

MINUTES

MONTANA SENATE 52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on March 28, 1991, at 9:30 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: none

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion:

HEARING ON HOUSE BILL 825

Presentation and Opening Statement by Sponsor:

Representative Dave Brown, District 72, said HB 825 would revise the concealed weapons law on which the 1989 Legislature spent considerable time before it died on third reading in the House. He stated that Representative Strizich, the Great Falls Sheriff, and others spent time during the interim putting this legislation together which passed the House 97-3.

Representative Brown explained that Section 1 provides a for a two-year permit to be issued by a sheriff, along with photograph identification. He said applicants must be residents of the state for six months, and that pages 1-3 list causes for denial. Representative Brown reported that applicants must also complete a firearms training course, and that the process will be consistent statewide.

Representative Brown further stated the sheriff is required to notify the area chief of police and the Department of Justice when permits are issued. He said the latter part of Section 3 provides that a sheriff may charge \$50 for an application and \$5 for fingerprint fees; Section 4 provides for an appeal process; Section 5 requires notifying the county of a change of residence; Section 6 provides immunity from liability for sheriffs; Section 7 addressed carrying weapons under the influence; Section 8 lists places where concealed weapons are prohibited; Section 9 provides a new definition of concealed weapons; Section 12 provides that existing permits carry on until their expiration dates. He said he believes this is responsible legislation, and asked the Committee to pass the bill.

Proponents' Testimony:

Clyde Byerly, Vice President, Montana Rifle and Pistol Association, read from prepared testimony (Exhibit #1). He said permits are denied right now on the whims of judges instead of applicants' qualifications. He stated that with the recent change to hunting big game with handguns, sportsmen need to be exempt. Mr. Byerly further stated that the office of primary responsibility should be the one best able to perform background checks, and that it would generate revenue for sheriffs via application fees. He said restrictions on carrying firearms in public places are addressed in the bill, and that he believes it is time for this law.

Charlie Hughes, Butte Gun Club, and Montana Rifle and Pistol Association, said HB 825 was written with the support of the law enforcement community, and is supported by NRA and private sector interests. He urged the Committee to pass the bill.

Charlie Kiss, Buffalo Road Muzzle Loaders, asked the Committee to pass HB 825.

Rick Later, Beaverhead County Sheriff and Montana Sheriffs and Peace Officers, stated his support of the bill.

Bob Butorovich, Butte Silverbow Sheriff, asked the Committee to support HB 825.

Representative Bob Clark, District 31, said HB 70 (1989 Session) was flawed in many ways, but the problems were worked out in the interim. He told the Committee that HB 825 is patterned mostly after Idaho law, passed in 1989. Representative Clerk advised the Committee that Florida, Michigan, Indiana, and Missouri have also passed similar legislation. He said Washington has had similar legislation since 1935.

A.M. Elwell, Montana Weapons Collectors Society, Montana Machine Sports, and Montana Game Association, read from prepared testimony. He said the process used now is discriminatory, and that he highly recommends passage of HB 825. He commented that the

bill does not say applicants must apply in the county in which they reside.

Written testimony sent by John C. Lenzier, Montana Liaison, National Rifle Association, was introduced (Exhibit #3).

Vito Ciliberti, Missoula, said he represented himself and a number of women friends in the Missoula area. He told the Committee these women were involved in firehouse training courses for women, and that a deputy sheriff made the comment that they would have to protect themselves. Mr. Ciliberti stated that his daughter would like to have this legislation in Montana, as it is now in Oregon. He quoted an article in the Missoulian, dated March 22, 1991, from Dateline Washington, on rape of women.

Opponents' Testimony:

There were no opponents of HB 825.

Questions From Committee Members:

Chairman Pinsoneault commented that the penalty is far too lenient if someone carries a concealed weapon while under the influence of alcohol.

Senator Crippen asked why applicants must go through this education process. Representative Brown replied the bill requires a firearms course, and said he believes people need to be reminded of how to deal with weapons properly.

Senator Crippen asked if people could go through airports carrying a concealed weapon. Lewis and Clark County Undersheriff, Bill Fleiner, replied that concealed weapons can't be taken into public buildings, and that even law enforcement officers don't often carry weapons on airlines during extradition.

Senator Crippen asked if he would have to apply in Yellowstone County since he resides there. Bill Fleiner replied that applicants must reside in the State for a period of six months, but can apply in any county. He said that the 1977 Legislature determined that all persons in the state be held in the same standards, and asked the Committee to keep in mind the training aspects of the bill. Mr. Fleiner further commented that it is very important to the Sheriffs and Peace Officers to know that individuals carrying concealed weapons possess the capability to use them properly.

Senator Crippen asked if the permits pertain to one particular type of weapon. Bill Fleiner replied it covers any handgun.

Senator Svrcek asked why the standards were changed from "probable" to "reasonable" on page 3 of the bill. Representative Brown replied he does not believe people are trying to set up a different system.

Senator Svrcek asked if a permit would be issued to a person with a history of family abuse. Representative Brown replied that law enforcement would check this, and said he doesn't believe they would issue a permit in such a situation. He stated that John MacMaster, Attorney, Legislative Council, drafted an amendment striking Section 7. He further stated that page 11 requires a reasonable explanation for requesting a permit, and that law enforcement not only has concerns about issuing these permits, but will go to great lengths to not put people in abusive situations.

Senator Mazurek commented that a sheriff can't deny an application, unless he or she finds the applicant ineligible. Representative Brown replied that applicants cannot be denied unless a sheriff has reasonable cause to believe the applicant is mentally ill, etc. (page 3, line 6). He said, "The bill sets a low standard for rejection".

Senator Mazurek stated that unless an applicant is mentally ill a sheriff cannot deny a permit. He asked if there is a bad reason for having a weapon. Representative Brown urged the Committee to be careful if it decides to amend the bill.

Senator Mazurek commented that the immunity in the bill requires no accountability or responsibility from sheriffs at all. Representative Brown replied he doesn't believe law enforcement people will react this way. Bill Fleiner responded that immunity is the most critical part of this legislation, and that he doesn't believe it will lessen law enforcement acting judiciously. He further stated that, "The sheriffs probably don't want people to have concealed weapons, quite frankly".

Senator Mazurek again stated that if a sheriff is concerned, but can't plug an applicant into mentally ill status or the applicant does not have a felony record, that sheriff can't deny a permit. He further stated that he agrees with Representative Brown that there will be some court cases.

Senator Towe advised the Committee that there is a double negative in the sentence on page 3 (g). Representative Brown replied that it says "or unless", and is not a double negative.

Senator Towe suggested amending the bill on line 8, inserting "or otherwise may be a threat to the peace and good order of the community". He also asked if a gun or a knife in a woman's purse would be a concealed weapon. Bill Fleiner replied that a one needs a permit to carry a weapon in a purse on their person. He said he believes this is covered by existing law.

Senator Towe stated that a knife is a concealed weapon, but no training is required to carry a knife. He also asked if there is any other law the Committee doesn't know about (page 1, lines 24-25). Representative Brown replied he was not aware of any.

Senator Svrcek asked if applicants must apply in the county in which they reside. Representative Brown replied they do (Section 3, page 10). He stated that a permit may be revoked if circumstances arise indicating revocation, and that the drafters tried to make this language unique to the situation in Montana.

Closing by Sponsor:

Representative Brown asked that Senator Jacobson carry HB 825, and that Senator Pinsoneault carry it if she cannot.

HEARING ON HOUSE BILL 451

Presentation and Opening Statement by Sponsor:

Representative Vivian Brooke, District 56, said HB 451 would generally revise laws concerning sex crimes. She stated she believes it would strengthen the Code concerning crimes with victims, and would clarify what "we call crimes" without victims. She provided a proposed amendment (Exhibit #4).

Proponents' Testimony:

Holly Franz, Womens Law Section of the State Bar Association, strongly urged the Committee to support HB 451. She read from prepared testimony and provided an amendment (Exhibits #5 and #6), and said the amendment is somewhat complicated.

Ms. Franz stated there is no reason for Section 1 now, and commented that Senator Crippen carried a bill in 1985 eliminating the crime of spousal rape (Section 2). She further stated that Section 3 is covered in HB 211 (Representative Bradley), and Section 4 covers indecent exposure. Ms. Franz said Section 5 is an incest provision, and commented that the current penalty is one-half of what it is for other rape. She stated that Section 6 addresses "date rape", and said Montana law is unique in this area as each sexual assault is looked at on an individual basis.

Ms. Franz continued, and said Section 7, defining sex, removes sexual deviate acts. She stated that 45-2-101, MCA, provides general definitions (pages 7-24). and that Sections 8-17 are miscellaneous renumbered provisions which have nothing to do with the bill. Ms. Franz further stated that section 18 is the repealer of deviant sexual acts.

Ms. Franz told the Committee that HB 451 only affects consensual adult homosexual sex, and that 25 states have adopted similar legislation. She said the American Bar has recommended decriminalization of consensual adult homosexual sex, as no one is harmed. Ms. Franz further stated there is no textual privacy guarantee in the U.S. Constitution, as in the Montana Constitution. She told the Committee that science has indicated that people have no control over this preference, and that most county attorneys

will not bring this crime. Mr. Franz commented that Missoula County believes it is unconstitutional, and said John Connor, Department of Justice, was present to answer questions.

Reverend Gary Hawk, Pastor, Plymouth Congregational Church, Helena, read from a prepared statement. He said the United Church of Christ ordains people without reference to their sexuality, and that he recently worked with a family whose husband/father did not advise them until he was dying and had exposed them to the disease, that he had AIDS. Reverend Hawk stated he believes these are people who need understanding and testing, but are driven by fear to hide.

Bruce Desonia, Department of Health and Environmental Sciences (DHES), read from a prepared statement in support of the bill (Exhibit #5a). He said his statutory duties include monitoring and preventing human immuno-deficiency viruses. He said a barrier occurs when a "gay" man goes to DHES for health screening because he might refuse to identify his sex partners. He referred to the book, No Magic Bullet by Allen Brandt.

Steve Simpson read from a prepared statement in opposition to HB 451 (Exhibit #6a).

Aylee Hendricks, told the Committee she is a date rape survivor, and that she believes her case was not taken seriously by the law. She read from a prepared statement, and said her assailant was not prosecuted. Ms. Hendricks said she believes date rape victims need support and protection of the legal system, and urged the Committee to support the bill.

Representative Tom Lee, District 49, said he supported the bill, as amended, as well as Steve White's remarks concerning health decriminalization. He said he believes it, "will open the door to the rest of the homosexual agenda, if not passed in amended form".

Opponents' Testimony:

There were no opponents of the bill.

Questions from the Committee:

Chairman Pinsoneault refuted the statement that no harm is done to the community by this legislation. He paraphrased Justice Berger's comments in the Georgia case (Exhibit #7), and said Laguna Beach, California has the highest incidence of AIDS in the nation. He restated that to suggest there is no harm is absolutely false. Holly Franz replied there is no cure for AIDS, and that the best way is prevention and education. She stated that, right now, HIV-positive people are defined as felons under Montana law.

Chairman Pinsoneault further stated that the Constitution speaks to dignity of human beings, but he is bothered by what goes

on behind closed doors, and the slime that leaks out into the community.

Senator Crippen asked Reverend Hawk if he realized it would not be against the law to have sex with an animal under this bill. Reverend Hawk replied he did not support bestiality.

Senator Crippen commented to Reverend Hawk that he said he supported HB 451. He asked Reverend Hawk where he is coming from. Reverend Hawk replied that he had said earlier that continuing to prosecute for same-sex relations and bestiality is not helpful.

Senator Crippen asked Reverend Hawk if he went along with eliminating sex with animals from the bill. Reverend Hawk replied he did not.

Senator Crippen asked Reverend Hawk to repeat the four methods he used in determining his support of this bill. Reverend Hawk replied he was trying to discern the will of God by relying on the Bible, cultural context, personal experience, and the history of the church.

Senator Crippen said he would challenge this method, and commented that Reverend Hawk was acting like the Pharisees in the Bible.

Senator Yellowtail stated that he believed the previous two lines of questioning were inappropriate. Senator Towe agreed, and Chairman Pinsoneault disagreed.

Senator Doherty asked how many times in the past ten years a county attorney has prosecuted for deviant sexual conduct. John Connor replied there was one incident, but the original charge was disposed of under another section of law. He stated he was not aware of any other cases.

Senator Doherty asked if this type of charge is sent to the Department of Justice. John Connor replied he is always in contact with county attorneys.

Senator Rye stated that this is a situation where a little hypocrisy in the law might be a good idea, and asked for John Connor's opinion on this. Mr. Connor replied he is present as a representative of the Montana County Attorneys, and believes this is a policy decision of the Legislature.

Senator Rye asked if this bill would be valid, from a legal point of view, if it were to pass. John Connor replied it would be, except for non-consensual sex.

Senator Svrcek said he echoed Senator Yellowtail's comments. He commented that he was concerned about rocky relationships between spouses, and whether one spouse could complain that the other spouse was engaging in indecent exposure by going around

their home clad only in underwear. Holly Franz replied that she didn't believe strolling around in the home is indecent exposure, unless there was someone else in the home would could be offended.

Senator Towe asked if rape isn't a separate offense to incest, and if incest is as serious a crime, particularly if it is consensual. John Connor replied that there could be a charge of rape, but prosecution could charge incest when there are acts of sexual intercourse between step-daughter and step-father, but there is no proof of penetration.

Senator Towe asked for comments on the House reinserting Section 6, evidence of past sexual conduct. John Connor replied that he liked the bill in its original form, and believes the amendments "mushes" up the issues.

Senator Towe asked why subsection (2) was stricken from the bill. John Connor replied it is not needed now.

Closing by Sponsor:

Representative Brooke said HB 451 is a difficult bill, and that people get uncomfortable with it. She stated it simply provides for civil rights and decriminalization, and is not an attempt to advance the homosexual agenda. Representative Brooke suggested amending divorce and getting it out of the Code. She said the Montana and U.S. Constitutions guarantee the right of privacy and that all citizens be treated equally under the law.

Representative Brooke told the Committee that 45-5-505, MCA, increases the fear of convicted felons, and said she hoped the Committee would not kill the bill. She stated there are several problems which need to be defined in the law, and commended the victim of date rape on her courage in testifying before the Committee.

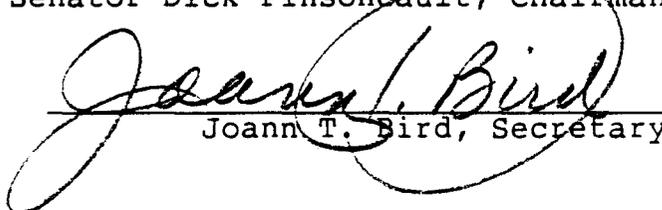
Representative Brooke challenged the Committee to set aside prejudice, and to pass the bill as introduced.

ADJOURNMENT

Adjournment At: 11:30 a.m.



Senator Dick Pinsoneault, Chairman



Joann T. Bird, Secretary

ROLL CALL

SENATE JUDICIARY

COMMITTEE

52nd LEGISLATIVE SESSION -- 1991

Date 28 Mar 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

Montana Rifle & Pistol Association



affiliated with
National Rifle Association

Testimony of Clyde G. Byerly

Subject: House Bill 825. Concealed handgun carry bill.

I wish to express support for the bill. I represent the Montana Rifle and Pistol Association which is a State membership organization of shooting sports and hunting enthusiasts.

The present method of reviewing and granting handgun carrying permits is not standardized within the State. There are no specific guidelines for use to determine if applicants are eligible for a permit to carry. All too often permits have been denied based on the personal whims and philosophy of judges rather than the applicants qualifications.

We need to codify the requirements which persons must meet to be considered for the issuance of a permit. The restrictions in the bill that spell out under what conditions a permit will be denied are comprehensive and adequate for the issuing agency to make an informed decision on denying a permit.

With the recent advent of big game hunting with handguns, many sportsmen in the field are carrying pistols which are best carried and protected under protective clothing. At present these persons are in technical violation of the laws. We need to exempt sportsmen in the field from the present concealed carry restrictions.

The application for the permit attached to the bill should be concise and to the point. Issuance of the permit is based on the character and eligibility of the applicant. In short, the application for the permit should be as simple as possible for the sheriff to make the determination if the INDIVIDUAL does not fall into any of the categories that would result in the denial of a permit. The detail and the information required on it should not be a hindrance to the average person which would discourage them from requesting a permit.

Ex #
28 Mar 91
HB 825

3/28/91

HB 825

The office of primary responsibility for issuance of the permit should be the one which can best perform background checks on applicants. With a 2/3 favorable vote, the liability limitation in the bill will encourage the County Sheriffs to perform this service for the public.

This is a revenue generating bill for the County Sheriffs because the actual cost of the initial background check will be more than adequately covered by the application fee. The application fees should reflect the actual cost of conducting a background investigation. The fee in the bill is high enough to cover these costs but not so high that it discourages the average person for applying for a permit. The figure of \$50.00 for the initial fee plus the addition of \$5.00 for the fingerprinting is more than sufficient to cover the actual cost of the check. Cooperation between law enforcement agencies makes the background check a routine communication matter.

The restrictions on carrying firearms in public places in the bill have been reviewed and discussed with various law enforcement agencies and officers. We feel that the restrictions available to local governments are adequate to protect the public.

This act in no way degrades the current laws which prohibit the ownership and carrying of various firearms which have already been classified as illegal to possess or carry.

In summary, this is a law whose time has come. We must bring organization and reason to the present inconsistent system.

END

ZX #2
20 Mar 91
HB 825

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS CHARLIE HUGHES. I AM HERE BEFORE YOU TODAY TO REPRESENT THE BUTTE GUN CLUB AND THE MONTANA RIFLE AND PISTOL ASSOCIATION AS THEIR CHAIRMAN OF THE LEGISLATIVE COMMITTEE.

THE LEGISLATION BEFORE YOU, HOUSE BILL 825, IS WELL WRITTEN AND LONG OVER DUE. OUR CURRENT SYSTEM OF ISSUING PERMITS IS DISCRIMINATORY AND HAS NO SYSTEM IN PLACE REQUIREING BACKGROUND CHECKS OF PERMITTEES. IT ALSO HAS NO GUIDELINE AS TO WHO CAN RECEIVE A PERMIT AND WHO CAN NOT, ~~THIS SYSTEM HAS BEEN ADOPTED IN SOME AREAS OF THE STATE.~~

THIS BILL WAS WRITTEN WITH THE SUPPORT OF THE LAW ENFORCEMENT COMMUNITY. IN FACT THE ORIGINAL DRAFT WAS WRITTEN BY POLICE CHIEF JONES OF GREAT FALLS. THIS BILL IS FURTHER SUPPORTED BY THE MONTANA RIFLE AND PISTOL ASSOCIATION, THE NATIONAL RIFLE ASSOCIATION AND THOSE OF INTEREST IN THE PRIVATE SECTOR. IT THOROUGHLY ADDRESS THE CONCERNS OF BOTH THE LAW ENFORCEMENT COMMUNITY AND THOSE OF THE PRIVATE CITIZENS OF OUR STATE.

AT THIS TIME I WOULD LIKE TO VOICE OUR UNQUALIFIED SUPPORT OF HOUSE BILL 825 AND SINCERELY HOPE THAT THIS COMMITTEE WILL GIVE IT A RESOUNDING DO PASS RECOMINDATION IN ITS CURRENT FORM.

THANK YOU FOR THE OPPORTUNITY TO SPEAK BEFORE YOU TODAY.



NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

EX 75
26 Mar 91
HB 825

March 27, 1991

The Honorable Richard Pinsoneault
Senate Judiciary Committee Chairman
Montana State Capitol
Capitol Station Room 412
Helena, MT 59620

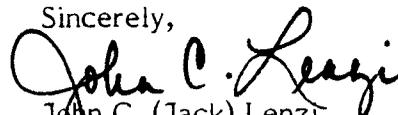
Dear Senator Pinsoneault:

On behalf of the National Rifle Association's more than 20,000 Montana members let me thank you for your efforts with regard to concealed carry reform in Montana. House Bill 825 is enthusiastically supported by the NRA and its members. I must, however, apologize for not attending the Senate Judiciary Committee Hearing of March 28; scheduling commitments have made the trip impossible.

House Bill 825 is an excellent proposal to complete the job that was started by the State Legislature in the previous session, and was passed favorably in the House on third reading by a vote of 92-7. I do, however, offer three minor, but important amendments to improve the bill and to ensure the intent of the Legislature and the concerns of Montana firearms owners are well met by enactment of HB 825. Those amendments can be found on pages 3-4 of the enclosed testimony, and I welcome any opportunity to assist you and your staff as may be needed.

Again, I apologize for being unable to attend the committee hearing and I do appreciate the opportunity to submit written testimony for the record to share with you and the Committee members the concerns of the National Rifle Association. If you have any further questions, or if there is anything else I can do for you on this issue during this legislative session, do not hesitate to contact me at (202) 828-6366.

Sincerely,


John C. (Jack) Lenzi
Montana Liaison

TESTIMONY OF
THE NATIONAL RIFLE ASSOCIATION
ON HR 417 AND IN SUPPORT OF HR 825
SUBMITTED BEFORE THE MONTANA SENATE JUDICIARY COMMITTEE
MARCH 28, 1991

John C. Lenzi
Montana Liaison

On behalf of the National Rifle Association, our 20,000 Montana members, their families, and sportsmen across the state, thank you for the opportunity to testify on HR 417, and in support of HR 825. My name is John Lenzi and I am the NRA Liaison for Montana.

As you know, the NRA has considered concealed carry permit reform an important element in the overall scheme of Montana state firearm laws. The 1980s was a decade of pro-firearm owner legislative reform encompassing state constitutional amendments, state preemption laws, sportsmen protection statutes, and, of course, concealed carry permit reform. There has been a growing concern among Montana residents, and law-abiding citizens nationally, over violent crime and the ability to lawfully carry a concealed handgun for personal protection if they have a need or desire to do so. The proposal before you today, HR 825, is a significant step in the right direction to create such a permit system. The NRA applauds the efforts of legislators, the law enforcement community, and Montana gun owners and sportsmen who have come together on this bill to address the needs and concerns of Montana residents.

In this regard, several of your colleagues in the House of Representatives deserve special mention for their efforts on HR 825. Representatives Dave Brown, William Strizich, and Robert Clark have been particularly active and helpful in discussions with Montana law enforcement, the Montana Rifle and Pistol Association, and of course, the NRA. Their exemplary work on HR 825 has created a well-written, well-thought out

proposal that has, as you know, already passed the House on a third reading vote of 92-7. I look forward to working with members of this committee, as well as the rest of the Senate, on HR 825, and I am certain that an excellent bill will be enacted.

HR 825 proposes to create a "shall issue" permit system administered by Montana sheriffs. Such a system eliminates the discretionary language found in the current statute, but does in fact establish a clear set of criteria that both law enforcement and permit applicants must abide by. HR 825 retains the current statutory requirement mandating six (6) months of state residency before an applicant may be eligible for the carry license. A limit of 60 days is provided for, during which time the sheriff must run a background check of the applicant, prior to issuance of the carry permit. It is obvious that only law-abiding residents will submit to a background check/permit system; the NRA accepts such permit systems due to political necessity. The NRA and Montanans across the state are satisfied with these provisions, and while the time periods could be somewhat shorter, there is certainly no logical reason to lengthen them.

It should be made clear that while the NRA supports each individual's right to possess and carry firearms, it does not advocate that all law-abiding citizens in fact do so. The decision to own firearms and (particularly) to carry a handgun for self-protection, is a deeply personal choice. Many who choose to own firearms, will not choose to obtain a concealed carry permit. However, HR 825 will ensure that those honest Montanans who elect to carry a handgun for personal protection will be able to do so through a permit

system which is both fair and uniform.

I would, however, like to take this time to note several provisions of the bill which cause the NRA concern. First, as was established in NRA testimony before the House Judiciary Committee, the NRA remains concerned over Section 1, paragraph 2 -- the demonstration of familiarity provision. Under this section of HR 825, an applicant must demonstrate familiarity with a firearm through a number of different means provided for in the bill. As is currently written, the sheriff is given the authority to choose the criteria that the applicant must meet. To avoid any possible abuse of this discretionary authority, I urge this Committee to amend paragraph 2 to allow the applicant to choose the criteria by which to demonstrate familiarity with a firearm. Sufficient language for this purpose would be as follows: "(2) An applicant for a permit under this section must, as a condition to issuance of the permit, demonstrate to the sheriff familiarity with a firearm by any one of the following:" The applicant will, of course, be required to prove or demonstrate that familiarity as provided for in Section 1, paragraph 3.

Second, the NRA again voices its concern over Section 1, paragraph (1)(g), specifically the "reasonable cause" language found in lines 6 and 7. To fully protect the due process rights of Montana residents, this language should either be deleted or significantly redrafted. This can be done while retaining the limited discretion desired by law enforcement to deal with persons they "know" to be perhaps mentally unstable. Sworn affidavits by individuals having personal knowledge of the applicant's behavior, or a pattern of behavior, that suggests the applicant is a danger of himself or others, submitted to the sheriff should be adequate to address the due process rights of Montana residents as well

as law enforcement concerns. Without such due process safeguards, this current language invites potential abuse, as well as potential lawsuits against the sheriff and the state.

Third, Section 8 specifies " a building owned or leased by the federal, state, or local government" as an area where carrying a concealed weapon is prohibited. This provision can be improved by adding language to provide for "notice" to the concealed handgun permit holders. This can be done by adding "known or reasonably should be known to be" following "a building" and before "... owned or leased..." The provision would then read a) a building known to be or reasonably should be known to be owned or leased by the federal, state, or local government." This change is in complete order with the "purposely or knowingly" language regarding the act of carrying concealed into these prohibited areas. Simple fairness dictates that a permit holder not be punished if he or she had no way of knowing whether or not a particular building was owned or leased by the government.

With regard to HB 417, it is clear that it is not the intent of the Montana legislature to impact adversely on the lawful and legitimate ownership, use, transportation, or transfer of firearms in Montana. To ensure that HB 417 will only impact on the unlawful use of firearms, we do, however, urge the adoption of two minor, but potentially vital amendments.

In Section 2, paragraph 1, "civil disorder" is currently defined as "[means] a public disturbance involving acts of violence by a group of two or more persons that causes an

immediate danger of, or results in injury to, the property or person of any other individual."

This definition can more clearly apply only to criminals by adding the word "unlawful" to the definition. Thus, the new definition of "civil disorder" would be "[means] a public disturbance involving unlawful acts of violence...".

Secondly, under Section 3, paragraph 3, item (f) (regarding self-defense training), the exemption currently reads: "an activity intended to teach or practice self-defense or self-defense techniques; or ". This section can similarly be improved to include actual acts of self-defense. Thus, Section 3, paragraph 3, item (f) should read "lawful self-defense or defense of others, or an activity intended to teach or practice self-defense or self-defense techniques; or".

Thank you again for the opportunity to submit testimony on HR 417, and particularly in support of HR 825. Montanans have long desired reform of the states concealed carry permit laws, HR 825 is a proposal that honest residents, law enforcement, and the legislature can be well satisfied with. I urge this Committee to consider the proposed amendments found in my testimony, and to report favorably HR 825. I am happy to answer any questions you may now have and offer the NRA's assistance on the aforementioned issues.

HB 451
J. M. 91

HOUSE BILL 451

TESTIMONY OF THE WOMEN'S LAW SECTION OF THE STATE BAR

My name is Holly Franz. I am the President of the Women's Law Section of the State Bar. The Women's Law Section is an organization of more than 100 attorneys who are concerned about the effect of Montana's laws on women. The Women's Law Section strongly urges support of HB 451.

HB 451 is a general revision of the sexual crimes act. It is designed to conform penalties for all rapes, to eliminate spousal exceptions, to redefine force to include the threat of retaliatory action, to repeal the crime of sexual deviate conduct, and to recognize the crime of date rape. My testimony will concentrate on the repeal of the deviate sex act. Amy Pfeifer of the Women's Law Section will address the date rape provisions.

House Bill 451 was amended by the House to delete the provisions which repeal the deviate sex act and decriminalizes consensual adult homosexual sex. In an attempt to solely address public health concerns, the House amended the deviate sex act to prohibit introducing evidence of HIV testing and treatment in criminal prosecutions. This amendment is completely inadequate. It disregards the many reasons to decriminalize homosexuality and will not have the desired public health effect. We ask that you restore the bill's original provision to decriminalize homosexuality.

Several of the provisions in HB 451 have already been addressed by other legislation. Representative Tom Lee's HB 113 redefines force to include the threat of substantial retaliatory action. HB 113 was passed by both the House and Senate and is awaiting the governor's signature. Section 1 of HB 451 also redefines force. Because this is already addressed by HB 113, we ask that you amend this section out of HB 451.

Representative Dorothy Bradley's HB 211 conforms the penalties for heterosexual and homosexual rape. HB 211 was passed by the House and referred to the Senate Judiciary Committee. Section 3 of HB 451 also conforms these penalties.

Conform penalties: Representative Dorothy Bradley's HB 211 has already conformed the penalties for heterosexual and homosexual rape. The maximum prison term for heterosexual and homosexual rape is 10 years. If the victim is less than 16 years old and the offender is 3 or more years older, or the offender inflicts bodily injury, then the maximum prison term is 20 years.

