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Constitutional Law-Right of Privacy-State Statute Prohibiting Private Consensual Sodomy Is Constitutional-Doe v. Commonwealth's Attorney

Constitutional Law—RIGHT OF PRIVACY—STATE STATUTE PROHIBITING PRIVATE CONSENSUAL SODOMY IS CONSTITUTIONAL—*Doe v. Commonwealth's Attorney,* 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.,* 425 U.S. 901 (1976).

John Doe and Richard Roe, active homosexuals,[1] brought an action before a three-judge federal district court, seeking declaratory and injunctive relief from a Virginia statute proscribing sodomy.[2] They alleged that enforcement of the statute would deny them important constitutional guarantees, including due process and the right of privacy.

The court denied the relief prayed for and found that within the circumstances of the case the statute was not unconstitutional and that the "wisdom or policy" of the statute was a matter for the state's determination. One judge dissented, viewing the statute as violative of plaintiffs' right of privacy. The United States Supreme Court affirmed the judgment in a memorandum decision.[3]

I. BACKGROUND

Sodomy is an offense of ancient origin. Having its inception no later than Biblical times,[4] it remained an infraction of only

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1. Brief for Plaintiffs at 1, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.,* 425 U.S. 901 (1976).

2. Act of Apr. 2, 1968, ch. 427, 1968 Va. Acts 529 (amending VA. CODE § 18.1-212 1950)) (current version at VA. CODE § 18.2-361 (1975)). Subsequent amendment has not changed the substance of the offense:

> 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.

VA. CODE § 18.2-361 (1975).

3. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.,* 425 U.S. 901 (1976). In the Supreme Court, Justices Brennan, Marshall, and Stevens voted to hear arguments in the case. 425 U.S. at 901. The same day, the Court also denied a petition for certiorari in State v. Enslin, 25 N.C. App. 662, 214 S.E.2d 318, *cert. denied, appeal dismissed,* 288 N.C. 245, 217 S.E. 2d 669 (1975), *cert. denied,* 425 U. S. 903 (1976). Enslin had unsuccessfully contended that his indictment for committing "the abominable and detestable crime against nature" was unconstitutional. 25 N.C. App. at 663, 214 S.E.2d at 319.

4. *Leviticus* 18:22-23; *I Corinthians* 6:9. Some courts and writers see sodomy laws today as an unmitigated extension of the original religious prohibition. *See, e.g.,* State v. Trejo, 83 N.M. 511, 514, 494 P.2d 173, 176(Ct. App. 1972) (Sutin, J., dissenting); Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied,* 12 SAN DIEGO L. REV. 799, 800-12 (1975). Other writers view the Judeo-Christian tradition as a source of the sodomy laws but in addition discern modern psychological factors behind the continued existence of the laws. *See, e.g.,* G. WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL 11-18 (1972).

ecclesiastical law throughout the Middle Ages. In 1533, under a statute enacted by Parliament, the English secular courts began to punish "the detestable and abominable Vice of Buggery."[5] That statute served as the foundation for later American laws against sodomy,[6] most of which still exist.

A. Current Status of Sodomy Laws

Presently, by means of general sodomy statutes which ostensibly prohibit "unnatural" acts between heterosexuals and homosexuals alike, thirty-one states and the District of Columbia provide criminal sanctions for consenting adults who engage in private homosexual conduct.[7] Two states expressly forbid only

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5. Act for the Punishment of the Vice of Buggery, 1533, 25 Hen. 8, c. 6; W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 2 (1973); 4 W. BLACKSTONE, COMMENTARIES *216; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 556-57 (2d ed. 1959). The crime had become so "detestable and abominable" by Blackstone's time that that noted scholar refused to refer to it by name, calling it instead "the infamous crime against nature." 4 W. BLACKSTONE, *supra* at *215; R. PERKINS, CRIMINAL LAW 389-90 (2d ed. 1969). Hence the wording in many of today's statutes. Note 7 *infra*. Interestingly enough, sodomy at early common law apparently did not include fellatio or cunnilingus. Perkins v. State, 234 F. Supp. 335, 336 (W.D.N.C. 1964); R. PERKINS, *supra* at 390; Note, *The Crimes Against Nature*, 16 J. PUB. L. 159, 162 (1967). Today, however, the majority of the states that proscribe sodomy include fellatio and cunnilingus under the generic term of sodomy. W. BARNETT, *supra* at 24; MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1955); R. PERKINS, *supra* at 390.

6. Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 689 (1973); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273, 275-76 (1971). One court has noted that "[t]he 18th Century American legislatures forbade sodomy to express moral outrage at the act itself and to prevent a general deterioration of the moral fiber of the populace." United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa. 1973), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), *cert. denied*, 416 U.S. 990 (1974).

