Constitutionality of Minnesota's Sodomy Law

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I. Introduction

Lesbians and gay men in Minnesota, inspired by the gay rights movement, have increased the visibility of their political and social activities. Enhanced visibility of lesbians and gays has occasioned a growth in social tolerance of homosexuality, as well as organized vocal opposition from conservative sectors. Minnesota lawmakers have codified resulting ambivalence toward lesbians and gays in state and local law and in enforcement practices. Minnesota's sodomy statute serves to legitimate and enforce homophobia and discrimination against lesbians and gay men because people assume that the statute censors only homosexual acts[1] and that its enforcement tends to discourage same-sex orientation. The statute, however, renders many sexual acts illegal. Furthermore, sodomy laws are seldom actually used to prosecute consensual homosexual behavior.

In contrast to this public discrimination, some Minnesotans have sought and gained limited public approval and legal protection for lesbians and gay men under city ordinances.[2] Minneapolis' civil rights ordinance,[3] for example, prohibits discrimination based on "affectional preference" in employment and housing. Yet Minneapolis' lesbians and gay men seldom file claims under the ordinance for fear of further discrimination after the legal proceedings have brought them "out of the closet."[4]

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1. In fact, Webster's Dictionary defines "sodomy" primarily as "copulation with a member of the same sex or with an animal." Webster's New Collegiate Dictionary 1096 (Woolf ed. 1981).

2. *See, e.g.*, St. Paul, Minn. Legislative Code, ch. 74.01 (July, 1974) (repealed April 28, 1978). *See also infra* note 3; St. Paul Citizens for Human Rights v. City Council, 289 N.W.2d 402 (Minn. 1979).

3. Minneapolis, Minn. Code, Title 7, ch. 138, § 139.10 (1976).

4. Speech by Rick Osborne, Minneapolis Civil Rights Commissioner, Conference on Gay and Lesbian Rights, in Minneapolis, Minnesota (April 17, 1984).

Minnesota's sodomy statute has ramifications more serious than legal or social ambivalence. The statute violates constitutional rights of lesbians and gay men and should therefore be invalidated.

In a marked trend away from universal condemnation of homosexuality, twenty-two states have decriminalized consensual sodomy[5] by either legislative action or judicial determination. Minnesota's sodomy statute (section 609.293) typifies the thirty state sodomy statutes that remain in force in the United States today.[6] The statute prohibits "voluntarily engag[ing] in or submit[ting] to" acts of "sodomy," which subdivision one defines as "carnally know[ing] any person by the anus or by or with the mouth."[7]

The sodomy statute and Minnesota's enforcement of it embody the dominant social definitions of sexuality and gender roles. In particular, the legal attitude toward consensual sodomy embodies social conceptions of the role of "consent" in delineating acceptable and non-acceptable sexual behavior for each gender. Elimination of state sodomy statutes may eventually broaden the social definition of acceptable sexual behavior for each gender. Until then, constitutional arguments concerning sodomy laws may continue to originate in and strengthen

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5. States that have decriminalized private, consensual, adult homosexual acts are: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, and Wyoming.

6. Statutes prohibiting private, consensual, adult homosexual acts are: Ala. Code § 13A-6-65(a)(3) (1978); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (Supp. 1977); Ark. Stat. Ann. § 41-1813 (1977); D.C. Code Encycl. § 22-3502 (West 1973); Fla. Stat. Ann. § 800.02 (West 1967); Ga. Code Ann. § 16-6-2 (1977); Idaho Code § 18-6605 (Supp. 1978); Kan. Stat. Ann. § 21-3505 (1974 & Supp. 1983); Ky. Rev. Stat. § 510.100 (1975); La. Rev. Stat. Ann. §§ 14:89, 14:89.1 (West Supp. 1977); Md. Ann. Code art. 27, §§ 553, 554 (Supp. 1977); Mass. Ann. Laws, ch. 272, §§ 34, 35 (Michie/Law. Co-op 1968); Mich. Comp. Laws §§ 750.158, 750.338, 750.338a (1968); Minn. Stat. § 609.293 (1982); Miss. Code Ann. § 97-29-59 (1972); Mo. Ann. Stat. § 566.090 (Vernon Supp. 1978); Mont. Code Ann. § 94-4118 (1975); Nev. Rev. Stat. § 201.190 (1977); N.C. Gen. Stat. § 14-177 (1969); Okla. Stat. Ann., tit. 21, § 886 (West 1951); 18 Pa. Cons. Stat. Ann. § 3124 (Purdon 1973); R.I. Gen. Laws § 11-10-1 (1969); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1976); Tenn. Code Ann. § 39-2-612 (1975); Tex. Penal Code Ann., § 21-06 (Vernon 1974); Utah Code Ann. § 76-5-403 (Supp. 1977); Va. Code § 18.2-361 (Supp. 1978); Wis. Stat. Ann. § 944.17 (West Supp. 1978).

7. Minn. Stat. § 609.293, subdivision five reads: "*Consensual acts*. Whoever, in cases not coming within the provisions of section 609.342 or 609.344 [criminal sexual conduct statutes], voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $1,000 or both." Minn. Stat. § 609.293 (1982).

stereotypical and male-oriented gender conceptions. These conceptions help create and maintain ambivalent attitudes toward gay men and discriminatory actions against all women.[8] Challengers of section 609.293 must avoid the perpetuation of sexism in their constitutional arguments.

In this analysis, I begin with an overview of prosecutorial practice under section 609.293, using the recent trial of Judge Robert Crane Winton as an example. I then question the social/sexual function of all sodomy statutes in male-dominated society. Next, I review various constitutional challenges to section 609.293. Finally, I conclude that although section 609.293 is unconstitutional on several grounds, lesbian and gay challengers of the statute's constitutionality may best combat sexism and homophobia by using first amendment and cruel and unusual punishment arguments rather than those based on privacy doctrine.

A. The Recent Trial of Judge Robert Crane Winton, Jr.

Until 1984, the Minnesota sodomy statute had never been challenged on constitutional grounds.[9] But the 1982 trial of District Court Judge Robert Crane Winton, Jr. raised doubts about the law and its constitutionality. Although Winton's homosexual acts violated the sodomy statute, the State of Minnesota prosecuted and convicted him only under its prostitution statutes.[10]

After male youths claimed that Winton had hired them to engage in sex with him, including oral sodomy,[11] Winton was

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8. *See infra* notes 46-65 and accompanying text.

9. The Minnesota Civil Liberties Union raised the issue of section 609.293's constitutionality before the Minnesota Supreme Court in its amicus curiae brief for *In the Matter of the Honorable Robert Crane Winton, Jr.*, S. Ct. File No. C8-83-150.

10. Minnesota v. Winton, Nos. 80369-1, 80370-1 and 80371-1 CO. (Minn. Dist. Ct. June 21, 1983).

11. In February of 1982, a series of television exposes was broadcast by WCCO-TV of Minneapolis. *See* Channel 4 News, WCCO-TV, I-Team series on the sexual abuse of children, Feb. 12, 1982, by Donald Shelby. WCCO's Donald Shelby introduced the segment about Winton by alleging that Winton sexually abused minors while using his judicial position to condemn other child abusers. The young men, whose profiles were shown in silhouette, described being solicited by Winton as they looked for male customers in Loring Park, a well-known center of male prostitution in Minneapolis. They described in detail being driven to Winton's home, talking with him, and allowing him to perform fellatio upon them, all for a fee ($40 in one instance).

A special prosecutor was appointed to investigate the matter. Testimony from Winton's subsequent trial revealed that the television station had become aware of the young men's allegations through contacts with the police depart-

indicted on three charges:[12] two gross misdemeanors for prostitution and one felony charge for prostitution with minors.[13] Winton pleaded guilty[14] in exchange for a dismissal of the more serious counts. Before sentencing, Winton submitted a short statement to the court discussing his sexual orientation toward members of his own sex. He was convicted of two misdemeanors and fined $300.[15] This reduced sentence was quite lenient in comparison with sentences recommended for either prostitution with a minor or sodomy.

Judicial disciplinary actions against Winton followed the close of the criminal proceedings. In a hearing before the Minnesota Board of Judicial Responsibility[16] Winton again commented on his homosexuality. Board members asked him if he would continue to violate the state's sodomy statute. Winton replied, "I don't know," but added that within a suitable relationship, "I'd probably do so."[17] Despite these discussions, the

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ment. Some months earlier, a male prostitute had implicated Winton when asked by an officer to name any well-known customers. This information was passed along to Shelby, who then contacted the young man personally and persuaded him to appear on television. *See* Minnesota v. Winton, Nos. 80369-1, 80370-1 and 80371-1 CO. (Minn. Dist. Ct. June 21, 1983).

12. A major city newspaper responded to Winton's indictment by praising his personal integrity and his ability as a judge. Winton's own attorneys publicly maintained that the allegations were "total fabrications." *See* Minneapolis Star & Tribune, Feb. 11, 1982, at 1A, 5A, col. 1. Print media support was echoed by parts of the legal community. The Minnesota State Bar Association's executive committee issued an official statement on February 23, 1982, criticizing WCCO and insisting upon a "presumption of innocence" for Winton. *See* Minneapolis Star & Tribune, Feb. 24, 1982, at 7A, col. 4. Fellow district court judge Harold Kalina openly supported Winton's retention on the bench, as did the editors of the Star & Tribune. *See* Minneapolis Star & Tribune, June 22, 1982, at 1A, col. 1 and 9A, col. 3.

13. Winton was indicted on two charges of prostitution which is a gross misdemeanor and a third charge of engaging in prostitution with a minor which is a felony. He was not charged under the sodomy law. Pending trial, Winton was suspended with pay from adjudicating new cases.

14. Winton originally pleaded not guilty and, in a motion to dismiss, argued that the state's excessive entanglement with the news media rendered evidence connected with the male prostitutes interviewed on television inadmissable. The court denied the motion to dismiss. *See Winton*, Nos. 80369-1, 80370-1, and 80371-1.

15. $150 for each count, plus an added $30 surcharge.

16. The Board met between May 10 and 17, 1982. During the hearing Winton faced politicians and religious leaders calling for his dismissal. On October 3, 1983, the three-judge panel which had reviewed Winton's actions and his performance on the bench, recommended Winton's removal from his position as Hennepin County District Court Judge. Minneapolis Star & Tribune, Oct. 4, 1983, at 1A, col. 6.

