v. Commonwealth’s Attorney for Richmond

In Doe v. Commonwealth’s Attorney for Richmond, anonymous male plaintiffs challenged the constitutionality of Virginia’s sodomy statute. They alleged that, as applied to their active and regular homosexual relations, the statute violated their fifth and fourteenth amendment guarantees of due process, their first amendment guarantee of freedom of expression, and their first and ninth amendment freedom of privacy. The United States District Court for the Eastern District of Virginia rejected the plaintiffs’ claim and found the statute constitutional. The United States Supreme Court summarily affirmed the decision.

The plaintiffs based their privacy argument largely on Griswold v. Connecticut and its progeny. In Griswold the United States Supreme Court struck down a Connecticut statute that prohibited the use of contraceptives by married couples. The Court in Griswold held that the use of contraceptives was protected by a right of marital privacy that surrounded the home and the family. The majority in Doe noted that Griswold distinguished forbidden extramarital sexuality, such as adultery and homosexuality, from marital sexuality. Therefore, Griswold did not invalidate state

52. The challenged statute was the 1950 predecessor to the current Virginia statute. VA. CODE § 18.1-212: Crimes against nature.—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. 403 F. Supp. at 1200 (quoting VA. CODE § 18.2-212 (1950)).
53. Id. at 1203.
55. 81 U.S. 479 (1965).
56. Id. at 485.
57. Id. at 485-86.
58. 403 F. Supp. at 1201. In Griswold, Justice Goldberg emphasized that “the Court’s holding today . . . in no way interferes with a state’s proper regulation of sexual promiscuity or misconduct . . . . ‘Adultery, homosexuality and the like are sexual intimacies which the state [properly may] forbid’ . . . .”
regulation of certain forbidden sexual acts. It required only that the decision whether to use contraceptives be left to the married couple.\(^9\)

The *Doe* opinion further noted that the Court has recognized adultery, homosexuality, fornication, and incest as not being immune from criminal inquiry, even if privately practiced.\(^6^0\) In 1961 the Supreme Court in *Poe v. Ullman*\(^6^1\) upheld the same Connecticut statute that it later rejected in *Griswold*. Dissenting in *Poe*, Justice Harlan declared that the right to privacy should embrace the decision between married persons whether to use contraceptives, but that

> I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare . . . .

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether . . . .

[Regulating the intimacy of husband and wife] is surely a different thing indeed from punishing those which establish intimacies which the law has always forbidden and which can have no claim to social protection.\(^6^2\)

The district court in *Doe* found that homosexual sodomy had no connection to the protected interests of family, marriage, and procreation on which the holding of *Griswold* rested.\(^6^3\) For that reason, it held homosexual sodomy not protected by the right to privacy.\(^6^4\)

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381 U.S. at 498-99 (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (Harlan J., dissenting) (1961)).

59. A substantial body of case law has developed that prohibits the application of sodomy statutes to married couples. Several courts have extended the *Griswold* right of marital privacy to protect marital sodomy despite Justice Goldberg's concurrence. *See, e.g., Lovisi v. Slayton*, 539 F.2d 349 (4th Cir), *cert. denied*, 429 U.S. 977 (1976); *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).


61. 367 U.S. 497.

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

63. 403 F. Supp. at 1202.

64. *Id.*
The court next applied rational basis scrutiny to the sodomy statute, finding that the legitimate state interest in the promotion of morals and decency was supported rationally by the effort to prohibit those specific types of indecent acts. The court reasoned that the state's concern that private sodomy was likely to lead to moral delinquency was a sufficient evil to justify the statute.

Judge Merhige dissented. He believed that the Supreme Court privacy decisions created a fundamental right to privacy regarding all aspects of sexual activity, including the choice of consensual sodomy partners.

**Doe as a Summary Affirmance**

Because the court summarily affirmed the district court decision, Doe's precedential value is unclear. In *Hicks v. Miranda,* the Supreme Court stated that the lower courts are bound by its summary decisions until the Court informs them otherwise. In 1977 the Court softened the weight of summary affirmances, saying that the Court adopts only the decision, not the judgment or reasoning, of a lower court in a summary affirmance. In 1979 the Court further defined the issue, stating that summary dispositions were confined to the exact facts of a case and to the precise question posed in the jurisdictional statement. Summary affirmances in short, merely leave undisturbed the lower court judgment and prevent lower courts from coming to opposite conclusions on the precise issues and facts presented and decided by that action.

Despite these limitations, however, a summary disposition is binding precedent and is a decision on the merits. In *Doe* the

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65. *Id.*
66. *Id.*
67. *Id.* at 1203-05 (Merhige, J., dissenting).
69. 422 U.S. 332, 344 (1975).
72. *Hardwick,* 760 F.2d at 1213-14 (Kravitch, J., dissenting); *Lecates v. Justice of Peace Court No. 4,* 637 F.2d 898 (3rd Cir. 1980). See generally, Annot., 45 L. Ed. 2d 791 (1976 &
question was whether the Virginia sodomy statute violated due process, freedom of expression, or privacy rights. The district court held that the statute did not violate those rights and that the statute was constitutional. The Supreme Court summarily affirmed that decision. *Doe* is dispositive, therefore, on due process, privacy, and freedom of expression attacks against a statute that prohibits consensual homosexual sodomy. Problems arise because some courts refuse to follow *Doe*.

**Dronenburg v. Zech**

In January 1981, James L. Dronenburg was administratively discharged from the United States Navy for misconduct relating to homosexual acts. Dronenburg challenged the discharge in the United States District Court for the District of Columbia, but the district court granted summary judgment for the Navy. Dronenburg then appealed to the United States Court of Appeals for the District of Columbia, contending that the discharge impinged on his constitutional rights to privacy and equal protection.

The court first rejected Dronenburg's right to privacy argument. It emphasized that, because of the Supreme Court's summary affirmation, *Doe* was binding on the lower courts. The Navy regulation, therefore, clearly was constitutional. The court also engaged in an independent analysis of *Griswold* and its progeny, concluding that the right to privacy did not protect homosexual conduct. Turning to equal protection, the court found no fundamental right to engage in homosexual conduct and assumed that homosexuals did not constitute a suspect classification. The regulation, there-
fore, was not subject to strict scrutiny. Under rational basis scrutiny, the military interest in the maintenance of discipline, good order, and morale was infringed sufficiently by homosexual relations between Dronenburg, a 27 year old instructor, and his student, a 19 year old seaman recruit, to justify Dronenburg’s discharge from the service.81

THE CURRENT ATTACKS

In Hardwick v. Bowers,82 the United States Court of Appeals for the Eleventh Circuit held the Georgia Sodomy statute83 unconstitutional because the statute violated a fundamental right to quintessential privacy and intimate association.84 In Baker v. Wade85 the United States District Court for the Northern District of Texas held the Texas Homosexual Conduct Statute86 unconstitutional because the statute violated both the fundamental right to privacy and the right to equal protection.87 The New York Court of Appeals in People v. Onofre88 reversed the conviction of a male defendant who had engaged in consensual deviate sexual intercourse

81. Id. at 1398. The military prohibition of homosexual conduct was approved in an earlier Supreme Court case, but the analysis rested primarily on the unique needs of the military service in promoting good order and discipline. See Parker v. Levy, 417 U.S. 733, 743 (1974); see also Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir.), cert. denied, 452 U.S. 905 (1980). The constitutional analysis in Dronenburg does not depend on military necessity argument.

82. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

83. (a) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

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

84. Id. at 1398. The military prohibition of homosexual conduct was approved in an earlier Supreme Court case, but the analysis rested primarily on the unique needs of the military service in promoting good order and discipline. See Parker v. Levy, 417 U.S. 733, 743 (1974); see also Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir.), cert. denied, 452 U.S. 905 (1980). The constitutional analysis in Dronenburg does not depend on military necessity argument.

85. Id. at 1398. The military prohibition of homosexual conduct was approved in an earlier Supreme Court case, but the analysis rested primarily on the unique needs of the military service in promoting good order and discipline. See Parker v. Levy, 417 U.S. 733, 743 (1974); see also Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir.), cert. denied, 452 U.S. 905 (1980). The constitutional analysis in Dronenburg does not depend on military necessity argument.

86. A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex.

Deviate sexual intercourse means any contact between any part of the genitals of one person and the mouth or anus of another person.

A violation of the Statute is a Class C misdemeanor, punishable only by a fine not to exceed $200.

87. Id. at 1134-45.

with a seventeen-year-old boy in his home, holding that the New York consensual sodomy statute\(^9\) violated his rights to privacy and equal protection.\(^{90}\) In *Commonwealth v. Bonadio,\(^9\)* female defendants were arrested at a pornographic theater and charged with violating the Pennsylvania Voluntary Deviate Sexual Intercourse Statute\(^9\) by engaging in sex with male patrons onstage for the viewing pleasure of the other patrons.\(^9\) The Supreme Court of Pennsylvania held that the statute exceeded the valid bounds of the police power and impinged on the constitutional right to equal protection.\(^9\) The court ruled that the states could not use their police power to enforce a majority morality on persons whose conduct did not harm others.\(^9\)

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89. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948-49. The applicable statute provided:

Consensual sodomy

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

Sex offenses; definitions of terms.

The following definitions are applicable to this article:

. . . .

2. Deviate sexual intercourse means sexual contact between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

N.Y. Penal Law §§ 130.00, 130.38 (McKinney 1975).

90. *Id.* at 494, 415 N.E.2d at 943, 434 N.Y.S.2d at 954.


93. 490 Pa. at 100, 415 A.2d at 52 (Nix, J., dissenting).

94. *Id.* at 99, 415 A.2d at 51-52.

95. The court quoted John Stuart Mill:

[The] sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of
These four cases are typical of the privacy and equal protection attacks on statutes regulating sexual behavior. The Note now analyzes these attacks in light of *Doe* and its progeny. This analysis is conducted within the marital, nonmarital, and homosexual framework outlined above. These distinctions are necessary because the case law and the relative strengths of the state and personal interests vary with each situation.

THE PRIVACY ANALYSIS

*The Right to Privacy*

The Supreme Court has recognized that a right of personal privacy exists under the Constitution. This right is not delineated textually, but is rooted in the "penumbra" of other constitutional provisions. These roots reach from the first amendment, the others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

490 Pa. at 95-96, 415 A.2d at 50 (quoting J. MILL, ON LIBERTY (1859)).


The decisions primarily were based on interpretation of the Immigration and Nationality Act, 8 U.S.C. § 1182(a) (1976 & Supp. V. 1981). In the Act, Congress treated homosexuals as psychopathic personalities or sexual deviates that could be prevented from entering the country. *See* Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967). Today the medical profession no longer considers homosexuals to be psychopathic personalities or sexual deviates. Some courts have reasoned, therefore, that Congress no longer intends to exclude homosexuals. Hill v. Immigration and Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983).


97. Id.
fourth and fifth amendments,\textsuperscript{99} the ninth amendment,\textsuperscript{100} and the concept of liberty guaranteed by the fourteenth amendment.\textsuperscript{101} Only personal rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy.\textsuperscript{102} A problem exists, however, in determining which personal privacy rights are "fundamental" or "within the concept of ordered liberty."

\textit{Creation of the Right to Privacy: Modern Lochnerization}

The threshold question concerning privacy is whether the Supreme Court legitimately can create substantive due process rights that are not enumerated specifically in the Constitution. The process of implying constitutional rights from other, specifically enumerated rights is termed "Lochnerization" after \textit{Lochner v. New York}.\textsuperscript{103} In \textit{Lochner}, the Court used the fourteenth amendment to create a constitutional "right to contract." The Court then used the right to contract to strike down a New York labor law limiting women's work in bakeries to no more than sixty hours per week.\textsuperscript{104} The practical effect of the decision was to replace the opinion of the people of New York as expressed through their legislature with the opinion of the Court in an area of economic theory. In his famous dissent in \textit{Lochner}, Justice Holmes questioned whether the Court could or should impose its opinion over the desires of the people\textsuperscript{105} and concluded that it should not.\textsuperscript{106}

\begin{footnotesize}
\begin{itemize}
\item 98. \textit{Id.} (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
\item 99. \textit{Id.} (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); and Boyd v. United States, 116 U.S. 616 (1886)).
\item 100. \textit{Id.} (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1975) (Goldberg, J., concurring)).
\item 101. \textit{Id.} (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
\item 102. \textit{Id.} (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
\item 103. 198 U.S. 45 (1905).
\item 104. \textit{Id.}
\item 105. \textit{Id.} at 75. A portion of Mr. Justice Holmes's dissent follows:

\begin{quote}
The case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislatures
\end{quote}
\end{itemize}
\end{footnotesize}
The spirit of Justice Holmes' dissent prevailed nearly thirty years later in *Nebbia v. New York*.

In deciding that the state had the power to fix retail prices for milk, the Court rejected the idea of judicial creation of rights not supported expressly by the Constitution's text. It held that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." Reasoning that no exercise of a private right could be imagined that would not affect the public in some way, the Court stated that, in the absence of textual constitutional restrictions, a state must be free to select the economic policy that it deems to promote the public welfare. Later decisions continued this theme of judicial deference to state legislatures on matters of economics.

