

# NOTES

## Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws

By PAULA A. BRANTNER\*

Laws regulating sodomy and other forms of same-sex sexual activity currently exist<sup>1</sup> in twenty-five states and the District of Columbia.<sup>1</sup> Although sodomy laws are rarely enforced, their very presence inhibits the expression of gay sexuality. Gay parents have been denied child custody and visitation rights,<sup>2</sup> gay employees have been denied security clearances and employment,<sup>3</sup> and gay organizations have been denied the right to legal existence,<sup>4</sup> all either directly or indirectly as a result of sodomy laws.<sup>5</sup> Our courts brand all gay men and lesbians as criminals,

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1. See ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. §§ 13-1411-1412 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1987); D.C. CODE ANN. § 22-3502 (1989); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 16-6-2 (Harrison 1990); IDAHO CODE § 18-6605 (1990); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. § 510.070 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14.89 (West 1986); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1990); MD. ANN. CODE art. 27, §§ 553-554 (1987); MICH. COMP. LAWS ANN. §§ 750.158, 750.338-338(b) (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 566.090 (Vernon 1979); MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1990); NEV. REV. STAT. § 201.190 (1986); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-13-510 (1989); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (West 1989); UTAH CODE ANN. § 76-5-403 (1978); VA. CODE ANN. § 18.2-361 (Michie 1988).

2. See *infra* notes 39-40 and accompanying text.

3. See *infra* notes 41-43 and accompanying text.

4. See *infra* note 44 and accompanying text.

5. Sodomy laws have been used directly to prohibit individual gay men and lesbians from having certain rights (e.g., as an unconvicted criminal, a lesbian or gay man is not entitled to a particular right). Sodomy laws are also used indirectly to deny group rights (e.g., because there is not a fundamental right to engage in sodomy, gay men and lesbians are not entitled to legal protection from anti-gay discrimination).

whether or not they actually engage in sodomy.<sup>6</sup>

Gay and lesbian activists consider the eradication of sodomy laws essential to the further advancement of gay rights. While every state had sodomy laws prior to the 1960s, efforts by reformers<sup>7</sup> have reduced the number of states with sodomy laws to twenty-five.<sup>8</sup> In 1986, Georgia activists attempted to invalidate the remaining state sodomy laws on federal constitutional grounds. In *Bowers v. Hardwick*,<sup>9</sup> a gay man challenged Georgia's sodomy law primarily on the basis of the right to privacy guaranteed by the federal constitution.<sup>10</sup> The Supreme Court refused to extend the right to privacy to include consensual same-sex sexual behavior. Justice White, writing for the majority, specifically granted the power to states to regulate such behavior.<sup>11</sup> Following this decision, state legislatures contemplating reform would no longer act on the as-

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6. "By defining gay people as persons who commit sodomy . . . courts overemphasize the importance of certain types of homosexual sex and devalue love and companionship in a homosexual relationship." See SEXUAL ORIENTATION AND THE LAW 10 (Harv. L. Rev. ed. 1989), reprinted from *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) [hereinafter HARVARD]. See, e.g., *Head v. Newton*, 596 S.W.2d 209 (Tex. Ct. App. 1980) (found calling an individual "queer" constituted slander per se, because it imputes the crime of sodomy).

7. "Pressure to liberalize [sodomy] laws first came from medical, social-welfare, and legal groups. . . . Homosexual organizations played a quiet role in the initial lobbying to repeal sodomy laws." PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 384 (1990).

8. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219; Act of May 12, 1975, ch. 71, §§ 4-12, 1975 Cal. Stat. 131, 133-136; Colorado Criminal Code, chs. 40-3-403, 40-3-404, 1971 Colo. Sess. Laws 388, 423; Conn. Penal Code, Pub. Act No. 828, §§ 66-91, 1969 Conn. Pub. Acts 1554, 1579-85; Delaware Criminal Code, ch. 497 §§ 766, 767, 58 Del. Laws 1611, 1665-66 (1972); Hawaii Penal Code, Act 9, §§ 733-735, 1972 Hawaii Sess. Laws 32, 90-01; Act of Feb. 25, 1976, Pub. Law No. 148, ch. 4 § 2, 1976 Ind. Acts 718, 733-734; Iowa Criminal Code, ch. 1245, §§ 901-906, 1976 Iowa Acts 549, 558-559; Maine Criminal Code, ch. 499, §§ 251-255, 1975 Me. Laws 1273, 1297-1300; Nebraska Criminal Code, L.B. 38 §§ 32-38, 1977 Neb. Laws 88, 100-102; Act of July 2, 1973, ch. 532:26, 1973 N.H. Laws 999, 1011; New Jersey Code of Criminal Justice, ch. 95, §§ 14:1 to 14:3, 1978, N.J. Laws 482, 547-550; Act of Apr. 3, 1975, ch. 109, 1975 Laws 265, 266-267; Act of Dec. 14, 1972, §§ 2907.01-.07, 1972 Ohio Laws 1966, 1906-1911; Oregon Criminal Code of 1971, §§ 104-120, 1971 Or. Laws 1873, 1907-1910; Crimes Code, No. 334, ch. 31, 1972 Pa. Laws 1983, 1528-31; Act of Feb. 26, 1976, ch. 158, §§ 22-2 to -4, 1976 S.D. Sess. Laws 227, 260-261; Washington Criminal Code, ch. 260, § 9A.88.100, 1975 Wash. Laws 817, 858; Act of Mar. 11, 1976, ch. 43, 1976 W. Va. Acts 241; Act of Feb. 24, 1977, ch. 70, 1977 Wyo. Sess. Laws 228, 228-310 (quoting Yao Apasugbtsu et al., Note, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526-27 (1986)).

9. 478 U.S. 186 (1986).

10. The sole issue in *Hardwick*, because of the procedural posture of the case, was "the appropriate standard of review, not the validity of the statute." Brief for Respondent at 4, *Bowers v. Hardwick*, 478 U.S. 186 (No. 85-140). Therefore, Professor Laurence Tribe, when writing the brief, and at oral arguments, presented only arguments relating to "whether a state must have a substantial justification when it reaches that far into so private a realm." Brief for Respondent at 5.

11. See *Hardwick*, 478 U.S. at 195-96.

sumption that sodomy statutes would be declared unconstitutional. The *Hardwick* decision thus removed one incentive to reform the sodomy statutes, which may explain why no legislatures have eliminated sodomy laws after *Hardwick*.

In the past few years, gay and lesbian activists, attempting to recover from the adverse effects of *Hardwick* and the accumulation of conservative federal court judicial appointments,<sup>12</sup> have called for alternatives to federal court litigation to achieve legal equality for gay men, lesbians, and bisexuals.<sup>13</sup> One strategy is to challenge sodomy laws in state courts on state constitutional grounds. The most important reason to use this approach is that state constitutions differ from the federal constitution, and thus are able to guarantee more rights to state citizens than the federal constitution. Additionally, state court judges may be more receptive to innovative state constitutional claims than federal judges who are ever conscious of the criticism directed at judicial activism.<sup>14</sup> Kentucky,<sup>15</sup> Michigan,<sup>16</sup> and Texas<sup>17</sup> recently invalidated state sodomy statutes on state constitutional grounds. Although these successes were at the trial court level, and thus have little precedential value, the victories encourage activists in other states that have similar state constitutional provisions.

This Note first examines the use of sodomy laws to perpetuate anti-gay discrimination. Next, the Note assesses the impact of *Hardwick* upon sodomy law reform and chronicles the subsequent change of focus of reform litigation from federal to state constitutional theory. The merits of arguments for and against state constitutional challenges, as well as the varieties of constitutional challenges that may be made, are discussed. Finally, the Note evaluates which challenges are most likely to be successful in particular states.

## I. State Sodomy Laws

### A. Enactment and Reform

Laws criminalizing consensual same-sex sexual activity<sup>18</sup> currently

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12. See *infra* note 154 and accompanying text.

13. See *infra* section III.

14. See *infra* note 149 and accompanying text.

15. *Commonwealth v. Wasson*, No. 86M859 (Fayette Dist. Ct. Oct. 31, 1986). See *infra* note 130 and accompanying text.

16. *Michigan Org. for Human Rights v. Kelley*, No. 88-815820 CZ, opinion and order (Mich. Cir. Ct. July 9, 1990). See *infra* notes 132-135 and accompanying text.

17. *Morales v. State*, No. 464, 898 (Tex. Dist. Ct., Mar. 15, 1990). See *infra* note 131 and accompanying text.

18. This Note uses the term "sodomy" to refer to laws prohibiting either same-sex or non-procreative heterosexual sexual activity. States may use terms other than sodomy, such as

exist in twenty-five states and the District of Columbia.<sup>19</sup> Prior to 1961, all fifty states had criminalized sodomy.<sup>20</sup> In 1955, the American Law Institute determined that sodomy laws would not be included in the Model Penal Code.<sup>21</sup> Illinois was the first state to follow the ALI's recommendation, and in 1961, decriminalized all consensual, adult, private sexual conduct.<sup>22</sup> Connecticut was the next state to decriminalize sodomy in 1969,<sup>23</sup> and throughout the 1970s, twenty state legislatures repealed their state's sodomy laws.<sup>24</sup> Wisconsin was the last state to date to decriminalize sodomy, in 1982.<sup>25</sup> Sodomy statutes in New York and Pennsylvania were invalidated by the highest state courts in both states.<sup>26</sup>

## B. Impact of Sodomy Statutes

Many people share a common perception that sodomy laws have little real impact because they are rarely enforced.<sup>27</sup> This perception is incorrect for two reasons. First, sodomy laws *are* enforced,<sup>28</sup> and such enforcement can ruin the lives of those prosecuted<sup>29</sup> for behavior engaged in by people of all sexual orientations. Second, even if sodomy laws were

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"sexual misconduct" or "crime against nature," but these laws are still generally known as sodomy laws. See HARVARD, *supra* note 6.

Traditionally, the word "sodomy" has referred to anal sex between two men, and thus excluded oral sex or any sexual activity between women. "There are still people who say that to commit sodomy one has to have a penis." Abby R. Rubinfeld, *Lessons Learned: A Reflection Upon Bowers v. Hardwick*, 11 NOVA L. REV. 59, 60 n.3 (1986). However, laws today may proscribe sexual activity between women. See *State v. Young*, 193 So. 2d 243 (La. 1966).

Thus the author uses the word sodomy for the sake of convenience, while recognizing that in certain states other terms may be more accurate, and that the word has been traditionally male-identified even though such laws also may be used against women.

19. See *supra* note 1.

20. Shelley R. Lieck, Comment, *Constitutional Challenges to Sodomy Statutes in the Context of Homosexual Activity After Bowers v. Hardwick*, 32 S.D. L. REV. 323, 325 (1987).

21. MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962); MODEL PENAL CODE § 207.5 (Tentative Draft No. 4, 1955).

22. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws 1985-2006 (codified as amended at ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1979 & Supp. 1983)).

23. 1969 Conn. Pub. Acts 828, § 214 (effective Oct. 1, 1971).

24. See *supra* note 8.

25. WIS. STAT. ANN. § 944.17 (West 1982).

26. *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).

27. *Hardwick, Sodomy Laws, and Our Fight for Sexual Freedom*, NATIONAL GAY AND LESBIAN TASK FORCE [hereinafter *Fight for Sexual Freedom*] (on file with the *Hastings Constitutional Law Quarterly*).

28. See *infra* notes 32-37 and accompanying text for situations where sodomy laws are enforced.

29. Those arrested for sodomy may be subjected to unwarranted media attention, because their names may be published in local newspapers, and their trials publicized. A sodomy charge may cause them to lose their jobs and jeopardize relationships with family and friends. They can be physically assaulted by police during the arrest, by other inmates in jail, and by gay-bashers once their identity is made known to others.

never enforced, their existence prevents gay men and lesbians from gaining full equality, and is repeatedly used to justify differential treatment of gay men and lesbians.<sup>30</sup> One activist characterized sodomy laws as "one of the last . . . final institutional discriminations against gay people."<sup>31</sup>

Sodomy laws are enforced in a number of situations. Prosecutors have used sodomy laws as a plea-bargaining tool in situations where the sodomy offense was accompanied by other violations such as public solicitation, aggravated assault, or statutory rape.<sup>32</sup> If prosecutors are unable to demonstrate lack of consent in a rape case, they may ask for a sodomy conviction instead, because lack of consent is not an element of the sodomy offense.<sup>33</sup> Police on duty in areas where gay men commonly meet have attempted to entrap gay men by encouraging men to have sex with them. When the men respond, they are charged with sodomy, solicitation, or conspiracy to commit sodomy.<sup>34</sup> In some cases, individuals have been arrested for having consensual, non-commercial sex,<sup>35</sup> because they were discovered in areas that may be defined as either public or private.<sup>36</sup> Although arrests for private, consensual, adult activity are relatively rare, primarily owing to the difficulty of monitoring such behavior, such arrests do happen. Michael Hardwick, the plaintiff in *Bowers v. Hardwick*,<sup>37</sup> is an example of such an arrest. The mere existence of sodomy laws invites police intrusion into sexual behavior, and allows for selective enforcement to harass gay individuals.<sup>38</sup>

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30. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 564, 577 (9th Cir. 1990) (security clearance); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (child custody); *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (adoption).