17. More specifically, Winton said, "I suppose that if I met a suitable person, or one I deem to be suitable, who wants to have a relationship with me that would involve sexual acts of that nature, I would probably do so. It would be done in private. It would be done behind closed doors and in a way that

board denied that Winton's homosexuality was at issue. The board recommended that Winton be dismissed, citing as the sole basis for their decision "Winton's own admissions and other evidence of statutory violations, including prostitution [and] *sodomy*."[18] On May 25, 1984, the Supreme Court of Minnesota removed Winton from his position as district court judge.[19] The court claimed that its decision was not based on Winton's violations of the sodomy statute.[20] Removal is a harsh and drastic penalty.

Winton's case has generated discussion and controversy concerning the propriety and application of section 609.293, its constitutionality, and its relation to the social status of gays and lesbians in Minnesota. It has also raised the issue of underlying political reasons for the legal system's seemingly contradictory treatment of Winton. His criminal sentence was nominal while the professional censure was exceedingly harsh. A close look at the use of the statute by Minnesota law enforcement agencies suggests that Winton's actions, homosexual in fact but in many ways typical of heterosexual behavior, triggered ambivalent legal responses historically consistent with both his superior social status as a male and his inferior social status as gay. Winton was protected from large fines and incarceration because he is a man and, as such, empowered as a sexual actor. He was professionally ostracized because he is gay and, as such, a threat to the heterosexual majority. A constitutional inquiry regarding sodomy law must take into account the interplay of sexism and heterosexism, their different effects on gay men, lesbians, and all women, and their common origin in male supremacy. Only careful consideration of lesbians' and gay men's complex political situation will assure fair adjudication of sodomy statutes' questionable constitutionality.

B. Enforcement Policies of Section 609.293

Lesbians, gay men and heterosexuals alike almost universally disobey Minnesota's sodomy statute. Although no records exist on the actual number of prosecutions under section 609.293, some Minnesota attorneys believe that the sodomy law

would not in any way, shape, manner or form bring discredit on the bench." *See* Minneapolis Star & Tribune, May 11, 1983, at 1A, 6A, col. 1. *See also* Minneapolis Star & Tribune May 12, 1983, at 1A, col. 4.

18. Minneapolis Star & Tribune, Oct. 4, 1983, at 1A, col. 6 (emphasis added).

19. *In re* Kirby, 350 N.W.2d 344 (Minn. 1984); Minneapolis Star & Tribune, May 25, 1984, at 1A, col. 1.

20. Minneapolis Star & Tribune, May 25, 1984, at 1A, col. 3.

"generally [is] not vigorously prosecuted."[21] In fact, the statute has a history of bifurcated enforcement. Minnesota law enforcement agencies have prosecuted homosexual and heterosexual sodomy differently.

Ironically, while many view Minnesota's sodomy statute as a long standing legislative disapproval of homosexuality, historically the majority of prosecutions under section 609.293 and its predecessors have been of adult male defendants charged with the rape of women and the sexual abuse of children. In other words, cases in which sodomous behavior has been prosecuted have been typically heterosexual.[22] This type of behavior continues to be prosecuted under other criminal sexual conduct statutes.[23] Currently, the Hennepin County attorney's office rarely prosecutes anyone under the sodomy law.[24] The county maintains a policy of nonenforcement of section 609.293, making exceptions only in cases in which defendants perform sodomy in public or semi-public places. County records show only six convictions of sodomy since 1981. The six convictions involved three pairs of adult male co-defendants. Law enforcement officers apprehended each pair engaging in consensual homosexual sodomy in the restrooms of commercial establishments. Numerous complaints precipitated all three investigations. Since 1981 there have been no convictions involving consensual heterosexual sodomy.

The county attorney's office attributes the small number of convictions to its policy of nonenforcement and to its frequent use of less stringent statutes in most sodomy cases. Gay participants are usually charged with disorderly conduct or "lewd and lascivious behavior."[25] Adult instigators of sodomy with minors may be charged under the criminal sexual conduct statutes.[26] The county no longer invokes section 609.293 except in cases of public consensual sodomy.

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21. Minneapolis Star & Tribune, Oct. 4, 1983, at 1A, col. 6.

22. *See infra* notes 48-58 and accompanying text.

23. *See infra* note 144.

24. Assistant to the County Attorney, Interview with Robert Lynn, Sexual Assault Division, Hennepin County Attorney's Office, Minneapolis, Minn. (March 26, 1984).

25. *See* Minn. Stat. § 609.72 (1982). *See also* Minn. Stat. § 617.23 (1982) (indecent exposure) and Minn. Stat. § 617.23 (1982). "Lewd and lascivious behavior" is an aspect of "indecent exposure" under Minnesota law. Although "lewd and lascivious behavior" is a much less serious crime than sodomy, the numerous charges under that statute have been devastating to gay men in Minneapolis, some of whom have chosen to commit suicide when faced with exposure of their homosexual acts. Osborne, *supra* note 4.

26. *See infra* note 144.

C. *Study of Minnesota Case Law*

Study of Minnesota case law concerning sodomous conduct suggests that the criminal law views men, not women, as culpable actors in sodomy and punishes men when they commit sodomy too violently, with children, or with other men. The study indicated that of fifty cases appealed[27] all involved male defendants.[28] Only two defendants appeared not to be adults.[29] Forty-five opinions included some facts relevant to discriminatory enforcement of section 609.293 or other relevant statutes. Seven opinions did not mention the age or sex of the person upon whom sodomy was committed by the defendant.[30] Of the remaining thirty-eight, eight described the target of the behavior as a woman,[31] and twenty-one involved children of either

27. This case study involved only sodomy cases in which defendants appealed their convictions. These cases do not necessarily typify all sodomy cases. Most cases in the study, however, reflect the county's policy of nonenforcement except under special circumstances.

28. In practice, lesbians, unlike gay men, have always been exempt from actual prosecution under section 609.293, even though they are frequently perceived as engaging in illegal sexual conduct. Lesbians are clearly affected by the statute's function as the embodiment of anti-homosexual and homophobic sentiment. One Minneapolis lesbian who requested anonymity remarked,

> You don't know exactly *what* they could get you for, but you know to stay out of trouble and keep away from the police; if you get mixed up with the law it's bound to come out that you're a lesbian and they *can* use that against you.
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> More than that, though, it's just humiliating to realize that your private life is of such interest to total strangers that they want to interfere in it. It's as if they're saying, 'we know you're sick—you're queer—and we think it's disgusting. We may not be able to stop you, but we want you to know that you're disgusting.'

29. In State *ex rel* Polk v. Tahash, 290 Minn. 493, 493-94, 186 N.W.2d 175, 175-76 (1971), the defendant was either 19 or 20 years old. In Minnesota v. Profit, 323 N.W.2d 34, 36 (Minn. 1982), the defendant was 18 years old.

30. The five cases without relevant facts in the opinions were: Minnesota v. C.A., 304 N.W.2d 353 (Minn. 1981); State *ex rel* Polk v. Tahash, 290 Minn. 493, 186 N.W.2d 175 (1971); State *ex rel* Sandeen v. Lund, 278 Minn. 433, 153 N.W.2d 894 (1967); Washburn v. Utecht, 236 Minn. 31, 51 N.W.2d 657 (1952); and State *ex rel* Gagnon v. Utecht, 227 Minn. 589, 34 N.W.2d 721 (1948).

The seven cases in which the age or sex of the victim was not mentioned but which provided some facts concerning the nature and/or manner of the crime were: Ani v. Minnesota, 288 N.W.2d 719, 720 (Minn. 1980); Minnesota v. Corarito, 268 N.W.2d 79, 79-80 (Minn. 1978); Minnesota *ex rel* Crosby v. Wood, 265 N.W.2d 638, 638 (Minn. 1978); Minnesota v. Ani, 257 N.W.2d 699, 699 (Minn. 1977); Minnesota v. Coleman, 311 Minn. 514, 514-15, 247 N.W.2d 56, 56-57 (1976); State v. Tellock, 273 Minn. 512, 514, 142 N.W.2d 64, 66 (1966).

31. The eight cases concerning women victims were: Peterson v. Minnesota, 282 N.W.2d 878, 879 (Minn. 1979); Minnesota v. Carignan, 271 N.W.2d 442, 444 (Minn. 1978); Minnesota v. Vance, 254 N.W.2d 353, 356 (Minn. 1977); Minnesota v. Hill, 312 Minn. 514, 514, 253 N.W.2d 378, 380 (1977) (the victim was 17 years old); State v. Riley, 303 Minn. 251, 251, 226 N.W.2d 907, 908 (1975); State v. Comparetto, 292 Minn. 425, 425, 193 N.W.2d 626, 627 (1971); State v. Taylor, 290

sex[32] (approximately half were girls). Three cases indicated the victim was female without describing her age, while one case involved a male of undesignated age.[33]

Only five "victims" were adult males. One man was eighty-four years old.[34] Two others were homosexually assaulted while in state custody.[35] The remaining two cases both involved consensual sodomy between adult males in department store bathroom stalls.[36]

Thirty-four opinions described the use of force through violence and threats, or the abuse of children. The women victims of sodomy were subjected to brutal violence. Of the seven non-consensual sodomy cases[37] involving women victims, de-

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Minn. 515, 515, 187 N.W.2d 129, 130 (1971); State v. Schmit, 273 Minn. 78, 79, 139 N.W.2d 800, 802 (1966). The opinions did not state whether any of the victims were lesbians.