In *Williamson v. Lee Optical*, the Court upheld an Oklahoma statute that strictly regulated visual care. The Court stated that "it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." The Court found the statute's overbreadth to be irrelevant: "The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . The day is gone when this Court uses the . . .
Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they might be unwise, improvident, or out of harmony with a particular school of thought.”

The Court further stated that the people must resort to the polls, not the courts, for protection against legislative abuses. To date, the Court has refused to interfere with economic regulation that does not conflict with enumerated constitutional rights.

Griswold v. Connecticut, the first major privacy decision, is simply Lochner in another context. In Griswold, the Court created a constitutional right to privacy, a nontextual right, to allow it to impose its opinion regarding contraceptives on the people of Connecticut. To protect this nontextual right, the Court struck down a Connecticut anticontraceptive statute as an impermissible infringement of the right to marital privacy.

112. Id. at 487-88.
113. Id. at 488.
115. 381 U.S. 479 (1965).
116. The Griswold decision can be portrayed as a logical extension of earlier case law. In 1923 the Supreme Court, in Meyer v. Nebraska, 262 U.S. 390 (1923), reversed the conviction of a German language teacher who was found in violation of a Nebraska law prohibiting the teaching of foreign languages to young children. The Court viewed “liberty” in the fourteenth amendment as going beyond freedom from bodily restraint to include the rights to contract, to engage in the occupation of one's choice, to marry, to have and raise children, and to worship God in the manner of one's choice. Id. at 399.

Two years later a unanimous Court overturned an Oregon law that required all children to attend public school. The education and upbringing of children were to be left to parents, and parents could choose private over public schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925). In 1942 the Supreme Court held that the sterilization of habitual criminals was unconstitutional because the punishment impermissibly impinged on marriage and procreation. Skinner v. Oklahoma, 316 U.S. 535 (1942). In each of these cases, there was an increasing awareness of the need to protect the individual's ability to have and to raise children. Griswold merely reinforced this ability to choose not to have children. Therefore, limiting Griswold to the choice whether to have children is reasonable; the line of cases preceding Griswold does not suggest an intent to create a right to sexual nonconformity.

117. 381 U.S. at 485. The Connecticut anticontraceptive statute was being used to prevent the Medical Director of the Planned Parenthood League of Connecticut from giving contraceptive advice to married persons. Because no home was searched for contraceptives, fourth amendment protection against unreasonable search and seizure was not infringed and the Court was forced to resort to the creation of the right to privacy. The Court further strengthened the sanctity of marriage in Loving v. Virginia, 388 U.S. 1 (1967), where it invalidated Virginia's prohibition of interracial marriage. The Court ruled that antimiscegenation statutes impinge impermissably on the right to privacy in the marital decision.
The *Lochner* constitutional right to contract is no less important than the right to use contraceptives. Further, as many constitutional penumbras support the right to contract as the right to privacy. The Court has chosen to allow the people, through their legislatures, to determine hours of employment or the cost of milk. Similarly, the Court should allow the people to decide whether they will use contraceptives, have abortions, or tolerate sodomy. Economic theory is opinion and morality is social norm based on majority opinion. Both involve broad social and policy questions that are best left to the legislatures. Consequently, courts should stop their interference in the field of morality for the same reasons they stopped their interference with economics.

Until the "moral" *Nebbia* is decided, the right to privacy remains the law. Uncertainty remains, however, concerning the limits of that right. Because the right to privacy is not enumerated in or necessarily implied from the Constitution, its legitimacy is questionable. The right to privacy, furthermore, has obvious natural limitations and must be construed narrowly. Although a man's home is his castle, he cannot commit murder there. Similarly, he cannot gamble, smoke marijuana, or use other illegal drugs under the protection of privacy. These acts are not within the specific groups of acts protected by the privacy case law. Consensual deviant sex has no relation to family, home, or procreation and therefore should be treated as outside the realm of constitutional pri-

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118. Writing for the United States Court of Appeals for the District of Columbia Circuit in *Dronenburg*, Judge Bork stated:

> If the revolution in sexual mores . . . is in fact ever to arrive, . . . it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.

741 F.2d 1388, 1397 (D.C. Cir. 1984).

119. [A] judge has no means of demonstrating that his moral views about forms of human [sexual] gratification are superior to the views of others. For that reason, a judge has no warrant, where the Constitution is silent, to force his morality upon a legislature that has made a different moral assessment.


Privacy and subject to state regulation.\textsuperscript{121}

Privacy Attacks by Heterosexuals

Whether the right to privacy protects consensual marital sodomy\textsuperscript{122} is considered first because privacy attacks by married couples on sodomy statutes have been the most successful in recent years. On its facts, \textit{Griswold} protects only the right of married couples to use contraceptives.\textsuperscript{123} Later interpretations of \textit{Griswold}, however, have expanded the right of privacy to protect individual autonomy in all matters of childbearing.\textsuperscript{124}

Conversely, Justice Goldberg's concurrence in \textit{Griswold} pointed out that the Court's holding did not restrict the state's regulation of sexual misconduct.\textsuperscript{125} Because of the suspect legitimacy of the right to privacy,\textsuperscript{126} the narrow interpretations of that right in Justice Goldberg's concurrence and \textit{Doe} are appropriate. Sodomy, adultery, and homosexuality have no rational connection to procreation or the maintenance of family life: These sexual activities should therefore be subject to state regulation.\textsuperscript{127} Nevertheless, the Virginia sodomy statute probably cannot be applied constitutionally to married couples. In \textit{Lovisi v. Slayton}\textsuperscript{128} the United States

\textsuperscript{121} \textit{Doe}, 403 F. Supp. at 1202.

\textsuperscript{122} Homosexual "marriage" is not a traditional form of marriage. Consequently, comments concerning the protection of marriage do not extend to homosexual marriages.

\textsuperscript{123} 381 U.S. at 485.

\textsuperscript{124} In 1973 the Supreme Court held that the right to privacy encompassed a woman's decision to have an abortion. Roe v. Wade, 410 U.S. 113, 153 (1973). The Court noted, however, that the right was not unlimited; some state regulation in areas protected by the right to privacy is appropriate when the state interests of health, medical standards, and prenatal life become dominant. \textit{Id.} at 154-55. Roe thus demonstrates that the right to privacy is not all-encompassing.


\textsuperscript{125} 381 U.S. at 498-99 (Goldberg, J., concurring).

\textsuperscript{126} \textit{See supra} text accompanying notes 103-21.

\textsuperscript{127} This position is defensible because \textit{Griswold} protects decisions of childbearing and no form of sodomy can lead to conception.