31. Dan Freedman & Faith Keenan, *Gays Laud End of Restrictions on Immigration*, S. F. EXAMINER, Oct. 30, 1990, at A5, (quoting Robert Bray, National Gay and Lesbian Task Force). Abby Rubinfeld, former director of Lambda Legal Defense and Education Fund claims, "We [lesbians and gay men] are criminals in the eyes of the law, and that is used against us. . . . [Sodomy laws] are the nails in the closet doors." Rubinfeld, *supra* note 18, at 61.

32. HARVARD, *supra* note 6, at 9-10.

33. *Id.*

34. *Fight for Sexual Freedom*, *supra* note 27. Arlene Zarembka, a Missouri attorney, describes typical police practices in that state. "The police regularly solicit the men for sex. The officer asks a man to go home with him and then arrests him. There doesn't even have to be any physical contact." Paul Reidinger, *Missouri Vice: Sodomy Ban Affirmed*, 72 A.B.A. J., Nov. 1, 1986, at 78.

35. For purposes of this Note, non-commercial sex is defined as sexual activity where neither of the participants expects pecuniary gain.

36. *Fight for Sexual Freedom*, *supra* note 27. Parties may have an expectation of privacy in areas such as lovers lanes, beaches, or wooded areas, even though they are not in a private bedroom.

37. See Section II.C.

38. *Eight Good Reasons to Decriminalize Sexuality*, NATIONAL GAY AND LESBIAN TASK FORCE (NGLTF Privacy Project, Washington, D.C.) [hereinafter *Good Reasons*] (on file with the *Hastings Constitutional Law Quarterly*).

Even if sodomy laws were never enforced, their mere existence has been used to deny rights to gay men and lesbians, whether or not they engage in behavior proscribed by the statutes. These laws substantially hinder gay rights reform in other areas. The courts have specifically used sodomy laws to deny child custody and visitation rights to lesbian and gay parents. Gay parents are considered criminals yet to be convicted, similar to substance abusers or gamblers, and are thus unfit parents.<sup>39</sup> Even if courts do not deem gay parents criminals, they hold that sodomy laws demonstrate a state interest against homosexuality.<sup>40</sup> Gay employees have been denied security clearances based upon their "lack of regard for the laws of society."<sup>41</sup> The Department of Defense, CIA, FBI, and the armed forces all presently have policies adversely affecting gay employees.<sup>42</sup> Gay individuals may be denied employment entirely, be subjected to more extensive investigations before security clearances are granted, or may be prohibited from gaining upper-level clearances, which may severely limit career advancement.<sup>43</sup> Universities have refused to recognize gay and lesbian student organizations because of the misconception that these organizations would further violations of the sodomy statutes.<sup>44</sup>

Sodomy statutes classify non-procreative sexual activity as inferior. While this classification primarily denigrates lesbians and gay men, other groups suffer harm as well. Many disabled persons are limited to certain types of sexual activity. Sodomy laws insult the disabled by denying them any legal means of sexual expression. Some state-funded institutions caring for the disabled have instructed employees to intervene in order to prevent the violation of sodomy laws by their residents.<sup>45</sup> Sodomy laws adversely impact women by limiting legal sexual activity to that which can lead to procreation, and thereby foreclosing those means

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39. See *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) ("Suppose the persona non grata were a habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher? To cut off association with such a person as a condition to the child custody would be entirely reasonable.").

40. *HARVARD*, *supra* note 6, at 128. See, e.g., *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982); *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985).

41. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1365 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990) (gay civilian employees of defense industry contractors were automatically subjected to extended investigations before security clearances could be granted).

42. *HARVARD*, *supra* note 6, at 46.

43. *Id.*

44. Although courts have generally rejected the universities' arguments, students nonetheless had to bring lawsuits to obtain recognition. See *Gay Student Serv. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); *Gay Lib v. University of Mo.*, 558 F.2d 848, 854 (8th Cir. 1977).

45. *National Day of Mourning Information Packet*, NATIONAL GAY AND LESBIAN TASK FORCE (NGLTF Privacy Project, Washington, D.C.), June 30, 1989, at 10 [hereinafter *NDOM Packet*] (on file with the *Hastings Constitutional Law Quarterly*).

of sexual expression which do not have that intended result and carry less serious consequences.<sup>46</sup>

Sodomy laws may also affect an individual's psychological and physical well-being. Sex educators and mental health professionals believe the criminalization of sexuality hampers the development of a healthy and freely chosen sexual identity.<sup>47</sup> In an era where dissemination of safe-sex information is crucial to prevent the transmission of AIDS, state officials in Arkansas, Georgia, and North Carolina censored educational materials because the officials believed the materials encouraged "lawlessness."<sup>48</sup> Even to the extent they remain unenforced, sodomy laws generate a wide array of adverse effects which unjustly target not only gay men and lesbians, but a number of others as well.

## II. *Bowers v. Hardwick* and its Aftermath

### A. Development of the Right to Privacy

"Although, [t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is, 'a right of personal privacy or a guarantee of certain areas or zones of privacy.'"<sup>49</sup>

The right to privacy was first outlined in *The Right to Privacy*, an 1890 law review article by Samuel D. Warren and Lewis D. Brandeis.<sup>50</sup> Brandeis, who later joined the Supreme Court, articulated the right to privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>51</sup> The right to privacy first commanded a Supreme Court majority in the case of *Griswold v. Connecticut*.<sup>52</sup> *Griswold* held that married couples' use of contraceptives was protected by the right to privacy. The Court found that a number of guarantees in the Bill of Rights, including the First, Third, Fourth, Fifth, and Ninth Amendments, created a constitutionally protected zone of privacy.<sup>53</sup> The statute's prohibition of contraception was found "repulsive

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46. Such consequences include pregnancy and sexually transmitted diseases that are more easily transmitted to women by vaginal intercourse.

47. See *Good Reasons*, *supra* note 38.

48. *NDOM Packet*, *supra* note 45, at 9. Because each of these states have sodomy laws, materials encouraging safer sex could be construed as encouraging readers of the materials to violate these laws.

49. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

50. Samuel D. Warren & Lewis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

51. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

52. 381 U.S. 479 (1965).

53. *Id.* at 484.

to the notions of privacy surrounding the marriage relationship.”<sup>54</sup> Seven years later, *Eisenstadt v. Baird* extended the zone of privacy to include contraception choices for unmarried adults.<sup>55</sup> The Court found

[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>56</sup>

The Court established the home as a zone of privacy in *Stanley v. Georgia*, a case which upheld the right of individuals to possess pornography in their own homes.<sup>57</sup> The Court stated, “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”<sup>58</sup> When governmental regulation intrudes on a zone of privacy, it “may be justified only by a ‘compelling state interest,’ and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>59</sup>

Prior to *Hardwick*, the Court had not yet considered whether private consensual sexual behavior among adults was constitutionally protected. In *Carey v. Population Services International*, another contraception case, the Court explicitly refused to answer that question because the case could be decided on more narrow grounds.<sup>60</sup> The logical next step in privacy jurisprudence seemed to be to constitutionally protect private consensual sexual activity, and a good method of determining how the Court would define the outer boundaries of the right of privacy was a challenge to a sodomy law enforced when the sexual activity was private, consensual, and between two adults.<sup>61</sup>

## B. *Bowers v. Hardwick*—The Sodomy Law Challenge

*Bowers v. Hardwick* appeared to be the ideal case for challenging the

54. *Id.* at 486.

55. 405 U.S. 438 (1972).

56. *Id.* at 453.

57. 394 U.S. 557 (1969).

58. *Id.* at 565.

59. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

60. See *supra* note 49 and accompanying text. “[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,’ and we do not purport to answer that question now.” *Carey v. Population Servs. Int’l*, 431 U.S. 678, 688 n.5 (1977) (quoting *Roe*, 410 U.S. at 155 n.17). Other commentators, however, believed that by implication, the right of privacy would extend that far. See David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case-Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 944 n.12 (1978); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

61. See Richards, *supra* note 60.

constitutionality of sodomy laws to the United States Supreme Court.<sup>62</sup> An Atlanta police officer arrested Michael Hardwick for consensual sexual behavior with another adult in the privacy of his own home.

Georgia defines sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another."<sup>63</sup> The statute, which prohibits both heterosexual and homosexual sodomy, applies equally to married and unmarried persons, and carries a penalty of up to twenty years in prison.<sup>64</sup> When Hardwick was arrested, he was charged with committing the crime of sodomy, although Atlanta police generally charged gay men with the lesser crime of "public indecency."<sup>65</sup> Although the district attorney's office declined to prosecute,<sup>66</sup> Hardwick remained subject to indictment until the four-year statute of limitations expired.<sup>67</sup> It was also possible for Hardwick to undergo an extended court battle. At the time of his arrest, he was employed in a gay bar, which lessened the danger of exposure which causes many defendants to forego public challenges so as to protect their jobs and their families.<sup>68</sup> Activists in Georgia had waited five years to find an appropriate test case: they believed they finally had one in Michael Hardwick.<sup>69</sup>

### C. Facts of *Bowers v. Hardwick*

"Think about a police officer at the foot of your bed when you are in bed with someone. Keep that in mind when you are talking about this subject. That is what happened to Michael Hardwick."<sup>70</sup> In 1982, Michael Hardwick was arrested in his home by an Atlanta police officer for violating Georgia's sodomy statute. Hardwick had been ticketed three weeks earlier for drinking in public, and due to a discrepancy in the dates listed on the ticket, had missed his court appearance. He paid the ticket the day after his missed appearance, but in the meantime, the Atlanta officer had obtained a warrant for his arrest. Three weeks after

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62. "It was a great case to bring. We had a good shot at winning. . . . This case presented the best factual pattern. We may never get another one like it." Rubinfeld, *supra* note 18, at 62.

63. GA. CODE ANN. § 16-6-2(a) (Harrison 1990). Many states retain the Blackstone definition of sodomy as the "crime against nature," which referred only to anal sex. *See infra* Section IV.C.

64. GA. CODE ANN. § 16-6-2(b) (Harrison 1990) (penalty of not less than one year nor more than 20 years for conviction under statute).

65. IRONS, *supra* note 7, at 383.

66. *Id.*

67. *Id.*

68. *Id.* at 397. Hardwick still faced a number of hardships related to his court battle, however. He was forced to live and work under an assumed name throughout the litigation, and was unable to move from Georgia for fear of jeopardizing his standing to challenge the law. *Id.* at 398.

69. *Id.* at 396.

70. Rubinfeld, *supra* note 18, at 60.

Hardwick had paid his ticket, the officer went to Hardwick's home to serve the warrant and was admitted by a guest staying there. Because the ticket had been paid, the officer's warrant was invalid.<sup>71</sup> Nonetheless, Hardwick was arrested for violating the sodomy laws by engaging in oral sex in his bedroom. Hardwick then spent twelve hours in jail harassed by other prisoners who were told the nature of his arrest.<sup>72</sup>

Attorneys from the Georgia ACLU contacted Hardwick within days to tell him they were looking for an appropriate test case. To begin the appellate process, Hardwick needed an adverse judgment. The district attorney refused to present Hardwick's case to a grand jury, so Hardwick's attorneys insisted upon obtaining a letter indicating that the district attorney had no intentions of further prosecution, to serve as the necessary state court judgment.<sup>73</sup> Hardwick's attorneys then proceeded on the federal level, seeking a declaratory judgment on the constitutionality of the Georgia statute. Hardwick lost at the district court level, but was successful in the 11th Circuit Court of Appeals,<sup>74</sup> where a two-judge majority found that Hardwick's behavior was constitutionally protected.<sup>75</sup>

#### D. *Bowers v. Hardwick*—The Decision

The State of Georgia appealed its defeat to the United States Supreme Court. Georgia asked the Court to avoid creating a "constitutional right which is little more than one of self-gratification and indulgence,"<sup>76</sup> basing its position upon "centuries-old tradition and the conventional morality of its people."<sup>77</sup> Hardwick was represented by Professor Laurence Tribe, who framed the issue not in terms of specific same-sex behavior, but in terms of "how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate personal association with another adult."<sup>78</sup>

The Court announced its decision on June 30, 1986.<sup>79</sup> Justice White wrote for a 5-4 majority which voted to overturn the 11th Circuit decision and found the Georgia statute constitutional. The majority defined

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71. IRONS, *supra* note 7, at 396. The arresting officer had a good faith belief in the validity of the warrant, and therefore would be able to introduce any evidence found in court. See *United States v. Leon*, 468 U.S. 897 (1984) (use of evidence not barred if obtained under a warrant which the officer believed in good faith was valid).