32. LaQuier v. Minnesota, 333 N.W.2d 638 (Minn. 1983) (victim was a "child"); Minnesota v. Profit, 323 N.W.2d 34 (Minn. 1982) (victim was a 15 year old girl); Laube v. Minnesota, 322 N.W.2d 723 (Minn. 1982) (victims were "three boys, ages 13 and 14"; the defendant had also murdered a "young girl"); Minnesota v. Coolidge, 282 N.W.2d 511 (Minn. 1979) (victim was a 16 year old male); State v. Koonsman, 281 N.W.2d 487 (Minn. 1979) (victim was one of two "brothers, ages 7 and 13"); Young v. Minnesota, 281 N.W.2d 692 (Minn. 1979) (victims were three girls, ages 9, 10, and 11); Minnesota v. Carignan, 272 N.W.2d 748 (Minn. 1978) (victim was a "child"); Korman v. Minnesota, 262 N.W.2d 161 (Minn. 1977) (victim was a "child"); State v. Shotley, 305 Minn. 384, 386, 233 N.W.2d 755, 757 (1975) (victim was a "boy"); State v. Chapman, 297 Minn. 508, 509, 210 N.W.2d 234, 235 (1973) (victim was a 14 year old girl); State v. Gengler, 294 Minn. 503, 504, 200 N.W.2d 187, 188 (1972) (victim was a 14 year old child); State v. Otten, 292 Minn. 493, 195 N.W.2d 590 (1972) (victim was a 14 year old girl); State *ex rel* Radke v. Tahash, 283 Minn. 146, 147, 166 N.W.2d 710, 711 (1969) (victim was a 7 1/2 year old child); State v. Pooley, 278 Minn. 67, 68, 153 N.W.2d 143, 144 (1967) (victim was defendant's 14 year old stepson); State v. Kobi, 277 Minn. 46, 47, 151 N.W.2d 404, 405 (1967) (victims were a 6 year old boy and possibly a 10 year old girl); State *ex rel* Edberg v. Tahash, 274 Minn. 334, 336, 143 N.W.2d 825, 826 (1966) (victim was a "boy"); State v. Spreigl, 272 Minn. 488, 489, 139 N.W.2d 167, 168 (1965) (victim was defendant's 11 year old stepdaughter); State v. Anderson, 270 Minn. 411, 414, 134 N.W.2d 12, 14 (1965) (victim was a male, age 8); State v. Hopfe, 249 Minn. 464, 465-66, 82 N.W.2d 681, 682-83 (1957) (victim was a 15 year old boy prostitute); State v. Jones, 234 Minn. 438, 439, 48 N.W.2d 662, 663 (1951) (victim was a 15 year old boy); State v. Quinnild, 231 Minn. 99, 100, 42 N.W.2d 409, 410 (1950) (victim was a 13 year old boy).

33. Minnesota v. Gilbert, 262 N.W.2d 334, 336 (Minn. 1977); Swanson v. State, 284 Minn. 66, 68, 169 N.W.2d 32, 34 (1969); State *ex rel* Baker v. Utecht, 221 Minn. 145, 147, 21 N.W.2d 328, 330 (1946).

34. State v. Marks, 295 Minn. 530, 203 N.W.2d 344 (1972) (defendant was convicted under subdivision 2 of the 1967 statute: aggravated sodomy, which includes force, threats, or the incapacity of the victim).

35. Minnesota v. Hyatt, 281 N.W.2d 716 (Minn. 1979); State v. Presley, 300 Minn. 556, 557, 220 N.W.2d 486, 487 (1974).

36. Minnesota v. Willadson, 268 N.W.2d 546 (Minn. 1978); State v. Bryant, 287 Minn. 205, 206, 177 N.W.2d 800, 801 (1970).

37. *Schmit*, 273 Minn. at 79, 139 N.W.2d at 802 (may have involved consensual heterosexual sodomy).

fendants kidnapped one victim, kidnapped and pimped another,[38] attacked two victims after intruding into their homes,[39] attacked one woman after she accepted a ride,[40] physically abused one woman and threatened her life,[41] and attempted to murder another victim.[42]

The affirmance rate in sodomy cases appeared high except in cases of consensual homosexual sodomy between adult male peers. As Winton's case suggests, reversal of these cases may be the result of social ambivalence toward gay men. The Minnesota Supreme Court affirmed thirty-eight of forty-five convictions.[43] It reversed and remanded or granted a new trial for six convictions, of which one involved consensual homosexual sodomy, one involved homosexual teenage prostitution, and one may have involved consensual heterosexual sodomy.[44] The other consensual homosexual sodomy case was reversed outright.[45]

D. Summary

Historical information from sodomy cases and modern statistics from the county attorney's office expose four significant trends in the enforcement of section 609.293. First, the statute regulates the conduct of men. Second, the conduct regulated is, for the most part, rape of women and children. Third, when the statute regulates consensual sodomy, the sexual acts are almost exclusively between two gay men. And fourth, courts will reverse convictions of consensual sodomy between peers more often than similar convictions of men engaging in sodomy with their social inferiors.

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38. *Hill*, 312 Minn. at 515-16, 253 N.W.2d at 380-81; *Taylor*, 290 Minn. at 515-16, 187 N.W.2d at 130.

39. *Comparetto*, 292 Minn. at 425, 193 N.W.2d at 627; *Riley*, 303 Minn. at 251, 226 N.W.2d at 908.

40. *Vance*, 254 N.W.2d at 356.

41. *Peterson*, 282 N.W.2d at 879.

42. *Carignan*, 271 N.W.2d at 443.

43. These affirmances include those affirmed but reduced in sentence or reversed on other charges.

44. *Willadson*, 268 N.W.2d at 546-47 (consensual sodomy); *Spreigl*, 272 Minn. at 497, 139 N.W.2d at 173; *Schmit*, 273 Minn. at 90, 139 N.W.2d at 809; *Hopfe*, 249 Minn. at 466-68, 475, 82 N.W.2d at 682-84, 688 (boy prostitution); *Jones*, 234 Minn. at 443, 48 N.W.2d at 665; *Quinnild*, 231 Minn. at 108, 42 N.W.2d at 414 (one defendant was aquitted of sodomy but convicted on charges of assault arising out of the incident). *Presley*, 330 Minn. at 556-57, 220 N.W.2d at 487.

45. *Bryant*, 287 Minn. at 206, 212, 177 N.W.2d at 801, 804 (consensual sodomy).

II. Section 609.293's Social Function

Introduction

Sodomy statutes usually regulate activities in the private sphere.[46] To assess state regulation in the private sphere, we must first understand the sociopolitical power structure of "private" relations. This understanding defines the constitutional relationship between the state and those with social power. It also reveals the effects of both intervention and non-intervention on those without social power—in this case gay men and women as a class, particularly lesbians.

A political analysis of sodomy and sodomy law in Minnesota reveals that section 609.293 serves to punish non-consensual, typically heterosexual behavior. This does not mean that the state is reluctant to prosecute lesbians and gays because they are homosexual. Rather, prosecutors are more likely to characterize sexual contact between socially powerful adult males, as opposed to between adult males and their social inferiors, as *consensual* in the masculine sense of the word. The power to consent, that is, to refuse, is inherent in and exclusive to the masculine gender role. Consensual sexual contact between male peers is, in a sense, an expression of the status quo of male power. Therefore, men engaging in such behavior are not often punished severely or openly through the legal system.

A. Institutionalized Heterosexuality

Social values have been largely defined by heterosexual men who have power over women and children.[47] Individual men do not have to establish their sexual power in society. Instead, the heterosexual hierarchy that gives them power perpetuates itself through custom and law. This system is pervasive and sometimes subtle. It is both legal and extra-le-

46. *See* Ruth Colker, *Pornography and Privacy: Toward the Development of a Group Based Theory for Sex Based Intrusions of Privacy*, 1 Law & Inequality 191 (1983). "Private" is often a synonym for the term "sexual." While private life (or sexual experience) is one facet of *men's* total experience, one which they define and control, private life (or sexuality) is *for women* the definition by men of women's total experience. Society defines women in terms of their sexuality and men's control over the private sphere translates into control over women's very beings and every aspect of their lives.

47. Andrea Dworkin defines male power to include 1) the power of the self, 2) the right to physical strength, 3) power to terrorize and instill fear in women as a class, 4) the power of naming, to define experience, 5) power of owning women and their issue, 6) power of money or wealth, and 7) the power of sex (which is defined by what the male does with his penis). Andrea Dworkin, Pornography: Men Possessing Women 1-24 (1981).

gal.[48] Male-dominated heterosexuality has become institutionalized in society.

A pervasive system of gender roles helps to maintain institutionalized heterosexuality.[49] Gender roles codify the everyday details of male dominance and female subservience.[50] Traditionally, women's gender role is to be the object of male sexual aggression.[51] Children are also objects of male sexual aggression because they are socially and sexually identified with women.[52] Male-initiated sexual aggression is, for the most part, acceptable in society. But men and therefore society as a whole find sexual contact between adult males frightening and unacceptable because it renders *men* objects of male sexual aggression and violence.[53] For "male sexual aggression is the unifying thematic and behavioral reality of male sexuality; it does not distinguish homosexual men from heterosexual men or heterosexual men from homosexual men."[54] Not every instance of heterosexual contact leaves a woman bruised and bloody.[55] Still, most concepts of sex and sexuality depend upon reference to a hierarchical gender system in which adult males have power over women and children. More specifically, power and its exercise through dominance and submission are the essence of sexiness in our society. Sex itself becomes male-oriented, even when there is no male participant, because the social reality of power is that it is inherently masculine. Ultimately, "sexual expression shaped by sex roles . . . allocates power in the interest of men and to the detriment of women."[56] Male power over women and children, even if some men do not exercise it overtly, inheres in every sexual act between persons

48. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence* in Women: Sex and Sexuality (Catharine Stimpson and Ethel Spector Person eds. 1980).

49. *See* Diana Russell, Rape in Marriage, 355-56 (1982).

50. Patricia Miller and Martha Fowlkes, *Social and Behavioral Constructions of Female Sexuality* in Women: Sex and Sexuality 256, 259 (Catharine Stimpson and Ethel Spector Person eds. 1980).

51. *Id.*

52. Dworkin, *supra* note 47, at 50.

53. "As long as male sexuality is expressed as force or violence, men as a class will continue to enforce the taboo against male homosexuality to protect themselves from having that force or violence directed against them." *Id.* at 60.

54. *Id.* at 57.

55. Andrea Dworkin attributes limits on male violence to the fact that "[m]en choose their spheres of advocacy according to what they can bear and/or what they can do well. Men will advocate some forms of violence and not others. Some men will renounce violence in theory, and practice it in secrecy against women and children." *Id.* at 52.

56. Catharine MacKinnon, Sexual Harassment of Working Women 156-57 (1979).

because it inheres in the concept of sex itself. Hence, the male-dominated gender system and sexual practice tend to strengthen one another through the mutual perpetuation of male power.

B. The Role of Consent

Within the context of forced institutionalized heterosexuality, "consent" is also defined only with reference to male power over women and children. By its definition the term functions to perpetuate male power. "Consent" by a woman or a child is, in political terms, never on an equal footing with consent by a man. Women's and children's "consent" to sexual activity is recognized when it enhances male power. Men's consent to sexual activity is power.