The maximum prison penalty for incest is 10 years or 20 years if the victim is less than 16 years old and the offender is 3 or more years older, or the offender inflicts bodily injury. The crime of incest includes sexual intercourse with a family member. As the law now stands, the maximum penalty for incestual rape is one-half of the penalty for non-incestual rape. Section 5 of HB 451 conforms these maximum penalties.

The maximum rape penalty should not differ depending upon the identity of the victim. HB 451 does not suggest that the maximum prison sentence should be imposed against all rapists or against all persons guilty of incest. The crime of incest includes, in addition to rape, the act of knowingly marrying, cohabiting with, or having sexual contact with an ancestor or descendant. In many situations the maximum penalty would not be appropriate. In those situations, however, where it is appropriate, a sentencing judge should have the discretion to sentence the offender to the maximum prison penalty regardless of the identity of the victim.

Spousal exceptions: Montana law originally did not define spousal rape or sexual assault as a crime. The 1985 legislature, in recognition of the serious problem of domestic abuse, removed the spousal exception from the rape law. Sections 2 and 4 remove the spousal exceptions from the crimes of sexual assault and indecent exposure. There are many situations when the crime of sexual assault or indecent exposure, which requires the causing of affront or alarm, could be an element of domestic abuse. In those situations, the conduct should be defined as criminal.

Date rape: Section 6 of HB 451 addresses the problem of date rape. Under current Montana law, if a person is raped while mentally incompetent to consent to sex, the offender is not guilty if the victim was a voluntary social companion of the offender and the alcohol was voluntarily consumed. A person is mentally incapacitated if she is temporarily incapable of appreciating or controlling her conduct due to alcohol. If an offender

rapes someone in this condition, it should not matter who the victim was drinking with.

Section 6 of HB 451 also amends the rape shield law. In most situations, a victim's past sexual history is inadmissible in rape trials. Montana law does, however, allow evidence of the victim's past sexual conduct with the offender. HB 451 would disallow such evidence except to show the origin of semen, pregnancy, or disease at issue in the prosecution. The fact that a person has consented to sex in the past is not consent to unlimited sex. Each sexual encounter should be judged on its own merit. If the statutory elements of rape, including the threat of violence or retaliatory action, are present, then a rape has occurred regardless of the victim and offender's past sexual relations.

Deviate Sex: Section 18 of HB 451 repeals the crime of deviate sexual conduct. Because Representative Dorothy Bradley's HB 211 has already incorporated nonconsensual deviate sex into the rape statute, HB 451 need only address consensual deviate sex. Deviate sex is defined to include all sexual contact or sexual relations between members of the same sex. It applies to the private sexual conduct of consenting adults.

At least 25 states, including Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming, have decriminalized consensual homosexual activity. In the last year, lower courts in Texas, Michigan and Kentucky struck down deviate sex statutes on privacy grounds. The Model Penal Code, adopted by the American Law Institute, and the American Bar Association recommend the decriminalization of consensual homosexual conduct. The Model Penal Code's reasons for decriminalization are adult consensual homosexual sex causes no harm to the community; existing law is substantially unenforced and is used primarily for harassment; and such laws violate personal privacy. The Model Penal Code was the catalyst for change in many states.

While most of the states acted legislatively, a number of state courts have ruled such statutes unconstitutional as a violation of the right to privacy and equal protection. The U.S. Supreme Court ruled in 1986 that deviate sex statutes do not violate the federal

right of privacy. The statute may, however, violate Montana's constitution. Montana's constitution, unlike its federal counterpart, expressly provides a right to privacy. The right to privacy typically protects private sexual acts between consenting adults. It is very likely that Montana's deviate sex act is unconstitutional under Montana's Constitution.

Montana's deviate sex act may also be unconstitutional because it criminalizes behavior based on an immutable trait. Scientific research indicates a person has little control over his or her sexual orientation and that once acquired, sexual orientation is largely impervious to change. In 1973, The American Psychiatric Association removed homosexuality from its list of psychic disorders. The American Medical Association followed suit in 1975 by endorsing the decriminalization of homosexual conduct between consenting adults.

Due to unresolved constitutional questions, many county attorneys will not file charges under the deviate sex act. For example, Missoula County has a policy of not enforcing this law because it believes the law is unconstitutional and it has no interest in prosecuting private, consensual adult sex acts. Nonetheless, the fear of felony charges has hindered county health efforts. HIV positive male homosexuals are hesitant to disclose their sexual partners because it implicates them and their partners in the commission of a felony. The deviate sex act, rather than deterring homosexuality, deters AIDS prevention and treatment. The house amendments do nothing to address this problem.

The deviate sex act should be repealed. It is arguably unconstitutional. It criminalizes an entire class of people based on unchangeable traits. It is not enforced, and it impairs public health concerns. It is a bad law that should be repealed.

The Women's Law Section urges support of HB 451. (The opinions of the Women's Law Section are its own and do not necessarily reflect the opinion of the State Bar of Montana.)

Ex 6

3/28/91

HB 451

March 28, 1991

To: Senate Judiciary Committee

From: Women's Law Section, State Bar of Montana

Subject: HB 451, An Act to Generally Revise the Laws Relating to Sexual Crimes

At the outset I must state that the following is the position of the Women's Law Section of the State Bar of Montana, and not necessarily that of the State Bar of Montana.

The Women's Law Section of the State Bar of Montana wholeheartedly supports HB 451. Prior to the beginning of the session, the provisions of this bill were determined by the Women's Law Section to be one of our priorities for this session.

As Holly Franz has addressed the other provisions of the bill, I am only here to testify regarding the proposed amendments to subsections (3) and (4) of MCA 45-5-511.

After reviewing the criminal law of many states relating to the issues of consent and admissibility of evidence in the prosecution of sexual intercourse without consent and sexual assault cases, the Women's Law Section believes the changes proposed to these subsections are entirely appropriate and necessary.

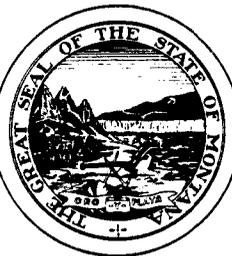
Of the fifteen states and the 1962 Model Penal Code examined, not one provided a voluntary social companion defense. Not one provided, as we do, that a victim, by accepting a date with the defendant, and voluntarily drinking alcohol with him, is not entitled to the protection of the criminal law when she is raped or sexually assaulted. A woman, or man, who accepts a date, or perhaps is introduced to someone at a party is not consenting to sexual intercourse or sexual contact any more than is a person who is attacked in her home by a stranger. These victims, voluntary social companions, are entitled to protection of our criminal laws; they are entitled to the removal of this provision as a defense to these crimes. Those that commit the crimes of sexual intercourse without consent, sexual assault and indecent exposure should be held accountable for their acts.

In the same way, a victim who has once consented to sexual intercourse or sexual contact with the defendant in the past, has not forever waived her right to withhold consent in the future. A lack of consent for any particular act is rape, or sexual assault. It is for this reason that we propose the deletion of current subsection (4) of MCA 45-5-411. Each act/occurrence should be evaluated on whether consent was given at that time.

On behalf of the victims of these offenses, we ask for your support and urge passage of HB 451.

DEPARTMENT OF
HEALTH AND ENVIRONMENTAL SCIENCES

Ex # 5a
26 Mar 91
HB 451



STAN STEPHENS, GOVERNOR

COGSWELL BUILDING

STATE OF MONTANA

FAX # (406) 444-2606

HELENA, MONTANA 59620

TESTIMONY ON HB 451 - 3/28/91

Mr. Chairman and members of the Senate Judiciary Committee, I am Bruce Desonia, past President of the Montana Public Health Association and current Program Manager of the AIDS/STD Program within the Preventive Health Services Bureau of the Montana Department of Health and Environmental Sciences. Our Department's statutory duties include "to make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public." [50-1-202,(2),MCA].

I wish to discuss our Department's views on a portion of this bill. That portion reinstates the penalty for consensual sex between adults of the same sex, or "deviate sexual relations." It is our belief that this portion negatively affects objectives in our AIDS/STD Program.

The primary mission of our program is to monitor and prevent the spread of the Human Immunodeficiency Virus (HIV) epidemic in Montana, which involves our support of counseling, testing, referral, and partner notification services. This is an opportunity to invite persons with high risk behavior (or other concerns regarding AIDS) to have counseling with a trained professional on ways to reduce their risk, identify their HIV serologic status, and prevent spread to others. A significant number of men having sex with men will not seek testing if there is a chance their identity may be revealed. The amendments to this bill passed in the House may have reduced the fear of prosecution, but not the fear of persecution.

Many who do present for testing are less willing to identify themselves as gay, because to do so would be admitting they are a criminal. This fact reduces the validity of the risk behavior information we collect about those tested for HIV. It may also adversely affect the health and medical treatment of individuals, who do not tell their personal physicians about their sexual orientation. There is also opposition to named reporting for HIV for these same reasons and therefore we have less accurate information on how the epidemic is spreading in Montana. Public health is a public trust.

A third barrier posed under the current law and present bill occurs when a gay man does present to a health care provider for counseling and testing. Traditional public health work involves the ability to cooperatively discuss with the HIV-infected patient, the risk posed to his or her sex or needle sharing partners. Men having sex with men are not likely to reveal sex partners, when to do so would identify their partner as a felon. If the source patient is unable or unwilling to notify their partners of their partner's risk for HIV, the health department or other health care provider has an obligation to offer these referral services confidentially.

Allen Brandt, Professor of the History of Medicine and Science at Harvard Medical School writes in No Magic Bullet in 1987,

AIDS demonstrates how economics and politics cannot be separated from disease; indeed, these forces shape our response in powerful ways. In the years ahead we will learn a great deal more about AIDS and how to control it. We will also learn a great deal about the nature of our society from the manner in which we address the disease. AIDS will be a measure upon which we may calibrate not only our medical and scientific skill but our capacity for justice and compassion.

MDHES supports decriminalizing consensual same sex behavior as originally presented in the introduced bill.

A handwritten signature in cursive script, reading "Bruce Desoria". The signature is written in black ink and is positioned to the right of the text above it.

Exhibit 6a
HB 451
3/28/91



^{SIMPSON}
TESTIMONY OF STEVE ~~SEASON~~,
SENATE JUDICIARY COMMITTEE
H.B. 451
(March 28, 1991)

OUT • IN • MONTANA

Mr. Chairman, members of the Senate Judiciary Committee: My name is Steve Simpson. I currently live in Missoula, but I grew up in Helena and graduated from Helena High School where I was regarded as a track star, top student, and a student leader. As a Boy Scout I achieved every possible rank and award available, including the Eagle Scout Badge.

After graduation I attended both the University of Montana and Montana State University, where I graduated in 1988. As an athlete I received numerous All Conference and national honors. I was also praised for my leadership abilities, not only in athletics, but also in student organizations. I held the position of team captain and I served as president of a student organization.

I have always enjoyed working with young people. I spent my summers working at various camps around the state: Diamont, for diabetic kids; Athletes-In-Action; and I worked as camp director at the YMCA's Camp Child. I have always been an advocate for volunteerism and have spent a great deal of my time at college working with Eaglemont, an organization that plans activities for disabled youth, and I organized the Bobcat Track Club for young athletes.

Now I spend a great deal of time running a hotline answering up to 15 to 20 phone calls per day. People concerned about AIDS, sexuality, support groups, and safer sex information call me for answers and referral. I have talked with teenagers about the risks of being sexually active at 14 or 15. I've talked with mothers and fathers who realize their homosexual feelings only after denying them for years and can't discuss them with their families. I've talked with people, including teens, who are considering suicide as an answer to the fear they feel because they are homosexual.

CA 69
HB 451
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I am effective^{ive} talking to these people about these very difficult topics. I am effective because I am an openly gay man. Most of these people won't call state or county health departments because they want to talk with someone who has also been ridiculed, discriminated against, rejected by family and friends, and even physically assaulted because of who we are.

I was hired for these qualifications, including that of being a gay man, under a state contract. Yet, I am also a felon by Montana state law. An amendment to protect those seeking medical treatment won't protect me from criminal prosecution, even though my job essentially requires that I be openly gay.

A national estimate of people who have exposed to the AIDS virus is over 1 percent. In our region it is estimated to be slightly less than that . . . about .7 percent. That means that between 5,000 and 6,000 Montanans may already be HIV positive.

We can no longer look at this subject as a moral issue. It is a health issue. Its is a civil rights issues. And it is time that we deal with it as such.

Thank you.

EX # 1
28 Mar 91
HB 451

[478 US 186]

MICHAEL J. BOWERS, Attorney General of Georgia, Petitioner

v

MICHAEL HARDWICK, and JOHN AND MARY DOE

478 US 186, 92 L Ed 2d 140, 106 S Ct 2841, reh den (US) 92 L Ed 2d 779,
107 S Ct 29

[No. 85-140]

Argued March 31, 1986. Decided June 30, 1986.

Decision: Due process clause of Fourteenth Amendment held not to confer fundamental right on homosexuals to engage in consensual sodomy, even in privacy of home.

SUMMARY

A Georgia statute made it a criminal offense, punishable by up to 20 years' imprisonment, to commit sodomy, which it defined as performing or submitting to any sexual act involving the sex organs of one person and the mouth or anus of another. After a homosexual was charged with violating the statute by committing sodomy with a consenting male adult in the bedroom of his home, and after the district attorney had decided not to prosecute unless further evidence developed, the homosexual brought suit in a Federal District Court challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The District Court granted a motion by the defendants, the state attorney general and others, to dismiss the action for failure to state a claim. The United States Court of Appeals for the Eleventh Circuit, however, reversed and remanded for trial, holding (1) that the statute violated the homosexual's fundamental right to privacy, protected by the Ninth Amendment and by the due process clause of the Fourteenth Amendment; and (2) that the state, in order to prevail at trial, had to prove that it had a compelling interest in regulating such behavior and that the statute was the most narrowly drawn means of achieving that end (760 F2d 1202).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals. In an opinion by WHITE, J., joined by BURGER, Ch. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., it was held that the due process clause of the Fourteenth Amendment does not confer any fundamental right on homosexuals to engage in acts of consensual sodomy.

Briefs of Counsel, p 839, infra.

BURGER, C. J., concurring

478 U. S.

while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.⁸

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante*, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality

⁸ Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

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POWELL, J., concurring

and the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i. e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is

EXHIBIT 8
3-28-91
HB 451

Aylee Hinderks
1616 5th St. NW
Great Falls, MT
March ~~22~~₂₈, 1991

My name is Aylee Hinderks and I am a date rape survivor. I hope that by now we all understand that rape is a devastating crime, one from which it takes an infinite amount of time from which to heal. I also hope we all understand how traumatic the rape victim's experience with police and courts can be. What we may not understand is that for the victim of date rape this experience is often much worse.

Date rape is not taken seriously by many police and prosecutors. Over two years ago I was raped by a boy I was dating. We reported the rape to the police and provided them with a list of witnesses who could testify that I had been suffering from rape trauma syndrome. The police took my statement. Several weeks later they requested I take a polygraph test, which I did. Then, without interviewing any of the witnesses or talking with my attacker, they closed their "investigation" and forwarded my case to the county attorney.

Repeated calls to youth court and the prosecutor's office brought only pleas for patience. They were busy, but would get to my case as soon as possible. They requested no additional investigation. Five months after the county attorney's office received my file they called me for the first time; they were dropping my case. It would be too expensive to prosecute and no one would believe me anyway.

ex. 8
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Aylee Hinderks
March 22, 1991
Page 2

We were so angry that a meeting was arranged to discuss what had gone wrong. The chief of police, county attorney and head of youth court services attended. They determined that the investigation needed to be completed before any decision could be made regarding prosecution.

All the witnesses were finally interviewed and the person who raped me was finally brought in for questioning, thirteen months after the rape was reported. The file was then sent back to the county attorney's office. That was in August of 1990. I have yet to hear one word from them. Our letters have gone unanswered.

After two years of this nonsense I have had nothing but false hopes. Rape and the legal system have changed my life forever. My family and the people I care about have been affected but the rapist has not.

For myself, the healing process is a daily battle that has been unnecessarily prolonged because even the satisfaction of justice has never been granted to me.

Today I wish to make it clear to you that when a person has been the victim of date rape they need the support and protection of the legal system, not its indifference. I believe the passage of this bill will help to impress upon law enforcement the seriousness of all crimes of sexual abuse, and for this reason I appeal to you to vote in favor of its passage.

Thank you.

3/28/91
HB 451

ACLU OF MONTANA

AMERICAN CIVIL LIBERTIES UNION

PO BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086

State Office
335 Stapleton Building
Billings, Montana 59101

BOB ROWE
President

SCOTT CRICHTON
Executive Director

JEFFREY T. RENZ
Litigation Director

March 28, 1991

Mr. Chairman, Members of the Committee:

For the record, my name is Scott Crichton, executive Director of the ACLU of Montana. I am here to go on record today supporting HB 451 as it was originally proposed. It is my hope that this committee will see the wisdom and justice in restoring the language that would repeal Montana's deviate sexual conduct law.

Montana should repeal it's deviate sexual conduct statute for a number of reasons fully articulated in the written testimony that I am submitting. In addition to the critique of why this invavsiive, vague, unconstitutional and unenforceable law should be removed from the books, I am also supplying additional materials for the committee's consideration. These include the:

- o American bar Association Resolution Urging Repeal of Sodomy Laws;
- o An Amicus Brief from numerous churches in *Bowers v. Hardwick* asserting, among other things, the established rights of intimate association between consensual adults and the sanctity of the home;
- o An Amicus Brief in the same case from the American Psychological Association and the American Public Health Association;
- o A Washington Post article from last October about Justice Powell's regreting his swing vote in *Bowers v. Hardwick*;
- o The American Law Institute Model Penal Code ~207 Comment.

Obviously, all sides of this issue have arguments for your consideration. You have heard testimony from the ACLU on numerous occassions this session relating to the rights of privacy in Montana. I urge you to do the right thing on this fundamental civil rights and civil liberties issue by restoring the original language to HB 451. Just as we today look back to the blindness and cruelty of our nations' racism of earlier decades, I suggest to you, we will soon be looking back to the days of homophobia with twinges of guilt and disbelief at our callousness and narrowness of thought. I hope you will demonstrate your leadership in helping us move into a time when we treat all citizens with fundamental dignity and respect and move beyond trying to legislate and regulate the private affairs of our citizenry.

"Eternal vigilance is the price of liberty"

MONTANA SHOULD REPEAL ITS DEVIATE SEXUAL CONDUCT LAW

1. THE MONTANA DEVIATE SEXUAL CONDUCT LAW VIOLATES THE STATE CONSTITUTION'S RIGHT TO PRIVACY.

The Montana state constitution has one of the strongest guarantees of the right to privacy in the United States. Mont. Const., Art. II, § 10 states that, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." In interpreting this clause, the Montana Supreme Court has employed a two part test: (1) whether the person involved has a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. See Flesh v. Bd. of Tr. of J. School Dist. 2, 786 P.2d 4, 8 (Mont. 1990).

An adult individual engaging in consensual, sexual behavior in the privacy of his or her home clearly has a subjective expectation of privacy in doing so. Second, that expectation is "reasonable," in that society recognizes the home as sacrosanct and private activities which go on within the home without affecting other individuals society recognizes as being beyond the state's control. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969). Thus, prosecution of someone for private, adult, consensual behavior would violate this constitutional protection.

Employing similar logic, in 1990, three state courts -- in Michigan, Kentucky, and Texas -- struck down their state sodomy statutes on the grounds that these statutes violated their state constitution's right to privacy.

Moreover, because Montana's privacy provision is broader than that contained within the federal constitution, see, e.g., Montana Human Rights Div. v. City of Billings, 649 P.2d 1283 (Mont. 1982), the United States Supreme Court's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld Georgia's sodomy statute, is inapposite. The Montana constitution requires a "compelling state interest" for invasions of privacy, while the Hardwick court subjected Georgia's sodomy law only to a rational relationship test. Accordingly, as with the three state decisions mentioned above, the Hardwick decision would not bar a finding that application of the deviate sexual conduct law to private, consensual, adult sexual behavior would run afoul of the Montana state constitution's right to privacy.

2. THE MONTANA DEVIATE SEXUAL CONDUCT LAW IS UNCONSTITUTIONALLY VAGUE.

In addition to violating the constitutional right to privacy, the deviate sexual conduct law violates the constitution because it is vague. The deviate sexual conduct law does not define what is meant by deviate sexual conduct and therefore gives an individual no notice

of what activities are prohibited. Such broad and sweeping criminal prohibitions are unconstitutionally vague and could not be enforced.

3. THE MONTANA DEVIATE SEXUAL CONDUCT LAW VIOLATES THE EQUAL PROTECTION CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS.

Article II, Section 4, of the Montana constitution states that: "The dignity of the human being is inviolable. No person shall be denied equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

Montana's deviate sexual conduct law violates this norm because it criminalizes certain conduct only when performed between individuals of the same gender. Accordingly, it discriminates on the basis of sex (if a man engages in sexual conduct with a woman, that is not criminal, but if a woman does, that conduct is criminal), and it discriminates on the basis of sexual orientation (only homosexual and not heterosexual conduct is proscribed). This discriminatory basis of the law renders it violative of the state constitution and of the Fourteenth Amendment to the United States constitution.

4. THERE IS NO CONTEMPORARY CONSENSUS ABOUT THE MORALITY OF DEVIATE SEXUAL CONDUCT: MANY RELIGIONS IN THE UNITED STATES DO NOT BELIEVE THAT THE STATE SHOULD CRIMINALIZE PRIVATE, ADULT, CONSENSUAL SEXUAL CONDUCT.

There is not a contemporary consensus that private, adult, consensual sexual behavior is immoral. Many religious denominations do not believe that private, consensual, adult sexual relations should be regulated by the state. For example, in adopting its 1973 position calling for the repeal of sodomy laws, the American Bar Association quoted the Council of the Episcopal Diocese of New York:

In matters of private morality, the State rightly seeks to give the protection of the law to the young, the innocent, the unwilling, and the incompetent. However, while adultery, fornication, homosexual acts, and certain deviate sexual practices among competent and consenting adults may violate Judeo-Christian standards of moral conduct, we think that the Penal Law is not the instrument for the control of such practices when privately engaged in, where only adults are involved, and where there is no coercion. We favor repeal of those statutes that make such practices among competent and consenting

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adults criminal acts.

Statement, on Private Sexual Morality, adopted by the Council of the Episcopal Diocese of New York, March 18, 1971. Similarly, in the Hardwick case, five religious organizations filed an amicus brief with the United States Supreme Court urging the Court to declare the Georgia sodomy law unconstitutional. Statements from these and an additional ten major religious organizations registering objections to sodomy laws are attached.

5. THE "DEVIATE SEXUAL CONDUCT" LAW DOES NOT PROTECT, AND INDEED UNDERMINES, THE PUBLIC HEALTH.

The deviate sexual conduct law undermines the public health because it deters individuals from coming forward for medical treatments, including testing for sexually transmitted diseases and HIV disease.

Furthermore, concerns that individuals who engage in deviate sexual conduct are themselves mentally ill and in need of treatment are scientifically discredited. Since 1973, the American Psychiatric Association has not listed homosexuality as a mental defect. The APA adopted the following resolution in 1973:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplors all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons. Further, the American Psychiatric Association supports and urges the enactment of civil rights legislation at the local, state, and federal level that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychiatric Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private.

See Marmor, "Homosexuality and the Issue of Mental Illness," in Homosexual Behavior: A Modern Reappraisal 393 (Marmor ed. 1980) (emphasis supplied).

And as long ago as 1969, a task force of the National Institute of Mental Health recommended repeal of sodomy laws to help alleviate discrimination against homosexuals and the resulting harm it causes the mental health of affected individuals. The report of the task force states:

We believe that most professionals working in this area -- on the basis of their collective research and clinical experience and the present overall knowledge on the subject -- are strongly convinced that the extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency.

National Institute of Mental Health, Final Report of the Task Force on Homosexuality, October 10, 1969.

6. POLICE FUNDS ARE BETTER SPENT ON OTHER ISSUES.

Law enforcement dollars are better spent on real crimes, not on the questionable surveillance which would culminate in a deviate sexual conduct arrest.

As the American Law Institute wrote in amending the Model Penal Code more than 35 years ago, "Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large number of atrocious crimes remain unsolved." The ABA expressed similar sentiments in adopting its 1972 position for repeal of sodomy statutes: "Enforcement of laws relating to private, consenting, non-commercial sexual conduct between adults requires an expenditure of enforcement manpower that could better be used to protect public safety and necessitates police practices that are often reprehensible or unsavory."

7. EVEN IF RARELY ENFORCED, THE MERE EXISTENCE OF THE DEVIATE SEXUAL CONDUCT STATUTE ENCOURAGES DISCRIMINATION, STIGMA, AND BLACKMAIL.

Because the deviate sexual conduct law is rarely, if ever, enforced, its maintenance as a criminal statute fulfills the sole function of creating opportunities for blackmail, stigma, and discrimination. In the words of the drafters of the 1955 revision to the Model Penal Code were instructive: "As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors, and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers."

**8. THE PERPETUATION OF THE DEVIATE SEXUAL CONDUCT LAW
INVITES VIOLENCE AGAINST LESBIANS AND GAY MEN.**

Because Montana's deviate sexual conduct law applies only to acts committed between persons of the same gender, it specifically stigmatizes lesbians and gay men, marking them as criminals in the eyes of the law. Accordingly, it serves as a basis for violent attacks against gay people. In enacting the Hate Crimes Statistics Act in 1990, Pub. L. 101-275, the United States Congress ordered the Justice Department to collect statistics about anti-gay violence; in so doing, Congress expressed its concern with this type of violent activity.

Statistics show that anti-gay violence is rising steadily. According to the National Gay and Lesbian Task Force, "Compared to 1989, reported anti-gay incidents increased in 1990 by 11% in Chicago, 20% in Los Angeles, 29% in San Francisco, 65% in New York City, 75% in the Boston area and 133% in Minneapolis/St. Paul. Taken together, anti-gay episodes in all six cities increased 42%." NGLTF Policy Institute, Anti-Gay/Lesbian Violence, Victimization & Defamation in 1990 1 (1991).



Exhibit 10
3/28/91
HB 451

TESTIMONY OF BILL SUMMERS
PRESIDENT, OUT IN MONTANA, INC.
BEFORE THE SENATE JUDICIARY COMMITTEE
THURSDAY, MARCH 28, 1991

Mr. Chairman, gentlemen of the Committee: My name is Bill Summers. I am president of **Out in Montana**, the statewide gay and lesbian advocacy and support organization. I am here in support of the proposed amendment to H.B. 451 before your Committee repealing Montana's "sexual deviancy" law. **Out in Montana** currently is working under a contract with the Montana Department of Health and Environmental Sciences to provide Montana's gay and bisexual population with life-saving information about a deadly disease: AIDS. Montana's law frustrates this already difficult task. Representative Thomas Lee's amendment to the original bill sought to solve the public health question. I can assure the Committee that it does not. To be effective in our outreach program it is vital that we gay and lesbian volunteers identify ourselves publicly in order to reach our peers. I am not protected by Representative Lee's amendment, nor our other gay and lesbian volunteer health workers protected. Representative Lee's amendment does not protect people identified as sexual partners of those who come forward for HIV testing. The realities of public health are simply too complex to be solved by simple exclusions such as the one presented by Representative Lee.

Let me share with you an actual experience that will illustrate the sort of problems we encounter in the face of the "sexual deviancy" law. The most current and reliable statistics reveal that over 20% of male prison inmates have been anally penetrated at least once during the course of their incarceration, regardless of their sexual orientation. Without the protection of a condom, this activity is considered an extremely high risk factor for the transmission of HIV, the virus that causes AIDS. **Out in Montana** last year urged the Montana Department of Institutions to provide condoms to men in prison. This is common practice in many other states. Officials in the Department of Institutions, however, told us that they cannot provide condoms to prisoners because sexual activity between people of the same gender is a crime. According to them, providing condoms to prisoners is to encourage felonious behavior. This application of the "sexual deviancy" statute

is particularly odious since officials who use it opt to risk the spread of the virus rather than acknowledge the realities of sexual behavior and help people with the process of behavior change. The irony here is a cruel one indeed. And an expensive one. Treating someone with AIDS costs between \$20,000 and \$60,000 a year, depending on the available outpatient services. Pre-AIDS treatment now costs at least \$5,500 a year. It is, of course, the Montana taxpayer who will pay the cost of treating HIV infection in the prison.

Because **Out in Montana** has dedicated so much time and effort in the war against AIDS, we cannot help but see the repeal of the "sexual deviancy" law as a health issue. But, of course, there are other equally compelling reasons for repeal as well. While Representative Lee's amendment may reflect his own personal religious beliefs, Montana's Constitution guarantees the separation of church and state. Montana's Constitution also protects its citizens' right to privacy. I am here to remind you that Montana's "sexual deviancy" law is this state's stamp of approval on individual people's homophobia, in much the same way that Jim Crow laws institutionalized racism and the segregation of black people in the South.