72. IRONS, *supra* note 7, at 396.

73. *Id.* at 398.

74. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

75. *Id.* at 1211.

76. Oral Argument on Behalf of the Petitioner at 16, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

77. *Id.*

78. Oral Argument on Behalf of the Respondents at 18, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

79. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

the issue before the Court as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .”<sup>80</sup> The Court found prior privacy cases inapplicable as precedents, because “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .”<sup>81</sup> Therefore, constitutionally protecting Hardwick’s behavior would have created a new fundamental right, which the Court was most reluctant to do.<sup>82</sup> Fundamental rights are limited to those either “implicit in the concept of ordered liberty”<sup>83</sup> or “deeply rooted in this Nation’s history and tradition.”<sup>84</sup> Since sodomy traditionally had been proscribed, and was at the time prohibited by roughly half the states, a claim that a right to engage in sodomy was fundamental was deemed “facetious” by the Court.<sup>85</sup>

The Court distinguished *Stanley* as a First Amendment case, not a privacy case, and therefore not applicable to *Hardwick*.<sup>86</sup> The Court rejected Hardwick’s claim that Georgia must provide a rational basis for the law, and that Georgia’s “presumed belief . . . that homosexual sodomy is immoral and unacceptable,” was insufficient to satisfy the rational basis standard,<sup>87</sup> indicating that morality was indeed a sufficient basis upon which to uphold the law.<sup>88</sup>

Chief Justice Burger wrote a separate concurrence to emphasize his belief that “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>89</sup> He outlined a brief history of sodomy laws, noting sodomy’s prohibition “throughout the history of Western civilization,” and found condemnation of sodomy “firmly rooted in Judaeo-Christian moral and ethical standards.”<sup>90</sup> One may question whether beliefs essentially reflecting religious principles should be enshrined in the law of a

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80. *Id.* at 190.

81. *Id.* at 191.

82. Justice White, writing for the court, stated:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental.

*Id.* at 194-195.

83. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

84. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

85. *Hardwick*, 478 U.S. at 194.

86. *Id.* at 195. See *supra* notes 57-59 and accompanying text.

87. *Hardwick*, 478 U.S. at 196.

88. *Id.*

89. *Id.* at 197.

90. *Id.* at 196.

nation that values and mandates the separation of church and state.<sup>91</sup> Chief Justice Burger's argument reflects agreement with the majority's assertion that "if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."<sup>92</sup>

Justice Powell wrote a separate concurrence to focus on his Eighth Amendment concerns. The Georgia statute permitted a sentence of up to twenty years for a sodomy conviction.<sup>93</sup> Justice Powell indicated that if *Hardwick* had actually been convicted and sentenced for a single, private, consensual act, he believed that *Hardwick* would have been protected under the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>94</sup>

If Justice Blackmun had been the author of the majority opinion instead of Justice White, the statuses of both privacy litigation and gay rights litigation today would be significantly different. Justice Blackmun, who was joined in dissent by Justices Brennan, Marshall, and Stevens, rejected the majority's narrow characterization of the question posed by the case as the "right to engage in homosexual sodomy."<sup>95</sup> Employing Justice Brandeis' definition of privacy, the dissent characterized the issue as "the right to be let alone."<sup>96</sup> Justice Blackmun borrowed from another former justice, Oliver Wendell Holmes, to reject the Court's historical analysis, observing that, "[i]t is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV."<sup>97</sup> Justice Blackmun questioned the majority's focus on homosexual activity, given that the statute also applied to heterosexual activity,<sup>98</sup> and disagreed with the majority's refusal to consider the case under Eighth or Ninth Amendment or equal protection grounds.<sup>99</sup> He saved his primary attack for the majority's refusal to find privacy implications in the case, stating that "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, cen-

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91. See U.S. CONST. amend. I.

92. *Hardwick*, 478 U.S. at 196.

93. GA. CODE ANN. § 16-6-2(b) (Harrison 1990). See *supra* note 64 and accompanying text.

94. *Id.* at 197. Justice Powell's position on this case is an interesting one, worthy of further analysis. It was reported that Justice Powell initially voted to invalidate the statute. Al Kamen, *Powell Changed Vote in Sodomy Case*, WASH. POST, July 13, 1986, at A1. He later changed his vote, resulting in the majority upholding the Georgia statute. Justice Powell, now retired from the Court, has since commented that he "made a mistake" in *Bowers v. Hardwick* because he feels the decision is inconsistent with the Court's other privacy decisions. Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling*, N.Y. L.J., Oct. 26, 1990, at 1.

95. *Hardwick*, 478 U.S. at 199.

96. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

97. *Id.* (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

98. *Id.* at 200-01.

99. *Id.*

tral to family life, community welfare, and the development of human personality.’”<sup>100</sup> Since the majority refused to recognize any liberty interest, Justice Blackmun noted that Georgia’s rationale for violating such an interest had not been fully considered. He considered the majority’s rationale, and found it wanting. Neither public health and welfare, nor Georgia’s attempt to “maintain a decent society,” provide sufficient justification for regulating “intimate behavior that occurs in intimate places.”<sup>101</sup> Justice Blackmun ended by expressing his hope that the Court would soon see its error and “conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.”<sup>102</sup>

Justice Stevens also dissented, focusing primarily on the statute’s application to both heterosexual and homosexual conduct, and Georgia’s apparent intent to enforce the law only against gay men and lesbians. He found that on the basis of *Griswold*<sup>103</sup> and *Eisenstadt*,<sup>104</sup> Georgia could not constitutionally enforce its statute against heterosexual couples.<sup>105</sup> He then questioned how Georgia could justify a selective application of the law against gay individuals. He said, “[a] policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group.”<sup>106</sup> Since Georgia had not demonstrated such an interest when enacting a statute applying to both heterosexual and homosexual sodomy, the State had not justified its selective application of the law.

#### E. The Legacy of *Bowers v. Hardwick*

In addition to being an obstacle to sodomy law reform, *Hardwick* has proved to be a formidable barrier to the creation of legal protections for lesbians and gay men in general. In a suit pending when *Hardwick* was decided, the Missouri Supreme Court used *Hardwick* to justify upholding Missouri’s sexual misconduct law, even though the case was argued on equal protection rather than privacy grounds.<sup>107</sup> Because *Hardwick* held that “there is no fundamental right under the United States Constitution to engage in private consensual homosexual activity,” the defendant’s equal protection claims failed.<sup>108</sup> Other legislatures<sup>109</sup>

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100. *Id.* at 205 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

101. *Id.* at 208-13.

102. *Id.* at 214.

103. 381 U.S. 479 (1965). See *supra* notes 52-54 and accompanying text.

104. 405 U.S. 438 (1972). See *supra* notes 55-56 and accompanying text.

105. *Hardwick*, 478 U.S. at 218.

106. *Id.* at 219.

107. *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986).

108. *Id.* at 511.

and courts<sup>110</sup> considering anti-gay discrimination have relied on *Hardwick* to support the proposition that gay and lesbian individuals are unworthy of constitutional protection. The legacy of *Hardwick* is that the case is now used by courts and legislatures seeking to deny legal protections to gay men and lesbians.<sup>111</sup>

Legislative reform appears to have ended after *Hardwick*. Although a public opinion poll following *Hardwick* showed that a significant number of Americans disagreed with the Court's decision and its implications,<sup>112</sup> state legislatures have been reluctant to repeal sodomy laws.<sup>113</sup> The only post-*Hardwick* legislative change has been in Tennessee, where the crime of sodomy, prohibiting both heterosexual and homosexual activity, was changed from a felony to a homosexual-specific misdemeanor.<sup>114</sup> Efforts toward decriminalization in Maryland, Minnesota, and Georgia have been unsuccessful so far.<sup>115</sup>

*Hardwick's* failure to address the constitutionality of sodomy laws applying to heterosexuals<sup>116</sup> makes it more difficult for gay legal reform organizations to build alliances with the nongay organizations who were natural allies prior to *Hardwick*.<sup>117</sup> There are two possible consequences of the Supreme Court's failure to address *Hardwick's* application to heterosexual behavior. One is that nongay organizations will not be interested in working to change sodomy laws, because the Supreme Court is apparently not troubled by the failure to enforce the laws against heterosexuals. The other consequence is that nongay organizations may choose to mount challenges against the application of sodomy laws to

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109. See N.H. REV. STAT. ANN. § 170-b:4 (1989) (prohibiting adoption by gay men and lesbians, and citing *Hardwick* in legislative history as partial justification.)

110. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (citing *Hardwick* while finding a rational basis for mandating lengthy investigations before granting gay employees security clearances); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) ("*Hardwick* . . . has an impact on the Army's classification of homosexuals."). *Id.* at 464.

111. Sue Hyde, former director of the Privacy Project for the National Gay and Lesbian Task Force, states, "The *Hardwick* decision now is cited over and over again—not just in court cases, but in the legislative arena—as justification and rationale for denying us basic civil rights." Cliff O'Neill, *Three Years After Hardwick: Sodomy Laws Challenged State by State*, TWN, June 28, 1989, at 3.

112. *A Newsweek Poll: Sex Laws*, NEWSWEEK, July 14, 1986, at 38. Forty-seven percent of respondents disapproved of the Supreme Court ruling in *Hardwick*; 57% said states should not prohibit private sexual practices between consenting adults engaged in same-sex activity.

113. "In many states, legislative repeal efforts have met with stiff resistance from skittish lawmakers." O'Neill, *supra* note 111, at 14.

114. TENN. CODE ANN. § 39-13-510 (1989).

115. O'Neill, *supra* note 111, at 14.

116. See *supra* notes 98-99 and accompanying text. *Hardwick* effectively distinguished between those whom the laws theoretically apply to, both heterosexual and homosexual adults, and those who suffer from the effects of sodomy laws, primarily gay men and lesbians.

117. See Letter to author from William B. Rubenstein, Director of the ACLU Lesbian and Gay Rights Project (Oct. 27, 1990) (on file with *Hastings Constitutional Law Quarterly*).

heterosexuals, because previous privacy decisions, and the Court's avoidance of the constitutional issues implicated in heterosexual sodomy prohibitions, indicate that challenges seeking to invalidate only the portion of the laws which regulate heterosexual behavior may be more successful.<sup>118</sup> One commentator has urged attorneys to make challenges to heterosexual prohibitions only, as those challenges are more likely to be successful than gay-specific litigation after *Hardwick*.<sup>119</sup> There is a potential for conflict when civil liberties activists choose to challenge only the prohibitions on heterosexual behavior.<sup>120</sup> The impetus for further legislative reform or decisions based on privacy grounds may be slowed once the laws apply only to same-sex behavior.<sup>121</sup> Gay organizations may also face difficulty initiating change and building coalitions with nongay organizations once heterosexual privacy rights are no longer infringed.<sup>122</sup>

### III. State Constitutional Challenges to Sodomy Laws

*Hardwick* has forced gay activists to revise their strategy for eradicating sodomy laws. Activists have explored the option of legislative repeal, and today reform efforts continue in Maryland and the District of Columbia where strategists view legislative reform as an achievable goal.<sup>123</sup> Other reform efforts focus on the overall criminal code recodification process. Currently, activists are assisting efforts in Tennessee and Oklahoma to omit sodomy laws as part of recodification.<sup>124</sup>

The strongest possibility for sodomy law reform may rest with state courts. The majority in *Hardwick* expressly stated that its decision did not affect "state-court decisions invalidating those laws on state constitu-

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118. One commentator has noted that "[t]he fact that the Court left open the possibility of a future Supreme Court challenge on equal protection . . . grounds appears at present to set more of a trap than provide a friendly invitation, especially in light of the High Court's recent refusal to reverse an Oklahoma court's decision holding that state's sodomy law unconstitutional as applied to consenting adult heterosexuals." *SEXUAL ORIENTATION AND THE LAW* § 11-119 (M. Newcombe, ed. 3rd release, 1990) (referring to *Post v. State*, 717 P.2d 1151 (Okla. Crim. App. 1986)).