7. ALA. CODE tit. 14, § 106 (1958); ALAS. STAT. § 11.40.120 (Supp 1975); ARIZ. REV. STAT. § 13-651 (West Supp. 1973); D.C. CODE § 22-3502 (1973); FLA. STAT. ANN. § 800.02 (West 1976) (Florida's sodomy statute was held unconstitutional, but prosecutions for "unnatural and lascivious" acts may still be allowed under § 800.02. Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971). *But cf.* FLA. STAT. ANN. § 794.011 (West 1976)); GA. CODE ANN. § 26-2002 (1972); IDAHO CODE § 18-6605 (Supp. 1975). IOWA CODE ANN. § 705.1 (West 1950) (The Iowa statute has been held unconstitutional as applied to sodomitic acts performed in private between consenting adults of the opposite sex. State v. Pilcher, 242 N.W.2d 348 (Iowa 1976)); KY. REV. STAT. §§ 510.070-.100 (1975); LA. REV. STAT. ANN. §§ 14-89, 89.1 (West Supp. 1976); MD. ANN. CODE art. 27, §§ 553-554 (1976); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1970) (The Massachusetts statute has been construed as inapplicable to the private, consensual conduct of adults. Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974)); MICH. COMP. LAWS ANN. §§ 750.158, .338, .338a (1968); MINN. STAT. ANN. §§ 609.293, .294 (West Supp. 1976); MISS. CODE ANN. § 97-29-59 (1973); MO. ANN. STAT. § 563.230 (Vernon 1953); MONT. REV. CODES ANN. § 94-4118 (1947); NEB. REV. STAT. § 201.190 (1973); N.J. STAT. ANN. §§ 2A:143-1 to -2 (West 1969); N.Y. PENAL LAW §§ 130.38 to -.50 (McKinney 1975); N.C. GEN. STAT. § 14-177 (1969); OKLA. STAT. ANN. tit. 21, § 886 (West 1958); PA. STAT. ANN. tit. 18, §§ 3101, 3124 (Purdon 1973); R.I. GEN. LAWS § 11-10-1 (1956); S.C. CODE § 16-412 (1962); TENN. CODE ANN. § 39-707 (1975); UTAH

homosexual sodomy.[8] Seventeen states no longer maintain any criminal penalties for private, consensual sodomy.[9]

The sodomy statutes that remain have come under an increasingly heavy barrage of criticism.[10] Detractors contend that

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CODE ANN. §§ 76-5-403 to -497 (Supp. 1975); VT. STAT. ANN. tit. 13, § 2603 (1974) (In addition to fellatio, which is proscribed by Vermont's statute, sodomy has been held to be a crime under the common law of Vermont in State v. La Forrest, 71 Vt. 311, 45 A. 225 (1899)); VA. CODE § 18.2-361 (1975); WIS. STAT. ANN. § 944.17 (West 1958); WYO. STAT. § 6-98 (Supp. 1975).

Most of these statutes describe the forbidden behavior in terms of "the crime against nature," "buggery," or "sodomy." None of the statutes declare homosexuality itself to be a crime, rather the homosexual's means of sexual expression is defined as criminal. W. BARNETT, *supra* note 5, at 7; Sherwin, *Sodomy*, in SEXUAL BEHAVIOR AND THE LAW 430 (R. Slovenko ed. 1965). Depending on the state, sodomy may be a misdemeanor or a felony, and the punishment may range from three months in jail and a fine to imprisonment for life. W. BARNETT, *supra* note 5, at 287-88. Although on their face the statutes provide for punishment of all "unnatural" sexual acts, whether between homosexuals, unmarried heterosexuals, or husband and wife, the real effect of the law today is to exclude the private, consensual activity of married persons from proscribed behavior. *See* notes 36-44, 48-49 and accompanying text *infra*. The statutes also provide the means to punish those who commit sodomy in public, by force, or with a minor. In this respect, there is no great debate over the need or worth of the statutes. The discussion in this note is thus concerned with the sodomy statutes as applied to consenting adults acting in private.

8. KAN. STAT. § 21-3505 (1974); TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974).

9. No. 928, § 3, 1975 Ark. Acts 2463 (repealing ARK. STAT. ANN. § 41-813 (1964)); CAL. PENAL CODE §§ 286, 228(a) (West Supp. 1976); COLO. REV. STAT. §§ 18-3-401 to -405 (Supp. 1976); CONN. GEN. STAT. ANN. § 53a-65, 53a-70 to -73a (West Supp. 1976); DEL. CODE tit. 11, §§ 765-66 (Supp. 1975); HAW. REV. STAT. §§ 707-733 to -737 (Special Pamphlet 1975); ILL. REV. STAT. ch. 38, §§ 11-2 to -6 (1973); Pub. L. No. 148, § 24, 1976 Ind. Acts (repealing IND. CODE ANN. § 35-1-89-1 (Burns 1975)); ME. REV. STAT. tit. 17-A, §§ 251, 253 to 255 (West 1976); N.H. REV. STAT. ANN. §§ 632-A: 1 to :5 (Supp. 1975); N.M. STAT. ANN. §§ 40A-9-21 to -22 (Supp. 1975); N.D. CENT. CODE §§ 12.1-20-02 to -07 (1976); OHIO REV. CODE ANN. §§ 2907.03 to .06 (Page 1975); OR. REV. STAT. §§ 163.305 to .445 (1975); ch. 158, § 22-8 1976 S.D. Sess. Laws 262 (repealing S.D. COMPILED LAWS ANN. § 22-22-21 (1967)); WASH. REV. CODE ANN. § 9A.98.010(209) (Special Pamphlet 1976) (repealing WASH. REV. CODE ANN. § 9.79.100 (1961)); W. VA. CODE § 61-8B-1 to -9 (Supp. 1976). Some of the cited statutes are repeals of traditional sodomy laws; others are new codifications that do not proscribe the consensual activity of adults. California's new, so-called "consenting adults law" may be a forerunner of liberalized sodomy statutes yet to appear, in other states. The former law read: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than one year." CAL. PENAL CODE § 286 (West 1970) (amended 1975). The present statute removes all penalties except where the act is committed with a minor, by force, or while confined in a state prison. CAL. PENAL CODE § 286 (West Supp. 1976); 13 SAN DIEGO L. REV. 40 (1976).

