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Right of Privacy Protects Consensual Heterosexual Behavior, State v. Pilcher, 242 N.W.2d 348 (Iowa 1976)

RIGHT OF PRIVACY PROTECTS CONSENSUAL HETEROSEXUAL BEHAVIOR

State v. Pilcher, 242 N.W.2d 348 (Iowa 1976)

In *State v. Pilcher*,[1] the Supreme Court of Iowa extended the right of privacy to protect consensual acts of sodomy performed in private by adults of the opposite sex.

Defendant, Pilcher, was convicted[2] of performing fellatio with an adult person of the opposite sex, not his spouse, in violation of the Iowa penal statute proscribing sodomy.[3] Pilcher appealed, challenging the constitutionality of the statute's application to private consensual sexual acts by adult heterosexuals.[4] The Supreme Court of Iowa reversed and *held*: the fundamental right of privacy protects consensual sodomitical acts performed in private by adults of the opposite sex and, absent a compelling state interest, may not be infringed. Accordingly, the

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1. 242 N.W.2d 348 (Iowa 1976).

2. The jury, by a general verdict, found the defendant guilty of sodomy without indicating whether they found that the act was accomplished by force or with the victim's consent. Therefore, the defendant had standing to challenge the constitutionality of the state's sodomy statute as applied to the private consensual acts of heterosexual adults. *Id.* at 354, 356.

3. IOWA CODE ANN. § 705.1 (West 1973) provides: "Whoever shall have carnal copulation in any opening of the body except sexual part, with another human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy." Shortly after the court's decision, the Iowa legislature enacted a new statute regulating sexual abuse. IOWA CODE ANN. § 901 (West Supp. 1976) provides:

> Sexual abuse
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> Any sex act between persons is sexual abuse by either of the participants when the act is performed with the other participant in any of the following circumstances:
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> 1. Such act is done by force or against the will of the other. In any case where the consent or acquiescence of the other is procured by threats of violence toward any person, the act is done against the will of the other.
>
> 2. Such other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.
>
> 3. Such other participant is a child.

4. The defendant charged that the sodomy statute was unconstitutional for the following reasons: 1) it was an improper exercise of the police power; 2) it violated the due process and equal protection clauses; 3) it was void for vagueness and overbreadth; 4) it violated the right to privacy; and 5) it imposed cruel and unusual punishment. Because the court found that the statute unconstitutionally infringed on the right of privacy, it did not reach the other grounds urged by the defendant. 242 N.W.2d at 350, 352, 359.

Iowa sodomy statute, unsupported by such an interest, is an unconstitutional invasion of the right to privacy.[5]

The state, acting under its broad police powers, may prohibit activities that threaten the health, safety, or general welfare of the public.[6] Absent a compelling interest,[7] however, it may not infringe constitutionally protected fundamental rights.[8] States have traditionally, to promote public morals, prohibited various "unnatural" sex acts

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5. *Id.* at 359.

6. Lochner v. New York, 198 U.S. 45, 53 (1905); *Ex parte* Weisberg, 215 Cal. 624, 627-28, 12 P.2d 446 (1932); People v. Drolet, 30 Cal. App. 3d 207, 105 Cal. Rptr. 824 (1973). *See generally* Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting): "Yet the very inclusion of . . . morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well." The state's criminal regulation of morality is premised on the view that society will disintegrate in the absence of a common morality. In addition, P. DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965), noted that the state's criminal regulation of morality is premised on the view that society will disintegrate in the absence of a common morality. Devlin's approach, however, sharply contrasts with the legislative role envisioned by Mill:

> The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because in the opinion of others to do so would be wise or even right. J. MILL, ON LIBERTY 73 (Everyman ed. 1859).

Finally, Hart advocates a more moderate approach, suggesting that legislative enforcement of morality is inappropriate where unessential to societal existence. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 8 (1967). *See also* H. HART, LAW, LIBERTY AND MORALITY (1963).

