University of Baltimore Law Review

Volume 9
Issue 1 *Fall 1979*

Article 5

1979

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HOMOSEXUAL RIGHTS: THE LAW IN FLUX AND CONFLICT

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This Article examines the recent surge in litigation arising from homosexuals' assertions of Constitutional rights. The author concludes that the recent cases reflect substantial judicial confusion, and suggests that both Constitutional principles and libertarian philosophy generally require resolution of the conflicts in favor of equality without regard for sexual preference.

Although in most states and many countries homosexual activity remains condemned as a crime,[1] there is a growing public and political disposition to regard the condition as something that should be treated — or tolerated.[2] Many go even further, asserting

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1. *See* ALA. CODE § 13-1-110 (1978); ARIZ. REV. STAT. ANN. §§ 13-1411 to -1412 (1978); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (1973); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 26-2002 (1972); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1974); KY. REV. STAT. § 510.100 (1975); LA. REV. STAT. ANN. §§ 14:89 to 89.1 (West 1974 & Supp. 1979); MD. ANN. CODE art. 27, §§ 553-554 (Supp. 1979); MASS. GEN. LAWS ANN., ch. 272, §§ 34, 35 (West 1970); MICH. COMP. LAWS ANN. §§ 750.158, 750.338, 750.338a (1968); MINN. STAT. ANN. § 609.293 (West Supp. 1978); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 566.090 (Vernon 1979); MONT. REV. CODES ANN. § 94-5-505 (1977); NEV. REV. STAT. § 201.190 (1977); N.Y. PENAL LAW § 130.38 (McKinney 1975); N.C. GEN. STAT. § 14-177 (1969); OKLA. STAT. ANN. tit. 21, § 886 (West 1958); 18 PA. CONS. STAT. ANN. § 3124 (Purdon 1973); R.I. GEN. LAWS § 11-10-1 (1969); S.C. CODE ANN. § 16-15-120 (1977); TENN. CODE ANN. § 39-707 (1975); TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (Supp. 1979); VA. CODE § 18.2-361 (Supp. 1979); WIS. STAT. ANN. § 944.17 (West Supp. 1979).

   Maryland is one of 29 states that imposes criminal penalties for private homosexual conduct between consenting adults. MD. ANN. CODE art. 27, §§ 553-554 (Supp. 1979). *See generally* Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*, 30 MD. L. REV. 91 (1970). In 1976, the Maryland legislature rejected the State Commission on Criminal Law's recommendation that private sodomy be deleted from the Crimes and Punishments article of the Maryland Annotated Code.

2. *See, e.g.*, Section of Individual Rights and Responsibilities, *Recommendation and Report to the House of Delegates*, 4 HUMAN RIGHTS 67 (1974); REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, Report No. 247 (1957); MODEL PENAL CODE § 207.5(1), Comment (Tent. Draft No. 4, 1955). All of the preceeding authorities have recommended the abolition of criminal penalties for consenting homosexual acts. *See generally* E. BERGLER, HOMOSEXUALITY: DISEASE OR WAY OF LIFE? (1971); T. LA HAYE, THE UNHAPPY GAYS (1978); and A. BRYANT, THE ANITA BRYANT STORY (1977).

   State and federal courts, however, routinely inflict criminal punishments on consenting homosexual adults. See notes 167-74 and accompanying text *infra.*

that one's sexual preference must be fully respected and that, provided there is no imposition of one's proclivity upon others, it should neither be a bar to employment nor impinge free speech or association.[3] Is this view the enlightened opinion of legal scholars and social scientists, or a less deliberate and more biased predilection of "libertarians" and homosexuals themselves?

There are several thousand reported cases in which homosexuality has been an issue,[4] and many of the decisions regarding constitutional rights are conflicting. Judicial opinions in the area may be roughly divided into those which look upon homosexuals as either sick or immoral,[5] and those which view them merely as an unpopular group entitled to the same civil liberties as anyone else.[6] In the meantime, a legislative trend toward removing the criminal sanctions, at least as they pertain to consensual sodomy, appears to be taking shape.[7]

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3. In California, the so-called gay rights movement has gone a step beyond, by asserting the right to proselytize. The City of San Francisco actively recruits homosexual police officers. *See San Francisco Recruiters Open Gates to Gay Lawmen,* Balt. Sun, May 8, 1979, at B1, col. 5.
4. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799 (1979). *See generally* Knutson, *The Civil Liberties of Gay Persons,* 2 J. HOMOSEXUALITY 337 (1977). Professor Knutson is principal investigator on a project to gather data pertinent to sodomy and homosexual cases, sponsored by the Center for Homosexual Education, Evaluation, and Research, San Francisco State University.

   Although Maryland has not been, by any stretch of the imagination, a frontrunner in pursuing homosexual rights, a significant number of cases involving sodomy recently have been before the Maryland courts. *See* State v. Grady, 276 Md. 178, 345 A.2d 436 (1975); *In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975); Phipps v. State, 39 Md. App. 206, 385 A.2d 90 (1978); Gooch v. State, 34 Md. App. 331, 367 A.2d 90 (1976); Edmonds v. State, 18 Md. App. 55, 305 A.2d 205 (1973).
5. *See generally* Knutson, *The Civil Liberties of Gay Persons,* 2 J. HOMOSEXUALITY 337, 339–40 (1977).
6. *Id. See also* Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1973), *cert. denied,* 419 U.S. 836 (1974); note 145 and accompanying text *infra.*
7. The following 22 jurisdictions had, as of July of 1979, removed criminal sanctions imposed upon private homosexual acts between consenting adults: Alaska; California; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Iowa; Maine; Nebraska; New Hampshire; New Jersey; New Mexico; North Dakota; Ohio; Oregon; South Dakota; Vermont; Washington; West Virginia; Wyoming. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799, 950–51 (1979).

   In Maryland, a local ordinance has been passed by Howard County which prohibits discrimination based upon "sexual orientation or personal appearance." HOWARD COUNTY, MD., CODE § 12.200 (1978). Sexual orientation has been defined in the Code as "the status of an individual as to homosexuality, heterosexuality or bisexuality by preference or practice." *Id.* at § 12.201(x).

   Legislators fear voter backlash should they support repeal of sodomy laws. The Community Relations Commission of Baltimore, for example, has drafted an ordinance prohibiting discrimination against homosexuals, but has voiced pessimism over its chances for passage in an election year. UNPUBLISHED MINUTES OF COMMUNITY RELATIONS COMMISSION, June 20, 1979. Note, however, that Maine repealed its sodomy law precisely because it was unenforceable. Potter, *Sexual Offenses,* 28 ME. L. REV. 65 (1976). Many western nations also permit homosexual acts without penalty. *See* Richards, *Unnatural Acts and the*

The purpose of this Article is to examine the constitutional foundations and confused status of homosexual rights, and to address the difficulties inherent in attempting to escape the legal quagmire.[8]

I. BACKGROUND

Once rarely addressed except by psychiatrists and academics,[9] the issue of homosexual rights today is commonly found in local elections, parent-teacher association meetings, corporate board deliberations, daily news reportage, and a variety of other milieus.[10] Unfortunately, though, relaxation of the taboo has not always served to clarify the pertinent moral and legal questions. The stereotype of the homosexual is still a confused hodgepodge, often yielding the image of an effeminate character with a sibilant vocabulary. *Webster's New Collegiate Dictionary* defines homosexuality simply as the sexual desire for members of one's own sex. But homosexuals are not necessarily pederasts (older men interested in young boys) nor transexuals (persons who exhibit gender confusion and appear to be uncomfortable with their respective sex roles), nor transvestites (people who are primarily heterosexual but derive pleasure from dressing as members of the opposite sex).[11] And debate still rages whether homosexuality is a disease.[12]

The law regarding homosexuality is but slightly more clear than the moralistic questions. In most jurisdictions one has the right to *be* a homosexual, but no right to *participate* in homosexual activity. Under the Constitution a person cannot be punished for physical

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Constitutional Right to Privacy: A Moral Theory, 45 FORDHAM L. REV. 1281, 1336 (1977) [hereinafter cited as Richards]; W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 293, 305-07 (1973).