Three basic realities reveal the role of "consent" in institutionalized heterosexuality. First, the contradiction between women's "consent" and the realities of rape denies women sexual power over their own bodies. Few women are able to actually avoid, or have the power not to consent, when men attempt rape. Second, the social and legal conception of what *constitutes* a woman's consent to the commission of sexual acts upon her is so broad as to make the term almost meaningless.[57] Spoken or gestured refusal is often interpreted as consent. If a female victim of sexual attack manifests any sexuality past or present, both the legal system and her social community are likely to characterize her as a seducer. Third, women's relative economic and psychological powerlessness often prevents them from exercising any power to refuse that men may grant them. In short, women are always presumed to consent to sexual aggression being acted out upon them. This presumption arises from the rigid female gender role of sexual submittor which defines female sexuality *as* consent to male sexual aggression. The presumption always reduces women's power to refuse.

Men's power to consent, in contrast, is so universal that it is seldom even considered except in the context of homosexual rape. Although men are sometimes the victims of rape, the percentage of adult male victims as compared to women and children victims is very small.[58] Homosexual rape evokes greater

57. *Id.* at 158. *See also* discussion of Rusk v. State, 406 A.2d 624 (Md. Ct. Spec. App. 1979), *rev'd*, 424 A.2d 720, (Md. 1980), in Caleb Foote and Robert Levy's textbook, Criminal Law: Cases and Materials, 609-17 (1981) for an example of men's inability even to decide whether to allow women to refuse sexual contact.

58. "Boys and men do experience sexual abuse at the hands of men. The

social outrage than heterosexual rape. This outrage both obscures the identity of the victims of the vast majority of rapes and instead focuses on men, as is the social norm. This outrage also occurs because men are presumed *not* to consent to sexual aggression being acted out upon them. This presumption arises from the rigid male gender role of the sexual aggressor. Exercising the presumption allows men the power to refuse by mere inaction.

In the context of institutionalized heterosexuality, sexual contact deemed "consensual" by its very nature will always affirm men's power over women because the dominant, socially empowered or "masculine," partner's consent means more than the submissive, socially devalued or "feminine," partner's consent.

C. Consent and Homosexual Sodomy

When consensual activity is homosexual, it is socially condemned not because it undermines male power, but because it extends that power too far, allowing it to be exercised over other less powerful men.

Homosexual sodomy between adult male peers is, in a sense, the ultimate exercise of male power through consent. Truly mutual consent in society is possible *only* between adult male peers.[59] Sexual behavior of the socially powerful is very difficult to prosecute. The socially powerful control privacy and they usually engage in sexual behavior in private. Between adult male peers, disclosure would operate against the sociopolitical as well as the penal interests of both parties. Hence, a failure to prosecute consensual homosexual sodomy is better viewed as the legal sanction of male sexual prerogative than as official condonation of homosexuality *per se*.

As an example of the exercise of male sexual power in "consensual" sexual contact, Judge Winton's case has come to represent conflicting—and perhaps changing—attitudes of a

homophobe's distorting concentration on this fact, which cannot and must not be denied, neatly eliminates from view the primary victims of male sexual abuse: women and girls." Dworkin, *supra* note 47, at 56.

59. Lesbians, *as women*, lack the requisite social power to consent and hence may be hindered in their sexual relations by social definitions of sex and sexuality. *As lesbians*, however, they may experience sex and sexuality outside the context of male participation and definition. *See* Marilyn Frye, *To Be and Be Seen: The Politics of Reality*, in The Politics of Reality: Essays in Feminist Theory 152 (1983). Absent an enforcer, male dominance no longer demands consent in the traditional sense. At this point, the sexualization of dominance and submission gives way to the possibility of mutuality.

male-dominated society toward gay men who are on the one hand very highly valued as men, and on the other, devalued as gay. Winton has attained public power, material wealth, and social prestige. He may be deemed to have benefited from and upheld male privilege through these traditional aspects of institutionalized male power.[60] Moreover, in light of Winton's social and professional prestige,[61] the relative youth of his sexual partners,[62] and his dominant role in the encounters,[63] Winton's behavior so typified the heterosexual male gender role that it is not surprising that the Minnesota legal system treated him as if he had engaged in heterosexual prostitution and not consensual homosexual sodomy.[64]

Yet Winton chose to relinquish a great deal of his male power by publicly discussing his homosexuality. At his hearing, Winton spoke of homosexual status as completely analogous to heterosexual status rather than as an aberration.[65] And perhaps most significantly, Winton openly contemplated future violation of section 609.293 in mature homosexual relationships with his adult male peers. His unusually frank statements implicitly threaten the system of institutionalized heterosexuality

60. Until the WCCO scandal, Winton was the epitome of the traditionally powerful male. His position of district court judge is an influential one, commanding a comfortable guaranteed salary ($48,000 per year). He was allowed considerable judicial discretion, and his reputation gave him a great deal of freedom to exercise that discretion. He was used in especially difficult or controversial cases because of his reputation for fairness.

61. Winton's criminal acts were in many ways a typical exercise of male sexual prerogative. Since males typically command money while women have traditionally relied upon them for financial support, sexual favors in return for money, whether within marriage or in the brothels, are a traditional aspect of institutionalized heterosexuality. Men's financial power is a significant component of their sexual power over women, and economic force is a major expression of male sexual aggression. "[T]he exchange of sex for survival has historically assured women's economic dependence and inferiority as well as sexual availability to men. Women historically have been required to exchange sexual services for material survival, in one form or another. Prostitution and marriage . . . institutionalize this arrangement," MacKinnon, *supra* note 56, at 174. Winton paid his partners to engage in sodomy with him.

62. At least one of Winton's partners was a minor while Winton is in his late fifties. The age difference aggravates the power differential between them.

63. Winton was apparently the sexual aggressor in the encounters; he performed fellatio upon the other males.

64. To maintain an appearance of propriety, courts in Minnesota have been fairly lenient concerning more common offenses committed by its judges and attorneys and hence have avoided the publicity of disciplinary actions. Common offenses such as alcoholism and heterosexual prostitution for example, are deemed to be "unrelated to the practice of law." See *In re* Kimmel, 322 N.W.2d 224 (Minn. 1982).

65. Minneapolis Star & Tribune, May 12, 1983 at 1A, col. 5: "I can put my feelings aside just like any heterosexual judge can when he is trying a rapist."

which protects males from masculine sexual aggression by social taboo.

The Minnesota Supreme Court is unlikely to declare section 609.293 unconstitutional in a case involving a male so closely identified with the judiciary and so clearly symbolizing male power. But, as the controversy around Winton's case indicated, gay men's gradual acquisition of power and social status may bring about a reevaluation of male homosexuality which may eventually have constitutional significance.

III. Constitutional Challenges to Sodomy Law

Many state courts have considered constitutional challenges to sodomy laws. These challenges have claimed sodomy laws 1) violate rights to privacy,[66] equal protection,[67] and freedom of expression,[68] or that they are 2) unconstitutionally vague[69] and overbroad,[70] 3) impositions of cruel and unusual punishment,[71] or 4) impermissible establishments of religion.[72] Unsuccessful challengers at the state level gained a forum in the United States Supreme Court in *Doe v. Commonwealth's Attorney for the City of Richmond*.[73] In *Doe*, the Court rejected several federal constitutional objections to a Virginia sodomy statute. In effect, the Court's decision in *Doe* left state courts and legislatures free either to retain the laws or to invalidate them under state constitutions. *Doe*'s uncertain precedential value has prompted some state courts to base invalidation on federal constitutional grounds.

66. Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976); People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied* 451 U.S. 987 (1981).

67. *Onofre*, 51 N.Y.2d at 485, 434 N.Y.S.2d at 949, 415 N.E.2d at 938-39; Hughes v. State, 14 Md. App. 497, 505, 287 A.2d 299, 305 (1972), *cert. denied*, 409 U.S. 1025 (1972); Stewart v. United States, 364 A.2d 1205 (D.C. 1976).

68. *Doe*, 403 F. Supp. at 1200; State v. Bateman, 113 Ariz. 107, 109, 547 P.2d 6, 8, *cert. denied*, 429 U.S. 864 (1976).

69. Rose v. Locke, 423 U.S. 48 (1975); Canfield v. State, 506 P.2d 987 (Okla. Crim. App. 1973), *appeal dismissed*, 414 U.S. 991 (1973); *Bateman*, 113 Ariz. at 109-10, 547 P.2d at 8-9; State v. Levitt, 118 R.I. 32, 371 A.2d 596 (1977); State v. Enslin, 25 N.C. App. 662, 214 S.E.2d 318 (1975); Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974).

70. Swikert v. Cady, 381 F. Supp. 988 (E.D. Wis. 1974), *aff'd*, 513 F.2d 635 (7th Cir. 1975); Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973) *cert. denied*, 416 U.S. 905 (1974).

71. *Doe*, 403 F. Supp. at 1200; *Carter*, 255 Ark. at 232-33, 500 S.W.2d at 373.

72. *Carter*, 255 Ark. at 230-31, 500 S.W.2d at 372-73; *Stewart*, 364 A.2d 1208-09.

73. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976).

The U.S. Supreme Court generally defers to the judgment of state legislatures concerning the validity of state law. Since the Supreme Court decided *United States v. Carolene Products*[74] in 1938, however, it has demonstrated its willingness to review with "strict scrutiny" state legislation which "appears on its face to be within a specific prohibition of the constitution."[75] The Court applies this heightened standard of review, less deferential to the states than the usual "presumption of validity" for state law, when the challenged legislation violates a right "fundamental" to "substantive" due process under the fourteenth amendment. *Carolene Products* also suggested that statutes violating specific prohibitions of the constitution or prompted by "prejudice against discrete and insular minorities" might trigger strict scrutiny of the legislation.[76] The "strict scrutiny" standard requires that compelling state interests justify a state's violation of fundamental constitutional rights or discriminatory treatment of a "suspect" group and that no less burdensome means to the state's desired end exist. In other words, the state must carefully tailor the statutory means to fit the compelling end by the best means available.[77] If the right is not fundamental, or the group affected is not "suspect," a lower standard of scrutiny applies. Under the lowest standard of scrutiny, the Court will uphold legislation "if it is merely rationally related to some legitimate governmental purpose which falls within the States broad police powers."[78]

Constitutional challenges to sodomy statutes have seldom commanded strict or even intermediate scrutiny from the courts, and therefore few have been successful. Each constitutional challenge, however, has support in some case law. State courts have most often accepted privacy and equal protection arguments. Other arguments, perhaps because they involve more subjective judicial determinations, have had limited success in this politically volatile area.