7. *See* Korematsu v. United States, 323 U.S. 214 (1944) (race classification upheld as necessary for national security during World War II); Crane v. New York, 239 U.S. 195 (1915) (restriction on employment of aliens upheld as necessary for welfare of unemployed U.S. citizens). Recently, relatively minor inhibitions on fundamental interests have survived strict scrutiny. American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

8. Interests deemed to be fundamental by the Supreme Court include the following: the right to procreate, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to vote, Dunn v. Blumstein, 405 U.S. 33 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); the right to travel, Dunn v. Blumstein, 405 U.S. 33 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); and some aspects of personal privacy, Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). *See* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 94-135 (1973); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 480 (1973).

9. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated on other grounds*

including sodomy.[9] Although a few states have decriminalized private consensual acts of sodomy,[10] many modern penal statutes continue to proscribe all "deviate"[11] sexual acts without regard to consent, age, marital status, sex of the participants, or place where the act occurs.[12] The Supreme Court's recent recognition of a fundamental right to privacy, however, challenges the constitutionality of these statutes.[13]

In *Griswold v. Connecticut*,[14] the Court identified a constitutional right to privacy inherent in the marital relationship, the home, and the family,[15] and struck down a statute forbidding the use of contraceptives by married couples.[16] Although the Constitution does not explicitly mention this right, Justice Douglas drew upon earlier decisions[17] and

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sub nom. Wade v. Buchanan, 401 U.S. 989 (1971); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 1 (1977); People v. Baldwin, 37 Cal. App. 3d 385, 112 Cal. Rptr. 290 (1974); People v. Ragsdale, 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976); People v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, *cert. denied*, 389 U.S. 832 (1967); 4 W. BLACKSTONE, COMMENTARIES * 215-16; 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 556 (2d ed. 1899). For a discussion of the common law treatment of sodomy, see Note, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W.L.R. 115, 115-16 (1968). For a discussion of the regulation of sodomy by religious institutions, *see* W. BARNETT, *supra* note 8, at 74-93.

10. Colorado, Connecticut, Delaware, Illinois, and Ohio do not criminally sanction private acts of sodomy between consenting adults.

11. Sexual practices deemed "deviate" by sodomy statutes include fellatio, cunnilingus, pederasty, and bestiality.

12. *E.g.*, ARIZ. REV. STAT. ANN. § 13-651 (Supp. 1973); IDAHO CODE ANN. § 18-6605 (1972); MO. ANN. STAT. § 563.230 (Vernon 1949); MONT. REV. CODES ANN. § 94-4118 (1947); VA. CODE ANN. § 18.1-212 (Supp. 1973) (amending VA. CODE ANN. §18.1-212 (1960)); WYO. STAT. § 6-98 (1957).

13. Although the right to privacy in matters of intimate sexual relations is not implicated by statutes proscribing forced sex acts, acts carried out in public, or acts with minors, it clearly is infringed by a statute prohibiting sex acts between consenting adults performed in private.

14. 381 U.S. 479 (1965).

15. Justice Douglas, writing for the majority in *Griswold*, explained the fundamental right involved:

> We deal with a right of privacy older than the Bill of Rights—older than any political parties, older than our school system. Marriage is the coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects.

381 U.S. at 486.

16. *Id.* at 485.

17. Lanza v. New York, 370 U.S. 139 (1962); Monroe v. Pape, 365 U.S. 167 (1961); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952); Breard v. Alexandria, 341 U.S. 622 (1951); Skinner v. Oklahoma, 316 U.S. 535 (1942).

concluded that the right to privacy in intimate sexual matters was a penumbra of the Bill of Rights and emanated from the specific guarantees of the first, fourth, fifth, ninth, and fourteenth amendments.[18] Justice Harlan's concurring opinion in *Griswold* pointed to an alternative source of the right to privacy:[19] the due process clause of the fourteenth amendment protected those fundamental values, including privacy, which were "implicit in the concept of ordered liberty."[20] Perhaps because the Court was uncertain about the origin of the right to privacy, it failed to clearly delineate its scope. Under a narrow reading of *Griswold*, the fundamental right to privacy extends only to intimate sexual relations between married people in their own home.[21] If read more broadly, the right protects all self-directed and consensual sex acts.[22]

In the late 1960s and early 1970s, the Warren Court expanded the scope of fundamental interests protected by the due process and equal

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18. Justice Douglas explained:

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

381 U.S. at 484.

For a discussion of the right to privacy articulated in *Griswold*, see Dixon, *The* Griswold *Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Katin, Griswold v. Connecticut: *The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW. 680 (1967); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235 (1965); Note, *Privacy After* Griswold: *Constitutional or Natural Law Right?*, 60 NW. U.L. REV. 813 (1966); 15 CATH. U.L. REV. 126 (1966).