8. For an exhaustive discussion of homosexual issues, *see* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).
9. *See generally* J. LAURITSENT AND D. THORSTAD, THE EARLY HOMOSEXUAL RIGHTS MOVEMENT (1864-1935) (1974). *See also* JEREMY BENTHAM'S ESSAY ADVOCATING DECRIMINALIZATION OF SODOMY (1785) (referred to at 3 J. HOMOSEXUALITY 309 (1978)).
10. *See, e.g., More Cities Face Battles Over Homosexual Rights*, N.Y. Times, May 28, 1978, at 36, col. 3.
11. *See generally* A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 610-66 (1948). *See also* W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE (1979).
12. The American Psychiatric Association no longer classifies homosexuality as a mental disease. *See* N.Y. Times, April 9, 1974, at 12, col. 4. *Compare* T. LA HAYE, THE UNHAPPY GAYS (1978), *with* D. LOOVIS, STRAIGHT ANSWERS ABOUT HOMOSEXUALITY FOR STRAIGHT READERS (1977). *See also* A. Bieber, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS (1962); and note 17 *infra*.

traits over which he[13] lacks control (*e.g.*, alcoholism), but neither will the same individual be permitted to justify his participation in acts which historically have been considered "unnatural."[14] Moreover, homosexuality has been used legally as a basis for discrimination in employment.[15]

The earliest association of homosexuality with the term "unnatural" can be found in Plato's *Laws*.[16] Although Plato himself was thought to be a homosexual,[17] he firmly maintained that sexual relations between men are unnatural in that they undermine the development of desired masculine traits, such as courage and self-control.[18] (Implicit in this notion is the idea that homosexuality degrades men to the status of women, which most other Greek philosophers also found shameful.) Plato's belief was reflected in early Judaeo-Christian thought that male sexuality has as its only purpose procreation within marriage.[19]

The concept that homosexuality results in a diminution of men to the status of women can be traced to the *Book of Leviticus*, in which it is written: "If a man also lie with mankind as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be upon them."[20] Such religious condemnation of homosexuality became the rationale for the none-too-subtle bias of a number of legal scholars among whom was Blackstone, who obliquely defined the homosexual act (presumably sodomy) as "an infamous *crime against nature*, committed with either man or beast . . . the very mention of which is a disgrace to

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13. The writer, having purposefully chosen to use the traditional impersonal masculine pronoun, notes that in most jurisdictions female homosexuality — lesbianism — is legal. *But see* United States v. Cozart, 321 A.2d 342 (D.C. 1974) (sodomy also includes cunnilingus).
14. *See generally* Richards, note 7 *supra*.
15. *See, e.g.*, Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977); Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N.W.2d 379 (1974). *See also* notes 131-52 and accompanying text *infra*.
16. PLATO, LAWS, Book VIII 835(d)-42(a).
17. In a letter to an American mother, Freud wrote:
    > Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respected individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo de Vinci, etc.) It is a great injustice to persecute homosexuality as a crime, and cruelty too.

    LETTERS OF SIGMUND FREUD 1873-1939, 419-20 (E. Freud 1961).
18. PLATO, LAWS, Book VIII 835(d)-42(a).
19. *Id. See also* Richards, note 7 *supra*, at 1293-94.
20. *Leviticus* 20:13. *See also Genesis* 19 (recounting the fall of Sodom and Gomorrah); Richards, note 7 *supra*, at 1294-95; Goodich, *Sodomy in Ecclesiastical Law and Theory*, 1 J. HOMOSEXUALITY 427 (1976).

human nature."[21] Blackstone concluded that the proper punishment for the crime was death, preferably by burning.[22]

The crime of homosexuality was originally within the sole province of the ecclesiastical courts; the first English statute was enacted in 1533.[23] In this country most states passed laws against sodomy at an early date, and the majority have them to this day.[24] Although Blackstone's characterization of sodomy remains in use in several American jurisdictions,[25] constitutional objections to the vagueness of the term "unnatural" as used in criminal statutes have led to greater specificity in criminal codes. The laws of Virginia, for example, contain the following language:

> 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 six felony.
> If any person shall by force carnally know any male or female person by the anus or by or with the mouth he or she shall be guilty of a class three felony.[26]

It was this statute that formed the basis of the landmark case of *Doe v. Commonwealth's Attorney*.[27]

The plaintiffs in *Doe* sought a declaratory judgment that the Virginia law was unconstitutional insofar as it affected private homosexual activities between consenting adults. Among other arguments, they claimed the statute violated their constitutional right to privacy.[28] The United States District Court for the Eastern

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21. 4 W. BLACKSTONE, COMMENTARIES *215, (emphasis in original). *See generally* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976).
22. 4 W. BLACKSTONE, COMMENTARIES *216.
    Blackstone traces the historical origin of such punishment to biblical times, observing that the "voice of nature and of reason and the express law of God determined [sodomy] to be capital. Of which we have a signal instance long before the Jewish dispensation by the destruction of two cities by fire from heaven; so that this is a universal, and not merely a provincial, precept." *Id.* (footnote omitted).
23. 25 Hen. 8, c.6 (repealed by 9 Geo. 4, c.31 [1828]). *See also* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 80 (1973).
24. *See* note 1 *supra*; Comment, *The Constitutionality of Sodomy Statutes,* 45 FORDHAM L. REV. 553, 553 n.1, 570 n.93 (1976).
25. *See, e.g.,* MASS. GEN. LAWS ANN., ch. 272, § 34 (West 1970). *See also* R. PERKINS, CRIMINAL LAW 389-92 (2d ed. 1969).
26. VA. CODE § 18.2-361 (Supp. 1979). Maryland's statute is worded similarly.
27. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976). *Cf.* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1078 (5th Cir. 1976) (dissenting opinion), *cert. denied,* 430 U.S. 982 (1977).
28. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200 (E.D. Va. 1974). *See generally* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A case Study in Human Rights and the Unwritten Constitution,* 30 HASTINGS L.J. 957 (1979).

District of Virginia, however, declared that the so-called right to privacy extended only to married couples and not to homosexual relationships, and that the "promotion of morality and decency" was a sufficient basis for the prohibition of private sodomy.[29] The case was affirmed without opinion by the Supreme Court of the United States.[30]

II. THE RIGHT TO PRIVACY: *GRISWOLD* THROUGH *ROE* TO *DOE* AND BEYOND

The concept of a guaranteed right to privacy was first seriously contemplated in an 1890 law review article by Samuel D. Warren and Louis D. Brandeis.[31] It was recognized as early as 1902 in the context of civil torts, and has been frequently invoked since, both statutorily and through case law.[32] The theory of a *constitutional* right to privacy, however, is of far more recent vintage. Prior to 1965, privacy had never been regarded as an independent constitutional right — perhaps simply because the word "privacy" appears nowhere in the Constitution.[33] But the Supreme Court in *Griswold v. Connecticut*[34] invalidated a statute forbidding the use of contraceptives as it applied to a married couple, on the grounds that it violated a constitutional right to privacy implicit in the marital relationship.

Justice Douglas, writing for the Court, found that an independent right to privacy could be inferred from a number of constitutional provisions:

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29. *Id.* at 1202.
30. 425 U.S. 901 (1976) (Justices Brennan, Marshall, and Stevens would have noted probable jurisdiction and brought the case on for hearing). Apparently Justice Marshall would have extended *Roe* in order to reverse the district court. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 425 (1979).

    The *Doe* case was heard in the district court before a three-judge court pursuant to 28 U.S.C. § 2281 (1970), and was before the Supreme Court by right of direct appeal pursuant to 28 U.S.C. § 1253 (1970).

    With respect to the effect of a memorandum affirmance on appeal, see note 56 and accompanying text *infra.*
31. Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).
32. *See* Roberson v. Rochester Folding-Box Corp., 171 N.Y. 538, 64 N.E. 442 (1902); N.Y. Sess. Laws, ch. 132, § 1-2 (1903).
33. *Cf.* U.S. CONST. amend. V ("private property"). Marital privacy, as a fundamental right, was first discussed by the United States Supreme Court in the dissenting opinions of Justices Douglas and Harlan in Poe v. Ullman, 367 U.S. 497 (1961). Justice Harlan's dissent in *Poe* only recognized marital sexual intimacies as worthy of a right to privacy. He specifically excluded all extramarital sexual conduct, including homosexuality. *Id.* at 553. Sexual privacy was mentioned as early as Skinner v. Oklahoma, 316 U.S. 535 (1942), an equal protection case, but one emphasizing marriage and procreation as "basic civil rights" and requiring "strict scrutiny." For a discussion of the strict scrutiny standard of review see notes 67-95 and accompanying text *infra.*
34. 381 U.S. 479 (1965).