10. *See, e.g.*, W. BARNETT, *supra* note 5; W. CHURCHILL, HOMOSEXUAL BEHAVIOR AMONG MALES 215-22 (1967); A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 483 (1953); Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in SEXUAL BEHAVIOR AND THE LAW (R. Slovenko ed. 1965); Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84 (1973); Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687 (1973); Note, *The Constitionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273 (1971); Comment,

although prosecutions for private consensual acts are rare,[11] there is nonetheless the constant *threat* of prosecution.[12] In addition, the laws lend support to other legal disabilities. For example, homosexuals may be ineligible for employment in certain government jobs,[13] for service in the armed forces,[14] or for permission to immigrate into the country.[15] The statutes generally encourage private and public discrimination of all kinds against homosexuals and provide means for the blackmail and exploitation of offenders.[16] Finally, the laws represent an explicit legal stigma on the lifestyle of homosexuals, most of whom, presumably, would prefer to live within the bounds of lawful conduct.

B. Constitutional Attacks

As a result of the criticism of the sodomy laws, there has been some legislative reform,[17] but most state legislatures are hesitant to seemingly condone conduct that is still repugnant to many voting citizens.[18] The battle thus has often been fought in the courts, where opponents of the sodomy laws—either defendants

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Sexual Freedom for Consenting Adults—Why Not?, 2 PAC. L.J. 206 (1971); Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

11. W. BARNETT, *supra* note 5, at 7. Indeed, without exceeding permissible search and seizure limitations, law enforcement officials find it nearly impossible to enforce the laws against consenting adults acting in private. *See Project—The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 689 (1966). Thus, in California's experience, actual enforcement of sodomy laws against consenting adults was limited to instances where the activity occurred in public. *Id.* at 718; Comment, *Sexual Freedom for Consenting Adults—Why Not?*, 2 PAC. L.J. 206, 214 (1971). Even then, because judges were unwilling to impose a felony penalty for a consensual act, many cases were disposed of as "disorderly conduct" misdemeanors. *See Project, supra* at 685. In the instant case, plaintiff testified by deposition that he neither knew of nor had heard of any individual who had been arrested for private, consensual homosexual activity. Brief for Defendants at4-5. Nevertheless, he testified that his enjoyment of homosexual acts is "chilled" by his fear of arrest. *Id.* at 5.

12. Brief for Defendants at 5. W. BARNETT, *supra* note 5, at 7-8.

13. *See* Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969).

14. *See* Comment, *Homosexuals in the Military*, 37 FORDHAM L. REV. 465 (1969); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273, 279 (1971).

15. *See* 8 U.S.C. § 1182(a)(4)(1970) (*construed in* Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967)).

16. W. BARNETT, *supra* note 5, at 8-9; Note, *The Crimes Against Nature*, 16 J. PUB. L. 159, 162, 175-77 (1967); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273, 279, 291, 299-302 (1971).

17. *See* note 9 and accompanying text *supra*.

18. W. BARNETT, *supra* note 5, at 4-5; Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273, 295 (1971).

charged with the crime of sodomy or plaintiffs seeking civil rights relief—have utilized a number of arguments in attacking the constitutionality of the statutes.[19]

1. Void for vagueness

The most common argument against the constitutionality of sodomy statutes—many of which forbid only "the crime against nature" and do not mention the word "sodomy" or otherwise define the offense—has been that the statutes are void for vagueness of language. Relying on the due process principle that a person may be held criminally responsible only for conduct that he can reasonably understand to be forbidden,[20] defendants in sodomy prosecutions have alleged that the euphemistic term "crime against nature" is archaic and not reasonably understandable today.[21] Most courts encountering the argument, however, have not agreed and have held either that the phrase "crime

19. There are, of course, other constitutional arguments that have been employed in addition to the ones here discussed. But these other arguments, while perhaps more imaginative, are less formidable—at least the courts seem to deal with them summarily or ignore them entirely when they are raised in pleadings or on appeal. *See,e.g.*, Raphael v. Hogan, 305 F. Supp. 749 (S.D.N.Y. 1969) (statute as applied to public acts of sodomy on stage does not violate right of freedom of speech); Carter v. State, 255 Ark. 225, 500 S.W. 2d 368 (1968) (statute does not violate Estabishment Clause or provide for cruel or unusual punishment); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (1973) (statute does not violate right to freedom of expression). In the instant case, plaintiffs raised the issues of freedom of association, establishment of religion, freedom of expression, and cruel and unusual punishment. Brief for Plaintiffs at 10-18, 20-21. The court, however, ignored these issues. *See* 403 F. Supp. at 1199-1203. The poor showing in the courts, however, has not discouraged legal writers from urging attacks based on the first and eighth amendments and on other doctrines. *E.g.* W. BARNETT, *supra* note 5, at 74-83, 269-301; Comment, *Homosexuality and the Law—A Right to Be Different?*, 38 ALB. L. REV. 84, 96-99 (1973); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273, 297 (1971).

20. United States v. Harriss, 347 U.S. 612, 617 (1954); Cline v. Frink Dairy Co., 274 U.S. 445, 459 (1927).

21. *See, e.g.*, Rose v. Locke, 423 U.S. 48 (1975); Connor v. Hutto, 516 F.2d 853 (8th Cir. 1975); Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974); State v. Mays, 329 So. 2d 65 (Miss. 1976); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973); Carson v. State, 529 P.2d 499 (Okla. Crim. App. 1974). A statute that is more explicit in terms of the prohibited conduct obviously does not have a potential "vagueness" handicap. The District of Columbia statute, for example, states:

> Every person who shall be convicted of taking into his or her mouth or anus the sexual organ of any other person or animal, or who shall be convicted of placiing his or her sexual organ in the mouth or anus of any other person or animal, or who shall be convicted of having carnal copulation in an opening of the body except sexual parts with another person, shall be fined not more than $1,000 or be imprisoned for a period not exceeding ten years.