19. 381 U.S. at 499.

20. *Id.* at 500. In a concurring opinion, Justice White agreed that the due process clause of the fourteenth amendment protected the right "to be free of regulation of the intimacies of the marriage relationship . . . ." *Id.* at 503.

21. *See* the Court's language in *Griswold* at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

22. *See Id.* at 484-85 (The Court used sweeping language in defining a right to privacy.).

protection clauses of the fourteenth amendment.[23] Not surprisingly, therefore, the Court in *Eisenstadt v. Baird*[24] relied upon a broad reading of the right to privacy recognized in *Griswold* to sustain an equal protection challenge to a Massachusetts statute prohibiting the dispensing of contraceptives to single people.[25] After noting that the statutory classification was not even rationally related to the legitimate state purpose of protecting public health and morals,[26] Justice Brennan addressed the privacy issue.[27] Although *Griswold* was concerned specifically with privacy inherent in the marital relationship, the right to privacy also protected the individual from governmental infringement of "matters so fundamentally affecting a person as a decision whether to bear or beget a child."[28] The logical, although not necessary,[29] implication of *Eisenstadt*[30] was that *Griswold's* broad right of privacy in marital sexual activity also protected the individual. In *Roe v. Wade*,[31] the Court further extended the right to privacy, holding that it encompassed a

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23. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Lindsey v. Normet, 405 U.S. 56 (1972) (although majority rejected appellant's argument that the "need for decent shelter" and the "right to retain peaceful possession of one's home" are fundamental interests, Justice Douglas in dissent readily adopted it); Dandridge v. Williams, 397 U.S. 471, 529 (1970) (Marshall, J., dissenting); Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Michelman, The Supreme Court, 1968 Term —*Forward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

24. 405 U.S. 438 (1972).

25. *Id.* at 455.

26. *Id.* at 452.

27. *Id.* at 453-54.

28. *Id.* at 453.

29. The Court's reasoning in *Eisenstadt* is subject to several interpretations. It is argued here that the first of these is the most logical:

1) The broad privacy right of married couples in their intimate sexual relations, upheld in *Griswold*, inhered in the individual and could not be interfered with absent a compelling state interest.

2) *Griswold* recognized a broad privacy right in the marriage relationship and specifically a right to privacy in matters of contraceptive use and procreation. Only this specific right was extended to individuals in *Eisenstadt* and could not be interfered with absent a compelling state interest.

3) Under a middle level analysis (Reed v. Reed, 404 U.S. 71 (1971)), the statute prohibiting the sale of contraceptives to unmarried people infringed upon an *almost* fundamental interest (either the broad privacy right or the specific right to privacy in matters of procreation). Because the classification scheme was not "substantially related" to the legitimate state purpose of protecting the health and morals of the people, it violated the equal protection clause of the fourteenth amendment.

30. 405 U.S. 438 (1972).

31. 410 U.S. 113 (1973).

woman's decision to obtain an abortion.[32] Absent a compelling interest, the state could not impinge this right.[33]

The Court, however, has recently contracted the scope of fundamental interests protected by the fourteenth amendment to those rights explicitly or implicitly guaranteed by the Constitution.[34] By summarily affirming a lower court ruling in *Doe v. Commonwealth's Attorney*,[35]

32. *Id.* at 153.

33. *Id.* at 154. The Court noted that during the second trimester the state could, to promote its interest in the health of the mother, regulate the abortion procedure in ways reasonably related to maternal health. During the last trimester the state could regulate and even proscribe abortions, except when medically necessary to preserve the life or health of the mother, in order to promote its interest in the potentiality of human life. *Id.* at 164.