On April 23, 1990, President Bush signed into law the Hate Crime Statistics Act requiring the Attorney General of the United States to collect as much information as possible on crimes motivated by religion, race, ethnicity, or sexual orientation. When he signed the law, the President said that, "Enacting this law . . . helps move us toward our dream - - a society blind to prejudice, a society open to all." In Montana, however, victims of homophobic attacks fear reporting those attacks to the authorities, for to do so would mean having to identify themselves as felons and as "sexual deviants." The "sexual deviancy" law affects a significant number of Montanans. According to the Kinsey statistics "at least 37 per cent of the male population has some homosexual experience between the beginning of adolescence and old age." Kinsey also tells us that, "whether the [sexual] histories were taken in one large city or another, whether they were taken in large cities, in small towns or in rural areas, whether they came from one college or from another, a church school or a state university or some private institution, whether they came from one part of the country or from another, the incidence date on the homosexual have been more or less the same. In other words, according to

OUT IN MONTANA TESTIMONY, SENATE JUDICIARY COMMITTEE, 3/28/1991, page 3

Kinsey, 148,676 Montana men are guilty of a felony. As the statistics are similar for women, we can safely assume that a significant number of Montana women must also be considered guilty of "sexual deviancy."

This law, even as amended by Representative Lee, conflicts with the goals of a sound public health policy, is unconstitutional, and promotes hatred and violence.

Out in Montana urges you to support the repeal of the "sexual deviancy" statute.

Thank you.

3-28-91

HB 451

Linda Gryczan
PO Box 124
Clancy, MT 59634

3/28/1991

Mr. Chairman and members of the committee I am Linda Gryczan from the Montana Lesbian Coalition. I am asking you today to overturn the Lee amendments and support HB451 as it was originally written.

It is no accident in this state of individualists that our Montana Constitution has such a strong right to privacy. Montana citizens value our individual rights to privacy. Twenty years ago, Montana lawmakers decided that the privacy rights in our new constitution should not extend to all citizens. The legislature at that time enacted the so-called deviant sexual conduct law. A law that makes felons out of otherwise law abiding people, simply for who we love

I am not asking for your approval or endorsement of my life, for it should make no difference on how you vote on this bill. I am not asking if your religion condones homosexuality, for it should not affect how you vote on this bill.

What I am asking is that you defend the Montana Constitution and vote to overturn the deviant sexual conduct law. I am asking that you extend the rights provided by the Montana Constitution to all of us.



March 18, 1991

Ex. 12
3-28-91
HB 451

Senator Richard Pinsoneault, Chairman
Senate Judiciary Committee
Capitol
Helena, MT 59620

Dear Senator Pinsoneault,

I am writing regarding HB 451, an act to generally revise the laws relating to sexual crimes.

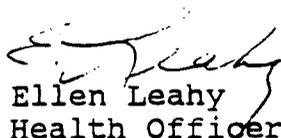
The original bill proposed to decriminalize sexual relations between same-sex, consenting adults. This measure was killed in the House in spite of testimony to its importance in controlling the spread of AIDS. Language providing immunity from prosecution to those seeking AIDS testing and treatment was substituted.

As a local health officer in Montana, I am responsible for controlling communicable diseases including AIDS. Having worked extensively with people at risk for AIDS, I believe that Montana's sexual deviance code does create an unnecessary barrier to controlling this epidemic. Language introduced in the House does not fully address this concern.

Providing immunity for individuals seeking testing does not extend protection to other actions commonly involved in fighting AIDS. For example, persons named as contacts of an infected individual and homosexual men involved in AIDS prevention programs are not protected by the House provision.

The truth is, no immunity provision can reach far enough to remove the stigma and fear created when an entire class of citizens is legally discriminated against. As long as this law is on the books, it will serve only to prevent those most at risk for contracting and spreading AIDS from coming forward. For these reasons I urge you to reinstate language which decriminalizes same-sex sexual relations between consenting adults.

Sincerely,


Ellen Leahy
Health Officer

cc Senator Mike Halligan

Ex. 13
3-28-91
HB 451

MISSOULIAN EDITORIAL

3/7/91

Prudish law doesn't work

State hasn't the means or any business policing bedrooms

The Montana House of Representatives has decided one of the great non-issues of our time: An archaic law prohibiting homosexual sex will remain on the books.

It is something less than a great moral victory.

Health advocates had sought a change in the law in hopes of removing fear of criminal prosecution as a reason deterring homosexuals from being tested for exposure to the AIDS virus, or from ensuring that partners of people who test positive for the AIDS virus are informed of their exposure. Only through efforts to make people aware of their potential to spread the disease can health officials hope to bring the AIDS epidemic under control.

That apparently isn't reason enough to alter a throwback law that presumes the sexual activities of consenting adults are the government's business.

The need to do all that is reasonable to prevent the spread of AIDS is reason enough to change the law. While AIDS testing and counseling are conducted under procedures that assure confidentiality, it's not unreasonable to suspect that some gays may forgo testing in the belief the law against homosexuality could put them in legal jeopardy.

But there's a simpler and far better reason why the law should be stricken: It isn't enforced and is, in fact, virtually unenforceable. The law does no good.

The mind boggles at the thought of the lengths our constabulary would have to go — the depths to which it would have to stoop — to ensure Montanans weren't sleeping with Montanans with similar chromosomes. The fact is our criminal justice system has its plate full enough with activities that actually protect and serve the public.

Life would be no worse, and our code books a lot thinner, if the Legislature would divest itself of laws that can't be enforced.

Ex. 14
B-28-91
HB 451

State Senate Judiciary Committee
Capital Building
Helena, Montana 59601
PHONE: (406)444-4800
FAX (406)444-4105

REGARDING: House Bill 451

MESSAGE: Vote to keep the Lee Amendment to House Bill 451.

SIGNED BY THE FOLLOWING INDIVIDUALS

Martin Jones	2130 AIRPORT RD	KALISPELL	755-2178
Max B. Ryan	614 2ND AVE E.	KALISPELL	752-6101
Don Chubbuck	975 SWAN RIVER RD	Big Lake	837-6713
Jim Wambler	475 BOATJACK LN RD	WHITEISH	862-1250
David B. Thomas	400 Liberty	Kalispell Mt.	752-5467
Steve Ryan	305 Westridge dr	Sanders Mt	857-3326
David Ray	966 AIRCRAFT DR	KALISPELL	752-5851
John Kelly	POB 151	Kalispell	755-4368
[Signature]	139 DOGWOOD LN	KALISPELL	N.A.
[Signature]	205N WOOD LAKE RD	KALISPELL MT	N.A.
Donald Williams	632 E. EVERETT DR	Kalispell MT	752-5889
Andrew Galt	Box 25N Kalispell mt	Kalispell MT	752-7241
Paul Taylor	1340 8TH AVE E	KALISPELL MT	752-7474
[Signature]	130 ARCTICWAY APT	WESTSIDE, MT.	844-3320
[Signature]	1005 FOX LAKE RD.	KALISPELL MT	755 3870

The Homosexual Agenda: Changing Your Community and Nation

by Brad Hayton

Homosexuals are attempting to force their lifestyle and its consequences upon society. Although they enjoy the rights of all American citizens under the Constitution, they want special rights that have been given to people who have unchangeable qualities: those of various races and handicaps. Though the homosexual lifestyle is a freely chosen behavior, these groups want social acceptance and privilege. They are attempting to accomplish these ends through "gay rights" and "anti-AIDS discrimination" legislation at all levels of government: local, county, state, and national. They desire to teach homosexuality as an "alternative lifestyle" in public schools, and want their immoral relationships both recognized and subsidized with government funding by means of "domestic partnership" laws that redefine the nature of the family.

Christians believe they have been called to promote morality in society, rather than immorality. Christians are called to be healing agents of the homosexual community, calling homosexuals to repentance and trust in the saving power of the Lord Jesus Christ. Christians must also minister to the needs of homosexuals as they suffer from the consequences of their sin, whether they take the form of medical, emotional, or spiritual suffering. And most Christians believe that they should work

against types of legislation that would both endorse and promote the homosexual lifestyle, in order fulfill Christ's command to be salt in society. Such homosexual rights legislation not only promotes immorality in society, but spreads the many diseases that result from the practices of homosexuals. Promiscuity and sodomy have been blamed for the worst epidemic in the twentieth century: AIDS.

What You Can Do!

You can make a difference regarding the influence that homosexuals have in your community, county, and country. You can make a difference in public policy. You don't have to be a George Washington, Abraham Lincoln, or even Ronald Reagan. The place to begin is right in your own home, church, and community.

At Home

Getting Informed

Getting informed is the first, and perhaps the most important, step in political action. Being informed about impending legislation, the issues sur-

rounding the legislation, who to contact and when are key to political action. Also if you are to be effective salt, you must be informed about what is happening in your own community.

At the local level, you should ask some of the following questions. Who are the homosexual groups in your community? What kind of literature are they publishing and distributing under their own name and under the name of others? What is this literature saying? What kind of legislation are they working towards? Who are your local homosexual politicians? What is their influence? What is being taught to your children in their local sex education classes about the lifestyle of homosexuals and its effects? When and where are local "gay rights" parades and celebrations being held? Who are sponsoring these groups? Who is funding these groups and their activities? Private organizations or public tax monies?

Applying these same questions to the county, state and federal levels will also give you much information about homosexual activism. This information will stimulate you to get more active yourself in countering these homosexual special interest groups.

There are many sources of information readily available to you. Radio and television, especially PBS stations and news broadcasting, keep up on local as well as some federal issues in a general way. Local newspapers as well as national newspapers are a valuable source of information on pending or controversial legislation. Magazines can keep you up on national events. Newsletters, especially those regarding your specific issues, are a quick and efficient means of communication. And, of course, books will help you decide upon what you believe about certain issues, giving you argumentation and Scriptural understanding.

Locally, use the telephone book and call for information about any organization that appears to be homosexual-oriented. Ask for copies of all their literature, as well as a statement about their funding sources. For example, you might find an organization that publishes AIDS education materials for your local junior high school has the same telephone number and address as a local homosexual activist group. Many homosexual activist groups are also funded through your tax monies. For example, one group funded by Los Angeles County actually finds foster teens 13-17 and places them with homosexual couples of the same sex.

Ask your local politicians about homosexual groups in the community. Ask your local schools about the content of their sex education program, especially their teachings on contraceptives, "safe sex," and abstinence. Ask your children, or the children in your church, about what is being taught in their sex education classes at school.

The millions of Christians in America *can* make quite a difference in the legislation of this country if they are informed of the issues and active in making political decisions. You do make a difference!

Writing Letters

Writing letters is an easy way to express your viewpoint to many of the decision-makers in this country. They take little time. And yet you can influence politicians at all levels of government, ranging from the President of the United States to your local city councilman or school board member. All are greatly influenced by public opinion since they are elected to office. That is surely one of the great features of the American democratic system. Our elected officials are responsible to us -- those who elected them to office.

In many cases, a letter expressing a given viewpoint can change a legislator's mind. A letter is particularly helpful when a representative is wavering on an issue or is received at key times during the legislation's process through subcommittees and committees, the House or Senate, as discussed above. Send a copy of your letter, or another copy, to the Chairman of the committee to which it was referred.

Your representatives view each letter they receive about an issue as representing the opinions of many people who do not write. A number of letters on the same topic may prompt the assignment of a staff member to draft a position-paper for a congressman or local official. In any case, the pros and cons received by mail or phone are counted and the Administrative Assistant regularly reports on the mail received.

Don't be discouraged, however, if the representative's vote still is unfavorable to your own position even after your letter. Other people are writing too, and next time the vote may go your way. Nevertheless, your representative and his or her staff have registered and listened to your opinion. You *are* having an influence.

It is important, though, that your message be presented as effectively as possible.

Writing Mailgrams and Telegrams

Sending mailgrams and telegrams are extensions of the letter writing technique, but are used when speed and/or instant visibility in your representative's office is essential. When a congressional bill is to be on the floor or presented before a committee that day or the next, an appropriately timed mailgram or telegram could sway your representative.

A mailgram is a telegram delivered the day after it is sent, whereas a telegram is delivered the same day. For the same cost the mailgram delivers about ten times as many words as the telegram. Though lengthy exposition is sacrificed at the expense of speed, the general guidelines of letter writing remain the same. Use your own words, be courteous, factual, helpful, and abstain from threats or demands.

Sending Post Cards

Although post cards combine the worst aspects of letter writing (delay in delivery and response) and telegrams (excessive brevity), they can be used with effectiveness when the message is brief and the need for numbers is great. Either at some kind of group gathering or visiting friends, relatives and acquaintances, have people write a message and address the card while you wait, and then hand it back for mailing. Don't use post cards with pre-printed messages, however. They are a waste of money and time, since after the first few cards of that variety reach the members' offices, they are ignored.

Meeting a Representative to Make Your Case

Meeting a government representative is the most effective way to solicit support for or against a project, program or bill. The process of meeting a member of Congress and a local representative is very much the same, though there are a few differences. The following will specifically address meeting with a congressional member.

Since not all congress people know all the issues, meeting with their Legislative Assistant (LA) who might have greater expertise in a specific issue is often equally as effective as talking to the member. Although it is often possible to meet with the member and/or his LA in his Washington office, you should expect to meet with only the member when he is back home in his district office.

Your local representatives are probably even more influenced by community opinion than your

congressional representatives since they have a much smaller constituent base. Thus, your meeting will have even a great impact upon his or her future policies. Your mayor, city councilperson, and even your school board representative are extremely influenced by public opinion. But they must hear your opinion! Visiting them is one of the most effective means for your voice to be heard.

Telephone Calls

Telephone calls to your representatives have the advantages of being swift and to the point. However, the key to a successful use of calls is talking to the right person. Unless you are personally known to the Senator, Congressman or other representative, or unless you contributed to his or her election campaign, you probably will not get to talk to him or her personally. It is better to utilize the phone call *after* you have become known to the member and his or her office staff.

When phoning a congressional representative, identify yourself as a resident of the State or the Congressman's district and then ask to speak to the Legislative Assistant (LA) who is handling the issue that concerns you. You can simply identify yourself as a voter who is very concerned about the issue and would like the representative to vote a certain way, or you may present some valid arguments concerning your issue to the LA. It is often not necessary to call your member's Washington office, since if you get your message to his Administrative Assistant at his home office, he will get the message to Washington through his WATS line to your representative.

Though many times your local representatives are not as equipped to handle a great amount of phone calls, they are also effective in communicating your opinions. Like letter-writing, timing is very important. Call just before a vote will be made on a "gay rights" ordinance or an anti-AIDS discrimination ordinance, or a decision about a homosexual parade or demonstration. Your calls will actually *help* your representative to better know the feelings of his or her constituency and community, and will be much appreciated.

Letters to the Editor

Writing letters to the editor of your local newspaper is an effective way to make your views known to the public. It is actually free publicity! Your letters can sway others to action. You may write your letter to:

1. Express your agreement or disagreement about a paper's recent editorial.
2. Express your reaction to an event recently covered in the paper.
3. Express your approval or disapproval of the way the paper is presenting the news, either accurate or sloppy, fair or biased.
4. Express your views on a community, state, or national problem like abortion, pornography, private education, national defense, etc.
5. Express your solutions to various community or national problems.
6. Express your judgment on the performance of elected officials.

Joining Local Groups or Forming Your Own

Working on an issue alone is sometimes a lonely business, and can easily become discouraging since results are not always immediate. You need support to keep you going. To do this, either find an already existing group in your church with these same interests or find other members of your church body who would like to start getting involved politically. Although for the most part there are relatively little political overtones in most types of social action, be sure to clarify that your political involvement focuses on Christians as individuals, rather than on churches as political action groups. You are trying to activate Christians as citizens in the political process by getting them to exercise their right to vote, contacting decision-makers, and conducting study groups on the homosexual rights issue.

Get together with a handful of people who believe as you do and want to work on this issue. You will probably want to name your group. If you have centered your group around this specific cause, then identify your cause within the name. Call your group "Citizens for Traditional Values" or "Citizens for a Sound AIDS Policy," or maybe even names like "Citizens for Heterosexual Rights," "Citizens for Health" or "Christians for Moral America." The name should also identify the scope of your activities, whether you are a national group, a chapter of a state or national group, or a state or local group. For example, "Southern Californians for Traditional Values."

If you intend to receive or spend money, you may want to incorporate. Check with an attorney about the corporation laws in your state. If your activities include lobbying your state legislature, your group will probably have to file with a state ethics commission. If your group decides to give money to candidates for federal offices, it will have to register with the Federal Elections Commission as a politi-

cal action committee. Nevertheless, if you only wish to do grass roots lobbying, as described below, these actions are not necessary.

Here's some suggestions for getting your group organized and moving.

1. **Choose a project.** Be specific and start small. Decide on both short-range and long-range goals. As a short-range goal you might want to win your congressman's vote on a particular bill. As a long-range goal, you might want to establish methods of keeping your congregation informed about the legislation pending regarding this issue (starting a newsletter, speaker's bureau, church bulletin, etc.) or even a goal to get every member of your congregation to be registered to vote.

2. **Get educated to act.** Read some of the books or other publications on the homosexual rights issue. Subscribe to a newsletter regarding this issue. Get in contact with a local, state or national organization that deals with homosexual rights and the homosexual agenda concerning the current legislation issues and people to contact. Find out how the problem is being expressed in your community.

As discussed above, locate your local homosexual activist groups, and find out what they are doing. Compare statistics of homosexual rapes, child molestation, and homicides to statistics of the heterosexual population. Locate the local homosexual bars, bath houses, and other hangouts, as well as businesses that cater to the homosexual population.

3. **Start acting.** There is a time for talking, but there is also a time for acting. Some groups may be willing to make a commitment for a year while other groups or members may want to try out the first project before they make further commitments. Be flexible and see what works for you. As you grow, find people who can help, motivate them, and give them responsibility. Divide your tasks up into various action groups for the purposes of research, building coalitions with other groups, recruiting more members, and publicity.

4. **Evaluate your progress.** Look for changes in the project you've undertaken, compare them with your original goals, and decide whether to reevaluate your methods. Ask yourself, "Are we getting the results we desired?" "How many members have we recruited for our organization, or gotten involved behind our issue?" "Has our representative responded to our letters, and what did he say?" "How are we coordinating our actions

and legislative issues. A monthly newsletter can be a great way to keep your congregation not only informed, but active in changing their world around them. It can also inform them what other Christians are doing in these areas, review books and articles of particular importance, and generally support and motivate them in their activities.

As a church leader, you can start a phone or letter tree to quickly notify members of pending legislation pertaining to biblical and moral issues. Again, as an official of the church, this must conform to some restrictions, but these restrictions do not apply to actions as a private citizen.

You might also organize a prayer chain in your church. Prayer is a mighty force in affecting both public policy and our elected officials. 1 Timothy 2:1-2 says, "I exhort therefore, that, first of all, supplications, prayers, intercessions, and giving of thanks be made for all men: for kings, and for all that are in authority; that we may lead a quiet and peaceable life in all godliness and honesty." Contact your church prayer group, the ladies' missionary society, youth group or other group interested in elected officials or government to recruit intercessors. It is also a good idea to have each member of your prayer chain to send a letter to their official once during the year, telling them that they are praying on their behalf.

In Your Community

Start An Initiative

Many Christians who are concerned about the homosexual agenda find that local city councils are enacting legislation without voter approval. Concerned citizens suspect that the vast majority of the community does not want this type of legislation, but they haven't been given the chance to vocalize their opinion through the voting process.

Consequently, many groups have formed to start initiatives in order to put the homosexual agenda legislation before the community for a vote. An initiative is a procedure enabling voters to propose a law and pass it by themselves. Many states, counties, and cities already give their citizens this right. Several also permit constitutional amendments to be proposed in the same way, though more citizen support is usually required for amendments. If your state, county, or city has not enacted the initiative process, get lobbying. You are missing out on this important safeguard for citizen rights.

The initiative is a powerful tool when citizens are confronted with an unresponsive legislature, since

it enables them to go over their heads and directly appeal to popular support. Initiatives should not be attempted, however, unless all other ordinary legislative channels have failed. They are difficult to organize successfully since just getting them on the ballot requires petitions from 6-10 percent of those who voted in the last election. Some states require that a certain percentage of the signatures collected must be in a specified number of counties or congressional districts.

There are two conditions required for success. Either the proposition must be so popular that people flock to support it, or a citizen's group must be extremely well organized to publicize the issue and capture the necessary support.

In either case, several steps must be taken to insure the initiative's success. First, make yourself completely familiar with the state law governing the initiative process. The technicalities of election law are often treated as sacred. Even the smallest wording of the petition or the method of collection may invalidate your petition. Pay special attention to the requirements about who can circulate, who can sign, and how they have to sign. Contact your secretary of state and also a lawyer familiar with petition procedures in your state. Contact the appropriate officials if your initiative is at the county or city level.

Second, the law which your group is seeking to have adopted must be very carefully drafted. Phrasing must be as clear and concrete as possible to avoid confusing the average voter. Law professors and constitutional lawyers can be a great help in this regard. Other similar state statutes may provide some useful models.

Third, your group must devise a sound campaign strategy. You must determine how the measure will be presented to the public, what other groups will join forces with you to cosponsor it, and who will aid you in the areas where support for the measure is weak. Most of the time the law specifies a time period during which signatures must be collected.

As always, media coverage is the key element of your success. Organize press conferences in the state capitol and the state's largest cities. Get appearances on radio and TV talk shows and make speeches before community groups. Use every method applicable described in this political activism section. Canvass large social and sport events, shopping centers, apartment complexes, etc. Don't stop, however, when you obtain the requisite number of signatures. Special interest groups against the initiative will most likely go to

with other local action groups concerning the same issue?"

Remember, however, that although you may not have changed anyone's opinion in government or your project may not have had any identifiable success in your community, you have been influencing the members of your group, getting them involved with changing their worlds and their lives. And you are attempting to communicate that message in the most effective way you can. Keep it up!

At Church

While churches cannot officially be involved in politics, individual church members can be involved as Christian citizens. While this is an important distinction, it is not designed to limit your political involvement. You should share your thoughts on Christian political action and interest in public affairs with your pastor. He might put you in contact with other interested politically involved Christians in your community, or might simply not want to get involved himself. He might have many legitimate concerns, including: Is this activity consistent with my calling as a pastor? Will it divide my time or split my church? Is it legal? Although pastors have certain legal restrictions regarding candidate endorsement, fund raising, the use of their church mailing lists, and official church lobbying, these restrictions do not apply to individuals within the church.

There are many activities that a pastor or church leader can do in the church setting. Here are just a few ideas.

Host a luncheon in your church on a weekday and invite local pastors to discuss the homosexual rights and AIDS issues. Pick out a specific issue for each luncheon. Or line up a speaker who is familiar with the issues currently before the House, Senate, State legislatures, or before the County supervisors or City Council.

Show a film documenting the homosexual lifestyle, organization, and influence upon American society, or a film that accurately describes the nature, effects, and treatment of AIDS, along with a Christian approach to helping those with the disease. This can be done in your church or local school auditorium or hall. Invite other local churches to help sponsor the film. There are several good documentary films available on these issues. Follow up the presentation with discussion and a plan of action if appropriate.

Help your pastor develop a series of Sunday School or Bible study lessons around many of the family issues that include promiscuity and homosexuality. Get your pastor the necessary resources like books, articles, Biblical studies, etc. to facilitate his studies. Pastors many times do not have the time to search out these materials, especially if they are not readily available in your local Christian book store.

Host a public policy study group in your home in order to discuss many of the issues mentioned above from a Christian perspective. Invite your pastor to moderate the discussion.

Set aside a special Sunday in your church to recognize and pray for your local elected officials. You can even plan a reception after the service so that the congregation can get to know their elected representatives.

You, as a church leader, can become a public policy liaison keeping your pastor and church updated on current issues, policies, and bills that are related to the biblical and moral positions of the church as well as their legal status. This might be merely keeping your pastor updated on current legislation, or even putting in the church bulletin current relevant information. You might get the pastor's permission to visit the adult Sunday school classes on occasion and bring them up to date on what is happening in Washington, your state legislature, or local community.

Be sure to keep yourself well-informed, certain about the facts, and not exaggerating the situation. Clearly explain the problem, describe its implications, and lay out a plan of action to correct the problem. Most members in the congregation don't have the time, or maybe even the interest, in doing the research for themselves. You, as the public policy liaison, can have a special ministry to their needs.

You can set up a literature rack in your church vestibule, keeping the rack well supplied with tracts, monographs, books, and brochures about organizations that deal with social and political issues and legislative matters. Most organizations have a special bulk price for their publications. You might finance this activity with a small "donation" box next to the rack.

You might also wish to start a newsletter in order to inform your congregation of current biblical and moral issues, policies, and bills that are related to the church. A newsletter must conform with the above rules about church involvement in political

court seeking to invalidate as many signatures as possible on technicalities. So get all the signatures you can in the allotted time period so that you have a cushion. And since petition gathering is also an educational experience for the public, you are informing potential supporters of the coming election.

Last, if your initiative has won a place on the ballot, employ all the methods of a good political campaign to obtain success in the election. Seek both editorial support from the media and present candidate support, though not letting it become a partisan issue. Hopefully, your initiative will be enacted into law.

Monitor the Media

The humanistic, anti-Christian, and even immoral biases of the media have increasingly become a great concern of the Christian community. They have almost consistently supported the homosexual agenda during the past fifteen years. They have reported homosexuals as poor and destitute, a discriminated minority who cannot get into the mainstream of society, even though most homosexuals are middle class and in society's mainstream. The media has disinforming the American populace about AIDS and the immoral lifestyles that spread the disease. And they almost consistently worked against the most sane methods for containing the disease.

Although many times you might feel powerless in changing this state of affairs, there are many positive actions that you can take that will make changes.

You can complain to the FCC. Whatever the wisdom of creating the FCC in the first place, you can use it to keep programming "balanced." For example, complain to the FCC about unfairness in broadcast news. Many times a program will consistently present pro-homosexual groups in a positive light and pro-family groups in the negative. Some will present only one side of the research on AIDS without adequately presenting the other side. Remember licenses can be revoked if the offenses are grievous! Write to the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554 or call (202) 635-4000.

If you discover a significant factual error in a news report, let Accuracy in Media (AIM) know. It monitors news reporting practices and launches embarrassing lawsuits on occasion to keep networks, magazines, and journals honest. AIM also

corrects the record by publishing the names of offending reporters, accompanied by an account of the story as it really happened. Write AIM, 1341 G Street, N.W., Suite 312, Washington, D.C. 20005. In this regard, you might also write some of the other appropriate media monitoring agencies listed in this publication. Some of these organizations will initiate political activism against these stations or programs.

A timely letter to the editor of the offending publication can sometimes do wonders. Note how to write a letter to the editor above. Not only will such a published letter bring your viewpoint to the public's attention, it will sometimes change publishing policy. One woman wrote to the editor of her local newspaper which published an ad displaying a nude woman, complaining of its offensive nature. When the ad appeared the next week, the same woman was used in the ad, but this time clothed. Your opinions have importance! Organize and motivate your political activism group to write when the need arises.

When you find obvious biases write or call the networks. Direct your calls and letters to specific individuals for a greater effect. Also let your local station know of your displeasure, since the networks depend on local outlets. Enough complaints from the affiliates of the networks will have a definite effect on network policy. Listed below are the addresses, telephone numbers and names of the chief staff members of the three major networks. Write AIM for their addresses.

Since stations are obliged to give air time to responsible individuals who disagree with editorials broadcast by the station, contact your local TV or radio stations in person or by phone or letter. Do this even if you object to a network program, since the networks try to keep their affiliates happy. When you aren't happy, neither are their affiliates.

Write the sponsors of shows you believe are biased or inaccurate. Commercial advertisers attempt to always stay clear of political controversy, and if they believe that they are losing buyers because they are sponsoring a program, they will back away quickly. The network may even reconsider the program contents. When writing the letter, be courteous but firm, saying that you will not buy their product so long as it sponsors the show. Make sure that these are not form letters since letters of complaint are especially effective if done spontaneously. Use your own words, but also motivate others to write.

We often forget that the most effective way to sway the media is by our subscription. When a newspaper or magazine continually offends you, drop the subscription. When a TV news network is continually biased in a direction that you disapprove, don't watch it. When a program is offensive either politically or morally, turn it off. Don't attend movies at a theater until you know its moral or political character. Don't patronize the movies that offend you in some way.

You'll be surprised how effective this is. Why do stations show family-oriented programs like the *Cosby Show*, *Little House of the Prairie*, *The Waltons*, etc.? Because people watch them. The same is true for immoral soaps and biased, inaccurate reporting. Movies that promote immoral sexual behavior abound because people, including Christians, consistently watch them.

When in doubt, turn it off. Monitor your own use of media. I know of one man who did this. Night after night he sat complaining about an offensive TV program that was very politically biased. "Why doesn't somebody do something about it!" he would say. Finally, he got so upset that he turned it off. To his surprise, three weeks later the program was cancelled due to low ratings. Evidently, others had the same feelings about the program and *took the same action*.

Conclusion

These are just some of the actions that you can take to educate and activate your friends, neighbors, church, and community about the homosexual agenda. God has commanded us to be a salt and light to this world. We should not let our salt lose its savor through lack of use, nor hide our light under bushels. Rather, God has given us both the right and power to be effective changers of our culture, especially in our democratic United States.

You can get involved at home, at church, and in your community to change our culture. Local groups are forming around the nation to fight the teaching of homosexuality as an "alternative lifestyle," and they are doing it effectively. It was concerned citizens who banded together to overturn San Francisco's domestic partnership legislation, by starting an initiative and giving the local voters a chance to express their opinions about this controversial legislation.

