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NOTES

The Constitutionality of Laws Forbidding Private Homosexual Conduct

The laws of forty-three states and the District of Columbia impose criminal penalties on consenting adults who engage in private homosexual conduct. Most of these laws are sodomy statutes, which also prohibit oral and anal intercourse between heterosexuals and sexual acts with animals. Two states have statutes explicitly limited to homosexual conduct. These statutes also prohibit nonconsensual homosexual activity and homosexual acts involving a minor, but this Note addresses only prohibitions on private consensual adult homosexual conduct.

Although the immediate impact of statutes prohibiting such activity may be slight because complaints are infrequently brought,

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The majority of states that prohibit homosexual conduct do so by forbidding "crimes against nature," "sodomy," or "buggery." Other statutes are more explicit. For example, the District of Columbia statute provides:

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


the existence of such laws has a significant impact upon homosexual people in at least three ways. First, laws prohibiting homosexual conduct may inhibit persons inclined toward that mode of obtaining sexual satisfaction from fulfilling their sexual desires. Second, the laws may encourage blackmail by providing a means whereby homosexual people can be threatened with exposure or prosecution and may discourage employers from hiring homosexual people for fear that they may pose security risks because of their vulnerability to blackmail.4 Finally, laws prohibiting adults from engaging in private consensual homosexual conduct indirectly sanction existing discrimination against homosexual people in employment, housing, and public accommodations.8

In Acanfora v. Board of Education6 a federal district court suggested a number of constitutional bases for a right to engage in private consensual adult homosexual conduct, although it denied relief on other grounds to a homosexual school teacher seeking reinstatement. The court suggested that prohibition of such conduct might be an infringement of the liberty protected by due process requirements,7 a violation of the right of privacy,8 a denial of equal protection,9 or an encroachment on individual associational rights under the first amendment.10 In a number of recent cases it has been contended without success that punishment of homosexual conduct constitutes cruel and unusual punishment in violation of the eighth amendment.11 Reliance on the first12 and eighth18 amendments seems

8. 359 F. Supp. at 852. See also In re Labady, 326 F. Supp. 924, 929 n.4 (S.D.N.Y. 1971); People v. Frazier, 256 Cal. App. 2d 630, 631, 64 Cal. Rptr. 447, 447-48 (1967) (holding that right of privacy does not apply to homosexual relationships among prisoners); People v. Roberts, 256 Cal. App. 2d 488, 495, 64 Cal. Rptr. 70, 74 (1967) (privacy argument summarily dismissed because conduct occurred in public restroom); Hughes v. State, 14 Md. App. 497, 287 A.2d 299, 304-05 (1972) (privacy argument not applicable where minor involved); W. BARNETT, supra note 7, at 82-73; Note, supra note 7, at 92-96.
10. 359 F. Supp. at 850. See also Note, supra note 7, at 98-99.
12. Freedom of association protects only the right "to associate with others for the attainment of lawful purposes." Douglas, The Right of Association, 63 Colum. L. Rev. 1361, 1367 (1963). See also Noto v. United States, 357 U.S. 536, 539-540 (1958); Scales v. United States, 367 U.S. 314, 329-330 (1961). Thus, freedom of association does not determine whether a state can make unlawful the homosexual acts that are the object of individual associations between homosexuals. Similarly, the argument that freedom of expression protects homosexual acts because that conduct involves expression, at least between the partners, seems weak. Stanley v. Georgia, 346 U.S. 557 (1969), holds that a state cannot punish an individual for mere private possession of obscene material, but that case means only that freedom of expression protects the "right to receive information and ideas." 346 U.S. at 564. Freedom of expression does extend to some expressive acts, see, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969) (picketing); Thornhill v. Alabama, 310 U.S. 88, 103-05 (1940) (picketing), but the Court has stated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." O'Brien v. United States, 391 U.S. 367, 376 (1968) (statute prohibiting knowing destruction or mutilation of selective service certificate upheld). See also Cox v. Louisiana, 379 U.S. 556, 555 (1965). The nonspeech aspect of homosexual conduct is probably sufficient to exclude the acts from first amendment protection.

13. The eighth amendment argument relies on Robinson v. California, 370 U.S. 660 (1962), and Powell v. Texas, 392 U.S. 514 (1968). Robinson held that a statute imposing criminal penalties on narcotics addicts violates the eighth amendment because it punishes individuals for a status over which they have no control. Powell suggested that Robinson may be extended to include acts compelled by such a status. Although five justices voted to sustain against an eighth amendment challenge a conviction under a statute penalizing an individual for being found intoxicated in a public place, the four dissenters and Justice White, the swing vote, agreed that if Robinson prohibited punishment of a status such as chronic alcoholism, acts compelled by that status must also be immune from punishment. Justice White, however, thought that the defendant had made no showing that his acts were compelled by chronic alcoholism. The other four justices distinguished Robinson as applying only to statuses, and not to acts. See also United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973), cert. denied, 414 U.S. 980 (1973) (majority relied on status/act distinction; four dissenters would have allowed the defense of compulsion to crime of possession of heroin).