\textsuperscript{128} 539 F.2d 349 (4th Cir.), \textit{cert. denied}, 429 U.S. 977 (1976). The plaintiffs, a married couple, solicited and obtained outside partners for their sex acts, which included sodomy. The couple's teenage daughters were encouraged to watch and photograph sex acts performed by their parents with strangers. The situation became known publicly when one of the daughters distributed some of the photographs at school. The Court held that the married couple, acting alone, was protected by the right of privacy. When a third person was
Court of Appeals for the Fourth Circuit held that marital intimacies shared by couples alone in their bedrooms are protected by the right of privacy.\textsuperscript{129}

The more difficult question is whether the constitutional right to privacy protects consensual sodomy between unmarried heterosexuals.\textsuperscript{130} In \textit{Eisenstadt v. Baird}\textsuperscript{131} the United States Supreme Court held that states could not deny contraceptives to unmarried persons. The Court held that the Massachusetts law prohibiting the sale of contraceptives to unmarried persons violated the equal protection clause of the fourteenth amendment because it impermissibly differentiated between married and unmarried persons.\textsuperscript{132} In discussing \textit{Griswold}, the Court in dicta stated:

\begin{quote}
[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the \textit{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.\textsuperscript{133}
\end{quote}

The question posed in interpreting this dicta is whether a general freedom “from unwarranted governmental intrusion into matters fundamentally affecting a person” exists or whether the freedom is limited to the decision “whether to bear or beget a child.” The latter interpretation seems more correct.\textsuperscript{134} In \textit{Carey v. Population Services International},\textsuperscript{135} a divided Supreme Court extended the right to contraceptives to minors. The Court noted that although the outer limits of privacy were unclear,\textsuperscript{136} the right pro-

\begin{itemize}
\item \textsuperscript{129} Id. at 351. In an addendum to the \textit{Lovisi} opinion, the Fourth Circuit noted the summary affirmance of \textit{Doe} and reasoned that only heterosexual conduct was protected by the right to privacy. Id. at 352; see also supra note 63 and accompanying text.
\item \textsuperscript{130} The question is confined to private as opposed to public heterosexual sodomy. See supra note 11.
\item \textsuperscript{131} 405 U.S. 438 (1972).
\item \textsuperscript{132} Id. at 454-55.
\item \textsuperscript{133} Id. at 453 (emphasis in original).
\item \textsuperscript{134} See infra notes 147-49 and accompanying text.
\item \textsuperscript{135} 431 U.S. 678 (1977).
\item \textsuperscript{136} Id. at 684.
\end{itemize}
tected certain fundamental liberties. These included marriage, procreation, contraception, traditional family relationships, and child rearing and education. The Court emphasized that "the decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."  

Carey implies that Eisenstadt's constitutional protection from unwarranted governmental intrusions into fundamental personal decisions is limited to the decision to conceive and bear children. In other words, Eisenstadt and Carey only require that the states not interfere with heterosexual couples' rights to procreation and contraception. They do not suggest that sodomy statutes are invalid. Carey footnotes did discuss briefly whether the states could regulate consensual sexual activity in general but reached no definitive answer. This Supreme Court silence, coupled with the narrow construction demanded of a nontextual right, suggests that courts should hesitate to extend privacy protection to nonmarital heterosexual sodomy.

Several alternative arguments remain. The first is that the right to privacy extends to all consensual sexual activity. This argument is based partially on the Supreme Court decision in Stanley v. Georgia. In Stanley police officers searched the defendant's

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137. Id. at 684-85.
138. Id. at 685 (citing Loving v. Virginia, 388 U.S. 11, 12 (1967)).
139. Id. (citing Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1972)).
140. Id. (citing Eisenstadt v. Baird, 438 U.S. 48, 453-54 (1972)).
141. Id. (citing Prince v. Massachusetts, 321 U.S. 510 (1944)).
142. Id. (citing Pierce v. Society of Sisters, 268 U.S. 570, 575 (1925)).
143. Id. at 685.
144. Expressio unius est exclusio alterius is a maxim of statutory interpretation meaning that the "expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 512 (5th ed. 1979). Applied to Carey, the specific Court expression of each area protected by the right of privacy excludes any other area from privacy protection. See 431 U.S. at 685.
145. 431 U.S. at 688 n.5, 694 n.17, 718 n.2 (Rehnquist, J., dissenting). Justice Rehnquist believed that the limit of privacy had been drawn short of the stipulated deviate sex acts of Doe. Id. at 718 n.2 (Rehnquist, J., dissenting).
146. For example, the Fourth Circuit has expressed doubt that the right to privacy extends to nonmarital sodomy. In the addendum to Lovisi the court stated "the Supreme Court necessarily confined the constitutionally protected right of privacy to heterosexual conduct, probably even that only within the marital relationship." 539 F.2d at 352 (emphasis added).
147. See Doe, 403 F. Supp. at 1203 (Merhige, J., dissenting).
home for evidence of alleged bookmaking activities and found obscene films in the defendant’s bedroom. A divided Court held that the private possession of obscene material in the home was not a crime. The Court reiterated the first amendment right to receive information and ideas, holding that the individual’s right to read or to observe what he pleased was “fundamental to our scheme of individual liberty.” The Court reasoned that the Framers of the Constitution “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.”

The argument following from Stanley is that if a person may view obscene films for sexual gratification in the home, then logically a person may pursue any form of sexual gratification within the home. This interpretation is incorrect. Stanley was a first amendment case and the “liberty” it enunciated was the liberty to receive speech, not to engage in sex acts. Further, the Constitu-

149. Id. at 558.
150. Id. at 568.
151. Id.
152. Id. at 564 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
153. The Supreme Court later limited the right to view obscenity to the home. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). In Paris the Court held that a state can prohibit the display of obscene films to “consenting adults” in a theatre. Id. at 68-69. The Court believed that its function was not “to resolve empirical uncertainties underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist . . . . [A] legislature [can] legitimately act on such a conclusion to protect the ‘social interest in order and morality.’” Id. at 60-61 (quoting Roth v. United States, 354 U.S. 476, 485 (1957)). The Court added that nothing in its decision intimated that there is any “fundamental” privacy right “implicit in the concept of ordered liberty” to watch obscene movies in places of public accommodation. Id. at 66. The idea that the Stanley privacy right to view pornography in the home could move outside the home as a “zone of privacy” therefore was rejected. Id.

By analogy, a state legislature could find a connection between antisocial behavior and sodomy and legitimately act on that conclusion to protect social order and morality. A “fundamental” privacy right likewise does not protect sodomy.