34. *See, e.g.*, Poelker v. Doe, 97 S. Ct. 2391 (1977); Maher v. Roe, 97 S. Ct. 2376 (1977) (Although a woman has a fundamental right to decide whether to bear her child or abort her pregnancy, the state may refuse to provide funds for abortions, thus effectively denying this right to indigent women.); Beal v. Doe, 97 S. Ct. 2366 (1977); Carey v. Population Servs. Int'l., 97 S. Ct. 2010 (1977) (limiting privacy right to decisions concerning procreation and contraception); Ingraham v. Wright, 97 S. Ct. 1401 (1977) (limiting child's right to be free from corporeal punishment in school); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (the right to work is not a fundamental right); Weinberger v. Salfi, 420 U.S. 636 (1975); Marshall v. United States, 414 U.S. 417 (1967).

35. 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975).

"Summary disposition of an appeal, . . . , either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 551 (3d ed. 1976). *Accord*, Mandel v. Bradley, 97 S. Ct. 2238 (1977); Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959). Summary dispositions are binding on the lower courts, Mandel v. Bradley, 97 S. Ct. 2238 (1977); Hicks v. Miranda, 422 U.S. 332 (1975), although not of the same precedential value to the Supreme Court itself as an opinion on the merits. Edelman v. Jordan, 415 U.S. 615 (1974). "[T]he precise effect of a per curiam affirmance is uncertain." Shanks, Book Review, 84 HARV. L. REV. 256, 258 n.17 (1970). The Court's memorandum affirmances and dismissals have been "criticized as revealing insufficient deliberation and affording inadequate guidance as precedent." Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 n.36 (1964).

In an era of judicial self-restraint it may be argued, however, that the summary affirmance in *Doe v. Commonwealth's Attorney* represents an approval of the lower court's reasoning as well as its holding. The Supreme Court's endorsement of the *Doe* court's analysis, which narrowly interpreted *Eisenstadt* and the fundamental right to privacy, would be consistent with the court's recent decisions in this area. *See* Poelker v. Doe, 97 S. Ct. 2391 (1977); Maher v. Roe, 97 S. Ct. 2376 (1977); Carey v. Population Servs. Int'l., 97 S. Ct. 2010 (1977); Paul v. Davis, 442 U.S. 693, 712-13 (1976); note 34 *supra* and accompanying text. The *per curiam* opinion in Mandel v. Bradley, 97 S. Ct. 2238 (1977), although specifically noting that "[b]ecause a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below," *Id.* at 4701, goes on to *support* the argument outlined above by stating that "[s]ummary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the

the Court indicated that, despite its holding in *Roe v. Wade*,[36] it would endorse the narrowing of the fundamental right of privacy, rather than follow the logical implications of *Eisenstadt* to hold that the personal privacy interest protected all sexual activity between consenting adults.[37] In *Doe*, a three-judge federal district court upheld Virginia's sodomy statute[38] and specifically refused to extend the right of privacy to consensual homosexual sodomitical activity.[39] Noting that homosexual intimacy had traditionally been prohibited by the state,[40] the

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particular facts involved." *Id.* The Court's affirmance of the limited privacy right upheld in *Doe* can be viewed as "breaking" no "new ground" only if the Court viewed *Griswold* and *Eisenstadt* as establishing a limited right to privacy in decisions relating to procreation and contraception.

36. 410 U.S. 113 (1973).

37. The court's reasoning in *Doe v. Commonwealth's Attorney* lends itself to two possible interpretations—the latter of which, it is suggested here, is better. On the one hand, the opinion could mean that the fundamental right to privacy in sexual activities discovered in *Griswold* and extended in *Eisenstadt* protects individuals who engage in heterosexual, but not homosexual, activity. Such reasoning, although it would make the *Pilcher* and *Doe* holdings consistent, could be challenged on equal protection grounds.

A better interpretation of the court's reasoning is that the fundamental right of privacy extends only to intimate sexual relations in marriage. The court in *Doe* did not even mention *Eisenstadt*, but relied instead on Justice Goldberg's concurrence in *Griswold* and Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), which explicitly limited the right to privacy in sexual activities to married couples. Because homosexual activities were outside the scope of the privacy right, the court held that the state could regulate them in the exercise of its police powers. 403 F. Supp. at 1202.