The argument that criminal punishment of homosexual behavior comes within the prohibition of Robinson and Powell suffers from defects more serious than the unclear consensus in Powell. First, the compulsion involved in homosexual acts is less clear than the compulsion involved in narcotics addiction or chronic alcoholism. The present understanding of homosexuality is that an individual's sexual preference is not the result of a voluntary decision. See text accompanying notes 86-98 infra. However, it does not necessarily follow that a homosexual person is compelled to engage in homosexual acts. The sexual drive is a basic one, but some homosexuals remain celibate and certainly not every homosexual act is compelled. Furthermore, the contention that not all homosexual acts are a matter of choice implies the debatable conclusion that homosexuality is a disease. In late 1973 the Board of Trustees of the American Psychiatric Association (APA) decided to remove homosexuality from the list of mental diseases. N.Y. Times, Dec. 16, 1973, at 1, col. 1 (late city ed.). The Board's action was approved by a general vote of the APA membership in April 1974, although only about one half of the membership voted, and of that group two fifths disagreed. N.Y. Times, April 9, 1974, at 12, col. 4 (late city ed.). Second, the eighth amendment argument would not invalidate the statutes forbidding private consensual homosexual acts but would only require that persons charged under such statutes be allowed to defend on the
—and attempt to evaluate them in light of the state interests in forbidding private homosexual conduct.

The due process and privacy arguments are closely related; privacy has been held to be protected by the due process clause.\(^\text{14}\) As far as homosexual rights are concerned, there is little difference between arguing that a new due process right should be recognized and arguing that an established one should be expanded. However, the first argument leads to a more expansive interpretation of the due process clause than the second.

The theory that homosexual conduct per se is a fundamental right protected from governmental infringement by the due process clauses of the fifth and fourteenth amendments rests on the notion that due process guarantees not only certain procedural safeguards\(^\text{15}\) but also a number of substantive rights.\(^\text{16}\) Although the Court has become reluctant to apply the due process clause to state economic regulation,\(^\text{17}\) it remains willing to strike down state laws infringing on personal or civil rights where the competing state interests are not adjudged compelling.\(^\text{18}\)

To be protected under the traditional concept of substantive due process, however, rights must be based upon “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\(^\text{19}\) This “fundamental rights” view of due process would not embrace all of the specific guarantees against federal action included in the Bill of Rights, but only those that are “of the very essence of a scheme of ordered liberty.”\(^\text{20}\)

ground that such acts were compelled. As under the Insanity defense, the successful defendant might be incarcerated in an institution, a result perhaps less appealing than conviction. Moreover, the defense will only be successful where the defendant can show that the homosexual acts were in fact compelled. The burden of proof may render the defense useless. Finally, the argument may prove too much. It would also apply to homosexual conduct that occurs in public, is accompanied by force, or involves a minor. Acceptance of the argument would logically require constitutionalizing this kind of psychic compulsion as an element of the Insanity defense to any criminal charge. Cf. Powell v. Texas, 392 U.S. 514, 536-37 (1968).

16. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to educate one’s child as one chooses); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to study the German language in a private school).
potentially broad interpretation\textsuperscript{21} is the incorporation approach, according to which the due process clause of the fourteenth amendment was intended only to make the entire Bill of Rights applicable to state governments.\textsuperscript{22} A majority of the Court has never accepted the doctrine of total incorporation of the first eight amendments.\textsuperscript{23} The Court has, however, selectively incorporated the fifth amendment’s privilege against self-incrimination\textsuperscript{24} and the sixth amendment’s right of an accused to confront the witnesses against him,\textsuperscript{25} among other rights, and it has used the due process clause to protect rights not expressly included in the Bill of Rights.\textsuperscript{26}

In \textit{Griswold v. Connecticut}\textsuperscript{27} the Supreme Court held the right of marital privacy to be constitutionally protected. Although all of the concurring justices applied the due process clause and found that Connecticut’s ban on the use of contraceptives infringed on the right of privacy, they disagreed as to the constitutional source of the right. Justice Douglas’s opinion for the Court appeared to follow the incorporation doctrine.\textsuperscript{28} He did not, however, insist on finding a right of privacy explicitly stated in the Bill of Rights, arguing instead that a penumbral right of privacy inheres in the first, third, fourth, fifth, and ninth amendments.\textsuperscript{29} Justice Clark apparently endorsed this approach since he joined no other opinion. In separate concurring opinions Justices Harlan and White expressly rejected the incorporation approach in favor of the fundamental rights version of due process.\textsuperscript{30} Justice Goldberg’s concurring opinion, in which Chief Justice Warren and Justice Brennan joined, emphasized “the relevance of [the Ninth] Amendment in the Court’s holding.”\textsuperscript{31} This

\begin{footnotes}
\footnote{21. As applied in \textit{Palko v. Connecticut}, 302 U.S. 319 (1937), the fundamental rights doctrine was more restrictive than the incorporation approach. It provided a basis for deciding that some of the rights guaranteed by the Bill of Rights are not applicable to the states under the fourteenth amendment. But the language of the test is so vague that it could be used to embrace rights outside the Bill of Rights. For one such expansionary use of the test see text accompanying notes 27-33 infra.}


\footnote{23. \textit{Kauper}, \textit{supra} note 19, at 240.}


\footnote{26. \textit{E.g.}, \textit{Schware v. Board of Bar Examiners}, 353 U.S. 232 (1957) (right not to be arbitrarily excluded from bar); \textit{Wieman v. Updegraff}, 344 U.S. 183 (1952) (right of public employee not to be dismissed arbitrarily).}

\footnote{27. 381 U.S. 479 (1965).}

\footnote{28. \textit{Kauper}, \textit{supra} note 19, at 244.}


\footnote{30. 381 U.S. at 502 (White, J., concurring); 381 U.S. at 499 (Harlan, J., concurring).}

\footnote{31. 381 U.S. at 487.}
approach approximates the fundamental rights view in result, because Justice Goldberg reasoned that "... the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."82

Eight years after Griswold seven justices agreed that the right of privacy is founded squarely on the fourteenth amendment's concept of personal liberty.83 In light of the Court's willingness to use the flexible fundamental rights approach to expand due process liberty to include the right of privacy, the way is now open to argue that the right to engage in private consensual homosexual conduct is also "fundamental" and therefore protected by the due process clause.