Many communities around the country have overturned "gay rights" legislation. TV networks have not shown pro-homosexual programs, as a result of subscriber pressure. Many community members have become aware of the homosexual threat to the traditional family and about the actual behaviors of homosexuals through concerned Christians who desire to educate themselves, their church, and their community.

You can make a difference!

The Homosexual Agenda: Issues and Arguments

by Brad Hayton

Many times it is difficult to write a letter to your representative or speak up at a city council meeting because you feel that you don't know what to say. You know that homosexuality is wrong, and you believe it is wrong because the Bible says so. "Because the Bible says so" is the bottom-line argument for the Christian.

And yet using the Bible does not always convince your representative, city councilman, or friend of the soundness of your opinion. They probably don't believe in the Bible.

You need other arguments for your beliefs -- arguments that they are more likely to hear and accept. They will give you a common ground upon which you can stimulate a lively discussion. Although many might not have some of the same morals as you, most value health. Most also value money, and when you show how much something will cost them, they tend to listen. Most believe that Americans have certain basic human rights. Most are against violence and coercion, and accept some of the ten commandments as basic morals: don't steal, murder, cheat, lie, harm others, etc. And most appreciate the logic of an argument. Although logic many times does not motivate people

the way emotions can, logic can give them a clear understanding of the issues involved and become the basis for sound public policy.

This essay outlines some arguments that you can make in fighting the homosexual agenda. You can use these arguments in writing to your representatives, making a case before your city council, writing a letter to the editor of your local newspaper, speaking before your local group, or even discussing the issues with your neighbor.

Homosexuals have used many strategies in their attempt to change the minds and behavior of the American culture. Although their primary goal is for total acceptance of the homosexual lifestyle, they attempt to accomplish this goal through many means. Below we have only touched upon a few of their means, and have outlined some arguments to counter them. The homosexual strategies surveyed here are their push for "gay rights" ordinances, the abolition of sodomy laws, the indoctrination of youth with homosexual "alternative lifestyle" education, the redefinition of the family as a "domestic partnership," "Gay Pride" demonstrations and parades, and AIDS anti-discrimination laws.

"GAY RIGHTS" ORDINANCES

Purpose of Ordinances

Throughout most of history societies have always socially discriminated against homosexuals. They have disapproved of the unhealthy behavior, child molestation, and sexual practices of homosexuals. Due in part to the West's increasing acceptance of sex as primarily a form of pleasure rather than for reproduction, homosexuality has increasingly become accepted as an "alternative lifestyle."

Though homosexuals have maintained their Constitutional rights as citizens of the United States, they still receive much social ostracism from others. For the most part, Americans still do not accept acts of sodomy as "normal," and psychiatrists still do not believe homosexuality psychologically healthy, though officially the diagnosis has been eliminated.¹

Thus, homosexuals have taken to the offensive in changing the opinions of American culture. By means of threat and coercion, they bullied the American Psychiatric Association into taking off homosexuality from their list of psychiatric disorders.² And by means of "gay rights" ordinances, they hope to categorize themselves with other minorities, so that society will begin to treat them "fairly."

"Gay rights" ordinances have begun to spread city by city across the United States, from California to New York. These ordinances link "sexual preference" and "sexual orientation" along with race, sex, national origin, and religion as grounds for non-discrimination. Homosexual activist groups hope that these ordinances will facilitate increasing social acceptance as they become used to force affirmative action policies in both the public and private sectors of society.³

Arguments Against Ordinances

Homosexuals already possess legal rights under current law

Homosexuals have the same legal rights that all individuals currently have under the law. These include the Bill of Rights that encompass such protections as freedom of speech, association,

of contracts, use of the courts, and equal protection of the law. They can form lobbyist organizations, incorporate, form student organizations, obtain tax deduction status, and publicly assemble, rally, petition, and carry out all forms of political activism in support of their political ideas. Indeed, the ACLU has published a book of close to 200 pages detailing the rights of homosexuals under existing law.⁴

Homosexual groups have shown no statistics in proof of their supposed discrimination. Though many times socially ostracized, there is no evidence of a disparity of incomes, cultural opportunities, or education.

"Gay rights" laws are of a different nature than other civil rights legislation

Proponents of "gay rights" laws have included themselves as an American "minority" that deserves the same protection as other minorities. However, homosexuals differ from other groups protected by civil rights ordinances in several ways.

First, sodomy is a freely chosen act, whereas race, color, sex, and national origin are not. Religious preference is the only exception. Yet the freedom and protection of religion is clearly a constitutional right. Human rights laws do not protect behavior.

Homosexuals have argued that they are "born that way," and that they cannot alter their acts of sodomy. However, such statements go against substantial scientific evidence to the contrary. There is no convincing evidence that homosexuality is genetic, and much evidence that those motivated to do so can change their behaviors.⁵

Second, sodomy has historically been morally condemned by most of civilization, whereas races, sex, and national origins are morally neutral.⁶ It makes no sense to force people to associate with those they consider immoral by their actions.

Third, human rights laws only protect against arbitrary and irrational discrimination. When sex, race, religion, or national origin are used to qualify a person for a job, it is arbitrary and irrational discrimination. Such discrimination has nothing to do with the character of an individual. Since homosexuals engage in behaviors that greatly increase the health risk of others, and model behaviors that most adamantly oppose, people should have the right to discriminate in their hiring practices to protect not only themselves, but their constituency as well. Deviant sexual behavior tells

significantly more about a person's character than does a person's race, color, or national origin.

"Gay rights" laws coerce people to violate their own consciences

Compelling people to hire homosexuals forces them to violate their own religious conscience, let alone moral conscience, that condemns such behavior. The Civil Rights Restoration Act demands that any religious organization that receives federal funding, no matter how small, must not discriminate on the basis on sex, race, religion, or national origin. If "sexual orientation" is added to these groups, then even churches, religious schools, and other religious organizations that receive government funds to help run their day-care centers, soup kitchens, battered women shelters, and other ministries for the poor and homeless will be coerced to hire homosexuals or lose all funding. In fact, some "gay rights" laws will force any private organizations that discriminate in their hiring practices to hire homosexuals, whether they believe the practice is immoral or not. Imagine such a law that would favor prostitutes or those who engage in other such "sexual deviations" as incest or exhibitionism. Though later repealed, a Duluth, Minnesota ordinance appeared to permit a person to come to work "in drag," the clothes of the opposite sex, since an organization could not discriminate against someone's "sexual preference."

"Gay rights" laws take away the legal rights of others

Giving more rights to homosexuals means taking away rights from other groups that do not approve of homosexual behavior. They will restrict a landlord's freedom to not rent to those who engage in what he or she believes is a sexual perversion. They restrict the right of a parent to select who will teach their children's moral values. They force religious organizations to hire those who they consider immoral.⁷

Magnuson outlines some of the implications of a proposed "gay rights" ordinance in Alexandria, Virginia.⁸ A convicted child molester, homosexual or heterosexual, could sue a day care center for refusing to hire him since it would be discriminating against his "sexual orientation." A hotel or motel owner could be sued for refusing to rent to couples desiring to fornicate or commit adultery or sodomy. An insurance company could be sued for refusing to extend benefits to HIV positive people or the "spouse" of a homosexual partner. A bank could be sued for refusing to loan money to a

movie maker who makes child or homosexual pornography, since it would be discriminating on the basis of "sexual orientation."

In addition, "gay rights" supercede one's "right of association." There are well-known social sanctions on those with flagrantly immoral lifestyles. People dissociate from liars, cheats, and flagrantly unfaithful spouses. Likewise, people have historically dissociated themselves from those who engage in bestiality, incest, necrophilia, transvestism, exhibitionism, voyeurism, and other sexual acts considered perversions. "Gay rights" laws would make such "rights of association" illegal.

"Gay rights" laws endorse the homosexual lifestyle

No previous civilization has ever endorsed the homosexual lifestyle. Each has condemned homosexuality, believing that such behavior would destroy the very foundation of civilization itself: the family. "Gay rights" laws, however, endorse these behaviors, legitimizing acts of sodomy. This goes against the wisdom of all past generations and civilizations. These laws reward the immoral at the expense of the moral. They punish those who are self-disciplined in marriage and child care, and reward those who live for momentary pleasure.

Advocating homosexuality as an "alternative lifestyle" of equal morality and propriety with heterosexual behavior is in actuality a theological and moral statement. It is a relativistic moral scheme that can easily include all "sexual preferences" or "sexual orientations." Yet, this standard is not shared by the world community. Bestiality, incest, exhibitionism, etc., have been considered immoral and perversions of human nature throughout western civilization. As the U.S. Supreme Court recently pointed out, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

"Gay rights" laws will give special privileges to homosexuals

First, though a heterosexual employee facing a legitimate job-related discipline would have difficulty claiming that such discipline was due to his or her "sexual orientation," a homosexual employee could make this accusation and thereby lessen or completely escape discipline, or charge the employer with discrimination.

Second, homosexuals would also gain special privileges in applying for jobs. They would receive subtle preference over an equally qualified

heterosexual applicant for fear that not hiring the homosexual might lead to a charge of discrimination.

Third, though "gay rights" legislation does not require affirmative action, other similar civil rights legislation has resulted policies that require certain percentages of specific groups. For example, since many homosexual groups claim that ten percent of Americans are homosexual, an employer might be pressured or even required by the state to have ten percent of his employees homosexual. Already, in some cities like Santa Cruz, homosexual civil rights laws have been applied to affirmative action.⁹

"Gay rights" law threaten public health

As described below, homosexuals have many more sexually transmitted diseases (STDs) than heterosexuals. Seventy-eight percent of homosexual men admit to having had a STD.¹⁰ They have exceptionally high rates of gonorrhea, syphilis, Hepatitis A, Hepatitis B, cytomegalovirus, amoebic bowel disease, herpes, and AIDS.¹¹ To just take two examples: homosexuals are responsible for up to one-half of the nation's cases of syphilis, and from 60-75 percent of AIDS, though the percentage of AIDS cases is decreasing. The public cost for AIDS alone may exceed sixty billion dollars by 1991.

"Gay rights" laws merely protect and promote STDs. After the passage of "gay rights" laws in San Francisco, the city has experienced a sharp increase in the rate of venereal disease (22 times the national average), infectious Hepatitis A (100%), and infectious Hepatitis B (300%).¹² Giving special rights for those who spread STDs significantly more than the rest of the population, merely gives them a license and encouragement to spread more. In the case of AIDS, it is a license to kill. It does not make rational and medical sense to give special legal protection to a behavior that is posing grave health risks and threatening society with the largest epidemic the world has ever known.

Endnotes

1. According to the latest polls of American psychiatrists, there is still widespread opposition to the APA's official position of homosexuals' normalcy. In a survey conducted in 1977, analysis of the first 2,500 responses to a poll of 10,000 psychiatrists found that 69 percent believed that homosexuality usually represented a pathological adaptation. Only 18 percent disagreed with this

proposition. Sixty percent of the respondents asserted that homosexual men were less capable of "mature, loving relationships" than their heterosexual counterparts. Finally, 70 percent supported the view that the problems experienced by homosexuals were more often the result of "personal conflicts" than of stigmatization. "Sexual Survey #4; Current Thinking on Homosexuality," *Medical Aspects of Human Sexuality*, November 1977, 11, pp. 110-111.

Interestingly, homosexuals tend to feel the same way about themselves. About a quarter of homosexuals believe homosexuality is an emotional disorder and 37 percent answered "yes" to "do you think you are psychologically disturbed?" (Bell, A.P. and Weinberg, M.S., *Homosexualities*, Simon & Schuster, 1978; Williams, C.J. and Weinberg, M.S., *Homosexuals and the Military*, Harper & Row, 1971). Homosexual activists blame these feelings on societal oppression, i.e., Western culture's own bias against homosexuals.

Still, when asked "if a teenager who was just starting homosexual activity came to you and asked your advice, what would you tell them?," homosexuals recommended cessation four to one (Gebhard, P.H. and Johnson, A.B., *The Kinsey Data*, Saunder, 1979).

2. A full account of what many have called "terrorist" tactics is given in Ronald Bayer, *Homosexuality and American Psychiatry* (New York: Basic Books, 1981), pp. 101-154 (a sympathetic account), and Charles W. Socarides, "The Sexual Deviations and the Diagnostic Manual," *American Journal of Psychotherapy*, 32, pp. 414-425.

3. The 1972 Gay Rights Platform, as well as the Gay Teachers Association Bill of Rights, shows the breadth of the homosexual objectives. These include the prohibition of discrimination in employment, housing, public accommodations, public services, the military, federal civil service, and immigration. They want federal funding for homosexual sex education courses in the public schools, aid to homosexual organizations, and release of all homosexuals in prison for sex offenses. They desire the repeal of sodomy laws, laws prohibiting prostitution, and child custody, adoption, visitation, and foster parenting rights. They want the repeal of all laws governing the age of sexual consent, as well as those that prohibit polygamy, transvestism, and cross dressing. And they want laws against those who criticize the lifestyle of homosexuals and other sexual deviates. See Roger J. Magnuson, *Are Gay Rights Right?* (Stratigate Press, 1985), pp. 44-49. Each year Congress attempts to pass homosexual affirmative action laws, sponsored by Sen. Alan Cranston and others.

4. Dorsen, N., ed., *The Rights of Gay People (An American Civil Liberties Handbook)* (Bantam Books, 1983).

5. Most biologists and psychologists believe that homosexual habits are learned. Evidence for this comes from several sources.

1) Most homosexuals believe that their sexual orientation is learned. (Only 9% believed they were born that way in two Kinsey studies: Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P., "Homosexualities: Their Range and Character" in *Nebraska Symposium on Motivation*, Cole, J.K. and Dienstbier, J., eds. (Univ Nebraska Press, 1973).

2) No one has found a single replicable genetic, hormonal or chemical difference between homosexuals and heterosexuals. (Marmor, J., ed., *Homosexual Behavior: A Modern Reappraisal* (Basic Books, 1980).

3) Those raised in non-religious homes have a 450 percent higher chance of choosing the homosexual lifestyle. (Institute for the Scientific Investigation of Sexuality, "What Causes Homosexuality and Can It Be Cured?," ISIS, 1984).

4) Most psychologists and psychiatrists still do believe that homosexuality is learned, even those who endorse their behavior. (Examples include Rado, Bierber, Socarides, Kinsey, Hooker, Szaz, Marmor, and Masters and Johnson. Cf. Bayer, R., *Homosexuality and American Psychiatry*, Basic Books, 1981.)

5) Since homosexuals engage in many deviant sexual practices, such as sodomy, sado-masochism, eating feces, drinking urine, fisting, rimming, the solicitation of sex with younger males, etc., it seems almost absurd to say that all of these behaviors are innate.

6) Many homosexuals do change their behavior. If homosexuality were innate, change would not be possible. Compare the studies of Bieber, I., *Homosexuality: A Psychoanalytic Study* (Basic Books, 1962); Socarides, C., "Homosexuality Concepts and Psychodynamics," *International Journal of Psychiatry*, 1972, 10, p. 118; Masters, W.H. and Johnson, V.E., *Homosexuality in Perspective* (Little, Brown, 1979); West, D.J., *Homosexuality Re-Examined* (Duckworth, 1977); Pattison, E.M. and Pattison, M.L., "Ex-gays: Religiously Mediated Change in 11 Homosexuals," *American Journal of Psychiatry*, 1980, 137, pp. 1553-1562. Homosexuals Anonymous, Exodus, and many other groups that help homosexuals change their sexual orientation are build upon this premise. (For a more complete list see the bibliography.) It is interesting to note that no one has sought therapy to change their race, color, or national origin. These are assumed to be innate, in contrast to the homosexual lifestyle.

6. Greek and Roman societies both outlawed homosexual behavior, believing that it was dangerous to the well-being of their society. Throughout the middle ages, homosexuality was outlawed in Western society. It has always been outlawed in the Far East, and still is today. Some authors, however, disagree. Cf. Boswell, J., *Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, 1980).

7. For example, in the state of California a woman has already lost her private property rights to not rent her house to an unmarried couple. In another state, a female lost the right to not have a lesbian roommate. When the female decided she did not want a lesbian for a roommate, the lesbian sued and won a settlement of \$1500.

8. Magnuson, R.J., *Are Gay Rights Right?* (Straitgate Press, 1985), p. 86.

9. Senator Alan Cranston (D-CA) has been proposing a homosexual affirmative action bill in the U.S. Senate.

10. Hansfield, H.H., "Sexually Transmitted Disease in Homosexual Men," *American Journal of Public Health*, 1981, 9, pp. 989-990; Cameron, P., Proctor, K., Coburn, W. and Forde, N., "Sexual Orientation and STDs," *Nebraska Medical Journal*, 1985, 70, pp. 292-299; Jay, K., and Young, A., *The Gay Report* (Summit, 1979); Cameron, P., Cameron, K., and Proctor, K., "Effect of Homosexuality Upon Health and Social Order," *Psychological Reports*, 1989, 64, p. 1172, report 85 percent for homosexual and 52 percent for bisexual in comparison to 30 percent for heterosexual.

11. Quinn, "The Polymicrobial Origin of Intestinal Infections in Homosexual Men," *New England Journal of Medicine*, 1983, 309 (10), pp. 576-82; Manligt, "Chronic Immune Stimulation by Sperm Allantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-41; Jaffe, "National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia in Homosexual Men: Part 1, Epidemiological Results," *Annals of Internal Medicine*, 1983, 99 (2), pp. 145-57; Buchanan and Muir, "Gay Times and Diseases," *The American Spectator*, August 1984, 15.

Drawing upon the standard medical text, *Harrison's Principles of Internal Medicine*, James Fletcher in the *Southern Medical Journal*, sums: "We notice an increasing incidence of multiple-drug-resistant strains of *Neisseria gonorrhoeae* in homosexuals; male anorectal and pharyngeal infections are frequently troublesomely asymptomatic; a

separate treatment category is required for homosexual men. Considering syphilis, of all men with primary, secondary, or early latent syphilis interviewed in the United States during 1980, one half were homosexual or bisexual; primary syphilis is usually missed in homosexual men. For example, in the US in 1974, 42% of cases of early syphilis in heterosexual men were detected in the primary stage, whereas by comparison only 23% of early cases in homosexual men were detected in the same primary stage. Homosexual men are among those cited at highest risk for lymphogranuloma venereum in the US; infection is often anal or rectal and can therefore produce hypogastric and deep iliac lymphadenitis, so massive at times as to lead to confusion with an 'acute abdomen' and to exploratory laparotomy. Cytomegalovirus infection is of higher prevalence in homosexual men. A newer clinical entity dubbed 'gay bowel syndrome' afflicts the same population and manifests itself as mechanical dysfunction of the lower tract, as well as an impressive array of intestinal infections. All of this information and more is readily available in common medical textbooks" (Holmes, K.K., "Gonococcal Infections" (chap 150), "Syphilis"

(chap 177), "Lymphogranuloma Venereum" (chap 193); Meyers, J.D., "Cytomegalovirus Infection" (chap 211). In Petersdorf, R.G., et al., eds., *Harrison's Principles of Internal Medicine* (McGraw-Hill, 1983).

In London, the same holds true. According to the *British Journal of Sexual Medicine* (April 1987), over a quarter of homosexuals had had syphilis, a disease rare among heterosexuals, over half had had gonorrhoea, more than half non-specific urethritis, and nearly one in five had had herpes. A survey of a thousand patients in 1975, who were attending STD clinics, found hepatitis B infection ten times more common in homosexual than heterosexual men (White, M., *AIDS and the Positive Alternatives* (Marshall Pickering, 1987, p. 45).

12. *San Jose Mercury* (April 24, 1980); "Sharp Increase in Hepatitis and Dysentery in San Francisco," *San Francisco Chronicle Examiner* (April 23, 1979).

SODOMY LAWS

History and Purpose of Sodomy Laws

Most of the world has always outlawed acts of sodomy. Many times the penalties for sodomy were very extreme, including death. The purpose of these sodomy laws was to protect the foundation of every society, the family. Sodomy was considered immoral as well as unhealthy.

The United States has had a long history of laws against sodomy. Whereas the privacy of the institution of marriage has been respected, the courts have not felt that adultery, incest, fornication, and homosexuality are immune from criminal enquiry. Regarding homosexuality, in particular, the state has every right to discourage people from entering into behavior that is psychologically, physically, and socially destructive.

Until recently most of the states have maintained laws against sodomy. Due to recent homosexual activism over the past two decades, about half of the states have overturned these laws, while the other half ignore them.¹ The U.S. Supreme Court, however, has always affirmed that states have the right to outlaw sodomy.²

Arguments for Sodomy Laws

Sodomy laws protect the victims of sodomy

Many people believe that sodomy is a victimless crime, and therefore, should be legalized like pornography, prostitution, and other sexual deviations. Yet, like pornography and prostitution, sodomy has many victims.

Although homosexuals represent 1-4 percent of the total population, they perpetrate between a third and a half of all recorded child molestations.³ Homosexual teachers have committed between a quarter and 4/5s of all molestations of pupils. Thus they are at least 12 times more apt to molest children than heterosexuals are, and homosexual teachers are at least seven times more likely to molest a pupil. In surveying the literature on pupil child molestation, one investigator found that teachers who practice homosexual acts are between 90 to 100 times more apt to involve themsel-

ves sexually with pupils than teachers who confine themselves to heterosexual acts.⁴ New York homosexual teachers agreed that homosexual relationships with their students were improper, but reserved the right to have relations with children outside the classroom.⁵

Homosexuals are about 18 times more apt to incorporate minors into their sexual practices than heterosexuals are. In fact, 31 percent of those claiming molestation by men before they had reached age 13 were homosexually assaulted.⁶ One survey by two homosexual authors found that 73 percent of homosexuals had at some time had sex with boys 16-19 years old or younger.⁷ It is no wonder that one of the stated objectives of the National Gay Task Force is to remove "age of consent" laws from state statutes, permitting voluntary sex with minors.⁸

Out of all of the mass murders in the U.S. over the past 17 years, homosexuals killed at least 68 percent of the victims, were implicated in at least 41 percent of the sets of crimes, committed 70 percent of the 10 worst murder sets, and were involved in five of the eight murder sets perpetrated by two or more people.⁹

These are amazing statistics when considering that homosexuals compose about 1-4 percent of the American population. Yet "if people mix sex and violence, it is reasonable to expect that at times the violence will become homicidal," writes the Family Research Institute. "Gay sex is disproportionately violent sex. A third of gays and an eighth of lesbians admit to sadomasochism (hurting or being hurt as a part of sexual 'fun'). This is a rate at least 600 percent greater than heterosexual males and 400 percent more than heterosexual females claim. Similarly, over a quarter of male gays and 8 percent of lesbians admit to urinating on sexual partners. Again rates over 450 percent higher than for heterosexuals."¹⁰

Similarly, about twice as many homosexuals report having contemplated suicide as compared to heterosexuals, and about three times as many homosexuals admit to having attempted suicide.¹¹

A quote from the guest editorial from the mainstream *Gay Community News* of February 15-21, 1987 by Michael Swift summarizes the homosexual danger to innocent individuals: "We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools, in your dormitories, in your gymnasiums, in your locker

rooms, in your sports arenas, in your seminaries, in your youth groups, in your movie theater bathrooms . . . Wherever men are together . . . Our only gods are handsome young men . . ."

Though by no means typical of all homosexuals, this quote, published in a mainline homosexual publication, makes anyone concerned about their children wary, especially when taking into consideration the record of homosexuals. Thus, for the protection of other individuals the acts of sodomy must be made illegal.

Sodomy laws seek to curtail a behavior that is destructive to homosexuals

Due to homosexual sexual practices, male homosexuals are 14 times more apt to have had syphilis than heterosexuals, 3 times more apt to have had gonorrhea, 3 times more apt to have had genital warts, 8 times more apt to have had hepatitis, 3 times more apt to have had lice, 5 times more apt to have had scabies, 30 times more apt to have had an infection from penile contact, hundreds of times more apt to have had oral infection from penile contact, and over 5000 times more apt to have AIDS, though this latter number is now decreasing.

In comparison to heterosexual females, lesbians are 19 times more apt to have had syphilis, 2 times more apt to have had genital warts, 4 times more apt to have had scabies, 7 times more apt to have had an infection from vaginal contact, 29 times more apt to have had an oral infection from vaginal contact, and 12 times more apt to have ever had an oral infection from penile contact.¹²

These diseases are a direct result from their homosexual behavior. (These next few paragraphs, only adults should read, since they graphically detail homosexual behavior.) Over 90 percent of male homosexuals participate in the insertion of the penis into the rectum of sex partners. This practice carries great risk for both participants. Fecal material can enter through the urethra. And sperm breaks through the single layer of the columnar epithelium of the rectum, causing massive immunological disruptions in the blood system, making the person at much greater risk for infections.

About 90 percent of male homosexuals and 65 percent of lesbians report having engaged in oral/anal sexual activity, inserting the tongue into or licking the anus. About 70 percent of male homosexuals and 25 percent of lesbians report some regularity of this practice. Seventeen percent

of homosexuals admit to eating and/or rubbing themselves with the feces of partners and an additional 12 percent report giving and receiving enemas as part of sexual pleasure. Homosexual men ingest, on the average, the fecal material of 23 different men per year. Yet ingestion of fecal material under any circumstances is unsound.

These practices are combined with others that are also medically unsound: 19 percent of male homosexuals and 4 percent of lesbians report urinating or defecating on their partners, 20 percent of homosexuals report sadomasochism where their partner is hurt, scratched, bruised and/or bloodied, and 41 percent of male homosexuals and 8 percent of lesbians report "handballing" or "fisting" where the hand and arm are inserted into the anus up the rectum of one's partner. It is no wonder that homosexuals are 245 percent more apt to report two or more sexually transmitted diseases than heterosexuals, and were 414 percent more apt to report deliberate infection of others.¹³

The detrimental consequences of this behavior is exploded when the amount of sexual partners with whom homosexuals copulate are examined. Most homosexual exchange occurs between strangers, 70 percent admitting that they had had sex only once with over half of their partners.¹⁴ Homosexuals average somewhere between 20 and 106 different partners per year.¹⁵ The average homosexual has had 300 to 500 partners during a lifetime.¹⁶ Twenty-eight percent of homosexuals have had sodomy with 1000 or more partners, 70 percent with 50 or more partners, and only 2 percent have had what could be described as monogamous or semi-monogamous relationships. Of these monogamous relationships, however, still 5 percent drank urine, 7 percent incorporated fisting, 33 percent ingested feces, 53 percent swallowed semen, and 59 percent received sperm up their rectum during the previous month of the study.¹⁷ Still other studies indicate that "monogamy" for homosexuals lasts between 9 to 60 months.¹⁸

Homosexual behavior in other countries matches those in the U.S. For example, a survey published in the *British Journal of Sexual Medicine* in April 1987 described the behavior of homosexuals in Britain. The mean age for their first sexual encounter with another male was 15 and one month. In London, over a quarter had had syphilis, over half had had gonorrhea, more than half had had non-specific urethritis, and nearly one in five had had herpes. Most men had had between one hundred and five hundred partners during their lives, and between six and fifty in the past year. Two London residents admitted to having five

hundred partners in one year; twelve admitted to five thousand partners in their lifetime; and 10 percent admitted to having sexual intercourse with between one and five thousand.¹⁹

Of course, these unhealthy sexual practices are the primary reason for the spread of the deadly AIDS virus in the United States. Seventy to ninety percent of the victims of AIDS are homosexuals. Already over 100,000 people have contracted the disease, 60% of whom have died, and it is estimated that 1.3 million are at present HIV positive and destined to die within 10 years.²⁰ Homosexuals themselves are the primary perpetrators of this disease, as well as the primary victims.

Thus, for the protection of those with homosexual tendencies, acts of sodomy must be made illegal.

Sodomy laws protect communities and the nation from disease

Though there are direct victims of homosexual behavior, both individuals and the homosexuals themselves, the nation itself is also at risk.

Homosexuals are one of the primary carriers of sexually transmitted diseases. These diseases are not restricted to their own population, but are spread to unsuspecting others. About 40 percent of homosexuals are or were married. Heterosexual sex is practiced either regularly or episodically by the 66 percent of male and 87 percent of female homosexuals who report one or more life-time heterosexual partners.²¹

It is well known that the number of sexual partners that homosexuals have are the primary cause for the spread of AIDS. Formerly called GRID5 (Gay Related Immune Deficiency Syndrome) since it primarily existed among homosexuals, the disease spread to other populations through bi-sexual behavior and the increased drug use of the homosexual population.

Though now rare, homosexual donated blood also spread the disease to hemophiliacs before 1985.²² Transfusions, once officially touted as low-risk by the medical establishment, also has communicated the disease to thousands of unsuspecting victims.²³

Clearly, the behavior of sodomy is a threat to public physical health. This promiscuous behavior is one of the primary means of transmission of sexually transmitted diseases, as well as the deadly disease of AIDS. The public cost of the AIDS virus

alone may well exceed sixty million dollars by 1991.²⁴

Other civil laws regulate bedroom behavior in order to protect both individuals and society

Many argue that the right to privacy includes sexual behaviors of all kinds. Current law, however, regulates many sorts of bedroom behaviors in order to protect both individuals and the community.