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[35]

Justice Goldberg, concurring and joined by Chief Justice Warren and Justice Brennan, believed the right to privacy was included in the "liberty" interest protected by the fourteenth amendment, using the ninth amendment as evidence that such liberty was not restricted to specific provisions of the Bill of Rights.[36] Justice Harlan, also concurring, declared the right to privacy to be part of the due process clause of the fourteenth amendment, "implicit in the concept of ordered liberty."[37] Harlan's view later received majority approval in *Roe v. Wade,*[38] where the Court stated:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is,* or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[39]

The constitutional right of privacy was extended to include circumstances outside marriage. In *Stanley v. Georgia,*[40] the Court held unconstitutional a state law prohibiting the private possession of obscene materials. "[A]lso fundamental," said the Court, "is the right to be free from unwarranted governmental intrusions into one's privacy."[41] Three years later, in *Eisenstadt v. Baird,*[42] the

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35. *Id.* at 484.
36. Griswold v. Connecticut, 381 U.S. 479, 487 (1965).
37. *Id.* at 500. Due process was likewise the basis for Justices Goldberg, Warren, Brennan, and White. Justice Douglas also mentions the due process clause of the 14th Amendment, but it is not clear whether he is referring to incorporation or to an independent source of rights.
38. 410 U.S. 113 (1973).
39. *Id.* at 153 (emphasis added).
40. 394 U.S. 557 (1969). *See* notes 53-55 and accompanying text *infra.*
41. *Id.* at 564.
42. 405 U.S. 438 (1972).

Supreme Court struck down a Massachusetts statute which forbade the distribution of contraceptives to single individuals, on the grounds that it violated the equal protection clause of the fourteenth amendment.[43] The *Eisenstadt* majority held that *Griswold's* doctrine of marital privacy was actually an individual right — that indeed if the right of privacy means anything, it is the right of the individual (married or single) to be free from unwarranted governmental meddling into matters so personal as the decision whether to bear a child.[44]

A number of lower courts have suggested that the right of privacy, as enunciated in *Griswold* and extended and modified in *Eisenstadt* and *Roe,* could be applied to protect private adult consensual homosexual acts from criminal prosecution.[45] The Supreme Court's summary affirmance of the *Doe* decision, however, appears to support a contrary conclusion.

When the lower federal court in *Doe* upheld the Virginia statute, it narrowly construed *Griswold* as limiting the right of privacy to the marital relationship. "Homosexual intimacy" was not protected because it "is obviously no portion of marriage, home, or family life."[46] The Virginia district court cited both Justice Goldberg's concurring opinion in *Griswold*[47] and Justice Harlan's dissenting opinion in *Poe v. Ullman*[48] for the proposition that homosexual activity is still "denunciable by the State."[49] Additionally, valid concerns of "morality and decency"[50] were found to be served by the statute in question, because these interests formed a "rational basis of state interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court."[51]

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43. 405 U.S. at 446-55. The Court never addressed the statute's validity under the strict scrutiny test because the law failed to satisfy the more lenient equal protection standard. *Id.* at 447 n.7. Some commentators believe this case extended the right of privacy to homosexuals. *See, e.g.*, Annot., 58 A.L.R.3d 636, 639-40 (1974).
44. *Id.* at 453. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (Court invalidated zoning ordinance that deprived grandmother from living in same residence with grandsons). Prior to *Griswold,* it was assumed that sodomy laws applied as well to husband and wife. *See* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 55 (1973). *See also* Roe v. Wade, 410 U.S. 113, 152-53 (1973).
45. *See, e.g.*, United States v. Brewer, 363 F. Supp. 606 (M.D. Pa.), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), *cert. denied,* 416 U.S. 990 (1974); State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), *rev'd on other grounds sub nom.* State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976). The latest case to bring consensual homosexual activity under the protection of the right to privacy — both subsequent and contrary to *Doe* — is New York v. Onofre, 48 U.S.L.W. 2520 (N.Y. App. Div. 1980).
46. 403 F. Supp. 1199, 1202 (E.D. Va. 1975).
47. *Id.* at 1201 (quoting Griswold v. Connecticut, 381 U.S. 479, 498-99 (1965)).
48. *Id.* at 1201-02 (quoting Poe v. Ullman, 367 U.S. 497, 546 (1961)).
49. *Id.* at 1201.
50. *Id.* at 1202. *See* note 187 and accompanying text *infra.*
51. *Id.* at 1203.

Only the dissenting opinion of Justice Merhige sought to bring homosexuality under the umbrella of the right to privacy. Applying both *Eisenstadt* and *Roe,* he would have ruled that

> the right to privacy in sexual relationships is not limited to the marital relationship. . . . [I]ntimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.[52]

Had the Supreme Court chosen to hear argument in *Doe,* it would undoubtedly have been provided the cogent suggestion that the constitutional right of privacy enunciated in *Stanley, Eisenstadt,* and *Roe* must logically apply to homosexual activity within the home. The Court in *Stanley* appeared to go a good deal further than merely prohibiting the government's regulation of privately-held pornography:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[53]

In this context are not body and mind synonymous? It is significant that the Court took pains to quote from *Olmstead v. United States*[54] in suggesting the constitutional derivation of the right of privacy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, *their emotions and their sensations.* They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the most valued by civilized man.[55]

52. *Id.* at 1204 (Merhige, J., dissenting).
53. Stanley v. Georgia, 394 U.S. 557, 565 (1969).
54. 277 U.S. 438 (1928).
55. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)) (emphasis added). *See generally* Wilkinson & White, *Constitutional Protection for Personal Lifestyles,* 62 CORNELL L. REV. 563 (1977).

It should be noted that the precedential value of the Supreme Court's summary affirmance of *Doe* is not altogether certain. It is well established that a summary affirmance does not necessarily represent adoption of the opinion below, and may only be the most effective way for the Court to avoid a decision in order to gain time for a more thorough consideration of the issue in question.[56] Yet the Fourth Circuit has already held that the Supreme Court's decision in *Griswold* "necessarily confined the constitutionally protected right of privacy to *heterosexual* conduct, probably even that only within the marital relationship."[57] One probable result of *Doe,* at least, is to validate the various anti-sodomy statutes in effect today.[58]

For this reason, and because the Court's summary affirmance appeared to reverse the trend toward expansion of the individual's right to privacy and protection from unwarranted government regulation, *Doe* has been greeted with a broadside of criticism by civil libertarians and legal scholars.[59] Perhaps the most penetrating condemnation of *Doe,* and the most thorough analysis of and argument for the homosexual's right to privacy, is Professor Richards' learned article.[60] He quotes at length from Judge Merhige's dissenting opinion,[61] and concludes that:

> The Supreme Court's summary affirmance . . . reflects popular imagination, abruptly truncating the reach of constitutional values in the name of "unnatural acts," which are excluded from the constitutional scrutiny otherwise required. In *Doe,* the Court failed to develop constitutional values in a reasonable way. Instead of showing how constitutional values, popularly accepted in the area of contraception, equally apply to unjustly hated minorities, the Court acquiesced in unexamined popular bromides and shabby arguments unworthy of our constitutional tradition.[62]

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56. *See* Fusari v. Steinberg, 419 U.S. 379, 391-92 (1974) (Burger, C.J., concurring). *See also* Comment, *The Constitutionality of Sodomy Statutes,* 45 FORDHAM L. REV. 553, 554-55 n.12 (1977). *But see* Note, *Supreme Court Per Curiam Practice: A Critique,* 69 HARV. L. REV. 707, 713 (1956).
57. Lovisi v. Slayton, 539 F.2d 349, 352 (4th Cir. 1976) (emphasis added). *See also* Cotner v. Henry, 394 F.2d 873 (7th Cir.), *cert. denied,* 393 U.S. 847 (1968); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds,* 401 U.S. 989 (1971). Dicta in a number of cases, however, have interpreted the Court's holding in Eisenstadt v. Baird, 405 U.S. 438 (1972), as extending the right of sexual privacy to all persons. *See* note 45 and accompanying text *supra.*
58. *See* L.A. Times, March 30, 1976, at 1, col. 3.
59. *E.g.,* Note, *Doe v. Commonwealth's Attorney: A Setback for Right to Privacy,* 65 KY. L.J. 748 (1977). *See In re* P., 92 Misc. 2d 62, 400 N.Y.S.2d 455 (1977) (court specifically rejected *Doe*); N.Y. Times, Apr. 8, 1976 at 37, col. 1; N.Y. Times, Mar. 30, 1976, at 17, cols. 1 & 2; Knutson, *The Civil Liberties of Gay Persons,* 2 J. HOMOSEXUALITY 337 (1977).
60. Richards, *supra* note 7.
61. *Id.* at 1321.
62. *Id.* at 1346.