154. Another question is whether the Privacy Act of 1974 codified the right to privacy. 5 U.S.C. § 552(a) (1982). Section 2(a)(4) of that Act contains the congressional finding that the “right to privacy is a personal and fundamental right protected by the Constitution of the United States.” The Act primarily safeguards individuals from the misuse of federal records and grants individuals access to those records. It was not used substantively to support the constitutional right to privacy in either Doe or Carey. Thus, the Act seemingly has not
tion does not incorporate the proposition that conduct involving only consenting adults always is beyond state regulation.\textsuperscript{155}

The breadth of the right to privacy was questioned most recently in \textit{Whalen v. Roe}.\textsuperscript{156} In \textit{Whalen}, the Supreme Court held that the right could not protect the identity of patients who received certain types of drugs.\textsuperscript{157} The Court raised the specter of \textit{Lochner} and pointed out that "state legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."\textsuperscript{158} A year later the Court let stand a lower court decision that refused to extend the rights of privacy and equal protection to prohibit employment discrimination based on adultery.\textsuperscript{159}

\textit{Privacy Attacks by Homosexuals}

The third major question under the privacy analysis is whether the right to privacy protects consensual sodomy between homosexuals. This question is best approached through an analysis of the successful recent attacks on sodomy statutes by homosexuals.\textsuperscript{160}

codified or provided any expanded substantive constitutional right.

In his concurrence in \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 635-38 (1952), Mr. Justice Jackson stated that Presidential power was at its maximum when used pursuant to an express or implied congressional authorization. \textit{Id.} at 635. When the President acts in the absence of a congressional grant or denial, he must rely on his independent powers. \textit{Id.} at 637. Finally, when the President acts incompatibly with the expressed or implied will of Congress, his power is at its nadir. \textit{Id.}

By analogy, the Supreme Court's credibility when creating nontextual rights is maximized when consistent with congressional will and is minimized when inconsistent with congressional will. Despite arguments of judicial independence, the congressional failure to codify the \textit{Griswold} right to privacy leaves the Court standing alone. Further, congressional attempts to repeal portions of the right to privacy indicate the Court's vulnerability when using substantive due process. \textit{See, e.g., S.J. Res. 119, 93rd Cong., 1st Sess. (1973); S.J. Res. 130, 93rd Cong., 1st Sess. (1973) (Helms Amendment); see also Dronenberg, 741 F.2d at 1396.}

\begin{itemize}
  \item \textsuperscript{155} 413 U.S. at 68.
  \item \textsuperscript{156} 429 U.S. 589 (1977).
  \item \textsuperscript{157} \textit{Id.} at 597.
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{160} \textit{See supra} text accompanying notes 82-95.
\end{itemize}
Baker v. Wade

In 1976, *Doe* held that the right to privacy did not protect certain forms of sexual conduct, including homosexual sodomy.\(^{161}\) In *Baker v. Wade*\(^{162}\) however, the United States District Court for the Northern District of Texas distinguished *Doe* as a summary affirmance and held that *Doe* was no longer law under the "doctrinal development" exception to summary affirmances.\(^{163}\) The court cited the footnote discussion in *Carey*\(^{164}\) and the denial of certiorari to *People v. Onofre*\(^{165}\) as "doctrinal developments" in the right to privacy that had invalidated *Doe.*\(^{166}\) The court then construed from *Stanley* that a right exists to engage in any form of sexual gratification in the home.\(^{167}\) It then used the *Eisenstadt* principle of nondistinguishment between married and unmarried persons to bootstrap the original *Stanley* proposition into a general right to engage in any form of sexual gratification with anyone in the home.\(^{168}\)

*Baker* is flawed for several reasons. First, a doctrinal development is a significant change in the Supreme Court's treatment of an issue.\(^{169}\) The doctrinal development exception reasonably cannot be applied to *Doe* because the Supreme Court has not noted probable jurisdiction or considered a sodomy case since *Doe,* and neither the *Carey* footnote discussion nor the denial of certiorari to *Onofre* constitutes a "change of law."\(^{170}\) For these reasons, *Doe* re-

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161. 403 F. Supp. at 1202. In 1973 the Supreme Court upheld a Florida sodomy statute against vagueness and retroactivity attacks. The Court did not address any other constitutional issues but provided implied support to sodomy statutes. Wainwright v. Stone, 414 U.S. 21 (1973). Vagueness attacks on sodomy statutes generally have failed due to incorporation of state common law definitions. 414 U.S. at 22.


164. See supra note 145 and accompanying text.


166. 553 F. Supp. at 1138.

167. Id. at 1141.

168. Id.

169. See Annot., supra note 163, § 6, at 803-04.

170. Id.; see also Hardwick, 760 F.2d at 1213-16 (Kravitch, J., dissenting).
 mains valid and should have controlled *Baker*.

Second, the *Stanley-Eisenstadt* bootstrapping analysis reached too far. *Stanley* was a first amendment case that, after *Paris Adult Theatre I v. Slayton*,\(^{171}\) must be questioned if anyone outside the home or the family is involved. When *Eisenstadt* is added, *Stanley* could reach no further than a right of nonmarried couples to use contraceptives in their home.\(^{172}\) If a broader reading is combined with *Carey*, the *Baker* bootstrapping analysis would protect the right to perform sodomy on minors in the home. That interpretation is inconsistent with recent decisions that protect children from sexual abuse and pornography.\(^{173}\)

*Hardwick v. Bowers*

Most recently, in *Hardwick v. Bowers*,\(^{174}\) the United States Court of Appeals for the Eleventh Circuit distinguished *Doe* as both a lack of standing case and a summary affirmance made inapplicable by the doctrinal developments exception. The court first stated that because *Doe* was a summary affirmance, its holding must be limited carefully.\(^{175}\) Because the court believed the plaintiffs in *Doe* lacked standing, the court chose to believe that the Supreme Court affirmed the Virginia statute on the ground that the plaintiffs lacked standing rather than on the ground that their constitutional claims lacked merit.\(^{176}\)

The Eleventh Circuit was incorrect for several reasons. First, if the Supreme Court had decided that the plaintiffs in *Doe* lacked standing, the Court would not have had jurisdiction to decide the case and would have dismissed their appeal rather than affirm the judgment below.\(^{177}\) Second, the jurisdictional statement in *Doe* mentioned the substantive constitutional issues in the case, but did

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171. 413 U.S. 49; see supra note 153.
172. See supra text accompanying notes 144-52.
173. See New York v. Ferber, 458 U.S. 747 (1982). A unanimous Court upheld a New York ban on child pornography, even if not obscene. The Court noted that the prevention of sexual exploitation and abuse of children were important government objectives that overrode the first amendment. *Id.* at 756-57.
175. *Id.* at 1207.
176. *Id.*
177. *Id.* at 1214 (Kravitch, J., dissenting).
not mention the issue of standing. The district court in Doe also did not mention standing. Because lower court interpretation of a summary affirmance is limited to the jurisdictional statement and because standing was not considered in the Doe statement, the Eleventh Circuit was incorrect when it distinguished Doe as a lack of standing case.\(^{178}\) Third, the decision in Doe was a decision on the merits that did not leave lower courts free to speculate whether the decision was based on a lack of standing.\(^{179}\)