D.C. CODE § 22-3502 (1973).

against nature" has continued to denote sodomy or buggery, as it did at common law,[22] or that the phrase is not impermissibly vague when read with state court decisions construing the language.[23]

In *Franklin v. State,*[24] the Supreme Court of Florida held that the state statute prohibiting the "abominable and detestable crime against nature"[25] was unconstitutional for vagueness and that changes in the law and in language had rendered the statute's meaning uncertain to today's "average man of common intelligence."[26]

While recognizing Florida's right to construe its own statutes, the Supreme Court of the United States in *Wainwright v. Stone*[27] may have noted its disagreement in principle with the "vagueness" holding in *Franklin.*[28] Then in *Rose v. Locke,*[29] the Supreme Court reversed a finding of the Sixth Circuit that the Tennessee sodomy statute[30] was void for vagueness of language.[31] The Court in *Rose* determined that a sodomy statute forbidding "the crime against nature" incorporated sufficient due process warning to enable men to conduct themselves so as to avoid forbidden activity.[32]

2. *Void for overbreadth*

The Supreme Court has enunciated the doctrine that an activity subject to state regulation may not be proscribed by means that sweep too broadly and thereby infringe upon a protected freedom.[33] The doctrine, which allows a court to strike down a statute on the basis of how it *might* be applied to others who are not litigants but who might be affected adversely by an overly

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22. *See, e.g.*, State v. Lair, 62 N.J. 388, 301 A.2d 748, 752 (1973).

23. *See, e.g.*, Wainwright v. Stone, 414 U.S. 21, 22-23 (1973).

24. 257 So. 2d 21 (Fla. 1971).

25. FLA. STAT. ANN. § 800.01 (West 1976) (repealed 1974).

26. 257 So. 2d at 23. The court, while thus holding that the defendant could not be convicted of the crime against nature, then directed entry of judgment against the defendant for violation of FLA. STAT. ANN. § 800.02 (West 1976)—the lesser offense of any unnatural and lascivious act. 257 So. 2d at 24.

27. 414 U.S. 21 (1973).

28. *Id.* at 22-24. The Court stated that Florida's sodomy statute was "not void at the time appellees performed the acts for which they were convicted." *Id.* at 24.

29. 423 U.S. 48 (1975).

30. TENN. CODE ANN. § 39-707 (1975).

31. 423 U.S. at 50, 52-53.

32. *Id.* at 50-51.

33. NAACP v. Alabama *ex. rel.* Flowers, 377 U.S. 288, 307 (1964).

broad statute, has been asserted primarily in cases involving first amendment rights.[34]

unconstitutionally include them.[42] The Supreme Court dismissed an appeal.[43] In the interim, the plaintiff in *Buchanan* was tried as a defendant in a state court and convicted of sodomy. His appeal to the Texas Court of Criminal Appeals was unsuccessful and his petition for certiorari to the United States Supreme Court was denied.[44]

3. *Equal protection*

According to the traditional equal protection test, the law may not treat people differently unless the classification made is rationally related to a legitimate state purpose.[45] The application of the test may be seen in *Eisenstadt v. Baird,*[46] where the Supreme Court found no rational explanation for a Massachusetts statute that barred single persons from obtaining contraceptives when married persons were able to obtain them.[47]

Attempting to analogize *Eisenstadt* and extend the decision to their own situations, defendants in a number of sodomy cases

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42. 463 S.W.2d at 193.

43. 402 U.S. 902 (1971).

44. Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971), *cert. denied,* 405 U.S. 930 (1972). Denial of certiorari has little if any weight as stare decisis. *See* United States v. Kras, 409 U.S. 434, 461 (1973) (Marshall, J., dissenting); Brown v. Allen, 344 U.S. 443, 491 (1953) (opinion of Frankfurter, J.).

In addition to the rationale that prosecutions of a husband and wife under a sodomy statute may be "virtually inconceivable" and are thus de facto excluded from a sodomy statute's meaning, courts have dismissed the void-for-overbreadth argument on other grounds. One ground is that of justiciability: a number of courts have held that defendants indicted for coercive or public sodomitic acts plainly do not have the standing to assert the rights of third parties who theoretically could be indicted for private, consensual conduct. *See, e.g.,* Swikert v. Cady, 381 F. Supp. 988 (E.D. Wis. 1974), *aff'd mem.,* 513 F.2d 635 (7th Cir. 1975); Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), *cert. denied,* 416 U.S. 905 (1974); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972); State v. Crawford, 478 S.W.2d 314 (Mo. 1972). The Supreme Court is likewise presently reluctant to grant a defendant standing to assert constitutional rights "vicariously." *See* Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

45. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). A more strict equal protection test might be required if it is argued sexual gratification is a "fundamental right." Where a fundamental right is affected by a statute (*e.g.,* a sodomy statute), the courts will allow different classes (*e.g.,* the class of married persons who commit sodomitic acts and the class of unmarried persons who commit sodomitic acts) to be treated differently only where a compelling state interest in the distinction is shown. Dunn v. Blumstein, 405 U.S. 330 (1972). It might also be argued that classification based on marital status or "sexual orientation," like race, is "suspect" and hence subject to the more rigorous equal protection test. *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (statute proscribing marriages between certain persons solely because of race violates equal protection and due process clauses).