But in pouring forth an impressive torrent of empirical and philosophical proofs that homosexuality is natural and harmless, it appears that the professor may be protesting too much. His soundest argument is often obscured. The fact remains that the practice of homosexuality has offended the moral sensibilities of the greater part of society throughout history, and that fact cannot easily be dismissed with the theory that the immorality of homosexuality is but "mere social convention."[63] (To posit further that "love is a civil liberty"[64] is to flirt with the dubious notion of law as poetry.)

The strongest argument should be, simply, that there is no legal *or* moral justification for discriminating against any group, no matter how unpopular, when that group does not seek to *impose* its views upon others and when a deleterious effect on the broader society cannot be demonstrated.[65] The more difficult question is how to determine when a personality trait becomes an imposition, or when an unpopular private activity adversely effects the public welfare. The right to privacy, after all, is a double-edged sword.[66]

III. EQUAL PROTECTION: *EISENSTADT, FRONTIERO,* AND *DOE*

The *Doe* case serves likewise to articulate another facet of homosexual-rights litigation: homosexuals are not viewed as a "suspect class," against whom any discrimination must be subjected to the "strict scrutiny" test, but instead are treated as a group to which the less severe "rational basis" standard is applied.

The fourteenth amendment provides that no state shall deny any person the equal protection of the law.[67] In its protection of individual rights, this clause has been interpreted to preclude "the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions."[68] In many situations the government need only establish some rational basis for its discriminatory behavior in order to justify regulatory prohibitions.[69] But where a discriminatory law touches upon a "fundamental interest,"[70] or creates a "suspect classifica-

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63. *Id.* at 1338.
64. *Id.* at 1347.
65. *See* New York v. Onofre, 48 U.S.L.W. 2520 (N.Y. App. Div. 1980), and notes 177-197 and accompanying text *infra.*
66. *See* Breard v. Alexandria, 341 U.S. 622 (1951) (local ordinance forbidding door-to-door solicitation held not to violate 1st or 14th amendments); *cf.* Martin v. Struthers, 319 U.S. 141 (1943) (local ordinance forbidding any person to distribute handbills door-to-door held invalid as a denial of freedom of speech and press). *See also* notes 177-97 and accompanying text *infra.*
67. U.S. CONST. amend. XIV. The fifth amendment by implication prohibits similar actions by the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954).
68. Comment, *The Legality of Homosexual Marriage,* 82 YALE L.J. 573, 582 (1973).
69. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1975); Mc Gowan v Maryland, 366 U.S. 420, 426 (1961).
70. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 626-30 (1969).

tion,"[71] strict judicial scrutiny is required and the government must establish that the legislation is necessary to promote a compelling state interest.[72]

Suspect classes are composed of "discrete and insular minorities," groups incapable of looking after their own interests through normal political means.[73] To date, only classifications by race, alienage, and national origin have been held suspect;[74] the category "poor people" has been rejected as a suspect classification because it is too "large, diverse, and amorphous."[75] The criteria that the Court has developed to determine the existence of a suspect classification include whether the classification is based upon traits over which the individual has no control; whether it is more the reflection of historic prejudicies than legislative rationality; whether the group discriminated against is relatively powerless to protect its interest in the political arena; and, finally, whether the classified group has a history of having been subjected to purposefully unequal treatment.[76]

Although it is unclear how many criteria there are to determine a suspect class, or how many need be satisfied, homosexuals do appear to meet at least several of the enunciated tests. They apparently have no control over their sexual proclivities; laws punishing the condition may arguably derive more from historical prejudice than reason; and homosexuals, though increasingly vocal and politically active, have a long history as objects of discrimination.

Although homosexuals appear to meet each of these measures for a suspect class, the courts thus far have refused to apply a stricter standard of review in cases regarding discrimination against them,[77] inquiring instead only as to the state's rational basis in support of the discrimination.[78]

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71. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967) (voiding a Virginia anti-miscegenation statute).
72. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969).
73. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See generally* Comment, *The Constitutionality of Sodomy Statutes,* 45 FORDHAM L. REV. 553, 587 (1977); and note 20 *supra.*
74. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. Florida, 379 U.S. 184 (1964).
75. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
76. *Id.* at 28. *See* Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972) (sodomy between married and unmarried individuals held not to deny equal protection of law).
77. *See* Comment, *The Constitutionality of Sodomy Statutes,* 45 FORDHAM L. REV. 553, 588 n.185 (1977).
78. *See, e.g.,* Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md.), *aff'd,* 491 F.2d 498 (4th Cir. 1973), *cert. denied,* 419 U.S. 836 (1974). *Cf.* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct,* 72 MICH. L. REV. 1613, 1622 (1974) (a finding that certain homosexual conduct is protected by the right of privacy would not invalidate state laws prohibiting such conduct, but would merely subject them to strict scrutiny).

It is difficult to avoid the conclusion, however, that classifications based upon sexual preference should be entitled to at least the same degree of scrutiny afforded those based on sex. In *Frontiero v. Richardson,*[79] four Justices declared in a plurality opinion that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[80] The rationale was that sex, like race or national origin, is an immutable characteristic determined at birth, and that our nation has engaged in a long and unfortunate history of sex discrimination.[81] Similarly, although there is a difference of opinion whether sexual preference is congenital, few dispute the fact that it is apparently beyond the individual's control from a very early age — or that homosexuals have been social outcasts of long standing.[82] While the *Frontiero* rationale has never been voiced by a majority of the Court,[83] it could provide a persuasive analogy for the argument that sexual preference should be protected from discrimination.[84]

The other path by which classifications based upon homosexual orientation could receive strict judicial scrutiny requires a demonstration that unequal treatment directly affects a fundamental interest,[85] that is, a right which is explicitly or implicitly guaranteed by the Constitution.[86] The right to privacy, for example, has been held a fundamental interest for the purpose of an equal protection analysis.[87] Thus, discriminatory schemes based on homosexual

79. 411 U.S. 677 (1973).
80. *Id.* at 682.
81. *Id.* at 684.
82. *See* notes 2 & 11 *supra,* and note 103 *infra.*
83. In fact, the Supreme Court recently has all but sounded the death knell for sex as a suspect classification. In Stanton v. Stanton, 421 U.S. 7 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Scheslinger v. Ballard, 419 U.S. 498 (1975), the Court employed a vigorous version of the rational basis test rather than relying upon sex as a suspect classification. Even Justice Brennan, who had taken such a strong stance in favor of sex as a suspect classification in *Frontiero,* elected to apply the rational basis test in *Wiesenfeld.* More recently, however, the Court has developed and clarified the standard of review to be applied to gender based classifications. Legislation establishing such classifications must substantially relate to the achievement of an important governmental objective. Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976). Discrimination against homosexuals is arguably *sex* discrimination in that both heterosexuals and lesbians are protected. *See* note 152 and accompanying text *infra.*
84. *See* Comment, *The Constitutionality of Sodomy Statutes,* 45 FORDHAM L. REV. 553, 588 n.185 (1977).
85. *See* note 70 *supra.*
86. *See* Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969). Interests that have been declared to be fundamental for purposes of equal protection include the freedom of speech (Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)); the right to interstate travel (United States v. Guest, 383 U.S. 745 (1966)); the right to procreate (Skinner v. Oklahoma, 316 U.S. 535 (1942)); the right to vote in state elections (Reynold v. Sims, 377 U.S. 533 (1964)); and the right to an appeal from a criminal conviction (Griffin v. Illinois, 351 U.S. 12 (1956)).
87. *E.g.,* Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* notes 27-65 and accompanying text *supra.*

preference may require strict scrutiny because the unequal treatment affects the individual's right to privacy.[88]

Since the appointment of Warren Burger as Chief Justice, the Supreme Court has expressed mounting discontent with the available guidelines (applying either strict scrutiny or a rational-basis standard) of the equal protection doctrine.[89] Professor Gunther has suggested that a "middle-tier" review is thus being developed by the Court.[90] Generally the middle-tier approach is more stringent than that requiring a rational basis, but somewhat less rigid than the strict scrutiny test.[91] Perhaps a case involving discrimination against homosexuals would provide an appropriate forum for the Court to elaborate on this "newer" theory of equal protection.

In practice, application of the rational-basis standard has usually resulted in approval of the legislation in question, with the Court often placing the burden of proof of unconstitutionality upon the party attacking the statute.[92] A number of lower courts have cited *Eisenstadt v. Baird*[93] in overturning antisodomy statutes which applied exclusively to unmarried persons, finding such laws violative of the equal protection clause.[94] Substantial doubt remains, however, whether the Supreme Court would follow suit.[95] The Court's apparent reluctance to apply the strict scrutiny standard to homosexual discrimination has made it more difficult for a homosexual to allege successfully that a fourteenth amendment right to equal protection has been denied.