One criticism of this argument is suggested by Justice Rehnquist's dissent in Roe v. Wade,34 in which the Court held that a woman's right to an abortion was protected under the due process clause. Rehnquist noted that "[t]he fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental...'."35 That the laws of forty-three states and the District of Columbia prohibit homosexual conduct arguably evidences a majority sentiment that the right to engage in such conduct is not fundamental. Nevertheless, Justice Rehnquist's argument was not accepted by the majority in Wade. Moreover, the infrequent enforcement of laws against homosexual conduct36 implies that they do not reflect public sentiment.

Another criticism of the argument that homosexual conduct is per se a fundamental right is directed against the fundamental rights approach itself. It has been argued that the vagueness of the approach leaves a court too free to inject its subjective values into the due process clause.37 The resultant uncertainty may strain the federal-state balance of power by leaving state courts and legislatures with little guidance in evaluating or formulating state laws. Despite this criticism the Court has apparently reaffirmed the fundamental rights

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82. 381 U.S. at 493.
34. 410 U.S. 113 (1973).
36. See materials cited note 3 supra.
approach in *Griswold* and *Wade*. The danger of judicial subjectivity, however, suggests that the Court may be reluctant to create fundamental rights beyond those already recognized.\(^{38}\)

The recognition of a new fundamental right is not necessary, however, if the right to engage in private consensual adult homosexual conduct is an aspect of the right of privacy. Because it has been established that the due process clause protects the right of privacy, further debate between adherents of the incorporation approach and adherents of the fundamental rights test for defining the limits of substantive due process would be irrelevant. Although *Griswold* recognized a right of marital privacy, in none of the four opinions that concurred in the judgment of the Court was there an affirmative indication that the right extended beyond the protection of the marital unit. Indeed, Justice Harlan's dissent in *Poe v. Ullman*,\(^{39}\) which first recognized marital privacy as a fundamental right, explicitly excluded homosexual practices. Justice Goldberg's opinion in *Griswold* also excluded deviant sexual conduct from the right and cited Harlan's language in *Poe* with approval.\(^{40}\) Thus at least four of the *Griswold* justices would definitely not have been willing to expand privacy to include homosexual conduct.

Subsequently, however, in *Eisenstadt v. Baird*\(^{41}\) the Court suggested that the right of privacy included the right of unmarried adults to use contraceptives. Although the Court based its holding on an equal protection theory and did not decide the due process question, it stated: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet ... [i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\(^{42}\) If the right of privacy extends to the sexual conduct of unmarried heterosexuals, it is hard to see why it would not also apply to the private sexual conduct of homosexuals.

In *Roe v. Wade*\(^{43}\) and its companion case *Doe v. Bolton*\(^{44}\) the Court held that the right of privacy "was broad enough to encompass a woman's decision whether or not to terminate her pregnancy."\(^{45}\) The majority in *Wade* explained that "... only personal rights that


\(^{40}\) 381 U.S. at 498-99 (Goldberg, J., concurring).

\(^{41}\) 405 U.S. 438 (1972).

\(^{42}\) 405 U.S. at 453 (emphasis original).

\(^{43}\) 410 U.S. 113 (1973).

\(^{44}\) 410 U.S. 179 (1973).

\(^{45}\) Wade, 410 U.S. at 153.
can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy,” and noted that the right of personal privacy had already had “some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education . . . .” As observed by Justice Douglas, these activities all involve “the basic decisions of one’s life.” The majority also stressed the fundamental importance to a woman of her decision to have an abortion:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

A homosexual’s decision whether to follow his or her sexual preference is also a basic one. It influences his or her choice of friends, social activities, and family relations, and bears on the decisions to marry and to procreate. It may also influence one’s self-image and affect how one is perceived by others. The decision to abide by the laws prohibiting homosexual conduct may result in psychological harm through frustration of the preferred sexual outlet.

Justice Douglas’s concurrence in Bolton seems to equate the right of privacy with a right of personal autonomy. He offers a “catalogue” of rights protected under the due process clause:

First is the autonomous control over the development and expression of one’s intellect, interests, tastes, and personality.

Second is freedom of choice in the basic decisions of one’s life.

By ignoring Justice Rehnquist’s claim that an abortion operation in a hospital “is not ‘private’ in the ordinary sense of the word,” the majority extended the right of privacy beyond absolutely private conduct. But cf. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (right of privacy does not protect showing of obscene material in a place of public accommodation).


48. 410 U.S. at 153.


51. 410 U.S. at 211-12 (emphasis omitted) (concurring opinion in Doe).

52. 410 U.S. at 159.
respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.53

This approach would not lead to absolute protection of personal whims because legitimate state incursions on personal autonomy would still be upheld under the compelling state interest test.54 But it would require that that test be applied to a wider range of personal interests—almost certainly including private homosexual conduct—than would the majority's approach.