46. 405 U.S. 438 (1972).

47. 405 U.S. at 446-47.

have reasoned that if no legitimate state purpose is served in barring contraceptives from unmarried persons when married persons are able to obtain them, then similarly, no legitimate state purpose is served by a sodomy statute that intrudes upon the sexual privacy of unmarried persons (whether heterosexual or homosexual) but on the basis of *Griswold v. Connecticut*[48] is virtually inapplicable to married couples.[49]

The Court of Appeals of New Mexico, in *State v. Elliott*,[50] accepted this line of reasoning and held that the New Mexico sodomy statute was unconstitutional.[51] Although a few lower state courts in other jurisdictions have reached similar decisions,[52] overall the equal protection argument has not fared well.[53]

4. *Substantive due process*

According to substantive due process principles,[54] the fourteenth amendment not only provides for procedural safeguards but also "expresses an integral philisophy of liberal democracy"[55]—the idea that in the absence of a compelling interest and a showing of necessity, a state may not infringe upon fundamen-

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48. 381 U.S. 479 (1965); notes 36-37 and accompanying text *supra*.

49. *See, e.g.*, Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973).

50. 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975).

51. 88 N.M. at 193, 539 P.2d at 213. Under the newly adopted N.M. STAT. ANN. §§ 40A-9-21 to -22 (Supp. 1975), private consensual sodomy is no longer punishable in New Mexico.

52. State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (Ct. App. 1975), *rev'd*, 113 Ariz. 107, 547 P.2d 6 (1976). People v. Rice, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Dist. Ct. 1974); People v. Johnson, 77 Misc. 2d 889, 355 N.Y.S.2d 266 (Buffalo City Ct. 1974).

53. *See* cases cited in note 49 *supra*. The New Jersey Supreme Court, in State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973), distinguished *Eisenstadt* by saying that *Eisenstadt* "touches in no way upon the right to marital privacy with which *Griswold* is concerned." State v. Lair, 301 A.2d at 753. The state is not bound to protect equally the sexual privacy of the married and the unmarried. "Much of our law, criminal and otherwise, bespeaks the contrary." *Id.*

54. The doctrine of substantive due process grew out of late nineteenth and early twentieth century cases overturning governmental business and labor regulations because of alleged infringement upon economic freedoms. *See* Acanfora v. Board of Educ., 359 F. Supp. 843, 850-51 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.) *cert. denied*, 419 U.S. 836 (1974); W. BARNETT, *supra* note 5, at 94-95. The doctrine has fallen into disrepute in the economic context. *Id.* at 95. The principle, however, has not infrequently been used by the Supreme Court to judicially protect certain announced human rights. Notes 57-62 and accompanying text *infra*. *See generally Symposium, Allocation of Policymaking Authority Between Court and Legislature*, 1976 B.Y.U. L. REV. 37.

55. Acanfora v. Board of Educ., 359 F. Supp. 843, 850-51 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir), *cert. denied*, 419 U.S. 836 (1974).

tal personal liberties.[56] Among the specific fundamental personal liberties articulated by the Supreme Court in recent times are the right to procreate,[57] the right of privacy in a group association,[58] the right of marital sexual privacy,[59] the right of freedom to marry,[60] the right to obtain and use contraceptives,[61] and the right to obtain an abortion.[62]

Homosexuals have seen in these cases the matrix of one or more additional "fundamental rights": the right to sexual fulfillment[63] or an absolute right of privacy—especially in the home—as to any conduct between consenting adults.[64] In upholding sodomy statutes, however, courts generally have concluded that no fundamental right has been infringed upon or have recognized the necessary state interest in a putative infringement.[65]

5. *Right of privacy*

Although the precise constitutional source of a general right of privacy has not been declared by a majority of the Supreme Court, its existence is undisputed.[66] The right has been integrally associated with overbreadth,[67] equal protection,[68] and substantive due process[69] attacks on sodomy laws. Independent of the other

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56. *See* Griswold v. Connecticut, 381 U.S. 479, 496-98 (1965) (Goldberg, J., concurring); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463-66 (1958).

57. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

58. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

59. Griswold v. Connecticut, 381 U.S. 479 (1965).

60. Loving v. Virginia, 388 U.S. 1 (1967).

61. Eisenstadt v. Baird, 405 U.S. 438 (1972).

62. Roe v. Wade, 410 U.S. 113 (1973).

63. *E.g.*, United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa. 1973): "[T]he apparent trend of recent decisions would indicate that such a right [to 'deviant sexual conduct'] among or between consenting adults does exist." W. BARNETT, *supra* note 5, at 97.

64. *E.g.*, Swikert v. Cady, 381 F. Supp. 988 (E.D. Wis. 1974), *aff'd mem.*, 513 F.2d 635 (7th Cir. 1975); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir), *cert. denied*, 419 U.S. 836 (1974); Dawson v. Vance, 329 F. Supp. 1320 (S. D. Tex. 1971); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), *cert. denied*, 416 U.S. 905 (1974); State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975); Canfield v. State, 506 P.2d 987 (Okla. Crim. App. 1973). *See also* United States v. Orito, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home . . . .")

65. *E.g.*, cases cited in note 64 *supra*.

66. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

67. *See* notes 35-37 and accompanying text *supra*.

68. *See* notes 48-49 and accompanying text *supra*.