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88. See text accompanying notes 31-66 *supra.*
89. *See* Justice Marshall's dissent in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973); Justice Powell's opinion for the Court in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); and Chief Justice Burger's opinion in Jimenez v. Weinberger, 417 U.S. 628 (1974). *See also* Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).
90. Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).
91. *See, e.g.,* Chief Justice Burger's statement in invalidating a challanged statute that was sexually discriminatory by insisting that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See also* notes 83-84 *supra.*
92. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961), which held that the rational basis test would be satisfied if "*any state of facts reasonably may be conceived to justify*" the legislation. *Id.* at 426 (emphasis added). *Cf.* Taylor v. State, 214 Md. 156, 133 A.2d 414 (1957) (assault with intent to commit sodomy is a crime against public generally). *See generally* Preston & Mehlman, *The Due Process Clause as a Limitation on the Reach of State Legislation: An Historical and Analytical Examination of Substantive Due Process,* 8 U. BALT. L. REV. 1 (1978).
93. 405 U.S. 438 (1972). *See* notes 42-43 and accompanying text *supra.*
94. *See, e.g.,* People v. Rice, 80 Misc. 2d 411, 363 N.Y.S.2d 484 (Dist. Ct. 1975).
95. *See generally* Comment, *The Constitutionality of Sodomy Statutes,* 45 FORDHAM L. REV. 553, 589-92 (1977).

IV. FIRST AND EIGHTH AMENDMENT PROTECTIONS

Two other methods by which discrimination against homosexuals may conceivably be challenged are by way of the eighth amendment's prohibition against cruel and unusual punishment and the first amendment's protection of free speech and association.

The eighth amendment has traditionally been used to protect persons facing criminal punishment, but the argument that it can apply by analogy to civil punishments[96] has been rejected.[97] The Supreme Court in *Robinson v. California*[98] held that a statute which makes it a misdemeanor to be addicted to the use of narcotics violates the cruel and unusual punishment clause. The Court distinguished between punishment for a status and punishment for an overt act necessarily related to that status, and concluded that the former was impermissible.[99] A later case, however, *Powell v. Texas*,[100] upheld the conviction of an alcoholic for public drunkenness despite evidence that alcoholism constituted a disease. The Court supported its conclusion by maintaining that the alcoholic was not being punished for his condition, but rather because he was in public while drunk.[101] Nevertheless, Justice Fortas, dissenting, interpreted *Robinson* to mean that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[102] Since it is generally agreed that adult homosexuals cannot change their sexual preference, it may be argued that civil and penal legislation discriminating against homosexuals is unconstitutional punishment.[103]

Litigation under the eighth amendment in this area, though, is even more difficult than under the other amendments. Medical science is still in doubt as to the nature and treatment of

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96. *See, e.g.*, Baker v. Nelson, 291 Minn. 300, 191 N.W.2d 185, 186 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (court rejected without discussion petitioners' contention that marriage statute which prohibited marriage between people of same sex violated the eighth amendment).
97. Ingraham v. Wright, 430 U.S. 651 (1977).
98. 370 U.S. 660 (1972).
99. *Id.* at 665-67.
100. 392 U.S. 514 (1968).
101. *Id.* at 532.
102. *Id.* at 567 (Fortas, J., dissenting).
103. National Institute of Mental Health, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 15 (1969); *cf.* W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE (1979) (suggesting that certain homosexuals may be able to alter their sexual preference).

At common law sodomy was punishable by death. *See* note 22 *supra*. No state today imposes capital punishment for the offense, although very heavy sentences have been sustained. *E.g.*, Perkins v. North Carolina, 234 F. Supp. 333 (W.D. N.C. 1964) (20 to 30 year sentence struck down on other grounds); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), *cert. denied*, 416 U.S. 905 (1974) (8 year sentence); Sinclair v. State, 166 Tex. Crim. 167, 311 S.W.2d 824 (1958) (10 year sentence).

homosexuality.[104] This, coupled with the historic limitation of the eighth amendment to criminal matters, renders it highly unlikely that the courts would consider penalties for homosexuality to be cruel and unusual.

Arguments based on the first amendment's guarantees of free speech and assembly have been considerably more fruitful. Over the years the Supreme Court has developed a "constellation" of personal rights which emanate from those explicitly protected by the Constitution.[105] Among the implicit freedoms is the right of an individual to associate with others in order to further his personal beliefs.[106]

An independent right of association was first recognized in *NAACP v. Alabama ex rel. Patterson,*[107] which held that the right derives from the first amendment and is incorporated by the fourteenth.[108] In analyzing possible infringements of the right to associate, subsequent courts have consistently declared that any denial of benefits — however indirect or insignificant — which diminishes a group's ability to engage in legal endeavors would amount to a violation of the constitutional guarantee.[109] Whether homosexuality should be "legal," of course, goes to the heart of the question of civil liberties.[110]

The issue of first amendment protections for homosexuals has been fired by numerous confrontations between student homophile organizations and universities. There is little doubt today that students are entitled to such protections. In *Tinker v. Des Moines School District,*[111] the Supreme Court asserted that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[112] More recently, in *Healy v. James,*[113] the Court articulated the right further, holding that a state university's denial of permission to use campus facilities for meetings by its chapter of Students for a Democratic Society unconstitutionally impeded that group's freedom of association.[114]

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104. *See* note 12 and accompanying text *supra.*
105. *See* Gay Students Organization of the University of N.H. v. Bonner, 367 F. Supp. 1088, 1094 (D.N.H.), *aff'd,* 409 F.2d 652 (1st Cir. 1974); Note, *Freedom of Political Association on the Campus: The Right of Official Recognition,* 46 N.Y.U. L. REV. 1149, 1152-58 (1971).
106. *See, e.g.,* Healy v. James, 408 U.S. 169, 181 (1972). *See generally* Wilson & Shannon, *Homosexual Organizations and the Right of Association,* 30 HASTINGS L.J. 1029 (1979).
107. 356 U.S. 449 (1958).
108. *Id.* at 460.
109. *See, e.g.,* Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
110. See text accompanying notes 178-86 *infra.*
111. 393 U.S. 503 (1969).
112. *Id.* at 506.
113. 408 U.S. 169 (1972).
114. *Id.* at 181.

Subsequent to the *Healy* decision in 1972, three federal circuits sustained, at least in part based upon the first amendment, the right of a student homophile organization to sponsor campus social functions.[115] In *Gay Students Organization of the University of New Hampshire v. Bonner,*[116] the federal district court held that although the university had not violated the students' more traditional first amendment rights, it could nonetheless be enjoined on the basis of the right of association.[117] The First Circuit affirmed, noting that although the prohibited social functions did not constitute "pure speech," there was sufficient "communicative conduct" to bring the organization within the ambit of traditional first amendment rights.[118] Communicative conduct, the Supreme Court has held, may be regulated in "time, place and manner" to further a substantial governmental interest — but only if the limitations imposed are not designed strictly to suppress the subject matter of the communication.[119]

Similarly, the Fourth Circuit in *Gay Alliance of Students v. Matthews,*[120] found a clear violation of first amendment rights when the Virginia Commonwealth University refused to recognize a homophile group as a registered student organization. In so holding, the court made clear that the group in question was not devoted to illegal sexual conduct,[121] but noted that individuals of every sexual persuasion have a fundamental right to meet, discuss current problems, and advocate changes in the status quo — so long as there is no "incitement to lawless action."[122]

Gay Lib v. University of Missouri,[123] an Eighth Circuit case, is particularly interesting in light of the Supreme Court's subsequent involvement. Relying on *Healy, Bonner,* and *Matthews,* the court of appeals had reversed the district court's[124] support of the university's refusal to recognize Gay Lib.[125] The university appealed. Although the Supreme Court denied certiorari,[126] Justice Rehnquist (joined by

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115. Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Students Organization of the University of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974). *But see* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied,* 430 U.S. 982 (1977) (student newspaper refused to accept a paid advertisement tendered by an off-campus gay organization).
116. 367 F. Supp. 1088 (D.N.H.), *aff'd,* 509 F.2d 652 (1st Cir. 1974).
117. *Id.* at 1094.
118. 509 F.2d at 660.
119. *E.g.,* Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
120. 544 F.2d 162 (4th Cir. 1976).
121. *Id.* at 166.
122. *Id.* (citing Brandenberg v. Ohio, 395 U.S. 44 (1969)).
123. 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978).
124. 416 F. Supp. 1350 (W.D. Mo. 1976), *rev'd,* 558 F.2d 848 (8th Cir. 1977).
125. 558 F.2d at 854.
126. Ratchford v. Gay Lib, 434 U.S. 1080 (1978).