The Eleventh Circuit also held that even if Doe was not a standing case, it had been overruled by the doctrinal developments exception to summary affirmances.\(^{180}\) The court cited footnote five in Carey\(^{181}\) and the denial of certiorari to Uplinger\(^{182}\) as significant subsequent developments in law that had overruled Doe.\(^{183}\) The court was incorrect regarding Carey because the discussion between footnotes five and seventeen indicated not that the right to privacy protected all private sexual conduct but that the right to privacy did not extend as far as the plaintiffs in Carey requested.\(^{184}\) The court was incorrect regarding Uplinger because a denial of certiorari has no precedential value, even where briefs are received and arguments are heard prior to the denial.\(^{185}\)

After attempting to distinguish Doe, the Eleventh Circuit proceeded to the merits and held sodomy to be protected specifically by a fundamental right to “quintessential privacy” and intimate association grounded in both the ninth amendment and the notion of fundamental fairness in the due process clause of the fourteenth amendment.\(^{186}\) The court combined a uniquely expansive view of Griswold and its progeny with Stanley’s first amendment right to speech in the home to create a new fundamental right to “quintes-

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178. Id. at 1213-14.
179. Id. at 1213.
180. Id. at 1208.
181. See supra notes 135-51 and accompanying text.
182. See infra notes 198-202 and accompanying text.
183. Hardwick, 760 F.2d at 1208-10.
184. Id. at 1214-15.
sential privacy".  

Again, the Eleventh Circuit was wrong for several reasons. The right to privacy has been limited to the realm of family, home, or procreation and cannot be distorted to protect deviant sexual preferences. Second, the Supreme Court has not found a right to "quintessential privacy" or sexual freedom and, with Doe remaining the law, the Eleventh Circuit had no license to create such a right.

**People v. Onofre**

In *People v. Onofre* the New York Court of Appeals also distinguished Doe as a case turning on lack of standing. Because a summary affirmance confirms only the holding, not the judgment of a lower court, the court in *Onofre* decided that the Supreme Court allowed the decision to stand because the defendant did not face actual charges, not because the right to privacy did not protect consensual sodomy. After dispensing with Doe, the court focused on the absence of physical harm in consensual sodomy relations and found no evil for the state to prevent and no public interest to protect. The court also distinguished private morality from public morality. It held that the police power protected only public morality. Because, according to the court, private morality had no effect on general public morality, the police power could not reach private morality.

In his dissent, Judge Gabrielli contended that the court had eliminated the long-recognized state power to regulate the moral conduct of its citizens and "to maintain a decent society." He noted that the court had hoisted substantive due process, through modern Lochnerization, to its former status as a vehicle for law-

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187. Id.
188. *See supra* notes 115-59 and accompanying text.
191. Id. at 493, 415 N.E.2d at 943, 434 N.Y.S.2d at 953-54.
192. Id. at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952-53.
193. Id. at 489-90, 415 N.E.2d at 941-42, 434 N.Y.S.2d at 952.
194. Id. at 497, 415 N.E.2d at 945, 434 N.Y.S.2d at 956 (Gabrielli, J., dissenting).
making by judicial fiat. Further, Judge Gabrielli asserted that the privacy cases must be interpreted narrowly, and that the Supreme Court had not created a generalized right of complete sexual freedom.

Judge Gabrielli was correct. *Doe* cannot be dismissed as a standing case for reasons discussed earlier. In summarily affirming *Doe*, therefore, the Supreme Court necessarily upheld both the standing of the plaintiffs and the lower court's holding that the right to privacy does not extend to consensual homosexual relationships.

Second, the court in *Onofre* failed to recognize that private immorality is inseparable from public immorality. Consequently, applying the *Onofre* reasoning has led to absurd results. An excellent example of the natural progression of the decision was the decision of the New York Court of Appeals in *People v. Uplinger*. The court struck down a New York statute that prohibited loitering to solicit partners for deviant sexual conduct by reasoning that the law punished anticipatory sodomy that *Onofre* now protected.

The facts paint a very different picture. One female defendant was flagging down cars on a street corner while making loud and overt offers to sell sexual favors. The primary male defendant asked people on the street whether they would like to participate in deviate sex acts. The heart of the holding seems to be that a right to consensual sodomy would be of little value if one could not go out on the street to solicit sex partners. *Uplinger* demonstrates the

195. Id. at 503, 415 N.E.2d at 949, 434 N.Y.S.2d at 959-60.
196. Id. at 499, 415 N.E.2d at 947, 434 N.Y.S.2d at 957.
197. See Dronenburg, 741 F.2d at 1392; see also supra notes 177-79.
199. N.Y. PENAL LAW § 240.35(a)(3) (McKinney 1980) prohibited loitering "in a public place for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse or other sexual behavior of a deviate nature."
200. 58 N.Y.2d at 938, 447 N.E.2d at 63, 460 N.Y.S.2d at 515.
201. Id. at 942, 447 N.E.2d at 65, 460 N.Y.S.2d at 517-18. (Jasen, J., dissenting).
202. After initially granting certiorari in *Uplinger*, 104 S. Ct. 64 (1984), the Supreme Court decided, per curiam, that certiorari had been improvidently granted. 104 S. Ct. 2332 (1984). The Court considered that the New York Court of Appeals opinion in *Uplinger* was "fairly subject to varying interpretations," leaving the precise constitutional issues unclear. Id. at 2333. Further, meaningful evaluation of the *Uplinger* decision required consideration of *Onofre*, a case not challenged by the petitioners. Id. at 2333-34. Chief Justice Burger,
fallacy of arguing that private morality does not affect public morality.

**Commonwealth v. Bonadio**

The Supreme Court of Pennsylvania decided *Commonwealth v. Bonadio* as a police power question. The court found no public interest and thus no justification for state interference with the onstage sexual exploits of the defendants. The court seemed to require actual physical harm before a legitimate state interest arose. The individual's pursuit of her own "morality," here public sex acts for money, was held more important than the state morality condemning that activity.

The Pennsylvania court made a number of errors in reaching its decision. As noted by Justice Nix's dissent, *Bonadio* did not involve private sodomy. The acts took place onstage before an audience and were conducted for commercial gain. *Paris Adult Theatre I* clarified that the Stanley protection of pornography does not apply outside the home. The court in *Bonadio*, however, did not mention or distinguish *Paris Adult Theatre I*. The court also ignored the longstanding case law that allowed the state to legislate morality, even without physical harm. Finally, the court did not consider or distinguish *Doe. Bonadio* is a clear example of the dangers of judicial Lochnerization. The Pennsylvania Supreme Court overrode the Pennsylvania legislature without even considering relevant case law.