69. *See* note 64 and accompanying text *supra*. The general right of privacy may in fact be a substantive due process right. The substantive due process and right of privacy arguments, however, are distinguished here for purposes of discussion.

arguments, it has been strongly and frequently argued as mandating the invalidation of sodomy statutes as applied to consenting adults who act in private.[70] The Supreme Court, however, has not yet held that the right of privacy embraces all of the private sexual concerns of unmarried, consenting adults; and other courts for the most part have not seen *Griswold v. Connecticut,*[71] *Eisenstadt v. Baird,*[72] and other privacy related decisions as indicative of how the Supreme Court would rule on the subject.[73]

II. Instant Case

The litigants in the instant case raised issues based upon many of the arguments previously employed against sodomy statutes, including the arguments of privacy,[74] substantive due process,[75] equal protection,[76] overbreadth,[77] and vagueness.[78] In delivering its opinion, however, the district court discussed only the right of privacy issue and the interest of the state in its sodomy statute,[79] and held that the statute was not unconstitutional on its face or in its application to the plaintiffs' circumstances.[80] The burden of the court's opinion was that the right of privacy as enunciated in *Griswold v. Connecticut*[81] applied to *marital privacy* only; it was not to be extended to include "homosexual intimacy."[82]

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70. *See, e.g.,* Connor v. Hutto, 516 F.2d 853 (8th Cir. 1975); Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974); Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), *cert. denied,* 416 U.S. 905 (1974); Connor v. State, 253 Ark. 854, 490 S.W.2d 114 (1973); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972).

71. 381 U.S. 479 (1965).

72. 405 U.S. 438 (1972).

73. *See, e.g.,* State v. Hughes, 14 Md. App. 497, 287 A.2d 299, 304 (1972).

74. Brief for Plaintiffs at 3-10.

75. *Id.* at 18-20.

76. *Id.* at 21.

77. *Id.* at 20-21.

78. Brief for Defendants at 19-20.

79. 403 F. Supp. at 1200-03.

80. *Id.* at 1200.

81. 381 U.S. 479 (1965); notes 36-37 and accompanying text *supra.*

82. 403 F. Supp. at 1201. The court quoted Justice Harlan:

> Adultery, homosexuality and the like are sexual intimacies which the State forbids . . ., but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. *It is one thing when the State exerts its power either to forbid extra-marital sexuality* . . . or to say who may marry, but it is quite another

The court further determined implicitly that the statute could not have violated plaintiffs' due process or equal protection rights. Having decided at the threshold that private, consensual homosexual activity was not a fundamental liberty, the court did not feel obligated to apply a strict "compelling state interest" test of fourteenth amendment violation.[83] Instead, the court noted that *if* the state had the burden of proving a "legitimate interest in the subject of the statute" or that the statute was "rationally supportable," then Virginia had fulfilled this obligation by the intimation that the proscribed conduct was "likely to end in a contribution to moral delinquency."[84] The statute, in other words, was "appropriate in the promotion of morality and decency."[85]

One of the three judges dissented. Viewing private, consensual sexual acts between adults as liberties protected by the right of privacy and in which the state has no legitimate interest, the dissent saw the sodomy statute as a violation of plaintiffs' right of privacy.[86] The dissent was confident that previous Supreme Court privacy decisions supported his view.[87]

The Supreme Court affirmed the decision of the district court,[88] and later denied a petition for rehearing.[89]

III. Analysis

Facets of the instant case to be analyzed in this note include the district court's incomplete treatment of the issues, its holding that a right of privacy does not protect the private, consensual sexual conduct of homosexuals, and its view of the state's interest in the maintenance of sodomy statutes proscribing such conduct. To be noted also are the contradictions that the outcome of the instant case represents in light of other recent Supreme Court privacy decisions and the likely effect of the Supreme Court's affirmance of the lower court's decision.

> when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (emphasis supplied). The statement was later quoted with approval by Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (concurring opinion).

83. *See* 403 F. Supp. at 1202. *See also* note 45 *supra*.

84. 403 F. Supp. at 1202.

85. *Id.*

86. *Id.* at 1203-05 (Merhige, J., dissenting).

87. *Id.* at 1205.

88. 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975).

89. 425 U.S. 985 (1976).

A. The Court's Incomplete Treatment of the Issues

The federal district court in the instant case focused its attention on probably the strongest argument against the constitutionality of sodomy laws—the argument that the general right of privacy bars prosecution for private, consensual sodomy.[90] But the court's determination that the right of privacy does not protect homosexual sodomy was not an automatic resolution of the other issues raised. Answers to plaintiffs' equal protection and due process arguments may be found, perhaps, in the court's failure to find that sexual gratification or absolute privacy in the home is a fundamental right. This failure may have been a result of conscious deliberation, but the court's opinion does not evidence much consideration of the matter. Similarly, responses to the vagueness and overbreadth issues may well be inferred from Supreme Court decisions relative to the subjects;[91] but again, the district court declined to address these issues. Had the court answered all the issues raised, its opinion would have been virtually comprehensive of litigation involving sodomy statutes and, with the Supreme Court's affirmance,[92] would have become possibly the final word on the subject.

B. Right of Privacy

The district court determined that the right of marital privacy announced in *Griswold v. Connecticut*[93] did not extend to the private sexual conduct of homosexuals. In so determining, the court ignored several post-*Griswold* privacy decisions of the Supreme Court, which many sodomy law opponents have read as clearing the way for a judicial overturning of the laws.