The lower federal courts and the state courts have given the privacy argument a mixed reception. Some lower courts have interpreted the right of marital privacy recognized in Griswold as extending to any kind of private sexual activity between consenting spouses.55 Where one participant is a minor,56 where force is involved,57 or where the challenged conduct does not take place in private,58 courts uniformly have refused to extend the protection of the right of privacy. One district court, relying on Eisenstadt, has suggested that the right of privacy protects private acts of sodomy between unmarried, heterosexual consenting adults:

It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy.59

Several cases holding that discrimination on the basis of sexual preference with regard to citizenship60 and employment61 is an uncon-

53. 410 U.S. at 211-13 (emphasis original).
58. Smayda v. United States, 352 F.2d 251 (9th Cir. 1965); People v. Frazier, 256 Cal. App. 2d 630, 64 Cal. Rptr. 447 (1967).
Institutional invasion of privacy might also support the extension of the right to private consensual adult homosexual conduct, although the holding that discrimination against a class of individuals engaging in particular conduct is unconstitutional does not necessarily imply that the right to engage in that conduct is constitutionally protected.62

A finding that certain homosexual conduct is protected by the right to privacy would not, without more, invalidate state laws prohibiting such conduct. The finding would simply subject the laws to "strict scrutiny"—analysis of whether compelling state interests exist that justify the prohibitions. Because the competing state interests are the same under due process and equal protection analysis, discussion of them will be deferred until the equal protection avenues to strict scrutiny have been explored.

The sodomy statutes may be attacked on equal protection grounds because they discriminate against homosexuals. The discrimination is obvious in statutes that explicitly prohibit homosexual intercourse but do not prohibit any heterosexual acts.63 Those that proscribe all oral and anal intercourse64 prohibit some acts that may be engaged in by heterosexuals; but they prohibit all forms of homosexual intercourse. The disparity between the treatments of homosexual and heterosexual persons is reduced somewhat in thirteen states that punish isolated acts of fornication and adultery65 and to a lesser extent in the District of Columbia and sixteen additional states that punish only isolated acts of adultery.66 However, the fornication and

62. See Griffin v. Illinois, 351 U.S. 12 (1956) (although a state is not required to provide appellate review, it may not do so in a way that discriminates against indigent defendants).


64. See statutes cited note 1 supra.


adultery laws do not close all legal outlets for heterosexual love, as they do for homosexual love, and the penalties for these crimes are usually much less severe than those imposed by the sodomy laws.67

Thus every state that prohibits oral and anal intercourse between members of the same sex implicitly classifies individuals on the basis of their sexual preference and discriminates against homosexuals.

These state classifications violate the fourteenth amendment if the discrimination thereby created is so unreasonable and arbitrary as to constitute a denial of equal protection.68 Over the past quarter-century the Supreme Court has been using a two-tiered standard of review of equal protection cases.69 When neither a fundamental right nor a suspect classification is involved, legislation is upheld so long as the classification it creates bears some rational relation to a constitutionally permissible purpose.70


or a suspect classification is involved, a stricter standard of review is applied: Discriminatory legislation is upheld only when a state demonstrates a compelling state interest that cannot be achieved by less drastic means.\(^\text{71}\) The cases decided under the two-tiered standard suggest that the resolution of a given case is determined largely by which branch of the test the Court employs. Little legislation has been struck down under the rational relation test;\(^\text{72}\) little legislation has been upheld under the strict scrutiny test.\(^\text{73}\)

It has already been argued in the due process context that sodomy laws infringe upon fundamental individual rights.\(^\text{74}\) Fundamental rights for due process purposes include at least those rights that are fundamental for equal protection purposes.\(^\text{75}\) The Court, however, recently has been unwilling to expand fundamental rights in equal protection cases.\(^\text{76}\) Even if homosexual conduct is an equal protection fundamental right, thereby subjecting sodomy laws to strict scrutiny under the equal protection clause, the due process argument alone would achieve the same result. Indeed, the charge has been made that in general "[w]hen an equal protection decision rests on [the fundamental right] basis, it may be little more than a substantive due process decision decked out in the trappings of equal protection."\(^\text{77}\)

The "suspect classification" arm of the equal protection test is not similarly dependent on due process and arguably mandates strict scrutiny of sodomy laws even if no fundamental rights are involved. Classifications already held suspect by the Supreme Court include those based on race,\(^\text{78}\) alienage,\(^\text{79}\) and national ancestry.\(^\text{80}\) Four justices though the right to a criminal appeal has not been held fundamental and wealth has not been held to be a suspect classification. See \textit{Rinaldi v. Yeager}, 384 U.S. 305 (1966); \textit{Douglas v. California}, 372 U.S. 353 (1963); \textit{Griffin v. Illinois}, 351 U.S. 12 (1956). Cf. materials cited note 107 infra.


\(^{74}\) \textit{See text accompanying notes 15-62 supra.}

\(^{75}\) \textit{See, e.g., Roe v. Wade}, 410 U.S. 113, 152 (1973) (due process case citing equal protection cases in support of holding that right of privacy is fundamental).

\(^{76}\) \textit{See cases cited note 38 supra.}


\(^{79}\) \textit{Takahashi v. Fish & Game Commn.}, 334 U.S. 410 (1948); \textit{Oyama v. California}, 332 U.S. 633 (1948).

\(^{80}\) \textit{Korematsu v. United States}, 329 U.S. 214 (1944).
have held that sex is a suspect classification. 81 The following factors have been suggested as typical of suspect classifications: The classifications are based on traits over which the individual has no control, 82 the classifications "are frequently the reflection of historic prejudices rather than legislative rationality," 83 the groups discriminated against "are relatively powerless to protect their interests in the political process," 84 and they have been "subjected to . . . a history of purposeful unequal treatment." 85

If homosexuality were physiologically determined, it would be clear that the homosexual person has no control over his or her sexual preference. There are, however, great differences of opinion regarding the causes of homosexuality. 86 Although some experimental studies have adduced evidence that sexual preference is genetically determined, 87 they are currently given little credence. 88 The theory that homosexuality is due to hormonal imbalance has also been rejected. 89 The prevailing view now seems to be that homosexual orientation "comes about as a result of experiences during the individual's lifetime, rather than as a consequence of an inborn physical peculiarity." 90 A psychoanalytic explanation of male homosexuality 91 suggests that it results from a parent-child relationship that includes a seductive, overattached, domineering mother and a detached, hostile


87. The best known of these experiments is F.J. Kallmann's 1952 study of homosexual twins. Thirty-seven homosexual persons who had identical twins were studied, and in every case the twin of the subject was also homosexually inclined. By contrast, of 26 sets of fraternal twins in which one of the members preferred homosexual conduct, only three sets were composed of pairs in which both twins were homosexually inclined, an incidence no higher than that of the general population. D. West, Homosexuality 169 (1968).