Incest and statutory rape are both criminally prosecuted, no matter if they occurred in private or public, whether or not there is consent. The state sets rules on who can get married and who can get divorced. Polygamy is outlawed. Prostitution is illegal, whether in private or public, because it affects individuals, community health, families, and society.²⁵

Second, government currently regulates such unhealthy practices as cigarette smoking. TV ads for the deadly practice are banned. It is against the law for minors to purchase cigarettes. Yet sodomy and its effects are much more deadly than cigarette smoking. The practice of sodomy is correlated with many types of crimes, as well as the most deadly diseases. And in America sodomy is blamed as the main cause for the transmission of the deadly AIDS virus which threatens to kill millions and destroy the American health system.

Third, for the most part sodomy is not practiced in the privacy of one's own bedroom. It is a public act. According to *The Gay Report*, a homosexual publication, the most frequent places to practice homosexual behavior are in public rest rooms, bus stations, service stations, public libraries, or rest stops; public parks where groups gather in the bushes; beaches; public baths, or "health clubs" where groups gather to watch others engage in sodomy or go to private booths for themselves; "gay bars" and night clubs; street corners where they "cruise" for others; "glory holes," circular holes cut out of partitions between stalls in public restrooms allowing anonymous oral sodomy with the person in the next stall; and pornographic bookstores, peep shows, or movie houses.²⁶ Out goes the "privacy of your own bedroom" argument. These public acts of sodomy should be outlawed.

Last, the right to privacy has only been found in the context of the nuclear family. Sex between consenting adults outside marriage has not been constitutionally protected as a fundamental right.²⁷

Western civilization has always outlawed sodomy

To do away with sodomy laws goes against the accumulated wisdom of centuries of known civilization. In sixteenth-century England, Henry VIII made sodomy a felony and imposed the death penalty for the "detestable and abominable vice of buggery." Sir Edward Coke and Blackstone, the legal authority even of the American colonies, concurred. The death penalty remained there until 1861 when the Offenses Against the Person Act reduced the punishment to a maximum of ten years' imprisonment.²⁸

The Founders of this nation also advocated strict sodomy laws. Thomas Jefferson, in his revision of the criminal code of Virginia during the Revolution, prescribed penalties for rape and sodomy. For the male he prescribed castration and for the female a hole, no less than one-quarter inch in diameter, bored through the cartilage of the nose.²⁹

Until the 1970's the U.S. Supreme Court appeared to take it for granted that states have the power to outlaw sodomy. Since that time, the Court has not protected homosexual activity under the Constitution. It has clearly held that there is no constitutional right to engage in homosexual sodomy.

Endnotes

1. States that still have sodomy laws on the books as of February 1985 include Alabama, Arizona, Arkansas, District of Columbia, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia (Magnuson, R.J., *Are Gay Rights Right?* (Straitgate Press, 1985)).

2. After summarizing the recent developments in the U.S. Supreme Court on the subject, Magnuson concludes, "The Supreme Court seems to be protecting the right to free speech, but not any so-called right to commit sodomy. This is not entirely consistent, but then, the Supreme Court has not spoke definitively in either case" (Magnuson, R.J., *Are Gay Rights Right?*, p. 102.)

3. Cameron, P., Coburn, W., Jr., Larson, H., Proctor, K., Forde, N. and Cameron, K., "Child Molestation and Homosexuality," *Psychological*

Reports, 1986, 58, pp. 327-337. Summarizing past studies on the topic, the authors report: "The original Kinsey data (Gebhard & Johnson, 1979 [*The Kinsey Data*, Saunders, 1979]) indicated that 37% of the gays and 2% of the lesbians admitted to sexual relations with under-17-yr.-olds, and 28% of the gays and 1% of the lesbians to sexual relations with under-16-yr.-olds while respondent was aged 18 yr. or older. In the second Kinsey Institute study (Bell & Weinberg, 1978 [*Homosexualities*, Simon & Schuster, 1978]) a quarter of gays admitted to sexual relations with under-16-yr.-olds while respondents were aged 21 yr. or older. Similarly, in the *Gay Report* (Jay & Young, 1979 [Summit]), 23% of the gays and 6% of the lesbians admitted to sexual interaction with youth less than 16 yr. of age since respondents were aged 20 yr. Schofield performed a random survey of British 15- to 19-yr.-old youth (1965 [*The Sexual Behavior of Young People*, Little, Brown]), and 35% of the boys and 9% of the girls claimed to have been approached for sex by adult homosexuals; 2% of the boys and 1% of the girls admitted to succumbing" (p. 336). Cf. Timnick, L., "The Times Poll," *Los Angeles Times*, 1985 (August 25-26), p. 104.

4. Cameron, P., "Homosexual Molestation of Children/Sexual Interaction of Teacher and Pupil," *Psychological Reports*, 1985, 57, pp. 1227-1236. It is no wonder that a 1977 *Boston Globe* poll showed that every local and national poll indicated that an overwhelming majority of people opposed hiring homosexuals as teachers (Dressler, J., "Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession," *Rutgers/Camden Law Journal*, 1978, 9 (3), pp. 399-445).

5. "Homosexual Love Away From School Is O.K., Gay Teachers Say," *New York Post*, July 11, 1979, p. 5.

6. "Child Molestation and Homosexuality," Institute for the Scientific Investigation of Sexuality, 1987; cf. Cameron, P., et al. and Cameron, P. studies above in *Psychological Reports*. The original Kinsey data (Gebhard, P.H. and Johnson, A.B., *The Kinsey Data*, Saunders, 1979) indicated that 37 percent of the gays and 2 percent of the lesbians admitted to sexual relations with under-17-year-olds, and 28 percent of the gays and 1 percent of the lesbians to sexual relations with under-16-year-olds while respondent was aged 18 year or older.

7. Jay, K. and Young, A., *The Gay Report* (Summit, 1979), p. 275. They also report that 23 percent of gays and 6 percent of lesbians admitted to sexual interaction with youth less than 16 years of age

since respondents were aged 20 years old. Schofield (*The Sexual Behavior of Young People*, Little, Brown, 1965) found that out of 15 to 19 year-old British youth, 35 percent of the boys and 9 percent of the girls claimed to have been approached for sex by adult homosexuals; two percent of the boys and 1 percent of the girls admitted to succumbing.

8. 1972 Gay Rights Platform, drawn up at the national Coalition of Gay Organizations convention (Chicago, 1972). Rueda E.T., *The Homosexual Network* (Devin Adair, 1982).

9. "Murder, Violence and Homosexuality," Institute for the Scientific Investigation of Sexuality, 1987; cf. Allen, C., *A Textbook of Psychosexual Disorders*, 2nd ed. (Oxford University Press, 1969) and de River, J.P., *The Sexual Criminal*, 2nd ed. (C.C. Thomas, 1956).

10. "Murder, Violence and Homosexuality," cf. Gebhard, P.H., and Johnson, A.B., *The Kinsey Data* (Sanders, 1979).

11. "Murder, Violence and Homosexuality," cf. O'Hara, K., "On Double Suicide," *Psychiatrica et Neurologica Japonica*, 1962, 44, p. 8.

12. "Medical Aspects of Homosexuality," Institute for the Scientific Investigation of Sexuality, 1985; cf. Jaffe, H.W., and Keewhan, C., et. al., "National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia in Homosexual Men; Part 1, Epidemiologic Results," *Annals of Internal Medicine*, 1983, 99 (2), pp. 145-157; cf. footnote no. 10 in "Gay Rights" Ordinances section.

13. "What Homosexuals Do," Institute for the Scientific Investigation of Sexuality, 1987; Jay, K. and Young, A., *The Gay Report* (Summit, 1979), pp. 490-93, 553-96, 563-4, 567; Hart, J., "Safe Sex and the Presence of the Absence," *National Review*, May 8, 1987, p. 43; Quinn, T.C., Stamm, W.E., et.al., "The Polymicrobial Origin of Intestinal Infections in Homosexual Men," *New England Journal of Medicine*, 1983, 309 (10), pp. 576-582; Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978).

14. Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978).

15. Corey, L. and Holmes, K.K., "Sexual Transmission of Hepatitis A in Homosexual Men," *New England Journal of Medicine*, 1980, 302, pp. 435-438. Dr. Winkelstein of the School of Public

Health at University of California, Berkeley, found that after several years of intense community-wide education about "safe sex," nearly 20 percent out of 1034 single men had over 50 sexual contacts in the two years prior to the study ("Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus," The San Francisco Men's Health Study, *Journal of American Medical Association*, 1987 (January 16), 257 (3), p. 323. One homosexual states in *The Gay Report*, "I believe my estimate of 4,000 sex partners to be very accurate. I have been actively gay since I was 13 (thirty-one years ago). An average of two or three new partners per week is not excessive, especially when one considers that I will have ten to twelve partners during one night at the baths" (p. 250).

As a result of AIDS, some homosexuals are slightly changing their behavior. Dr. Morin, gay activist and chairman of the American Psychological Association's ethics committee reported that the 824 homosexuals he studied lowered their sex-rate from 70 different partners per year in 1982 to 50 by mid-1984 (Stewart, S.A., *USA Today*, November 21, 1984). McKusick reported declines from 76 to 47 in the same period (McKusick, L., et. al., "AIDS and Sexual Behavior Reported by Gay Men in San Francisco," *American Journal of Public Health*, 1985, 75, pp. 493-96). Dr. Hunter Handsfield, Director of the Sexually Transmitted Disease Control Program in Seattle, notes, however, that in the face of AIDS, these changes in behavior are "almost ludicrous" (Letters to the Editor, *American Journal of Public Health*, December 1985, 75, pp. 1449-1450).

16. Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978); Manligit, G.M., and Talpaz, M., et. al., "Chronic Immune Stimulation by Sperm Allonantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-241; U.S. Center for Disease Control Study (Atlanta, 1982) reported in Meredith, "The Gay Dilemma," *Psychology Today*, January 1984, p. 50.

17. McKusick, L., et. al., "AIDS and Sexual Behavior Reported by Gay Men in San Francisco," *American Journal of Public Health*, 1985, 75, pp. 493-96.

18. Kinsey found that about 60 percent of the homosexuals he interviewed said that they would not want a monogamous relationship (Gebhard, P.H. and Johnson, A.B., *The Kinsey Data*, Saunder, 1979). Kinsey and others found that the longest "marriages" average two or three years, and that most homosexuals engage in sexual relationships

with others about half way through the relationships (Bell, A.P., Weinberg, M.S. and Hammersmith, S.K., *Sexual Preference* (Indiana University Press, 1981); Institute for the Scientific Investigation of Sexuality, "The Psychology of Homosexuality," ISIS, 1984. There is now some evidence that the quantity of homosexual acts are decreasing between different partners due to the threat of AIDS, though whether this decreased will be sustained is unknown.

19. White, M., *Aids and The Positive Alternatives* (Marshall Pickering, 1987), pp. 73-75.

20. Rueda, E.T. and Schwartz, M., *Gays, AIDS and You* (Devin Adair, 1987) cites the Department of Health and Human Services with an estimated 1.5 million Americans infected with HIV or the AIDS virus, though they admit that some private groups estimate three times the number of cases. They write, "If those estimates are reasonably accurate, then at least 94 percent, and possibly as many as 98 percent of the people who are infected with AIDS have not been tested and are unaware that they are carriers of the disease" (p. 7). Rueda and Schwartz say that 75 percent of the victims of AIDS are homosexuals. The Center for Disease Control reports that at least 90 percent of reported cases can be attributed to the combination of homosexual activity and/or drug use (Garriss, J.V., *AIDS: Civil Rights or Civil Wrongs*, National Perspective Institute, 1986, pp. 9-10). Lawrence J. and Brian F. McNamee (*AIDS: The Nation's First Politically Protected Disease*, National Medical Legal Publishing House, 1988) report the CDC finding of 80-90 percent of the infected outside continental Africa are homosexual. The most important route of transmission of AIDS is anal sodomy (Felberbaum & Salzberg, "Epidemiology and Risk Factors Associated with AIDS in AIDS and Related Infectious Diseases, *Topics in Emergency Medicine*, 9, July 1982, p. 5).

21. Bell and Weinberg reported that as many as 65 percent of more of practicing homosexuals report having engaged in heterosexual coitus and 20 percent or more are or have been married (*Homosexualities*, Simon & Schuster, 1978, p. 162). Robert Hawkins, associate dean at the School of Allied Health Professions, concurs that most male homosexuals report having had sexual activity with women (Sivak, S., et. al., "How Common is HTLV-III?," *New York Magazine*, October 7, 1985, p. 85). About 16 percent of the women in the U.S. currently infected with AIDS contracted the disease from contact with bisexual men (McNamee, L.J., & McNamee, B.F., *AIDS*, National Medical Legal Publishing House, 1988, p. 69).

22. There are now roughly 12,000 to 20,000 blood transfusion recipients infected by blood transfusions (Heilig, S., "Lookback Programs Track HIV-Positive Donors' Blood," *California Physician*, July 1987, p. 20). Some studies estimate that more than 90 percent of hemophiliacs now carry the AIDS antibody (*Answers About AIDS*, American Council on Science and Health, January 1986, p. 16).

23. Dr. Curran of the CDC, along with others such as Dr. Jeffrey Green of New York University Medical Center, minimized the risks of blood transfusion in 1983 (O'Connor, W., "AIDS: The Alarming Reality," *HIVE Foundation*, October 16, 1986, p. 10).

24. "The Nation Comes to Grips With the Widening Problems of AIDS," *Wall Street Journal* (May 18, 1987).

25. Homosexuals themselves understand the connection between these behaviors and their practices. Thus, they desire to lower the age of consent so that they can enjoy sexual relations with children, and desire to legalize both prostitution and polygamy.

26. Jay, K. and Young, A., *The Gay Report* (Summit, 1979), p. 500. Cf. Rechy, *The Sexual Outlaw* (Grove Press, 1977) and the *Gayyellow Pages*, a reference book widely circulated in the homosexual community that gives a state-by-state, city-by-city description of where homosexuals congregate, and for what purpose.

27. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Johnson v. San Jacinto Junior College*, 498 F. Supp. 555 (S.D. Tex. 1980); *cert. denied sub nom. Day v. South Park Indep. School Dist.*, 474 U.S. 1101 (1986). Judge Harlan stated: "The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced . . . but the intimacy of husband and wife is necessarily and essential and accepted feature of marriage, an institution which the State not only must allow but which always and in every age it has fostered and protected" (*Poe v. Ullman*, 367 U.S. 497, 552-553 (1961)).

28. Bayer, R., *Homosexuality and American Psychiatry* (Basic Books, 1981), p. 17.

29. Jaffa, H.V., "Sodomy and the Future of the Academy," *The Proposition*, April 1989; Jaffa, H.V., "The Right To Be Queer: A Very Queer Right," *The Proposition*, March 1987.

HOMOSEXUAL ALTERNATIVE LIFESTYLE EDUCATION

Purpose of Homosexual Sex Education

In their effort to convince the American populace that homosexuality is an alternative lifestyle, homosexual groups have attempted to change the sexual education classes of the public and private school systems. They have worked diligently to portray their perverse and unhealthy behavior as just an alternative lifestyle. In order to be morally "unbiased," many public school educational programs have adopted this "lifestyle" education assumption.

Arguments Against Homosexual Sex Education

Such sex education presupposes that homosexuality is an "alternative lifestyle," a moral statement

Sex education that teaches homosexuality as an "alternative lifestyle" is making a moral statement. Most would agree that sexual responsibility, i.e. morals, should be taught in conjunction with sexual education. The two topics cannot be divorced from one another.

Yet teaching homosexuality as an "alternative lifestyle" is teaching a morality not believed by the surrounding community. No heterosexual community in the United States endorses the morality of acts of sodomy. Half the states still outlaw sodomy.

Likewise, American communities do not believe that the homosexual lifestyle is morally neutral. They do not endorse the common homosexual practices of fisting, swallowing urine and feces, sadomasochism, and the multiple and impersonal nature of homosexual sexual acts.¹ (See above for more detailed statistics and description of these acts.)

In sum, sex education that endorses homosexuality as morally neutral and as an "alternative lifestyle" forces what most to believe an immoral morality upon the majority of U.S. citizens.

Many times these sex education classes presuppose that ten percent of the population are homosexuals

Alfred Kinsey interviewed thousands of individuals during the 1940's and found that about 10 percent of the male population were "more or less" exclusively homosexual for about three years of their lives. The numbers were significantly less for homosexuals for more than three years. Only about four percent of males and between one and three percent of females were found to be exclusively homosexual.² Based on this ten percent figure, though, some sex education programs are using the public junior high and high schools to identify ten percent of teens, and help them engage in a more "healthy" homosexuality, putting them in contact with other homosexual individuals and groups. The Los Angeles County Project 10 which does this is headed by a lesbian.

First, this ten percent figure is misleading, if not purely inaccurate. Since 1981 three studies have randomly sampled twelve different areas of the United States and have arrived at similar conclusions.³ About 96 percent of the population consider themselves exclusively heterosexual, while about 4 percent consider themselves bi- to homosexual. Only 1-3 percent consider themselves exclusively homosexual.

Second, the sample populations interviewed about their sexual preferences were adults, rather than children.⁴ Thus, they could be very non-representative of the population in junior high or high school ages. It is during these years that sexual identity is formed. By teaching homosexuality as an "alternative lifestyle," the classes are actually encouraging homosexuality, rather than heterosexuality.

Third, a statistical description of a population is not a prescription for action. In other words, just because 4 percent of the population are bi- or homosexuals does not mean they should be, or that others should be. Drug abuse, sexual promiscuity, and teenage pregnancy are rampant in high school populations; this does not mean that these actions should be encouraged. It would be absurd to offer classes on how to take drugs safely, or how to get pregnant safely. Yet that is what these sex education classes are doing regarding homosexuality. If sodomy is wrong, if it is unhealthy, if such acts spread disease and even death, these acts should be discouraged rather than taught as an "alternative lifestyle."

Such sex education classes are not scientific in their descriptions of the homosexual lifestyle and its consequences

Sex education classes that describe homosexuality as an "alternative lifestyle" do not adequately describe the homosexual lifestyle so that children and teenagers can make informed decisions. Sidney Hook, no conservative on family issues, while lunching with a friend at a park, asked his friend, "Ralph, I want you to tell me something I don't know. What exactly do homosexuals do?" So the friend told him. Hook's glasses came down a bit on his nose, and then he said, "That's disgusting!"⁵

If children and teens are to be given the opportunity to a rational, well-informed choice, they must be given the facts. They must be told about the percentages of homosexuals who have anal intercourse, eat feces and drink urine, engage in fist-ing and pour urine on one another. They must be briefed about the places where most homosexual activity is performed: public bathrooms, bars, porno shops, etc. They must be informed about the transitional relationships between homosexuals, and that they have hundreds of partners over a lifetime. They must be told about the increased chance of contracting venereal disease and even the deadly AIDS virus. They should know that many psychiatrists and psychologists still maintain that homosexuality is psychologically abnormal, despite the politically motivated change in their official diagnosis.⁶

Most likely, if teachers in sex education classes told students these facts, parents would be outraged. Even the U.S. Congress was outraged when Rep. William E. Dannemeyer attempted to put a description of homosexual behavior in the *Congressional Record*. Other House members described the behaviors as obscene and pornographic. Likewise, when Rep. Dana Rorabacher attempted to display in Congress Mapplethorpe's government-subsidized photographs of homosexual behavior, Congress again objected, saying that they were obscene and therefore inappropriate for display. In a similar manner, parents have every right to object to the description of homosexual perversions in the classroom. But then why should these behaviors be encouraged by teachers, by using the description, an "alternative lifestyle?"

Sex education classes that sterilize homosexuality and its consequences misrepresent the truth. Instead, they recruit children and teenagers, who will not know the facts, into a deadly and disease-ridden lifestyle.

Such sex education promotes increased homosexual exploration by children, disease, and even death

Sex education that teaches homosexuality as an "alternative lifestyle" encourages the very behaviors that most of society attempts to discourage. Early and late adolescents are busy forming their sexual identity that will last them a lifetime. Much research has demonstrated that their early sexual experiences will determine much of their later sexual behavior.⁷ Encouraging these adolescents to engage in homosexual behavior, even on a trial basis, will mold them for the rest of their lives.

Since homosexuals have such high rates of disease, teaching sodomy as a sexual alternative is encouraging disease among the nation's youth. Though the use of condoms cuts down the spread of STDs and AIDS among homosexuals, they are not 100% effective. Abstinence, by all scientists' admission, is the best solution to stop the spread of STDs and AIDS. Consequently, many state legislatures are making it mandatory to teach abstinence in state sex education programs.⁸ Yet the homosexual lifestyle, built upon instant sexual pleasure gratification, does not lend itself to condom use. Its sexual practices described above (in the sodomy section), its impersonal nature, the quantity of sexual partners, and a 414 percent rate over heterosexuals of deliberate infection of others are practices and values that oppose the use of condoms.⁹

The United States has only seen the tip of the iceberg in homosexual death tolls. Sixty-five percent of homosexuals going to STD clinics in Houston are HIV positive, 75 percent of those in Washington, D.C., and nearly 80 percent in San Francisco. To encourage homosexuality in sex education classes only promotes this disease and death. If the state school system can discourage smoking for health reasons, it should discourage sodomy for health reasons alone.

These sex education classes advocate values in direct opposition to parental values

Most parents do not want their children taught the homosexual lifestyle as an "alternative" to the heterosexuality. Parents want their children to learn about healthy sexuality rather than unhealthy (both medically and psychologically), and what many consider to be immoral, sexuality.

Yet most parents do not even know what their children are being taught in state-run sex education classes. When they do find out, they have consis-

...and the approval of a parent or a positive consent before their child attends any such class.

Consequently, many states are encouraging parents to take more of a part in classroom sex education. Parents want to know specifically about the content of each class time, and be able to give their consent, before the material is presented. This will make sex education programs more community based, and more representative of parental values.

Endnotes

1. With few exceptions, societies throughout world history have disapproved of homosexual behavior. Even today, there are relatively few cultures that endorse or condone sodomy between same sex couples. Frank du Mas, *Gay is Not Good* (Thomas Nelson, 1979) sums up what he considers an historical survey:

"1. No society in history has favored incest (heterosexual or homosexual) as a way of life for its members.

2. The myths and legends of every society studied show heterosexuality predominating over homosexuality.

3. Heterosexuality predominates over homosexuality in the world's erotic literature.

4. Of the world's great religious, moral, and spiritual leaders (Moses, Mohammed, Gandhi, Christ, Confucius, and others) most were heterosexual and married, some had children, all sanctioned heterosexuality, marriage, the family, and children. A few were so dedicated to their work that they did not marry at all; others, like Gandhi, married and had a family but later in life voluntarily sublimated their sex drives. Not one of these leaders openly approved of or practiced homosexuality.

5. Biographies indicate that the very large majority of the world's great achievers in all fields -- science, art, music, literature, political affairs, athletics, business -- were heterosexual and/or married.

6. All societies studied have a traditional, widely practiced heterosexual marriage.

7. Most societies have a ritual of passage to adulthood in which the overwhelming majority of its members assume the sex role indicated by their biological organs.

9. The great majority of all societies do not initially permit homosexual marriage.

10. In thousands of subhuman animal studies, heterosexuality is the overwhelming choice for animals existing in their natural state and having free access to members of both sexes.

11. In thousands of animal studies involving millions of hours of observation of animals in their natural environment, not one case of the homosexual equivalent of heterosexual intercourse has been observed.

The sexual emphasis of history is heterosexual" (pp. 50-1).

2. du Mas (*Gay Is Not Good*) outlines many of the criticisms of Kinsey's report:

"1. It was the first attempt at large scale quantitative study of sexuality, especially homosexuality. . . ."

2. Homosexuals have an intense desire to be accepted as normal; therefore, we can be fairly certain that a disproportionately large number of homosexuals volunteered for the study. Kinsey's sample is greatly distorted and does not represent the actual quantitative occurrence of homosexuality in the general population.

3. Many of the homosexuals who volunteered may have had unconscious motives to prove that everybody has homosexual tendencies, thereby reducing their own guilt and minimizing their societal rejection.

4. Most sick people or neurotics tend to have a circle of friends who share their maladjustments or problems. Therefore, the second and third group of volunteers who came largely from the first group's friends most certainly were similar to them, and errors made in the first group were perpetuated and extended into later groups.

5. The meaning and qualitative significance of sex acts are not sufficiently taken into account by Kinsey et al. A twelve-year-old boy dreaming of girls while engaged in mutual masturbation is tallied as an incident no different from a highly experienced transvestite in black lace underwear performing premeditated fellatio.

6. Kinsey purports to make a scientific study of human sexuality but at the same time omits those complex qualitative aspects of their lives that are uniquely human.

7. Kinsey implies that normal is equal to a large number. Ashley Montague [Geddes, D.F. and Curie, E., *About the Kinsey Report*, New World, 1948] points out that there are millions of people with criminal tendencies, but the size of their number does not make them normal, natural, or desirable.

8. Legman [Legman, G. In Lockridge, N., *The Sexual Conduct of Men and Women*, Hogarth, 1948] makes the point that Kinsey equated the idea of maximum with optimum. He further states that Kinsey uses a four-fold statistical bastion to safeguard his ignorance of what homosexuality really is.

9. Bergler [Bergler, E., "The Myth of a New National Disease," *The Psychiatric Quarterly*, January 1948] suggested that the Kinsey study has created a dangerous and absurd illusion of a new national disease of which fifty million people are victims. He criticizes Kinsey for labeling disease as health when he speaks of a heterosexual-homosexual continuum or balance.

10. Cleckley [Cleckley, H., *The Caricature of Love*, Ronald, 1957] shows that Kinsey in his statistical tables purports to be scientific but then repeatedly makes very unscientific value judgments almost always in favor of homosexuality as normal, natural, and healthy.

11. Many other experts in the field believe that instead of thirty-seven percent of white males being exclusively or predominantly homosexual (as Kinsey's statistics imply), the percentage is closer to one to five percent [Magee, B., *One in Twenty: A Study of Homosexuality in Men and Women*, Stein & Day, 1966].

12. The United States has more than twenty million blacks. Yet not one black was included in the Kinsey study." [Cf. Bergler, E., *Homosexuality and the Kinsey Report*, Citadel, 1954; Bergler, E. and Kroger, W., *Kinsey's Myth of Female Sexuality*, Grunc & Stratton, 1954; Cleckley, H.M. (4th ed.), *The Mask of Sanity*, Mosby, 1964] (pp. 153-56).

3. Bell, A.P., Weinberg, M.S. and Hammersmith, S.K., *Sexual Preference* (Indiana University Press, 1981); Cameron P. and Ross, K.P., "Social Psychological Aspects of the Judeo-Christian Stance toward Homosexuality," *Journal of Psychology and Theology*, 1981, 9, pp. 40-57; Hunt, M., *Sexual Behavior in the 1970s* (Playboy Press, 1974).

4. Kinsey also oversampled a deviant population to begin with (Karlen, A., *Sexuality and Homosexuality*, Norton, 1971).

5. William F. Buckley, Jr., "Remembering Sidney Hook," *National Review*, September 1, 1989, p. 55.

6. According to the latest polls of American psychiatrists, there is still widespread opposition to the APA's official position of homosexuals' normalcy. In a survey conducted in 1977, analysis of the

first 2,500 responses to a poll of 10,000 psychiatrists found that 69 percent believed that homosexuality usually represented a pathological adaptation. Only 18 percent disagreed with this proposition. Sixty percent of the respondents asserted that homosexual men were less capable of "mature, loving relationships" than their heterosexual counterparts. Finally, 70 percent supported the view that the problems experienced by homosexuals were more often the result of "personal conflicts" than of stigmatization. "Sexual Survey #4; Current Thinking on Homosexuality," *Medical Aspects of Human Sexuality*, November 1977, 11, pp. 110-111.

7. Erikson, E., *Childhood and Society* (Norton, 1950/63) makes the adolescent stage key in sexual and adult role development. In the first Kinsey study (Gebhard, P.H., Gagnon, J.H., Pomeroy, W.B. and Christenson, C.V., *Sex Offenders*, Harper & Row, 1965, p. 468), 48 percent of the boys with any childhood homosexual experience adopted homosexual habits. The Institute for the Scientific Investigation of Sexuality (ISIS) found in 1985 that 96 percent of heterosexual males and 97 percent of heterosexual females reported that their first sexual experience was heterosexual while 85 percent of the gays and 29 percent of lesbians said that their first sexual experience was bi- or homosexual.

8. California, for example, currently mandates that abstinence be taught in every sex education class. The overwhelming evidence supports abstinence sex ed, rather than contraceptive sex ed, both in the curtailment of teenage pregnancy and in the prevention of AIDS. See Gasper, J. (ed.), *What You Need to Know About AIDS* (Servant, 1989) for an excellent summary of both evidence supporting abstinence and abstinence-based sex ed programs.

9. "Criminality, Social Disruption and Homosexuality," 1988, Institute for the Scientific Investigation of Sexuality (ISIS). In fact, Robert Schwab, a homosexual activist and late president of the Texas Human Rights Foundation, proclaimed: "There has come the idea that if research money (for AIDS) is not coming at a certain date, all gay males should give blood . . . whatever action is required to get national attention is valid. If that includes blood terrorism, so be it" (*Dallas Gay News*, May 20, 1983).