A. Substantive Due Process and the Right to Privacy

Some courts have held that the constitutional right to privacy protects the right to engage in consensual sodomy.[79] Such a ruling would invalidate any state statute that significantly im-

74. 304 U.S. 144 (1938).
75. *Id.* at 152 n.4.
76. *Id.*
77. Griswold v. Connecticut, 381 U.S. 479, 504 (1965).
78. *Id.*
79. *See Onofre*, 51 N.Y.2d at 485, 434 N.Y.S.2d at 949, 415 N.E.2d at 938 (1980).

pinges upon that right unless the state has a sufficiently compelling reason to enact the statute. Although the Supreme Court rejected privacy challenges to a state sodomy statute in *Doe*, the Court's prior privacy cases provide a basis for extending the right of privacy to consensual sodomy. Some lower courts, citing this line of authority, have done so.

Plaintiffs challenging Minnesota's sodomy law on privacy grounds must assert that the prerogative to engage in consensual sodomy is a fundamental right that outweighs any possible state interest in its regulation. Bringing such a challenge will occasion a political balancing contest. Lesbian and gay opponents of section 609.293 are disadvantaged in that contest by two current legal trends. First, the Supreme Court has struggled to limit the spectrum of available "fundamental" rights to conservative and time-honored activities related to heterosexuality, such as childrearing and marriage.[80] Without new personnel or more educating advocacy,[81] the conservative Court seems unlikely to see as fundamental the freedom to engage in what has traditionally been considered deviant sex acts. And, second, regardless of which "tier" of scrutiny is applied to the statute, federal courts have allowed the states to assert "compelling" interests such as the prevention of crime and "moral delinquency," without requiring specific proof of any causal connection between these interests and the regulation of sodomy.

Heterosexual couples who practice sodomy might persuade the Supreme Court to recognize a fundamental right of privacy protecting heterosexual sodomy. The Supreme Court in *Griswold v. Connecticut*[82] held that the marital relationship is "within the zone of privacy created by several fundamental constitutional guarantees."[83] The Court invalidated a state law forbidding the use of contraceptives by married couples.[84] Justice Douglas, writing for the majority, was repulsed by governmental invasion of "the sacred precincts of marital bedrooms."[85] In *Eisenstadt v. Baird*,[86] the Court extended the

80. Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942); Loving v. Commonwealth of Virginia, 388 U.S. 1, 12 (1967).

81. *See, e.g.*, David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 Law & Inequality 33 (1984).

82. *Griswold*, 381 U.S. 479 (1965).

83. *Id.* at 485.

84. *Id.*

85. *Id.*

86. 405 U.S. 438 (1972). Subsequently, the Supreme Court held in *Stanley v. Georgia* that the right to privacy prohibits the state from making criminal

right of married persons to use contraceptives to unmarried individuals. The Court reasoned that the equal protection clause required even-handed treatment of married and unmarried (heterosexual) persons as regards contraception.[87] In *Roe v. Wade*,[88] the Court further broadened the zone of privacy to include a woman's right to terminate her pregnancy by abortion during the first trimester after conception.[89]

The privacy challenge to Minnesota's sodomy statute may be attractive to lesbian and gay, as well as heterosexual, opponents of section 609.293 because it has been more seriously discussed and more readily accepted than other constitutional challenges. A favorable privacy ruling, moreover, would operate to decriminalize consensual sodomy, both homosexual and heterosexual.

Challengers of section 609.293 have a model privacy argument in *People v. Onofre*.[90] In *Onofre*, the New York Court of Appeals invalidated New York's sodomy statute in 1980.[91] Reading the prior cases broadly, the court in *Onofre* extended the *Griswold* line of privacy cases to support a fundamental right to engage in both homosexual and heterosexual sodomy in private. The court construed the privacy right first articulated in *Griswold* and *Eisenstadt* as standing for a fundamental right of privacy encompassing "the right . . . to make decisions with respect to the consequence of sexual encounters and, necessarily, to have such encounters. . . ."[92] The New York court also interpreted a Supreme Court pornography case as recognizing the fundamental right to "seek sexual gratification by viewing [obscene material in private]."[93] Noting that the state

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"mere private possession of obscene material," pornography, within one's home. 394 U.S. 557, 568 (1969).

87. Justice Brennan, in an often quoted paragraph of the majority opinion, justified this extension of *Griswold*:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If 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 or not to bear or beget a child.

Id. at 453.

88. 410 U.S. 113 (1973).

89. *See also Roe's* progeny in Colker, *supra* note 46, at 207 n.64.

90. 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980).

91. *Id.*

92. *Id.* at 487, 434 N.Y.S.2d at 950, 415 N.E.2d at 940.

93. *Id.* (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

had made no showing of physical harm to individuals engaging in sodomy, the court saw no reason that "the right of privacy . . . to indulge in acts of sexual intimacy by unmarried persons" should not extend to protect consensual sodomy, both homosexual and heterosexual.[94] Having determined that the sodomy statute impinged significantly upon this fundamental right, the court applied a standard of strict scrutiny. The state had failed to show (beyond its bald assertions) any danger to public health or morals due to sodomous conduct. The court, therefore, found no compelling state interest to justify the violation of privacy.

It is uncertain whether the Supreme Court would accept such an argument. The Court has lent some approval to pro-statutory opinions confining the *Griswold* precedent strictly to their facts in its summary affirmance of *Doe v. Commonwealth's Attorney for Richmond*. The lower court in *Doe* more clearly limited *Griswold* to decisions concerning procreation, and refused to recognize a fundamental right to privacy in choosing any particular form of sexual gratification. It held that the rational-basis test was applicable and sodomy laws might be upheld so long as the legislature might reasonably have believed that criminalization of sodomy would protect public health and morals.[95] However, changing attitudes might prompt the Supreme Court to follow the New York Court of Appeals' interpretation of the privacy doctrine in *Onofre*.

The lower court in *Doe*, like the dissent in *Onofre*, restricted *Griswold* to matters of marriage and procreation, and held that there was "no authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life. . . ."[96] *Doe*, however, was decided by a three-judge panel with one judge dissenting for the same reasons as were later set forth in *Onofre*. It was affirmed without oral argument by the Supreme Court and is therefore of uncertain precedential value.

By ignoring Winton's violation of the sodomy statute, the Minnesota legal system extended a *de facto* privacy right to Winton's prerogative to engage in consensual homosexual sod-

94. *Id.* at 488, 434 N.Y.S.2d at 951, 415 N.E.2d at 940.

95. Unprovable assumptions, about what is necessary to protect societal interest in order and morality, suffice under the rational-basis test to show that the law based on those assumptions is a valid exercise of the police power. Paris Adult Theater I v. Slaton, 413 U.S. 49, 63-64 (1973).

96. *Doe*, 403 F. Supp. at 1202; *Onofre*, 51 N.Y.2d at 498, 434 N.Y.S.2d at 957, 415 N.E.2d at 946 (Gabrielli, J., dissenting).

omy. Perhaps the trial court's treatment of Winton's prosecution signals a willingness to consider privacy challenges in the future. A Minnesota Supreme Court decision to allow Winton to remain on the bench would have amounted to a determination that homosexuality does not negatively affect the moral or intellectual capacity of a district court judge to decide cases. Had such a precedent been set, Minnesota's courts would have had great difficulty upholding section 609.293's constitutional validity on grounds that homosexual sodomy is either morally reprehensible or dangerous to the public. Had Winton been allowed to stay on the bench, due process arguments based on the *Griswold* line of privacy cases would have been a great deal more persuasive. As *Onofre* illustrates, the state's inability to prove any substantial harm from consensual sodomy is the key to a successful due process challenge. Without proof of harm there is neither a "compelling state interest" to outweigh intervention under strict scrutiny, nor a "rational basis" for the statute under the lowest deferential lower tier of scrutiny.

The *Griswold* line, however, is a less favorable foundation for rights of lesbians and gays, for it reinforces male-defined and male-centered notions of "consent." The *Griswold* cases, insofar as they imply a zone of privacy around sexual activity, generally extend to those with social power the freedom to do as they wish, without governmental interference, so long as their activity is termed "sexual." In this way the *Griswold* line benefits men as a class by reaffirming and extending their sexual prerogative.

For women, the result of a policy of non-intervention into "private" sexual relations is exploitation[97] because society defines sex in terms of the exploitation of women and other social inferiors by men. Extending the heterosexual sexual privacy right to consensual homosexual sodomy would bolster the erroneous belief that "private" heterosexual relations are always "consensual" and therefore, by definition, non-exploitative. Strict non-interventionism through privacy doctrine glosses over the unequal power relations which are the source of an exploitative concept of "consent."

Extending privacy rights without considering inequality in the private sphere might produce two harms. First, the extension of a privacy right to consensual homosexual sodomy would expose socially devalued males to a sexual status similar to

97. For a discussion of sexism in privacy law, see Colker, *supra* note 46 at 199-213.

that of women. Second, this extension would add legitimacy to men's sexual power, which by definition could subject women to more intrusive sexual abuse within the confines of male-dominated "consensual" sexual relations.

While intervention by a male-dominated legal system does not guarantee equality, a judicial forum allows women and other socially devalued individuals to challenge sexist definitions of consent by seeking relief from or remedy for the imposition of sexual contact by men. Use of the constitutional concept of privacy by challengers of Minnesota's sodomy statute may perpetuate sexism. Current privacy doctrine seems to ignore sexist gender conceptions that are a result of and have resulted in a power differential between men and women in the "private" sphere. The doctrine has functioned to preserve that differential. Unfortunately, Winton's relatively lenient treatment by the criminal justice system seems to reinforce rather than challenge the institutional concept of privacy in sexual activity.

B. Equal Protection

Lesbian and gay opponents of sodomy statutes have argued that the equal protection clause of the fourteenth amendment forbids the disparate treatment that the statutes occasion. A logical corollary to the privacy challenge, the equal protection argument has had limited success in that it has not served to protect lesbians and gays *as such* from the effects of sodomy laws. The anti-lesbian, anti-gay impact of the laws has survived with approval.

The equal protection clause requires that "a [statutory] classification [of persons] 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[98] Equal protection arguments have therefore centered on issues of differences between various groups or classes of people and the relation of statutory classifications to those differences.

Under the "mere rationale" test, a discriminatory statute is upheld so long as "the classification [it draws] has relation to the purpose for which it is made."[99] The Court has described deferential review in equal protection law: "[W]e will not over-

98. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

99. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

turn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[100]

Since *Carolene Products*,[101] discriminatory infringement of a "fundamental" right or discrimination against a "protected class" requires that the state justify the statute with "compelling" state interests and that the discriminatory classification is "necessary" to achieve the desired goal.[102] In equal protection analysis this means the difference that the classification purports to reflect must be both real and accurately described.