89. W. Barnett, supra note 7, 140-43; C. Berg & C. Allen, supra note 88, at 41; B. Oliver, supra note 88, at 126.

90. D. West, supra note 87, at 292. See also B. Oliver, supra note 88, at 126.

91. This discussion is limited to causes of male homosexuality because little study has been devoted to the causes of lesbianism. W. Barnett, supra note 7, at 149.
father.92 Other commentators stress a combination of varied experiential factors in determining an individual's sexual orientation.93 Some gay liberationists assert, perhaps in order to refute the disease model of homosexuality, that sexual orientation is in fact a matter of individual choice.94

Regardless of the initial causes of homosexuality, an individual's sexual orientation once acquired is extremely difficult to alter.95 Although psychotherapists have reported cure rates of as high as fifty per cent, such cures may include instances in which the individual is merely refraining from homosexual conduct while retaining his or her homosexual inclinations.96 Nor do the figures indicate whether those "cured" remained heterosexually oriented.97 Moreover, even if psychoanalysis can alter sexual orientation, the expense and the dearth of available analysts keeps the treatment out of the reach of most homosexuals.98 Homosexuality, therefore, can fairly be characterized as a trait over which the individual has no control.

It can also be argued that discrimination against homosexuals is the reflection of historical prejudice. As argued below,99 legislative classifications based on sexual preference are not the most rational way to achieve most of the legitimate state ends that might justify the prohibitions. Alternative statutory solutions do not exist if the goal is moral condemnation of homosexuality, but such an aim is itself indicative of a traditional bias against homosexuals. The lack of a substantial relationship between other state goals and statutes forbidding homosexuality suggests that the statutes intend only to repress homosexuals, but this argument is weakened by the admission that the statutes do have a minimal relation to some valid state goals.100

Still, the political weakness of homosexuals and their history of legal oppression suggest that a legislative classification based on sexual preference is suspect. Like racial and ethnic minorities, homosexuals constitute a relatively small percentage of the adult population.101 No major political party has espoused homosexual rights.

94. D. ALTZAN, supra note 86, at 18.
95. D. WEST, supra note 87, at 266.
96. W. BARNETT, supra note 7, at 227.
97. Id.
98. Id. at 233.
100. See text following note 123 infra.
101. Kinsey states that 37 per cent of the total male population has had some overt homosexual experience and that 4 per cent of white males are exclusively homosexual
The history of discrimination against homosexual individuals dates at least from the Biblical period. Although not every society has condemned homosexuality, Christianity's abhorrence of homosexual conduct resulted in its prohibition in many Western states. When the Puritans emigrated to America, they brought with them their aversion to homosexuality, thus giving early rise to the strict prohibitions against homosexual conduct that remain substantially in force in forty-three states and the District of Columbia. The Victorian Age's revulsion toward all types of sexuality contributed to the discrimination against homosexual individuals in the legal systems of Great Britain and the United States.

In sum, classifications based on sexual preference share fully several of the indicia of suspect classes and share some of the others to a lesser extent. The argument is worth advancing, but it is not clear that the courts will recognize homosexuals as a suspect class.

The Court, however, has not always explicitly applied the two-tiered standard; it has struck down state legislation that neither infringed on fundamental rights nor discriminated against a suspect class. Moreover, the rigidity of the division between the traditional two tiers of review has led to a search for alternative versions of the equal protection test. A standard with a less rigid gap between strict and minimal scrutiny might offer more protection for homosexual conduct.


102. Leviticus 18:22 states: "Thou shalt not lie with mankind, as with womankind; it is abomination."


105. Id. at 15. See statutes cited notes 1-2 supra.

106. Id. at 15-16.


Rodriguez\textsuperscript{109} Justice Marshall advocates a general balancing test in which the state's interest in regulating conduct is weighed against "the constitutional significance of the interests affected and the invidiousness of the particular classification."\textsuperscript{110} Marshall's test does not eliminate the categories of fundamental rights and suspect classifications, but tries to bridge the gap between strict and minimal scrutiny by suggesting that there are degrees of "fundamentalness" or "suspectness." Thus in Rodriguez Justice Marshall would have required a strong state interest to justify discrimination in educational benefits on the basis of community wealth because "[e]ducation directly affects the ability of a child to exercise his First Amendment interest,"\textsuperscript{111} and because group wealth bears many of the indicia of suspect classifications.\textsuperscript{112} It was argued above that matters of private heterosexual conduct and decisions regarding procreation that appear to be largely included in the fundamental right of privacy are very similar to the decision (if such it be\textsuperscript{118}) to follow homosexual inclinations: They all are basic choices respecting one's total life style. The decision to engage in homosexual conduct may affect one's heterosexual and procreative activity, especially where the decision is to engage solely in homosexual conduct. This relationship to a fundamental right, while not as close as the nexus between education and first amendment rights Justice Marshall found in Rodriguez, is augmented by factors evidencing the suspect nature of a classification based on sexual preference. Thus, under the Marshall approach, the state should have to advance at least a fairly strong state interest to justify the prohibition of private consensual adult homosexual conduct.