**Dronenburg v. Zech**

In *Dronenburg*, however, the United States Court of Appeals for the District of Columbia Circuit held that the right to privacy did
not extend to homosexual conduct.\textsuperscript{208} The court considered the \textit{Baker} position that \textit{Stanley} and \textit{Eisenstadt} created a general right to engage in any form of sexual gratification in the home and concluded that the right to privacy did not extend that far and certainly did not protect a right to homosexual conduct.\textsuperscript{209} The court considered an argument similar to the \textit{Onofre} position that the legislature could not reach private morality and concluded that such an argument was completely frivolous.\textsuperscript{210} The court concluded that there was no constitutional right to engage in homosexual conduct.\textsuperscript{211}

A critique of the above cases demonstrates that \textit{Doe} remains good law. Consequently, the right to privacy does not protect homosexual sodomy.\textsuperscript{212} No general right of sexual freedom has emerged.\textsuperscript{213} Although debatable interpretations of \textit{Griswold} and its progeny protect marital sodomy and muddy the waters of nonmarital sodomy, the \textit{Hardwick}, \textit{Baker}, and \textit{Onofre} attempts to protect homosexual sodomy are specious.

\textbf{Equal Protection Analysis}

The equal protection clause of the fourteenth amendment directs that "all persons similarly circumstanced shall be treated alike."\textsuperscript{214} Legislatures may classify persons differently so long as the classifications do not involve a "suspect class" or infringe a "fundamental right."\textsuperscript{215} In the absence of these exceptions, the classification need bear only some fair relationship to a legitimate state purpose.\textsuperscript{216} "The judiciary [will] not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. . . ."\textsuperscript{217}

The first step in an equal protection analysis is to determine the

\textsuperscript{209} Id. at 1393-96.
\textsuperscript{210} Id. at 1397.
\textsuperscript{211} Id.
\textsuperscript{212} See id. at 1395-96.
\textsuperscript{213} Id. at 1391.
\textsuperscript{215} Id. at 216-17.
\textsuperscript{216} City of New Orleans v. Dukes, 427 U.S. 297, 303 (1975).
\textsuperscript{217} Id.
particular problem that a state regulation seeks to alleviate. In the case of Virginia's sodomy statute, that problem is sexual conduct that is likely to contribute to legislatively determined moral delinquency.\textsuperscript{218} The state's concern is legitimate because it is well settled that the police power may be exercised to preserve and protect public morals.\textsuperscript{219} The police power can be used to preserve public morality because government is public order and destroying public order weakens government.\textsuperscript{220}

The second step in an equal protection analysis is to determine whether a suspect class has been singled out by the statute. In \textit{Frontiero v. Richardson},\textsuperscript{221} the Supreme Court provided the framework for determining a suspect class. In \textit{Frontiero}, the Court compared sex to the quintessential suspect class of race and concluded that sex was an inherently suspect classification.\textsuperscript{222} The factors considered were whether there was historical stigmatization or overuse of the classification with an implication of inferiority,\textsuperscript{223} whether the classification addressed a discrete and insular minority,\textsuperscript{224} and whether the classification was based on an immutable characteristic.\textsuperscript{225}

Traditionally, the courts have not considered homosexuals to be a suspect class.\textsuperscript{226} The \textit{Frontiero} analysis supports this conclusion. Homosexuals historically have been victimized by the heterosexual majority. The long history of Anglo-American sodomy statutes demonstrates that stigmatization.\textsuperscript{227} The other two factors, however, are not satisfied. Although homosexuals are a minority, they are

\begin{itemize}
\item \textsuperscript{218} \textit{Doe v. Commonwealth's Attorney}, 403 F. Supp. at 1202.
\item \textsuperscript{219} Berman v. Parker, 348 U.S. 26, 32 (1954); see also State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, cert. denied, 398 U.S. 832 (1967).
\item \textsuperscript{220} Cf. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959). New York banned the film "Lady Chatterley's Lover" because it depicted adultery as a moral act. The Supreme Court reversed because the statute impinged on the textually enumerated freedom of speech, not because the state lacked power to regulate moral conduct. \textit{Id}.
\item \textsuperscript{221} 411 U.S. 677 (1973).
\item \textsuperscript{222} \textit{Id} at 688. Sex no longer is considered a suspect classification. See \textit{Michael M. v. Superior Court}, 450 U.S. 464 (1981). \textit{Frontiero} is used only for its suspect-class analysis.
\item \textsuperscript{223} 411 U.S. at 684-87.
\item \textsuperscript{224} \textit{Id} at 686 n.17; see also Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978).
\item \textsuperscript{225} 411 U.S. at 686.
\item \textsuperscript{226} \textit{See Doe}, 403 F. Supp. 1199 (E.D. Va. 1975).
\item \textsuperscript{227} \textit{See supra} notes 25-37 and accompanying text.
\end{itemize}
not a "discrete or insular" minority. Homosexuals are not identified easily by an immutable characteristic, like race or sex, and society is not divided easily along heterosexual-homosexual lines. Appearance alone gives no indication of a person's sexual preference. Sexual preference also arguably is not an immutable characteristic, like race or sex. Because homosexuals fail to meet the last two factors, they are not a suspect class.

Another characteristic defining a suspect class is whether the particular group has been denied participation in the political process. Recent decisions that protect homosexual speech and association have ensured access to the media. The decriminalization of consensual sodomy by twenty-two states reflects the political participation and power of homosexuals. Homosexuals therefore do not need the special protection afforded suspect classes.

The third step in equal protection analysis is to determine whether unnatural sexual activity is a fundamental right. Thus far, the recognized fundamental rights have been limited to voting, appeal, counsel, travel, association, and privacy. By the principle expressio unis, no fundamental right to sodomy exists.

Finally, the fourth step is to determine whether the statute rationally supports a legitimate state purpose. In the absence of a suspect class or a fundamental right, rational basis scrutiny is the applicable standard of judicial review. In this instance, if any persons decline to engage in the prohibited sexual conduct because of the sodomy statute, the legitimate goal of enhancing general morality will be achieved. Although the precise effect of the statutes is not quantifiable, they may inhibit persons inclined toward homo-

229. See supra note 49.
237. See supra note 144 and accompanying text; see also Dronenburg, 741 F.2d at 1397.
sexuality from engaging in sodomy. The statutes, therefore, rationally serve the states' purpose.