119. Mitchell Lloyd Pearl, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 69 N.Y.U. L. REV. 154 (1988).

120. "In [heterosexual sodomy] cases, an advocate seems forced to make an argument distinguishing *Hardwick* on the grounds that the decision should be read to apply only to homosexual sodomy. Of course, such arguments can work to undermine equal protection arguments for lesbians and gay men." Letter from William B. Rubenstein, *supra* note 117.

121. *Id.*

122. For example, while the national ACLU has policies opposing all sodomy laws, state affiliates set their own agendas for litigation and legislative reform. Gay-only statutes may not be considered as high of a priority to some state affiliates as statutes applying to everyone's sexual behavior, leaving gay organizations in those states to lead the efforts.

123. O'Neill, *supra* note 111, at 14, 16.

124. *Task Force Report*, NEWSLETTER OF THE NATIONAL GAY AND LESBIAN TASK FORCE, Summer 1990, at 3A (on file with the *Hastings Constitutional Law Quarterly*).

tional grounds.”<sup>125</sup> After *Hardwick*, gay activists began the “scramble . . . to read articles about and learn how to use state constitutions and state courts” to further reform.<sup>126</sup> One commentator notes the irony that people traditionally went to federal court to protect their civil rights because state courts were unsympathetic to civil rights issues.<sup>127</sup> Now state courts show promise, as state court constitutional challenges have met with some success after *Hardwick*. Although the Missouri Supreme Court reached an unfavorable result in *State v. Walsh*,<sup>128</sup> that decision was not based on state constitutional grounds.<sup>129</sup> In contrast, trial courts in Kentucky,<sup>130</sup> Texas,<sup>131</sup> and Michigan,<sup>132</sup> have invalidated their state’s sodomy laws on the basis of the right to privacy found in their respective state constitutions. The trial judge in *Michigan Organization for Human Rights v. Kelley*<sup>133</sup> adopted the reasoning used in Justice Blackmun’s dissent. The judge claimed that “state courts . . . can and have defined state privacy guarantees more broadly than the Court in *Bowers v. Hardwick*,”<sup>134</sup> and found that “[t]his is the case in our state particularly as it relates to acts occurring in the privacy of one’s home.”<sup>135</sup> Activists are planning similar challenges in Florida and Montana,<sup>136</sup> states that have express guarantees of privacy rights in their state constitutions.<sup>137</sup>

#### A. Arguments in Favor of State Court Challenges

Even prior to *Hardwick*, commentators noted that the Burger and Rehnquist Courts both retreated from far-reaching definitions of constitutional rights, and urged those seeking more expansive rights to resort

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125. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

126. Rubinfeld, *supra* note 18, at 64.

127. *Id.*

128. 713 S.W.2d 508 (Mo. 1986). See *supra* notes 107-108 and accompanying text.

129. See Reidinger, *supra* note 34, at 78.

130. *Commonwealth v. Wasson*, No. 86M859 (Fayette Dist. Ct. Oct. 31, 1986).

131. *Morales v. State*, No. 464, 898 (Tex. Dist. Ct. Mar. 15, 1990) (enjoining Texas from further enforcement of sodomy statute). The Texas Human Rights Foundation brought this case with the help of a number of local gay political and community leaders who served as plaintiffs. *Texas’ Anti-Gay Sodomy Law Ruled Unconstitutional*, BAY AREA REP., Dec. 13, 1990, at 2.

132. *Michigan Org. for Human Rights v. Kelley*, No. 88-815820-CZ, opinion and order (Mich. Cir. Ct. July 9, 1990).

133. *Id.* The Michigan Organization for Human Rights, a statewide gay organization, sponsored this litigation. The plaintiffs included “homosexual males, lesbian women, a bisexual man and woman, heterosexual men and women, and a woman with a physical disability.” *Id.* at 2.

134. *Id.* at 9.

135. *Id.*

136. Paula Ettelbrick, Address at the Bay Area Lawyers for Individual Freedom Family Law Conference (Nov. 17, 1990).

137. FLA. CONST. art. 1, § 23 (1981); MONT. CONST. art. II, § 10 (1972).

to state constitutions.<sup>138</sup> Former Associate Justice William Brennan advocated this strategy as a response to his colleagues' reluctance to recognize or expand civil rights and civil liberties. He stated,

the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach. . . . [T]he diminution of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role.<sup>139</sup>

State constitutional challenges present a number of advantages over federal constitutional challenges. While federal constitutional guarantees are broadly stated, state constitutions are generally more comprehensive, and almost code-like in their attention to detail.<sup>140</sup> Thus, state constitutions frequently provide explicit guarantees of rights that must otherwise be read into the broad language of the federal constitution.<sup>141</sup> In addition, state courts often guarantee rights by stating them affirmatively, while the federal constitution only prohibits governmental interference with rights.<sup>142</sup> As a result, state courts can more readily implement unique, state-specific protections that guarantee more rights to the state's citizens than are found in the federal constitution.<sup>143</sup>

Another advantage of state court challenges is that such decisions have only statewide, not nationwide, impact. This is an important factor affecting the way both state and federal court decisions are made. State court decisions need merely reflect a reasonable statewide consensus; if a particular decision does not do so, most state constitutions may be re-

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138. See, e.g., Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Charles G. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123 (1978); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Utter & Stanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987).

139. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) [hereinafter *Guardians*]. For Brennan's earlier commentary on the subject, see William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

140. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1355 (1982) [hereinafter *Developments*].

141. *Id.*

142. *Id.* For example, the federal constitution says, "Congress shall make no law . . . prohibiting free speech." U.S. CONST. amend. I. A state constitution might say, however, "Citizens are guaranteed the right of free speech." "Thirty-nine state constitutional free speech provisions are phrased in terms of an affirmative individual right; the negatively phrased first amendment by its terms merely places a restraint on governmental action." *Developments*, *supra* note 140, at 1399 (citations omitted).

143. Utter and Pitler, *supra* note 138, at 636.

vised relatively easily.<sup>144</sup> Federal decisions, especially Supreme Court decisions, may be limited to what the Court believes is achievable on a national basis.<sup>145</sup> The Court ever remains concerned about federalism and the preservation of state autonomy, and may limit the reach of decisions to protect only those rights that reflect a broader nationwide consensus.<sup>146</sup> State courts are more able, and are thus encouraged, to experiment with filling the gaps left by federal court decisions.<sup>147</sup>

Federal courts also are highly sensitive to issues of credibility. To preserve their credibility for the defense of the most important guarantees and principles, the federal courts are apt to be selective in choosing targets, and restrained when expanding constitutional limits.<sup>148</sup> The federal courts are the primary guardians of federal constitutional rights, and their authority may be weakened by each decision that the public perceives to be beyond the limits of the courts' authority. Thus, federal courts are particularly susceptible to charges of judicial activism.<sup>149</sup> State courts, however, have been encouraged to engage in what at the federal level would be labeled judicial activism, as their role is not to define the minimum levels of protection from government, but to explore the outer boundaries of rights guaranteed to state citizens.<sup>150</sup> In doing so, state courts less strongly fear the loss of credibility.

Differences in the structure of the federal and state judiciaries may account in part for differing judicial philosophies underlying the decision-making process on key constitutional issues. Federal judges are appointed for life-long terms which remove them from the political process, while in most states judges are held accountable through the re-election or reappointment process.<sup>151</sup> In some states, judges are elected by popular vote, either partisan or nonpartisan, and so are beholden to the state's citizens who elected judges on the basis of a particular approach to decision-making and expect adherence to that approach.<sup>152</sup> In other states, judges are appointed by the executive, but usually serve limited terms, and may be reappointed through a non-competitive approval election.<sup>153</sup>

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144. "[A]mendment of state constitutions typically can be initiated easily and is consummated by simple majority vote in a referendum." *Developments, supra* note 140, at 1354.

145. *Id.* at 1348-49.

146. *Id.* at 1348-50.

147. See *Guardians, supra* note 139, at 548-53. See also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

148. *Developments, supra* note 140, at 1350.

149. *Id.* at 1351.

150. *Id.* at 1357.

151. *Id.*

152. In 1986, three California Supreme Court justices were recalled because of the electorate's displeasure with their positions against the death penalty. See Mary Ann Galante, *California Justices Face Own "Executions": Bitter Campaign Focuses on Death Penalty*, NAT'L L.J., Nov. 3, 1986, at 1.

153. *Developments, supra* note 140, at 1351.

Judges in the various state courts reflect a wide range of political and philosophical values based on the values of the states' citizens. The federal judiciary, however, primarily reflects the conservative values of the last two presidential administrations.<sup>154</sup>

The test the Supreme Court traditionally used to determine whether to grant certiorari to a state court decision was the presence of "adequate and independent state grounds."<sup>155</sup> Under this standard, the Court refused to review any case that could have rested on independent and adequate state law or constitutional grounds, even if the state court based its decision in part on federal questions.<sup>156</sup> The Court presumed the existence of independent and adequate state grounds, and if necessary, remanded the case for the state court to clarify the basis, state or federal, for its decision.<sup>157</sup> Beginning in the mid-1970s with *Oregon v. Hass*,<sup>158</sup> however, the Supreme Court expanded its review of state cases entailing both state and federal questions.<sup>159</sup> Four decisions between 1977 and 1983 changed the test from a presumption of independent state grounds.<sup>160</sup> The Court indicated that no independent state ground would now exist if the state court decision was compelled by,<sup>161</sup> dependent on,<sup>162</sup> or reliant on<sup>163</sup> federal constitutional grounds. A state court decision that was the consequence of federal constitutional precedents could not evade review under the adequate state grounds test. The most significant change in the test came in the 1983 case, *Michigan v. Long*.<sup>164</sup> As a result of *Long*, the presumption of independent state grounds was changed to a presumption *against* state grounds, unless the decision "indicate[s] clearly and expressly that the [decision] is alternatively based on bona fide, separate, adequate and independent grounds."<sup>165</sup> In three types of decisions, the Court will presume that the state court decision rests on federal grounds, and thus is subject to review.<sup>166</sup> The Court will presume a decision was made on a federal basis if it "appears to rest

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154. "By 1992, as many as three-quarters of the country's 752 federal trial and appeals court judges will owe their jobs to Ronald Reagan or George Bush—if Bush continues to make appointments at the same pace as Reagan." Godfrey Sperling, Jr., *President Bush and the Courts: What Impact?* L.A. DAILY J., Mar. 17, 1989, at 6.

155. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

156. *Developments*, *supra* note 140, at 1330, 1332.

157. Phyllis S. Bamberger, *Methodology for Raising State Constitutional Issues*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 291 (Practicing Law Institute ed., 1985).

158. 420 U.S. 714 (1975).

159. Bamberger, *supra* note 157, at 291-92.

160. *Id.* at 292.

161. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

162. *Delaware v. Prouse*, 440 U.S. 648 (1979); *South Dakota v. Neville*, 459 U.S. 553 (1983).

163. *Oregon v. Kennedy*, 456 U.S. 667 (1982).

164. 463 U.S. 1032 (1983).

165. *Id.* at 1033, 1041.

166. Bamberger, *supra* note 157, at 295.

primarily on federal law, or to be interwoven with the federal law,"<sup>167</sup> or where the adequacy and independence of the decision is unclear.<sup>168</sup> Therefore, while a state court may use its own constitution as a basis for decision despite the existence of a federal analogue, to avoid Supreme Court review, it must state explicitly the basis under the state constitution for its decision. In later sections of this Note, the author will encourage state courts to make decisions overturning sodomy statutes under a state right to privacy or other state constitutional grounds.<sup>169</sup> Since such decisions made on federal constitutional grounds would likely run afoul of *Hardwick*, state courts should clearly base the decision on state grounds; otherwise any victory at the state court level would be quite short-lived, if appealed to the United States Supreme Court.