The chief criticism of this version of equal protection analysis is that the weighing of interests involving nonconstitutional rights is primarily a legislative and not a judicial function.\textsuperscript{114} Justice Marshall counters this criticism by arguing that the balancing he proposes is implicit in some of the Court's decisions purportedly reached under the traditional minimal scrutiny standard and therefore should be made explicit.\textsuperscript{115} Justice Douglas joined Justice Marshall's dissent in Rodriguez and Justice White has voiced some support for the approach.\textsuperscript{116} Nevertheless, a majority of the Supreme Court reaffirmed

\textsuperscript{109} 411 U.S. 1 (1973).
\textsuperscript{111} 411 U.S. at 112 (Marshall, J., dissenting).
\textsuperscript{112} 411 U.S. at 122 (Marshall, J., dissenting).
\textsuperscript{113} \textit{See} note 13 \textit{supra}; text accompanying notes 87-98 \textit{supra}.
\textsuperscript{115} 411 U.S. at 110 (Marshall, J., dissenting).
\textsuperscript{116} Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).
the two-tier standard in *Rodriguez* and in *Village of Belle Terre v. Boraas.*

Traditional minimal scrutiny in equal protection analysis is very similar to the minimum scrutiny imposed on state laws under the due process clause. Where no fundamental interest is involved, due process also requires merely a rational relationship between the state law and some legitimate state interest, and is equally deferential to state legislative judgments. Neither of these minimum rationality standards requires that the government objective advanced to support the challenged statute have been the legislature's purpose in enacting the statute; the courts will search for a justification of their own. Moreover, the state may not even be required to prove that the relationship between the statute and some legitimate state interest in fact exists; it may be sufficient that the legislature could have believed that such a relationship exists. However, equal protection is nevertheless denied if with respect to any plausible legislative goal the statute is arbitrarily underinclusive or overinclusive. Under-inclusion that imposes a burden is generally a much less serious objection to a statute's validity than a burdening overinclusion.

Under this test there are a number of interests that might justify state prohibitions on private consensual adult homosexual conduct: protection of individuals, especially children, from sexual coercion; elimination or control of venereal disease; maintenance of a citizenry that can function well in society; preservation of the traditional institution of heterosexual marriage; and the guarding of public morality. All of these state interests are arguably legitimate. As the following discussion shows, most of them satisfy minimal scrutiny.

If the sodomy laws infringe on a fundamental right or involve discrimination against a suspect class, however, they can be justified under either due process or equal protection tests only by a compelling state interest that cannot be achieved by any less drastic

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121. "Under-inclusion occurs when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated." Note, supra note 69, at 1084.
122. "An over-inclusive classification includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well." Id. at 1086.
123. Id.
legislative means. \(^{124}\) State interests that have been held important enough to qualify as compelling have included national security, \(^{125}\) maintenance of an efficient and impartial governmental service, \(^{126}\) preparation of accurate voter lists, \(^{127}\) protection of viable fetal life, \(^{128}\) and protection of the health of pregnant women in the last two trimesters. \(^{129}\) The state must also be able to prove that the legislation in fact advances the alleged legislative purpose. \(^{130}\) Under strict scrutiny underinclusion and overinclusion can invalidate a statute even if not arbitrary. How much disparity a court will tolerate depends on its perception of the relative weights of the competing state interests and individual rights involved. \(^{131}\) Where the scope of an overinclusive statute could be narrowed and still achieve the state's goal, the statute is also invalid on the ground that less drastic means are available. Thus the compelling state interest/less drastic means test is difficult for a state to satisfy. It seems doubtful that any of the state interests in prohibiting homosexual conduct could satisfy this test.

The state's interest in protecting individuals from sexual coercion, and more specifically in preventing child molestation or corruption, is not directly advanced by prohibitions on private consensual adult homosexual conduct. Nor is there settled proof that the prohibitions on such conduct indirectly further these state interests. No correlation has been proved between homosexual conduct and the incidence of sexual violence. \(^{132}\) Furthermore, despite the fact that "[t]he argu-

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131. Note, supra note 59, at 1101, 1103.

132. R. Mitchell, supra note 103, at 12.
ment most frequently advanced to support the continued statutory
treatment of homosexuals as felons is that homosexuals are a menace
to society in general and to children in particular, the strength of
the correlation between homosexual conduct and the molestation
of children is in dispute. Moreover, one can argue that these state
interests may be served by less drastic means by removing the pro-
hibitions on private consensual adult homosexual conduct while
retaining laws against homosexual conduct by force or with a minor.
A legal outlet for homosexual conduct might actually promote
compliance with the laws against homosexual conduct with a minor or
with a nonconsenting adult. The speculative nature of the relation-
ship between these state interests and the prohibitions is probably
sufficient to satisfy minimal scrutiny but not strict scrutiny.