Justice Blackmun) made it clear that he would have heard the case and, further, that he was inclined to reverse the Eighth Circuit:[127]

> From the point of view of the University . . . the question is . . . akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for the repeal of the law would nowise do.[128]

Such casual equation of measles and homosexuality, coming as it does within the delicate balancing of individual liberty and governmental restraint, reflects little more than unbecoming sophistry. In any event, the University sought a rehearing, which the Court likewise denied.[129]

V. EMPLOYMENT DISCRIMINATION: ANALYSIS BY EXAMPLE

Ironically, while homosexuals have been relatively successful arguing their rights to free speech and assembly, they have discovered that the first amendment is virtually useless in preventing employment discrimination.[130] Under the constitutional guarantees of free speech, due process, and equal protection of the laws, public employers need only a rational basis for refusing to hire or for dismissing an employee.[131]

As recently as 1969, the United States Civil Service Commission maintained that "persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts . . . are not suitable for federal employment."[132] In *Norton v. Macy*,[133] however, the District of Columbia

127. *Id.* at 1082.
128. *Id.* at 1084.
129. 435 U.S. 981 (1978).
130. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 934 (1979).
131. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, as amended by, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)). *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).
132. FEDERAL PERSONNEL MANUAL SUPPLEMENT (INT.) 731-71. *See generally* Note, *Government Created Employment Disability of the Homosexual*, 82 HARV. L. REV. 1738 (1969); *Legal Rights of Homosexuals in Public Employment*, 1978 ANNUAL SURVEY OF AMERICAN LAW 455; Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976). "One homosexual can pollute a Government office," according to Senate Committee on Expenditures in the Executive Departments, Employment of Homosexuals and Other Sex Perverts in Government, S. DOC. No. 241, 81st Cong., 2d Sess. 4 (1950).
133. 417 F.2d 1161 (D.C. Cir. 1969). *See also* Society for Individual Rights, Inc. v.

Circuit held that a competent civil servant could not be dismissed solely on the basis of private homosexual conduct;[134] the civil service regulation was found to be overly broad and a denial of due process.[135] Dismissal may be justified, though, where there is a rational connection between deliberately public homosexual involvement and diminished efficiency on the job.[136]

The same distinction appears to be made at state and local levels, where homosexuals have been protected against discriminatory regulations under the first amendment,[137] but not where their performance on the job was deleteriously affected,[138] or where they had engaged in overt, public homosexual behavior.[139]

A. Teachers: Acanfora *and* Gaylord

The problems facing homosexual teachers who commence litigation based on constitutional rights are made all the more difficult by the presence of "impressionable" young people in the classrooms.[140] Most states, including Maryland,[141] have enacted laws which allow the dismissal of a teacher for "immoral behavior." Despite the apparent constitutional difficulties presented by so

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Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd*, 428 F.2d 905 (9th Cir. 1975) (finding of immoral or indecent conduct would support dismissal without further inquiry if conduct has ascertainable and deleterious affect on efficiency of the service).

134. *See* note 151 and accompanying text *infra*.
135. *See* Comment, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553, 556-67 (1977), for arguments against sodomy statutes as vague and overly broad.
136. Singer v. United States Civil Serv. Comm., 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977). *See* Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969).
137. Acanfora v. Board of Educ., 491 F.2d 498, 501 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974); Burton v. Cascade School Dist. Union High Sch. No. 5, 512 F.2d 850 (9th Cir. 1975) (per curiam).
138. *See* Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N.W.2d 379 (1974) (dismissal of plaintiff who was a homosexual house-parent for retarded minor children at a state institution).
139. See McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1976), in which the homosexual plaintiff was refused a job after having attracted public attention by attempting to marry a fellow homosexual. The court said plaintiff had tried "to foist tacit approval of this socially repugnant concept upon his employer," and was therefore not subject to protection by the law. *Id.* at 196. Private homosexual conduct, however, would merit protection. *Id.*.
140. According to the results of a Gallup Poll appearing in the *New York Times*, 56% of the general population supported the principle of equal employment opportunity for homosexuals, but 65% opposed the presence of homosexual teachers in the classroom. N.Y. Times, June 26, 1978, at 12, col. 1. An article in the *New York Times* indicates that Oklahoma now explicitly permits a school board to refuse to hire anyone who either engaged in or advocated homosexual activity. N.Y. Times, April 7, 1968, at 12, col. 1. *Accord*, OKLA. STAT. ANN. tit. 70, § 6-103.15 (West 1979).
141. *See* MD. EDUC. CODE ANN. § 6-202(a) (1978).

inherently vague a term, such statutes generally have withstood the scrutiny of federal courts.[142]

The Maryland-generated case of Joseph Acanfora III provides an interesting study in point and, viewed together with *Gaylord v. Tacoma School District No. 10*,[143] accurately reflects the current confused status of homosexual rights and the law. Acanfora was active in a homophile student organization while an undergraduate at Pennsylvania State University. Upon earning his degree in education he applied for employment to several school districts around the country, and eventually received an offer to teach in Montgomery County, Maryland. At no time during the interview process did Acanfora disclose his sexual preference. He also intentionally omitted any mention of his membership in the homophile group on that portion of the employment application relating to extracurricular activities. During this same period, Acanfora applied in Pennsylvania for certification as a teacher—a prerequisite to which was a finding of "good moral character." He acknowledged his homosexuality at a hearing before the Pennsylvania State Certification Board. Subsequently the Pennsylvania authorities announced in a public news conference that Acanfora, although homosexual, had been certified to teach in the State. When the Montgomery County Board of Education learned of Acanfora's avowed homosexuality, he was immediately transferred out of the classroom and into a non-teaching position, with no loss of salary, pending further investigation.[144]

At trial in the United States District Court for the District of Maryland, substantial evidence was introduced concerning the effects on students of a teacher's admitted homosexuality. Judge Joseph Young declared that Acanfora's pre-trial appearance on several local and national news programs exceeded the discretion which a teacher must exercise concerning his private life, and that such notoriety formed the necessary rational basis to support the Montgomery County School Board's transfer:

> Plaintiff's actions were not reasonably necessary for self-defense. Indeed the media appearances were likely to incite or produce imminent effects deleterious to the education process and "instead of furnishing a defense, [aggravated] the case."
>
> It is noteworthy that the fault in plaintiff's public appearances does not lie with the possibility of arousing

142. *See, e.g.*, Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974); *cf.* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (state court). *But see* Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

143. 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

144. Acanfora v. Board of Educ., 359 F. Supp. 843, 845 (D. Md.), *aff'd*, 491 F.2d 498 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974).

> sympathy to the prejudice of a fair trial, but rather with an indifference to the bounds of propriety which of necessity must govern the behavior of any teacher, regardless of sexual tendencies.[145]

Although the Fourth Circuit Court of Appeals affirmed Judge Young's decision, it did so based upon Acanfora's willful omission of information regarding his homosexuality, and not upon the teacher's pre-trial media appearances.[146] Indeed, Acanfora's public statements on homosexuality were held to be constitutionally protected speech: "There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said."[147]

A competing point of view, however, was enunciated in *Gaylord.* The plaintiff was an admittedly competent teacher[148] who kept his homosexual proclivities to himself. But when a suspicious vice-principal questioned him about his sexual preference, Gaylord did not lie. His subsequent dismissal was upheld by Washington's highest state court, which found that public knowledge of Gaylord's homosexuality so impaired his academic efficiency as to justify his removal.[149] The *Gaylord* decision has been subjected to almost the same quantity and quality of criticism as that in *Doe.*[150]

There has been relatively little litigation by homosexuals in the private sector except to challenge discriminatory hiring or firing as violative of Title VII of the Civil Rights Act of 1964,[151] which prohibits discrimination because of sex. The courts, as well as the Equal Employment Opportunity Commission, generally have held

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145. *Id.* at 857.
146. 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974).
147. *Id.* at 5003-01. *See generally* Board of Educ. of Long Beach v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973); Morrison v. Board of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (homosexual may not be excluded from public employment absent specific showing of unfitness to teach).
In *Pettit,* the dissenting opinion observed in part:
> [T]he majority opinion is blind to the reality of sexual behavior. Its view that teachers in their private lives should exemplify Victorian principles of sexual morality, and in the classroom should subliminally indoctrinate the pupils in such principles, is hopelessly unrealistic and atavistic.

Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 44, 513 P.2d 889, 899, 109 Cal. Rptr. 665, 675 (1973) (Tobriner, J., dissenting).
148. 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied,* 434 U.S. 879 (1977). His last personal teaching evaluation read, in part: "Mr. Gaylord continues his high standards and thorough teaching performance. He is both a teacher and a student in his field." 88 Wash. 2d at 300, 559 P.2d at 1347 (Dolliver, J., dissenting).
149. *Id.* at 288, 559 P.2d at 1342.
150. *See* Note, *Civil Rights in Homosexual Teacher Dismissal: A Deviant Decision,* 53 WASH. L. REV. 499 (1978). *See* note 59 and accompanying text *supra.*
151. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, as amended by, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)).

that Title VII refers to discrimination because of *gender*, not sexual proclivity.[152]

B. Soldiers: Matlovich *and* Berg

The area of homosexual litigation which has received most public attention, and one in which the law is equally unclear, is that which involves military personnel dismissed as a result of their sexual preference. Almost all branches of the armed forces have promulgated regulations which ban homosexuals from their ranks;[153] dismissal from the military for such cause, however, is invariably left to the discretion of the Secretary of each branch. It is this discretion which was called into question in the cases of Sergeant Leonard Matlovich and Ensign Vernon Berg.[154]

The service record of Sergeant Matlovich showed that he had fought in Vietnam, repeatedly volunteered for hazardous duty, been wounded in a mine explosion, earned a Purple Heart, two Air Force Commendation Medals, and the Bronze Star, and received the highest merit ratings possible from his superiors.[155] Being aware of Air Force regulations prohibiting homosexuality, however, Matlovich wrote to the Secretary of the Air Force, advising him of his sexual preference and requesting that the regulations against homosexuality be waived in his case.

The Air Force's Administrative Discharge Commission investigated. Matlovich admitted to having had sexual relationships with two other Air Force men, neither of whom were under his command and one of whom had already been discharged. Based upon those facts the Commission recommended that Matlovich be given a general discharge for unfitness. The Secretary accepted the recommendation but elected to upgrade the discharge to honorable. Matlovich sought reinstatement to the military by appealing to the Air Force Board for the Correction of Military Records.[156] The appeal failed, and Matlovich took his case to the United States District Court for the District of Columbia.

The companion case to *Matlovich* as it wended its way through the federal courts was that of Ensign Berg,[157] who had been

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152. *See* Sinisealco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495, 500-06 (1976). *But see* Voyler v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975); Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975). *See generally* Annot., 42 A.L.R. Fed. 189 (1979).
153. *See, e.g.*, AIR FORCE MANUAL 39-12, ¶ 2-103; BUREAU OF NAVAL PERSONNEL MANUAL, Art. 2, 3410100, 3420250.
154. Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977), *vacated and remanded*, 18 F.E.P. Cases 1068 (D.C. Cir. 1978); Matlovich v. Secretary of Air Force, 13 F.E.P. Cases 269 (D.D.C. 1976), *vacated and remanded*, 18 F.E.P. Cases 1061 (D.C. Cir. 1978).
155. Matlovich v. Secretary of Air Force, 18 F.E.P. Cases 1061, 1062 (D.C. Cir. 1978).
156. *Id.*
157. Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977), *vacated and remanded*, 18 F.E.P. Cases 1068 (D.C. Cir. 1978).

stationed in Gaeta, Italy, when an enlisted man accused him of attempting to commit a homosexual act. Berg denied the charge but admitted the fact that he was homosexual. The Navy's Administrative Discharge Board, following an investigation, concluded that Berg had in fact committed the alleged act. The Secretary of the Navy gave him a less-than-honorable discharge,[158] after which Berg brought suit in the United States District Court for the District of Columbia.[159]

Both cases were heard by Judge Gerhard Gessell, and both plaintiffs lost. Judge Gessell reasoned that: (1) *Roe v. Wade*[160] serves to exclude the right of privacy as between consenting adult homosexuals;[161] (2) the Navy and Air Force had a rational basis (*i.e.*, morale) for removing homosexuals from the military;[162] (3) neither plaintiff had been denied due process in that both had been granted hearings before administrative discharge boards; and (4) neither Secretary had abused his discretion.[163]

Berg and Matlovich appealed to the United States Court of Appeals for the District of Columbia where, late in 1978, each won at least a battle, if not the war.[164] Based on a principle of administrative law,[165] the court of appeals ruled that the Secretary in each branch must state the grounds upon which he exercises his discretion. In neither *Matlovich* nor *Berg,* said the court, was it possible to tell on what grounds the service had refused to make exceptions — that is, how it distinguished these cases from those in which homosexuals had been retained.[166]

VI. FLUX AND CONFLICT: LIBERTY AND THE SEARCH FOR RATIONAL BASES

Thus the law regarding homosexual rights is clearly in a state of flux and conflict, and the uncertainty extends well beyond the classroom or military cases. Some courts would overturn dismissal of a homosexual who has publicly stated his views as a violation of the

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158. Berg's discharge was shortly thereafter upgraded to honorable.
159. Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977), *vacated and remanded,* 18 F.E.P. Cases 1068 (D.C. Cir. 1978).
160. 425 U.S. 901 (1976).
161. 436 F. Supp. at 79.
162. *Id.* at 80.
163. *Id.* Judge Gessell went on to commend the Navy for upgrading Berg's discharge.
164. Berg v. Claytor, 18 F.E.P. Cases 1068 (D.C. Cir. 1978); Matlovich v. Secretary of Air Force, 18 F.E.P. Cases 1061 (D.C. Cir. 1978).
165. 18 F.E.P. Cases at 1063, 1069. The problem was that the Air Force and Navy had been discretionary in discharging homosexuals and must therefore cite more than the mere regulation as authority for their actions.
166. *Id.* Civilians working in the Defense Department or engaged in national security appear to be protected by the government's obligation to establish a rational basis for discharging or refusing to hire a homosexual. *See* Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir.), *clarified,* 494 F.2d 1135 (D.C. Cir. 1973).

first amendment's guarantee of free speech,[167] while others have allowed employers to fire homosexuals and thereby avoid "tacit approval of this socially repugnant concept."[168] Some courts would treat removal of a homosexual bar's liquor license as a violation of the fourteenth amendment's equal protection clause,[169] while others have reached the opposite conclusion.[170] Some courts would hold that the ninth amendment's implicit right to privacy prohibits anti-sodomy laws as they apply to consenting adults,[171] while others have limited that right to married couples.[172] And some courts would allow a homophile organization the freedom to associate,[173] while others would not.[174]

Few courts have found the act of homosexuality to be "natural" and harmless[175] — and thus one which the state, of course, could not justly punish. Nor could the state fairly penalize homosexuals if they are victims of a self-contained sickness any more than it could discriminate against dwarfs, albinos, or fat people. But if homosexuality, whether disease or sin (status or act), is deemed broadly deleterious, a society may in its pursuit of life, liberty, and happiness impose certain limitations upon the offensive agent — under the same justification by which it may make education compulsory or quarantine lepers.[176] Any such intrusion, however, must be balanced

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167. *See* Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md.), *aff'd*, 491 F.2d 498 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974); note 137 and accompanying text *supra*.
168. McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1976). *See generally* Wein & Remmers, *Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075 (1979).
169. Kerma Restaurant Corp. v. State Liquor Auth., 21 N.Y.2d 111, 233 N.E.2d 833, 286 N.Y.S.2d 833 (1967).
170. Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973).
171. State v. Bateman, 25 Ariz. App. 1, 540 P.2d 732 (1975), *modified*, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 1302 (1976). *See* text accompanying notes 34-66 *supra*.
172. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); note 28 and accompanying text *supra*.
173. *See, e.g.*, Gay Students Organization of Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974). *See* notes 53-55 and accompanying text *supra*.
174. *See, e.g.*, Gay Lib v. University of Mo., 416 F. Supp. 1350 (W.D. Mo. 1976), *rev'd*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).
175. *See* Richards, *supra* note 7.
176. There are numerous, well-articulated debates among legal scholars as to the proper relationship between law and morality. Lord Devlin, perhaps the most quoted advocate of society's right to prevent immorality through law, argues that a set of shared moral values is essential to a healthy society, and the violation of a shared value, even if in private, threatens that health. He also asserts that a generally held conviction that certain activity is wrong justifies a law against it. *See* Comment, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553, 581 n.147 (1976) (quoting Sartorius, *The Enforcement of Morality*, 81 YALE L. J. 891, 892-93 (1972)). *See also* notes 58-62 and accompanying text *supra*. *But see* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 104 (1973); H. HART, LAW, LIBERTY, AND MORALITY (1963); Richards, *supra* note 7, at 1336-38.