Another benefit of state court challenges is that they focus attention upon gay rights issues by bringing the movement to the attention of those who may not know any openly gay or lesbian individuals, or are largely unaware of the inequities faced by lesbians, bisexuals, and gay men.<sup>170</sup> Challenges mounted on a state level remind individuals in that state that gay people live not only in San Francisco, New York City, and other urban areas, but also live in their own state as respected neighbors, friends, and community members. In addition, mobilization in each state requires the building of coalitions with non-gay organizations, such as disabled, civil liberties, and religious groups, which may reap benefits in areas other than sodomy law reform.<sup>171</sup> Successful challenges in one state encourage activists in other states to seek similar changes, and may create the necessary awareness nationwide to further sway public opinion in favor of reform.

## B. Arguments Against State Court Challenges

Anyone contemplating a challenge to a state's sodomy law should ensure that a legal challenge is the most appropriate way to eliminate the law, as there are certain risks inherent in each such challenge. First is the danger that the challenge will draw attention to a largely unenforced law. Once sodomy laws become subject to a significant amount of public debate, there is the potential that law enforcement officials will increase

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167. *Long*, 463 U.S. at 1032, 1040-41.

168. *Id.* at 1033.

169. *See infra* section V.

170. "[*Hardwick*] has made nongay people aware that in a lot of jurisdictions their sexual behavior is illegal. I'm not saying that the vast majority of nongay people are now in support of gay rights; they're not. But they do understand that there is an issue of sexual privacy here . . . ." Rubinfeld, *supra* note 18, at 68.

171. "[T]his [adverse decision in *Hardwick*] is a beginning in terms of coalition building." *Id.* at 67.

enforcement to demonstrate their belief that the law is necessary.<sup>172</sup>

Second, a legal challenge may result in a stricter interpretation of the law than what previously existed. For example, in states where the law does not itself define prohibited acts, an opinion interpreting the statute could further define such acts.<sup>173</sup> In addition, once an adverse case exists, future challenges, both to the sodomy law and other laws that affect gay men and lesbians, may become more difficult as future courts, no matter how sympathetic, may be limited by *stare decisis*. Individuals may be less motivated to challenge laws where clear adverse precedent exists.

Another disadvantage is that litigants attempting a challenge may face an invasion of their privacy. In criminal cases, depending on the individual charged and the particular fact situation, defendants may prefer to forego a protracted challenge so as to protect their privacy.<sup>174</sup> Plaintiffs seeking a declaratory judgment on the statute's constitutionality sacrifice personal privacy as well. In order to demonstrate the standing necessary to challenge the statute, they must allege that they engage in sodomy and plan to continue to do so, and that they have a fear of prosecution.<sup>175</sup> While plaintiffs obviously must volunteer for declaratory judgment actions, they should be prepared to face the possible adverse effects resulting from publicity of the case, including physical danger, adverse media attention, and invasion of their privacy.

One risk of challenging sodomy statutes is that a public challenge may galvanize support for those opposing gay rights. As long as gay and lesbian organizations in the state are relatively invisible and not vocal, organizations opposing gay rights may not be concerned with the state's failure to enforce its sodomy laws. When a challenge is made, however, antigay political activity may coalesce around it, and adamant public opposition may remain long after the sodomy challenge ends.<sup>176</sup> Adverse

172. In May 1987, two Tennessee men received five-year suspended sentences for felonious "crimes against nature." The district attorney was quoted as saying that he was trying to "make an example" of them, to discourage other gay individuals from living there. *NDOM Packet*, *supra* note 45, at 13.

173. For example, if a court determines that oral sex is a "crime against nature," where previously only anal sex was believed to be prohibited, such a strict definition could lead to more enforcement.

174. *See supra* note 68 and accompanying text.

175. The standard for standing in a declaratory judgment action is "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 78 (2d ed. 1988) (quoting CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3532, at 112 (2d ed. 1984)).

176. Individuals such as William Dannemeyer or Jerry Falwell, and groups such as California's Traditional Values Coalition have "declar[ed] war on homosexuality," and closely monitor the actions of legislators and public officials. Once any action is taken that appears to support homosexuality, they mobilize opposition forces, and even after the challenge ends, organizations may remain to obstruct any actions designed to improve the status of lesbians

results in one state may then negatively influence results in other states. While decisions of another state court are not binding, judges often examine what their colleagues in other states have done.

Activists anxious to challenge the sodomy statutes in court also may neglect other strategies, such as legislative repeal and penal code reform. While nonjudicial reform may require more work and take more time, it may have a more lasting effect because the law itself is eradicated, and not merely held in abeyance by one court's majority. A courtroom decision may be limited to its facts, or may make only minor adjustments to the law.<sup>177</sup> One danger of state court challenges is that activists can neglect potentially successful federal court litigation.<sup>178</sup>

Finally, litigation is expensive and time consuming. Those who wish to reform sodomy laws must decide which reforms will be the most beneficial, especially in the gay and lesbian community where limited resources must be used to support a wide variety of reforms. Some members of the gay community feel that sodomy law reform is not a top priority on the gay and lesbian agenda, and oppose focusing energy and financial resources on this area.<sup>179</sup>

The above arguments in favor of and against litigation of sodomy law challenges indicate that activists must consider each state individually; no one model exists that ensures success in each state.

#### IV. Constitutional Arguments in State Courts

This section will not exhaustively cover each constitutional argument that may be made in a sodomy law challenge; each of those arguments have entire notes or articles devoted to their application to sodomy law reform.<sup>180</sup> This section merely outlines the basis for each constitu-

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and gay men. See Sue Hyde, *Sex and Politics: Challenging the Sodomy Laws* (available from the National Gay and Lesbian Task Force Privacy Project, and on file with the *Hastings Constitutional Law Quarterly*).

177. See *Commonwealth v. Wasson*, No 86M859 (Fayette Dist. Ct. Oct. 31, 1986), *supra* note 130. "That case, however, was also eventually brought down to a debate on a technicality that rendered the case useless as a vehicle with which to overturn the state's sodomy law." O'Neill, *supra* note 111, at 14, col. 2.

178. Mary C. Dunlap, author of an amicus brief submitted in *Bowers v. Hardwick*, strongly warns against this danger. "[R]etreat from development of the United States Constitution (in whatever direction) is not feasible. . . . The right to privacy for gay and lesbian persons cannot be fully developed if we relegate our efforts solely to the patchwork of state legal systems." *Brief Amicus Curiae for the Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., and the National Women's Law Center*, 14 N.Y.U. REV. L. & SOC. CHANGE 949, 951 (1986) (introduction by Mary C. Dunlap).

179. However, as one leading activist counters, "We cannot concentrate on things like spousal benefits until we put considerable resources into ridding ourselves of sodomy laws." Rubinfeld, *supra* note 18, at 62.

180. For privacy, see Nan Feyler, Note, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986); Craig T. Pear-

tional argument that activists may use to challenge state sodomy laws.

### A. Privacy<sup>181</sup>

*Hardwick*, decided on privacy grounds, forecloses further arguments based on a right to privacy under the federal constitution.<sup>182</sup> Many states, however, have provisions in their state constitutions that either explicitly or implicitly guarantee a right to privacy.<sup>183</sup> Four states explicitly guarantee such a right.<sup>184</sup> Courts in three states have found a right to privacy within their constitution's search and seizure provisions.<sup>185</sup> Other states have found an implicit right to privacy under their state constitutions, similar to that which has been found under the federal constitution.<sup>186</sup>

Whether the right to privacy is explicit or implicit, some states have found their privacy rights more extensive than those found under the federal constitution. When there is an explicit right to privacy mentioned, the argument for more extensive privacy rights is especially strong, since the federal constitution does not have an explicit clause guaranteeing privacy. Some states that have found an implicit right have found it more extensive than the federal constitution, based on different case law or different conceptions or formulations of privacy theory. The state may have been previously willing to disagree with the Supreme Court on constitutional matters, or to guarantee more rights than the federal constitution.

### B. Equal Protection

Equal protection law under the federal constitution is based on the Fourteenth Amendment, which states in part, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>187</sup> Although the constitutional lan-

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son, Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811 (1984). For equal protection, see Harris M. Miller, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984). For cruel and unusual punishment, see J. Drew Page, Note, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the Solem v. Helm Test*, 56 U. CHI. L. REV. 367 (1989).

181. The foundations for privacy arguments have been previously discussed in section II.A.

182. See *supra* notes 80-84.

183. See *infra* section V for the provisions of states that still have sodomy statutes.

184. ALASKA CONST. art. 1, § 22 (1972); CAL. CONST. art. I, § 1 (1972); FLA. CONST. art. 1, § 23 (1981); MONT. CONST. art. II, § 10 (1972). Florida and Montana continue to retain sodomy statutes.

185. ARIZ. CONST. art. II, § 8 (1910); LA. CONST. art. I, § 5 (1974); S.C. CONST. art. I, § 10 (1971).

186. See *infra* section V for states that have extended their state constitutional rights beyond federal constitutional standards.

187. U.S. CONST. amend. XIV.

guage is relatively simple, the Supreme Court has been quite verbose while developing an equal protection framework; much time is spent divining the meaning of such terms as “discrete and insular minority,” “heightened scrutiny,” and “suspect classification.”<sup>188</sup> Three standards have emerged that govern how courts evaluate statutes that appear to adversely impact one group over another.

The first standard of review, strict scrutiny, applies whenever a statute infringes upon a “fundamental right,” or uses a suspect classification.<sup>189</sup> The Supreme Court has determined that classifications based upon race, national origin, or alienage are suspect classifications.<sup>190</sup> If strict scrutiny applies, then the use of the classification must be necessary to promote a compelling governmental interest.<sup>191</sup>

The second standard of review, intermediate-level scrutiny, applies to classifications based on gender and illegitimacy.<sup>192</sup> To satisfy this level of scrutiny, the classification must serve “important governmental objectives and must be substantially related to achievement of those objectives.”<sup>193</sup>

The lowest level of scrutiny under the Equal Protection Clause is “mere rationality.”<sup>194</sup> If the means selected by the legislature rationally relate to the objective the statute seeks to achieve, the statute will be upheld. This standard shows great deference to the legislative branch’s right to define its own objectives.<sup>195</sup> Under this standard, statutes are presumptively constitutional. This presumption may be overcome only by a showing that the statutes are grossly unfair or irrational.<sup>196</sup>

Some commentators have argued that sodomy laws and any statutes burdening lesbians and gay men should be subject to either strict or heightened scrutiny. Some sodomy laws apply only to same-sex behavior, and even where laws as written apply to all individuals, they are often enforced only against those engaged in same-sex behavior. Gay men and lesbians share several characteristics with groups the Supreme Court has deemed to be entitled to a strict scrutiny standard: immutability of the characteristic (here, homosexuality<sup>197</sup>), incorrect stereotypes,<sup>198</sup> a history of discrimination,<sup>199</sup> and political powerlessness.<sup>200</sup> The federal

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188. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

189. *Id.* at 440.

190. *TRIBE*, *supra* note 175, at 1544.

191. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

192. *Miller*, *supra* note 180, at 811-12 (1984).

193. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

194. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

195. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

196. *TRIBE*, *supra* note 175, at 1445-46.

197. *Miller*, *supra* note 180, at 812-13.

198. *HARVARD*, *supra* note 6, at 57.

199. Sodomy laws are just one form of discrimination gay men and lesbians have faced. See *id.*

courts that have considered gay-only statutes have generally rejected the application of heightened scrutiny to statutes disparately affecting gay men and lesbians.<sup>201</sup> The most recent decisions have cited *Hardwick* as justification for doing so, although the *Hardwick* majority expressly stated that *Hardwick* was not decided on equal protection grounds.<sup>202</sup>

“The importance of state constitutional equality provisions, and the fact that they differ significantly from the equal protection clause of the fourteenth amendment, has received little attention.”<sup>203</sup> “Attorneys seeking to challenge sodomy laws, however, should pay close attention to any equality provisions in their state constitutions, and note that many of the traditional legal arguments addressed to such disputes [under the federal constitution] can be ‘repackaged’ under more specific, or at least significantly different, state constitutional equality provisions.”<sup>204</sup> While some states do not have an equal protection clause, other provisions that guarantee equality may provide a basis for equal protection analysis that differs from that of the Supreme Court. In states that have equal rights provisions in their state constitutions, attorneys may argue the enforcement of sodomy laws only against those engaged in same-sex behavior constitutes gender-based discrimination, in that men are prosecuted only when engaged in activity with other men, and not for engaging in the same activity with women, and women are prosecuted for engaging in activity with other women, when they are not prosecuted for engaging in the same activity with men. In order to ensure that challenges to sodomy laws are successful, activists should encourage states either to expand the number of classifications warranting heightened scrutiny, or to formulate their own tests differing from the Supreme Court’s tests which reflect the unique history of their equality clauses.