A more substantially related state interest is the control of
venereal disease, a major health problem, especially among homo-
sexuals. This interest is probably sufficiently furthered by the
prohibitions to satisfy minimal scrutiny. The Supreme Court's hold-
ing in Roe v. Wade suggests that this state interest may even be
compelling. In that case the Court held that the State's interest in
protecting the health of a pregnant woman during the last two
trimesters of pregnancy was sufficient to justify placing restrictions
on the constitutionally protected right to have an abortion. If the
state's interest in protecting an individual's health is compelling, its
interest in maintaining public health through the control of con-
tagious venereal diseases would seem even stronger. However, both
Wade and Doe v. Bolton, its companion case, invoked the less
drastic means limitation. Restrictions on the right to have an abortion

133. Project, supra note 3, at 787.
134. See studies cited in D. West, supra note 87, at 117-18, which show a small
correlation between homosexuality and child molestation. See also Schofield, Social
Aspects of Homosexuality, 40 Brit. J. Venereal Diseases 129, 130 (1964). Other
studies have revealed a higher percentage of pedophiles among homosexual men. For
example, in C. Berg, Fear, Punishment, Anxiety and the Wolfenden Report 33-34
(1959), one study was reported in which, of 1,022 men in prison for homosexual of-
fenses, 58 per cent involved offenses against boys under the age of 15. Similarly, accord-
ing to a recent analysis of appellate cases involving the charge of sodomy, over 50 per
cent involved one or more children between the ages of five and nineteen. R. Mitchell,
supra note 103, at 11. However, these higher percentages probably reflect the fact that
those who molest children are more frequently apprehended than homosexual people
who engage in sexual acts only with consenting adults. The fact that the distinction
between homosexuality and pedophilia has not been recognized is deplored by the
majority of homosexual people who ... do not share, do not approve, and fear to be
associated with paedophiliac interests.” D. West, supra note 87, at 119.
135. N.Y. Times, March 14, 1974, at 11, col. 1 (late city ed.).
Diseases 48 (1966).
137. 410 U.S. 113 (1973).
are permissible only "... to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 139

The state could use less drastic means to control venereal disease. Sodomy prohibitions are overinclusive in that they affect both homosexual males and lesbians, although the latter "practically never become infected except through contact with men." 140 They are also overinclusive because they prohibit stable homosexual relationships as well as isolated homosexual contacts, although only the latter are responsible for the disproportionately high incidence of venereal disease within the homosexual population. 141 Thus, under strict scrutiny the state could probably justify at most regulation of infected homosexuals.

It can be argued that the prohibition of all homosexual conduct actually contributes to the spread of venereal disease. The high incidence of venereal disease among homosexual individuals results primarily from the promiscuous nature of many homosexual relationships, 142 rather than from the distinctive characteristics of anal and oral intercourse. 143 Homosexual persons attribute the prevalence of promiscuity primarily to the laws prohibiting homosexual conduct:

Many homosexuals say that they are so placed that, for fear of the law, they dare not be known to have male friends. Having no other means of finding partners, they have to resort to picking up strangers "incognito" ... They say that the law as it now stands leaves no alternative outlet for the homosexual other than intercourse with strangers and male prostitutes and so encourages the spread of venereal disease. 144

The prohibitions on homosexual conduct outlaw homosexual marriages, 145 discourage stable relationships, and encourage furtive affairs. The prohibitions also contribute to the higher incidence of venereal disease among homosexual people by discouraging them from seeking treatment or diagnosis. Although at present "[t]he diagnosis of

139. Wade, 410 U.S. at 163.
142. See text accompanying note 141 supra.
143. Homosexual Practices and Venereal Diseases, 1964 Lancet (pt. 1) 481. But see Schofield, supra note 134, at 132: "It should also be remembered that the promiscuous homosexual does not use a sheath, and that this increases the chance of contracting and passing on an infection."
venereal diseases is manifestly more difficult in homosexuals because of hidden lesions in the rectal and oral mucosa in the passive sexual partner; this difficulty would be simplified if homosexual individuals felt free to disclose their sexual orientation to a physician. If a physician is aware of the possibility of anal or oral infection, his examination will generally disclose the hidden lesions. Efforts to control venereal disease are also impeded because homosexual persons at present do not aid medical authorities in locating infected contacts. Many homosexual persons are unable to name their partners because their contacts are made anonymously to avoid exposure. Further, infected homosexuals are reluctant to incriminate themselves or their partners.

The state interest in maintaining a socially effective citizenry can justify the prohibitions only if it can be shown that homosexuality hinders an individual from fulfilling most useful roles in society. The authorities are divided over whether this relationship can be presumed. With regard to the homosexual's ability to function as an employee one federal district court has stated:

Because of the potential for blackmail, [an employee's homosexuality] might jeopardize the security of classified communications. . . . It may in some circumstances be evidence of an unstable personality unsuited for certain kinds of work. If an employee makes offensive overtures while on the job, or if his conduct is notorious, the reactions of other employees and of the public with whom he comes in contact in the performance of his official functions may be taken into account.

Engaging in any homosexual activity still conclusively bars an individual from admission to the military. The Court of Claims has stated: "Any schoolboy knows that a homosexual act is immoral, indecent, lewd and obscene. Adult persons are even more conscious that this is true. If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected."

147. Jackson, supra note 141, at 632.
149. Schofield, supra note 134, at 133.
152. R. Mitchell, supra note 103, at 49-50.
particularized and unsubstantiated contention that possible embar-
raiment to an agency stemming from an employee's homosexuality
may threaten the agency's performance has been rejected. In
the area of public education it has been held that a male teacher's homosexuality
does not presumptively render him unfit to teach. Similarly, the District of Columbia Court of Appeals held that a Civil Service employee could not be discharged for engaging in private consensual adult homosexual conduct without a showing of an effect on the efficiency of the service. Thus, while there may be certain functions, such as military service or jobs involving classified information, for which homosexuals are presumptively unfit, homosexuality apparently does not unsuit an individual for all or even most societal functions. Therefore, a ban on all homosexual activity will not significantly further the state interest in maintaining an effective citizenry.