against equally weighty principles of civil liberties — that is, the right to be *free* from unwarranted governmental intrusion. Civil libertarians maintain, with some reason, that any law is unwarranted which discriminates against an offensive individual or group — whose unpopular ideas or practices are *not visited upon others against their will.*[177]

American democracy is based upon the theory of natural rights,[178] many of which were propounded by Hobbes and Locke and later synthesized by Mill. Hobbes developed the notion of a social contract between the people and the state, together with the idea of the absoluteness of sovereignty.[179] Locke formulated the social contract in such a way as to establish the ultimate supremacy of the people over the government. Laws of nature, according to him, impel men to voluntary respect for certain primary rights of others.[180]

The framers of the federal system counted security of individual freedom as one of the elements for its success, and sought to assure such freedom by way of checks and balances, and by verbalizing certain "inalienable" rights of the citizen.[181] Thomas Paine felt that natural rights included

> all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right . . . .[182]

But it has never been possible to develop a reasoned catalogue of precisely what are the rights of men. (Thus we have the ninth amendment, that a constitutional enumeration of certain rights "shall not be construed to deny or disparage others retained by the people.") Various theorists, to be sure, have attempted the task, distinguishing natural rights, those already in existence in the state of nature, from civil rights, those dependent upon membership in society. The former were absolute, because they involved only personal interests. The latter affected other men, and therefore were subject to control by government. But the distinction has always met with great practical difficulties, such as when Mill argued that laws requiring Sabbath-observance offended individual rights, but that state control of family size did not.[183]

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177. Determining when one's sexual proclivity is imposed upon others often presents a difficult judgmental problem. See notes 65 *supra* and 196-97 *infra* and accompanying text.
178. *See* E. GERHART, AMERICAN LIBERTY AND "NATURAL LAW" 149 (1953).
179. *See* F. COKER, READINGS IN POLITICAL PHILOSOPHY 446 (1938).
180. *Id.* at 528-29.
181. *See* E. GERHART, AMERICAN LIBERTY AND "NATURAL LAW" 57, 103 (1953).
182. F. COKER, READINGS IN POLITICAL PHILOSOPHY 675 (1938).
183. *See* O. HANDLIN, THE DIMENSIONS OF LIBERTY 61 (1961).

Mill's theory of liberty rests on two principles: (1) "All restraint . . . is an evil . . . leaving people to themselves is always better . . . than controlling them"; and (2) "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. That the only purpose for which power can rightfully be exercised over any number of a civilized community, against his will, is to prevent harm to others."[184] The first he deemed to be a self-evident truth. The second, of course, has engendered the greatest amount of criticism: Is it possible to categorize laws into those which are warranted as preventing harm to others and those which are not? Is there any such thing as a truly victimless crime?

The ultimate issue in any system of government based upon natural law is, who will be that law's exponent? Americans have chosen to delegate this power to the Supreme Court, which has defined, restricted, and extended many "natural" and constitutional rights.[185] Thus the "imposition/effect" test as refined by Mill and applied by civil libertarians is not an alternative to the rational-basis standard or others formulated by the Court, but merely a reflection of the natural law upon which those standards are constitutionally based. What has remained constant is not the content of the rights, but the conception of them.[186]

The founding fathers clearly felt that in certain areas opportunities for unwarranted intervention were troublesome enough to require a Bill of Rights. We are thus protected against laws which would inhibit speech or religion or which would permit unreasonable searches and seizures. Because the freedom of sexual preference is not specifically guaranteed, however, the question remains: to what extent may homosexuality be legitimately restricted under the law's power to establish a "moral" society — that is, to what extent does homosexuality adversely affect the social fabric?[187]

It would appear that proof of such an adverse effect should be necessary to find a rational basis upon which discriminatory legislation must be grounded. Obviously there are cases where adverse effects may be proven. Yet it is equally apparent that no causal connection has been empirically and universally demonstrated between an individual's homosexuality and his/her ability to be a good employee or citizen. There is no evidence that homosexuals are more involved than heterosexuals in offenses against the

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184. P. RADCLIFF, LIMITS OF LIBERTY: STUDIES OF MILL'S ON LIBERTY 83 (1966).
185. *See* O. HANDLIN, THE DIMENSIONS OF LIBERTY 62-63 (1961).
186. *Id.* at 64. *See also* note 179 and accompanying text *supra.*
187. The Supreme Court frequently has justified the state's right to a kind of moral paternalism, the "right to the Nation and the States to maintain a decent society," or, more particularly, the government's right to base its anti-obscenity laws on "unprovable assumptions" about what is good for the people. *See, e.g.,* Paris Adult Theater I v. Slaton, 413 U.S. 49, 59-60, 62 (1973).

young;[188] that they are more violent or prone to disease;[189] that laws against sodomy inhibit children from becoming homosexuals;[190] or that such laws have a healthy effect on heterosexual marriages.[191] On the other hand, the more that homosexuals feel free to declare themselves, the more tenuous becomes the argument that the avoidance of opportunities for blackmail is a rational basis for discrimination.[192]

In short, promiscuity and homosexuality could in many cases be defended as affecting no one but the parties taking part; were the pressures of law and public opinion relaxed, however, there might well be serious consequences for family life and the social structure, which on the whole we may wish to preserve.[193]

Thus the rights of the homosexual must be decided on a case-by-case basis — as should similarly troublesome problems of pornography, polygamy, prostitution, etc. Is there an imposition? Is the potential for social harm significant? For better or worse the arbiter of these underlying questions is the Supreme Court, relying as it does on a current interpretation of natural rights as guaranteed or limited by the Constitution.[194]

Vis-a-vis homosexual rights in general, however, it seems that the imposition/effect test would be hard to satisfy if the Court were to carry its reasoning in *Stanley v. Georgia*[195] to its logical end — *viz.*, that governmental regulation of homosexual acts within the home is a likely violation of the right to privacy.

The line to be drawn is the traditional balance between private right and public welfare. If the argument is accepted that cigarette smokers should be restricted only where they physically endanger their non-smoking neighbors, then, similarly, only where homosexuals engage in offensive conduct by force or in public should they be

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188. Richards, *supra* note 7, at 1334.
189. *Id.*
190. *Id.* at 1335.
191. *Id.* at 1341. To the contrary, legal heterosexual relations outside marriage probably contribute as much if not more to the breakdown of the nuclear family. *See also* New York v. Onofre, 48 U.S.L.W. 2520 (N.Y. App. Div. 1980).
192. *See* Geis, *Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven States*, 1 J. HOMOSEXUALITY 419 (1976); Levitt and Klassen, *Public Attitudes Toward Homosexuality*, 1 J. HOMOSEXUALITY 29 (1974).
193. *See* P. RADCLIFF, LIMITS OF LIBERTY: STUDIES OF MILL'S ON LIBERTY 85 (1966).
194. *Id.* at 55. It is important to note that this characterization of a "natural law" basis for Supreme Court reasoning is purposefully circumspect. As Professor Ely points out in his recent learned article "*On Discovering Fundamental Values*," 92 HARV. L. REV. 5 (1978), a slavish insistence on natural law justifications is highly problematic — as are the other frequently cited theories of "neutral principles," "reason," "tradition," and "consensus." He ends with a sympathetic reading of Alexander Bickel's conclusion: if the proper role of the Supreme Court is the definition and imposition of values, the observer "might well after a lifetime of searching conclude that since nothing else works — since there isn't any impersonal value source out there waiting to be tapped — one might just as well 'do the right thing' by imposing one's own values." *Id.*
195. 394 U.S. 557 (1969). *See* notes 53-55 and accompanying text *supra*.

penalized. Strict libertarian doctrine would suggest that even unimposed public acts should be permitted, on the same ground that one is not obliged to view obscene films,[196] and that, moreover, *all* of the so-called "victimless crimes" should be legalized unless it can be proven they have a deleterious effect.[197] Difficulty in proving (or denying) that effect is, of course, the primary reason for the continuing debate among lawyers, legislators and libertarians regarding homosexual rights.

VII. CONCLUSION

The subject of homosexual rights is inevitably an emotional one, on which the Supreme Court to date has declined a definitive statement, and about which numerous lower courts appear to be in conflict. Within most jurisdictions the effect of this confusion is disturbingly clear: apart from the criminal sanctions, homosexuals may be legally discriminated against, and in many areas of American life, they are. That in a free society this should be the state of affairs is a doubtful though widely and hotly argued proposition — and one for which, whether the advocate be pro or con, there are no easy proofs.

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196. Richards, *supra* note 7, at 1344-45 n.331.
197. *Id.* at 1347-48 n.340.