"DOMESTIC PARTNERSHIP" LAWS DEFINITION OF THE FAMILY

History of "Domestic Partnership"

The number of people sharing a home without blood or contractual ties has been growing for more than two decades. Though in 1988 married couples made up 56 percent of the nation's 91.7 million households, according to the Census Bureau, 2.8 percent were households where unmarried couples of the opposite sex lived together. This proportion has almost doubled since 1970. Unrelated people of the same sex made up 1.7 percent. In addition, 8 percent of the total are composed of single-parent households.¹

"Domestic partners," as they are starting to be called, do not obtain the same benefits as more traditional families. Companies many times deny pension funds and life insurance payments to unrelated named beneficiaries. Families have successfully blocked bequests made to unrelated loved ones. Parents have been denied custody and visitation rights because they live with someone not related to them. Unrelated applicants for renter's insurance must usually buy separate policies. Even unmarried homeowners are sometimes told by authorities that they must move because zoning ordinances prohibit unrelated individuals from living together.

With the increase in single-parents, unmarried opposite sex couples, homosexual couples, and roommate living situations due to longer waits before marriage, cities are starting to change their definition of the family so that more benefits can be obtained for people dwelling in these varied living situations. West Hollywood has enacted health benefit ordinances for domestic partners. Though previously vetoed by Mayor Dianne Feinstein in 1982, the San Francisco Board of Supervisors recently passed domestic partnership legislation. Yet before it could go into effect, opponents submitted a 27,000-signature petition to City Hall to force a public referendum on the matter in November 1989. When allowed to decide for themselves, voters overturned the ordinance, though narrowly. The ordinance would have established a registry system whereby couples may register their relation-

ship with the city or county clerk. To qualify, they must have lived together six months. After qualification, they would have been eligible for bereavement leave if they worked for the city or county. And if their partner was in the hospital, they would have had visitation rights. The city was supposed to also create a task force to study the extension of city and county employees' health benefits to their partners, which would have been paid for by the employee.

Other cities have followed suit. Berkeley, Madison, Santa Cruz, and Takoma Park, a suburb of Washington, D.C., all have similar legislation. In these cities, a variety of interpersonal living arrangements qualify for health insurance, bereavement leave, insurance, annuities and pensions, and such rights as housing, adoption, and inheritance. According to homosexual lobby groups, the aim is to include federal income tax and veterans' benefits as well. Even the transfer of frequent flier benefits to homosexual partners is sought, along with family auto insurance.

In New York City, Judge Vito J. Titone, writing for the majority opinion, dismissed a narrowly construed definition of the family. Instead, he wrote, "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." Thus, the court ruled that a homosexual lover qualified as a family member and had the right to stay in his deceased partner's rent-controlled apartment.

Arguments Against "Domestic Partnership"

"Domestic partnership" definitions of the family reward lack of commitment

By the very nature of the marriage contract, a couple who has married has covenanted together for a life-time. They have committed themselves to love and honor each others' wishes, engaging in self-sacrifice on each others' behalf.

Those who are married, promise to stay together to raise children. The family setting, with a long-term married man and woman, is the best setting in which to raise children. Children need both a mother and a father to develop a healthy sexual identity. They need the consistency of both spouses for all their lifetime. Divorce has measurable negative consequences to both young and older children.²

According to George Gilder, the marital bond anchors the male sex drive to one woman, and to the provision of a family. Most occupations favor hiring married men over single men because they know married men have more motivation to work, save, and climb the ladder of their profession. There is a direct correlation between the number of children that a man has and the amount of his income. Thus, the work ethic is greatly supported by the traditional definition of the family.³

"Domestic partnership" interpretations of the family help undermine this type of support that children, and indeed society, so desperately need. Such interpretations of the family encourage short term relationships, where couples are not financially responsible toward one another.⁴

Domestic partnership relationships want rights without responsibility

Live-in heterosexual couples can easily enter into a legal marital relationship if they so desire. Foster parents can usually adopt the children they take care of. Most relationships that are long-term can be made legal in the sight of the law.

This is not the problem. Most do not make these relationships long-term in the eyes of the law because they do not want the responsibilities that legal long-term relationships imply. Heterosexual couples do not get married because they don't want the pressures of commitment. They want an easy way out, just in case the relationship "doesn't work." And in fact, only one-third of such live-in relationships result in marriage.⁵ Likewise, foster parents do not desire adoption since it would imply many legal ramifications that they are not willing to enter.

It then appears that most of these groups who want to be defined "domestic partners" want the benefits without the responsibilities of the more traditional family arrangements. Another case supports this point. Homosexual domestic partners don't want to be financially liable the way a spouse would be if his partner covered by a lover's health insurance policy contracts AIDS or some other catastrophic illness not adequately covered by the insurance. They want rights without responsibilities.⁶

The definition of "domestic partnership" is too vague

Potential domestic partners must prove a certain degree of financial interdependence, shared living arrangements, and a commitment to mutual caring. They don't even need a sexual relationship.⁷

This definition is simply too vague, and can be severely abused. No conservative, even Andrew Sullivan of *The New Republic* believes, "In principle, an elderly woman and her live-in nurse could qualify. A couple of uneuphemistically confirmed bachelors could be DPs. So could two close college students, a pair of seminarians, or a couple of frat buddies. Left as it is, the concept of domestic partnership could open a Pandora's box of litigation and subjective judicial decision-making about who qualifies."⁸ Ad hoc decisions about what sorts of living arrangements qualify as a domestic partnership or a family will be left to the courts and local governments.

This vague definition of the family will greatly increase the monetary cost to society

Since virtually anyone who can convince the courts that they qualify as a "domestic partnership" will obtain all the benefits usually obtained for more traditional families, the monetary costs of insurance, pension and annuity plans, etc. will greatly increase to both state and local governments. A logical result of these kind of ordinances will be to force private businesses to "not discriminate" and also give traditional benefits to domestic partnerships.

Before Seattle had a chance to adopt its own domestic partnership ordinance in the Spring of 1989 that would have required both public and private employers to provide these benefits to those in this expanded definition of the family, businesses rose up in opposition which made the politicians retreat, at least for the moment. "We knew it would have a skyrocketing effect on cost because there were virtually no controls in place," says Molly A. Swain, communications manager for Blue Cross of Washington and Alaska in Seattle.⁹

Those who are committed to long-term relationships with their spouse and children should not be forced to pay higher insurance premiums to cover those who do not wish to have such commitment.

A weakened definition of the family will hurt the poor the most

Strong traditional families must be supported by governmental policy. Such policies must reward long-term commitments by opposite-sex partners. When policies reward the breakdown of these relationships, women and the poor suffer the most.

At present many policies reward both the female and the male for short-term relationships. Such policies as "no-fault" divorces, the absence of the

father's right to keep his wife from having an abortion, and more welfare support for single mothers have encouraged alternative marital relationships.

As a consequence, single mothers and their children now compose a majority of those living in poverty in the United States. Fathers refuse to pay child support. And mothers are rewarded for having more children out of wedlock, or for killing their unborn children using government funding.¹⁰

Including homosexual couples in "domestic partnership" definitions will have detrimental effects upon children

The inclusion of homosexual couples as "domestic partners" opens the doors to many problems. One of these problems is that homosexuals will be able to legally adopt children or raise foster children.

This possibility will have several detrimental effects upon children. First, homosexual relationships are highly unstable. In an age where the divorce rate among heterosexuals is 50% in the U.S., the instability of heterosexual relationships are infinitesimal in comparison to homosexual relationships. Most homosexual partners admit having hundreds of partners during their lifetime, and many admit to thousands. Average "monogamous" relationships last nine to sixty months, and yet those monogamous partners admit to having sex with a minimum of one other partner during each week.¹¹

Second, homosexual couples make poor sex-role models for children. Homosexual relationships are much more centered around self-centered eroticism than heterosexual relationships. Their impersonal acts of sodomy, fecal and urine ingestion, sado-masochism, fisting, fellatio, etc. are not healthy models to children. Psychologists have consistently demonstrated that having a committed male and female in the home provide the best role-models for children. Children desperately need intimacy with both sexes in a parental relationship. If they do not experience these, they will experience much sexual identity confusion in later years. Many believe, in fact, that homosexuals themselves were raised in such homes, and now suffer sexual identity confusion.¹²

Third, homosexuals have high rates of child abuse and molestation. When three-quarters of homosexuals admit having sex with children 16-19 years of age, and homosexual teachers have a 90-100 times greater probability to molest their students, it is no wonder that homosexuals are working hard to drop the age of consent to sexual

relations. Children who have had homosexual relations at an early age are much more likely to later become homosexuals.¹³

Last, children who are reared by homosexuals will learn not only a lifestyle considered by many to be perverse and psychologically abnormal, but disease-ridden. Children will model homosexual sexual behaviors that are linked to numerous diseases, as well as AIDS. If heterosexual couples trained their children in such unhealthy practices, a child might be taken away from them due to possible "physical abuse" or "emotional abuse." The children of homosexuals will suffer a lifetime.

Endnotes

1. Diegmuller, K., "Extended Definition of Family Fuels Partnership Controversy," *Insight*, August 7, 1989, p. 18.

2. "It is estimated that as many as one-third of today's children will experience their parents' divorce and close to one-half will spend some time in a single parent family before the age of 18" ("The American Family Under Siege: An Analysis of Social Change Affecting the Family 1950-1990," Family Research Council, 1989).

The effects of divorce upon children and adolescents can be devastating. Arnold Stolberg and James Anker cite problems common to children of divorce already identified as: higher rates of delinquency, enuresis [bedwetting], depression, aggressiveness to parents, sexual acting out and school problems. They have significantly poorer cognitive performance and social interaction skills. Also the perceptual experience of some children of divorce is one of self-blame, of feelings of being different from their peers, and of a heightened sensitivity to interpersonal incompatibility.

Adolescents also experience potentially severe adaptive consequences. As in younger children, increased impulse control problems and antisocial, aggressive behaviors are common due to the disruption of the family due to divorce (Stolberg, A.L. and Anker, J.M., "Cognitive and Behavior Changes in Children Resulting from Parental Divorce and Consequent Environmental Changes," *Journal of Divorce*, Winter, 1983. Cf. Wallerstein, J.S. and Blakeslee, S., *Second Chances* (Ticknor & Fields, 1989) for the best recent study on the long term effects of divorce on both children and adults.

3. Gilder, G., *Men and Marriage* (Pelican, 1986).

4. Homosexual relationships are usually extremely short. As stated above, most homosexual exchange occurs between strangers, 70% admitting that they had had sex only once with over half of their partners. Homosexuals average somewhere between 20 and 106 different partners per year. The average homosexual has had 300 to 500 partners during a lifetime. Twenty-eight percent of homosexuals have had sodomy with 1000 or more partners, 70% with 50 or more partners, and only 2% have had what could be described as monogamous or semi-monogamous relationships. Cf. Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978); Manligit, G.M., and Talpaz, M., et. al., "Chronic Immune Stimulation by Sperm Alloantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-241; U.S. Center for Disease Control Study (Atlanta, 1982) reported in Meredith, "The Gay Dilemma," *Psychology Today*, January 1984, p. 50.

5. Only one-third of live-in couples marry. Cf. Craig, G.J., *Human Development*, 3rd ed. (Prentice-Hall, 1983), p. 420.

6. Diegmüller, K., "Extended Definition of Family Fuels Partnership Controversy," *Insight*, August 7, 1989, p. 19.

7. Regarding the New York Court of Appeals domestic partnership case in July 1989, Judge Vito J. Titone dismissed a narrowly construed definition of the family, writing, "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." Diegmüller likewise relates, "In a New York case, a woman and her young son had moved from the South and boarded with a widower. Although no sexual relationship developed between the man and the woman, the three came to consider themselves a family; the boy eventually became the incapacitated widower's primary caretaker. When the old man died, his landlord tried to evict the younger man and his mother, even though they had lived in the apartment for 25 years. The tenants won the case, but the landlord is appealing" (p. 19).

8. Sullivan, A., "Here Comes the Groom," *The New Republic*, August 28, 1989, p. 20.

9. Diegmüller, K., p. 19.

10. "The divorce epidemic has not only devastated childhood, it has brought financial crisis to

millions of women. Divorce reform was supposed to be a panacea for women trapped in bad marriages. Instead, it has trapped many of them in poverty. A widely respected study of one state's landmark no-fault divorce law found that the effect of the average divorce decree was to decrease the standard of living of the women and her minor children by 73 percent, while increasing the man's standard of living by 42 percent" ("The American Family Under Siege: An Analysis of Social Change Affecting the Family 1950-1990," Family Research Council, 1989.)

Two-parent families have a 7 percent poverty rate, as against 35 percent for those headed by women. Nearly three-quarters of all poor black families are headed by females. Nearly half of America's poor live in female-headed families with no husband present, even though such families in the general population are only 16 percent of the total. These families end up living on government welfare. Nearly 90 percent of AFDC children have able-bodied, but absent, fathers.

Butler and Kondratas write, "When the family is in bad shape, what follows is poor education, poor skills, and poor performance. The federal government may try to douse the flames, but the fire has already caught hold. As Secretary of Education, [now drug czar], William Bennett points out, of course, this does not mean 'society is relieved of responsibility to do what it can when the family cannot do or is not doing its job. . . . But society cannot replace the family' [Speech by William Bennett to the fourth annual meeting of Networking Community-Based Services, Washington, D.C., June 10, 1986].

From the standpoint of averting poverty, the ideal family is a healthy, two-parent family" (Butler, S. and Kondratas, A., *Out of the Poverty Trap* (Free Press, 1987), pp. 138-141.

11. Corcy, L. and Holmes, K.K., "Sexual Transmission of Hepatitis A in Homosexual Men," *New England Journal of Medicine*, 1980, 302, pp. 435-438; Winkelstein, "Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus," The San Francisco Men's Health Study, *Journal of American Medical Association*, 1987 (January 16), 257 (3), p. 323; Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978); Manligit, G.M., and Talpaz, M., et. al., "Chronic Immune Stimulation by Sperm Alloantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-241; U.S. Center for Disease Control Study (Atlanta, 1982) reported in Meredith, "The Gay Dilemma," *Psychology Today*, January 1984, p. 50; McKusick, L., et. al., "AIDS and Sexual Behavior Reported by Gay Men

Bowers V Hardwick

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HENRY C. LIND
REPORTER OF DECISIONS

UNITED STATES
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BOWERS, ATTORNEY GENERAL OF GEORGIA
v. HARDWICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
 THE ELEVENTH CIRCUIT

No. 85-140. Argued March 31, 1986—Decided June 30, 1986

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

Held: The Georgia statute is constitutional. Pp. 190-196.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupported. Pp. 190-191.

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Pp. 191-194.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance. Pp. 194-195.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Stanley v. Georgia*, 394 U. S. 557, distinguished. Pp. 195-196.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. P. 196.

760 F. 2d 1202, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J. and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J. post, p. 196, and POWELL, J., post, p. 197, filed concurring opinion. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, post, p. 199. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 214.

Michael E. Hobbs, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J. Bowers*, Attorney General, *pro se*; *Marion O. Gordon*, First Assistant Attorney General, and *Daryl A. Robinson*, Senior Assistant Attorney General. *Laurence H. Tribe* argued the cause for respondent Hardwick. With him on the brief were *Kathleen M. Sullivan* and *Kathleen L. Wilde*.*

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute crim-

*Briefs of *amici curiae* urging reversal were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell*; for the Rutherfordford Institute et al. by *W. Charles Bundren*, *Guy O. Farle Jr.*, *George M. Weaver*, *William B. Holberg*, *Wendell R. Bird*, *John Whitehead*, *Thomas O. Kotouc*, and *Alfred Lindh*; and for David Robinson, Jr., *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Robert Hermann*, Solicitor General, *Lawrence S. Kahn*, *Howard L. Zwick*, *Charles R. Fraser*, and *Sanford M. Cohen*, Assistant Attorneys General, and *John Van de Kamp*, Attorney General of California; for the American Jewish Congress by *Daniel D. Levenson*, *David Cohen*, and *Frederick Mandel*; for the American Psychological Association et al. by *Margaret Farrell Ewing*, *Donald N. Bersoff*, *Anne Simon*, *Nadine Taub*, and *Hilbert Semmel*; for the Association of the Bar of the City of New York by *Steven A. Rosen*; for the National Organization for Women by *John S. Katz*; and for the Presbyterian Church (U. S. A.) et al. by *Jeffrey Bramlett*.

Briefs of *amici curiae* were filed for the Lesbian Rights Project et al. by *Mary C. Dunlap*; and for the National Gay Rights Advocates et al. by *Edward P. Errante*, *Leonard Graff*, and *Jay Kohorn*.

nalizing sodomy¹ by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.² He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U. S. 901 (1976).

¹Georgia Code Ann. § 16-6-2 (1984) provides, in pertinent part, as follows:

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

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

²John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.*, at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.*, at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F. 2d 1202, 1206-1207 (CA11 1985), and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other persons of ██████████ y.

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F. 2d 1202 (1985). The court first held that, because *Doe* was distinguishable and in any event had been undermined by later decisions, our summary affirmation in that case did not require affirmation of the District Court. Relying on our decisions in *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972); *Stanley v. Georgia*, 394 U. S. 557 (1969); and *Roe v. Wade*, 410 U. S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case,³ we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment.⁴

³See *Baker v. Wade*, 769 F. 2d 289, rehearing denied, 774 F. 2d 1285 (CA5 1985) (en banc); *Dronenburg v. Zech*, 239 U. S. App. D. C. 229, 741 F. 2d 1388, rehearing denied, 241 U. S. App. D. C. 262, 746 F. 2d 1579 (1984).

⁴Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmation in *Doe*. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*. See *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 14 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 309, n. 1 (1976); *Edelman v. Jordan*, 415 U. S. 651, 671 (1974). Cf. *Hick v. Miranda*, 422 U. S. 552, 344 (1975).

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International*, 431 U. S. 678, 685 (1977). *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and *Meyer v. Nebraska*, 262 U. S. 390 (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts*, 321 U. S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U. S. 1 (1967), with marriage; *Griswold v. Connecticut*, *supra*, and *Eisenstadt v. Baird*, *supra*, with contraception; and *Roe v. Wade*, 410 U. S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, *supra*, at 688-689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the

claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U. S., at 600 n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty or property is taken, the cases are legion in which the Clauses have been interpreted to have substantive content. Subsuming rights that to a great extent are immune from general or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey*.

Striving to assure itself and the public that announced rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' choice of values on the States and the Federal Government. The Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U. S. 319, 325, 326 (1937), it was said this category includes those fundamental liberties that "implicit in the concept of ordered liberty," such that "no

liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (POWELL, J.). See also *Griswold v. Connecticut*, 381 U. S., at 506.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.⁵ In 1868, when the Fourteenth Amendment was

⁵ Criminal sodomy laws in effect in 1791:

Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).

Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. "The First Laws of the State of Georgia, pt. 1, p. 290 (1981).

Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, *Sources and Documents of United States Constitutions* 372 (1975).

Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.

New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680-1726, p. 141 (1978).

Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.

New York: Laws of New York, ch. 21 (passed 1787).

ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.⁶ In fact, until 1961,⁷ all 50 States outlawed sodomy, and today, 24 States and the District of Columbia

At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina, ch. 17, p. 314 (Martin ed. 1792).

Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).

Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, p. 142 (1977).

South Carolina: Public Laws of the State of South Carolina, p. 49 (1790).

At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 Henning's Laws of Virginia, ch. 5, § 6, p. 127 (1821) (passed 1776).

⁶ Criminal sodomy statutes in effect in 1868:

Alabama: Ala. Rev. Code § 3604 (1867).

Arizona (Terr.): Howell Code, ch. 10, § 48 (1865).

Arkansas: Ark. Stat., ch. 51, Art. IV, § 5 (1858).

California: 1 Cal. Gen. Laws, ¶ 1450, § 48 (1865).

Colorado (Terr.): Colo. Rev. Stat., ch. 22, §§ 45, 46 (1868).

Connecticut: Conn. Gen. Stat., Tit. 122, ch. 7, § 124 (1866).

Delaware: Del. Rev. Stat., ch. 131, § 7 (1893).

Florida: Fla. Rev. Stat., div. 5, § 2614 (passed 1868) (1892).

Georgia: Ga. Code §§ 4286, 4287, 4290 (1867).

Kingdom of Hawaii: Haw. Penal Code, ch. 13, § 11 (1869).

Illinois: Ill. Rev. Stat., div. 5, §§ 49, 50 (1845).

Kansas (Terr.): Kan. Stat., ch. 53, § 7 (1855).

Kentucky: 1 Ky. Rev. Stat., ch. 28, Art. IV, § 11 (1860).

Louisiana: La. Rev. Stat., Crimes and Offences, § 5 (1856).

Maine: Me. Rev. Stat., Tit. XII, ch. 160, § 4 (1840).

Maryland: 1 Md. Code, Art. 30, § 201 (1860).

Massachusetts: Mass. Gen. Stat., ch. 165, § 18 (1860).

Michigan: Mich. Rev. Stat., Tit. 30, ch. 158, § 16 (1846).

Minnesota: Minn. Stat., ch. 96, § 13 (1859).

Mississippi: Miss. Rev. Code, ch. 64, § LII, Art. 238 (1857).

Missouri: 1 Mo. Rev. Stat., ch. 50, Art. VIII, § 7 (1856).

Montana (Terr.): Mont. Acts, Resolutions, Memorials, Criminal Practice Acts, ch. IV, § 44 (1866).

Nebraska (Terr.): Neb. Rev. Stat., Crim. Code, ch. 4, § 47 (1866).

[Footnote 6 is continued on p. 194]

continue to provide criminal penalties for sodomy performed in private and between consenting adults. See *Survey*, U. Miami L. Rev., *supra*, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudi-

Nevada (Terr.): Nev. Comp. Laws, 1861-1900, Crimes and Punishments, § 45.

New Hampshire: N. H. Laws, Act. of June 19, 1812, § 5 (1815).

New Jersey: N. J. Rev. Stat., Tit. 8, ch. 1, § 9 (1847).

New York: 3 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 5, § 20 (5th ed. 1859).

North Carolina: N. C. Rev. Code, ch. 34, § 6 (1855).

Oregon: Laws of Ore., Crimes—Against Morality, etc., ch. 7, § 655 (1874).

Pennsylvania: Act of Mar. 31, 1860, § 32, Pub. L. 392, in 1 Digest of Statute Law of Pa. 1700-1903, p. 1011 (Purdon 1905).

Rhode Island: R. I. Gen. Stat., ch. 232, § 12 (1872).

South Carolina: Act of 1712, in 2 Stat. at Large of S. C. 1682-1716, p. 493 (1837).

Tennessee: Tenn. Code, ch. 8, Art. 1, § 4843 (1858).

Texas: Tex. Rev. Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860).

Vermont: Acts and Laws of the State of Vt. (1779).

Virginia: Va. Code, ch. 149, § 12 (1868).

West Virginia: W. Va. Code, ch. 149, § 12 (1868).

Wisconsin (Terr.): Wis. Stat. § 14, p. 367 (1839).

⁷In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, §§ 11-2, 11-3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

ation of much of the substantive gloss that the Court placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great assistance to expand the substantive reach of those Clauses particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary essentially takes to itself further authority to govern the country without express constitutional authority. The claim right pressed on us today falls far short of overcoming resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the private home. He relies on *Stanley v. Georgia*, 394 U. S. (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in 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 house, what books he may read or films he may watch." *Id.*, at 565.

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was grounded in the First Amendment. The right pressed on us here has no similar support in the text of the Constitution and it does not qualify for recognition under the principles for construing the Fourteenth Amendment. Limits are also difficult to discern. Plainly enough, other illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of firearms, or stolen goods. *Id.*, at 568, n. 11. And respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, even by fiat, to limit the claimed right to homosexual con-

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while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.⁸

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante*, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality

⁸ Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

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and the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i. e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a

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felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16-5-24, first-degree arson, § 16-7-60, and robbery, § 16-8-40.¹

In this case, however, respondent has not been tried, much less convicted and sentenced.² Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

¹ Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code § 13A-6-65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. § 41-1813 (1977) (1-year maximum); D. C. Code § 22-3502 (1981) (10-year maximum); Fla. Stat. § 800.02 (1985) (60-day maximum); Ga. Code Ann. § 16-6-2 (1984) (1 to 20 years); Idaho Code § 18-6605 (1979) (5-year minimum); Kan. Stat. Ann. § 21-3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. § 510.100 (1985) (90 days to 12 months); La. Rev. Stat. Ann. § 14:89 (West 1986) (5-year maximum); Md. Ann. Code, Art. 27, §§ 553-554 (1982) (10-year maximum); Mich. Comp. Laws § 750.158 (1968) (15-year maximum); Minn. Stat. § 609.293 (1984) (1-year maximum); Miss. Code Ann. § 97-29-59 (1978) (10-year maximum); Mo. Rev. Stat. § 566.090 (Supp. 1984) (1-year maximum); Mont. Code Ann. § 45-5-505 (1985) (10-year maximum); Nev. Rev. Stat. § 201.190 (1985) (6-year maximum); N. C. Gen. Stat. § 14-177 (1981) (10-year maximum); Okla. Stat., Tit. 21, § 886 (1981) (10-year maximum); R. I. Gen. Laws § 11-10-1 (1981) (7 to 20 years); S. C. Code § 16-15-120 (1985) (5-year maximum); Tenn. Code Ann. § 39-2-612 (1982) (5 to 15 years); Tex. Penal Code Ann. § 21.06 (1974) (\$200 maximum fine); Utah Code Ann. § 76-5-403 (1978) (6-month maximum); Va. Code § 18.2-361 (1982) (5-year maximum).

² It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. See *Thompson v. Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939). Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

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JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante*, at 191, than *Stanley v. Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U. S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16-6-2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16-6-2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." *Ante*, at 190. But the fact that the moral judgments expressed by statutes like § 16-6-2 may be "natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Roe v. Wade*, 410 U. S. 113, 117 (1973), quoting *Lochner v. New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most inti-

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mate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians." *Herring v. State*, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confel[r] a fundamental right upon homosexuals to engage in sodomy," *ante*, at 190, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante*, at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16-6-2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.¹ I therefore see no basis for the

¹Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim. Code § 26-5901 (1933). In *Thompson v. Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939), the Georgia Supreme Court held that § 26-5901 did not prohibit lesbian activity. And in *Riley v. Garrett*, 219 Ga. 345, 133 S. E. 2d 367 (1963), the Georgia

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Court's decision to treat this case as an "as applied" challenge to § 16-6-2, see *ante*, at 188, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16-6-2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4-5; cf. 760 F. 2d 1202, 1205-1206 (CA11 1985). But his claim that § 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante*, at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold v. Connecticut*, 381 U. S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10-12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."

Supreme Court held that § 26-5901 did not prohibit heterosexual cumming. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as *Riley*," Note, *The Crimes Against Nature*, 16 J. Pub. L. 159, 167, n. 47 (1967).

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Bramlet v. Wilson, 495 F. 2d 714, 716 (CA8 1974); see *Parr v. Great Lakes Express Co.*, 484 F. 2d 767, 773 (CA7 1973); *Due v. Tallahassee Theatres, Inc.*, 333 F. 2d 630, 631 (CA5 1964); *United States v. Howell*, 318 F. 2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1357, pp. 601-602 (1969); see also *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that §16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be preemptorily dismissed.² The Court's cramped reading of the

² In *Robinson v. California*, 370 U. S. 660 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In *Powell v. Texas*, 392 U. S. 514 (1968), where the Court refused to extend *Robinson* to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by JUSTICE MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." *Id.*, at 532. JUSTICE WHITE wrote separately:

"Analysis of this difficult case is not advanced by preoccupation with the label 'condition'. In *Robinson* the Court dealt with 'a statute which makes the "status" of narcotic addiction a criminal offense . . .'. 370 U. S., at 666. By precluding criminal conviction for such a 'status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson* The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are suf-

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issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U. S. 747, 772 (1986). In construing the right to privacy, the Court has proceeded along two somewhat distinctly proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'" *Id.*, at 550-551, n. 2.

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as *Amici Curiae* 8-11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under JUSTICE WHITE's analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carrey v. Population Services International*, 431 U. S. 678, 711 (1977) (POWELL, J., concurring in part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause's applicability to §16-6-2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend §16-6-2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, e.g., *Rowland v. Mad River Local School District*, 470 U. S. 1009 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985).

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ting, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make. *E. g.*, *Roe v. Wade*, 410 U. S. 113 (1973); *Pierce v. Society of Sisters*, 263 U. S. 510 (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E. g.*, *United States v. Karo*, 468 U. S. 705 (1984); *Payton v. New York*, 445 U. S. 573 (1980); *Rios v. United States*, 364 U. S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Ante*, at 190-191. While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts v. United States Jaycees*, 468 U. S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore v. East Cleveland*, 431 U. S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U. S., at 777, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288-289 (1977). And so we protect the decision whether to

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marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U. S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. *Thornburgh v. American College of Obstetricians & Gynecologists*, *supra*, at 777, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. *Moore v. East Cleveland*, 431 U. S., at 500-506 (plurality opinion). The Court recognized in *Roberts*, 468 U. S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." *Ibid.*

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I v. Slaton*, 413 U. S. 49, 63 (1973); see also *Carey v. Population Services International*, 431 U. S. 678, 685 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Roe v. Wade*, 410 U. S., at 153.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose

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how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U. S. 205, 223-224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" *Katz v. United States*, 389 U. S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" *California v. Ciraolo*, 476 U. S. 207, 226 (1986) (Powell, J., dis-

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sending), quoting *Boyd v. United States*, 116 U. S. 616, 630 (1886).