The courts that have invalidated state sodomy statutes on equal protection grounds have failed to apply this analysis properly. The court in *Baker* struck down the Texas sodomy statutes both because it could find no legitimate state interest behind the statute and because the heterosexual-homosexual distinction was impermissible. The court was incorrect, however, on both points. First, the "public distaste" for homosexual sodomy that the court found not to be a legitimate state interest is a legitimate interest if it represents the expression of the general public morality. Further, most cases have held that the regulation of morals is within the police power.

Second, the heterosexual-homosexual distinction should have passed rational basis scrutiny. Because sodomy is the only form of sexual expression available to homosexuals, they necessarily are more likely to perform sodomy than heterosexuals. So long as homosexuals are more likely to engage in prohibited conduct, a statute applied only to them is rationally related to the legitimate state goal of preventing, or at least reducing, sodomy. Admittedly the Texas statute and all sodomy statutes have the effect of discriminating against homosexuals by denying them their only sexual outlet while not so denying heterosexuals. In *Washington v. Davis*, however, the Supreme Court held that disproportionate impact alone is insufficient to render a statute constitutionally defective. Some discriminatory intent must exist.

The court in *Onofre*, discovered a different equal protection defect, finding that the New York statute distinguished impermissi-
bly between married and unmarried persons. The court apparently held the view that *Griswold* protects all sexual activity between married persons and that *Eisenstadt* extended that range of sexual freedom to all persons, married or unmarried. Consequently, the court believed that no distinction could be drawn between married and unmarried persons without a rational justification. The Pennsylvania court in *Bonadio* engaged in similar reasoning.

This married-unmarried distinction, like the "pure" heterosexual-homosexual distinction, should not make sodomy statutes defective. Because homosexual couples by definition are unmarried, and homosexuals are more likely to engage in sodomy, a statute applied only to unmarried couples rationally furthers the legitimate state interest in preventing sodomy.

Most recently, the United States Court of Appeals for the Eleventh Circuit circumvented the entire analysis by creating a fundamental right to quintessential privacy and intimate association. The court then remanded the case to the United States District Court for the Northern District of Georgia for strict scrutiny of the statute. The Eleventh Circuit was incorrect because the Supreme Court has never held a fundamental right to sodomy to exist and, with *Doe* remaining the law, the Eleventh Circuit did not have the power to create such a fundamental right.

*Baker*, *Onofre*, and *Bonadio* all demonstrate that the courts which invalidate sodomy statutes do so by distorting the equal protection analysis. In the absence of a suspect class or fundamental right, they are in reality applying a strict scrutiny analysis rather than the proper rational basis scrutiny. *Hardwick* went one step further and created a new fundamental right. These courts are ignoring totally the state's long-recognized ability to define and to protect morality. As a result, the decisions reached by these

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245. 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
246. See *Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968).
247. 51 N.Y.2d at 491-92, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
249. See supra notes 186-87.
250. *Hardwick*, 760 F.2d at 1213.
251. See supra notes 230-37 and accompanying text.
252. See supra notes 186-88.
courts conflict with a proper equal protection analysis of the sodomy statutes.253

THE LEGISLATIVE DECISION

After determining that the states constitutionally may criminalize consensual homosexual sodomy, the question remains whether, as a matter of policy, the states should criminalize such sodomy. Several important factors argue for decriminalization. Philosophically, John Stuart Mill argues that "[t]he only purpose for which power can be rightfully exercised . . . is to prevent harm to others."254 This argument commonly is used to prevent any criminal enforcement of private, consensual, but "immoral," acts.255 Second, as a practical matter, the sodomy statutes virtually are unenforceable and any attempted enforcement will be expensive.256 In addition, crimes more important than sodomy face the state police forces.257 Third, the thought of police peeking in windows or searching bedrooms for evidence of sodomy is distasteful even in the absence of a specific constitutional right to privacy. Finally, an unenforced law often is disregarded by the public. The existence of such a law encourages public disdain for other, more important laws, and may defeat the preservation of order sought by the forced imposition of morality.

Alternatively, sodomy statutes are the type of laws that, even if largely unenforceable, may serve valuable societal interests. First, some forms of consensual sodomy threaten the traditional family unit and consequently threaten society.258 Second, no private act is a true self-regarding act.259 All private, consensual acts necessarily affect other members of society, even if tangentially. Third, en-

253. See supra text accompanying notes 214-53.
254. See supra note 95.
257. Id.
258. Fourth amendment protections against unreasonable search and seizure nullify the danger of this factor.
Enforcement of sodomy statutes may play a crucial role in the containment and eradication of Acquired Immunodeficiency syndrome. Fourth, sodomy statutes play an important role as ancillary charges in sexual assault, rape, or child abuse cases. Sodomy statutes also provide a lesser included offense in forcible or public sodomy cases. Fifth, decriminalization of sodomy without decriminalization of other "victimless" moral crimes like drug use, bestiality, and necrophilia is logically inconsistent. Sixth, government has an obligation to provide social norms for its citizens and government should provide examples of acceptable and unacceptable conduct. Even if disobeyed by a vocal minority, these laws provide necessary moral guidance to the bulk of society.

Disregard of the law, moreover, does not prevent sodomy statutes from having an effect on homosexuals. First, laws prohibiting sodomy apparently do dissuade some persons from homosexual activity. Second, the sodomy laws have a larger opportunity for enforcement against homosexuals because people are more likely to report homosexual misconduct. Third, the laws indirectly support societal discouragement of homosexuality. For these reasons, a state legislature rationally could continue the criminalization of homosexual sodomy.

Conclusion

Attempts to expand the right to privacy to protect private consensual sodomy should fail. The right to privacy is not absolute and never was intended to protect sodomy. Because the Supreme Court created the right to privacy by judicial Lochnerization, the right must be defined narrowly. The equal protection attacks on sodomy statutes are inapposite because homosexuals are not a suspect class, because no fundamental right to sodomy exists, and because the sodomy statutes rationally support a legitimate state purpose. For these reasons, Doe v. Commonwealth's Attorney remains the proper expression of the law.

261. See supra notes 41 & 239.
262. See Hook, supra note 238, at 2.
263. Id. at 3 (discussing the prevalence of blackmail against homosexuals).
265. See supra text accompanying notes 121 & 196.
The larger issue is which branch of government should decide moral questions for our society. The state legislatures traditionally made all decisions concerning sexual morality until Griswold. The state legislatures should be allowed to continue to resolve these questions. Decisions regarding morality require the balancing of broad policy considerations. Legislatures are better suited for these decisions. Thus, judicial interference should be minimized.

Finally, granting that the states have the power to criminalize consensual sodomy, they should balance carefully the efficacy of a sodomy statute with the practicalities and problems of its enforcement. Twenty-two states have reacted to these factors by decriminalizing consensual sodomy.266 Conversely, if a legislature determines that the prohibition of consensual sodomy will enhance general morality, it should be free to make that choice.

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266. See supra note 49.