In Carey v. Population Servs. Int'l, 97 S. Ct. 2010 (1977), Justice Rehnquist, in dissent, supports this interpretation:

> I cannot, however, let pass without comment, the statement that "the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." Ante, at 8-9, n. 5, 14 n.16 While we have not ruled on every conceivable regulation affecting such conduct, the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been "definitely" established. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976).

Id. at 2033 n.2.

38. The Virginia Code, as amended in 1960, provides in pertinent part:

> § 18.1-212. Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

39. 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

40. The court noted:

> Although a questionable law is not removed from question by the lapse of any prescriptive period, the longevity of the Virginia statute does testify to the State's interest and its legitimacy. It is not an upstart notion; it has ancestry going back to Judaic and Christian law. The immediate parentage may be

court concluded that the statute was rationally related to the legitimate state interest of protecting public morals.[41]

In *State v. Pilcher*,[42] the Iowa Supreme Court ignored the *Doe* decision,[43] and held that a statute prohibiting private consensual acts of sodomy unconstitutionally infringed the fundamental right to privacy.[44] The majority reasoned that because *Griswold* protected the sexual activity of married couples from governmental interference,[45] the Iowa sodomy statute, unjustified by a compelling state interest, was unconstitutional as applied to married persons.[46] Furthermore, the court said that *Eisenstadt* had extended the *Griswold* privacy right of married people and specifically their right to use contraceptives to include the sexual activity of unmarried adults[47] because there was no rational basis to distinguish the right of married and unmarried people to use contraceptives. Similarly, the court concluded that the Iowa sodomy statute, which could not be applied to married people, was unconstitutional if applied to unmarried consenting adults of the opposite sex.[48]

The Court in *Pilcher* adopted the view that the right to privacy protects any act that is "personal to the one performing it and [has] no effect on others."[49] The court noted, however, that this right did not

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readily traced to the Code of Virginia of 1792. All the while the law has been kept alive, as evidenced by periodic amendments, the last in the 1968 Acts of the General Assembly of Virginia, c. 427.

Id. at 1202-03.

41. *Id.* at 1203. The *Doe* court explained the test to be applied in reviewing legislation that implicated no fundamental interest:

> With no authoritative judicial bar to proscription of homosexuality—since it is obviously no portion of marriage, home or family life—the next question is whether there is any ground for barring Virginia from branding it as criminal. If a state determines that punishment therefore [*sic*], even when committed in the home is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so.

403 F. Supp. at 1202.

42. 242 N.W.2d 348 (Iowa 1976).

43. Justice Reynoldson, dissenting, remonstrated the court for "ignor[ing] the action of the United States Supreme Court, which upheld the constitutionality of a similar Virginia Sodomy Statute." *Id.* at 360.

44. *Id.* at 359.

45. *Id.* at 357.

46. *Id.* at 358.

47. *Id.*

48. *Id.*

49. *Id.* The court adopted the broad definition of the right to privacy stated in Lovisi v. Slayton, 363 F. Supp. 620, 625-26 (E.D. Va. 1973):

> The phrase 'right to privacy' may, unless carefully defined, be misconstrued. This is because privacy can refer either to seclusion or to that which is per-

protect sex acts performed in public, forced sex acts, bestiality, or adult corruption of children.[50] In addition, the majority specifically reserved the question of whether the state could prohibit acts of sodomy between consenting homosexuals.[51]

The *Pilcher* dissent[52] recognized that under *Griswold* the Iowa statute could not constitutionally regulate the private sexual activity of consenting spouses.[53] Noting the Supreme Court's affirmance of *Doe*,[54] however, the dissent maintained that the statute was constitutional as applied to unmarried individuals.[55] *Griswold* conferred a broad right of privacy on married couples in their intimate sexual relations, specifically including matters of procreation and contraceptive use within that right; the *Pilcher* dissent, however, said that *Eisenstadt* extended only the specific right of privacy in matters of procreation and contraception to single people.[56] Because *Eisenstadt* did not confer a broad privacy right on individuals, the state could enact a sodomy statute which applied only to nonmarried people so long as it was rationally related to the legitimate state purpose of promoting public health and morals. The statute clearly passed this mere rationality test.[57] The dissent concluded that the majority, offended by the outdated statute, struck it down to force the state legislature to revise it.[58]

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sonal. To describe an act as private may mean that it is performed behind closed doors. It may also mean that the doing of that act is a decision personal to the one performing it and having no effects on others. In the constitutional context, the meaning is doubtless closer to the latter than the former definition.