The Court's interpretation of the pivotal case of *Stanley v. Georgia*, 394 U. S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante*, at 195. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

"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."

"These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U. S., at 564-565, quoting *Olmstead v. United States*, 277 U. S., at 478 (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising no First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I v. Slaton*, 413 U. S. 49 (1973), the Court suggested that reliance on the Fourth

Amendment not only supported the Court's outcome in *Stanley* but actually was *necessary* to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" 413 U. S., at 66. "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," *ante*, at 195. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16-6-2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim.³ In light of the state of the record, I see

³ Even if a court faced with a challenge to § 16-6-2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show

no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," *ante*, at 195, to which *Stanley* refused to extend its protection. 394 U. S., at 568, n. 11. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," *ante*, at 195; drugs and weapons are inherently dangerous, see, e. g., *McLaughlin v. United States*, 476 U. S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16-6-2 to be physically dangerous, either to the persons engaged in it or to others.⁴

an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by § 16-6-2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, e. g., Brief for Petitioner 36-37 and Brief for David Robinson, Jr., as *Amicus Curiae* 23-28, on the one hand, with *People v. Onofre*, 51 N. Y. 2d 476, 489, 415 N. E. 2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as *Amici Curiae* 11-14; and Brief for the American Psychological Association and American Public Health Association as *Amici Curiae* 19-27, on the other.

⁴ Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, *ante*, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmental provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity

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The core of petitioner's defense of § 16-6-2, however, is that respondent and others who engage in the conduct prohibited by § 16-6-2 interfere with Georgia's exercise of the "right of the Nation and of the States to maintain a decent society," *Paris Adult Theatre I v. Slaton*, 413 U. S., at 59-60, quoting *Jacobellis v. Ohio*, 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16-6-2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see *ante*, at 190, 192-194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. See, e. g., *Roe v. Wade*, 410 U. S. 113 (1973); *Loving v. Virginia*, 388 U. S. 1 (1967); *Brown v. Board of Education*, 347 U. S. 483 (1954).⁵ As Justice Jackson wrote so eloquently

is warranted. See Tr. of Oral Arg. 21-22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

⁵The parallel between *Loving* and this case is almost unanny. There, too, the State relied on a religious justification for its law. Compare 388 U. S., at 3 (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20-21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in *Loving v. Virginia*, O. T. 1966, No. 395, pp. 28-29, with *ante*, at 192-194, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U. S., at 6, n. 5 (noting that 16 States still outlawed interracial marriage), with *ante*, at 183-194 (noting that 24 States and the District of Columbia have sodomy

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for the Court in *West Virginia Board of Education v. Barrette*, 319 U. S. 624, 641-642 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, e. g., *McGowan v. Maryland*, 366 U. S. 420, 429-453 (1961); *Stone v. Graham*, 449 U. S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of secular coercive power.⁶ A State can no more punish private behavior be-

statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U. S., at 7-12, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*, at 12.

⁶The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense

cause of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U. S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor v. Donaldson*, 422 U. S. 563, 575 (1975). See also *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *United States Dept. of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973).

Nor can § 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*, 413 U. S., at 68-69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, will not because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, *Immorality and Treason*, reprinted in *The Law as Literature* 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning

was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. Stephen, *A History of the Criminal Law of England* 429-430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, *The History of English Law* 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, *Institutes*, ch. 10 (4th ed. 1797).

public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I*, 413 U. S., at 66, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold v. Connecticut*, 381 U. S. 479 (1965)).⁷

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond v. Charles*, 476 U. S. 54, 65-66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis*, 310 U. S.

⁷ At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16-6-2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See *Tr. of Oral Arg.* 10-11. The suggestion misses the point entirely. If the law is not invalid, then the police can invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in *Griswold v. Connecticut*, 381 U. S. 479 (1965), was precisely the possibility, and repugnancy, of permitting searches to obtain evidence regarding the use of contraceptives. *Id.*, at 485-486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16-6-2 seems no less intrusive, or repugnant. Cf. *Winston v. Lee*, 470 U. S. 753 (1985); *Mary Beth G. v. City of Chicago*, 723 F. 2d 1263, 1274 (CA7 1983).

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586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Like the statute that is challenged in this case,¹ the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.² Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.³

¹ See Ga. Code Ann. § 16-6-2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

² The Court states that the "issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Ante*, at 190. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, *infra*. Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

³ See, e. g., 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the ancient common law, and punished, according to some authors, with burning; according to others, . . . with burying alive"); 4 W. Blackstone, Commentaries *215

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That condemnation was equally damning for heterosexual and homosexual sodomy.⁴ Moreover, it provided no special exemption for married couples.⁵ The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy.⁶ Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.⁷ The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, *ante*, at 192-194,

(discussing "the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

⁴ See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with a beast"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast. . . . The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

⁵ See J. May, The Law of Crimes § 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. . . . It may be committed by a man with a man, by a man with a beast, or by a woman with a man, or by a man with a woman—his wife, in which case, if she consent, she is an accomplice").

⁶ The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code, Tit. 1, Pt. 4, § 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, e. g., *Comer v. State*, 21 Ga. App. 306, 94 S. E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

⁷ See *Thompson v. Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939).

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and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.³

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.⁴ Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold v. Connecticut*, 381 U. S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey v. Population Services International*, 431 U. S. 678 (1977); *Eisenstadt v. Baird*, 405 U. S. 438 (1972).

³ A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

⁴ See *Loving v. Virginia*, 388 U. S. 1 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, *The Criminal Law*, at 287 (discussing crime of sodomy); *id.*, at 288 (discussing crime of miscegenation).

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In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

"These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individuals' right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald v. Porter Memorial Hospital*, 523 F. 2d 716, 719-720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the

tions about the importance of the State's selective application of its generally applicable law.¹²

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.¹³ I respectfully dissent.

¹² It is, of course, possible to argue that a statute has a purely symbolic role. Cf. *Carey v. Population Services International*, 431 U. S. 678, 715, n. 3 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a prosecution under the statute . . . is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, *supra*, the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

¹³ Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." *Marks v. United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part).

JAPAN WHALING ASSOCIATION ET AL. v. AMERICAN CETACEAN SOCIETY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-954. Argued April 30, 1986—Decided June 30, 1986*

The International Convention for the Regulation of Whaling (ICRW) included a Schedule regulating whale harvesting practices of member nations (including the United States and Japan) and setting harvest limits for various whale species. It also established the International Whaling Commission (IWC) and authorized it to set harvest quotas. However, the IWC has no power to impose sanctions for quota violations, and any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation to comply with the limit. Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967, directing the Secretary of Commerce (Secretary) to certify to the President if nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of an international fishery conservation program. The President, in his discretion, may then direct the imposition of sanctions on the certified nation. Later, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, requiring expedition of the certification process and mandating that, if the Secretary certifies that nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of the ICRW, economic sanctions must be imposed by the Executive Branch against the offending nation. After the IWC established a zero quota for certain sperm whales and ordered a 5-year moratorium on commercial whaling to begin in 1985, Japan filed objections to both limitations and thus was not bound thereby. However, in 1984 Japan and the United States concluded an executive agreement whereby Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988, and the Secretary agreed that the United States would not certify Japan under either the Pelly Amendment or the Packwood Amendment if Japan complied with its pledges. Shortly before consum-

*Together with No. 85-955, *Baldrige, Secretary of Commerce, et al. v. American Cetacean Society et al.*, also on certiorari to the same court.

STEVENS, J., dissenting

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State—to decide.¹⁰ The essential “liberty” that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within “the sacred precincts of marital bedrooms,” *Griswold*, 381 U. S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U. S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia’s citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in “liberty” that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that “all men are created equal” is not always clear, it surely must mean that every free citizen has the same interest in “liberty” that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary

¹⁰ Indeed, the Georgia Attorney General concedes that Georgia’s statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple “would be unconstitutional” because of the “right of marital privacy as identified by the Court in *Griswold*”). Significantly, Georgia passed the current statute three years after the Court’s decision in *Griswold*.

STEVENS, J., dissenting

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associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.” *Ante*, at 196. But the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to press criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia’s prohibition on private, consensual sodomy has not been enforced for decades.¹¹ The record of nonenforcement, in this case and in the last several decades, belies the Attorney General’s representa-

¹¹ *Ante*, at 198, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. 4-5 (argument of Georgia Attorney General) (noting, in response to question about prosecution “where the activity took place in a private residence,” the “last case I can recall was back in the 1930’s or 40’s”).

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able within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-569. *IN RE DISBARMENT OF CHRISTAKIS*. It is ordered that Lee J. Christakis, of Gary, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-570. *IN RE DISBARMENT OF PAYNE*. It is ordered that K. Richard Payne, of Fort Wayne, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-571. *IN RE DISBARMENT OF WILLIAMS*. It is ordered that David F. Williams, of Springfield, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-573. *IN RE DISBARMENT OF SHIELDS*. It is ordered that William J. Shields, of Garfield Heights, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-574. *IN RE DISBARMENT OF BRANNEN*. It is ordered that Joseph Carchner Brannen, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-575. *IN RE DISBARMENT OF SICKMEN*. It is ordered that Russell T. Sickmen, of Hauppauge, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-576. *IN RE DISBARMENT OF WEISS*. It is ordered that Steven J. Weiss, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-577. *IN RE DISBARMENT OF HARRISON*. It is ordered that Charles Julian Harrison, of Towson, Md., be suspended from

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the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 85-140. *BOWERS, ATTORNEY GENERAL OF GEORGIA v. HARDWICK ET AL.*, ante, p. 186. Petition for rehearing denied.

SEPTEMBER 15, 1986

Dismissal Under Rule 53

No. 85-2122. *HOPE ET AL. v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1245 ET AL.* C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 785 F. 2d 826.

SEPTEMBER 16, 1986

Miscellaneous Orders

No. A-205. *RILES v. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

No. A-213. *MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS v. RILES*. Application of the Attorney General of Texas for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the Southern District of Texas, presented to JUSTICE WHITE, and by him referred to the Court, denied.

SEPTEMBER 17, 1986

Miscellaneous Order

No. A-207. *RAULT v. BLACKBURN, WARDEN*. Application for stay of execution of sentence of death, presented to JUSTICE

ensure a proper balance between the interests of majority and minority shareholders.

Michael R. Rickman

BEHIND THE FACADE: UNDERSTANDING THE POTENTIAL EXTENSION OF THE CONSTITUTIONAL RIGHT TO PRIVACY TO HOMOSEXUAL CONDUCT

The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . I'm not God. The currents and eddies of right and wrong, which you find such plainsailing I can't navigate, I'm no voyager.¹

Since the days of ancient Sodom, laws have proscribed homosexual conduct.² American prohibitions on sodomy are as old as American history itself.³ These laws, whether based on religion,⁴ medical understanding,⁵ or "natural law,"⁶ reflect society's disdain for homosexuality.

1. R. Bolt, *A Man for All Seasons*, act I at 147 (1967), quoted in Tennessee Valley Authority v. Hill, 98 S. Ct. 2279, 2303 (1978) by Chief Justice Burger.

2. The word "sodomy" comes from the Biblical city of Sodom, which, according to the Bible, God destroyed because of its citizens' evil practices. Genesis 19: 1-29. Judaic law specifically prohibited homosexual sodomy. The punishment for homosexual sodomy was death. Leviticus 20:13.

3. The Jamestown colony prohibited sodomy. For the Colony in Virginia Britannia: Laws Divine, Moral, and Marital Etc., art. 9, at 12 (London 1612) (comp. by W. Strachey 1969) ("No man shall commit the horrible, and detestable sins of Sodomie upon pain of death. . . .") The old English "buggery" statute of 1533, which made the "detestable and abominable Vice of Buggery" a capital crime, provided the historical roots of the Jamestown prohibition. 25 Hen. 8, ch. 6 (1533). After the Revolution, Virginia passed its own "buggery" statute, which retained the penalty of death. I S. SHEPARD, THE STATUTE AT LARGE OF VIRGINIA 1792 TO 1806 113 (1970). Most states followed Virginia's pattern. MUELLER, SEXUAL CONDUCT AND THE LAW 41 (2d ed. 1980).

4. The early Christian Church, relying in part on Old Testament prohibitions, believed that homosexuality was deviant and should be punished. See Romans 1: 26-27 ("men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men"); 1 Corinthians 6: 9-10 ("neither this immoral, nor idolaters, nor adulterers, nor homosexuals, nor thieves, nor the greedy, nor drunkards, nor revilers, nor robbers will inherit the kingdom of God"); See also supra note 2. But see J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 117 (1980) (the New Testament takes no demonstrable position on homosexuality).

Thomas Aquinas cataloged homosexuality as a sin against God. He reasoned that God created men and women as sexual beings only for procreation. He considered sodomy a noncreative pleasure of the flesh, and therefore in conflict with man's spiritual destiny. 43 T. AQUINAS, *Summa Theologica* 246-249 (T. Gilby ed. 1968).

5. At one time, the American Psychiatric Association labeled homosexuality as a "mental disorder" and classified it as a "sexual deviation." In general, psychiatrists believed homosexuals were ill because they failed to conform to the prevailing cultural norms. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I) 38-39 (1952). Later, the association retained the "mental disorder," but categorized homosexuality under "personality disorders." A personality disorder is a deeply ingrained maladaptive pattern of behavior, but is

Recently, however, various groups have attempted to mobilize public support for changes in sodomy laws.⁷ Although twenty-one states have decriminalized sodomy,⁸ twenty-four have chosen⁹ to retain their

different from psychiatric and neurotic symptoms. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-II) (1968) DSM III.

6. BLACKSTONE'S COMMENTARIES 215 (Lewis's ed. 1897) (referring to sodomy as "the infamous crime against nature, committed with either man or beast . . . the very mention of which is a disgrace to human nature.")

The young American states copied Blackstone's language in their sodomy statutes, using such language as "unnatural" or crimes against nature. See, e.g., Va. Code § 18.2-361 (1982);

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.

7. Homosexuals began to organize in 1961 following a riot outside a bar in New York's Greenwich Village. Police had beaten a man outside a bar frequented by homosexuals. Homosexuals adopted the term "gay," meaning celebration, for their movement. See generally P. Simpson, *From the Closet to the Courts* (1976).

8. The following states have decriminalized consensual sodomy between adult homosexuals: Alaska, 1978 Alaska Sess. Laws ch. 166 (effective Jan. 1, 1980); California, 1975 Cal. Stat., ch. 71, § 7 (effective July 1, 1976); Colorado, 1971 Colo. Sess. Laws, ch. 121, § (approved June 2, 1971); Connecticut, 1969 Conn. Pub. Acts, § 214 (effective Oct. 1, 1971); Delaware, 58 Del. Laws, ch. 497, § 1 (effective Apr. 1, 1973); Hawaii, 1972 Hawaii Sess. Laws, act 9, § 1 (effective Jan. 1, 1983); Illinois, 1961 Ill. Laws, pt. 1983, § 11-2 (effective Jan. 1, 1962); Indiana, 1976 Ind. Acts, P.L. 148, § 24 (effective July 1, 1977); Iowa, Iowa Acts, ch. 1245, § 520 (effective Jan. 1, 1978); Maine, 1975 Me. Acts, ch. 499, § 5 (effective May 1, 1976); Nebraska, 1977 Neb. Laws L.B. 38, § 328 (effective July 1, 1978); New Hampshire, 1978 N.H. Laws, 532: 26 (effective Nov. 1, 1973); New Jersey, 1978 N.J. Laws, ch. 95, § 2C:98-2 (effective Sept. 1, 1979); New Mexico, 1975 N.M. Laws, ch. 109, § 6; North Dakota, 1977 N.D. Sess. Laws, ch. 122, § 1 (effective May 19, 1977); Ohio, 1972 Ohio Laws, 134 v H 511, § 2 (effective Jan. 1, 1974); Oregon, 1971 Or. Laws, ch. 743, § 432 (167-040) (effective Jan. 1, 1972); South Dakota, 1976 S.D. Sess. Laws, ch. 158, § 22-8 (effective Apr. 1, 1977); Vermont, 1977 Vt. Acts, no. 51, § 3 (effective July 1, 1977); Washington, 1975 Wash. Laws, 1st spec. Sess., ch. 260 (effective July 1, 1976); West Virginia, 1976 W. Va. Acts, ch. 43 (effective June 11, 1976); Wyoming, 1977 Wyo. Sess. Laws, ch. 70, § 3 (effective May 27, 1977).

9. The following states prohibit various forms of private consensual sodomy. "Modern definition" statutes exclude the conduct of married couples. Alabama, Ala. Code § 13A-6-64 to -65 (1982) (modern definition); Arizona, Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1978 & Supp. 1983-84) (common law definition); "infamous crime against nature": Arkansas, Ark. Stat. Ann. § 41-1813 (1977) (modern definition; homosexual act only); District of Columbia, D.C. Code Ann. § 2203502 (Michie 1981) (modern definition); Florida, Fla. Stat. Ann. § 800.2 (West 1976) ("unnatural and lascivious acts"); Idaho, Idaho Code § 18-6605 (1979) (common law definition); Kansas, Kan. Stat. Ann. § 21-3505 (West Supp. 1984) (modern definition); Kentucky, Ky. Rev. Stat. § 510.100 (1975) (modern definition); Louisiana, La. Rev. Stat. Ann. § 14-89 (West 1974 & Supp. 1984) (modern definition); Maryland, Md. Ann. Code §§ 27-553, 27-554 (Michie 1982) ("sodomy" and "unnatural and perverted sex practices"); Massachusetts, Mass. Ann. Laws, ch. 272, §§ 34, 35 (West 1970) (common law definition); Michigan, Mich. Comp. Laws §§ 750.158, 750.338, 750.338a, 750.338b (2968) (common law definition); Minnesota, Minn. Stat. Ann. § 609.293-.294 (West Supp. 1984) (modern definition); Mississippi, Miss. Code Ann. § 97-29-59 (1973) (common law definition); Missouri, Mo. Ann. Stat. § 566.090 (Vernon 1979) (modern definition); Montana, Mont. Code Ann.

prohibitions.

Recently, advocates of the decriminalization of sodomy urged the Supreme Court to do what representative legislatures have refused to do—change laws prohibiting homosexual conduct.¹⁰

In *Bowers v. Hardwick*, however, the Court refused, over a strongly worded dissent by Justice Blackmun, to invalidate sodomy laws.¹¹ This Note analyzes the arguments in favor of an extension of the constitutional right to privacy to homosexual conduct and examines the governing role that the Supreme Court assumes when it invalidates laws on the basis of constitutional privacy. Part I examines the nature of our constitutional government. Part II analyzes the creation of the constitutional right to privacy and its articulated limitations. Part III examines three approaches offered by Justice Blackmun to extend privacy protection to homosexual conduct. Finally, after a brief description of recent legislative action, this Note concludes that an extension of constitutional privacy protection to homosexual conduct would be unprincipled and undemocratic judicial action.

I. THE MAJORITY-RULE PRINCIPLE.

The Constitution presupposes a system of representative government based on the principle of majority rule. During the birth of the Constitution, some expressed concern over the effect of majoritarianism on minority interests.¹² They feared that political issues would be decided "not according to the rules of justice and the rights of the minor party, but by

§ 45-5-505 (1984) (deviate sexual conduct); Nevada, Nev. Rev. Stat. § 201.190 (1979) (homosexual acts only); North Carolina, N.C. Gen. Stat. § 24-177 (1981) (common law definition); Oklahoma, Okla. Stat. Ann. tit. 21, § 886 (West 1983) (common law definition); Rhode Island, R.I. Gen. Laws § 11-10-1 (1981) (common law definition); South Carolina, § C. Code Ann. § 16-15-120 (Law Coop. 1977) ("abominable crime of buggery"); Tennessee, Ten. Code Ann. § 39-2-612 (1982) (common law definition); Utah, Utah Code Ann. § 76-5-403, -406 (1978 & Supp. 1983) (modern definition); Wisconsin, Wis. Stat. Ann. § 944.17 (West 1982 & Supp. 1983-1984) (modern definition).

10. Georgia, Ga. Code Ann. § 16-6-2 (1982) (declared unconstitutional by the United States Court of Appeals for the Eleventh Circuit in *Hardwick v. Bowers*, 760 F.2d 1202 (1985)). New York, N.Y. Penal Law §§ 130.00, 130.38 (McKinney 1975) (criminal statute invalidated by the New York Court of Appeals in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.3d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981)); Pennsylvania, 18 Pa. Cons. Stat. §§ 1301, 1324 (1973) (criminal statutes invalidated by the Pennsylvania Supreme Court in *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980)); Texas, Tex. Penal Code Ann. tit. 5, § 21.06 (Vernon 1974) (held unconstitutional by the United States District Court for the Northern District of Texas in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982)).

11. 54 U.S.L.W. 4919 (July 24, 1986).

12. THE FEDERALIST, No. 10, at 77 (J. Madison) (Am. Lib. Ed. 1961). Madison, for example,

the superior force of an interested and overbearing majority."¹³ To protect against this danger, Madison urged adoption of the political structure contained in the proposed United States Constitution, a structure calculated to divide and disperse political power among and between various levels of government.¹⁴ The Bill of Rights supplemented this sophisticated political protection by expressly protecting certain "rights of the minor party" against invasion by the majority.¹⁵

The majority-rule principle has operated as the centerpiece of American political freedom.¹⁶ At its most fundamental level, the majority-rule principle creates a political environment where legal obligations reflect the values of a community.¹⁷ By appealing to citizens' sense of fairness, the principle of majority rule contributes to political stability.¹⁸ Majority rule also promotes consensus building and encourages pluralism by forcing minority factions to bind together to achieve wider public support.¹⁹ "The majority," said Abraham Lincoln, "is the only true sovereign of a free people."²⁰

Despite the political norm of majority rule and its accompanying bene-

feared the power of political factions united by some "common impulse of passion" which would ignore the "rights" of other citizens or the "aggregate interest" of the community. *Id.*

13. *Id.*

14. *Id.*

15. The Constitution did not originally contain the Bill of Rights. *Id.* at 529-50. In responding to arguments that a bill of rights should be included in the Constitution, Alexander Hamilton called such an addition unnecessary. He argued that the establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and the lack of titles of nobility were "greater securities to liberty and republicanism." Hamilton explained that the Constitution's list of specific powers limited the authority of the federal government, and that wise legislative discretion, regulated by public opinion, would adequately restrict the exercise of those powers. *THE FEDERALIST*, No. 84, at 510-515 (A. Hamilton) (Am. Lib. Ed. 1961).

16. The majority-rule principle is an indispensable ingredient in the daily functioning of government. Before a "bill" originating in either house of the United States Congress can become a "law," it must first be approved by a majority vote in both houses of Congress; without such approval, the bill cannot be presented to the President for his consideration. U.S. CONST. art. I, § 7, Cl. 2.

The veto power of the executive and the requirement that a bill be approved by both houses of Congress check the capacity of one house to enact a law by a simple majority vote of that house. U.S. CONST. art. I, § 7, Cl. 2.

17. Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice*, 54 *TEMP. L.Q.* 226, 287-87 (1980). One commentator has suggested that there "exists a 'fundamental right' to have the majority rule principle as the operative norm in society." BUCHANAN, *MORALITY, SEX, AND THE CONSTITUTION* 9 (1983).

18. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

19. *Id.*

20. 3 SANDBURG, *ABRAHAM LINCOLN* 132 (1942).

fits, the Constitution defines certain spheres in which our domestic society has agreed to be ruled undemocratically.²¹ For example, short of a constitutional amendment, Americans cannot, however overwhelming the majority, establish a state religion. The Constitution's first amendment, as interpreted by an unelected Supreme Court, prohibits such action. "We the People" have articulated a value judgment in the Constitution—that church and state should be separate institutions.²²

The Bill of Rights originally operated only to limit the power of the federal government. After the Civil War, however, Congress enacted the fourteenth amendment, in part, to increase constitutional authority of states.²³ The fourteenth amendment contains a "due process" clause that²⁴ courts originally interpreted in general terms to mean that government cannot harm citizens unless it follows certain procedures.²⁵

In *Lochner v. New York*, however, the Supreme Court discovered a substantive component in the clause.²⁶ The court found, implicit in the word "liberty," certain unenumerated "fundamental" rights.²⁷ For thirty years, the Court employed this methodology, known as substantive due process, to strike down economic and social legislation that violated "fundamental" rights.²⁸ Eventually, the Court expressly repudiated substantive due process and, in fact, continues to do so.²⁹ "Lochnerizing" allowed the courts to protect what it perceived as "fundamental" rights, without textual or historical support from the Constitution.

A Supreme Court that makes rather than implements, fundamental

21. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

22. Admittedly, the Supreme Court faces far more difficult questions than this elementary hypothetical. Nonetheless, that conclusion does not invalidate the basic premise that the Constitution contains identifiable value choices which preclude legislative action.

23. See generally Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *HARV. L. REV.* 366 (1911).

24. U.S. CONST. amend. XIV § 1, cl. 3.

25. J. ELY, *DEMOCRACY AND DISTRUST* 19 (1980).

26. 198 U.S. 45 (1905).

27. *Id.* at 48.

28. During the "Lochner era" the Court invalidated economic legislation which outlawed "yellow dog" contracts, *Coppage v. Kansas*, 236 U.S. 1 (1915); set minimum wages for women, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); and which prohibited the use of second-hand, unsterilized fabrics in the manufacture of bedding material, *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926).

29. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963) ("the doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long been discarded").

value choices cannot be squared with Madisonian government.³⁰ Such action is neither inherently democratic nor constitutionally approved democratic decisionmaking. The Constitution—its history, structure, and language—is the beginning and the end of judicial responsibility.³¹ In fact, in every opinion involving a constitutional question, the Supreme Court asserts that the Constitution compels the result.³² The framers specifically rejected the idea that the Court should be a "Council of Revision" with the authority to alter legislative policy.³³ As a result, legislative judgments should stand, unless those judgments contravene a principle "fairly discoverable" in the Constitution.³⁴

II. THE CONSTRUCTION OF THE CONSTITUTIONAL PRIVACY FACADE

The Constitution does not contain an express right to privacy. It does however, proscribe certain types of potentially intrusive government action.³⁵ The first proposal for creating a separate "right to privacy" emerged in 1890.³⁶ Samuel Warren and Louis Brandeis, fearing a dra-

30. Bork, *supra* note 21, at 6. Unless judicial decisions are based on principles "generally acceptable values on the Constitution," unfettered decisionmaking, "which enables courts to impose unacceptable values on the people," may result. Leede, *A Critique of Illegitimate Noninterpretivism*, 8 U. DAYTON L. REV. 533, 540 (1983).

31. *Id.* at 8. ("The judge must stick close to the [Constitution's] text and the history, and their implications, and not construct new rights.") See also Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) (the judicial responsibility is to determine the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text).

32. Bork, *supra* note 21, at 3-4.

33. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 435-38 (1865). During the constitutional convention, some delegates argued that the judicial branch should be a "Council of Revision," a third legislative chamber with revisionary power over all legislation it deemed "improper." In effect, the Council of Revision would have given judges not only control over constitutional questions, but also control over legislative policy. The Convention rejected this concept of judicial authority. *Id.*

34. See J. ELY, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 n.3 (reference to privacy in the Bill of Rights pertains to ways in which the government can go about collecting information). Under the third amendment, the federal government cannot forcibly quarter soldiers in civilian homes in peacetime. U.S. Const. amend. III. The fourth amendment prohibits the federal government from conducting "unreasonable searches and seizures" against citizens' "persons, houses, papers and effects." U.S. Const. amend. IV. The fifth amendment prohibits compulsory confessions in criminal trials. U.S. Const. amend. V. Far from granting a general right to privacy, however, these amendments govern activity in limited certain spheres. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 3 (1965).

36. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

matic increase in unauthorized publicity, urged courts to recognize a separate common law remedy for invasions of personal "privacy."³⁷ Viewing the development of "instantaneous photographs" and the newspaper enterprise as especially threatening to citizens' solitude, Warren and Brandeis urged courts to recognize a right "to be let alone."³⁸ Most courts, finding "privacy" adequately protected by other causes of action, balked at recognizing a separate right.

Seventy-five years later the United States Supreme Court discovered a separate, constitutional right to privacy.³⁹ The court, expressing grave fears about physical and figurative intrusions into marital solitude, held that states could not interfere with married couples' "private" use of contraceptives.⁴⁰ In 1972, the Court moved away from its concern for marriage and marital solitude, and found the right to privacy protects individual decisions to purchase contraceptives.⁴¹ In 1973, the Court ruled that constitutional privacy also includes the "right to decide" to have an abortion.⁴² Constitutional "privacy" therefore prevents states from prohibiting abortions, surgical procedures, performed in state-licensed hospitals and clinics, by state-licensed physicians.⁴³ In short, the Court's concern for "privacy" has moved from the solitude of the marital bedroom to decisions carried out in public hospitals.