### C. Void for Vagueness/Due Process

The void for vagueness doctrine arose out of Fifth and Fourteenth Amendment due process theory.<sup>205</sup> Simply stated, the doctrine requires that “a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory en-

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200. *Id.* at 57.

201. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

202. “Respondent does not defend the judgment below based on . . . the Equal Protection Clause. . . .” Bowers v. Hardwick, 478 U.S. 186, 196 n.8 (1986).

203. Robert F. Williams, *Equality and State Constitutional Law*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 157, at 68.

204. *Id.* at 71.

205. Connally v. General Constr. Co., 269 U.S. 385 (1926).

forcement.”<sup>206</sup> Sodomy statutes have generally reflected the reluctance of legislatures to specifically mention sexual acts, and thus often prohibit “the abominable and detestable crime against nature,” or “deviant sexual behavior,” without specifying what constitutes the crime.<sup>207</sup> Of the eleven states that do not define the specific acts that are prohibited,<sup>208</sup> ten states have found that the language of the statute is not unconstitutionally vague.<sup>209</sup> The Supreme Court also has held that a statute defining sodomy merely as the “crime against nature” is not unconstitutionally vague.<sup>210</sup> If a challenge is made as part of a criminal case where the act committed has not been prosecuted previously under the statute, then challenges should be made on vagueness grounds.

#### D. Cruel and Unusual Punishment

Two arguments may be made under the Eighth Amendment when attorneys challenge sodomy statutes. The first argument parallels the concern shown by Justice Powell for the lengthy sentence imposed under Georgia law for a sodomy conviction.<sup>211</sup> Some of the most extreme sentences that may be imposed for sodomy convictions range from five to twenty years in prison.<sup>212</sup> Thus, the penalty for sodomy law conviction is disproportionate to the magnitude of the act, because it may be more akin to those sentences imposed for rape or armed robbery, although it is imposed for private, consensual adult sexual behavior.<sup>213</sup> Even if no sentence is imposed, a felony conviction carries other possible ramifications, such as the loss of a professional license, or the inability to hold certain jobs.<sup>214</sup>

The second argument is that gay men and lesbians are actually being punished for their status and not for their behavior. The Supreme Court held in *Robinson v. California*<sup>215</sup> that it was cruel and unusual punishment to prosecute a person for the status of being a substance abuser. Later, in *Powell v. Texas*,<sup>216</sup> the Court distinguished *Robinson* by separating Powell’s status of being an alcoholic from the behavior for which he was arrested, drinking in public, and upheld his conviction. Courts would likely follow the same logic and uphold sodomy statutes on the

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206. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

207. See *infra* note 208 for states with statutes that do not specifically define prohibited behavior.

208. Arizona, Florida, Idaho, Louisiana, Massachusetts, Michigan, Mississippi, North Carolina, Oklahoma, Rhode Island, South Carolina.

209. Each state listed in note 208, except for South Carolina.

210. *Rose v. Locke*, 423 U.S. 48, 50 (1975).

211. *Bowers v. Hardwick*, 478 U.S. 186, 197-98 (1986) (Powell, J., concurring).

212. See *infra* section V.

213. *Fight for Sexual Freedom*, *supra* note 27.

214. Feyler, *supra* note 180, at 977.

215. 370 U.S. 660 (1962).

216. 392 U.S. 514 (1968).

grounds that sodomy statutes regulate sexual behavior, not the status of being gay or lesbian. If only those known by police to be gay, however, are arrested and convicted for violations of the sodomy statutes when such behavior is forbidden to all, what is really at issue is the defendant's status as gay or lesbian.

### E. Establishment of Religion

Previous challenges to sodomy statutes have argued that the statutes violate the Establishment Clause<sup>217</sup> by embodying the religious views of Judeo-Christian tradition.<sup>218</sup> Attorneys can argue that the statutes have no secular purpose, and therefore legislatures enacting the statutes sought only to promote particular religious views. In states that have a legislative history available, debate surrounding passage of the statute may shed light on the legislature's purpose for enacting the statute. Even if legislatures holding particular religious values sought to enshrine them in sodomy statutes, such challenges have not thus far been successful. Courts respond that it is possible to distinguish morality and religion. While the two frequently intersect, statutes promoting a particular moral view may have little or no religious foundations. An Establishment Clause argument standing alone will thus not have a strong chance of success. The establishment argument is at its strongest when used to bolster privacy or equal protection arguments that seek to prove that no "rational bases" exist for the statutes.

## V. Constitutional Arguments by State

This section will look at the history of reform litigation in the states that retain sodomy statutes, as well as litigation on related constitutional grounds, to evaluate the possibility of success in each state. Factors examined for each state include: language of the statute itself, previous litigation utilizing constitutional theory, willingness of the state to move beyond federal constitutional guarantees by relying upon state constitutional grounds, and the National Gay and Lesbian Task Force's own evaluation of the reform outlook.<sup>219</sup>

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217. U.S. CONST. amend. I. "Congress shall make no law . . . respecting an establishment of religion."

218. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) ("Condemnation of these practices is firmly rooted in Judaeo-Christian moral and ethical standards.").

219. *Privacy Project Fact Sheet*, NATIONAL GAY AND LESBIAN TASK FORCE (on file with the *Hastings Constitutional Law Quarterly*). NGLTF rates each state as "very close," "best chances," "not impossible," or "longshots." These ratings are "an arbitrary division based on each state's past record, the strength of local organizations, the degree of support from individual elected officials and other factors." NGLTF's evaluation is primarily concerned with the possibility of legislative reform. The implications for litigation strategy are two-fold, however. First, the strength of local gay organizations may dictate whether legal challenges can be suc-

### A. Alabama

Alabama courts have found more extensive rights under Alabama's constitution than the Supreme Court has found under the federal constitution.<sup>220</sup> Courts in Alabama have not decided any sodomy cases utilizing privacy or equal protection arguments. An appellate court rejected one challenge to the law made on vagueness grounds.<sup>221</sup> NGLTF considers Alabama a "longshot."<sup>222</sup> Attorneys can make challenges on privacy, equal protection, and Establishment Clause grounds.

### B. Arizona

Arizona has a privacy provision in its state constitution.<sup>223</sup> Arizona courts have relied upon the provision in a case involving the right to refuse medical treatment.<sup>224</sup> Courts have found that the sodomy statute is not unconstitutionally vague, nor violative of freedom of expression.<sup>225</sup> NGLTF rates Arizona as "not impossible."<sup>226</sup> Reformers should make challenges based on privacy and equal protection grounds.

### C. Arkansas

Arkansas has one of the most difficult records to overcome for successful sodomy law reform. Challenges made on grounds of vagueness and establishment of religion,<sup>227</sup> federal and state privacy rights,<sup>228</sup> and equal protection<sup>229</sup> have all failed to invalidate the law. In reported cases, Arkansas courts have not recognized a right to privacy more extensive than that found under the federal constitution. NGLTF calls this

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cessfully mounted by these organizations. Second, in states where a negative record precludes most or all constitutional arguments, and legislative reform chances are good, then working through the legislative branch for reform may be the best strategy.

220. See *Ex parte Caffie*, 516 So. 2d 831 (Ala. 1987); *Ex parte Jackson*, 516 So. 2d 768 (Ala. 1986). "This Court does not need to await revelation from the federal judiciary when our own state constitution also guarantees to a criminal defendant the equal protection of the laws." *Id.* at 772.

221. *Boyington v. State*, 227 So. 2d 807 (Ala. App. 1969) (the law does not have to specifically define what acts are prohibited).

222. See *supra* note 219.

223. ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs or his home invaded, without authority of law."). This has generally been applied only in a Fourth Amendment context, regarding search and seizure. See *State v. Murphy*, 570 P.2d 1070, 1072 (Ariz. 1977).

224. *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. 1987).

225. *State v. Bateman*, 547 P.2d 6 (Ariz. 1976).

226. See *supra* note 219.

227. *Connor v. State*, 490 S.W.2d 114 (Ark. 1973).

228. *Carter v. State*, 500 S.W.2d 368 (Ark. 1973).

229. *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983). This case involved public sex. Since heterosexual couples could be prosecuted if they engaged in public sexual activity, equal protection was not denied to a gay man prosecuted for engaging in public activity.

state a "longshot."<sup>230</sup> Since the statute applies only to homosexual sodomy, and *Lemons* involved public sex, the only possible grounds for sodomy reform litigation would be on equal protection grounds.

#### D. District of Columbia

The District of Columbia has an extensive history of sodomy litigation. The D.C. Court of Appeals found the statute valid both on its face and as applied when the statute was challenged on equal protection grounds.<sup>231</sup> A challenge made on First Amendment Establishment Clause grounds also failed.<sup>232</sup> The sodomy statute was almost repealed in 1982, but the District Council and Congress became embroiled in a dispute over home rule which led to Congress rejecting the law eliminating sodomy prohibitions.<sup>233</sup> NGLTF rates the District of Columbia as a "best chances" jurisdiction.<sup>234</sup>

#### E. Florida

Florida is one of the two states with sodomy laws that has an explicit right to privacy in its state constitution.<sup>235</sup> Courts have interpreted this clause more expansively than the federal constitutional right to privacy.<sup>236</sup> A challenge in Florida is one of those next contemplated by activists.<sup>237</sup> While Florida courts have held that the statute is not unconstitutionally vague,<sup>238</sup> challenges on equal protection, privacy, or Establishment Clause grounds have not been foreclosed by precedent. NGLTF rates this state as "not impossible."<sup>239</sup> There is a good chance for reform in this state, based upon the strong state constitutional privacy provisions and the lack of substantial negative precedent.

#### F. Georgia

Georgia is the site of *Hardwick*, the most noteworthy sodomy statute challenge to date. Activists in Georgia have not stopped working for reform after *Hardwick*, however. In 1987, a challenge based on equal

230. See *supra* note 219.

231. *United States v. Cozard*, 321 A.2d 342 (D.C. App. 1974).

232. *Stewart v. United States*, 364 A.2d 1205 (D.C. App. 1976). This case rejected the argument that sodomy laws were the "direct unbroken legacy of the Christian Church."

233. O'Neill, *supra* note 111, at 16.

234. See *supra* note 219.

235. FLA. CONST. art. I, § 23 (1980) ("Every natural person has the right to be let alone and free from governmental intrusion into his private life. . .").

236. *Stall v. State*, 570 So. 2d 257 (Fla. 1990) "It is clear that Florida's right to privacy is broader than the federal right." *Id.* at 262.

237. Address by Paula Ettelbrick, *supra* note 136.

238. See *Johnsen v. State*, 332 So. 2d 69 (Fla. 1976); *Bell v. State*, 289 So. 2d 388 (Fla. 1973); *State v. Fasano*, 284 So. 2d 683 (Fla. 1973).

239. See *supra* note 219.

protection grounds failed.<sup>240</sup> Another equal protection challenge made in 1990 failed for lack of evidence showing that the law was enforced selectively.<sup>241</sup> While NGLTF considers this state a "longshot,"<sup>242</sup> attempts at reform continue.<sup>243</sup> Courts in Georgia have not developed a right of privacy distinct from the federal constitution, so a cruel and unusual punishment challenge, once someone is actually prosecuted under the statute, has the greatest potential to be successful.<sup>244</sup>

### G. Idaho

Idaho has not developed a distinct right to privacy under its state constitution,<sup>245</sup> although a state supreme court justice in a strong dissent encouraged the court to do so.<sup>246</sup> Attorneys litigated a sodomy challenge based on equal protection grounds which failed.<sup>247</sup> Idaho is also considered a "longshot" by NGLTF.<sup>248</sup> A cruel and unusual punishment challenge may be successful, because there is a mandatory five-year sentence for a sodomy conviction.

### H. Kansas

The only challenge which has been made to the Kansas sodomy statute failed. Because the state convicted the defendant of forcible sodomy, he had no standing to challenge the constitutionality of the statute as applied to consensual behavior.<sup>249</sup> The Kansas statute applies only to same-sex sodomy, thus it may be challenged on equal protection grounds. Kansas courts generally have interpreted their state constitution similar to the Supreme Court's interpretation of the federal constitution, but have asserted their willingness to expand guarantees in the appropriate case.<sup>250</sup> NGLTF has called Kansas "not impossible."<sup>251</sup>

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240. *Gordon v. State*, 360 S.E.2d 253 (Ga. 1987).