State v. Pilcher, 242 N.W.2d at 358.

50. *Id.* at 359.

51. *Id.* The court in *Pilcher* held that the fundamental right to privacy protects individuals in their private sexual activities, and, on equal protection grounds, drew no distinction between heterosexual and homosexual acts. Nevertheless, the court in the future may hold that the state interest in protecting public morals is sufficiently compelling to justify an infringement of the privacy rights of homosexuals. In Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), a federal district court suggested this possibility: "On the facts of this case [acts of sodomy were photographed and publicized], however, the court is not compelled to make the difficult determination of whether a compelling state interest underlies and justifies [the sodomy statute involved here.]" *Id.* at 625.

52. 242 N.W.2d at 360.

53. *Id.* at 364.

54. *Id.* at 360.

55. *Id.* at 364.

56. *Id.* at 365-66.

57. *Id.* at 366.

58. *Id.* at 363.

Although the *Pilcher* court's holding that the right of privacy protects intimate sexual activity between consenting adults is commendable, its reasoning, derived from a superficial reading of *Eisenstadt*,[59] is unconvincing. First, its broad reading of *Eisenstadt*—that the *Griswold* privacy right protecting the intimate sexual activities of married couples extends to individuals—leads to a conclusion that the right protects homosexual as well as heterosexual activities.[60] Such a result is inconsistent with the *Doe* holding.[61] In addition the court in *Doe* ignored *Eisenstadt* and relied instead on Justice Goldberg's concurring opinion in *Griswold*[62] to restrict the broad privacy right to the confines of the marriage relationship. By affirming the *Doe* holding, the Supreme Court, consistent with its trend of narrowing fundamental interests,[63] seems to indicate that *Eisenstadt* only extended a right of privacy in matters of procreation and contraceptive use to single people.[64] Thus, the *Pilcher* court's holding is undermined both by a misinterpretation

59. The dissent correctly criticizes the majority in *Pilcher* for its "superficial" reading of *Eisenstadt*. *Id.* at 364.

60. Once the court extends the fundamental right to privacy in sexual matters to unmarried individuals, the legislature cannot enact a statute which discriminates against homosexuals absent a compelling state interest; the statute must withstand strict scrutiny by the court. *See* note 51 *supra*.

61. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976).

62. 381 U.S. 479, 486 (1965). Justice Goldberg and the *Doe* court relied heavily on Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), which emphasized the link between the privacy right and the marital relationship:

> 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.

Id. at 546.

Eisenstadt clearly rejected this language. That the Court affirmed an opinion relying on this language supports the thesis that the Burger Court has embraced the narrow holding of *Eisenstadt*.

63. *See* notes 34-35 *supra* and accompanying text.

64. *See* note 29 *supra*. The Court in Carey v. Population Servs. Int'l, 97 S. Ct. 2010 (1977), implicitly supports the proposition that *Eisenstadt* held only that an individual is protected from unjustified governmental interference in the decision whether "to bear or beget a child." *Id.* at 2018. Justice Brennan, writing a section of the opinion in which a majority joined, went further and narrowed the broad language of *Griswold*:

> Read in light of its progeny [*Eisenstadt*; *Roe v. Wade*; *Whalen v. Roe*] the

of *Eisenstadt* and a failure to identify and distinguish *Doe* from the instant case.