Despite the two-tiered theory, equal protection case law reveals a multi-tiered or "sliding scale" approach. The nature of the group discriminated against and the importance of the right violated determine the level of scrutiny to be applied. Different levels of scrutiny require different degrees of corollation between statutory classifications and "real" differences.

In *San Antonio Independent School District v. Rodriguez*,[103] the Supreme Court set forth "the traditional indicia of suspectness: the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[104] The Court has also used strict scrutiny when the class discriminated against has " 'been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities . . .' "[105], when the characteristic upon which the classification is drawn "is an immutable characteristic determined solely by an accident of birth . . ."[106] or when the characteristic "frequently bears no relation to the ability to perform or contribute to society."[107]

While racial classifications are "immediately suspect" and trigger "the most rigid scrutiny,"[108] classifications based on sex

100. Vance v. Bradley, 440 U.S. 93, 97 (1979).

101. *See supra* notes 74-78 and accompanying text.

102. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); *In re* Griffiths, 413 U.S. 717, 722-23 (1973).

103. 411 U.S. 1 (1973).

104. *Id.* at 28.

105. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307-313 (1976) ("aged" persons did not constitute a "suspect" class).

106. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (women did not constitute a "suspect" class).

107. *Id.*

108. Korematsu v. United States, 323 U.S. 214, 216 (1944).

characteristics trigger only an intermediate level of scrutiny. "[C]lassifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives."[109] Sex discrimination is not considered "inherently odious" as racial discrimination is because it does not share according to the Court, the latter's "lengthy and tragic history."[110]

Some federal courts have relied on *Doe* as authority in holding that gays and lesbians are not a protected class for purposes of the equal protection clause.[111] Some courts, however, have applied an "intermediate" level of review to sodomy law, recognizing that laws which infringe on homosexual preference violate the "fundamental" right to privacy.[112] Under such scrutiny, the court balances the individual right violated against the importance of the governmental interest, and also considers the degree to which the right is infringed upon and the availability of less restrictive statutory means.[113] As in privacy law, the government is allowed to assert largely unprovable "compelling" state interests that may prevail over an equal protection challenge to a sodomy law despite the law's discriminatory infringement of "fundamental" rights.

Other federal courts have distinguished *Doe*, finding that lesbians and gays form a protected class because they have all the indicia of "suspectness." A Texas court, for example, reasoned that most homosexuality is "not a matter of choice."[114] Applying strict scrutiny, the court found that a Texas statute proscribing only homosexual sodomy[115] was not sufficiently re-

109. Craig v. Boren, 429 U.S. 190, 197 (1976) (emphasis added).

110. University of California Regents v. Bakke, 438 U.S. 265, 265-303 (1978).

111. Beller v. Middendorf, 632 F.2d 788, 809 (9th Cir. 1980); DeSantis v. Pacific T. & T. Co., Inc., 608 F.2d 327, 333 (9th Cir. 1979).

112. Hatheway v. Secretary of the Army, 641 F.2d 1376, 1381-82 (9th Cir. 1981).

113. *Id.* at 1381; Childers v. Dallas Police Department, 513 F. Supp. 134 (N.D. Tex. 1981).

114. Baker v. Wade, 553 F. Supp. 1121, 1143 (N.D. Tex. 1982). The court distinguished *Doe* as applying only to sodomy laws that do not discriminate between homosexual and heterosexual sodomy and hence do not violate the equal protection clause. *Id.* at 1136-38.

For discussions of homosexuality as natural and chosen, see After You're Out: Personal Experiences of Gay Men and Lesbian Women (Karla Jay & Allen Young eds. 1975); Sidney Abbott & Barbara Love, Sappho Was A Right-On Woman (1978).

115. *Baker*, 553 F. Supp. at 1150 ("Article 524 (Sodomy) was replaced with § 21.06 (Homosexual Conduct), which condemned only oral or anal sex between consenting adults of the same sex: 'A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex!").

lated to purported governmental interests in "morality, decency, health, welfare, safety and procreation" to withstand such scrutiny.[116]

In some states, like Minnesota, the equal protection challenge may be difficult to litigate because the laws, like section 609.293, seldom mention the sex of either participant in sodomous acts.[117] At least according to the literal text of many sodomy statutes, everyone is equally punishable for sodomous activity. Therefore, a successful equal protection challenge depends upon Minnesota courts' willingness to consider disparate enforcement of section 609.293's prohibition of consensual sodomy. Even if the courts reach the enforcement issue, they may consider lesbians and gays a proper focus of limited prosecutorial resources because lesbians and gays are presumed more likely than others to commit the proscribed acts.

If the prosecutor's decision not to charge Winton under the state's sodomy statute and the court's disposition of his criminal case signal a positive re-evaluation of gay men, then the state may be unable to prove a difference between the harm caused by consensual homosexual sodomy and that caused by consensual heterosexual sodomy. Since only gay men have been prosecuted in recent years the statute could be struck down as discriminatorily enforced. The equal protection clause would then preclude Minnesota from prosecuting and discriminating against lesbians and gay men simply because they are lesbians and gay men.

Onofre was a rare example of a successful equal protection challenge extended to protect the rights of lesbians and gays as *unmarried* persons. The New York sodomy statute did not apply to married couples engaging in sodomy. Using *Eisenstadt* as authority for extending the *Griswold* fundamental right to marital privacy, or sexual privacy, to the unmarried, the court found, without refering to the sex of the partners vis-a-vis one another, that no significant differences existed between the consensual sodomy of married couples and consensual sodomy of the unmarried. Hence there was no prerequisite legislative rationale, "compelling" or not, for treating these "similarly circumstanced" classes differently. The court invalidated the statute on equal protection grounds.

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116. *Id.* at 1124-25.

117. In Stewart v. United States, 364 A.2d 1205 (D.C. 1976), gay challengers lost on equal protection grounds since "by its very terms [the statute] proscribes specific conduct and does not single out any particular group of persons." *Id.* at 1207.

Unmarried lesbian and gay opponents might challenge the Minnesota sodomy statute on equal protection grounds. Section 609.293, however, makes no express distinction between married and unmarried persons. Without the express statutory distinction the argument depends on a successful privacy challenge by married persons establishing their right to engage in sodomy. Inevitably, such a privacy challenge loses its appeal. Like the *Griswold* privacy cases, this privacy argument reaffirms the exploitation within "private" sexual relations.[118]

Failure of the equal protection clause in the area of lesbian and gay rights may only reflect heterosexual society's inability to recognize homosexuality as a status at all. Once again, male-dominated society is unable to conceive of homosexuality in the context of the heterosexual gender system. While heterosexual gender roles are seen as fixed and immutable from birth, homosexual orientation is seen as acquired or perhaps even actively sought out by lesbians and gays.[119] (One does not have to *do* anything to be heterosexual, but through homosexual acts one "becomes" lesbian or gay.) Heterosexual society reduces lesbian and gay status to a series of acts undeserving of the protection of the equal protection clause.

Advancement in equal protection law for lesbians and gays seems contingent upon advancement in equal protection law for women. If sexual relations between the sexes were less hierarchical, homosexual relations would not threaten men's power advantage over women.

Women as a class and gay men as a class have endured similar oppression. Both are stereotyped as weak, impotent, and ineffectual. Both have been condemned, legally punished and even murdered for actively expressing their sexuality. Both have been excluded from employment, housing, and participation in government and social organizations because of their status. Both have sought to "pass" as heterosexual men to avoid discrimination. At a minimum, the Supreme Court must consider sex discrimination "suspect." As one federal circuit court has reasoned, if sex is not considered suspect, certainly homosexuality is not suspect.[120] Just as sex discrimination must be suspect so too must heterosexual discrimination be suspect.

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118. *See supra* note 97 and accompanying text.

119. *But see supra* note 114.

120. DeSantis v. Pacific T & T Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979).

C. Void for Vagueness

The concept of "void for vagueness" is an outgrowth of the due process clause of the fourteenth and the fifth amendments. This constitutional doctrine prohibits the states from depriving their citizens of liberty or property without "due process of law." Under this doctrine the Court has invalidated statutes written so vaguely that they fail to provide average persons with fair notice that certain acts are illegal.[121]

Legislatures have traditionally used very general, euphemistic and often archaic language in the construction of sodomy statutes. The Supreme Court of Alaska noted, "[t]he subjects of 'sodomy' and 'crime against nature' are said by many authorities to be so loathsome that they should be discussed only in language which is enigmatic to the point of deliberate obscurantism."[122] Such legislative modesty has made some sodomy statutes vulnerable to constitutional attack under the fourteenth amendment. But "void for vagueness" challenges have had only limited success. Many courts have found sodomy law's historical terminology specific enough, despite euphemisms.

The Supreme Court in *Rose v. Locke*[123] held that a statute proscribing the "crime against nature" was not unconstitutionally vague as applied to cunnilingus.[124] The Court concluded that the statute provided sufficient notice that the acts in question were illegal, noting the long use of the term "crime against nature," its frequent use at common law, and previous state holdings defining the term to include fellatio, and "sodomy."[125] As applied to fellatio, sodomy statutes prohibiting "unnatural and lascivious acts," and "the infamous crime against nature," have likewise been found constitutional.[126]

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121. The rationale behind the concept of vagueness is that "no man (sic) shall be held criminally responsible for conduct which he (sic) could not reasonably understand to be proscribed." United States v. Harris, 347 U.S. 612, 617 (1954), quoted in Wainright v. Stone, 414 U.S. 21, 22 (1973). The doctrine reinforces notions of scienter on the one hand while it discourages arbitrary and discriminatory conduct of law enforcement officers and judges on the other.

122. Harris v. State, 457 P.2d 638, 642 (Alaska 1969).

123. 423 U.S. 48 (1975).

124. Justice Brennan, however, dissented, insisting that the common law meaning of "crime against nature" was limited to anal intercourse and that average persons would understand the statute to prohibit only those acts. 423 U.S. at 53. The Alaska Supreme Court has held the same phrase, "crime against nature," void for vagueness when applied to anal intercourse. *Harris*, 457 P.2d at 648.

125. 423 U.S. at 50.

126. State v. Levitt, 118 R.I. 32, 371 A.2d 596 (1977); Commonwealth v. Baltha-

The Minnesota legislature seemed to anticipate vagueness challenges to its sodomy statute when, in 1921, it struck out the term "the detestable and abominable crime against nature" from the statutory language and redefined "sodomy" as "carnal know[ledge] of any . . . person by the anus or by or with the mouth."[127] This wording, retained in today's statute, seems unquestionably less vague than that upheld in state court cases.