1. Other privacy decisions

In spite of the Supreme Court's paeans to the institution of marriage in *Griswold*,[94] subsequent decisions have indicated that

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90. This aspect of the court's opinion is discussed in notes 93-110 and accompanying text *infra*.

91. *E.g.*, Rose v. Locke, 423 U.S. 48 (1975). *Compare* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds sub nom.* Wade v. Buchanan, 401 U.S. 989 (1971) *with* Younger v. Harris, 401 U.S. 37 (1971).

92. This aspect of the instant case is discussed in notes 120-123 and accompanying text *infra*.

93. 381 U.S. 479 (1965).

94. "Marriage is a coming together for better or worse, hopefully enduring and, intimate to the degree of being sacred. . . . [I]t is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486.

the right of privacy in sexual matters was not necessarily inherent in *marriage* but rather was inseparable from the *individuals* involved. "If the right of privacy means anything," the Supreme Court stated in *Eisenstadt v. Baird,*[95] "it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[96]

In the controversial case of *Roe v. Wade,*[97] the Court held that the individual's right of personal privacy includes the abortion decision, qualified by certain state interests.[98] After *Roe,* the right of privacy in sexual and reproductive matters took on sweeping dimensions: the individual's right of personal privacy superceded (within certain time limitations) the state's interest in protecting the unborn,[99] thus superceding the potential or nascent rights to life of the unborn themselves.[100] While the Court still refused "to recognize an unlimited right" to "do with one's body as one pleases,"[101] one could now do with one's body as one pleased to an extraordinary degree.

Contributing to the Supreme Court's recognition of a greatly expanded right to personal privacy (absent incontrovertible harm to others) was *Stanley v. Georgia.*[102] Although *Stanley* dealt with the regulation of obscenity and not sexual privacy, still it emphasized the Court's belief that some activities that are repugnant or unquestionably illegal if carried out in public are nonetheless protected if they occur in private: "[T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession [of pornography] by the individual in the *privacy of his own home.*"[103] Along with *Eisenstadt and Roe, Stanley* thus represented an expansion of the thitherto defined bounds of the right to privacy.

2. Lack of treatment of privacy cases by the district court

The district court did not mention *Eisenstadt, Roe,* or *Stanley,* much less discuss the implications of these post-

95. 405 U.S. 438 (1972); notes 46-47 and accompanying text *supra.*
96. 405 U.S. at 453.
97. 410 U.S. 113 (1973).
98. *Id.* at 154.
99. *Id.* at 154-66.
100. *See id.*
101. *Id.* at 154.
102. 394 U.S. 557 (1969).
103. 394 U.S. at 568 (emphasis supplied).

Griswold decisions.[104] The court may have felt the implications had been discussed sufficiently elsewhere.[105] It is more likely, however, that the court realized that direct treatment of these cases would have demanded a more rigorous analysis of privacy issues in order to justify its position.[106]

Whatever reasons it had for not discussing *Eisenstadt, Roe,* or *Stanley,* the court might be faulted for avoiding a potentially discomforting treatment. Already, on the basis of the Supreme Court's privacy decisions, a New Mexico court had held its state's sodomy statute unconstitutional;[107] the Supreme Judicial Court of Massachusetts had construed that state's statute to be inapplicable to the private consensual conduct of adults regardless ot sex or marital status;[108] and at least three federal courts had intimated that the right of privacy might very well extend to *any* private, consensual sexual act.[109]

Any criticism of the court in the instant case would, however, have to be greatly tempered when viewed in light of the Supreme Court's affirmance of the decision.[110] Ignoring what could have been clear portents in the earlier privacy cases, the district court unerringly divined the Supreme Court's intention not to include the private sodomitic conduct of homosexuals within the bounds of the right of privacy.

C. *The State's Interest*

After ruling that private homosexual activity was not protected by the right of privacy, the district court in the instant case noted that the state was free to punish the conduct in question if it wished to do so.[111] The court proceeded to show that the state had a "legitimate interest in the subject of the statute" and that

104. *Eisenstadt, Roe,* and *Stanley* were discussed in plaintiffs' brief. Brief for Plaintiffs at 4.

105. *See, e.g.,* State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973).

106. The dissent does not omit citation of *Eisenstadt, Roe,* and *Stanley.* 403 F. Supp. at 1203-05.

107. State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975).

108. Commonwealth v. Balthazar, 318 N.E.2d 478, 480-81 (Mass. 1974). The court did not "decide whether a statute which *explicitly* prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm." *Id.* at 481 (emphasis supplied).

109. Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973); 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); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974).

110. 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975).

111. 403 F. Supp. at 1202.

the statute was "rationally supportable."[112] In noting the state's interest, the court mentioned the state's objective in the "promotion of morality and decency."[113] The court observed furthermore that "the longevity of the Virginia statute," while not decisive of its constitutionality, "does testify to the State's interest and its legitimacy."[114] The intimation was that when the state has, in the continued existence of a statute, an interest in morality and decency, and the standards of morality and decency themselves are not arbitrary but have their bases in history and civilization's experience, then courts must be slow to act; in such circumstances, "the wisdom or policy" of a statute is generally "a matter for the State's resolve."[115]

Opponents of the sodomy laws wonder what real interest a state has in the proscription of private, consensual homosexual sodomy; they declare that such private, consensual acts are "victimless" and are essentially products of personal moral judgments outside the area of the state's concern.[116] In the instant case, except for the somewhat weak reference to the prevention of "moral delinquency,"[117] the district court did not adequately address this position. Nonetheless, the court by its mention of morality and decency signaled its refusal to admit that the morality and decency of citizens was not the state's concern.