241. *Ray v. State*, 389 S.E.2d 326 (Ga. 1990).

242. *See supra* note 219.

243. O'Neill, *supra* note 111, at 14.

244. *See Bowers v. Hardwick*, 478 U.S. 186, 197-98 (1986).

245. *State v. Kincaid*, 566 P.2d 763 (Idaho 1977) (Idaho's right to privacy not as extensive as Alaska's, since not explicit in the state constitution).

246. *State v. Lang*, 672 P.2d 561, 563 (Idaho 1983) (Bistline, J., dissenting). "[S]tate supreme courts are not obliged to parrot the Supreme Court of the United States, but rather should be at least somewhat inclined to individualistic thinking and judgment."

247. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983).

248. *See supra* note 219.

249. *State v. Thompson*, 558 P.2d 1079, 1084-85 (Kan. 1976).

250. "[The Kansas Supreme Court] can construe the Kansas constitutional provision so as to provide greater protection to Kansas citizens than has been afforded to U.S. citizens by the United States Supreme Court's interpretation of a similar provision in the federal Constitution." *State v. Morgan*, 600 P.2d 155, 159 (Kan. 1979).

251. *See supra* note 219.

## I. Kentucky

In the few cases where Kentucky courts have interpreted the Kentucky Constitution in conjunction with the federal constitution, they have chosen to parallel closely federal rights and protections, making it somewhat unlikely that sodomy statutes would be violative of the Kentucky Constitution.<sup>252</sup> *Commonwealth v. Wasson* asserts claims under the Kentucky Constitution, however, and is currently pending in Kentucky courts.<sup>253</sup> Kentucky has a clean slate in the area of sodomy reform litigation; no appellate courts have adjudicated the constitutionality of Kentucky's deviate sexual intercourse law.<sup>254</sup> NGLTF rates Kentucky as "not impossible."<sup>255</sup> The lack of precedent in this area may prove beneficial to privacy, Equal Protection, and Establishment Clause challenges.

## J. Louisiana

Louisiana's constitution protects against "unreasonable searches, seizures or invasion of privacy."<sup>256</sup> While this protection generally has been perceived as a search and seizure guarantee, Louisiana courts have determined that the independent clause "invasion of privacy" has meaning outside of the context of search and seizure issues.<sup>257</sup> Courts have strictly interpreted Louisiana's sodomy law, as it has been held to apply when the defendant merely approached an officer and was arrested before any sexual activity occurred.<sup>258</sup> Other cases have held that the statute is not unconstitutionally vague,<sup>259</sup> and may be used against two women.<sup>260</sup> In 1976, the Louisiana Supreme Court held that the right to privacy was not violated by the sodomy law,<sup>261</sup> but the recent development of a

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252. See, e.g., *Louisville Bd. of Realtors v. City of Louisville*, 634 S.W.2d 163, 166 (Ky. 1982); *Commonwealth v. Appleby*, 586 S.W.2d 266 (Ky. 1978).

253. 785 S.W.2d 67 (Ky. Ct. App. 1990). The circuit court had initially dismissed the case on procedural grounds, but the court of appeals reversed and remanded to the circuit court for consideration of the merits of the district court's dismissal of the sodomy statute as unconstitutional. *Id.*

254. The appellate court in *Wasson* failed to consider the constitutional merits of the statute, but remanded to the circuit court for a consideration of the merits.

255. See *supra* note 219.

256. LA. CONST. art. I, § 5 (1974).

257. See *Moresi v. Dept. of Wildlife & Fisheries*, 567 So. 2d 1081 (La. 1990). "The section [art. 1, § 5] establishes an affirmative right of privacy impacting on non-criminal areas of the law." *Id.* at 1092; *State v. Davis*, 547 So. 2d 1367 (La. 1989). "[T]he rights described in Article 1, Section 5 of the Louisiana Constitution afford a higher standard of individual liberty than that granted by the federal Constitution, as interpreted by the jurisprudence." *Id.* at 1371.

258. *State v. Wallace*, 466 So. 2d 714 (La. 1985).

259. *State v. Mills*, 505 So. 2d 933 (La. 1987); *State v. Neal*, 500 So. 2d 374 (La. 1987); *State v. Picchini*, 463 So. 2d 714 (La. 1985).

260. *State v. Young*, 193 So. 2d 243 (La. 1966).

261. *State v. McCoy*, 337 So. 2d 192 (La. 1976).

strong privacy guarantee under the state constitution coupled with the strict interpretation of the law assists a litigator to develop a reasonable argument for reform. NGLTF considers this state a "longshot."<sup>262</sup>

### K. Maryland

NGLTF considers Maryland "very close."<sup>263</sup> There has been a considerable amount of legislative activity in this state. Activists plan to work for reform in 1991, when the composition of the state Judiciary Committee changes.<sup>264</sup> On the judicial front, a recent case interpreted the statute to exclude application to "noncommercial, consensual, sexual intimacies between heterosexual adults in private," thus avoiding the constitutional issues involved.<sup>265</sup> Maryland has generally been unwilling to interpret its constitution independently to provide more rights than provided by the federal constitution.<sup>266</sup> Challenges based on equal protection and Eighth Amendment grounds,<sup>267</sup> privacy,<sup>268</sup> and vagueness grounds<sup>269</sup> have all been unsuccessful. Legislative reform appears most appropriate in Maryland, because of the failure of courts to extend state constitutional protection and the existence of unfavorable precedent.

### L. Massachusetts

Activists and legal scholars debate whether Massachusetts' sodomy law has been invalidated. A companion statute prohibiting unnatural and lascivious acts was invalidated by *Balthazar v. Commonwealth* in 1978.<sup>270</sup> While some claim that this invalidation applies to the sodomy statute as well,<sup>271</sup> others consider this state unreformed.<sup>272</sup> The Massachusetts Constitution has an explicit right to privacy,<sup>273</sup> which courts have found to be more extensive than the privacy right under the federal

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262. See *supra* note 219.

263. See *supra* note 219.

264. O'Neill, *supra* note 111, at 16.

265. Schochet v. State, 580 A.2d 176 (Md. 1990).

266. Lodowski v. State, 513 A.2d 299 (Md. 1986). "It is true that similar provisions within the Maryland and United States Constitutions are independent and separate from each other. Generally, however, comparable provisions of the two constitutions are deemed to be *in pari materia* [to be construed similarly]." *Id.* at 306 (citations omitted).

267. Neville v. State, 430 A.2d 570 (Md. 1981).

268. Kelly v. State, 412 A.2d 1274 (Md. 1980); Neville, 430 A.2d 570.

269. Cherry v. State, 306 A.2d 634 (Md. 1973).

270. 573 F.2d 698 (1st Cir. 1978) (invalidated MASS. GEN. L. ch. 272, § 35 (1920)).

271. See, e.g., Brief for Respondent, *supra* note 10 (Professor Tribe considers Massachusetts reformed). See also, HARVARD, *supra* note 6, at 9 n.2 ("the [Massachusetts sodomy] statute was arguably invalidated as applied to private consensual conduct by *Commonwealth v. Balthazar* . . .").

272. See, e.g., Letter from Sue Hyde, Director of NGLTF Privacy Project, to author (Nov. 5, 1990) (on file with the *Hastings Constitutional Law Quarterly*).

273. MASS. CONST., pt. I, art. XIV.

constitution.<sup>274</sup> NGLTF considers this state a "best chances" jurisdiction.<sup>275</sup>

### M. Michigan

Whether *Michigan Organization for Human Rights v. Kelley* will reform Michigan's sodomy statute remains to be seen;<sup>276</sup> at present, the state has declined to appeal its loss in the trial court, making the victory one of little precedential value.<sup>277</sup> Other Michigan courts have declined to extend privacy rights beyond the federal constitution.<sup>278</sup> A recent decision, however, invalidated a referendum that would have eliminated state-subsidized abortions, on the grounds that the measure violated the independent right to privacy under Michigan's constitution.<sup>279</sup> The combination of a strict sodomy law, with the possibility of a fifteen-year sentence, and a newly strengthened state constitutional privacy right could lead to reform in the near future. NGLTF considers Michigan a state in the "best chances" category.<sup>280</sup>

### N. Minnesota

Minnesota's sodomy statute was once challenged by a man who had paid for sex with a minor.<sup>281</sup> In this case, the court refused to expand state constitutional protections to those engaged in commercial sex; however, the court also carefully noted that "[w]hether the scope of any privacy right asserted under the Minnesota Constitution should be expanded beyond federal holdings remains to be resolved in future cases wherein the issue is properly raised."<sup>282</sup> This language seems to invite activists to "properly raise" the issue. Minnesota has already recognized an independent right of privacy under its state constitution.<sup>283</sup> NGLTF considers this state "very close."<sup>284</sup> Given the encouragement provided by the Minnesota Supreme Court, the state could be one of the next states in which sodomy laws are eradicated.

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274. "We have often recognized that art. 14 of the Declaration of Rights does, or may, afford more substantive protection to individuals than that which prevails under the Constitution of the United States." *Commonwealth v. Blood*, 507 N.E.2d 1029, 1033 n.9 (Mass. 1987) (citations omitted).

275. *See supra* note 219.

276. *See supra* notes 132-35 and accompanying text.

277. Address by Paula Ettlbrick, *supra* note 136.

278. *See, e.g.,* *People v. Thivierge*, 435 N.W.2d 446, 446-47 (Mich. 1988).

279. *Doe v. Director of the Dep't of Social Serv.*, 468 N.W.2d 862 (Mich. 1991).

280. *See supra* note 219.

281. *State v. Gray*, 413 N.W.2d 107 (Minn. 1987).

282. *Id.* at 114.

283. *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988).

284. *See supra* note 219.

## O. Mississippi

Mississippi has recognized a right to privacy in its state constitution.<sup>285</sup> Mississippi's constitution also contains a search and seizure provision,<sup>286</sup> but no cases have interpreted this provision independently from the federal constitution. Mississippi's sodomy statute has been found not unconstitutionally vague.<sup>287</sup> NGLTF calls this state a "longshot."<sup>288</sup> In general, while the lack of many previous challenges is beneficial, Mississippi's general unwillingness to extend additional constitutional rights, despite *In re Brown*, indicates that this state would likely follow *Hardwick*.

## P. Missouri

*State v. Walsh* has been the most significant sodomy reform case in Missouri.<sup>289</sup> This case forecloses challenges on an equal protection basis. The Missouri Supreme Court declined to consider the privacy issues, because privacy was not the basis of the lower court's decision. The court made clear, however, that it would not expand the Missouri Constitution to invalidate sodomy laws on a privacy basis.<sup>290</sup> In other cases, Missouri also has been unwilling to expand state constitutional rights beyond the federal constitution.<sup>291</sup> NGLTF considers Missouri "not impossible."<sup>292</sup> The Privacy Rights Education Project currently is engaged in lobbying and educating legislators and the populace.<sup>293</sup>

## Q. Montana

Montana has the combination of a relatively strict, gay-only sodomy statute<sup>294</sup> and an explicit privacy guarantee in the state constitution.<sup>295</sup> Reform seems to have been prevented thus far only by a lack of willing

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285. See *In re Brown*, 478 So. 2d 1033 (Miss. 1985) (finding a state constitutional right to privacy inherent in MISS. CONST. art. III, § 32).

286. MISS. CONST. art. III, § 23.

287. *State v. Mays*, 329 So. 2d 65 (Miss. 1976), cert. denied, 429 U.S. 864 (1976).

288. See *supra* note 219.

289. 713 S.W.2d 508 (Mo. 1986). See *supra* notes 107-08 and accompanying text.

290. *Walsh*, 713 S.W.2d at 511.

291. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc). "Neither the federal nor the Missouri constitutions expressly provide a right of privacy. In *State v. Walsh*, this Court was asked to recognize an unfettered right to privacy. We declined to do so." *Id.* at 417 (citation omitted).

292. See *supra* note 219.

293. Arlene Zarembka and Zuleyma Tang Halpin, Presentation at Lavender Law II, the Second National Conference on Lesbian and Gay Legal Issues (October 8, 1990).

294. MONT. CODE ANN. § 45-5-505 (1991) prohibits "deviate sexual conduct" between members of the same sex. Those convicted of violating the statute may be sentenced for up to 10 years in prison, or fined up to \$50,000.