Challengers of section 609.293 might take advantage of the fact that the precise meanings of terms like "crime against nature," "unnatural acts," and "sodomy" are legal issues that remain unresolved. American case law is conflicting and vague as to exactly which acts constitute "sodomy" and which do not. Section 609.293's title, "sodomy," and its use of the somewhat antiquated term "carnal know[ledge]" make it partially vulnerable to attack on grounds of vagueness.

Despite its occasional success, void for vagueness adjudications of sodomy laws have limited effectiveness. A legislature determined to prohibit sodomy after judicial invalidation of its sodomy statute might easily reformulate its statute in more precise language, as did the Minnesota legislature in 1921,

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zar, 366 Mass. 298, 318 N.E.2d 478 (1974); Canfield v. State, 506 P.2d 987 (Okla. Crim. App. 1973).

127. *See* Katheryn Katz, *Sexual Morality and the Constitution: People v. Onofre*, 46 Albany L. Rev. 311 (1982). Gen. Stat. Minn. § 10183 (1921). Sodomy was among the enumerated crimes when Minnesota legislators enacted their first criminal code in 1851. Minn. Rev. Stat. ch. 107 § 13 (1851). In 1873 the state punished "sodomy, or the crime against nature, either with mankind or any beast." Gen. Stat. Minn. ch. C § 14 (1873). In 1891 the state recast the statute to prohibit "the detestable and abominable crime against nature" and included necrophilia as well as bestiality in the broad scope of the law. Minn. Gen. Stat. § 6216 (1891). In 1921, Minnesota legislators again revised the statute into a form that more closely resembled the modern statute. Gen. Stat. Minn. § 10183 (1921). The 1921 revision punished "any person who carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus or by or with the mouth . . . or attempts sexual intercourse with a dead body." The 1921 statute, unlike its predecessors, expressly included consensual behavior, punishing anyone who "voluntarily submits to such carnal knowledge."

The law remained unchanged until 1967 when the Minnesota legislature enacted Minn. Stat. § 609.293 (1967) (original version at 1967 Minn. Laws ch. 507, § 4). This statute retained the definition of sodomy as carnal knowledge "by the anus or by or with the mouth," but it no longer included necrophilia or bestiality, which were redefined as the separate crime of "bestiality." ("Whoever carnally knows a dead body or an animal or bird is guilty of bestiality which is a misdemeanor. If knowingly done in the presence of another he may be sentenced to imprisonment for not more than one year" or to a $1,000 fine or both. *Id.* at § 5.)

Finally, in 1977 the legislature amended the statute to prohibit only consensual sodomy. Minn. Stat. § 609.293 (1982) (original version at 1977 Minn. Laws ch. 130, § 4). *See supra* note 7 and *infra* note 144.

so that it conforms to the minimum requirements of due process.

D. Overbreadth

The overbreadth challenge has sometimes been successful in decriminalizing heterosexual conduct. It is, however, a challenge particularly ill-suited for those seeking the decriminalization of consensual homosexual sodomy. The success of an overbreadth challenge depends upon a statute's infringement of the rights of a "protected" class. As previously discussed, lesbians and gays are only sometimes classified as protected classes.[128]

The Supreme Court held in *NAACP v. Alabama*[129] that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means that sweep unnecessarily broadly and thereby invade the area of protected freedoms."[130] Courts apply the resulting "overbreadth" doctrine, which invalidates unnecessarily broad regulations, in three stages. First, the challenger must demonstrate that she is in a protected class and is harmed by the statute.[131] The threat of future prosecution has been held sufficient to fulfill the requirement of harm.[132] Second, the state must prove a valid governmental interest in the legislation. In sodomy cases, for example, states contend that their police power to regulate "sexual promiscuity or misconduct" includes the regulation of sodomy.[133] And finally, if the court determines that the statute unnecessarily includes the challenger's behavior, it invalidates the statute.

Courts have used the overbreadth doctrine to challenge the unconstitutionality of sodomy laws. Sodomy laws which criminalize sodomy between husband and wife invade marital privacy.[134] The right to marital privacy (sexuality) is a long recognized, respected, and constitutionally protected "freedom."[135]

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128. *See supra* notes 111-20 and accompanying text.

129. 377 U.S. 288 (1964).

130. *Id.* at 307.

131. Hughes v. State, 14 Md. App. 497, 501, 287 A.2d 299, 302 (Md. 1972); Swikert v. Cady, 381 F. Supp. 988 (1974), *aff'd mem.*, 513 F.2d 635 (7th Cir. 1975); Buchanan v. Batchelor, 308 F. Supp. 729, 731 (N.D. Tex. 1970), *vacated sub nom.*, Wade v. Buchanan, 401 U.S. 989 (1971).

132. *Buchanan*, 308 F. Supp. at 731.

133. *Id.* at 733.

134. *Id.* at 729, 735.

135. *Griswold*, 381 U.S. at 486. This line of reasoning is illustrated in *Buchanan* where the court held the applicable sodomy statute "void on its face

For unmarried heterosexuals overbreadth would seem to be an ideal challenge to Minnesota's sodomy statute. The general language in section 609.293 prohibits consensual sodomy between married persons. However, overbreadth may not be an attractive argument for lesbian or gay challengers of the statute. Since lesbians and gays cannot legally marry, they will have difficulty convincing a court that they are harmed by a sodomy statute's invasion of the constitutional right to marital privacy.[136]

To overcome this problem a court might require the lesbian or gay to join married complainants, upon whose rights any invalidation of the statute will be based.[137] This requirement, in effect, permits the court and the legislature to continue state regulation of homosexual and other non-marital sodomy. Such a practice reduces the chances of future judicial invalidation of the statute by lending authority to negative judicial comments concerning lesbians, gays, and unmarried heterosexuals who engage in sodomy. In rejecting the overbreadth challenge, some courts have even indicated that they consider punishing marital sodomy to prevent "sexual misconduct."[138]

E. Cruel and Unusual Punishment

The eighth amendment prohibits cruel and unusual punishment. The Supreme Court has recognized two methods for defining what conduct constitutes impermissibly cruel and unusual punishment. Punishment which is highly disproportionate to the crime is unconstitutional. Punishment imposed on someone because of a disease or that person's status is also un-

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for unconstitutional overbreadth insofar as it reaches the private, consensual acts of married couples." 308 F. Supp. at 735.

136. *See supra* note 83 and accompanying text. *See* Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970). Standing is not lightly granted, especially in cases concerning non-consensual sodomy. *See Swikert*, 381 F. Supp. 988. If the challenger can prove that *her* individual privacy rights have been violated, the overbreadth doctrine may apply.

137. *Buchanan*, 308 F. Supp. at 730-31.

138. *See, e.g.*, Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971) in which a district court refused to exercise its equity jurisdiction to enjoin enforcement of a Texas sodomy law against married heterosexual couples. The court noted that "[sodomy] is an act . . . of immemorial anathema. . . . It is clearly an offense involving moral turpitude whether defined by common law or by statute. The practice is inherently inimical to the general integrity of the human person." *Id.* at 1322. Even if the results of such cases are unfavorable to opponents of the sodomy laws they are consistent. It is hard to fault the logic in the premise that if sodomy were immoral, it would be no less so between married persons than between unmarried persons.

constitutional. Challenges based on the cruel and unusual punishment doctrine have not fared well in constitutional adjudication. The Supreme Court summarily dismissed the argument, for example, in *Doe*.[139]

The concept of impermissible disproportionality between punishment and crime originated with *Weems v. United States*.[140] There, the Supreme Court held that "[i]n interpreting the eighth amendment it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense."[141] The Court also articulated a way to judge proportionality. It stated that "[i]n determining whether a punishment is cruel and unusual . . . this court will consider the punishment of the same or similar crimes in other parts of the United States. . . ."[142] Punishment in *Weems* seemed to mean length of imprisonment. Cases following *Weems*, however, tended to focus on maltreatment of prisoners. More recent cases have restricted *Weems* to its facts and have indicated that mere length as opposed to the conditions of imprisonment are not determinative of unconstitutionality.[143]

The argument that section 609.293 imposes disproportionate punishment has been weakened by the leveling of sentences bringing sodomy roughly into line with other sex offenses in Minnesota.[144] For over seventy-five years the maximum penalty for consensual sodomy was twenty years in

139. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976).

140. 217 U.S. 349 (1910).

141. *Id.*

142. *Id.* at 350.

143. Rummel v. Estelle, 445 U.S. 263, 271-76 (1980). *See* Atiyeh v. Capps, 449 U.S. 1312, 1316 (1981). *But see* Solem v. Helm, 463 U.S. 277 (1983).

144. *See supra* note 127 for a history of the Minnesota legislature's amendments of the sodomy statute. The original punishment for sodomy in Minnesota was a prison term of one to five years. Minn. Rev. Stat. ch. 107 § 13 (1851). In 1891 the legislature increased the punishment to five to 20 years in state prison. This harsh punishment remained a part of the sodomy statute until 1967 when the legislature enacted Minn. Stat. § 609.293, which recognized four degrees of sodomy. "Aggravated sodomy" was characterized by force or threats and punished by up to 30 years in prison. "Sodomy" involving the misleading or drugging of one person by another person was punishable by up to 20 years in prison. Sodomy with a child was punishable by up to 30, 20, or 10 years, depending upon the age of the child. Consensual sodomy ("voluntarily engag[ing] in or submit[ing] to" acts of sodomy) was punished by up to one year in the county work house, a $1,000 fine, or both. In 1977, the legislature incorporated aggravated sodomy, nonconsensual sodomy, and sodomy with a child into other criminal sexual misconduct statutes. *See* Minn. Stat. §§ 609.342-.345 (criminal sexual conduct in the first, second, third, and fourth degree). Only the prohibition of consensual sodomy and its one year/$41,000 penalty remain intact. *See* Minn. Stat. § 609.293 (1982).

prison, but in 1967 the legislature reduced it to one year and a $1,000 fine.[145]

A disproportionate punishment argument also suffers from the enormous latitude allowed judges in defining "similar" crimes. To use other sex crimes to determine if sodomy is "properly" punished, the court must first determine what other sex crimes are similar to sodomy. The judicial discretion inherent in this process makes the argument of disproportionality a risky one. A judge may use rape or other forms of sexual abuse as a standard in comparison to sodomy. The maximum sentence under section 609.293, however, would fall well below those of such "peers," and make a disproportionality argument completely untenable.[146] The final shortcoming of the disproportionality argument is that a successful challenge is likely to result only in a legislative reduction in penalty rather than decriminalization.