It has been argued that the prohibition on homosexual conduct
is necessary to encourage new marriages and to prevent the breakup of existing marriages. Although perhaps sufficient for minimal scrutiny, this interest probably fails to meet the compelling state interest/less drastic means test for several reasons. First, the relationship between the prohibition on homosexual conduct and the state's interest in protecting marriages seems tenuous. Clearly the prohibition has no effect on homosexuals with no interest in heterosexual conduct; such persons will probably not enter into heterosexual marriages regardless of the prohibition. Moreover, the interest may simply not be sufficiently important. Without articulating its reasons, the Supreme Court summarily held in New Jersey Welfare Rights Organization v. Cahill that the state purpose to preserve and strengthen traditional family life is not a compelling state interest where individual rights to welfare benefits are concerned. Finally, the use of a prohibition on homosexual activity as a means to preserve the institution of heterosexual marriage is seriously underinclusive. Extramarital heterosexual conduct may have a more detrimental effect on marriage than extramarital homosexual conduct, but

157. P. Wilson, supra note 50, at 52.
159. P. Wilson, supra note 50, at 52.
fornication and adultery are not prohibited in all states.160 In those states in which adultery and fornication are proscribed the penalties are often much less severe than for homosexual acts.161 The disparity in punishment constitutes a form of underinclusion and indicates that the states either do not regard the preservation of heterosexual marriages as the real purpose of the prohibition on homosexual conduct or do not regard that purpose as sufficiently compelling to warrant full use of the state's power to penalize.

The strongest argument a state can marshal to justify abridgments of a homosexual's rights is based on the state's interest in preserving "'the tone of the society, the mode, . . . the style and quality of life.'"162 In Paris Adult Theatre I v. Slaton163 the Supreme Court held that a state prohibition on the showing of obscene movies in places of public accommodation was justified in order to prevent the spread of antisocial behavior. The Court's opinion does not define "antisocial behavior," but the term appears to include all sexual conduct that a state might consider immoral. In dictum included in his dissent in Poe v. Ullman,164 Justice Harlan explicitly tied a state's interest in guarding public morality to the prohibition of private adult consensual homosexual conduct:

...[S]ociety is not limited in its objects only to the physical wellbeing of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.165

In one sense Paris Adult Theatre I is a harder case than one

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160. See statutes cited notes 65, 66 supra.

161. See statutes cited note 67 supra.


163. 413 U.S. 49 (1973).


involving prohibition of homosexual conduct. Because Paris Adult Theatre I involved no fundamental rights the Court did not apply the compelling state interest test and did not require proof of the connection between the showing of obscene movies and antisocial behavior. In defending a prohibition on homosexual conduct, there could not be a proof problem; the prohibition on the conduct the state views as immoral clearly furthers the state interest in condemning that conduct. A less drastic means might be the use of persuasion rather than the power of the criminal law, but it is questionable how effective that alternative would be.

The extent to which a state legislature is free to legislate morality, however, is in dispute. Whether or not it can, the state interest in branding as immoral individual private homosexual conduct cannot be compelling if the right to engage in such conduct is indeed a fundamental right, because the state's interest would then be diametrically opposed to the value embodied in the constitutional right. In other words, the question whether the state can legislate morality in this area is precisely the same as the question whether the exercise of homosexuality is a fundamental right for due process purposes. The foregoing due process analysis thus is also an argument that the state's interest in legislating moral judgments with regard to homosexual conduct is not legitimate, much less compelling.

The due process argument therefore stands or falls on whether private consensual adult homosexual conduct is a fundamental right. If it is not, the state's interests in controlling venereal disease and in legislating morality should be sufficient to withstand minimal scrutiny. Similarly, the success of the equal protection argument under the traditional two-tier standard depends on whether a fundamental right or a suspect class is involved.

Justice Marshall's approach to equal protection, however, may offer an avenue to constitutional protection even if strict scrutiny cannot be invoked. It has already been argued that an individual's interest in engaging in homosexual conduct has a sufficiently close connection with the constitutional right of privacy and that homosexuals have sufficient indicia of a suspect class to raise the scrutiny the sodomy laws must withstand above the level of minimal rationality. Objections to state regulation based on underinclusion, overinclusion, or the availability of less drastic means, however, are probably less telling where fundamental rights or suspect classes are involved.


167. See text accompanying notes 14-62 supra.

168. See text accompanying notes 109-12 supra.

169. See text following note 112 supra.
not involved. The state interests in controlling venereal disease and promoting traditional heterosexual marriages might thus provide stronger arguments for the state under Marshall’s test than under strict scrutiny, although the state’s interest in governing sexual morality is subject to the same criticism as under the two-tier standard:

To the extent that a court finds a nexus between an individual’s interest in engaging in private consensual adult homosexual conduct and the right of privacy, it cannot also embrace the opposite value judgment that a state has a strong interest in intruding upon individual sexual morality. It is difficult to foresee how a court will weigh the competing interests when they are evaluated on these sliding scales because, as its critics have pointed out, Justice Marshall’s test leaves much room for judicial value judgments. Nevertheless, it seems that the state’s burden of proof might well be too demanding under this test to justify prohibiting homosexual conduct on the basis of any of the state interests discussed above.

Aside from the unclear result under Justice Marshall’s test, there is a tactical reason for advocates of homosexual rights to eschew novel constitutional theory and hew to well-established doctrine: Homosexuality is simply too controversial a topic to expect a court to create new constitutional law in order to protect it. Even the recognition of a new suspect class for equal protection purposes, a step the Court has recently been unwilling to take, may be too much of a doctrinal development to expect. But the developing right of privacy offers a traditional constitutional argument that requires no major doctrinal change in order to protect homosexuality. In extending the right of privacy to all forms of heterosexual conduct, the courts have gone so far that exclusion of homosexuality cannot be justified. The privacy argument is clearly the best argument and one that should succeed in securing constitutional protection for the private exercise of consensual adult homosexual activity.

170. See text accompanying note 114 supra.