Justice Blackmun, dissenting in *Bowers v. Hardwick*, argued that the constitutional right to privacy includes the right to engage in homosexual

37. *Id.* at 195. More specifically, Warren and Brandeis feared an increase in the "unauthorized circulation of portraits of private persons," a press "overstepping in every direction the obvious bounds of propriety and decency," and the publishing of "unseemly gossip" which had resulted in the "lowering of social standards and morality." *Id.*

38. *Id.* at 193. This phrase originated in COOLEY, TORTS 29 (2d ed. 1888). According to Cooley: "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley characterized the corresponding duty as, "not to inflict an injury and not, within such proximity as might render it successful, to attempt the infliction of an injury." *Id.*

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

40. *Id.*

41. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972).

42. Roe v. Wade, 410 U.S. 113, 154 (1973).

43. After *Roe*, the Supreme Court invalidated a number of state enactments on the basis of violations of "privacy." See, e.g., Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 75 (1976) (striking down a parental consent requirement for abortions performed on minors). The Court also held that constitutional privacy not only prevents the states from interfering with the abortion decision, but also prohibits the spouse from "interfering" as well. 428 U.S. at 69 (states may not constitutionally require spousal consent for an abortion). In addition, the *Danforth* Court struck down a provision which prohibited a particular abortion procedure, despite extensive lower court and legislative findings that the procedure was dangerous. 428 U.S. at 95-99 (White, J., dissenting in part and concurring in part).

sodomy.⁴⁴ The Constitution, according to Justice Blackmun, prohibits states from interfering with "intimate behavior" that does not take place in public.⁴⁵

Justice Blackmun offered three general bases for his conclusion: first, the constitutionalization of John Stuart Mill's principle of liberty;⁴⁶ second, a judicial ban on legislating "private morality,"⁴⁷ and, finally, implicit constitutional values protecting intimate relationships.⁴⁸ Adoption of these principles, however, would invade the province of legislative decisionmaking and allow the Court to impose its values on a reluctant public.

III. JUSTICE BLACKMUN'S BASES FOR EXPANDING THE RIGHT TO PRIVACY

A. *The Constitutionalization of John Stuart Mill's Principle of Liberty*

The dissenters in *Bowers* would have the Court constitutionalize the contemporary version of John Stuart Mill's libertarian principle of liberty. Mill proposed that governments could only regulate individual behavior that "harms others."⁴⁹ Justice Blackmun wrote that nothing justified the conclusion that homosexuality is "physically dangerous, either to the persons engaged in it or to others."⁵⁰ In short, the dissenters would have held that states cannot, consistent with the Constitution, regulate behavior unless it is harmful.

This constitutionalization of Mill's principle would transfer to the judiciary the broad responsibility of determining whether individual behavior constitutes sufficient harm to warrant legal prohibition. When the *Bowers* dissenters concluded that "private" homosexuality is not harmful, they ignored two critical questions, namely, what is a "sufficient harm" and who should decide what is harmful. The dissenters, by concluding that homosexual conduct is not harmful, either meant that ho-

44. 54 U.S.L.W. at 4924-25.

45. *Id.* at 4926-27. ("[T]he mere fact that intimate behavior may be punished when it takes place in public cannot dictate [state regulation of] intimate behavior that occurs in intimate places.")

46. *Id.* at 4925-26.

47. *Id.* at 4926.

48. *Id.* at 4924-25.

49. J.S. MILL, ON LIBERTY 13 (Lib. Arts Ed. 1956). To his basic proposition, Mill added the corollary that government should not enact purely "paternalistic" laws. Mills sought to articulate one basic principle that could "govern absolutely" the extent to which society could control individuals. *Id.*

50. 54 U.S.L.W. at 4925-26.

mosexuality is completely without social effects, or that the effects are not "harmful" enough to justify legal sanction. The former conclusion is absurd, the latter a determination only for an elected legislature.

Homosexuality clearly "affects" society. "Homosexuality," according to one commentator, is a "continuous aspect of personality or personhood that usually requires expression across the public/private spectrum."⁵¹ As one author observed, the gay experience "provides an opportunity to question traditional lifestyles and values and create an individual lifestyle based on personal knowledge and clarified social values."⁵² Legal recognition of an alternative "lifestyle," by definition, affects the character of society.

The question of what constitutes sufficient justification for legal prohibition is a question for the legislature. To begin with, the constitutionalization of Mill's principle confuses political philosophy with constitutional principles. Legislators may vote against a mandatory motorcycle helmet law based on a personal belief that the legislation is an unjust interference with personal autonomy. The Constitution, however, does not compel the same result.⁵³ The Constitution⁵⁴ allows states to enact even paternalistic laws to protect the "health, safety, morals, and general welfare" of their citizens.⁵⁵ Constitutionalization of Mill's principle would call into question the validity of numerous statutes commonly thought to be within states' police power, including compulsory

51. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1890 (1985).

52. NUNGUSSER, *HOMOSEXUAL ACTS, ACTORS, AND IDENTITIES* viii.

53. See, e.g., *Bisenius v. Karns*, 42 Wis. 2d 42, 165 N.W.2d 377, cert. denied, 395 U.S. 709 (1969). See also Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355 (1969). Comment, *Society's Right to Protect an Individual from Himself*, 2 CONN. L. REV. 150 (1969). See generally Comment, *States' Power to Require an Individual to Protect Himself*, 26 WASH. & LEE L. REV. 112 (1969).

54. The Constitution provides: "powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The Supreme Court has acknowledged the broad powers left to the states. In *GIBBONS v. OGDEN*, 9 Wheat 1, 6 L.Ed. 23 (1824) Chief Justice John Marshall explained that residual state powers include "an immense mass of legislation which embraces everything within the territory of a State." *Id.* at 72.

55. *Berman v. Parker*, 348 U.S. 26, 32 (1954). The Court identified public safety, public health, morality, peace and quiet, and law and order as some of the more conspicuous examples of states' police power. The Court also explained that the legislature, not the judiciary is the main guardian of the public's needs. *Id.*

seat belt laws, compulsory physical and mental treatment, and prohibitions on the use of allegedly harmful substances.

More importantly, legislatures should determine whether certain behavior harms society because the question of what constitutes "harm" often involves moral judgments about empirical evidence. A conclusion that homosexual conduct justifies prohibition of criminal penalties involves especially difficult value judgments about the empirical evidence on the social effects of homosexuality. First, the exact cause and character of homosexuality is unknown. Psychiatrists do not agree whether homosexuality, properly understood, is a lifestyle, a preference, an illness, a sociopolitical movement or a biological predisposition.⁵⁶ Moreover, any medical judgment declaring the exact pathological status of homosexuality is most likely already politicized.⁵⁷

Second, social theorists have long studied the repression of certain sexual behaviors and disagreed over its significance and effects. Freud, for example, theorized that communal life depends on sexual repression.⁵⁸ Western societies, according to Freud, sought to divert energy from sexual activity to social uses such as work.⁵⁹ Restricting sexual gratification to heterosexual, genital, monogamous sex, although a "serious injustice" to those desiring alternate sexual gratification, also stabilized society by creating de-sexualized social ties.⁶⁰ These bonds are necessary, according to Freud, to dampen man's inherent aggressiveness towards other members of society.⁶¹

Other social theorists have concluded that capitalism is especially dependent on the repression of sexual excesses, such as homosexuality.⁶² Max Weber located the creation of capitalism in the coming of Protes-

56. See generally MEYER, *EGO-DYSTONIC HOMOSEXUALITY, IN COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 1056 (H. Kaplan & B. Saddock, 4th ed. 1985) (a firm pathological understanding of homosexuality is marked by a fundamental lack of consensus).

57. R. BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981) ("A furious egalitarianism [compels] psychiatric experts to negotiate the pathological status of homosexuality with homosexuals themselves.")

58. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 51 (J. Strachey trans. 1961). Freud observed, for example, that the continuation of family life depended on a prohibition of incest. Freud called this prohibition "the most dramatic mutilation of man's erotic life." *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 56.

62. Emile Durkheim contended that society could not be maintained unless some of humankind's strongest inclinations—"the obscure, mysterious, forbidding character of the sexual act"—were controlled. LUKE, EMILE DURKHEIM, *HIS LIFE AND WORK, A HISTORICAL AND CRITICAL SURVEY* 533 (1972).

tant religion and its accompanying prohibitions on certain types of sexual expression.⁶³ Protestantism infused work with religious significance, and strove to deflect persons' energy from erotic tendencies.⁶⁴ This sexual repression repudiated all nonprocreative "idolatry of the flesh."⁶⁵ Daniel Bell has recently described the clash between a productive economy and a polity dependent upon work on the one hand, and a consumptive economic culture stressing hedonism on the other.⁶⁶ Joseph Schumpeter has predicted difficulty in sustaining capitalism in a culture of rootless and childless apartment dwellers.⁶⁷

Finally, the recent appearance of the disease AIDS (Acquired Immune Deficiency Syndrome), which vividly shows that homosexuality is not without social or individual costs, complicates any analysis of the effects of homosexuality.⁶⁸ AIDS is a deadly disease with no known cure.⁶⁹ The spread of the disease is epidemic, as the number of reported cases doubles every six months.⁷⁰ Anyone may contract the disease,⁷¹ but the overwhelming majority of cases involve men who have engaged in homosexual conduct.⁷² Given the high incidence of the disease among homosexuals, some commentators have proposed stricter prohibitions on sodomy as a means to control the disease.⁷³

63. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 166-67 (T. Parsons trans. 1930).

64. *Id.*

65. *Id.* at 169.

66. D. BELL, *THE CULTURAL CONTRADICTION OF CAPITALISM* 71-72 (1976).

67. J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* chs. XI-XIV (1950).

68. See generally Note, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 315 (1984). Note, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, GOLD. GATE U. L. REV. 301 (1985).

69. Landesman and Vieira, *Acquired Immune Deficiency Syndrome (AIDS): A Review*, 143 ARCH. INTERNAL MED. 2307 (1983). Seventy percent of patients diagnosed before January, 1983 have died. Over 72% of the victims were male homosexuals, especially those with multiple sexual partners. 33 CENTERS FOR DISEASE CONTROL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *Morbidity and Mortality Weekly Report (MMWR) Update: Acquired Immune Deficiency Syndrome (AIDS)—United States*, No. 47 (Nov. 30, 1984).

70. Flaherty, *A Legal Emergency Brewing Over AIDS*, 6 NAT'L L.J. 44 (July 9, 1984).

71. Landesman and Vieira, *supra* note 69, at 2308.

72. Seilk, *Haverkos and Curran, Acquired Immune Deficiency Syndrome (AIDS): Trends in the U.S.*, 1978-1982, 76 AM. J. MED. 394 (1984). Men who have had homosexual contact constitute 70% of reported cases. *Id.* at 499. The high level of promiscuity among homosexuals compounds the problem. Jaffe, Choi, and Thomas et al., *National Case Control Study of Kaposi's Sarcoma and Pneumocystis Carinii in Homosexual Males, Part I and II*, 99 ANNALS INTERNAL MED. 145 (1983) (the control group averaged 25 partners per year while bathhouse customers averaged 65 sexual partners per year).

73. See, e.g., Robinson, *quoted in Bar Ass'n for Human Rights of Greater New York*, LES-

Representative legislatures, not unelected judges, should evaluate the evidence on the effects of homosexual conduct and decide whether prohibitions are justified.⁷⁴ Judicial imposition of Mill's principle would improperly redistribute the constitutional authority to determine what constitutes prohibitable conduct from the legislatures to an unelected judiciary.

B. *A Judicial Ban on Legislating Morality*

Another principle offered by the dissenters in *Bowers* to expand the Court's privacy protection characterizes the right to privacy as a judicial ban on states' legislating private morality. Justice Blackmun criticized the majority for failing to see a constitutional difference between "public sensibilities" and "private morality."⁷⁵

The general assertion that the Supreme Court has, or can, prohibit states from legislating morality represents a misunderstanding of the nature of law, morality, and the relationship between the two. Law frequently reflects social norms, or "morals." Most law is moral legislation insofar as it conditions actions and thoughts in conformity with those social norms.⁷⁶ States enact laws and implement policies that proscribe,

mandate, regulate, and subsidize individual behavior that will, over time, nurture, bolster, or alter habits, dispositions, and values on a public scale.⁷⁷

The Constitution, the dissenters in *Bowers* nonetheless argued, prohibits states from regulating "private," as opposed to public, morality. Such a distinction, however, does not exist. Morals regulate conduct, commanding individuals to engage in or refrain from certain behavior. This behavior, even if based on "personal" desires, is inherently "public."⁷⁸ The moral virtue of courage, for example although based in the personal quality of fearlessness, manifests itself in "public" behavior conditioned on this quality. Similarly, while the source of homosexuality is a "personal" desire to engage in sex with a person of the same gender, homosexuality manifests itself in the "public" behavior of expressing a desire for and engaging in sex with other persons. All private morals, therefore, are also public morals.⁷⁹ "Morals" exist only within the awareness of other members of society; they mean nothing to a person in isolation.

Dividing morality into two categories, the morality of aspiration and the morality of duty, provides a more useful model for understanding the relationship between law and morality.⁸⁰ The morality of aspiration is "the morality of the Good Life, of Excellence, or the fullest realization of human powers."⁸¹ When a man fails to achieve all that to which he "aspires" he is merely guilty of a shortcoming, but not of wrongdoing.

BIAN/GAY LAW NOTES 1 (Jan. 1986). Professor Robinson suggests that: "the only rational means of responding to this extraordinary tragedy [of AIDS] is to change our behavior. The behavior believed to have infected about three fourths of the victims is sodomy. . . ." He argues that states should be allowed to enact sodomy statutes to restrict "potentially lethal behavior" and to close bathhouses and bars where "promiscuous, extraordinarily risky sexual activity takes place." *Id.* See also Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645, 650 n.41 (1983). "As the incidence of AIDS increases in the homosexual community and as bisexual members of that community carry the disease to the population at large, the enforcement of sodomy statutes may become a primary alternative in the containment of this disease." *Id.*

74. The debate over the American Law Institute's proposed Model Penal Code illustrates the appropriate forum for discussing whether to prohibit homosexual conduct. The ALI opposed the criminalization of homosexual conduct because it did not involve force, adult corruption of minors, or offenses committed in public. The drafters, acknowledging Mill's principle, concluded that communities were not harmed by atypical sex practices that occurred in seclusion between consenting adults. This proposal set off a furious debate. Some argued that the "suppression of vice" is necessary because violation of society's moral structure undermines the "very basis" of that society. On the other hand, proponents of decriminalization adhering to Mill's principle, argued that regulation was unjustified because such conduct, which they perceived as "private," did not harm society. In the end, state legislatures decided to accept or reject the ALI report. MODEL PENAL CODE § 207.5 commentary at 277 (Tent. Draft No. 4, 1955).

75. 54 U.S.L.W. at 4926.

76. G. WILL, STATECRAFT AS SOULCRAFT 19-20 (1985). See also R. POUND, THE PHILOSOPHY OF LAW 71 (1922). Law is "a system of ordering human conduct and adjusting human relations beyond merely individual feelings or desires." *Id.*

77. G. WILL, *supra* note 76, at 20.

78. KELSEN, PURE THEORY OF LAW 59-60 (1978). The social character of morals is sometimes called into question by pointing to those moral norms that prescribe a behavior not toward other individuals but toward oneself—such as the norms that prohibit suicide or prescribe courage or chastity. The behavior of the individual, which these norms prescribe, refers directly—it is true—only to this individual; but indirectly to other members of the community. For this behavior becomes the object of a moral norm in the consciousness of the community, only because of its consequences on the community. Even the so-called obligations toward oneself are social obligations. They would be meaningless for an individual living in isolation.

79. *Id.* The fallacy of the private/public distinction is also apparent in the context of abortion

rights:

The law can treat abortions as private transactions between women and their doctors. The law cannot, however, make the consequences—1.7 million abortions a year; a new casualness about the conceiving and disposing of life; transformed attitudes about sex, relations between sexes, and the claims of family and children—the law cannot make those "private" consequences.

G. WILL, *supra* note 76, at 87. Decisions to abort fetuses thus become part of the social consciousness of the community and of its social norms.

80. See generally FULLER, THE MORALITY OF LAW 5 (1964).

81. *Id.* at 6.

The morality of duty, on the other hand, lays down the basic rules without which an ordered society is impossible. The morality of duty, therefore, condemns citizens for failing to respect the basic requirements of social living.⁸²

Society determines when to turn moral obligations into legal obligations. The law cannot force all citizens to lead "perfect" lives,⁸³ but legislatures routinely use legal sanctions to "heighten" the moral aspirations of individuals.⁸⁴ When legislatures take such measures diverse political interests can battle over the point at which legal pressure should end and the challenge of personal excellence begins.⁸⁵

In some cases, the Constitution prohibits legislatures from imposing majoritarian morality on citizens. For example, suppose a state decides to expand its road system to increase economic activity in a poverty-stricken region of the state. The state cannot force citizens to a poverty-land, without compensation, for an interstate highway. Such forced benevolence would violate the "taking clause" of the fifth amendment.⁸⁶ The judiciary must intervene and enforce a constitutionally predetermined value judgment.⁸⁷

A state's decision to prohibit sodomy, however, does not violate any

constitutional limitation on majoritarian morality. Sodomy laws, at the very least, manifest society's displeasure with homosexual conduct and reinforce social values.⁸⁸ The law provides citizens with the moral gratification of living in a state which prohibits behavior they feel is morally wrong. The Constitution is silent on the question of the social propriety of homosexuality, and therefore the Court has no mandate to intervene. No principle identifiable in the text or history of the Constitution makes homosexuals' sexual gratification more important than other citizens' moral gratification.⁸⁹

Constitutional protection of conduct that society deems morally deficient undermines the capacity of the majority to achieve the levels of moral excellence to which it aspires.⁹⁰ The moral choices of citizens, made through their elected representatives, should make or change laws.⁹¹ Where the Constitution is silent, unelected judges have no mandate to impose their moral preferences upon a people who have made a different moral assessment.⁹²

satisfied the "public use" requirement for governmental takings, even though the land ended up in private hands.).

88. RADZINOWICZ, SIR JAMES FITZJAMES STEPHEN AND HIS CONTRIBUTION TO THE DEVELOPMENT OF CRIMINAL LAW 229-30 (1957). "The sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax. It converts into a judgment what otherwise might be a transient sentiment." *Id.* See also Buchanan, *supra* note 87, at 559 ("It is hard to condemn what the law permits").

89. Bork, *supra* note 21, at 10. Bork explains that absent a moral or ethical principle embodied in the Constitution, community judgments must stand. *Id.*

90. Buchanan, *supra* note 85, at 559.

91. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (A judge "is not a knight errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles.") See also Dronenberg v. Zeck, 741 F.2d at 1397. (Bork, J.). "If the revolution in sexual mores . . . is in fact ever to arrive, . . . it must arrive through the moral choices of the people and their elected representatives, not through the ukase of [a] court." *Id.* The danger of equating the courts' perceived moral superiority with its legal power is that the "morally superior judge" will be one who imposes a set of "authoritarian ethics" on an unconsenting public. Leede, *supra* note 30, at 549.

92. Plato proposed a political system ruled by "philosopher kings." These rules, according to Plato's plan, would make wiser decisions than those made by a majority in a representative form of government. Plato contended that it is possible to devise a political system that would generate a continuing procession of philosopher kings as rulers. THE REPUBLIC OF PLATO 205-11 (F. Cornford ed. 1961).

Justice Learned Hand once observed: "For myself it would be most irksome to be ruled by a bey of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 73 (1958). See also Bork, *Judge Bork Replies*, 1984 A.B.A. J. 132 (explaining his 1971 article, Bork, *supra* note 21).

82. *Id.*

83. *Id.* at 9. Fuller wrote, "There is no way to compel a man to live up to the excellence of which he is capable." As an example, Fuller states that society cannot compel citizens to live lives of reason. *Id.*

84. In the 1960s for example, Congress enacted civil rights legislation, primarily to improve the condition of black Americans. Congress also sought, however, to change the "immoral" racial attitudes of many white Americans. Congress accomplished its goals by forcing races to eat, live, and study together. Desegregation and the civil rights laws explicitly and successfully changed individuals' moral beliefs by compelling them to change their behavior. Congress improved society by integrating the races, and also heightened the moral aspirations of citizens by effectuating a change in moral attitudes. See *Selections from Hearings before Senate Commerce Committees in July and August of 1963*, in GUNTHER, CONSTITUTIONAL LAW 159-162 (11th ed. 1985).

85. FULLER, *supra* note 80, at 10; G. WILL, *supra* note 76, at 87. See also Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 559 (1985).

Political philosophers have long disagreed over the appropriate role of government in encouraging citizens to lead "Good" lives. Edmund Burke, for example, argued that "the principles of true politics are those of morality enlarged." I BURKE, CORRESPONDENCE 332 (William ed. 1944). Bertrand Russell, however, condemned a high level of government interference in moral issues. B. RUSSEL, MARRIAGE AND MORALS 291 (1929).

86. "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

87. See *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). Ironically, at the same time the Supreme Court is restricting the authority of states to make certain social judgments, the Court is expanding the authority of the states concerning certain economic matters. See, e.g., *Hawaii Housing Authority v. Midkiff*, 467 U.S. 227 (1984) (The public purpose of breaking up land oligarchies

C. *Extra-Constitutional "Traditions" as the Basis for Overturning Legislative Judgments Jurisprudence*

The *Bowers* dissenters would also have applied an elastic form of "tradition-based" jurisprudence. Justice Blackmun, relying heavily on an article written by Professor Karst, attempted to identify an individual freedom to choose the "form and nature" of "intensely personal bonds."⁹³ Justice Blackmun rooted this freedom in what he perceived as the nation's values.⁹⁴

In general, tradition-based jurisprudence, unattached to constitutional guidelines, is inconsistent with Madisonian government. Tradition-based jurisprudence allows a judge to arrive at almost any conclusion that he is predisposed to make.⁹⁵ Because no finite set of indicia exists to define what are "traditions," judges decide the content of controlling traditions.⁹⁶ Moreover, if a judge can arbitrarily choose which indicia of tradition to use, or if a judge simply cannot identify controlling "traditions,"⁹⁷ his own values, and not the Constitution, guide his decisionmaking.

Even assuming that judges can identify traditions, such jurisprudence is inherently undemocratic. It is hard to square the theory of our government with the notion that yesterday's majority (assuming it was a majority) should control today's.⁹⁸

Professor Karst, advocates extending privacy protection to certain "intimate associations."⁹⁹ He defines an intimate association as "a close and

93. 54 U.S.L.W. at 4924.

94. 54 U.S.L.W. at 4927.

95. See generally Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39-43 (1978) [hereinafter cited as Ely, *Discovering Fundamental Values*].

96. See Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306, 1320 (1975) ("Assuming that society does have a fundamental commitment to 'those canons of decency and fairness which express the notions of justice of English-speaking peoples; what specific conclusions follow. Certainly those same standards could and have permitted the exclusion of Negroes from juries.'") See also *Betts v. Brady*, 316 U.S. 455 (1942) (the majority and dissenting opinions reached opposite conclusions on whether American traditions required the appointment of counsel for those who could not afford it).

97. Ely, *Discovering Fundamental Values*, supra note 94, at 39 (1978) (noting the "tremendous uncertainties in ascertaining anything very concrete" about past intellectual or moral climates').

98. *Id.* at 42.

99. Karst, *The Freedom of Association*, 89 YALE L.J. 624 (1983). Professor Tribe reaches the same result by defining tradition in such meaningless terms that it will apply to almost anything. Tribe admits that the history of homosexuality is one of "disapproval and disgrace," but circumvents the obstacle by proposing to raise the definition of tradition to a higher "level of generality." This

familiar personal relationship that is in some significant way comparable to a marriage or family relationship."¹⁰⁰ To determine whether an "intimate association" is entitled to constitutional protection, Karst relies on four values: society,¹⁰¹ caring and commitment,¹⁰² self-identification,¹⁰³ and intimacy.¹⁰⁴ These values come from a "sense of collectivity," the "shared sense that 'we exist beyond 'you' and 'me.'"¹⁰⁵ Karst finds these values present in a homosexual relationship and concludes that the Constitution protects the act of sodomy from criminal penalties.¹⁰⁶

Simply stated, "the shared sense that 'we exist beyond 'you' and 'me'" is a principle based on a value preference rather than on a principle identifiable in the history, language, or structure of the Constitution. Notwithstanding Karst's elaborate collection of historical references to certain values, the simple fact is that twenty-four state legislatures continue to make the value judgment that sodomy is a crime.¹⁰⁷ Professor Karst's conglomeration of vague values does not justify judicial nullification of those legislative judgments.

IV. THE RECENT POLITICAL RESPONSE TO SODOMY STATUTES

Illinois, in 1962, decriminalized private sexual conduct between adult homosexuals.¹⁰⁸ Since 1979, twenty-five states have decriminalized homosexual conduct.¹⁰⁹ Whether due to improved medical understanding, the sexual revolution, or political pressure from gay rights activists, legislatures have responded to political pressure. In 1980 and 1984, for example, the Democratic Party included a gay rights plank in its national

permits, according to Tribe, "unconventional variants" to claim the same constitutional protection as "mainstream versions" of conduct. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-13, at 944-946 (1978). Through semantic gymnastics he arrives at the bizarre conclusion that what is "traditional" includes what is "unconventional."

100. *Id.* at 630. Karst defines society as the opportunity to enjoy the company of certain people, an "expectation of access" to another person's physical presence. *Id.*

101. *Id.* at 632. "Caring and commitment," according to Karst, is the chief value. In essence, "caring and commitment" is living and being loved. *Id.*

102. *Id.* at 634. Self-identification is the formation and shaping of an individual's identity. As societies, Karst asserts, profoundly affect our personalities and senses of self. *Id.*

103. *Id.* Intimacy is the context of caring which makes the sharing of personal information significant. *Id.*

104. *Id.* at 630.

105. *Id.* at 682.

106. See supra note 9.

107. See supra note 8.

108. *Id.*

109. See supra note 9 accompanying text.

platform. In fact, homosexuals enjoy political dominance in certain regions of the country. At the same time, twenty-four states and the District of Columbia have chosen to retain laws which prohibit some form of sexual contact between persons of the same sex. These states, for whatever reasons, continue to prefer a society in which sodomy is prohibited. The mere reluctance of states to change, however, is not a constitutional mandate for judicial intervention.

V. CONCLUSION

Justice Blackmun's dissent in *Hardwick*, if followed, would reaffirm *Lochner* in American jurisprudence behind the facade of protecting privacy. Statutes that currently prohibit homosexual conduct reflect societal value judgments concerning the propriety of a particular form of behavior. Absent a conflicting constitutional value the majority-rule principle allows such determinations to govern. The Supreme Court's only role is to invalidate legislative acts which contravene principles embodied in that Constitution. Nullifying sodomy statutes, on the basis of a "fundamental" right to privacy, would unprincipledly and undemocratically replace centuries-old values with those of an unelected Court.¹¹⁰

Alan J. Wertjes

110. F. Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 58 (1931). Frankfurter wrote:

The veto power of the Supreme Court over the socioeconomic legislation of the states, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The most destructive, because it stops experiment at its source, preventing an increase of social knowledge by the only scientific method available; namely the tests of trial and error. The least responsible, because it often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual justices, in matters of fact and opinion not peculiarly within the competence of the judges behind the impersonal authority of the Constitution.

Id. (emphasis added).

JUSTICE MARSHALL AND EQUAL PROTECTION REVIEW: A SPECTRUM OF STANDARDS?

For nearly a century from the ratification of the fourteenth amendment until the Warren Court era, the equal protection clause played a minor role in the Supreme Court's jurisprudence.¹ The Court narrowly interpreted the clause to serve the primary purpose of its drafters² and largely restricted its use to cases involving racially discriminatory legislation.³

Today equal protection is a powerful and frequently invoked, yet confused, constitutional doctrine. Depending upon the class of persons or nature of the interests affected by the challenged legislation, the Court has employed one of two purportedly distinct standards of review, rational basis or strict scrutiny. Because two-tiered scrutiny has often proved a blunt instrument the Court has developed a number of analytic techniques to sharpen rational basis scrutiny and to dull strict scrutiny.⁴ In addition, the Court now acknowledges a third standard of review.⁵

1. Substantive due process analysis overshadowed the role of equal protection analysis during this period. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (New York law limiting working hours of bakery employees held to violate 14th Amendment liberty of contract). In addition to employing substantive due process analysis, the Court also affirmatively rejected equal protection challenges during this era. See, e.g., *Buck v. Bell*, 274 U.S. 200, 208 (J. Holmes) (labelling equal protection "the usual last resort of constitutional arguments"); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (upholding state law denying women the right to practice law). However, successful equal protection challenges to legislation were not unknown. Legislation drawn along racial lines was invalidated under the equal protection clause, see *infra* note 3, and even economic legislation fell prey to equal protection challenges. See, e.g., *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897) (regulation requiring railroads but not other defendants to pay attorneys' fees to successful plaintiffs held unconstitutional under equal protection clause).

2. The primary, although not necessarily the only purpose of the equal protection clause was to protect the newly freed slaves from the legislative disabilities imposed by the Black Codes, laws passed by Southern states after the Civil War. See STAMPP, *THE ERA OF RECONSTRUCTION*, 79-81, 133-45 (1965). See also *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 70 (1873).

3. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (West Virginia statute excluding blacks from juries held to violate equal protection).

4. See, e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 226-29 (1979); Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 881 (1980); Wilkerson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947-54 (1975).

5. In addition to strict scrutiny and rationality review, intermediate review seems to be ac-

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Judiciary

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