Punishment based on status or disease was declared unconstitutional in *Robinson v. California*.[147] In *Robinson* the Supreme Court invalidated a state law making addiction to narcotics a crime. The Court compared addiction to various kinds of disease, noting that the defendant need not have performed any acts within the state to have committed the offense. The Court reasoned that the imposition of any punishment for mere status or disease, as opposed to acts, would universally be considered cruel and unusual.

A challenge based on the argument that section 609.293 makes homosexual status, as an assumed proclivity to engage in certain acts, illegal would seem well-suited to lesbian or gay challengers of Minnesota's sodomy statutes. The statute's facial proscription of isolated acts rather than lesbian or gay status *per se*[148], however, may undermine the argument that a major *effect* of the statute is to make homosexual orientation itself illegal or at least suspect.

To say sodomy statutes inflict cruel and unusual punish-

145. *Id.*

146. In Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), the Arkansas court rejected gay challengers' argument that an extremely disparate penalty for gay offenders as opposed to married heterosexual offenders made the sodomy statute unconstitutional.

147. 370 U.S. 660 (1962).

148. Stewart v. United States, 364 A.2d 1205, 1207-08 (D.C. 1976), held that the District of Columbia sodomy statute "by its very terms, proscribes specific conduct and does not single out any particular group of persons." The court reasoned that discriminatory enforcement was due only to the police's lack of knowledge of incidents of heterosexual sodomy. *Id.* at 1208.

ment, when the statutes are not literally directed at homosexuals, lesbian and gay challengers would have to establish discriminatory enforcement of the laws against them. The empirical data necessary to sustain a claim of discriminatory enforcement based on homosexual status remains to be collected. This limited study of Minnesota case law suggests that section 609.293 and previous sodomy laws have been used mainly to prosecute non-consensual heterosexual sodomy or pederasty. However, when consensual sodomy is censured under the law it is virtually always between gay men.

The major impact of section 609.293 on lesbian and gay Minnesotans may well be extra-legal in character and therefore impossible to remedy under the eighth amendment. Many lesbians and gay men feel that Minnesota law imposes upon them a markedly "sub-legal" social status. The threat of prosecution and the many harmful consequences of a perceived inferior social status are perhaps the real and most pervasive "punishment" imposed by section 609.293.[149]

F. Establishment of Religion

Some legal scholars contend that the best challenge to sodomy statutes derives from the establishment of religion clause of the first amendment.[150] That clause, in effect, prohibits the intermingling of state and religion. Even though some of the statutes derive from biblical passages,[151] the courts have ignored establishment of religion challenges.[152] Perhaps these challenges have been neglected because the pervasiveness of anti-lesbian and anti-gay feeling obscures homophobia's religious origins and the religious impetus that often sustains it.

The Supreme Court's test for violation of the establishment of religion clause is potentially difficult for any challenger to meet. "[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental en-

149. *See supra* note 28.

150. Katz, *supra* note 127, at 353-62.

151. *See supra* note 127. Compare the early Minnesota statutes cited in note 127 with Romans 1:26-27 which reads, "God gave them up unto vile affections: for even their women did change the natural use into that which is against nature; And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly . . ." *Romans* 1:26-27 (King James). *See also Genesis* 13:13, 18:20; *Leviticus* 18:22.

152. Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973).

tanglement with religion."[153] Successful establishment of religion challenges depend upon the exclusively religious nature of the challenged legislation. In *Harris v. McRae*[154] the Court noted that "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' "[155]

Many proponents of section 609.293 defend the law on religious grounds including the religious leaders who testified at Judge Winton's disciplinary hearing. Section 609.293 clearly coincides with the tenets of many religions, notably those of the Christian and Jewish faiths. Many people see the statute as a moral example and guideline, even if states do not rigidly enforce them. These arguments might persuade a court that section 609.293 has a "principal or primary effect" of advancing religion.

A long history of state and private discrimination against lesbians and gays provides ample "secular" support for sodomy laws. Whether condemnation of homosexuality is seen as "religious" or "secular" depends a great deal upon the personal view of the judge who must make the determination. For these reasons, establishment of religion challenges are likely to fail until societal prejudice against lesbians and gays abates.

G. Freedom of Expression

Challengers of state sodomy law have not often utilized the first amendment "freedom of speech" clause. When such a challenge has been made, courts have often rejected it. The right to freedom of expression, presumably penumbral to the first amendment, protects not only words but also some acts intended as expressions of ideas. The Court's difficulty with the acts/words distinction in first amendment case law[156] bears out the fact that when "words" are characterized as the antithesis of "acts", neither is clearly definable. The distinction therefore,

153. Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980).

154. 448 U.S. 297 (1980).

155. *Id.* at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)). In *Harris*, the Court held that the Hyde amendment (which severely limited federal funding for abortions) did not violate the clause. The Court concluded that the Hyde amendment was not an impermissible establishment of religion because disapproval of abortion is as much a "traditionalist" view as a religious one. This was true despite the religious origins of many of our country's traditions.

156. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

does not facilitate the formulation of legal rules for the application of the first amendment. In a sense, all acts are expressions of ideas.

As a general rule, "[c]ommunicative conduct is subject to regulation as to 'time, place, and manner' in the furtherance of a substantial governmental interest, so long as the restrictions imposed are only so broad as required in order to further the interest and are unrelated to the content and subject matter of the message communicated."[157] In practice, protection of expressive acts, verbal or non-verbal, depends upon a judicial determination that the acts are 1) meant to convey ideas, and 2) are not harmful, or 3) that any harm they may cause is outweighed by the social value of the free exchange of ideas.[158]

Consensual sodomy as an expressive act meriting constitutional protection was an issue raised by the plaintiffs in *Doe*.[159] The lower court in *Doe* did not discuss the argument in its brief opinion. Such an argument is viable, however, when combined with equal protection law. Expressions of heterosexuality are accepted and even encouraged by society, while expressions of homosexuality are censured. The state violates the equal protection clause when it participates in this kind of discrimination.

> The first amendment equal protection right . . . to lesbian/gay public expression argues that official indulgence of one [heterosexual expression] and sanctioning of the other [homosexual expression] is discrimination. . . . Once the expression of lesbian/gay personhood is seen as speech, the alternative to protecting it is seen to chill expression, stifle advocacy, and dictate 'affirmation of a belief' in the content of heterosexuality.[160]

A similar argument based on *private* expression of lesbian and gay status is even more persuasive. State interest in *public* health or morals cannot justify intrusion into the *private* sphere to prohibit private consensual sodomy. Therefore, sod-

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157. Gay Students Organization v. Bonner, 509 F.2d 652, 660 (1974) (quoting Police Dep't v. Mosley, 408 U.S. 92 (1972)).

158. Gregory v. Chicago, 394 U.S. 111 (1969); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

159. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976).

160. Jose Gomez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 Law & Inequality 121, 128 (1983). Gomez asserts that there is no speech exception (such as obscenity or libel) applicable to such expression nor is there an outweighing state interest in regulation.

omy laws broadly infringe on the constitutional right to freedom of private expression.

Freedom of expression challenges to sodomy statutes based on the first amendment are heavily subject to judicial prejudices. Legal rules give the court of jurisdiction a great deal of leeway in evaluating both the harm caused by sodomy and the value of the participant's "expression." When judges weigh these harms and values a freedom of expression ruling is especially subject to political influences and changing social attitudes. Minnesota courts might reject the freedom of expression argument after their subjective determinations that the idea or ideas expressed in the act of private consensual sodomy are of minimal value and are clearly outweighed by the harm it is assumed to cause. Once again the requisite quantum of specific proof of causality may vary according to the court's assessment of the constitutional right in question. A favorable reevaluation of gay men as well as a determination that homosexual sodomy is not harmful may be evidenced by Minnesota's failure to prosecute Winton under section 609.293. Such political and judicial influences would support invalidation of section 609.293 under the first amendment.

IV. Conclusion

Section 609.293 and its use by Minnesota law enforcement agencies serve the institution of forced heterosexuality in three major ways. First, section 609.293 is used chiefly to police sexual behavior that falls outside the bounds of institutionalized heterosexuality. On the one hand, convictions for heterosexual conduct tend to involve sodomy in the context of brutal rapes and child abuse. The law stops acceptable male aggression only when it begins to threaten male access to other men's women and children. On the other hand, both consensual and non-consensual sexual contact between adult male peers seems to be subject to censure under section 609.293, but often male power and prerogative, both social and sexual, allow the participants to keep the contact hidden and ultimately to avoid actual conviction. Thus the law codifies the social belief that male sexual aggression is generally acceptable when it is perpetrated against women and children, but unacceptable when directed toward men. Second, the statute imposes semi-criminal status upon lesbians and gays. This status lessens the threat their sexual orientation poses to institutionalized heterosexuality. The social consequence of section 609.293 is the

delegitimization of lesbians and gays because they deviate from set gender roles. In effect, the statute punishes gay men for initiating sexual aggression toward other males. It punishes lesbians for refusing to be objects of male sexual aggression. Third, regardless of its actual enforcement, section 609.293 codifies and serves as an official condonation of religious and semi-religious beliefs that support institutionalized heterosexuality and homophobia.

The major constitutional challenge to the statute—that of substantive due process and the right to privacy—would, if successful, have the effect of adding more governmental sanction to male dominance and the social institutions that perpetuate it. Litigators must modify governmental policy of nonintervention so that the policy recognizes the problem of social inequality. This modification would render the privacy argument for invalidation of section 609.293 ethically sound.

Because the cruel and unusual punishment challenge, the establishment of religion challenge, and the freedom of expression challenge do not extend the privacy doctrine to sexual activity *per se*, these challenges are the best means of attacking the constitutionality of Minnesota sodomy law. Since the law in these areas allows for considerable judicial discretion, a political climate and a general judicial attitude favoring equality for lesbians and gays may be necessary for the invalidation of section 609.293 on these grounds. As lesbians and, more realistically, gay men gain financial, professional, and social status in Minnesota, such a ruling will become more possible.

Judge Winton's harsh treatment by the Board of Judicial Responsibility shows that the judicial reevaluation of homosexual status necessary for a successful first amendment or cruel and unusual punishment challenge is not immediately forthcoming. At this point, lesbians and gays are perceived as threatening the status quo of male power. Therefore the inferior status that section 609.293 imposes upon them remains an incident of institutionalized male power.