295. MONT. CONST. art. II, § 10 (1989).

litigants to challenge the statute.<sup>296</sup>

Montana has previously found the state constitution's privacy guarantees to be more extensive than the federal constitution's guarantees.<sup>297</sup> NGLTF rates this state as "not impossible," probably due to the lack of strong local organizations willing to mount challenges.<sup>298</sup> Because of the explicit privacy guarantee in the state constitution, the outlook for judicial reform seems very strong, and Montana is one of the next challenges contemplated by activists.<sup>299</sup>

## R. Nevada

*Doe v. Bryan* is the only reported case interpreting the Nevada sodomy statute, and was not a true challenge.<sup>300</sup> The court found that the plaintiff lacked standing, since there was no indication of a threat of arrest.<sup>301</sup> This precedent may make future civil challenges difficult, but does not preclude challenges in criminal cases. Nevada generally has chosen to follow the federal constitution in interpreting individual rights.<sup>302</sup> NGLTF considers this state "not impossible."<sup>303</sup> Once a challenge overcomes the difficulty of achieving standing, the lack of negative precedent may bode well for its success.

## S. North Carolina

Although parties have challenged North Carolina's sodomy statute on constitutional grounds, the North Carolina courts have found, without discussion, that the statute is not unconstitutional.<sup>304</sup> North Carolina courts have also determined that the "crime against nature" statute is not unconstitutionally vague.<sup>305</sup> An appellate court determined that a candidate for a police officer position could be required to answer ques-

296. O'Neill, *supra* note 111, at 14.

297. *State v. Sorensen*, 792 P.2d 363 (Mont. 1990). "The protection afforded under Montana's constitutional right of privacy is broader than the right of privacy guaranteed under the United States Constitution." *Id.* at 366.

298. *See supra* note 219.

299. Address by Paula Ettlbrick, *supra* note 136.

300. 728 P.2d 443 (Nev. 1986). This case was an action for declaratory relief, not a criminal prosecution.

301. *Id.*

302. *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990). "Article 1, Section 8 of the Constitution of the State of Nevada tracks the Fourteenth Amendment of the United States Constitution in protecting its citizens against deprivation of their right to liberty without due process of law." *Id.* at 622.

303. *See supra* note 219.

304. *See, e.g., State v. Enslin*, 214 S.E.2d 318 (N.C. 1975) (appellants argued under the 1st, 3rd, 4th, 5th, 9th, and 14th Amendments, but no further detail was provided); *State v. Adams*, 264 S.E.2d 46 (N.C. 1980) (finding statute constitutional).

305. *See State v. Poe*, 252 S.E.2d 843 (N.C. 1979), *discr. rev. denied*, 259 S.E.2d 304 (N.C. 1979).

tions about homosexual activity during a polygraph test, since *Hardwick* found that engaging in homosexual activity is not a fundamental right.<sup>306</sup> North Carolina courts have not found a separate right to privacy within their state constitution, and thus are not likely to depart significantly from *Hardwick*. North Carolina is a "longshot" state, according to NGLTF.<sup>307</sup>

## T. Oklahoma

The Oklahoma Supreme Court has invalidated the portion of the sodomy statute that proscribes the sexual activity of heterosexual couples.<sup>308</sup> In that case, the court never reached the question of whether the prohibition of homosexual activity was unconstitutional.<sup>309</sup> Although *Post* was decided prior to *Hardwick*, and appears to be in direct conflict with it,<sup>310</sup> the Supreme Court denied certiorari in the case.<sup>311</sup> Oklahoma courts have found that the statute is not unconstitutionally vague,<sup>312</sup> and applies to two females as well as two males or a male and a female.<sup>313</sup> Challenges can be made on privacy and equal protection grounds, although Oklahoma courts have not independently interpreted the state constitution, and so the result may closely parallel *Hardwick*. The statute provides for a ten-year sentence,<sup>314</sup> and so challenges should be made on cruel and unusual punishment grounds should someone actually be sentenced under the statute. NGLTF considers Oklahoma a "longshot" state.<sup>315</sup>

## U. Rhode Island

Rhode Island's sodomy statute contains one of the nation's strictest penalties, imprisonment for up to twenty years.<sup>316</sup> Sodomy is defined only as the "abominable and detestable crime against nature," but the Rhode Island Supreme Court has held that the statute is not unconstitutionally vague,<sup>317</sup> nor violative of the right to privacy.<sup>318</sup> A 1980 case

306. *Truesdale v. University of N.C.*, 371 S.E.2d 503 (N.C. 1988).

307. *See supra* note 219.

308. *Post v. State*, 715 P.2d 1105 (Okla. 1986), *cert. denied*, 479 U.S. 890 (1986).

309. *Id.* at 1109-10.

310. "It now appears to us that the right to privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners." 715 P.2d at 1109.

311. 479 U.S. 890 (1986).

312. *Plotner v. State*, 762 P.2d 936 (Okla. Crim. App. 1988); *Casady v. State*, 721 P.2d 1342 (Okla. Crim. App. 1986); *Peninger v. State*, 721 P.2d 1338 (Okla. Crim. App. 1986); *Hicks v. State*, 713 P.2d 18 (Okla. Crim. App. 1986).

313. *Warner v. State*, 489 P.2d 526 (Okla. Crim. App. 1971).

314. OKLA. STAT. tit. 21, § 886 (1990).

315. *See supra* note 219.

316. R.I. GEN. LAWS § 11-10-1 (1986).

317. *State v. Gibbons*, 418 A.2d 830, 834 (R.I. 1980); *State v. Levitt*, 371 A.2d 596 (R.I. 1977).

held that the purpose of the statute was to proscribe all extra-marital copulation.<sup>319</sup> The Rhode Island Supreme Court occasionally has recognized a right to privacy under the state constitution in search and seizure cases.<sup>320</sup> This state is a "best chances" state, according to NGLTF.<sup>321</sup> While Rhode Island has not recognized fully a state constitutional right to privacy, a sodomy challenge could firmly establish such a right.

## V. South Carolina

South Carolina is the only state where a vagueness challenge is foreclosed neither by the specificity of the law, nor by previous interpretation of the statute, because only "the abominable crime of buggery," without further definition, is prohibited by the statute.<sup>322</sup> Courts have mentioned the state constitution in the context of individual rights only in search and seizure cases, and did not give the South Carolina Constitution independent significance. This state is another "longshot" state, according to NGLTF,<sup>323</sup> but the judicial history provides a clean slate for attorneys attempting reform.

## W. Tennessee

Tennessee recently revised its sodomy provision from one applying to both heterosexual and homosexual acts,<sup>324</sup> to one prohibiting only same-sex behavior.<sup>325</sup> No cases have challenged the validity of this new statute. Tennessee also lessened the penalty under the new statute, which may indicate the legislature's opinion regarding its lack of seriousness. Nonetheless, because the law specifically discriminates against gay men and lesbians, it should be challenged on equal protection grounds.<sup>326</sup> In the few cases in which Tennessee courts have simultaneously interpreted the federal and Tennessee constitutions, the courts have found similar rights and guarantees under both constitutions, and have not established the independence of the provisions of the Kentucky Constitution. NGLTF considers Tennessee "not impossible,"<sup>327</sup> but the small penalty

318. *Gibbons*, 418 A.2d at 834; *State v. Santos*, 413 A.2d 58 (R.I. 1980).

319. *Santos*, 413 A.2d at 64.

320. *See, e.g., Pimental v. Department of Transp.*, 561 A.2d 1348, 1350 (citing *Cooper v. California*, 386 U.S. 58, 62 (1967), in which the United States Supreme Court recognized the ability of the states to impose higher search and seizure standards than those found under the federal constitution).

321. *See supra* note 219.

322. *See S.C. CODE ANN.* § 16-15-120 (Law. Co-op. 1985). No reported cases have interpreted the statute.

323. *See supra* note 219.

324. *TENN. CODE ANN.* § 39-2-612 (1982) (a felony with a possible 5 to 15 year sentence).

325. *TENN. CODE ANN.* § 39-13-510 (1989) (a Class C misdemeanor, punishable by a \$25 fine).

326. O'Neill, *supra* note 111, at 14.

327. *See supra* note 219.

currently in force may make it difficult to mobilize activists for reform.

## X. Texas

In January 1992, oral arguments were heard in a Texas appellate court in *Morales v. State*, since the state attorney general chose to challenge a trial court's recent declaration that the statute was unconstitutional.<sup>328</sup> Texas courts have already noted a distinct right to privacy under the Texas Constitution.<sup>329</sup> A previous challenge was rejected in a decision that was issued shortly after *Hardwick*.<sup>330</sup> According to NGLTF, Texas is among the "best chances" states,<sup>331</sup> and given the current governor's support of sodomy law reform,<sup>332</sup> such reform could happen soon, perhaps as a result of *Morales v. State*.<sup>333</sup>

## Y. Utah

There have been no reported cases challenging the validity of the sodomy law in Utah. The state has shown a willingness, however, to differ from the Supreme Court in the area of Fourth Amendment protections<sup>334</sup> and equal protection doctrine.<sup>335</sup> This state is considered a "longshot" by NGLTF,<sup>336</sup> but Utah's lack of negative precedent makes reform feasible.

## Z. Virginia

Virginia was the site of a 1975 reform attempt that reached the United States Supreme Court, *Doe v. Commonwealth's Attorney*.<sup>337</sup> In *Doe*, the Supreme Court summarily affirmed the lower court,<sup>338</sup> which

328. *Texas Human Rights Foundation's Case Challenging "Sodomy Statute" Goes to the Appellate Level*, NEWS RELEASE (Texas Human Rights Found.), Dec. 2, 1991. The state's decision to appeal is a positive development in the case. An appellate court's finding that the statute is unconstitutional would be reported and have more precedential value, and if the intermediate court reversed the trial court's decision, the case could be taken to the Texas Supreme Court for adjudication. The appellate court's decision was not available at time of publication of this Note.

329. *May v. State*, 780 S.W.2d 866 (Tex. 1989) ("implicit right of privacy under the Texas Constitution has also been acknowledged by Texas courts . . ."). *Id.* at 870.

330. *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985).

331. *See supra* note 219.

332. Arthur S. Leonard, *Texas Trial Court Rules Sodomy Law Unconstitutional*, LESBIAN/GAY LAW NOTES, Jan. 1991, at 1.

333. *Id.*

334. *State v. LaRocco*, 794 P.2d 460 (Utah 1990).

335. *Malan v. Lewis*, 693 P.2d 661 (Utah 1984).

336. *See supra* note 219.

337. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

338. 425 U.S. 901 (1976). The summary affirmance sparked a debate about the precedential value of *Doe* which lasted until the *Hardwick* decision was announced. *See Hardwick v. Bowers*, 760 F.2d 1202, 1207-08 (11th Cir. 1985) (found *Doe* not binding, since that case could have been decided on standing grounds).

had held no right to privacy was violated by sodomy statutes.<sup>339</sup> In 1986, a Virginia court held that sodomy statutes were not violative of equal protection guarantees.<sup>340</sup> Virginia courts have proven reluctant to expand constitutional guarantees under the state constitution.<sup>341</sup> Virginia is considered a “not impossible” state by NGLTF.<sup>342</sup>

## VI. Conclusion

Because there is no indication that *Bowers v. Hardwick* will be overruled in the immediate future, state constitutions provide fertile ground for activists seeking to overturn sodomy laws. Reformers should encourage state courts to interpret their state constitutional right to privacy to encompass private consensual sexual behavior between adults. Such interpretation does not run afoul of *Hardwick*, to the extent it is explicitly made on independent state grounds. In addition, reformers should urge states to find homosexuality a suspect or quasi-suspect classification, and invalidate sodomy laws on an equal protection basis, which would have an impact on many other areas besides sodomy law reform. Where warranted by individual state sodomy statutes, parties should assert Eighth Amendment claims as well. While conditions in each state should be carefully considered to evaluate the chance of success and the price of failure, attorneys should aggressively litigate the constitutionality of sodomy laws in state courts. This can ultimately achieve what *Hardwick* failed to accomplish: the eradication of state sodomy laws. When sodomy laws are eradicated, the right to choose one's sexual partner and means of sexual expression without governmental interference will never again be considered “facetious.”<sup>343</sup>

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339. 403 F. Supp. at 1201.

340. *Fletcher v. Commonwealth*, No. 0405-85 (Va. Ct. App. Oct. 10, 1986).

341. *See, e.g., Wells v. Commonwealth*, 371 S.E.2d 19 (Va. 1988). “Article 1, § 10 of the Virginia Constitution and the fourth amendment are substantially the same.” *Id.* at 21 n.1.

342. *See supra* note 219.

343. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