Without a great deal of finesse, the court thus made an important and often neglected point: ascertaining and articulating the morality of its citizens is of vital concern to the state. All legislation, after all, is an embodiment of a collective social judgment as to what is right and wrong or fair and just. Food and drug laws or progressive income taxes, for example, codify certain moral decisions that people may make regarding the type of society they want.[118] The state's duty is primarily to implement those choices. While the state should not be permitted to govern

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112. *Id.* at 1202-03. The showing of rationality and the state's interest may have had two purposes: (1) If the Supreme Court were to determine that the right of privacy did apply to private, consensual homosexual sodomy, then the showing would hopefully serve to satisfy due process and equal protection requirements. (2) An articulation of the rationality and state interest might well help forestall an inclusion of the proscribed behavior within the right of privacy at the outset of consideration, and thus preclude any later and more strict comparison of the rationality or interest with fourteenth amendment standards.

113. *Id.* at 1202.

114. *Id.*

115. *Id.* at 1200.

116. *See* sources cited in note 10 *supra.*

117. 403 F. Supp. at 1202.

118. Rostow, *The Enforcement of Morals,* 1960 CAMBRIDGE L.J. 174, 197-98.

thought or even behavior within a wide range of limitation, it must, for the society's own survival, hearken to collective judgments concerning what should be tolerated and what should not be tolerated. Without broadly shared ideas in political and moral matters, and the state's implementation of those ideas, the society would not exist.[119]

A state thus cannot afford to ignore the ideals, morals, aspirations, and fears of its constituent society. In this light, sodomy laws provide more than criminal sanctions for a certain kind of conduct. They become a manifestation of social policy, an indication of the type of community people want, a small component of a necessary social cohesiveness. While there may be few prosecutions of homosexuals for private consensual violations of the statutes and while it may perhaps be conceded that the violations are "victimless" in a very strict sense, yet members of a society by means of the statutes should be permitted to express their collective disapproval of the activity and unequivocally state, in effect, that they believe homosexuality, whatever its cause, is undesirable, or that they prefer their children have the chance to grow up having as little exposure to homosexual activity as possible.

D. Inconsistencies Between the Supreme Court's Affirmance in the Instant Case and Other Supreme Court Decisions

In its memorandum decision affirming the district court's decision, the Supreme Court by implication raised one troubling question: Can the outcome of the instant case be reconciled with some of the earlier privacy cases—*Roe v. Wade,* for example?

Implicit in the district court's opinion in the instant case and in the Supreme Court's affirmance was the balancing of two considerations in the threshold determination that homosexual sodomy is not protected by the right of privacy. One consideration involved the bounds of the right of privacy as defined in *Griswold, Stanley, Eisenstadt, Roe,* and earlier cases.[120] The other consider-

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119. P. DEVLIN, THE ENFORCEMENT OF MORALS 9-10 (1965). Note too a dissent from the Supreme Court's now discredited economic substantive due process approach:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

120. *See* notes 94-103 and accompanying text *supra.*

ation was the experience of civilization and the interest of the state and its citizens in articulating and maintaining a social policy of disapprobation of certain activities.[121] In the instant case, the latter consideration obviously weighed more heavily. Why did it not weigh at least as heavily in *other* cases where the stakes were arguably greater?

The result in *Roe v. Wade,* in particular, is shocking in light of the instant case: the state may proscribe a homosexual's private, consensual sodomitic acts, but it may not proscribe the termination of inchoate life. If the proscribed behavior in the instant case had been considered to be activity protected by the right of privacy, as was the conduct in *Roe v. Wade,* the sodomy statutes would not have survived. If the conduct in *Roe v. Wade* had been considered, on the bases of majority attitudes and states' concern, primarily as a legitimate subject of proscription, as was the behavior in the instant case, the anti-abortion statutes undoubtedly would have survived. Did the Supreme Court give too little weight to the right-of-privacy arguments in the instant case, as some contend?[122] Or did the Court give too much weight to right-of-privacy arguments in *Roe v. Wade*?[123] In the answer to these questions may lie the ultimate irony of the instant case—or the frightful irony of *Roe v. Wade.*

E. End of the Court Battle

The Supreme Court's failure to address the right of privacy argument—probably the strongest argument against the constitutionality of sodomy statutes—signals the termination, or at least the postponement, of attempts to judicially overturn sodomy laws. But the end of the court battle does not mean that there is no change in the future for the laws. As previously noted,[124] seventeen states no longer punish any private, consensual sodomitic acts of adults, whether homosexual or heterosexual, whether by persons married or single. Over twenty-eight municipalities—many of them major cities such as New York, San Francisco, Seattle, Detroit, and Minneapolis—have recently enacted so-called "gay rights protection" ordinances.[125] Further-

121. *See* notes 111-119 and accompanying text *supra.*

122. *E.g.*, CONG. REC. H2552-53 (daily ed. Mar. 30, 1976) (remarks of Rep. Koch); 122 CONG. REC. E1686 (daily ed. Mar. 31, 1976) (remarks of Rep. Abzug).

123. *See generally* Will, *Discretionary Killing,* NEWSWEEK, Sept. 20, 1976, at 96.

124. Note 9 and accompanying text *supra.*

125. Information Release of National Gay Task Force, 80 5th Ave., New York, New York 10011, Oct. 20, 1976.

more, a bill has been sponsored in Congress to include "affectional or sexual preferences" among protected civil rights.[126] While some of the pending legislation does not directly remove