Beyond its faulty reasoning, the Iowa Supreme Court's decision in *Pilcher* raises a fundamental question about the role of the court in a democratic society: Is a court the proper forum to decide whether an individual's private consensual sexual activity is a legitimate subject for criminal regulation? In *Pilcher*, the dissent thought not, and accused the majority of overstepping its bounds by "unnecessarily engineer-[ing] in complex moral and social areas better left to the legislature."[65] Rather than follow the dissent's reasoning and affirm the statute's constitutionality,[66] the Iowa court struck down a statute they believed to be an outmoded and offensive invasion of the right to privacy. This required the legislature to devise a more just policy.[67] The court in *Doe*, on the other hand, upheld the Virginia sodomy statute and specifically declined to judge the wisdom of the state's policy in the matter.[68]

The decriminalization of sodomy may be an important step in harmonizing the law with contemporary sexual attitudes.[69] Neverthe-

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teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state. *Id.* at 2018.

To be sure, Justice Brennan asserted in a footnote that the Court had not yet answered the "difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," *id.* at n.5, seeming to diminish the significance of the *Doe* affirmance. However, in strong concurring statements, Justices White and Stevens, although joining in the Brennan opinion, indicated that states, acting under their broad police powers, could restrict or prohibit sexual activity. In view of these statements, and those of the concurring and dissenting justices in *Carey*, it appears that a majority of the Court adopted the reasoning as well as the holding of *Doe*. The constitutionally protected right to privacy does not extend to private consensual sex acts and therefore the state may regulate this activity so long as the regulatory scheme is rationally related to a valid state purpose.

65. 242 N.W.2d at 367.

66. *Id.* at 363.

67. The legislature subsequently enacted a new sexual abuse statute. *See* note 3 *supra.*

68. 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976).

69. A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 392 (1948) (95% of male population has engaged in a sexual act violative of a criminal statute; 59% engaged in oral-genital contact; 17% of males reared on farms have experienced sexual intercourse with animals). The MODEL PENAL CODE § 207.5, Comment 27C (Tent. Draft No. 4, 1955), states: "[N]o harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." *See generally* E. BERNE, SEX IN HUMAN LOVING (1970); B. LEGMAN, ORA-GENITALISM (1969); W. MASTERS & V. JOHNSON, HUMAN SEXUAL RESPONSE (1966); D. REUBEN, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX (1969); Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV. 199 (1968); Note, *Deviate Sexual*

less, when interests not clearly fundamental are infringed by statutes which are rationally related to the legitimate purpose of promoting the general welfare, the court should defer to the legislature which is more responsive to the concerns of the general public.[70] Particularly in the area of privacy, which has no self-evident limits, the courts should be wary of creating policy and encroaching upon the legislative function.[71]

In *State v. Pilcher* the Iowa Supreme Court extended the right of privacy to protect sex acts carried on in private between consenting adults. This enabled the court to strike down a sodomy statute that the legislature subsequently revised to conform better with contemporary views. Although the court's action is understandable, it is questionable whether a state court should expand the privacy right to protect activities traditionally subject to regulation for the general welfare.

Behavior: The Desirability of Legislative Prescription, 30 ALB. L. REV. 291 (1966); Note, *The Bedroom Should Not Be Within The Province of the Law*, *supra* note 9; Note, *Sodomy, Crime, or Sin?*, 12 U. FLA. L. REV. 83 (1959); Note, *Extending the Right to Sexual Privacy*, 2 W. ST. L. REV. 281 (1975).

70. *See, e.g.*, Carey v. Population Servs. Int'l., 97 S. Ct. 2010 (1977), statements by Justices Powell (concurring): "But a test so severe that legislation rarely can meet it should be imposed by courts with deliberate restraint in view of the respect that properly should be accorded by legislative judgment." *Id.* at 2027, and Justice Rehnquist (dissenting):

> The majority of New York's citizens are in effect told that however deeply they may be concerned about the problem of promiscuous sex and intercourse among unmarried teenagers, they may not adopt this means of dealing with it. The Court holds that New York may not use its police power to legislate in the interests of its concept of the public morality as it pertains to minors. The Court's denial of a power so fundamental to self-government must, in the long run, prove to be but a temporary departure from a wise and heretofore settled course of adjudication to the contrary.

Id. at 2034, to this effect.

71. Gunther notes that a generalized right to privacy might extend to all self-directed acts having no effect on others. The problem, Gunther implicitly suggests, remains one of defining "self-directed" and determining whether those acts begin to infringe others. No guidelines can be found in a general constitutional right to privacy. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 655-56 (9th ed. 1975).